UNITED STATES OF AMERICA

before the

SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 87663 / December 5, 2019

WHISTLEBLOWER AWARD PROCEEDING

File No. 2020-3

In the Matter of the Claims for Award

in connection with

Redacted

Notice of Covered Action Redacted

ORDER DETERMINING WHISTLEBLOWER AWARD CLAIMS

The Claims Review Staff ("CRS") issued a Preliminary Determination recommending the denial of the whistleblower award applications submitted by the following individuals (collectively, the "Claimants") in connection with the above-referenced action (the "Covered Action"):

Redacted ("Claimant 1");
Redacted ("Claimant 2");
Redacted ("Claimant 3");
Redacted ("Claimant 5"); and
Redacted ("Claimant 8").[1]

Claimants filed timely responses contesting the preliminary denials. For the reasons discussed below, and upon careful consideration of the administrative record with respect to each contesting claimant, Claimants' award applications are denied.

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[1] Three other individuals also submitted award applications in connection with the Notice of Covered Action. However, these individuals did not contest the preliminary denial of their claims and, as such, the Preliminary Determination with respect to their 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).

I. INTRODUCTION

A. The Covered Action

On Redacted, staff in the Commission's Division of Enforcement ("Enforcement") opened a matter under inquiry ("MUI") based on a tip to the Commission two days earlier. The MUI was converted to an investigation in Redacted and then a Formal Order of Investigation was issued in Redacted, entitled Redacted. Initially, the investigation included one investigative track, referred to in the administrative record as the Redacted (the "First Track").

In Redacted, the Enforcement staff initiated a second investigative track as part of the same investigation, referred to in the administrative record as the Redacted (the "Second Track"), which later culminated in the Covered Action. The staff initiated the Second Track based upon the staff's own review Redacted at Redacted (the "Parent Company"). This review consisted of a quantitative analysis that was independently devised and conducted by Commission staff as part of a broader initiative Redacted. The Second Track was conducted by a separate Enforcement team that investigated different facts and securities violations from the First Track and resulted in a separate enforcement action with different named defendants, underlying facts, and charged violations. Neither investigative track focused on any matters relating to the Parent Company's, Redacted (the "Company"), and their affiliates' conduct Redacted.

The Second Track focused on potential securities fraud violations committed by the Company and certain affiliated entities, in offering and selling to investors Redacted ("Securities"). The Second Track ultimately resulted in the Covered Action, which was a civil action filed on Redacted, based upon charges that the defendants violated Redacted by making misstatements and omissions in the Securities offering documents Redacted.

On Redacted, the Office of the Whistleblower ("OWB") posted Notice of Covered Action Redacted on the Commission's public website to notify interested individuals to file award applications with respect to the Covered Action within 90 days, by Redacted.[2] OWB received whistleblower award applications from all of the Claimants.

[2] *See* Exchange Act Rule 21F-10(b), 17 C.F.R. § 240.21F-10(b).

B. The Preliminary Determination

The CRS issued a Preliminary Determination[3] recommending that the Commission deny each of the Claimants' award applications because none of the information provided by any of the Claimants led to the successful enforcement of the Covered Action.[4] The record supporting that Preliminary Determination included the declaration of one of the primary Enforcement staff attorneys responsible for the Second Track and Covered Action, which stated under penalty of perjury that the Claimants' tips to the Commission were not used in the investigation, including the Second Track, or enforcement of the Covered Action.

The CRS also preliminarily denied Claimant 1's claim on the additional independent grounds that Claimant 1's award application was untimely[5] and that any information Claimant 1 provided to the Commission for the first time before July 21, 2010 was not "original information."[6] The CRS also preliminarily denied Claimant 8's claim on the additional independent grounds that Claimant 8's award application was untimely[7] and that Claimant 8 failed to qualify as a whistleblower by not submitting Claimant 8's tips to the Commission on Form TCR.[8]

The Claimants subsequently filed timely written responses contesting the Preliminary Determination.[9]

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

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[3] *See* Exchange Act Sections 21F(b), (c), 15 U.S.C. § 78u-6(b), (c); Exchange Act Rule 21F-10, 17 C.F.R. § 240.21F-10.

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

[5] *See* Exchange Act Rule 21F-10(b), 17 C.F.R. § 240.21F-10(b).

[6] *See* Exchange Act Section 21F(a)(1), 15 U.S.C. § 78u–6(a)(1); Exchange Act Rule 21F-4(b)(1)(iv), 17 C.F.R. § 240.21F-4(b)(1)(iv).

