

UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 98198 / August 22, 2023

WHISTLEBLOWER AWARD PROCEEDING

File No. 2023-77

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In the Matter of the Claim for an Award

in connection with

Redacted

Notice of Covered Action Redacted

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**ORDER DETERMINING WHISTLEBLOWER AWARD CLAIMS**

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

**I. Background**

**A. The Covered Action**

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

Redacted The Commission alleged that Redacted Redacted

Redacted The Commission also alleged that the Company Redacted

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<sup>1</sup> The CRS also recommended the denial of award applications from Claimant 3 and Claimant 4, neither of whom contested the Preliminary Determinations. Accordingly, the Preliminary Determinations with respect to Claimant 3’s and Claimant 4’s award claims became the Final Order of the Commission through operation of Exchange Act Rule 21F-10(f), 17 C.F.R. §240.21F-10(f).

Redacted

Redacted

The Commission charged the Company with violations of  
Redacted

Redacted The Company agreed to disgorgement, prejudgment interest, and a civil monetary penalty totaling of 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 filed timely whistleblower award claims.

## B. The Preliminary Determinations

The CRS issued Preliminary Determinations recommending that Claimants’ claims be denied because Claimants 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 Claimants’ 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 staff from the Division of Examinations (“Examinations”) <sup>2</sup> commenced an examination (the “Exam”) of the Company in Redacted and that the decision to commence the examination was not based on any information or tips from Claimant 1 or Claimant 2. The CRS also preliminarily determined that in Redacted Examinations staff began looking at the issue of Redacted (the “Subject Matter”) which became the subject of the Covered Action. The CRS preliminarily determined that Examination staff did not look into the Subject Matter because of information provided by Claimant 1 or Claimant 2. With respect to Claimant 1, the CRS preliminarily determined that while Examinations staff reviewed Claimant 1’s tips during the exam, Claimant 1’s information was unrelated to the Subject Matter and did not affect or guide the scope of the Exam, and none of Claimant 1’s information was referred to Enforcement staff responsible for the Investigation.

With respect to Claimant 2, the CRS preliminarily determined that Claimant 2 submitted a tip in Redacted after Commission staff commenced the Exam and after Commission staff became aware of possible misconduct related to the Subject Matter. The CRS noted that Claimant 2’s TCR raised concerns relating to the affiliation of Redacted (“the Entity”) and the Company; however, even though Examinations staff noted information regarding the Entity in the referral to Enforcement, and Enforcement staff considered issues relating to the Entity, the CRS preliminarily determined that the issues relating to the Entity did not become part of the Covered Action. Accordingly, the CRS stated that Claimant 2’s information did not lead to the success of the Covered Action. In addition, the CRS preliminarily determined that to the extent Claimant 2 relied upon information provided to the Commission prior to Redacted as a basis

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<sup>2</sup> At the time, the Division of Examinations was known as the Office of Compliance Inspections and Examinations.

for his/her award application, such information was not provided to the Commission pursuant to the procedural requirements of Exchange Act Rule 21F-9. Rule 21F-9 requires, as relevant here, that (1) a claimant submit information through the Commission's online portal or on Form TCR, and (2) a claimant to sign a whistleblower declaration. Claimant 2 did neither until submitting a tip in <sup>Redacted</sup>

### C. Claimant 1's Response to the Preliminary Determinations

Claimant 1 submitted a timely written response contesting the Preliminary Determinations.<sup>3</sup> Claimant 1 contends, among other things, that he/she has been following issues concerning the Subject Matter for over fifteen years, citing to press articles from that time, and that Claimant 1 had attended meetings with representatives from the Company for more than fifteen years. Claimant 1 argues that he/she based <sup>\*\*\*</sup> independent analysis upon review of publicly-available data regarding the Subject Matter. Claimant 1 further argues that he/she expressed concerns to Commission staff and later emailed the Chair of the Commission on <sup>Redacted</sup> and that his/her "strategy was to pull in journalists, academics and leading investment advocates . . . ." Claimant 1 argues that it is "not reasonable to think my work . . . was not a primary motivator for the SEC to open its investigation."

