

UNITED STATES OF AMERICA

before the

SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 95032 / June 3, 2022

WHISTLEBLOWER AWARD PROCEEDING

File No. 2022-57

In the Matter of the Claim for an Award

in connection with

Redacted

Notice of Covered Action Redacted

ORDER DETERMINING WHISTLEBLOWER AWARD CLAIM

The Claims Review Staff (“CRS”) issued a Preliminary Determination recommending the denial of the whistleblower award claim submitted by Redacted (“Claimant”) in connection with the above-referenced covered action (the “Covered Action”). Claimant filed a timely response contesting the preliminary denial. For the reasons discussed below, Claimant’s award claim is denied.

I. Background

A. The Covered Action

On Redacted the Commission filed suit in federal court charging Redacted
*** (the “Defendant”) with Redacted
Redacted (the “Company”). The Commission alleged that Redacted

Redacted The Commission charged Defendant with violations of Redacted
Redacted

Redacted Following a jury verdict in favor of the Commission, on Redacted
Redacted the court entered an amended final judgment ordering Defendant to pay Redacted in
disgorgement and prejudgment interest.

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. Claimant filed a timely whistleblower award claim.

B. The Preliminary Determination

On ^{Redacted} the CRS issued a Preliminary Determination¹ recommending that Claimant’s claim be denied on the grounds that Claimant did not provide information that led 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 because Claimant’s information did not either (1) cause the Commission to (a) commence an examination, open or reopen an investigation, or inquire into different conduct as part of a current Commission examination or investigation, and (b) thereafter bring an action based, in whole or in part, on conduct that was the subject of Claimant’s information, pursuant to Rule 21F-4(c)(1); or (2) significantly contribute to the success of a Commission judicial or administrative enforcement action under Rule 21F-4(c)(2). The CRS found that the investigation which led to the Covered Action (the “Investigation”) was opened before Enforcement staff received Claimant’s information, and that by the time Claimant submitted his/her tip in ^{Redacted} Enforcement staff conducting the Investigation was already aware of the key facts underlying Claimant’s allegations.

The record supporting the Preliminary Determination included the declaration (the “First Declaration”) of one of the Enforcement attorneys who was assigned to the Investigation and the resulting Covered Action.² The First Declaration stated, under penalty of perjury, that Enforcement staff opened the Investigation on ^{Redacted} and that Claimant’s tip was submitted to the Commission in ^{Redacted}. The First Declaration stated that Enforcement staff in coordination with other Commission staff had been monitoring the Company since ^{Redacted} that Company’s ^{Redacted} and ^{Redacted} Commission filings raised substantial concerns and questions about the Company; that none of the information provided by Claimant was used in or had any impact on the charges brought by the Commission in the Covered Action; and that Enforcement staff assigned to the Investigation did not have any communications with Claimant. The First Declaration also explained that Claimant’s tip was mostly duplicative of information Enforcement staff on the Investigation already were aware of from other Commission staff and from publicly available information.

C. Claimant’s Response to the Preliminary Determination

Claimant submitted a timely written response contesting the Preliminary Determination.³ Claimant does not contest the determination that Claimant’s ^{Redacted} submission did not cause the opening of the Investigation, which the record shows was opened approximately one month

¹ See Exchange Act Rule 21F-10(d), 17 C.F.R. § 240.21F-10(d).

² The whistleblower rules contemplate that the record upon which an award determination is made shall consist of, as relevant here, 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, the claimant’s award application, and any other materials timely submitted by the claimant in response to the Preliminary Determination. See Exchange Act Rule 21F-12(a).

³ See Exchange Act Rule 21F-10(e), 17 C.F.R. § 240.21F-10(e).

before Claimant submitted his/her ^{Redacted} tip. Claimant argues instead that the First Declaration “is demonstrably false; so much so that it suggests a purposeful effort and intention to deceive.” Claimant provided a copy of an email that Claimant sent to OWB staff on ^{Redacted} ^{Redacted} which Claimant contends caused Enforcement staff to open the Investigation. Claimant’s ^{Redacted} email to OWB staff quoted from several of the Company’s ^{Redacted} public filings and ^{Redacted} alleged that the Company made ^{Redacted} and that the Company was ^{Redacted} Claimant states that “[i]t should be obvious that the source of the information causing an investigation to be opened by the SEC on [the Company] on ^{Redacted} was solely and directly from [Claimant]”

In an attempt to offer proof for the argument that Claimant was the cause of the Investigation, Claimant’s attorney then pivots to discussing his/her own dialogues with Commission staff. Claimant’s attorney stated, “I can tell you with confidence that OCIE⁴ was not investigating [Company’s] ^{Redacted} They were, however, investigating the issues I brought to their attention. My concerns with respect to [the Company] and [other agency] were shared with OCIE well before ^{Redacted}.” According to the attorney, he/she “had an ongoing dialogue” with a particular OCIE staff member about issues unrelated to the Company’s ^{Redacted} Based on those interactions, the attorney concludes that the SEC ^{Redacted} was not examining Company’s ^{Redacted} until Claimant sent his/her ^{Redacted} email.

