

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 90872 / January 7, 2021

WHISTLEBLOWER AWARD PROCEEDING
File No. 2021-23

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 joint whistleblower award claim submitted by ^{Redacted} (“Claimant 1”) ^{***} and ^{Redacted} (“Claimant 2”) (together, “Claimants”) in connection with the captioned covered action (the “Covered Action”). Claimants filed a timely response contesting the preliminary denial.² For the reasons discussed below, Claimants’ joint award claim is denied.

I. Background

A. The Covered Action

On ^{Redacted}, the Commission instituted contested administrative and cease-and-desist proceedings against ^{Redacted}

^{Redacted}. On ^{Redacted}, the Commission issued separate settled administrative orders finding that ^{Redacted} violated the ^{Redacted} by ^{Redacted} and that ^{Redacted} caused these ^{Redacted} violations. ^{Redacted} was ordered to pay a civil penalty of approximately ^{Redacted}, and ^{***}

¹ ^{Redacted}

² The Preliminary Determination also recommended denying an award to ^{Redacted} (“Claimant 3”). On ^{Redacted}, Claimant 3 informed the Commission that ^{***} would not contest the Preliminary Determination. Accordingly, the Preliminary Determination has become the Final Order of the Commission with respect to Claimant 3 pursuant to Exchange Act Rule 21F-10(f), 17 C.F.R. § 240.21F-10(f).

³ Exchange Act Rule 15c3-5, 17 C.F.R. § 240.15c3-5.

Redacted were ordered to pay a combined total of approximately Redacted in monetary sanctions.

On Redacted, the Commission’s Office of the Whistleblower (“OWB”) posted a Notice of Covered Action on the Commission’s public website inviting claimants to submit whistleblower award applications within 90 days.⁴ Claimants filed a timely joint whistleblower award application.

B. The Preliminary Determination

On Redacted, the CRS issued a Preliminary Determination⁵ recommending that Claimants’ joint award claim be denied because the information provided by Claimants did not lead to the successful enforcement of the Covered Action under Exchange Act Rule 21F-4(c)(1)-(2).⁶ The record supporting the Preliminary Determination included the declaration (the “First Declaration”) of one of the attorneys in the Redacted in the Commission’s Division of Enforcement who was responsible for the Covered Action. The First Declaration stated under penalty of perjury that the staff responsible for the Covered Action reviewed Claimants’ Redacted tip on Form TCR (the “Redacted Tip”) in Redacted and determined that the tip did not concern, or even mention, Redacted By Redacted the First Declaration continued, the investigation with regard to Redacted was already complete and the staff was primarily concerned with preparing for the administrative proceeding and conducting settlement discussions. The First Declaration further attested that the staff responsible for the Covered Action did not meet with Claimants, did not request any information from them or otherwise communicate with them, and did not use any of the information received from them.

C. Claimants’ Response to the Preliminary Determination

On Redacted, Claimants submitted a timely written request contesting the Preliminary Determination.⁷ Specifically,⁸ Claimants emphasize that they submitted information to the Commission Redacted times between Redacted and Redacted, at times directly to the then-head of the Redacted, and that they also met with the then-head and other staff of the Redacted in Redacted. On this basis, Claimants argue that the Commission’s staff improperly ignored the information they had submitted and failed to distribute it properly to the appropriate investigative staff.⁸ To further substantiate this argument, Claimants request declarations from certain persons in the

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

⁵ See Exchange Act Rule 21F-10(d), 17 C.F.R. § 240.21F-10(d).

⁶ See Exchange Act Section 21F(b)(1), 15 U.S.C. § 78u-6(b)(1); Exchange Act Rules 21F-3(a) & 4(c), 17 C.F.R. §§ 240.21F-3(a) & 4(c).

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

⁸ Because of these perceived errors, Claimants requested in their response “an extension on the appeal period . . . until the SEC provides responses to our questions, document [] requests and reasoning for withholding this information.” The whistleblower rules do not provide for such an extension. See Exchange Act Rule 21F-10(e)(2) (providing that a decision to contest a Preliminary Determination must be submitted “within sixty (60) calendar days of the date of the Preliminary Determination, or if a request to review materials is made pursuant to paragraph (e)(1) of this section, then within sixty (60) calendar days of the Office of the Whistleblower making those materials available for your review.” Moreover, this Order addresses Claimants’ questions and requests.

***, documents from the Commission’s investigative files, and explanations from the staff as to why Claimants’ information was not handled differently.

