

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 94397 / March 11, 2022

WHISTLEBLOWER AWARD PROCEEDING
File No. 2022-37

In the Matter of the Claim for an Award

in connection with

Redacted

Redacted

Notice of Covered Action Redacted

ORDER DETERMINING WHISTLEBLOWER AWARD CLAIMS

The Claims Review Staff (“CRS”) issued Preliminary Determinations recommending the denial of the whistleblower award claim submitted by Redacted (“Claimant 1”), and denial of the joint whistleblower award claim submitted by Redacted and Redacted Redacted (“Claimant 2” and “Claimant 3”, or together, the “Joint Claimants”) in connection with the above-referenced covered action (the “Covered Action”). Claimant 1, Claimant 2, and Claimant 3 filed timely responses contesting the preliminary denials.¹ For the reasons discussed below, Claimant 1’s, Claimant 2’s, and Claimant 3’s award claims are denied.

I. Background

A. The Covered Action

On Redacted staff from the Division of Enforcement opened an investigation in response to news stories concerning Redacted

(“Company”) (the “Investigation”).² Based on its

¹ The Preliminary Determinations also recommended denying awards to two other claimants. Neither of these claimants contested the Preliminary Determinations. Accordingly, the Preliminary Determinations have become the Final Order of the Commission with respect to these claimants. Exchange Act Rule 21F-10(f), 17 C.F.R. §240.21F-10(f).

² The Covered Action resulted from two investigations relating to the Company that were opened on Redacted and Redacted respectively, in response to news stories concerning the Company’s Redacted. For purposes of the Order, we refer to these two related investigations as the Investigation.

review of [Redacted] the staff identified [Redacted]
[Redacted] the staff identified [Redacted]
On [Redacted], the Commission instituted a settled administrative and cease-and-desist proceeding against the Company, charging it with [Redacted].
The Commission ordered the Company to pay [Redacted], consisting of disgorgement, prejudgment interest and a civil penalty.

On [Redacted], the Office of the Whistleblower (“OWB”) posted the Notice for the Covered Action on the Commission’s public website inviting claimants to submit whistleblower award applications within 90 days. Claimants 1, 2, and 3 filed timely whistleblower award claims.³

B. The Preliminary Determinations

[Redacted] the CRS issued Preliminary Determinations⁴ recommending that Claimants’ claims be denied because the information provided by Claimants did not lead to the successful enforcement of the Covered Action.⁵ The record supporting the Preliminary Determinations included three declarations from Division of Enforcement staff.

Based on the staff’s declarations, the CRS found that the staff responsible for the Investigation did not receive any information from Claimant 1 before or during the Investigation, and that Claimant 1 did not assist or contribute in any way to the Investigation or the resulting Covered Action. The CRS also found, based on the staff declarations, that the staff was already investigating the specific conduct and the specific transaction described in one of the Joint Claimants’ tips when the tip was submitted, and that that tip did not provide any new information that advanced the Investigation. The CRS also noted that the staff did not expand the scope of the Investigation or the Covered Action to include the transactions that were the subject of the other tips submitted by the Joint Claimants, which were submitted after the opening of the Investigation, nor did those tips provide any new information that advanced the Investigation.

³ In addition to Claimant 1’s timely written response, Claimant 1 also submitted hundreds of pages of documents to supplement his/her application after the expiration of the ninety-day period for filing applications in connection with the Covered Action. Given the CRS’s Preliminary Determinations that the staff conducting the Investigation never communicated with or received any information from Claimant 1, and that none of Claimant 1’s information contributed to the successful enforcement of the Covered Action, the CRS considered only those materials submitted by the deadline.

⁴ See Exchange Act Rule 21F-10(d), 17 C.F.R. § 240.21F-10(d).

⁵ See Exchange Act Rule 21F-4(c), 17 C.F.R. §240.21F-4(c).

C. Claimants' Responses to the Preliminary Determinations

Claimant 1 submitted a timely written response contesting the Preliminary Determinations.⁶ Specifically, Claimant 1 argued that Claimant 1 provided the Commission with an original, independent analysis of Redacted that caused the Commission to inquire into different conduct as part of the Investigation.⁷ Claimant 1 claims that the Commission's attorneys "had access" to his/her independent analysis and "should have" or "would have" reviewed it. Claimant 1 also contends that Claimant 1 qualifies for an award in connection with purported related actions – including a Redacted and the Company (the Redacted 8

