UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 72659 / July 23, 2014

WHISTLEBLOWER AWARD PROCEEDING
File No. 2014-7

In the Matter of the Claim for Awards

in connection with

Redacted

and

Redacted

ORDER DETERMINING WHISTLEBLOWER AWARD CLAIM

Redacted ("Claimant") failed to submit Redacted claims for an award for Notices of Covered Action Redacted and Redacted to the Office of the Whistleblower ("OWB") within ninety (90) calendar days of the date of the respective Notices of Covered Action as required by Rule 21F-10(b) under the Securities Exchange Act of 1934 ("Exchange Act") to be considered for an award. Claimant also did not demonstrate "extraordinary circumstances," as required by Rule 21F-8(a) under the Exchange Act, to justify the waiver of the ninety (90) day requirement. For the foregoing reasons, the Claims Review Staff ("CRS") issued a Preliminary Determination recommending that Claimant's claims for an award be denied. Claimant now has filed a response contesting the Preliminary Determination.

For the reasons set forth below, Claimant's claims are denied.

I. Commission Enforcement Actions and Notices of Covered Action

A. The Commission's Enforcement Actions

i. Redacted

On Redacted the Commission filed a complaint in the U.S. District Court Redacted against Redacted Redacted ("the Redacted Matter"). On Redacted Redacted the district court entered a final judgment in favor of the Commission. Among other relief, the district court ordered Redacted to pay disgorgement of Redacted together with prejudgment interest of Redacted, amounting to Redacted, plus Redacted in civil penalties.

ii. Redacted

On Redacted the Commission filed a complaint against Redacted Redacted Redacted ("the Redacted Matter"). On Redacted the district court entered final judgments in favor of the Commission. Among other relief, the district court ordered Redacted jointly and severally liable for disgorgement in the amount of Redacted together with prejudgment interest of Redacted for a total of Redacted and ordered Redacted to pay a civil penalty of Redacted

B. Notices of Covered Action

The OWB posted Notices of Covered Action (each, a "NoCA") on Redacted for both the Redacted Matter, NoCA Redacted and the Redacted Matter, Redacted Redacted on the Commission's website pursuant to Rule 21F-10(a) under the Exchange Act. Each NoCA listed Redacted ninety (90) calendar days from the date of posting, as the deadline for submitting claims.[1]

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[1] Rule 21F-10 outlines the procedures for making a claim for a whistleblower award in Commission actions that result in monetary sanctions in excess of $1,000,000. 17 C.F.R. § 240.21F-10. Section (b) of 21F-10 imposes specific timing requirements upon the whistleblower to make an award claim:

> 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

C. Claimant's Applications for Award

Claimant submitted whistleblower award applications for both matters. Claimant's Redacted and Redacted award applications were received by the OWB on Redacted and Redacted respectively—nearly three months past the Redacted Redacted deadline.

On Redacted Claimant submitted a letter to the OWB explaining that neither Redacted nor Redacted attorney knew about the NoCA postings on the Commission's website, which resulted in Claimant's delay in submitting the applications.

II. Claimant's Claims are Denied

A. Background

Claimant submitted information to the Commission about suspected wrongdoing in the Redacted Matter and Redacted Matter in or about Redacted and Redacted For instance, Claimant contacted the Redacted on or about Redacted Redacted with information regarding wrongdoing by Redacted with respect to the stock of Redacted . Similarly, on or about Redacted , the Claimant provided the Commission with a transcript of testimony that Redacted had given in Redacted the Claimant believed that Redacted had described Redacted in Redacted testimony. According to the Enforcement attorneys involved in the Redacted and Redacted Matters, Claimant (prior to final judgments being entered) did not provide any additional information following the effective date of the whistleblower program—*i.e.*, July 21, 2010 when the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") was enacted.

B. The Preliminary Determination

On December 19, 2012, the CRS made a Preliminary Determination recommending that Claimant's award applications be denied. The Preliminary Determination explained that the Claimant had failed to provide the OWB with the award application for either NoCA within ninety (90) calendar days of the date of the respective NoCA as required by Rule 21F-10(b) of the Exchange Act to be considered for an award. The Preliminary Determination also stated that the Claimant had not demonstrated "extraordinary circumstances" to justify the waiver of the ninety (90) day requirement pursuant to Rule 21F-8(a). 17 C.F.R. § 240.21F-8(a).

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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.

C. Claimant's Response to the Preliminary Determination

On February 19, 2013, Claimant submitted a written response contesting the Preliminary Determination pursuant to Rule 21F-10(e)(2). 17 C.F.R. § 240.21F-10(e)(2). Rule 21F-10(e)(2) provides that a claimant seeking to contest a Preliminary Determination may submit a written response within sixty (60) days that "sets forth the grounds for your objection to either the denial of an award or the proposed amount of an award."