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.⁵ Among other things, to be considered original information, the submission must be provided to the Commission for the first time after July 21, 2010.⁶ Additionally, as relevant here, original information will be deemed to lead to a successful enforcement action if either: (i) the original information caused Commission staff to commence an examination, open or reopen an investigation, “or to inquire concerning different conduct as part of a current examination or investigation” and the Commission brought a successful action based in whole or in part on conduct that was the subject of the original information;⁷ or (ii) the conduct was already under examination or investigation, and the original information “significantly contributed to the success of the action.”⁸

In determining whether the information “significantly contributed” to the success of the action, the Commission will consider whether the information was “meaningful” in that it “made

⁴ The Commission’s Office of Compliance Inspections and Examinations (“OCIE”) is now known as the Division of Examinations.

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

⁶ See Exchange Act Rule 21F-4(b)(1)(iv); 17 C.F.R. §240.21F-4(b)(1)(iv).

⁷ See Exchange Act Rule 21F-4(c)(1); 17 C.F.R. §240.21F-4(c)(1).

⁸ See Exchange Act Rule 21-F-4(c)(2), 17 C.F.R. § 240.21F-4(c)(2).

a substantial and important contribution” to the success of the covered action.⁹ For example, the Commission will consider a claimant’s information to have significantly contributed to the success of an enforcement action if it allowed the Commission to bring the action in significantly less time or with significantly fewer resources, or to bring additional successful claims or successful claims against additional individuals or entities.¹⁰

We find, based on the evidence in the record, that Claimant did not provide information that caused Enforcement staff to open or reopen an investigation, commence an examination, or inquire concerning different conduct as part of a current examination or investigation. While Claimant’s information alleged misconduct by the Company, Enforcement staff was already aware of the key facts underlying those allegations. Therefore, Claimant’s information does not satisfy Rule 21F-4(c)(1).¹¹ Claimant does not contest that Claimant’s ^{Redacted} submission did not cause the opening of the Investigation; instead, Claimant points to the ^{Redacted} email Claimant sent to the Commission as the cause behind the opening of the Investigation. After review of Claimant’s response to the Preliminary Determination, Enforcement staff who wrote the First Declaration wrote a supplemental Declaration (the “Second Declaration”). The Second Declaration, which we credit, confirmed under penalty of perjury that Commission staff had already begun coordinating in examining and reviewing the Company’s ^{Redacted} and ^{Redacted} in ^{Redacted}, more than six months before the Investigation was opened on ^{Redacted}. In addition, the Second Declaration indicated that Commission staff conducted examinations of the Company in ^{Redacted} and ^{Redacted}. The Second Declaration confirmed that the Company’s ^{Redacted} filings with the Commission ^{Redacted}, raised concerns ^{Redacted}. The ^{Redacted} Second Declaration also confirmed that Enforcement staff did not recall receiving Claimant’s ^{Redacted} email. Based on the First Declaration and the Second Declaration and the other facts in the record, we find that it was for these principal reasons that Enforcement staff opened the Investigation on ^{Redacted}, and not because of any information provided by Claimant.

Because Claimant’s information did not cause Enforcement staff to open the Investigation, Claimant’s information can only be deemed to have led to the success of the Covered Action if it caused the Commission staff to commence an examination, inquire concerning different conduct as part of a current investigation,¹² or “significantly contributed to the success of the action.”¹³ We find, based on evidence in the record, that Claimant’s information did not cause the Commission staff to commence an examination, as Commission staff had already begun examinations of the Company prior to the submission of Claimant’s tip. Further, Claimant’s information did not cause Enforcement staff to inquire into different conduct

⁹ Order Determining Whistleblower Award Claims, Exchange Act Rel. No. 90922 (Jan. 14, 2021) at 4; *see also* Order Determining Whistleblower Award Claims, Exchange Act Rel. No. 85412 (Mar. 26, 2019) at 9 (same).

¹⁰ Exchange Act Rel. No. 85412 at 8-9.

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

¹² Exchange Act Rule 21F-4(c)(1), 17 C.F.R. § 240.21F-4(c)(1).

¹³ Exchange Act Rule 21F-4(c)(2), 17 C.F.R. § 240.21F-4(c)(2).

and did not make a substantial and important contribution to the success of the Covered Action, including by allowing the Commission to bring the action in significantly less time or with significantly fewer resources, or to bring additional successful claims or successful claims against additional individuals or entities. The Second Declaration confirms that Enforcement staff did not recall receiving Claimant's ^{Redacted} email. The record also reflects that Claimant's ^{Redacted} submission did not advance the Investigation.

Claimant's attorney's argument based on the attorney's own pre-2010 conversations with one Commission staff member is unavailing and unhelpful to Claimant's award application. Anecdotes about conversations with a single Commission staff member do not constitute persuasive evidence of what an entire government agency may or may not have been investigating.

Accordingly, Claimant did not provide information to the Commission that led to the success of the Covered Action and, therefore, Claimant is not eligible to receive a whistleblower award.¹⁴

III. Conclusion

Accordingly, it is hereby ORDERED that the whistleblower award application of Claimant in connection with the Covered Action be, and hereby is, denied.

By the Commission.

Vanessa A. Countryman
Secretary

¹⁴ To the extent that Claimant argues that any conversations with or information given to Commission staff pre-July 2010 supports a claim for a whistleblower award, an argument that would be made for the first time in Claimant's response to the Preliminary Determination, Claimant's argument fails. To be considered "original information," a claimant must submit information to the Commission after July 21, 2010. *See* Exchange Act Rule 21F-4(b)(1)(iv); 17 C.F.R. §240.21F-4(b)(1)(iv). Further, as noted above, the information in the record confirms that none of the information Claimant provided after July 2010 led to the success of the Covered Action.