

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Release No. 77368 / March 14, 2016

WHISTLEBLOWER AWARD PROCEEDING  
File No. 2016-5

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In the Matter of the Claim for Award

in connection with

Redacted ,  
Redacted

Notice of Covered Action Redacted

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**ORDER DETERMINING WHISTLEBLOWER AWARD CLAIM**

Claimant #1 (“Claimant 1”), Claimant #2 (“Claimant 2”), and Claimant #3 (“Claimant 3”) (collectively, “Claimants”) failed to submit their claims for an award for Notice of Covered Action Redacted to the Office of the Whistleblower (“OWB”) within ninety (90) calendar days of the date of the Notice of Covered Action (“NoCA”), as Rule 21F-10(b) of the Securities Exchange Act (“Exchange Act”) requires for award consideration.<sup>1</sup> As a result, the Claims Review Staff (“CRS”) issued a Preliminary Determination recommending that each Claimants’ untimely claim be denied.<sup>2</sup>

For the reasons set forth below, each Claimant’s award claim is denied.

**I. Background**

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<sup>1</sup> Rule 21F-10(b), 17 C.F.R. § 240.21F-10(b), provides:

To file a claim for a whistleblower award, you must file Form WB-APP, Application for Award for Original Information Provided Pursuant to Section 21F of the Securities Exchange Act of 1934 (referenced in § 249.1801 of this chapter). You must sign this form as the claimant and submit it to the Office of the Whistleblower by mail or fax. All claim forms, including any attachments, must be received by the Office of the Whistleblower within ninety (90) calendar days of the date of the Notice of Covered Action in order to be considered for an award. 17 C.F.R. § 240.21F-10(b).

<sup>2</sup> The Preliminary Determination also denied an award to Redacted . \*\* did not contest that denial, and thus it became the final order of the Commission pursuant to Exchange Act Rule 21F-10(f).

On [Redacted] the Commission filed a complaint in the U.S. District Court for the District of [Redacted] against [Redacted] for engaging in financial fraud to overstate [Redacted] financial condition. Between [Redacted] and [Redacted] [Redacted] the district court entered final judgments against [Redacted] ordering, among other sanctions, that \*\* and \*\* pay a civil penalty of [Redacted] \*\* pay disgorgement and prejudgment interest of [Redacted] and a civil penalty of [Redacted] and \*\* and \*\* pay disgorgement, prejudgment interest and civil penalties of [Redacted] and [Redacted], respectively.

On [Redacted] the OWB posted NoCA [Redacted] for this covered action. On [Redacted], the 90-day period established by Rule 21F-10(b) to submit an award claim expired without any of the three Claimants having made a submission. Instead, the three Claimants submitted their award claims approximately two years after the deadline.<sup>3</sup> On June 5, 2015, the CRS issued a Preliminary Determination recommending that each Claimant’s award claim be denied due to untimeliness.

Pursuant to Rule 21F-10(e),<sup>4</sup> the three Claimants subsequently submitted written responses contesting the Preliminary Determination.<sup>5</sup> In their responses the Claimants did not dispute that their claims were late. Rather, they argued that the Commission should excuse their untimely filings due to certain purported “extraordinary circumstances.” While the Claimants each raise different contentions as to why extraordinary circumstances excused their late submissions, none of the Claimants’ claims that the delay was caused by factors outside his control. Rather, the Claimants assert that extraordinary circumstances should be found because of purported mistakes committed by the Commission in its investigation and in the prosecution of the enforcement action, the purported importance of the information the claimants provided to the staff during its investigation and continue to provide in the subsequent SB bankruptcy proceeding, and the Commission’s failure to directly notify the Claimants of the posting of the NoCA and the deadline for submitting an award application.

## II. Analysis

At the outset, we think it is important to observe that the 90-day deadline set forth in Rule 21F-10(b) serves several 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 we can make

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<sup>3</sup> Claimant 1 filed an award application on Form WB-APP dated March 31, 2014, almost two years after the application deadline. Claimant 1’s application stated that it was also made on behalf of Claimants 2 and 3, although it was only signed by Claimant 1. Claimants 2 and 3 subsequently submitted their own award applications on Forms WB-APP on July 14, 2014 and July 15, 2014, respectively.

<sup>4</sup> Rule 21F-10(e), 17 C.F.R. § 240.21F-10(e), provides that a claimant seeking to contest a Preliminary Determination may submit a written response within the specified period under the rule “setting forth the grounds for your objection to either the denial of an award or the proposed amount of an award.”

