UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 96708 / January 19, 2023

WHISTLEBLOWER AWARD PROCEEDING
File No. 2023-31

In the Matter of the Claim for an Award

in connection with

Redacted

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"). [1] Claimant filed a timely response contesting the preliminary denial. For the reasons discussed below, Claimant's award claim is denied.

[1] The Commission received two other award claims in this matter. One claim was withdrawn and another claim was preliminarily denied by the Office of the Whistleblower through the preliminary summary disposition process, which subsequently became the final order of the Commission through operation of law pursuant to Rule 21F-18(b)(4).

I. Background

A. The Covered Action

On Redacted , the Commission charged Redacted Redacted Redacted in the Covered Action. According to the Commission's complaint, Redacted Redacted . According to the Commission's complaint, Redacted Redacted Redacted Redacted . The complaint alleged that Redacted Redacted . According to the Commission's complaint, Redacted Redacted Redacted .

The Commission's complaint, which was filed in the Redacted Redacted Redacted , charged Redacted Redacted Redacted . The Commission's complaint also charged Redacted Redacted Redacted Redacted . The Commission sought permanent injunctions, disgorgement of ill-gotten gains with prejudgment interest, and civil penalties against each of the defendants. In addition, the Commission's complaint Redacted Redacted Redacted Redacted .

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Redacted , the Office of the Whistleblower ("OWB") posted the Notice of Covered Action on the Commission's public website inviting claimants to submit whistleblower award applications within 90 days.[2] Claimant filed a timely whistleblower claim.

B. The Preliminary Determination

The CRS issued a Preliminary Determination[3] recommending that Claimant's claim be denied on the grounds that Claimant did not submit "original information" to the Commission because the information was obtained in connection with Claimant's legal representation of his/her employer, Redacted ("Employer"), and therefore, the information was not derived from Claimant's independent knowledge or independent analysis.[4] Claimant served as an attorney for the Employer. Claimant also participated in Redacted

Redacted

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Claimant learned the information that was the subject of Claimant's submission to the Commission by virtue of Claimant's role as an attorney at the Employer and Claimant's role in providing legal services in connection with Redacted . The CRS preliminarily determined that no exception would permit Claimant to disclose the information for Claimant's own benefit in a whistleblower submission. As such, the CRS preliminarily determined that Claimant is not eligible to receive an award in connection with the Covered Action.[5]

C. Claimant's Response to the Preliminary Determination

Claimant submitted a timely written response contesting the Preliminary Determination.[6] Claimant asserted that he/she is eligible for a whistleblower award because his/her information satisfies exceptions pursuant to 17 C.F.R. § 205.3(d)(2) of the Commission's Standards of

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[2] *See* Exchange Act Rule 21F-10(a), 17 C.F.R. § 240.21F-10(a).
[3] *See* Exchange Act Rule 21F-10(d), 17 C.F.R. § 240.21F-10(d).
[4] *See* Exchange Act Rule 21F-4(b)(4)(ii), 17 C.F.R. § 240.21F-4(b)(4)(ii).
[5] The CRS did not address Claimant's award claim in connection with a related action because it cannot consider such a claim until a final judgment has been entered in that action and Claimant submits a new related action claim for award in connection with that judgment. However, award eligibility in an SEC Covered Action is a prerequisite to receiving an award in connection with a related action. *See* Rule 21F-3(b), 17 C.F.R. § 240.21F-3(b). Because Claimant is not eligible to receive an award in the Covered Action, Claimant will also be ineligible for any future related action claim.
[6] *See* Exchange Act Rule 21F-10(e), 17 C.F.R. § 240.21F-10(e).

Professional Conduct for Attorneys ("Attorney Conduct Rules")[7] and the Florida Rules of Professional Conduct ("RPC").

