

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION  
SECURITIES EXCHANGE ACT OF 1934  
Release No. 87828 / December 20, 2019  
WHISTLEBLOWER AWARD PROCEEDING  
File No. 2020-4

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In the Matter of the Claim for Award

in connection with

Redacted

Redacted

Notice of Covered Action <sup>Redacted</sup>

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**ORDER DETERMINING WHISTLEBLOWER AWARD CLAIM**

The Claims Review Staff (“CRS”) issued a Preliminary Determination recommending that the claim submitted by <sup>Redacted</sup> (“Claimant”) in connection with Notice of Covered Action <sup>Redacted</sup> (“Covered Action”) identified above be denied. Claimant subsequently filed a timely written response contesting the Preliminary Determination.<sup>1</sup>

After careful consideration of the administrative record, including Claimant’s written response, we deny Claimant’s award claim.

**I. Background**

**A. The Covered Action**

On <sup>Redacted</sup>, Division of Enforcement (“Enforcement”) staff opened a Matter Under Inquiry (“MUI”), which was elevated to a formal investigation on <sup>Redacted</sup>, that resulted in the Covered Action. Enforcement staff opened the investigation based on a self-report by <sup>Redacted</sup> (the “Company”) in <sup>Redacted</sup>. On <sup>Redacted</sup>

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<sup>1</sup> The Preliminary Determination of the CRS also recommended denying an award to Claimant 2, who has not filed a written response. Accordingly, Claimant 2 has failed to exhaust administrative remedies and the Preliminary Determination has become the Final Order of the Commission with respect to Claimant 2 pursuant to Exchange Act Rule 21F-10(f), 17 C.F.R. § 240.21F-10(f).

Redacted the SEC filed a civil injunctive complaint in federal district court. On Redacted Redacted the court entered final judgment, ordering the Company to disgorge \$ Redacted , together with prejudgment interest of \$ Redacted , for a total of \$ Redacted , and a civil penalty in the amount of \$ Redacted .

On Redacted , over 21 months after the MUI was opened, Claimant made a written submission with accompanying documentation to the Commission, which was subsequently uploaded to the Commission’s Tips, Complaints, and Referrals Intake and Resolution System (“TCR system”). Claimant submitted additional tips on Redacted and Redacted Redacted . Because Claimant’s tips appeared to contain potentially privileged information, the tips were referred to a privilege filter team (the “filter team”), which was completely separate from the Enforcement staff responsible for the Covered Action. In Redacted , the filter team had a call with Claimant in an effort to determine whether the information submitted by Claimant was privileged. Although the filter team redacted from the tips information it believed to be privileged, Enforcement staff responsible for the Covered Action determined not to review Claimant’s tips, including in redacted form, because the investigation had been ongoing for a significant period of time and the staff did not want to risk compromising the investigation by reviewing potentially privileged information. The Enforcement staff also had no communication with Claimant.

On Redacted , the Office of the Whistleblower posted a Notice of Covered Action on the Commission’s public website inviting claimants to submit whistleblower award applications within 90 days.<sup>2</sup> Claimant filed a timely whistleblower award claim.

## **B. The Preliminary Determination**

The CRS issued a Preliminary Determination<sup>3</sup> recommending that Claimant’s award claim be denied because Claimant’s information did not lead to the successful enforcement of the Covered Action within the meaning of Section 21F(b)(1) of the Exchange Act and Rules 21F-3(a)(3) and 21F-4(c) thereunder. Claimant’s information did not cause the Commission staff to open the investigation, as it was opened 21 months before the Commission received any information from Claimant. Nor did Claimant’s information significantly contribute to the success of the Covered Action as Enforcement staff responsible for the Covered Action determined not to review Claimant’s tips out of concern that they contained potentially privileged information, and had no communications with Claimant before or during the investigation of the Covered Action.

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<sup>2</sup> See Exchange Act Rule 21F-10(a), 17 C.F.R. § 240.21F-10(a).

<sup>3</sup> See Exchange Act Rule 21F-10(d), 17 C.F.R. § 240.21F-10(d).

## C. Claimant's Response to the Preliminary Determination

After requesting and receiving a copy of the record, Claimant submitted a timely written response contesting the Preliminary Determination,<sup>4</sup> including a declaration from Claimant. Specifically, Claimant makes two principal contentions in response to the Preliminary Determination.

*First*, Claimant asserts that the Commission failed to provide any statements from either the filter team or Enforcement staff to confirm the two staff attorney declarations that documented that Claimant's information was not used in any way to advance the investigation. Claimant asserts that the staff declarations fail to provide an exhaustive representation that no one else on the staff used Claimant's information to advance the investigation. Claimant re-asserts that Claimant provided valuable information that was used in the charges that were ultimately brought by the Commission against the Company.

*Second*, Claimant contends that the Commission staff disclosed Claimant's identity as a Commission whistleblower to the Company and then used that information to secure a more favorable settlement with the company.

## II. Analysis

To qualify for an award under Section 21F of the Exchange Act, a whistleblower must voluntarily provide the Commission with original information that leads to the successful enforcement of a covered action.<sup>5</sup> As relevant here, information leads to the success of a covered action if it: (1) causes the Commission staff to (i) open or reopen an investigation, or (ii) inquire into different conduct as part of a current Commission investigation;<sup>6</sup> or (2) significantly contributes to the success of a Commission judicial or administrative enforcement action.<sup>7</sup>

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<sup>4</sup> See Exchange Act Rule 21F-10(e), 17 C.F.R. § 240.21F-10(e).