<sup>5</sup> Claimants 1 and 2 requested oral argument before the Commission. We are denying those requests because we find that argument would not benefit the Commission’s consideration of their award applications.

timely awards to meritorious whistleblowers.<sup>6</sup>

Notwithstanding these important programmatic functions, we recognize that there may be rare situations where an exception should be made. To allow for this, Rule 21F-8(a) provides that “the Commission may, in its sole discretion, waive” the 90-day filing requirement “upon a showing of extraordinary circumstances.”<sup>7</sup> We do not find that any of the three Claimants has made the necessary showing to trigger our discretionary authority to waive the deadline.

In determining whether a claimant has demonstrated extraordinary circumstances to excuse an untimely submission under Rule 21F-8(a), we have explained that “the ‘extraordinary circumstances exception is to be narrowly construed and applied only in limited circumstances.’”<sup>8</sup> We have further explained that an extraordinary circumstance in the context of a late filing requires a claimant to show that the reason for the failure to timely file was beyond the claimant’s control.<sup>9</sup> Further, we identified attorney misconduct or serious illness that presented the applicant from making a timely filing as two examples of the demanding showing an applicant must make for us to consider exercising our discretionary authority to excuse an untimely filing.<sup>10</sup>

Applying that demanding standard here, we find that that none of the three Claimants has demonstrated that their failure to timely file an award application was caused by factors beyond their control. For example, neither the purported mistakes made by the Commission in its investigation and enforcement action, nor the purported importance of the information provided by the Claimants during the Commission’s investigation and the SB bankruptcy proceeding, explains why circumstances beyond the Claimants’ control prevented them from timely filing their award claims.

Finally, we disagree with the Claimants’ contention that the Commission had a duty to notify the Claimants of the posting of the NoCA and the deadline for submitting an award application, and that the failure to provide such notice constituted an extraordinary circumstance justifying a waiver of the timing requirement. Rule 21F-10(a) provides for constructive, not actual, notice of the posting of a covered action and of the deadline for submitting a claim.<sup>11</sup> The

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<sup>6</sup> See *Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934*, Release No. 34-64545, at 172 (May 25, 2011), available at <http://www.sec.gov/rules/final/2011/34-64545.pdf> (“Implementing Release”).

<sup>7</sup> 17 C.F.R. § 240.21F-8(a).

<sup>8</sup> *Order Determining Whistleblower Award Claim*, Exchange Act Release No. 72659, Whistleblower Award Proceeding File No. 2014-7, at 4 (July 23, 2014), available at <http://www.sec.gov/rules/other/2014/34-72659.pdf> (citation and internal quotation marks omitted) ; see also *Order Determining Whistleblower Award Claim*, Exchange Act Release No. 72178, Whistleblower Award Proceeding File No. 2014-4, at 3 (May 16, 2014), available at <http://www.sec.gov/rules/other/2014/34-72178.pdf> (including same language).

<sup>9</sup> Exchange Act Rel. No. 72659 at 5; Exchange Act Rel. No. 72178 at \*3.

<sup>10</sup> Exchange Act Rel. No. 72659 at 6; Exchange Act Rel. No. 72178 at \*3.

<sup>11</sup> Rule 21F-10(a), 17 C.F.R. § 240.21F-10(a), states that “[w]henver a Commission action results in monetary

NoCA for this matter was clearly posted on the Commission’s website, along with the filing deadline, which constitutes the requisite notice. As we have previously explained, “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.”<sup>12</sup> 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. Here, the Claimants failed to do that, and their failures were not caused by an extraordinary circumstance that might excuse the untimely award applications.<sup>13</sup>

### **III. Conclusion**

Accordingly, upon due consideration under Rule 21F-10(h), 17 C.F.R. § 240.21F-10(h), it is hereby ORDERED that the claims for whistleblower awards by Claimant 1, Claimant 2, and Claimant 3 be, and hereby are, denied.

By the Commission.

Brent J. Fields  
Secretary

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sanctions totaling more than \$1,000,000, the Office of the Whistleblower will cause to be published on the Commission’s website a ‘Notice of Covered Action’ . . . [and that] [a] claimant will have ninety (90) days from the date of the Notice of Covered Action to file a claim for an award based on that action, or the claim will be barred.” In our release adopting the final whistleblower rules, we explained that the constructive notice procedure of Rule 21F-10(a) “provides the best mechanism to provide notice to all whistleblower claimants who may have contributed to the action’s success.” Implementing Release at \*171.

<sup>12</sup> Exchange Act Release No. 72659 at \*5 (“The Commission is under no duty to provide Claimant . . . with direct notice of the filing deadline.”).

<sup>13</sup> Although the Claimants have not requested that we invoke our separate exemptive authority under Section 36(a) of the Exchange Act, we would decline to do so if they had. 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.” We believe that none of the Claimants has met their burden to demonstrate any considerations that would satisfy the requirements for us to exercise our Section 36(a) exemptive authority.