II. Analysis

To qualify for a whistleblower award under Section 21F of the Exchange Act, an individual must voluntarily provide the Commission with original information that leads to the successful enforcement of a covered action.⁹ As relevant here, original information “leads to” a successful enforcement action if either: (i) the original information caused the staff to open an investigation, and the Commission brought a successful action based in whole or in part on conduct that was the subject of the original information; or (ii) the conduct was already under examination or investigation, and the original information significantly contributed to the success of the action.¹⁰

We find that none of the information that Claimants submitted led to the successful enforcement of the Covered Action. First, the First Declaration states that Enforcement staff opened the investigation concerning Redacted’s Redacted practices in Redacted based on information developed from a separate investigation into certain Redacted. Claimants do not dispute this statement. We therefore credit the First Declaration and find that Claimants’ information did not cause the staff to open the investigation that culminated in the Covered Action.

Second, the First Declaration states that the staff responsible for the Covered Action reviewed the *** Tip and dismissed it as irrelevant and that they never met or communicated with Claimants or used their information. Claimants argue that this tip should have prompted the staff to dig deeper and review Claimants’ other submissions. However, we need not consider what the staff should or should not have done after reviewing the *** Tip, since Claimants do not dispute that the tip was not used in any way in the Covered Action. Nor do Claimants offer any evidence that their other submissions of information were used by the staff responsible for the Covered Action.

Claimants argue that their Redacted meeting with certain *** staff contradicts the First Declaration’s statement that the staff responsible for the Covered Action never met with Claimants. One of the *** attorneys who attended the Redacted meeting declared that a separate investigation unrelated to the matters investigated in the Covered Action had been opened in *** as a result of a series of analyses and allegations of wrongdoing submitted by the Claimants and that this led the staff of that investigation to schedule the Redacted meeting with the Claimants to discuss their allegations. According to the *** attorney, in Redacted, ***, *** shared certain of Claimants’ submissions with staff in other Divisions of the Commission and, after consultation with the staff in those Divisions, the *** staff determined to close the investigation because it could not substantiate Claimants’ allegations. The attorney further declared that the investigative team did not share the information it received from Claimants with the Enforcement staff responsible for the Covered Action, other than a

⁹ Exchange Act Section 21F(b)(1), 15 U.S.C. § 78u-6(b)(1).

¹⁰ Rule 21F-4(c)(1)-(2), 17 C.F.R. § 240.21F-4(c)(1)-(2).

Redacted email from the head of the Redacted to certain Redacted staff mentioning that others in Redacted were looking at Redacted allegations by the Claimants that touched on Redacted and another email it had received from one of the Claimants in Redacted, in which Claimant 1 commented on the Commission's filing a few days earlier of the Covered Action.

In response to Claimants' letter contesting the Preliminary Determination, the Redacted attorney who wrote the First Declaration wrote a supplemental declaration (the "Second Declaration"). The Second Declaration stated under penalty of perjury that, during the course of the investigation that culminated in the Covered Action, the investigation team did not receive or review any of the emails and documents Claimants sent to the Commission between Redacted Redacted other than the Redacted Tip, which did not concern or even mention Redacted, and the Redacted and Redacted emails noted above. The Second Declaration also states that the Redacted investigation team was unaware of the Redacted meeting between Claimants and certain members of the Redacted and that it did not receive any information about the meeting from the staff who attended it. This is consistent with and supports the statement of the Redacted attorney who attended the meeting. Thus, the fact that this meeting took place does not contradict the statement in the First Declaration that the staff responsible for the Covered Action never met with Claimants. And in any event, Claimants present no reason to believe that any information submitted or discussed at the Redacted meeting was used by the staff responsible for the Covered Action. We therefore credit the three staff declarations and find that Claimants' information did not significantly contribute to the success of the Covered Action.

As noted above, Claimants also argue that the staff mishandled their information and that they should be entitled to discovery to ascertain why it was not handled differently. In essence, Claimants argue that their information would have led to the success of the Covered Action had it been handled differently. But the standard for award eligibility is not what the staff would have, or could have done in hypothetical circumstances but, rather, what impact the whistleblower's information actually had on the investigation.¹¹ Here, the First and Second Declarations are clear that Claimants' information neither caused the staff to open its investigation nor significantly contributed to the success of the Covered Action, and thus we need not consider Claimants' request for discovery of additional information.¹² We therefore conclude that Claimants' information did not lead to the successful enforcement of the Covered Action and that, as a result, Claimants are ineligible for an award with respect to the Covered Action.

¹¹ See Order Determining Whistleblower Award Claim, Release No. 34-79294 (Nov. 14, 2016) (denying whistleblower award to claimant who argued that staff errors resulted in improper processing of submission, because information submitted did not actually lead to successful enforcement of covered action), *pet. rev. denied sub nom. Doe v. SEC*, 729 F. App'x 1 (D.C. Cir. 2018).

¹² See *Doe v. SEC*, 729 F. App'x at 3 (concluding that the Commission did not err by rejecting a claimant's request to include additional materials in the administrative record, where the Commission's determination was reviewable on the basis of materials already in the record).

III. Conclusion

Accordingly, it is ORDERED that Claimants' joint whistleblower award claim be, and hereby is, denied

By the Commission.

Eduardo A. Aleman
Deputy Secretary