The Joint Claimants also submitted a timely written response, together with two expert reports and a detailed Company *** analysis, contesting the Preliminary Determinations. The Joint Claimants argue that their analysis "provid[ed] the SEC with a playbook to *** Redacted from multiple issuers, including [the Company]," and that the SEC could not have made the findings in the Covered Action absent the methodology provided in the Joint Claimants' TCRs. The Joint Claimants state that, prior to the Covered Action, the SEC had never utilized a particular methodology "to uncover Redacted," and they conclude that the staff must have learned this methodology from the Joint Claimants' TCRs. In particular, the Joint Claimants assert that the Redacted that were included in their TCR "Redacted" referenced in the Covered Action. The Joint Claimants further argue that the timing of one of their TCRs (approximately *** Redacted before the Company and the Commission reached a settlement in principle), creates a "plausible, if not probable, inference" that their analysis provided the staff with "the additional negotiation leverage it needed to bring [the Company] to a Redacted settlement."⁹

⁶ See Exchange Act Rule 21F-10(e), 17 C.F.R. § 240.21F-10(e).

⁷ According to Claimant 1, his/her analysis "highlight[ed] Redacted

Redacted and the analysis further Redacted ,,

⁸ Claimant 1 also raises a number of procedural objections to the Preliminary Determination, asserting, among other objections, that certain "[m]aterial declarations of record [by OWB attorneys] were not released to Claimant [1] as set forth in in Rule 21F-12(a) of the Securities and Exchange Act of 1934" and that it was improper for the CRS to only consider those whistleblower award application materials Claimant 1 submitted by the deadline since "[i]t appears that OWB and the investigative team don't coordinate or share [Claimant 1]'s communication or certain NoCA Redacted WB-APP Related Action information."

⁹ According to the Joint Claimants, the insights from this TCR "had the impact of providing the SEC with the ammunition it needed to effectuate a settlement with [the Company] within just a few weeks after Claimants provided these insights [and that it was these] insights that enabled the SEC's months-long settlement negotiation with [the Company] to be concluded."

II. Analysis

To qualify for an award under Section 21F of the Securities Exchange Act of 1934 (“Exchange Act”), a whistleblower must voluntarily provide the Commission with original information that leads to the successful enforcement of a covered action.¹⁰ As relevant here, original information “leads to” a successful enforcement action if either: (i) the original information caused the staff to open an investigation, or to inquire into different conduct as part of an ongoing investigation, and the Commission brought a successful action based in whole or in part on conduct that was the subject of the original information; or (ii) the conduct was already under examination or investigation, and the original information significantly contributed to the action.¹¹

A. Claimant 1

We find that none of the information that Claimant 1 submitted led to the successful enforcement of the Covered Action. First, Claimant 1 does not dispute that the Enforcement staff opened the Investigation on Redacted months prior to the analysis report Claimant 1 submitted to the Commission – in response to news stories concerning Redacted ***

the Company. We therefore find that Claimant 1’s information did not cause the staff to open the investigation that culminated in the Covered Action.

Second, Claimant 1’s information did not cause the staff to inquire concerning different conduct as part of an ongoing investigation and did not significantly contribute to the Covered Action. Although Claimant 1 argues that the staff “should have” or “would have” reviewed Claimant 1’s submissions, the standard for award eligibility is not what the staff would have or could have done hypothetically, but, rather, what impact the whistleblower’s information actually had on the investigation.¹² The staff responsible for the Covered Action credibly declared, under penalty of perjury, that they neither communicated with Claimant 1 nor used Claimant 1’s information in the Investigation.¹³ In summary, there is no evidence that the

¹⁰ See Exchange Act Section 21F(b)(1), 15 U.S.C. §78u-6(b)(1).

¹¹ See Exchange Act Rule 21F-4(c)(1)-(2), 17 C.F.R § 240.21F-4(c)(1)-(2).

¹² See *Order Determining Whistleblower Award Claim*, Release No. 34-88667 (April 16, 2020) (“We must look to whether the Claimant’s information actually contributed to the success of the Covered Action, not whether ‘it should have or could have,’ as Claimant urges us to do.”) (citing *Order Determining Whistleblower Award Claim*, Release No. 34-85412 (Mar. 26, 2019)).

¹³ Claimant 1 claims in correspondence, dated Redacted, with Commission staff that Claimant 1 submitted his/her analysis “to the OWB” on Redacted. However, a staff declaration stated under penalty of perjury that the staff on the actual Investigation did not receive information from Claimant 1. The declaration stated that the Investigation staff “had no communications with [Claimant 1] before or during the Investigation [and that] [a]dditionally, we did not receive information from [Claimant 1] before or during the Investigation nor did [Claimant 1] assist or contribute in any way to the Investigation that culminated in the [Company] Action.” The staff also declared that it did not independently search the TCR system and find Claimant 1’s TCRs during the pendency of the Investigation nor did it receive any analysis from Claimant 1 that was forwarded to it from OWB or other offices in the Commission.

submissions or information provided by Claimant 1 were actually used by the staff responsible for the Covered Action.

