

UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 97831 / July 3, 2023

WHISTLEBLOWER AWARD PROCEEDING

File No. 2023-72

In the Matter of the Claim for an Award

in connection with

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 3”) in connection with the above-referenced action (the “Covered Action”). The Office of the Whistleblower (“OWB”) issued a Preliminary Summary Disposition recommending the denial of the whistleblower award claim of Redacted (“Claimant 5,” and collectively, “Claimants”) in connection with the Covered Action. Each of the Claimants filed timely responses contesting the preliminary denials.¹ For the reasons discussed below, each of the Claimants’ award claims are denied.²

I. Background

A. The Covered Action

On Redacted, the Commission instituted settled administrative and cease-and-desist proceedings against Redacted (together, the “Company”) alleging that the Company Redacted

¹ The CRS also preliminarily denied the award claims of three other claimants. Those claimants did not seek reconsideration of the Preliminary Determinations, and therefore the denials of their claims were deemed to be the Final Orders of the Commission under Exchange Act Rule 21F-10(f).

² Pursuant to Exchange Act Rule 21F-18(b)(5), OWB determined that Claimant 5’s claim should be resolved in the same proceeding as Claimant 3’s claim through the claims adjudication procedures set forth in Rule 21F-10.

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The Commission charged the Company with violations of the Company

Redacted

The Commission also found that

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Redacted

The Company agreed to pay a civil monetary penalty of to settle the matter.

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On , 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 3 submitted a timely whistleblower award claim. Claimant 5 submitted a whistleblower award claim on , approximately seven months after the deadline for submitting whistleblower applications.

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B. The Preliminary Denials and Claimants’ Responses

1. Claimant 3

i. The Preliminary Determinations as to Claimant 3

The CRS issued Preliminary Determinations recommending that Claimant 3’s claim be denied because Claimant 3 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. The CRS stated that Claimant 3’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) of the Exchange Act. The CRS preliminarily determined that Enforcement staff responsible for the investigation that led to the Covered Action (the “Investigation”) did not receive any information from, or have any communications with, Claimant 3.³

ii. Claimant 3’s Response to the Preliminary Determinations

Claimant 3 submitted a timely written response contesting the Preliminary Determinations.⁴ Claimant 3 principally argues that Claimant 3 began communicating with the Commission in Claimant 3 notes that he/she initially submitted a tip to (“Other Agency A”) in , approximately

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³ While not a basis for the denial of Claimant 3’s claim, the CRS also stated that Claimant 3’s submission does not appear to be voluntary because Claimant 3 checked “no” to Question 8a in the Form WB-APP, which asks whether the claimant provided the information to the Commission prior to receiving a request, inquiry or demand for the information from the Commission or other authorities as set forth in Rule 21F-4(a).

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

fifteen months earlier. Claimant 3 contends that he/she supplied information to Other Agency A which then contacted the Company. Claimant 3 states that when he/she had not heard from Other Agency A in some time, Claimant 3 called Other Agency A and was told to submit a tip to the Commission. Claimant 3 argues that “I was told to contact the SEC and file a tip with them. . . I sent my tip to the SEC, at their suggestion. You have our correspondence. . . . I feel I should receive an award because all the information to [Other Agency A] that was needed to start a claim was given by me. They had filed the same grievance before against them and I provided enough information to create a new case. The fact that this information was not in the reason for denial of my complaint concerns me.”

2. Claimant 5

i. The Preliminary Summary Disposition as to Claimant 5

OWB issued a Preliminary Summary Disposition to Claimant 5 recommending that Claimant 5’s claim be denied on the grounds that Claimant 5’s award application was untimely because Claimant 5 failed to submit the application to OWB within 90 days of the date of the Covered Action, as required by Rule 21F-10(b). OWB noted that the deadline to file award claims was ^{Redacted} ninety days after the posting of the Notice of Covered Action on ^{Redacted} ^{Redacted} OWB received Claimant 5’s application on ^{Redacted} approximately seven months after the deadline. OWB also stated that Claimant 5 did not specify in his/her award application which TCR submission to the Commission formed the basis of his/her award application. OWB also stated that a search of the TCR system for Claimant 5’s tip identified the tip, but a designation in the TCR system indicated that Claimant 5’s tip was not forwarded to Enforcement staff in connection with any investigation.

ii. Claimant 5’s Response to the Preliminary Summary Disposition

Claimant 5 submitted a timely written response contesting the Preliminary Summary Disposition. Claimant 5 argues that he/she provided information to ^{Redacted} (“Other Agency B”) in ^{Redacted} one month before the Commission filed the Covered Action. Claimant 5 also argues that he/she provided valuable information to the Commission and other government agencies regarding the Company’s misconduct. Claimant 5 also states that he/she spent significant time and energy on his/her efforts to address the Company’s misconduct, and that he/she has endured significant hardships during that time, including terminal illness and financial hardships.