Claimant first contends that by providing his/her tip to the SEC, Claimant intended to prevent an issuer from committing or abetting the commission of a material violation that would cause significant financial injury to the investors as permitted under 17 C.F.R. § 205.3(d)(2)(i). Although Claimant's tip focused on Redacted (hereinafter, "Third Party") misappropriation of investor funds, Claimant now contends that his/her goal was not solely to prevent the Third Party from committing a crime, but also to prevent his/her client, the Employer, as well as Redacted (hereinafter, "Employer's Manager") and the affiliated entities within the Redacted (hereinafter, "Project") from committing a crime. According to Claimant, the tip included *** transferred to various entities including the Employer and other entities controlled by the Employer's Manager.[8] Claimant asserts that the purpose of his/her tip was therefore to alert the SEC to investigate the entire Project, including tracing all investor funds and investigating all affiliated persons and entities, including Claimant's client, the Employer. Claimant also contends that he/she provided additional information to the SEC following the initial tip, most of it relating to the activities of the Employer, the Employer's Manager, and affiliated entities. Claimant acknowledges that he/she did not yet have "smoking gun" proof of misconduct by the Employer, the Employer's Manager, or the other entities as he/she did for the Third Party at the time Claimant made the whistleblower submission, but Claimant had "suspicions" that the interests of investors were not being protected by the Employer, Employer's Manager, or *** (hereinafter, "Limited Partnership").[9]

Claimant further contends that he/she brought his/her concerns to the Employer's Manager before reporting to the SEC, but "did not feel *** actions effectively addressed the situation."[10] Claimant states that he/she believed disclosure to the SEC and the parties involved

[7] 17 C.F.R. § 205.3(d)(2).

[8] Claimant acknowledges that some of these fund transfers may have been legitimate. According to Claimant's declaration attached to his/her response, Claimant contends that he/she knew the documents included in the tip showed expenditures to the Employer's Manager and his affiliated entities that would likely be investigated and he/she sought to avoid producing any attorney-client privileged information from his/her client. Furthermore, Claimant states that he/she focused on wrongdoing by the Third Party in the initial allegations because Claimant feared retaliation by the Employer if the whistleblower submission came to light.

[9] Claimant further states that he/she had heard that the Employer's Manager had allowed the Limited Partnership to provide investor funds to the Third Party in order to finance the Third Party's ***. Claimant's declaration states that "while I did not have documentary proof of collusion between [the Employer's Manager] and [the Third Party] (and therefore did not allege as such), I considered the tip would lead to an SEC investigation of the entire money trail, and would uncover any wrongdoing by [the Employer, the Employer's Manager] or Redacted."

[10] According to Claimant, the Employer did not have a compliance department or compliance officer for Claimant to report his/her concerns to, and Claimant did not believe that further reporting to the Employer's Manager would be

becoming aware of the SEC investigation would encourage law-abiding behavior by those parties and prevent investors from being defrauded. Claimant also asserts that because the Limited Partnership had used his/her services for Redacted in furtherance of the criminal scheme, he/she was attempting to "rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of … investors in the furtherance of which the attorney's services were used," and thus, disclosure was permitted pursuant to 17 C.F.R. § 205.3(d)(2)(iii).

Second, Claimant argues that he/she also qualifies for an exception pursuant to the RPC. Claimant contends that he/she satisfies RPC 4-1.6(b) which requires disclosure of confidential information under specified circumstances, because Claimant believed the disclosure was necessary to prevent his/her client, the Employer, from committing or being an accessory to crimes, as well as to protect investors from fraud perpetrated by the Third Party, the Employer's Manager or any other entities involved in the Project. Claimant further argues that he/she was permitted to disclose the information pursuant to RPC 4-1.6(c), which allows disclosure under certain circumstances, including to serve the client's interest, because Claimant believed that disclosure would serve his/her client's interest by potentially preventing further misappropriation by the Third Party, possibly recovering funds that had been misappropriated, and helping lead to the successful completion of the Project that his/her client was sponsoring. Additionally, Claimant argues that pursuant to RPC 4-3.3 regarding candor toward the tribunal, he/she was permitted to disclose the information because Claimant suspected the Employer and/or himself/herself (unknowingly) made false statements to Redacted Redacted ("Other Agency"). Claimant states that he/she considered the SEC whistleblower submission as the best way to bring the conduct at issue to the proper authorities' attention since the Other Agency did not have a process whereby Claimant could report this conduct. Finally, Claimant argues that since he/she believed some of the statements in the offering documents were or had become inaccurate, Claimant believed it was his/her duty under RPC 4-4.1 to disclose the information to the SEC in order to correct false statements of material fact, specifically regarding expenditures of funds.