In Redacted response, Claimant does not dispute that Redacted WB-APPs were untimely. Instead, Claimant attempts to demonstrate the presence of extraordinary circumstances that caused the late-filed WB-APPs. Claimant's response centers on one critical argument— Redacted was not aware of the whistleblower award program prior to the expiration of the 90-day filing deadline. Claimant further argues that Redacted lack of knowledge was due to the failure of the Commission to provide Redacted with actual notice of the program and its filing requirements, and Redacted attorney's failure to learn of the program and timely submit the award applications.

D. Analysis

Rule 21F-10(a) specifically states that "[a] claimant will have ninety (90) days from the date of the Notice of Covered Action to file a claim for an award based on that action, or the claim will be barred." As the Commission explained when it adopted this rule, "The 90-day bar provides finality at the end of a reasonable application period so that we may assess the award applications and conclusively determine which applicant, if any, is entitled to an award, and in what percentage amount." *Securities Whistleblower Incentives and Protections*, Rel. No. 34-64545, n. 351 (May 25, 2011). But "…the Commission may, in its sole discretion, waive" the 90-day bar "based upon a showing of extraordinary circumstances." 17 C.F.R. § 240.21F-8(a). Claimant asks that we do so, but we find that Redacted application does not warrant such equitable relief.

In determining whether a claimant has demonstrated extraordinary circumstances to excuse an untimely submission under Rule 21F-8, we look to our analogous decision in *In the Matter of the Application of PennMont Securities et al.*, SEC Release 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. After examining analogous areas of federal law, we determined that demonstration of an extraordinary circumstance in the context of an untimely submission requires a person seeking relief to show that "the reason for the failure to

timely file was beyond [his or her] control[.]" *Id.*

As explained above, Claimant asserts that extraordinary circumstances exist here to justify Redacted untimely filing because Redacted did not know of the whistleblower program until after the expiration of the 90-day filing period. But a lack of awareness about the program does not, in our view, rise to the level of an extraordinary circumstance as a general matter. Claimants have it well within their control to learn about the whistleblower program's existence and its requirements, and to file a timely award application; they simply need to visit the Commission's web page, which prominently features the relevant information about the program. Their failure to do so does not warrant equitable relief, particularly since a central premise underlying Rule 21F-10(a)(1) is that potential claimants bear the ultimate responsibility to learn about the program and to take the appropriate steps to perfect their award applications.

We are similarly unpersuaded by Claimant's attempt to shift responsibility for Redacted lack of knowledge about the whistleblower program to the Commission and to Redacted attorney. The Commission is under no duty to provide Claimant (or Redacted attorney) with direct notice of the filing deadline—and Claimant has failed to suggest any legal authority suggesting otherwise.[2] Again, the NoCAs are clearly posted on the Commission's website, each with a definite filing deadline, which constitutes sufficient notice.

Nor are we persuaded by Claimant's contention that we should forgive Redacted untimeliness because Redacted attorney did not discover the whistleblower program's existence and, thus, advise Redacted about it, until after the expiration of the 90-day

[2] We note Claimant has not asserted that due process requires that Redacted receive actual notice of the whistleblower award program's existence and, thus, any such argument is waived. But it would fail in any event. Congress enacted the program through legislation, the Commission published the rules implementing the program in the Federal Register, and those rules are available to the public in the Code of Federal Regulations. For due process purposes, this more than sufficed to provide Claimant with notice that the program exists. *Cf. Luna v. Holder*, 659 F.3d 753, 759 (9th Cir. 2011) (finding that all aliens presumptively have been given notice of a deadline to file a motion to reopen where the law has been enacted by Congress and the regulation has been published in the Federal Register); *Stearn v. Dep't of Navy*, 280 F.3d 1376, 1384 (Fed. Cir. 2002) (finding that government employees claiming certain retirement benefits were placed on notice of the requirements for obtaining those benefits by publication of the governing regulation in the Federal Register); *LaChance v. Reno*, 13 F.3d 586, 589-90 (2d Cir. 1994) (explaining that the publication of an administrative regulation provides constructive notice); *Jordan v. Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor*, 892 F.2d 482, 488-89 (6th Cir. 1989) (holding that a party "received constructive notice of her right to obtain an attorney at no charge by virtue of the publication of [the regulation] in the Federal Register and the Code of Federal Regulations").

submission period. To be sure, as we observed in *PennMont*, attorney misconduct in some circumstances might give rise to extraordinary circumstances justifying equitable relief. *PennMont*, 2010 WL 1638720 at *4. But the requisite level of attorney misconduct causing the untimely submission must be severe, involving blatant client deception, outright abandonment, or similar egregious misconduct; ordinary negligence such as Claimant's attorney here may be responsible for will not suffice.[3] And because Claimant has failed to offer anything that exhibits the requisite level of egregious attorney misconduct, we find that any failure on Redacted attorney's part does not constitute an extraordinary circumstance necessary to trigger our discretion to toll the 90-day filing deadline.[4]

But the Claimant's request that we exercise our equitable tolling authority fails for an additional reason— Redacted failed to act promptly upon learning of the missed filing deadline. As we explained in *PennMont*, "[e]ven when circumstances beyond the applicant's

