

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 72178 / May 16, 2014

WHISTLEBLOWER AWARD PROCEEDING

File No. 2014-4

In the Matter of the Claim for Awards

in connection with

Redacted

Notice of Covered Action Redacted

ORDER DETERMINING WHISTLEBLOWER AWARD CLAIM

Claimant Redacted failed to submit -- claim for an award for Notice of Covered Action Redacted to the Office of the Whistleblower (“OWB”) within ninety (90) calendar days of the date of the Notice of Covered Action (“NoCA”), which Rule 21F-10(b) of the Securities Exchange Act (“Exchange Act”) requires to be considered for an award.¹ As a result, the Claims Review Staff (“CRS”) issued a Preliminary Determination recommending that Redacted untimely claim be denied.

For the reasons set forth below, Redacted award claim is denied.

¹ Rule 21F-10(b) provides:

To file a claim for a whistleblower award, you must file Form WB-APP, Application for Award for Original Information Provided Pursuant to Section 21F of the Securities Exchange Act of 1934 (referenced in § 249.1801 of this chapter). You must sign this form as the claimant and submit it to the Office of the Whistleblower by mail or fax. All claim forms, including any attachments, must be received by the Office of the Whistleblower within ninety (90) calendar days of the date of the Notice of Covered Action in order to be considered for an award. 17 C.F.R. § 240.21F-10(b).

I. Commission Enforcement Action and Notice of Covered Action

On Redacted the Securities and Exchange Commission (“Commission” or “SEC”) filed a complaint in the U.S. District Court Redacted against Redacted for engaging in Redacted On Redacted the district court entered a default judgment against Redacted and Redacted. Among other relief, the court ordered Redacted to pay disgorgement in the amount of Redacted prejudgment interest in the amount of Redacted and a civil penalty of Redacted

On Redacted the OWB posted NoCA Redacted for the Redacted Matter.

II. Redacted Claim is Denied

A. Background

On Redacted the 90-day period established by Rule 21F-10(b) to submit an award claim expired without Redacted having made a submission. Instead, Redacted submitted -- award claim dated Redacted – more than Redacted late.

B. The Preliminary Determination

On Redacted the CRS issued a Preliminary Determination recommending that Redacted claim be denied because it was untimely.

C. Redacted Response to the Preliminary Determination

On Redacted submitted a response pursuant to Rule 21F-10(e)(2), 17 C.F.R. § 240.21F-10(e)(2), contesting the Preliminary Determination. Redacted conceding that -- claim was late, argued that the Commission should nonetheless excuse -- untimely filing due to certain purported “extraordinary circumstances.” Redacted identified two considerations that -- argues rise to the level of an extraordinary circumstance that should excuse -- untimely filing: (i) Redacted purportedly provided information to SEC and other federal investigators relating to the Redacted fraud that -- claims “led directly to the Redacted and (ii) -- lacked knowledge about the whistleblower program until “[s]hortly after Redacted the date charges were filed against the Defendants in the Redacted matter.

D. Analysis

Under Rule 21F-8(a), “the Commission may, in its sole discretion, waive” the 90-day filing requirement “upon a showing of extraordinary circumstances.” 17 C.F.R. § 240.21F-8(a). We find, however, that Redacted has not made the necessary showing to trigger our discretionary authority to waive that requirement.

In determining whether a claimant has demonstrated extraordinary circumstances to excuse an untimely submission under Rule 21F-8(a), we look to our analogous decision in *In the Matter of the Application of PennMont Securities et al.*, SEC Rel. No. 34-61967, 2010 WL 1638720 (April 23, 2010) (hereinafter “*PennMont*”), *aff’d* 414 Fed. Appx. 465 (3d. Cir. 2011). There, in determining whether extraordinary circumstances were shown to permit an untimely filing under Commission Rule of Practice 420(b), 17 C.F.R. § 201.420(b), we explained that “the ‘extraordinary circumstances’ exception is to be narrowly construed and applied only in limited circumstances.” *PennMont*, 2010 WL 1638720 at *4. Accordingly, after examining analogous areas of federal law, we determined that demonstration of an extraordinary circumstance in the context of a late filing requires a person seeking relief to show that “the reason for the failure to timely file was beyond [his or her] control [.]” *Id.* Further, we identified attorney misconduct or serious illness that presented the applicant from making a timely filing as two examples of the types of showing an applicant must make for us to consider exercising our discretionary authority to excuse an untimely filing. *Id.*

