

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION
SECURITIES EXCHANGE ACT OF 1934
Release No. 85273 / March 8, 2019
WHISTLEBLOWER AWARD PROCEEDING
File No. 2019-3

In the Matter of the Claim for Award

in connection with

Redacted

Redacted

ORDER DETERMINING WHISTLEBLOWER AWARD CLAIM

Redacted (“Claimant 1”) and Redacted (“Claimant 2”) (together, “Claimants”) seek whistleblower awards pursuant to Section 21F of the Securities Exchange Act of 1934 (“Exchange Act”), and the rules thereunder, in connection with the above-referenced Commission enforcement matter (“Covered Action”).

The Office of the Whistleblower posted a Notice of Covered Action (“NoCA”) on its website on Redacted and the ninety-day period for filing claims for award ended in Redacted. Because Claimants submitted their award claims after the ninety-day period, and have not demonstrated extraordinary circumstances justifying waiver of that requirement, Claimants’ claims are denied.

A. Background

The Commission received Claimant 1’s award application on Redacted approximately eleven months after the deadline to apply for an award for the Covered Action. Claimant 1 stated in Claimant 1’s application that Claimant 1 was under the impression that the Commission would contact Claimant 1 regarding the need to file an award claim, that Claimant 1 was never advised to watch for a posting of a NoCA on the Commission’s website, and that Claimant 1 was unaware of the ninety-day period for filing an award claim.

The Commission received Claimant 2’s award application on Redacted more than two years after the deadline to apply for an award for the Covered Action. Claimant 2 did

not provide an explanation or justification for the late filing in Claimant 2's application, nor did Claimant 2 acknowledge in the application that Claimant 2 filed it late.

On ^{Redacted} the Claim Review Staff ("CRS") preliminarily determined to recommend that we deny Claimants' award claims on the grounds that they were untimely.

B. Requests for Reconsideration

On ^{Redacted} Claimant 1 filed a timely request for reconsideration in which Claimant 1 does not dispute that Claimant 1's award application was filed after the deadline, but appears to request that the Commission waive that procedural defect based upon extraordinary circumstances. First, Claimant 1 represents that Claimant 1 never knew of, nor agreed to, the requirement that claimants file an application for a whistleblower award within ninety days of a posting of a NoCA. Second, Claimant 1 represents that hackers intentionally kept Claimant 1 from learning of the posting of the relevant NoCA by repeatedly taking Claimant 1's website offline, requiring Claimant 1 to spend all of Claimant 1's online time working to get Claimant 1's website up and running again.

On ^{Redacted} Claimant 2 submitted a timely request for reconsideration. Claimant 2 appears to argue that the Commission has not collected (or finished collecting) funds in the Covered Action, that the NoCA therefore was premature, and that Claimant 2's application therefore is timely. Claimant 2 also argues that the application was timely because the Commission was put on notice when Claimant 2 submitted a tip to the Commission that Claimant 2 wished to be considered for an award.

C. Analysis

The requirement that claimants file whistleblower award claims within ninety days of the posting of a NoCA, set forth in Exchange Act Rule 21F-10(b), serves important programmatic functions. *See* 17 C.F.R. § 240.21F-10(b). The deadline ensures fairness to potential claimants by giving all an equal opportunity to have their competing claims evaluated at the same time. The deadline also brings finality to the claim process so that the Commission can make timely awards to meritorious whistleblowers.¹

Under Exchange Act Rule 21F-8(a), "the Commission may, in its sole discretion, waive" certain procedural requirements, including the ninety-day filing deadline, "upon a showing of extraordinary circumstances." 17 C.F.R. § 240.21F-8(a). In determining whether a claimant has demonstrated extraordinary circumstances that would trigger the Commission's discretion to

¹ *See Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934*, Release No. 34-64545, at 172 (Effective Aug. 12, 2011) (available at <http://www.sec.gov/rules/final/2011/34-64545.pdf>).

waive the ninety-day filing deadline, we have previously looked to our decision in *In the Matter of the Application of PennMont Securities*.² There, in determining whether applicants had demonstrated extraordinary circumstances that would trigger the Commission’s discretion to waive the thirty-day filing deadline 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.”³ An extraordinary circumstance is one “where the reason for the failure timely to file was beyond the control of the applicant”⁴ Further, “[e]ven when circumstances beyond the applicant’s control give rise to the delay, an applicant must also demonstrate that he or she promptly arranged for the filing as soon as reasonably practical thereafter.”⁵ We have declined requests to waive the ninety-day filing deadline for whistleblower award claims because of claimants’ failures to meet the *PennMont* standard.⁶