Claimant 5 contends that he/she did not submit a whistleblower application in a timely manner because he/she believed that ^{Redacted} Commission press release announcing whistleblower awards to two claimants in connection with two other actions, issued approximately two months after Claimant 5 submitted his/her award application for the Covered Action, was in fact an award to Claimant 5 for his/her reporting. Claimant 5 also argues that he/she communicated with Commissioners and the Ombudsman in ^{Redacted} approximately two months after the Covered Action was filed, informing them of the information contained in Claimant 5’s submission to Other Agency B three months earlier; Claimant 5 states that Commission staff told him/her the “SEC does not handle what I reported [and] gave other resources.” As a result, Claimant 5 argues he/she was “not allow[ed] . . . the 90 [day] window to

file a claim for [the Covered Action or for other actions filed during the same month].” Claimant 5 also states that he/she “is a layman . . . doing the best [he/she] can.”

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 As relevant here, under Exchange Act Rules 21F-4(c)(1) and (2), respectively, the Commission will consider a claimant to have provided original information that led to the successful enforcement of a covered action if either: (i) the original information caused the staff to open an investigation “or to inquire concerning different conduct as part of a current . . . investigation” and the Commission brought a successful action based in whole or in part on conduct that was the subject of the original information;⁶ or (ii) the conduct was already under examination or investigation, and the original information “significantly contributed to the success of the action.”⁷

In determining whether information “significantly contributed” to the success of the action, 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.⁸ 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.⁹

A claimant must also submit a whistleblower award claim within ninety days of the posting of a Notice of Covered Action (“NoCA”), as set forth in Exchange Act Rule 21F-10. This requirement serves important programmatic functions. The deadline ensures fairness to potential claimants by giving all an equal opportunity to have their competing claims evaluated at the same time. The deadline also brings finality to the claims process so that the Commission can make timely awards to meritorious whistleblowers.¹⁰

A. Claimant 3

Claimant 3 does not qualify for a whistleblower award because his/her information did not cause the staff to open the Investigation, nor did Claimant 3’s information cause the staff to

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

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

⁷ See Exchange Act Rule 21F-4(c)(2), 17 C.F.R. § 240.21F-4(c)(2).

⁸ 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.

⁹ Exchange Act Rel. No. 85412 at 8-9.

¹⁰ See Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34300, 34300 (June 13, 2011); Order Determining Whistleblower Award Claim, Release No. 88464 at 3 (Mar. 24, 2020).

inquire into different conduct in or significantly contribute to the ongoing Investigation. As an initial matter, the record demonstrates that the Investigation was opened in ^{Redacted} based on the staff's investigative efforts in connection with an earlier investigation and not based upon information provided by any claimant. The record also does not support Claimant 3's contention that his/her submission to Other Agency A may have caused the staff to open the Investigation. A supplemental staff declaration, which we credit, confirms that the Investigation was not opened based upon any information from Other Agency A.

In addition, the record does not show that Claimant 3's information caused the staff to inquire into different conduct or significantly contributed to the Investigation. Claimant 3's TCR was not forwarded to staff assigned to the Investigation, nor did staff assigned to the Investigation receive any information from or communicate with Claimant 3 before or during the Investigation. Lastly, the staff confirms in the supplemental declaration that it did not receive, review, or use any information related to Claimant 3 from Other Agency A before or during the Investigation.

For these reasons, Claimant 3 is not eligible for a whistleblower award.

B. Claimant 5

Claimant 5 is not eligible for a whistleblower award on the grounds that Claimant 5 did not submit his/her award application within ninety days of the posting of the NoCA; instead, Claimant 5 submitted his/her application approximately seven months late. To the extent Claimant 5 argues that the Commission should use its authority under Exchange Act Rule 21F-8(a) to waive the ninety-day filing requirement in the Covered Action, we decline.¹¹ Rule 21F-8(a) provides that "the Commission may, in its sole discretion, waive any of these procedures upon a showing of extraordinary circumstances."¹² We have explained that the "extraordinary circumstances" exception is "narrowly construed" and requires an untimely claimant to show that "the reason for the failure to timely file was beyond the claimant's control."¹³ Further, we have identified "attorney misconduct or serious illness" that prevented a timely filing as two examples of the "demanding showing" that an applicant must make before we will consider exercising our discretionary authority to excuse an untimely filing.¹⁴

¹¹ To the extent that Claimant 5 is asking that we invoke our exemptive authority under Section 36(a) of the Exchange Act to waive the timeliness requirement, we decline to do so for the reasons discussed herein. Section 36(a) grants the Commission the authority in certain circumstances to "exempt any person . . . from any provision or provisions of this title or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors." The circumstances here do not warrant invoking Section 36(a).