In *PennMont*, we also concluded that “[e]ven when circumstances beyond the applicant’s control give rise to the delay, however, an applicant must also demonstrate that he or she promptly arranged for the filing ... as soon as reasonably practicable thereafter.” *Id.* Indeed, we admonished that “[a]n applicant whose application is delayed as a result of extraordinary circumstances remains under an obligation to proceed promptly” thereafter in making his submission. *Id.*

Applying the *PennMont* standard here, we think it apparent that neither of the considerations that Redacted has identified rises to the level of an extraordinary circumstance under Rule 21F-8(a). Redacted has not demonstrated how, if at all, --- purported role in leading to the Redacted behind the Redacted and the impact that this may in turn have had on the recovery of significant funds, constitutes an extraordinary circumstance such that we may excuse --- untimely award claim.

We understand Redacted to claim that, at the time the Notice of Covered Action was posted, --- was unaware that the information that --- had shared would lead to Redacted Redacted

Redacted This, however, does not constitute an extraordinary circumstance beyond Redacted control that excuses --- failure to timely file an award application with respect to the *Commission’s successful enforcement action*.² The 90-day deadline set forth in Rule 21F-10(b) was intended both to ensure fairness to

² We note that, in order to qualify for an award based upon information provided to criminal authorities in connection with a related criminal action, Redacted would first have to qualify for an award in the Commission’s enforcement action. See Rule 21F-3(b), 17 C.F.R. § 240.21F-3(b). Even if --- application were timely, --- would likely not be eligible for an award because nothing in the record (including the information that the claimant has submitted) indicates that --- information led to the successful enforcement of the Redacted by the Commission.

potential claimants by giving all an equal opportunity to have their competing claims evaluated at the same time, and to bring finality to the claims process so that we can make timely awards to meritorious whistleblowers.³ To reopen the process to consider claims based on purported assistance provided to investigators in collecting money long after the deadline has passed for claims to be filed in response to a NoCA would undercut these important goals and make the whistleblower claims process unworkable. For this reason, and consistent with our analysis in *PennMont*, we do not view Redacted claim as justifying a waiver of the filing deadline based upon “extraordinary circumstances.”⁴

Turning to Redacted second claim for relief, we find that --- lack of awareness about the whistleblower program until “[s]hortly after Redacted does not constitute an extraordinary circumstance justifying a waiver of the timing requirement. As an initial matter, we have serious doubts that such lack of awareness by a claimant could ever rise to the caliber of circumstances beyond a party’s control for which we would exercise our Rule 21F-8(a) authority. That said, we need not conclusively decide the issue today. Even if we were persuaded to see that issue in Redacted favor, --- would still not be eligible for discretionary relief because --- has offered no explanation for why it took --- until Redacted – approximately Redacted after supposedly first learning about the whistleblower program – to “prepare the paperwork” to file --- award claim. Redacted failure to proceed promptly upon supposedly learning of the whistleblower program is, under the *PennMont* standard, fatal to --- already weak request that we exercise our discretionary authority here.⁵

III. Conclusion

Accordingly, upon due consideration under Rule 21F-10(h), 17 C.F.R. § 240.21F-10(h), it is hereby ORDERED that Redacted whistleblower award claim be, and hereby is, denied.

By the Commission

Kevin M. O’Neill
Deputy Secretary

³ See *Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934*, Release No. 34-64545, at 172 (May 25, 2011).

⁴ We see nothing about subsequent developments in the Redacted that excuses under the *PennMont* standard Redacted untimely application. We fail to see how subsequent developments in the Redacted have any relevance to alerting Redacted that --- was a potential claimant in the Commission’s action, as those developments would have no bearing on whether --- had provided the Commission information that “led to” the earlier success of the Commission’s action.

⁵ If the Commission believes that an award is merited notwithstanding that the untimely filing was within the claimant’s control, the Commission could still have recourse to its general exemptive authority under Section 36(a) of the Exchange Act. However, we do not find any evidence that would support the Commission exercising its authority to exempt Redacted from --- obligation to have timely filed.