[7] *See* Exchange Act Rule 21F-10(b), 17 C.F.R. § 240.21F-10(b).

[8] *See* Exchange Act Rules 21F-9(a)-(b), 17 C.F.R. §§ 240.21F-9(a)-(b).

[9] Upon receiving executed confidentiality agreements from Claimants 2, 3, and 5, OWB provided each of these claimants with a copy of the record that formed the basis of the Preliminary Determination as to their respective claims. *See* Exchange Act Rule 21F-10(e)(1)(i), 17 C.F.R. § 240.21F-10(e)(1)(i). Claimants 1 and 8 submitted their requests for reconsideration without having requested a copy of the record that formed the basis of the Preliminary Determination as to their claims.

to the successful enforcement of a covered action.[10] As relevant here, information leads to the success of a covered action if it: (1) causes the Commission staff to (i) open or reopen an investigation, or (ii) inquire into different conduct as part of a current Commission investigation;[11] or (2) significantly contributes to the success of a Commission judicial or administrative enforcement action.[12]

Having considered the administrative record with respect to each contesting claimant, including their responses to the Preliminary Determination, we conclude that Claimants 1, 2, 3, 5, and 8 are not eligible for a whistleblower award because none of their respective information led to the successful enforcement of the Covered Action. In particular, we credit the staff declarations in the administrative record, which demonstrate that the information submitted by the Claimants did not cause the Commission staff to open the investigation that resulted in the Covered Action, did not cause the staff to initiate a new line of inquiry or reopen an investigation that resulted in the Covered Action, and did not significantly contribute to the success of the Covered Action.

First, no claimant can be credited for causing the Enforcement staff to open the investigation. The staff declarations demonstrate that the investigation was opened on Redacted, based upon a non-whistleblower complaint, wholly separate from and independent of Claimants' tips.[13]

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[10] *See* Exchange Act Section 21F(b)(1), 15 U.S.C. § 78u-6(b)(1).

[11] *See* Exchange Act Rule 21F-4(c)(1), 17 C.F.R. § 240.21F-4(c)(1).

[12] *See* Exchange Act Rule 21F-4(c)(2), 17 C.F.R. § 240.21F-4(c)(2). In determining whether information significantly contributed to an enforcement action, we consider "whether the information allowed us to bring: (1) Our successful action in significantly less time or fewer resources; (2) additional successful claims; or (3) successful claims against additional individuals or entities." *Securities Whistleblower Incentives and Protections*, 76 Fed. Reg. 34300, 34325 (June 13, 2011). In other words, "[t]he individual's information must have been 'meaningful' in that it 'made a substantial and important contribution' to the success of the covered action.'" *Order Determining Whistleblower Award Claims*, Exch. Act Rel. No. 85412, 2018 SEC LEXIS 615, at *16 (Mar. 26, 2019); *Order Determining Whistleblower Award Claims*, Exch. Act Rel. No. 82897, 2018 SEC LEXIS 750, at *16 (Mar. 19, 2018).

[13] For purposes of this analysis under Exchange Act Rule 21F-4(c)(1), we deem the investigation to have been opened the date that the MUI was opened— Redacted —regardless of the fact that the MUI was converted to an "investigation" the following month. In addition, because the investigation was opened on Redacted, the Claimants' information could not have prompted its opening unless they had submitted their information on or prior to that date. But any information submitted in or before Redacted would not qualify as "original information" to support an award because it would have been submitted to the Commission for the first time before July 21, 2010. *See* Exchange Act Section 21F(a)(1), 15 U.S.C. § 78u–6(a)(1); Exchange Act Rule 21F-4(b)(1)(iv), 17 C.F.R. § 240.21F-4(b)(1)(iv); *see also Order Denying Whistleblower Award Claim*, Exch. Act Rel. No. 70772, 2013 WL 5819623, at *5-9 (Oct. 30, 2013), *pet. rev. denied sub nom. Stryker v. SEC*, 780 F.3d 163 (2d Cir. 2015).

Second, none of the information submitted by Claimants caused the staff to initiate a new line of inquiry or significantly contributed to the successful enforcement of the Covered Action. The staff declaration for one of the primary Enforcement staff for the Second Track demonstrates that the Second Track was initiated in Redacted based solely upon the quantitative analysis by the staff, and that the Enforcement staff for the Second Track did not use any of the Claimants' information during the course of the Second Track or as part of the Covered Action.

Third, for the reasons discussed below, we reject the contrary arguments raised in the Claimants' respective written responses to the Preliminary Determination, and we find additional grounds for denying the award applications of Claimants 1 and 8.

