

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 96767 / January 30, 2023

WHISTLEBLOWER AWARD PROCEEDING
File No. 2023-34

In the Matter of the Claim for 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 civil action (“Civil Action”) as well as ^{Redacted}
^{Redacted}
^{Redacted}

^{Redacted} hereinafter collectively referred to as 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

In ^{Redacted} Division of Enforcement (“Enforcement”) staff (“Staff”) opened an investigation (“Investigation”) concerning alleged misconduct by ^{Redacted} and ^{Redacted}

^{Redacted} and ^{Redacted} (collectively, “Defendants”). The Investigation focused on ^{Redacted} and

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Although the District Court ordered Redacted
Redacted there

was no recovery.

In Redacted the District Court effectively resolved the Civil Action by issuing an order that, among other things, required Redacted to pay monetary sanctions totaling Redacted which the Receiver was to return to defrauded investors. ***

In Redacted the Commission filed the Redacted and the 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.⁶ Claimant filed a timely whistleblower award claim.

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⁵ For the purposes of evaluating Claimant’s claim for award, we are treating the Civil Action Redacted as a single Covered Action because the proceedings arose out the same nucleus of operative facts. See Exchange Act Rule 21F-4(d)(1), 17 C.F.R. § 240.21F-4(d)(1).

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

B. The Preliminary Determination

On ^{Redacted} the CRS issued a Preliminary Determination⁷ recommending that Claimant's claim be denied⁸ primarily on two grounds.⁹ The CRS also recommended that the ^{Redacted} and the ^{Redacted} be treated as part of the Covered Action.

First, the CRS preliminarily determined 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 Securities Exchange Act of 1934 ("Exchange Act") and Rules 21F-3(a)(3) and 21F-4(c) because any information provided did not: (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 under 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 preliminarily determined that Staff opened the Investigation based on a referral from ^{Redacted} Claimant's information did not significantly contribute to the success of the Covered Action because it was already known to Staff or concerned matters that did not become part of the Covered Action. Although Claimant's information resulted in the Motion ^{Redacted} that motion as well as the ^{Redacted} Order did not affect the ultimate disposition of the Covered Action. In addition, the ^{Redacted} Order did not impose any monetary sanctions.

⁷ See Exchange Act Rule 21F-10(d), 17 C.F.R. § 240.21F-10(d).

⁸ The CRS also preliminarily determined that Claimant is not eligible for an award in connection with any related action. 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. See Exchange Act Rule 21F-3(b)(1), (b)(2); 21F-11(a).

⁹ The record supporting the Preliminary Determination included the declaration of one of the Enforcement attorneys who was assigned to the Investigation ("Declaration"). The whistleblower program rules ("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 whistleblower award application, and any other materials timely submitted by the claimant in response to the Preliminary Determination. See Exchange Act Rule 21F-12(a), 17 C.F.R. § 240.21F-12(a).

Second, the CRS preliminarily determined that certain of Claimant’s information did not constitute “original information” that led to the successful enforcement of the Covered Action within the meaning of Exchange Act Section 21F(b)(1) and Rules 21F-3(a)(2) and 21F-4(b). The CRS reasoned that some of Claimant’s information derived entirely from publicly available sources and did not include any examination or evaluation that revealed information that was not generally known or available to the public.

C. Claimant’s Response to the Preliminary Determination

Claimant submitted a timely written response contesting the Preliminary Determination.¹⁰ Claimant makes five arguments.

First, Claimant argues that his/her information did lead to the successful enforcement of the Civil Action within the meaning of Rule 21F-4(c) because his/her information about Redacted Redacted directly resulted in the Motion Redacted which in turn caused Redacted Redacted Claimant asserts that his/her assistance with the Motion Redacted significantly contributed to the success of the Civil Action in several ways. Claimant states that his/her assistance prevented Redacted from causing over Redacted in investor losses.¹¹ Claimant also asserts that his/her assistance allowed the District Court to issue Redacted via the Redacted Order, which prevented future harm to investors and the securities markets while also preserving Defendants’ assets. Claimant further argues that his/her assistance allowed the Commission to avoid substantial costs and preserve resources that would have been incurred had Redacted continued. Claimant also alleges that without his/her information, there would have been even more investors harmed, who in turn would have diluted the assets available for the victims of the original fraud. Moreover, Claimant contends that his/her assistance, the Motion Redacted and the Redacted Order supported the Commission’s efforts to obtain the Redacted final judgment in the Civil Action.