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

useful in preventing harm to investors. Claimant resigned from the Employer due to increasing concerns about the Employer's Manager almost a year after submitting Claimant's tip.

enforcement of a covered action.[11] Exchange Act Rule 21F-4(b)(4)(ii) provides that the Commission "will not consider information to be derived from [an individual's] independent knowledge or independent analysis" if the individual "obtained the information in connection with the legal representation of a client on whose behalf [the individual or his/her] employer or firm is providing services and [the individual] seek[s] to use the information to make a whistleblower submission for [his/her] own benefit; unless disclosure would otherwise be permitted by an attorney pursuant to the Attorney Conduct Rule, the applicable state attorney conduct rules, or otherwise."

Because Claimant obtained the information he/she submitted to the Commission in connection with his/her legal representation of the Employer, in order to be eligible for a whistleblower award, Claimant must qualify for an exception under the Attorney Conduct Rule, or under the applicable state attorney conduct rules. The Attorney Conduct Rule provides that "[a]n attorney appearing and practicing before the Commission in the representation of an issuer may reveal to the Commission, without the issuer's consent, confidential information related to the representation to the extent the attorney reasonably believes necessary: (i) [t]o prevent the issuer from committing a material violation[12] that is likely to cause substantial injury to the financial interest or property of the issuer or investors…." Claimant contends that he/she meets the requirements under this rule because Claimant worked on the Limited Partnership's Redacted Redacted ,[13] and he/she intended to prevent the Limited Partnership from committing or abetting the commission of a material violation (misappropriation) that would cause significant financial injury to its investors. However, for the exception to be applicable, the attorney must be "appearing and practicing" before the Commission which requires that legal services be provided "to an issuer w*ith whom the attorney has an attorney-client relationship*…."[14]

First, neither the Limited Partnership nor any of the Project's affiliated entities are "issuers" for purposes of the Attorney Conduct Rule because they are all private companies. Section 205.2(h) defines issuer as "an issuer (as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c)), the securities of which are registered under 12 of that Act… or that is required to file reports under section 15(d) of that Act… or that files or has filed a registration statement that has not yet become effective under the Securities Act of 1933… the term 'issuer'

[11] Exchange Act Section 21F(b)(1), 15 U.S.C. §7u-6(b)(1).
[12] Pursuant to § 205.2(i), the term "material violation" means "a material violation of an applicable United States federal or state securities law, a material breach of fiduciary duty arising under United States federal or state law, or a similar material violation of any United States federal or state law." 17 C.F.R. § 205.2(i).
[13] Pursuant to § 205.2(g), "in the representation of an issuer" means "providing legal services as an attorney for an issuer, regardless of whether the attorney is employed or retained by the issuer." 17 C.F.R. § 205.2(g).
[14] *See* 17 C.F.R. § 205.2(a)(2)(i) (emphasis added).

includes any person controlled by an issuer, where an attorney provides legal services to such person on behalf of, or at the behest, or for the benefit of the issuer, regardless of whether the attorney is employed or retained by the issuer."[15] Claimant argues that the Employer, Employer's Manager, the Third Party, Redacted, and Redacted also fall within the definition of issuer because the Employer's Manager and Third Party marketed and sold securities in connection with the Project though the Employer, the Limited Partnership, Redacted and *** ***. However, when discussing Section 205.2(h), the Adopting Release focuses on public issuers only.[16] While Section 205.2(h) references the general definition of an issuer under Exchange Act Section 3(a)(8), that phrase is modified by the requirement for registration under Exchange Act Section 12. Thus, Claimant's argument fails because none of the entities at issue ever registered with the Commission under Section 12 of the Exchange Act, were required to file reports under Section 15 of the Exchange Act, or had filed a registration statement under the Securities Act. Therefore, none of them are issuers for the purposes of the Attorney Conduct Rule.[17]

Second, even if the Limited Partnership or any of the Project's affiliated entities or individuals satisfied the definition of issuer for purposes of the Attorney Conduct Rule, there is no evidence in the record that Claimant had an attorney-client relationship with any entity or individual other than the Employer. In fact, Claimant's response only refers to the Employer as his/her client and Claimant previously represented to the Commission that he/she did not work for the Third Party, Redacted (the entity that owned the Limited Partnership) or any related entity. Claimant further represented that while the Employer's Manager was the Redacted of the Employer, only the Employer was Claimant's client. Therefore, while Claimant may have performed some services with respect to the Limited Partnership's Redacted, the record does not demonstrate that the Limited Partnership was ever Claimant's client as Claimant only identifies Employer as being his/her client.[18]

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[15] 17 C.F.R. § 205.2(h).