<sup>5</sup> See Exchange Act Section 21F(b)(1), 15 U.S.C. § 78u-6(b)(1).

<sup>6</sup> See Exchange Act Rule 21F-4(c)(1), 17 C.F.R. § 240.21F-4(c)(1).

<sup>7</sup> See Exchange Act Rule 21F-4(c)(2), 17 C.F.R. § 240.21F-4(c)(2). In determining whether information significantly contributed to an enforcement action, we consider factors such as "whether the information allowed us to bring: (1) Our successful action in significantly less time or with significantly fewer resources; (2) additional successful claims; or (3) successful claims against additional individuals or entities." *Securities Whistleblower Incentives and Protections*, 76 Fed. Reg. 34300, 34325 (June 13, 2011). "The individual's information must have been 'meaningful' in that it 'made a substantial and important contribution' to the success of the covered action." *Order Determining Whistleblower Award Claims*, Exch. Act Rel. No. 85412, 2018 SEC LEXIS 615, at \*16 (Mar. 26, 2019); *Order Determining Whistleblower Award Claims*, Exch. Act Rel. No. 82897, 2018 SEC LEXIS 750, at \*16 (Mar. 19, 2018).

After careful consideration of the record, including Claimant’s request for reconsideration, we conclude that Claimant is not eligible for a whistleblower award because Claimant’s information did not lead to the successful enforcement of the Covered Action. In particular, we credit the staff declarations in the administrative record, which demonstrate that the information submitted by Claimant did not cause the Commission staff to open the investigation that eventually resulted in the Covered Action, did not cause the staff to initiate a new line of inquiry or reopen an investigation that resulted in the Covered Action, and did not significantly contribute to the success of the Covered Action.

The Claimant cannot be credited with causing the Enforcement staff to open the investigation. The staff declarations demonstrate that the investigation was opened on <sup>Redacted</sup> <sup>Redacted</sup>, based on a self-report by the Company in <sup>Redacted</sup>, over 21 months before Claimant’s first submission in <sup>Redacted</sup>. As such, Claimant’s information could not have caused the staff to open the investigation.

In addition, none of the information submitted by Claimant caused the staff to initiate a new line of inquiry or significantly contributed to the successful enforcement of the Covered Action. The staff declarations demonstrate that Claimant’s information was never reviewed or used by the Enforcement staff responsible for the Covered Action during the course of the investigation or as part of the Covered Action.

Finally, for the reasons discussed below, we reject the arguments raised in Claimant’s written response to the Preliminary Determination.

First, Claimant contends that the staff attorney declarations supporting the Preliminary Determination are not sufficient because they “fail to provide an exhaustive representation that no one on the <sup>Redacted</sup> staff, including the taint team, used Claimant’s information.” We reject this argument and find that the staff declarations supporting the Preliminary Determination adequately demonstrate that the Covered Action investigative staff did not review or use Claimant’s information in any way and had no communications with Claimant. We credit the sworn declaration from one of the primary Enforcement staff attorneys responsible for the investigation that she conferred with other staff on the investigation and *no member* of the staff responsible for the investigation reviewed any of the information that Claimant submitted or had any contact with Claimant. Further, supplemental declarations from Enforcement staff confirm and buttress the conclusion that Enforcement staff responsible for the Covered Action did not review or use Claimant’s information in any way. The staff declarations demonstrate that it was the staff conducting the filter review—who were completely separate from the investigative staff responsible for the Covered Action—that interviewed Claimant in an effort to determine whether Claimant’s information was privileged, and that the Enforcement staff on the investigation had no communications with either the filter team or Claimant. The Enforcement

staff declarations further show that they did not learn of the Company's misconduct from Claimant, and none of Claimant's information was used to support the underlying charges in the Covered Action. Further, the record reflects that the filter team who reviewed Claimant's tips and who interviewed Claimant did not forward those tips to the Enforcement staff responsible for the Covered Action and did not relay the substance of their communications with Claimant to the Enforcement staff responsible for the Covered Action.

Second, Claimant's surmise that staff disclosed Claimant's identity as a Commission whistleblower to the Company and then used that information to secure a more favorable settlement is contradicted by the record. As noted, the investigative staff responsible for the Covered Action never communicated with Claimant or accessed any of Claimant's information. Further, in a supplemental declaration, investigative staff confirmed that they did not disclose to the Company counsel directly, or indirectly, that Claimant was a Commission whistleblower or that Claimant had submitted tips to the Commission. Likewise, one of the filter team staff who interviewed Claimant also does not recall any contact with the Company or its counsel, and the documentary records of the filter team's work—which do not show any such contacts—further support this conclusion. As such, the fact that Claimant submitted tips to the Commission did not advance the staff's settlement negotiations with the Company or provide staff with any leverage in those settlement discussions. As reflected above, there is no evidence in the record that the Claimant's tips helped advance or were used in the investigation, including in the context of the staff's settlement discussions with the Company. And at no point during the settlement negotiations, did counsel for the Company indicate that it was willing to settle the case because of Claimant.

### **III. CONCLUSION**

Accordingly, it is ORDERED that Claimant's whistleblower award claim be, and hereby is, denied.

By the Commission.

Vanessa A. Countryman  
Secretary