Second, Claimant argues that the Motion Redacted was an integral part of the Civil Action, and thus, the CRS erroneously considered his/her assistance in support of the Motion Redacted to be outside of the same proceeding as the Civil Action.***

Third, Claimant argues that even if the Motion Redacted were a different proceeding from the Civil Action, the conduct at issue in the Motion Redacted and the Redacted Order involved the same type of fraudulent activity charged in the Civil Action and therefore, Redacted

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

¹¹ Claimant asserts that Redacted

Redacted misconduct was merely a continuation of the original Redacted According to Claimant, because the two proceedings arose out of the same nucleus of operative facts, the proceeding triggered by the Motion Redacted must be treated as the same Commission action by operation of Rule 21F-4(d).

Fourth, Claimant argues that there is no authority to support the conclusion that Claimant is not entitled to an award because the Redacted Order did not impose any monetary sanctions.

Finally, Claimant argues that the Preliminary Determination must be vacated because it was not based on a consideration of all relevant factors under the Rules or on a complete factual record. Claimant alleges that the Declaration stated in conclusory terms that Claimant's non-Redacted information did not advance or impact the Investigation.

II. Analysis

We address each of Claimant's arguments in turn.

First, we consider whether Claimant's information led to the successful enforcement of the Civil Action within the meaning of Rule 21F-4(c), as Claimant contends. A whistleblower's original information will be deemed to lead to a successful enforcement action if either: (1) 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, pursuant to Rule 21F-4(c)(1);¹² or (2) the conduct was already under examination or investigation by the Commission, and the original information "significantly contributed to the success of the action," pursuant to Rule 21F-4(c)(2).¹³ In determining whether the "significantly contributed" prong is met, the Commission will consider whether the information was "meaningful" in that it "made a substantial and important contribution" to the success of the covered action.¹⁴

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

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

¹⁴ 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).

We find, based on the evidence in the record, that Claimant did not provide original information that “led to” the successful enforcement of a covered action within the meaning of Rules 21F-4(c)(1) or (c)(2). The Declaration, which we credit, stated under penalty of perjury that Staff opened the Investigation that resulted in the Civil Action based on a referral from Redacted and not because of Claimant’s information. The Declaration explained that although Claimant provided information about Redacted this information did not advance the Investigation because it was duplicative of information Staff already had. The Declaration further explained that although Claimant provided new information in Redacted —this time about Redacted —the new information was only used in the Motion Redacted which did not affect the ultimate dispositions of the Civil Action, the Redacted or the Redacted. In sum, the Declaration explained that notwithstanding Staff’s use of Claimant’s information about Redacted in the Motion Redacted none of Claimant’s information was used in, or had any impact on, the charges, litigation, or resolution of the Covered Action.

Claimant’s response to the Preliminary Determination generally focuses on Claimant’s provision of information about Redacted. With respect to Redacted as distinct from the Investigation and allegations in the Covered Action, the Declaration confirmed that Staff was not previously aware of Claimant’s information about Redacted. The Declaration also stated that Staff successfully used Claimant’s information about Redacted in the Motion Redacted to persuade the District Court to Redacted.

Although Redacted was ordered by the District Court to Redacted as the Declaration explained, no money had been raised in Redacted and thus, there was no monetary relief. Moreover, the Declaration stated that the Motion Redacted and the Redacted Order did not affect the ultimate disposition of the Civil Action, which did not include any allegations concerning the Redacted fraud. We conclude in light of these facts and circumstances that Claimant’s information did not lead to the successful enforcement of the Civil Action.

Claimant also argues that his/her information and assistance allowed the District Court to Redacted via the Redacted Order; in turn, the Redacted Order prevented future harm to investors and the securities markets while also preserving Defendants’ assets for the benefit of harmed investors in the Civil Action. However, while the Redacted Order Redacted no money had been raised Redacted and thus, there was no recovery. Moreover, in both Redacted and then again in Redacted several months before the District Court issued the Redacted Order in Redacted the District Court Redacted.***

15 In his/her reconsideration request, Claimant cites to a letter (“Redacted Letter”) written

Second, Claimant argues that his/her information, the Motion ^{Redacted} and the ^{Redacted} Order supported the Commission's efforts to obtain a final judgment in the Civil Action and thus, the Motion ^{Redacted} should be regarded as the same proceeding as the Civil Action. Assuming that the Motion ^{Redacted} is part of the proceeding, nothing about the Motion ^{Redacted} the ^{Redacted} Order, or Claimant's information had any bearing on the rest of the Civil Action, which concerned distinct misconduct.¹⁶