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[3] *See, e.g., Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990) (explaining that an attorney's ordinary negligence is generally not an "extraordinary circumstance" warranting equitable tolling); *Holland v. Florida*, 130 S. Ct. 2549, 2564 (2010) ("[A] garden variety claim of excusable neglect, such as a simple miscalculation that leads a lawyer to miss a filing deadline, does not warrant equitable tolling.") (internal citations omitted). *See also Geraci v. Senkowski*, 211 F.3d 6, 9 (2d Cir. 2000) (finding a mistake by counsel as to the calculation of time remaining to file a petition did not constitute extraordinary circumstances); *Frye v. Hickman*, 273 F.3d 1144, 1146 (9th Cir. 2001) (finding that ordinary attorney negligence, such as miscalculating a deadline, is not an extraordinary circumstance that warrants equitable tolling); *Toccaline v. Commissioner*, 2012 WL 603294, at *10 (No. 3:10-cv-1404) (D. Conn. Feb. 23, 2012) (finding that petitioner's ignorance of the law did not constitute an extraordinary circumstance to warrant equitable tolling); *McCaskill, II v. Dep't of the Army*, 2006 WL 314555, at *7 (No. 1:05-CV-536) (M.D.N.C. Feb. 8, 2006) (finding that missing a 90-day deadline to file—or failing to inform a client to file—is "garden-variety" ordinary negligence). *Cf. Martinez v. City of Chicago*, 2 F.3d 752, 756 (7th Cir. 2007) (explaining that even though the plaintiff's attorney's neglect resulted in the dismissal of what may have been a meritorious action, the plaintiff's attorney serves as the plaintiff's agent, and the plaintiff is thus bound by his actions).

[4] In other contexts, recent cases finding extraordinary circumstances have generally involved attorney abandonment of clients without notification or similar egregious attorney misconduct. *See, e.g., United States v. Martin*, 408 F.3d 1089, 1096 (8th Cir. 2005) (client entitled to equitable tolling where his attorney retained files, made misleading statements, and engaged in similar conduct); *Dillon v. Conway*, 642 F.3d 358, 362-64 (2d Cir. 2011) (attorney willfully misled his client); *Walden v. Link Systems, Inc.*, 2012 WL 3779210, at *2 (No. 1:11–cv–0388) (S.D. Ind. Aug. 9, 2012) (attorney "walked away from her clients and her law practice at some point without giving any notice to her clients.").

control give rise to the delay, … an applicant must also demonstrate that he or she promptly arranged for the filing … as soon as reasonably practicable thereafter." *Id*. at *4. 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*.

In Redacted response to the Preliminary Determination, Claimant states that Redacted "did not sit on Redacted rights" after learning about the program. Claimant's Response to the Preliminary Determination, at 1; *see also id.* at 2 ("Once the information was found, we applied immediately."). But the record leads us to conclude otherwise. In a Redacted letter, the Claimant represented that Redacted attorney became aware of the whistleblower program in late Redacted yet Claimant's award applications were not received by the OWB until Redacted and Redacted , respectively. Given the relatively straightforward nature of the WB-APPs that Claimant submitted, we fail to see why Redacted delayed over a month in submitting them. Nor has Claimant offered any credible explanation for the delay.[5] Accordingly, we find that Claimant failed to demonstrate that Redacted pursued Redacted rights diligently upon learning that the whistleblower program existed.

For these reasons, we conclude that Claimant has not met the heavy burden of demonstrating that extraordinary circumstances prevented Redacted from timely submitting to the OWB Redacted award applications for NoCAs Redacted and Redacted .[6]

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[5] In a letter to the OWB Redacted Claimant asserted that Redacted delayed submitting the Redacted application to avoid jeopardizing a purportedly then-pending non-public criminal investigation. But we do not credit this explanation because: (i) we fail to understand why Redacted felt this was necessary given that the Commission does not make whistleblower applications publicly available, and (ii) if Claimant had in fact had this concern it seems to us the appropriate course would have been to promptly alert the OWB and to seek its guidance rather than to simply unilaterally delay filing the application. In any event, none of this explains Claimant's delay in submitting the earlier Redacted award application.

[6] We note that, based on the record currently before us, Claimant would not be entitled to an award even if Redacted had demonstrated that "extraordinary circumstances" prevented Redacted timely filing of the award applications. It appears that, with one exception discussed below, the information that Claimant provided to the Commission relating to the Redacted and Redacted Matters was provided *before* the July 21, 2010 enactment of Dodd-Frank. Under Rule 21F-4(b)(1)(iv), information provided to the Commission for the first time before Dodd-Frank's enactment is not considered "original information" and, thus, cannot serve as the basis for an award. 17 C.F.R. § 240.21F-4(b)(1)(iv). On or about Redacted Claimant submitted to the Commission a copy of Redacted testimony from a criminal sentencing hearing, but this information could not have contributed to the successful resolution

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 claims be, and hereby are, denied.

By the Commission.

Kevin M. O'Neill
Deputy Secretary

of either the Redacted or Redacted Matters because final judgments had already been entered in those cases on Redacted and Redacted respectively.