Claimant 1 represents that Claimant 1 was unaware of the posting of the relevant NoCA and the ninety-day deadline for submitting Claimant 1’s application, but the lack of awareness of the submission deadline does not constitute an extraordinary circumstance justifying a waiver of the requirement that applicants file their claims within ninety days.⁷ As we have previously explained, “a lack of awareness about the [whistleblower award] program does not rise to the level of an extraordinary circumstance as a general matter [since] potential claimants bear the ultimate responsibility to learn about the program and to take the appropriate steps to perfect their award applications.”⁸ “A potential claimant’s responsibility includes the obligation to regularly monitor the Commission’s web page for NoCA postings and to properly calculate the deadline for filing an award claim.”⁹

As explanation for Claimant 1’s purported failure to learn of the NoCA and the filing deadline, Claimant 1 proffers that hackers took Claimant 1’s website offline, requiring Claimant 1 to spend all of Claimant 1’s online time during the ninety-day filing period working to get Claimant’s website back online. But this proffer is insufficient, as it does not suggest that Claimant 1 could not access the Commission’s website because of circumstances beyond Claimant 1’s control; rather, it merely suggests that Claimant 1 chose to use Claimant 1’s online

² *PennMont Sec.*, Release No. 34-61967 (Apr. 23, 2010), *pet. for rev. denied sub nom. PennMont Sec. v. SEC*, 414 F. App’x 465 (3rd Cir. 2011).

³ *Id.* at 8-9.

⁴ *Id.* at 9.

⁵ *Id.*

⁶ *See* Order Determining Whistleblower Award Claim, Release No. 34-77368 (Mar. 14, 2016), *pet. for rev. denied sub nom. Cerny v. SEC*, 708 F. App’x 29 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 2005 (2018), *reh’g denied*, 138 S. Ct. 2715 (2018) (“Release No. 34-77368”); *see also* Order Determining Whistleblower Award Claim, Release No. 34-82181 (Nov. 30, 2017); Order Determining Whistleblower Award Claim, Release No. 34-72659 (July 23, 2014); Order Determining Whistleblower Award Claim, Release No. 34-72178 (May 16, 2014).

⁷ *See* Release No. 34-77368 at 3.

⁸ Order Determining Whistleblower Award Claim, Release No. 34-72659 at 5 (July 23, 2014). *See also id.* (“The Commission is under no duty to provide Claimant.....with direct notice of the filing deadline.....”).

⁹ Release No. 34-77368 at 4.

time restoring Claimant 1’s website rather than checking the Commission’s website to learn of the NoCA and the deadline for filing an award claim.¹⁰

Claimant 2 contends that Claimant 2’s submission was not untimely filed because the Commission’s collections efforts have supposedly not been completed in the Covered Action, and because, in any event, Claimant 2’s tip put the Commission on notice of Claimant 2’s interest in an award. But even if, as Claimant 2 suggests, collections have not been completed in the Covered Action, these contentions are unavailing. A NoCA is posted when a Commission action results, through entry of a final judgment or order, in monetary sanctions totaling more than \$1 million, independent of the status of any collections in the action. *See* 17 C.F.R. § 240.21F-10(a). Moreover, a claimant must file a timely award claim on a Form WB-APP in order to qualify for an award; the filing of a tip does not suffice. *See id.* (“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.”)

For the above reasons, Claimants’ whistleblower award claims were not timely filed, and Claimants have not demonstrated the existence of “extraordinary circumstances” necessary to trigger the Commission’s discretion to waive their lack of compliance with Exchange Act Rule 21F-10(b)’s ninety-day filing deadline.¹¹

D. Conclusion

Accordingly, it is ORDERED that Claimants’ whistleblower award claims be, and hereby are, denied.

By the Commission.

Brent J. Fields
Secretary

¹⁰ Even if, as Claimant 1 asserts, Claimant 1 was unable to check the Commission’s website through most of ^{Redacted} Claimant 1 has not explained why Claimant 1 could not file an application between the end of ^{***} and ^{Redacted} ^{Redacted} the date the SEC received Claimant 1’s application. Claimant 1’s proffer therefore is also insufficient because it fails to demonstrate, as required by the second *PennMont* factor, that Claimant 1 “promptly arranged for the filing . . . as soon as reasonably practical” after Claimant 1’s purported problems with hackers supposedly ceased.

¹¹ Although the Claimants have not requested that we invoke our separate exemptive authority under Section 36(a) of the Exchange Act, we would decline to do so if they had. Section 36(a) grants the Commission the authority in certain circumstances to “exempt any person . . . from any provision or provisions of this title or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.” We believe that Claimants have not met their burdens of demonstrating any considerations that would satisfy the requirements for us to exercise our Section 36(a) exemptive authority.