### D. Claimant 2's Response to the Preliminary Determinations

Claimant 2 submitted a timely written response contesting the Preliminary Determinations. Claimant 2 argues that while the Commission commenced an examination of the Company before Claimant 2 submitted a TCR, the record does not indicate what prompted the examination of the Company. Claimant 2 notes that "it was precisely around the time that [Examinations staff] commenced its investigation into [the Company] that [Claimant 2's] prior counsel . . . began a dialogue" with the former co-head of a specialized Enforcement unit ("Former Official"). Claimant 2 states that "if [his/her] information contributed to the opening of the SEC investigation, then [Claimant 2] should receive credit for that information pursuant to the statute." Claimant 2 also contends that he/she provided "specific and detailed information on a continuous and sustained basis over the course of several years to [Former Official] and other top staff members of the SEC about various . . . practices, including information that formed the exact basis for the Covered Action against [the Company] relating to [the Subject Matter]." Claimant 2 states that he/she responded to a set of questions from Former Official and attended a meeting with Commission staff in Washington, D.C., to discuss the matter. Based on these communications, Claimant 2 argues that information provided in Claimant 2's <sup>Redacted</sup> submission, supplemental submissions, and at the <sup>Redacted</sup> meeting significantly contributed to the success of the Covered Action.

Claimant 2 also requests that Claimant 2 be allowed to depose seven current or former Commission staff members and that Claimant 2 be allowed to review "all documentation the [CRS] had made available for its review." Claimant seeks "all emails, correspondence and other material regarding [Claimant 2's] filing as well as the administrative file for the [Investigation]." Claimant 2 also requests "all notes, emails and other material related to [Claimant 2's] meetings

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

with SEC officials.” Claimant 2 asks that the Commission “make an award determination in [his/her] favor . . . or alternatively vacate the Preliminary Determination because it is not based on a complete record.”

## 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.<sup>4</sup> 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 “commence an examination, to open 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;<sup>5</sup> or (ii) the conduct was already under examination or investigation, and the original information “significantly contributed to the success of the action.”<sup>6</sup>

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.<sup>7</sup> 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.<sup>8</sup>

### A. Claimant 1

Claimant 1 does not qualify for a whistleblower award in this matter because his/her information did not cause Commission staff to open an examination or investigation, inquire into different conduct as part of an ongoing examination or investigation, nor did it significantly contribute to an ongoing investigation or examination. As an initial matter, the investigation that led to the Covered Action (the “Investigation”) was opened based upon a <sup>Redacted</sup> referral from Examinations staff to Enforcement staff relating to, among other things, the Subject Matter. The record shows that Examinations staff commenced the Exam in <sup>Redacted</sup> based on a risk-based approach that examines a variety of factors and information. The record also shows that the scope of the Exam was determined based upon Examinations own risk-based

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<sup>4</sup> Exchange Act Section 21F(b)(1), 15 U.S.C. § 78u-6(b)(1).

<sup>5</sup> See Exchange Act Rule 21F-4(c)(1), 17 C.F.R. § 240.21F-4(c)(1).

<sup>6</sup> See Exchange Act Rule 21F-4(c)(2), 17 C.F.R. § 240.21F-4(c)(2).

<sup>7</sup> 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.

<sup>8</sup> Exchange Act Rel. No. 85412 at 8-9.

examination approach following a review of information provided by the Company, publicly available information, and information in the Commission's own systems, including the TCR System.

Claimant 1 bases his/her award claim on a TCR submitted in <sup>Redacted</sup> more than one year before the Exam began. Claimant 1 also submitted a second TCR approximately four months later and other supplemental material. A declaration from Examinations staff, which we credit, confirms that Claimant 1's TCR submissions and other submissions to the Commission did not play a part in the staff's decision to commence the Exam, nor did Claimant 1's information have any role in the determining the scope of the Exam. Although Examinations staff reviewed Claimant 1's information, Examinations staff determined that Claimant 1's information did not pertain to the Subject Matter and Examinations staff declined to pursue Claimant 1's allegations.