Moreover, we conclude that the related action award claims submitted by Claimants 1, 2, 3, and 8 should be denied because these claimants have not qualified for an award for the Covered Action, which is a necessary precondition for a related action award.[14] Also, the civil and administrative cases that Claimants 1, 2, 3, and 8 submitted for related action award claims should be denied because the various matters identified by these claimants were not brought by designated non-Commission agencies and thus do not qualify as "related actions."[15]

A. Claimant 1

1. Claimant 1's information did not lead to the successful enforcement of the Covered Action.

Claimant 1 submitted numerous tips and additional information, which the Commission received in Redacted and on various dates in **** . In those submissions Claimant 1 provided information concerning, among other things, a **** criminal prosecution of the Parent Company's employees and other individuals, as well as a **** civil suit brought by Claimant 1 against the Parent Company Redacted . The underlying factual events discussed in Claimant 1's submissions allegedly occurred between 1982 and 1990. Claimant 1 also claims to have previously provided this same information to the Commission on two

[14] *See* Exchange Act Section 21F(b), 15 U.S.C. § 78u–6(b); Exchange Act Rules 21F-3(b), (b)(1), 21F-4(g) & (f), 21F-11(a), 17 C.F.R. §§ 240.21F-3(b), (b)(1), 21F-4(g) & (f), 21F-11(a) (providing that related action awards 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); *Order Determining Whistleblower Award Claims*, Exch. Act Rel. No. 84506, 2018 SEC LEXIS 3031, at *8 n.5 (Oct. 30, 2018) (same); *Order Determining Whistleblower Award Claim*, Exch. Act Rel. No. 84503, 2018 SEC LEXIS 3030, at *7 n.4 (Oct. 30, 2018) (same); *Order Determining Whistleblower Award Claims*, Exch. Act Rel. No. 80596, 2017 SEC LEXIS 1318, at *11 n.10 (May 4, 2017) (same).

[15] *See* Exchange Act Rules 21F-3(b)(1), 21F-4(f) & (g), 17 C.F.R. §§ 240.21F-3(b)(1), 21F-4(f), (g).

earlier occasions, specifically on or around Redacted and Redacted .[16]

The staff declarations in the administrative record, which we credit, demonstrate that none of Claimant 1's information led to the successful enforcement of the Covered Action. The declaration of one of the primary Enforcement staff attorneys responsible for the Second Track and the Covered Action attests that the Enforcement investigative team did not receive any information from Claimant 1, that they did not have any communications with Claimant 1, and that Claimant 1 did not assist or contribute in any way to the Second Track or the Covered Action. Moreover, the declaration of the OWB staff attorney corroborates, based on a review of the Commission's files, that none of the information submitted by Claimant 1 in **** and **** was shared with the Enforcement investigative team responsible for the Second Track.[17]

Both the nature and the timing of Claimant 1's tips corroborate these staff declarations. The nature of the information that Claimant 1 provided, and claims to have provided, to the Commission about the criminal conduct of the Parent Company's employees and about the Parent Company's Redacted , on their face, do not relate to the claims that were asserted by the Commission in the Covered Action. Specifically, the Covered Action's claims are based upon events primarily occurring around **** and **** —decades after the facts alleged in Claimant 1's information—and concerned the Company and certain affiliated entities misstating or omitting certain material facts in the Securities offering documents. With respect to timing, as reflected in the record, the **** and **** tips were submitted after the Second Track was initiated and, apart from the Redacted tip, after the Covered Action had concluded, and so could not have been used during the Second Track or enforcement action. Likewise, Claimant 1's purported Redacted tip was sent to the Commission after the investigation was opened in Redacted and the Second Track was initiated in Redacted

Moreover, Claimant 1's written response offers no factual evidence or legal arguments that rebut the Preliminary Determination that Claimant 1's information did not lead to the successful enforcement of the Covered Action. Rather, Claimant 1 offers three objections to the Preliminary Determination in this regard, none of which has merit.

First, according to Claimant 1, Claimant 1's information circuitously led to the success of the Covered Action on the theory that the information that Claimant 1

[16] We assume without deciding that Claimant 1 did in fact make these submissions in **** and **** , although the record reflects that the Commission's files do not contain any such earlier submissions from Claimant 1.