Turning to Claimant 1's contention that Claimant 1 qualifies for an award in connection with the ^{Redacted}, this argument also fails. A related action award may be made only if, among other things, the claimant satisfies the eligibility criteria for an award for the applicable covered action in the first instance.¹⁴ As Claimant 1 does not qualify for an award in the Covered Action, Claimant 1's claim for an award in connection with related actions, including the ^{Redacted}, cannot succeed.¹⁵

B. Claimants 2 and 3

We find that none of the information that the Joint Claimants submitted led to the successful enforcement of the Covered Action. First, as explained above, the Enforcement staff opened the Investigation on ^{Redacted} – many months before the Joint Claimants began submitting their information in *** -- in response to ^{Redacted}

***. Joint Claimants do not dispute this. We therefore find that the Joint Claimants' information did not cause the staff to open the investigation that culminated in the Covered Action.

Second, Joint Claimants' information did not cause the staff to inquire concerning different conduct as part of an ongoing investigation and did not significantly contribute to the Covered Action. Declarations from two staff attorneys who worked on the Investigation stated under penalty of perjury that none of the information provided by the Joint Claimants helped advance the Investigation nor was it used in, or had any impact on, the charges brought by the Commission in the Covered Action. Joint Claimants' argue that the SEC could not have made the findings in its Covered Action absent the methodology contained in their TCRs. But the staff credibly declared, under penalty of perjury, the staff had already substantially completed its

¹⁴ See Exchange Act Rules 21F-3(b) and -11(a), 17 C.F.R § 240.21F-3(b) and -11(a).

¹⁵ We also reject Claimant 1's procedural objections. See *supra* note 8. With regard to Claimant 1's assertion that Claimant 1 should receive additional staff declarations, Exchange Act Rule 21F-10(e)(1)(i), 17 C.F.R § 240.21F-10(e)(1)(i), provides that a claimant objecting to his/her preliminary determination is entitled to "review the materials from among those set forth in §240.21F-12(a) of this chapter that formed the basis of the Claims Review Staff's Preliminary Determination." Rule 21F-12(a), 17 C.F.R § 240.21F-12(a), states that "the record upon which an award determination is made shall consist of a sworn declaration provided by the relevant Commission staff, in addition to the publicly available materials related to the Covered Action, the claimant's tip and the claimant's award application." Claimant 1 received all of these materials, including all three staff declarations that were provided to the CRS in connection with its review of this matter.

With regard to Claimant 1's objection to the CRS having only considered those of Claimant 1's materials that were submitted by the deadline, we first note that the whistleblower rules require that "[a]ll 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." Exchange Act 21F-10(b)(1), 17 C.F.R § 240.21F-10(b)(1). We also note that any such materials presented after the deadline would not, in any event, change the disposition here since the record shows that the investigative staff never communicated with or received information from Claimant 1.

investigation by the time it received Joint Claimants' TCRs.¹⁶ Moreover, sworn declarations from the staff explained that Joint Claimants' information was incorrect on certain key matters, and that it did not, as the staff stated, "aid or otherwise inform ... pending settlement talks." Specifically, the staff noted that, as the " Redacted [Joint] Claimants included in *** Redacted

Redacted As such, [Joint] Claimants' allegations reflected an Redacted . Further, Claimants incorrectly assumed that Redacted ,"¹⁷

We therefore conclude that Joint Claimants did not provide information that led to the success of the Covered Action and they are, therefore, ineligible for an award with respect to the Covered Action.

¹⁶ A staff declaration averred under penalty of perjury that most of the Joint Claimants' TCRs related to transactions unrelated to the Investigation and that, to the extent that the Joint Claimants' TCRs did address the transactions at issue in the Investigation, the staff was already aware of the issues identified by the Joint Claimants, and nothing in those TCRs advanced the Investigation in any way. Additionally, the Joint Claimants' TCRs were received after the staff had substantially completed the Investigation and were in late stages of settlement negotiations with the Company.

¹⁷ In response to the Joint Claimants' contentions in response to their Preliminary Determination, the staff provided an additional sworn declaration in which it noted under penalty of perjury that the Joint Claimants provided Redacted

III. Conclusion

Accordingly, it is hereby ORDERED that the whistleblower award applications of Claimants 1, 2, and 3 be, and hereby are, denied.

By the Commission.

Vanessa A. Countryman
Secretary