The record also confirms that Claimant 1's information did not cause Enforcement staff to open the Investigation, nor did Claimant 1 significantly contribute to the Investigation. Enforcement staff confirms, in a sworn declaration, which we credit, that the Commission's TCR System indicates that Claimant 1's tips were not forwarded to Enforcement staff responsible for the Investigation. In addition, Enforcement staff responsible for the Investigation did not receive any information from Claimant 1 before or during the Investigation, nor does Enforcement staff recall having any communication with Claimant 1.<sup>9</sup>

Accordingly, Claimant 1 is not eligible for an award.

## **B. Claimant 2**

Claimant 2 is not eligible for a whistleblower award because Claimant 2's information did not lead to the success of the Covered Action. First, Claimant 2's information does not meet the criteria of Exchange Act 21F-4(c)(1) because the record does not show that Claimant 2 meets both elements of Rule 21F-4(c)(1): (a) that Claimant 2's information caused either Examinations staff to commence the Exam or Enforcement staff to open the Investigation, or inquire in to different conduct, and (b) that the Covered Action in whole or in part was based on conduct that was the subject of Claimant 2's information. The record shows that Claimant 2's information did not cause the staff to commence the Exam: Claimant 2 submitted his/her TCR approximately three months after Examinations staff had already commenced the Exam. And prior to Claimant 2's TCR, Examinations staff was already aware of the Subject Matter, as well as issues relating to the Entity. Examinations staff assigned to the Exam also confirm that there was no communication with Claimant 2.<sup>10</sup>

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<sup>9</sup> Claimant 1's response to the Preliminary Determinations refers to information and communications Claimant 1 had with Commission staff and other government agency staff prior to July 21, 2010. To the extent that Claimant 1 bases his/her award application on such information and communication, Claimant 1 does not qualify for an award. Among other things, as noted above, an individual must submit original information to the Commission to qualify for an award. And to be considered original information, the individual's submission must be provided to the Commission for the first time after July 21, 2010. See Exchange Act Rule 21F-4(b)(1)(iv); 17 C.F.R. § 240.21F-4(b)(1)(iv).

<sup>10</sup> Claimant 2 states that he/she met with the Director of Examinations in <sup>Redacted</sup> along with other senior

Enforcement staff opened the Investigation based on a referral from Examinations, not based on Claimant 2's TCR submission. And while the Examinations referral addressed, among other things, the Subject Matter and potential misconduct regarding the Company and the Entity raised by Claimant 2, the Covered Action ultimately did not include any allegations regarding the Entity. Examinations staff had already identified the Subject Matter and issues relating to the Entity and Claimant 2's information did not play a role in the Covered Action.<sup>11</sup> Accordingly, the Covered Action was not based in whole or in part on information provided by Claimant 2. Therefore, Claimant 2 does not qualify for an award under Rule 21F-4(c)(1).

Second, Claimant 2's information did not meet the criteria of Exchange Act Rule 21F-4(c)(2) because it did not significantly contribute to the success of the Exam or the Investigation – and thereby did not significantly contribute to the success of the Covered Action. As previously stated, Examinations staff commenced the Exam in <sup>Redacted</sup> approximately three months before Claimant 2 submitted his/her TCR. And while Examinations staff did receive a whistleblower tip regarding the Entity in <sup>Redacted</sup> Examinations staff had already been aware of issues relating to the Entity before <sup>Redacted</sup> Further, Examinations staff confirms that the Subject Matter had been an issue of interest in the Exam prior to Claimant 2's TCR submission, and that Examinations staff did not look into the Subject Matter because of Claimant 2's information.