¹² Exchange Act Rule 21F-8(a), 17 C.F.R. § 240.21F-8(a).

¹³ Order Determining Whistleblower Award Claim, Release No. 34-77368 at 3 (Mar. 14, 2016), *pet. for rev. denied sub nom. Cerny v. SEC*, 708 F. App'x 29 (2d Cir. 2017), *cert. denied*, 138 S.Ct. 2005 (2018).

¹⁴ See Order Determining Whistleblower Award Claim, Release No. 77368 at 3; see also Order Determining Whistleblower Award Claim, Release No. 82181 (Nov. 30, 2017); Order Determining Whistleblower Award Claim, Release No. 72659 (July 23, 2014); Order Determining Whistleblower Award Claim, Release No. 72178 (May 16, 2014).

Claimant 5 does not meet that “demanding showing” here. While Claimant 5 states that he/she is suffering a significant illness, the record does not demonstrate that Claimant 5’s illness prevented him/her from submitting a whistleblower application in a timely manner. Further, Claimant 5’s lack of awareness of the submission deadline does not rise to the level of an “extraordinary circumstance.” As we have said in a prior order when addressing other untimely whistleblower applications:

[T]he Commission is not obligated to notify a claimant of the posting of a NoCA or the deadline for submitting an award application. As we have explained, our whistleblower rules provide “for constructive, not actual, notice of the posting of a covered action and of the deadline for submitting a claim.” The NoCA for the Covered Action [was] clearly posted on the Commission’s website, along with the requisite deadline[.]. Under our rules, that is all the notice that Claimant was due.

“[A] lack of awareness about the [whistleblower award] program does not . . . rise to the level of an extraordinary circumstance as a general matter [since] potential claimants bear the ultimate responsibility to learn about the program and to take the appropriate steps to perfect their award applications.” “A potential claimant’s responsibility includes the obligation to regularly monitor the Commission’s web page for NoCA postings and to properly calculate the deadline for filing an award claim.” Claimant’s failure to regularly monitor the Commission’s web page for NoCA postings is not an “extraordinary circumstance” that might trigger our discretion to excuse the fact that Claimant submitted the award application more than two years late.¹⁵

In addition, we are not persuaded by Claimant 5’s other contentions. While Claimant 5 argues that he/she provided information to Other Agency B in ^{Redacted} approximately one month before the Covered Action was filed, the record does not demonstrate that staff assigned to the Investigation received any information from Other Agency B during that time that advanced the Investigation. Claimant 5 submitted a TCR to the Commission in ^{Redacted} approximately seven months after the Commission filed the Covered Action.¹⁶ Further, the staff confirmed, in a supplemental declaration, that the staff did not receive, review, or use any information from Claimant 5 before or during the Investigation.¹⁷

¹⁵ Order Determining Whistleblower Award Claim, Release No. 88464 at 3-4 (March 24, 2020) (internal citations omitted).

¹⁶ Although not a separate ground for this denial, the record does not demonstrate that Claimant 5 provided information to the Commission that led to the success of the Covered Action.

¹⁷ Further, Claimant 5’s argument that we consider the hardships he/she encountered does not warrant the granting of an award. While we may consider “any unique hardships experienced by the whistleblower as a result of his or her reporting,” such consideration does not apply to whether a claimant is eligible for an award, but instead to the amount of an award after a claimant has met all of the award eligibility criteria. *See* Rule 21F-6(b)(2)(vi). As discussed above, Claimant 5 has not met the eligibility criteria for an award. Accordingly, we need not consider Claimant 5’s argument regarding any hardships.

Accordingly, Claimant 5 is not eligible for a whistleblower award.

III. Conclusion

Accordingly, it is hereby ORDERED that the whistleblower award applications of Claimant 3 and Claimant 5 in connection with the Covered Action be, and they hereby are, denied.¹⁸

By the Commission.

Vanessa A. Countryman
Secretary

¹⁸ To the extent that each of the Claimants seeks a related action award, neither Claimant is eligible. Because each of the Claimants is not eligible for an award for the Covered Action, each of the Claimants is not eligible for an award based on a related action by another government agency. *See* 15 U.S.C. § 78u-6(b); Exchange Act Rule 21F-3(b), (b)(1); Rule 21F-4(g) and (f), and Rule 21F-11(a); Order Determining Whistleblower Award Claims, Release No. 34-84506 (Oct. 30, 2018); Order Determining Whistleblower Award Claims, Release No. 34-84503 (Oct. 30, 2018).