Third, Claimant contends that even if the Motion ^{Redacted} were a separate proceeding, it arose out of the same nucleus of operative facts as the Civil Action and thus, it should be part of the Covered Action by operation of Rule 21F-4(d). We disagree with this interpretation. The animating purpose of Rule 21F-4(d) is to include additional collections, as appropriate, so that a meritorious whistleblower would receive the full payment to which he/she is entitled.¹⁷ We decline to interpret Rule 21F-4(d) to allow the inclusion of a proceeding that results in the imposition of no monetary sanctions. Moreover, even if Rule 21F-4(d) allowed a proceeding with no sanctions to be added to a Covered Action, the Motion ^{Redacted} here

by ^{Redacted} dated ^{Redacted} to ^{Redacted}
^{Redacted} The ^{Redacted} Letter responded to a letter from ^{Redacted}
concerning communications received by ^{Redacted} from Claimant relating to the ^{Redacted}
Commission's case against ^{Redacted} Claimant has cited to the ^{Redacted} Letter in support
of his contention that he/she is entitled to an award. Nothing about this letter changes our
determination to deny Claimant an award, as its only relevance is to acknowledge that Claimant
provided the Commission with information that was helpful to the Motion ^{Redacted} and the
^{Redacted} Order.

¹⁶ Claimant asserts that the Motion ^{Redacted} and the ^{Redacted} Order were included as ^{Redacted}
^{Redacted} in support of the Commission's motion ^{Redacted} ***
^{Redacted} in the Civil Action.

^{Redacted} This, however, is of no import. The Commission's only reference
to the Motion ^{Redacted} and the ^{Redacted} Order throughout its ^{Redacted}
^{Redacted} was a single paragraph in the procedural history section.

¹⁷ See *Securities Whistleblower Incentives and Protections*, 76 Fed. Reg. 34,300, 34,328 (June 13, 2011) (explaining that under Rule 21F-4(d)(1), "if a qualified whistleblower provided us with original information that led to the successful enforcement of any one of the proceedings, we will make an award to that whistleblower for 10 to 30 percent of the total monetary sanctions collected in those proceedings").

would still fail the same-nucleus-of-operative-facts test. As noted above, the Motion^{***}
Redacted concerned transactions that were not the subject of the Civil Action.¹⁸

Fourth, Claimant’s contention that his/her information need not lead to monetary sanctions is misplaced. As explained above, the Claimant’s information did not lead to the success of the Covered Action, without regard to whether the information led specifically to monetary sanctions. But, for the sake of argument, if we considered the Motion^{Redacted} to be a separate action, then the text of Exchange Act Section 21F requires a claimant to have provided information that led to the successful enforcement of a “covered judicial or administrative action,” defined to mean a Commission action resulting in sanctions of more than \$1 million.¹⁹ In fact, while the^{Redacted} Order^{Redacted} and thus, there was no recovery. The charges that the Commission brought in the Civil Action, and which led to the imposition of monetary sanctions exceeding \$1,000,000, concerned conduct that was distinct from the conduct involved in the Motion^{Redacted} and the^{Redacted} Order.

Finally, the Preliminary Determination considered all relevant factors under the Rules, and it was based on an appropriate record, which included: (1) the Declaration; (2) all of Claimant’s submissions; and (3) documents filed in the Covered Action. Claimant has pointed to no additional documents he/she believes should be part of the record or which the Preliminary Determination failed to consider, and the Commission is aware of no such additional documents.

Claimant’s assertions about the failures of the Declaration to specifically explain why Claimant’s non-^{Redacted} information did not advance or impact the Investigation are unavailing. The Declaration comprehensively set forth the fact that Claimant’s non-^{***}
Redacted information was already known or was not used by Staff.²⁰

¹⁸ See *id.* at 34,327 n.238 (explaining that the same-nucleus-of-operative facts test under Rule 21F-4(d)(2) is met where the newer allegations “grow[] out of the same transaction or series of connected transactions” as the older allegations) (internal quotation marks omitted).

¹⁹ Exchange Act Section 21F(a)(1), 15 U.S.C. 78u-(a)(1) (defining “covered administrative or judicial action”); *id.* 78u-6(b)(1) (general standard for payment of awards).

²⁰ Additionally, Claimant has not cited any legal authority to support his/her contention that a declaration must amass a list of concrete examples and details regarding the usefulness (or lack thereof) of a claimant’s information in order constitute substantial evidence supporting a whistleblower award claim determination. Moreover, a claimant cannot allege purported deficiencies in a declaration as a backdoor way to seek discovery of the Commission’s law enforcement files, which is generally prohibited by Rule 21F-12(b).

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