The record does not show that Claimant 2's information significantly contributed to the Investigation. OWB staff state, in a sworn declaration, which we credit, that Claimant 2's TCR submission and its supplements were not forwarded to staff assigned to the Investigation. While Enforcement staff assigned to the Investigation met with Claimant 2 in <sup>Redacted</sup> approximately nine months after Claimant 2 submitted his/her TCR, that meeting was related to a separate and unrelated matter and not connected to the Investigation. And while Enforcement staff assigned to the Investigation were aware that Claimant 2 submitted information related to the Entity, the staff elected not to pursue charges regarding the Entity in the Covered Action. Enforcement staff confirmed that they did not use any information provided by Claimant 2, nor did Claimant 2's information affect the Covered Action. Accordingly, Claimant 2 does not qualify for an award under Rule 21F-4(c)(2).<sup>12</sup>

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Commission staff. However, there is no evidence in the record that this meeting had any impact on the Exam. Instead, the record shows that the Exam commenced nearly a year before the <sup>Redacted</sup> meeting and resulted in a referral to Enforcement approximately three months before Claimant 2 met with the Exams Director.

<sup>11</sup> Claimant 2 concedes this fact in his/her application, noting that “the misconduct associated with [the Entity] was not mentioned in the [Covered Action] Order.”

<sup>12</sup> Claimant 2 also faults the Preliminary Determinations and the underlying record for not “specify[ing] what prompted the investigation into [Company's] . . . practices.” But as evident from the Exams staff declaration in the record, which we credit, and as noted above, Examinations commenced the Exam based on its own risk-based approach and review of public sources and not based upon any information or allegations from an individual outside of the Commission. Claimant 2 also argues that Claimant 2's counsel had been in contact with the Former Official since <sup>Redacted</sup> approximately six months before Claimant 2 submitted his/her tip. While Claimant 2 argues such communications may have assisted the staff or caused the commencement of the Exam, we are not persuaded. The record contains no indication that Claimant's counsel's communication with the Former Official influenced the commencement or course of the Exam. Further, such information, even if useful, was not submitted pursuant to the requirements of Exchange Act Rule 21F-9, which requires an individual to submit information on a Form TCR,

In addition, Claimant 2 argues that even if his/her information was not forwarded to staff assigned to the Investigation, he/she submitted supplemental material, met in-person with other Enforcement staff, including the Former Official, and other senior Commission staff in <sup>Redacted</sup> and shared information and responded to staff questions that ultimately assisted the staff and the Investigation. However, the record does not confirm Claimant 2's contentions. The record does not reflect that any information Claimant 2 shared with the Former Official was shared with or otherwise impacted the Investigation. And as noted above, Enforcement staff assigned to the Investigation confirm that none of Claimant 2's information was used in or contributed to the Covered Action.

Lastly, Claimant 2's argument that the record is not complete and the Preliminary Determination should therefore be vacated is not meritorious. Claimant 2 is not entitled to depose current or former Commission staff, or receive, as requested in Claimant 2's response to the Preliminary Determinations, "all documentation that the Claims Review Staff had made available for its review. . . [or] all emails, correspondence and other material regarding [Claimant 2's] filing as well as the administrative file for the [Covered Action]." Exchange Act Rule 21F-12(a) lists the materials that form the basis for the Preliminary Determination and that Claimant 2 may request from the Commission.<sup>13</sup> "These rules do not entitle [Claimant 2] to obtain from the Commission any materials . . . other than those listed in paragraph (a) of this section." Exchange Act Rule 21F-12(b). Claimant 2 requested and received the materials to which he/she was entitled under the Rule 21F-12(a) and is entitled to no more.

Therefore, Claimant 2 is not entitled to a whistleblower award.

### III. Conclusion

Accordingly, it is hereby ORDERED that the whistleblower award applications of Claimant 1 and Claimant 2 in connection with the Covered Action be, and they hereby are, denied.

By the Commission.

Vanessa A. Countryman  
Secretary

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which Claimant 2 did not do until <sup>Redacted</sup> Accordingly, we are not persuaded by Claimant 2's argument.

<sup>13</sup> See Exchange Act Rule 21F-10(e)(1).