[16] Adopting Release for the Implementation of Standards of Professional Conduct for Attorneys, Release Nos. 33-8185; 34-47276; IC-25919 (Aug. 5, 2003).

[17] Because 17 C.F.R. § 205.3(d)(2)(iii) also requires the attorney to have an attorney-client relationship with the issuer, disclosure pursuant to this rule was also not permitted.

[18] Furthermore, Claimant does not demonstrate how disclosure of information related to the Third Party's past misappropriation of investor money was necessary to prevent the Limited Partnership from committing a future material violation. Claimant admits that he/she only had "suspicions" that the interests of investors were not being protected by the Employer, the Employer's Manager, or the Limited Partnership. Thus, Claimant has not demonstrated that he/she had a reasonable belief at the time of his/her submission that the Limited Partnership intended to commit a future material violation. Accordingly, the record does not demonstrate that disclosure of confidential information to the SEC was necessary to prevent an "issuer" from engaging in a material violation.

Claimant also does not qualify for any exception under the applicable state attorney conduct rules. According to the RCP, "[a] fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation," whether it was obtained from the client itself or from a third party.[19] The information Claimant provided to the SEC was client confidential information because it was related to the representation of his/her client, the Employer. As such, Claimant could only disclose it if the disclosure is authorized under an exception to the duty of confidentiality. Because the conduct at issue in the Covered Action occurred in Florida and Claimant was acting as an in-house counsel in Florida, Claimant agrees that the RPC apply here.[20] RPC 4-1.6(a) provides that a lawyer must not reveal information relating to the representation of a client unless the client gives informed consent or in the event of certain narrow exceptions, discussed below. There is no evidence in the record that Claimant received informed consent to submit the information to the Commission from the Employer or its owner, the Employer's Manager.

First, RPC 4-1.6(b) provides that a lawyer *must* reveal confidential information to the extent the lawyer reasonably believes necessary to prevent a client from committing a crime or to prevent a death or substantial bodily harm to another. Although Claimant alleged that the Third Party misappropriated investor funds and that this conduct may have been ongoing, RPC 4-1.6(b) only applies where disclosure is necessary to prevent *the client* from committing a crime. As discussed above, Claimant has acknowledged that only the Employer was his/her client. Claimant's response states that "since my client, [the Employer], knew about the misappropriation by [the Third Party], its failure to correct or disclose that misappropriation would also be a crime (or make it an accessory to a crime) that would cause substantial harm to investors, and this was one potential crime by my client that I sought to prevent." First, Claimant has not specified the criminal offense he/she thought the Employer was about to commit. Further, we do not believe RPC 4-1.6(b) mandated Claimant's disclosure because the record fails to demonstrate that Claimant reasonably believed his/her disclosures were necessary to *prevent* the Employer from committing a crime. Reasonableness is determined under an objective standard, and a lawyer's suspicion or speculation that his/her client is committing a crime is insufficient to trigger RPC 4-1.6(b). While RPC 4-1.6(b) permits limited disclosure of client confidential information when a lawyer reasonably believes disclosure is necessary to prevent

[19] *See* RPC 4-1.6(a) commentary ("The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.").
[20] Although Claimant was also a Redacted licensed attorney, the Redacted Rules of Professional Conduct are less favorable for Claimant. The Redacted equivalent of RPC 4-1.6 permits disclosure of a client's confidential information only in instances to prevent a criminal act that would result in death or serious bodily injury.

the client from committing a future or ongoing crime, it does not permit a lawyer to disclose a client's past or completed fraudulent acts except where reasonably necessary to prevent the future death or substantial bodily harm to another. Here, the record does not establish that at the time Claimant disclosed information to the Commission, Claimant had information that the Employer knew of the Third Party's misappropriation or had any role in the Third Party's alleged ongoing misconduct. At most, the information in Claimant's tip showed *past* transfers of investor funds to the Employer, some or all of which may have been legitimate according to Claimant. Claimant acknowledges that he/she only had "concerns" about his/her client's conduct and "suspicions" that the interests of investors were not being protected by his/client and others. Concerns and suspicions do not satisfy the requirements of RPC 4-1.6(b).[21]

Second, RPC 4-1.6(c)(1), among other things, provides that a lawyer *may* disclose confidential information "to the extent the lawyer reasonably believes necessary … to serve the client's interest unless it is information the client specifically requires not be disclosed." Claimant asserts that he/she was permitted to disclose the information in his/her tip because he/she believed it would serve the Employer's interest by potentially preventing further misappropriation by the Third Party, possibly recovering funds that had been misappropriated, and help lead to the successful completion of the Project that his/her client was sponsoring. Claimant contends that disclosure to the SEC would lead to his/her client making more diligent efforts to ensure that investor funds were used only for Project-related purposes and that such efforts would be in his/her client's best interests. However, all of the interests described by Claimant serve the interests of the Limited Partnership investors rather than the interests of his/her client. Moreover, Claimant does not demonstrate how exposing his/her client to an SEC investigation and/or enforcement action based on suspicions would be in his/her client's interest. As a result, we have no basis to conclude that Claimant was permitted to disclose the information pursuant to RPC 4-1.6(c)(1).

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[21] Overall, RPC 4-1.6 sets a high bar for disclosure of confidential information. *See Florida Bar v. Knowles*, 99 So.3d 918, 922 (Fla. 2012) (client's statement that she would lie in court to avoid deportation did not establish a sufficient basis for respondent to reasonably believe client would commit perjury). *See also U.S. v. McCorkle*, 2000 WL 133759 at *30 (M.D. Fla Jan 14, 2000) (noting the exceptions to RPC 4-1.6(a) are "narrow"). The commentary to RPC 4-1.6 states that while a lawyer must reveal information in order to prevent a client from committing a crime, "[i]t is admittedly difficult for a lawyer to 'know' when the criminal intent will actually be carried out, for the client may have a change of mind." Furthermore, the commentary notes that the lawyer "should seek to persuade the client to take suitable action" and that in "any case, disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose." Here, Claimant fails to demonstrate that he/she had any knowledge that his/her client intended to carry out a crime or what, if anything, Claimant did to try to persuade his/her client to take suitable action. Moreover, Claimant's tip concerned only past conduct of others and did nothing to prevent his/her client from committing a crime. *See Florida Bar v. Dunagan*, 731 So.2d 1237, 1242 (Fla. 1999) (disclosure of confidential information unrelated to narrow purpose of preventing a client from committing a crime violates RPC Rule 4-1.6(b)).

Third, RPC 4-3.3 provides that a lawyer shall not, among other things, knowingly make a false statement of fact or law to a tribunal, fail to correct a false statement previously made to the tribunal by the lawyer, fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, or offer evidence that the lawyer knows to be false. Claimant argues that under this rule, if a lawyer suspects his/her client has made false statements to a tribunal such as the Other Agency, "the lawyer shall take reasonable remedial measures," which could include disclosure pursuant to RPC 4-3.3(4). Claimant's argument is misplaced. Claimant does not explain how the Other Agency was acting in an adjudicative capacity with respect to the information his/her client provided.[22] Claimant also does not describe what information his/her client provided to the Other Agency or why it was false. Nevertheless, even if the Other Agency met the definition of a tribunal, to the extent Claimant or his/her client provided any false information to the Other Agency, Claimant does not demonstrate why disclosure of confidential information to the SEC was a *reasonable* remedial measure nor does he/she demonstrate why the disclosure was *necessary*. Furthermore, the rule only discusses disclosure of confidential information to the tribunal itself-- it does not permit disclosure of confidential information to an entirely separate entity, which in this case was the SEC.

Finally, RPC 4-4.1 states that in the course of representing a client, "a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by rule 4-1.6." Claimant argues that since he/she believed some of the Redacted were or had become inaccurate, Claimant believed it was his/her duty under RPC 4-4.1 to disclose the information to the SEC in order to correct false statements of material fact, specifically regarding expenditures of funds. For the reasons discussed above, Claimant's disclosure was prohibited by RPC 4-1.6. Because this rule does not permit disclosure that is prohibited by RPC 4-1.6, Claimant's disclosure of information was not permissible under RPC 4-4.1.

Based on the record in this case, Claimant was neither required nor permitted to reveal the information at issue to the Commission under the Attorney Conduct Rule or the RPC. Thus, Claimant's information cannot be considered as derived from Claimant's independent knowledge

[22] Chapter 4 of the RPC defines tribunal as "a court, an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency, or other body acting in an adjudicative capacity. A legislative body, administrative agency, or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter."

or analysis. We therefore find that Claimant is ineligible for an award under Rule 21F-4(b)(4)(ii).

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