[17] The OWB staff declaration explains that the submissions were reviewed by other Commission staff and determined either to be not relevant or otherwise not warranting further action or investigation.

submitted on Redacted to the Commission, and earlier tips submitted to other federal agencies, led to the successful enforcement of an alleged and unnamed enforcement action of Redacted ,[18] and that action led to the Covered Action. But any such tip to the Commission in Redacted could not have caused and did not cause the staff to open the Second Track, since the tips were sent to the Commission after the Second Track began in Redacted . Additionally, for all of the reasons just discussed, we credit the staff declaration attesting that the Enforcement staff who worked on the Second Track did not receive or use any information from Claimant 1 in connection with the Second Track and following enforcement action, nor did they communicate with Claimant 1. Thus, the tips could not have contributed in any manner to the Second Track nor the Covered Action. Furthermore, the nature of the information that Claimant 1 claims to have provided to the Commission about the criminal conduct of the Parent Company's employees and about the Parent Company's Redacted , on their face, do not relate to the claims that were asserted by the Commission in the Covered Action. Specifically, the Commission's claims in the Covered Action concerned the Company and certain affiliated entities misstating or omitting certain material facts in the Securities offering documents.

Second, Claimant 1 argues, without invoking specific facts or legal authority, that the CRS's preliminary denial of the award claim violated Claimant 1's rights under the Constitution and Bill of Rights, Claimant 1's civil rights, and Claimant 1's human rights. Claimant 1 also claims that the CRS violated two criminal statutes involving false statements and embezzlement, and violated the civil and uniformed services oath of office. But the Exchange Act and our whistleblower rules do not authorize granting Claimant 1's award claim based upon any of those grounds.[19] Furthermore, and specific to Claimant 1's constitutional argument, there is no constitutional right to receive a Commission whistleblower award, and the grounds for denying Claimant 1's claims are

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18 Redacted

[19] *See* Exchange Act Section 21F, 15 U.S.C. § 78u–6; Dodd-Frank Act Section 924, 15 U.S.C. §78u–7; Exchange Act Rules 21F-1 to 21F-17, 17 C.F.R. §§ 240.21F-1 to 21F-17 (authorizing awards when whistleblower voluntarily provided the SEC with original information that led to a successful enforcement action resulting in an order of monetary sanctions exceeding $1 million, among other requirements); *see also Order Determining Whistleblower Award Claim*, Exch. Act Rel. No. 85273, 2019 WL 1098914, at *2 n.11 (Mar. 8, 2019) (permitting a limited and discretionary exemption from an award eligibility requirement if claimant satisfies the requirements that exemption is "necessary or appropriate in the public interest, and is consistent with the protection of investors").

based upon Claimant 1's failure to qualify for an award based on criteria that do not implicate Claimant 1's constitutionally protected interests.[20] Claimant 1 has not demonstrated eligibility for an award based on the neutral, objective criteria in the Exchange Act and our whistleblower rules.

Third, Claimant 1 argues that Claimant 1 deserves an award because Claimant 1 is a victim Redacted by the Parent Company and the Parent Company retaliated against Claimant 1, because Claimant 1 has been a longtime whistleblower to federal agencies about the Parent Company, and because Claimant 1's **** tip to the Department of Justice ("DOJ") led to the criminal prosecution of the Parent Company's employees and others. But even accepting these assertions as true for the sake of argument, they have no bearing on whether Claimant 1 qualifies for a whistleblower award for the Covered Action, since these arguments do not show Claimant 1 was a whistleblower who voluntarily provided the Commission with original information that led to a successful enforcement of the Covered Action[21]; nor do these arguments show that Claimant 1 meets any of the other requirements necessary to qualify for whistleblower awards.[22]

We therefore conclude that Claimant 1's information did not lead to the successful enforcement of the Covered Action, and that as a result, Claimant 1 is ineligible for an award with respect to either the Covered Action or any related action.[23]

2. Claimant 1's whistleblower award application was untimely.

Claimant 1 first submitted an award application identifying the Covered Action (Redacted) by U.S. Mail postmarked Redacted .[24] This date was after the 90-day

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[20] *See, e.g., Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (recognizing that "a person has no 'right' to a valuable governmental benefit and . . . the government may deny him the benefit for any number of reasons" unless denial is on grounds that infringe constitutionally protected interests).

[21] *See* Exchange Act Rule 21F-3(a), 17 C.F.R. § 240.21F-3(a).

[22] *See* Exchange Act Section 21F, 15 U.S.C. § 78u–6; Dodd-Frank Act Section 924, 15 U.S.C. §78u–7; Exchange Act Rules 21F-1 to 21F-17, 17 C.F.R. §§ 240.21F-1 to 21F-17.

[23] We also determine that the five new related action awards that Claimant 1 seeks in the request for reconsideration do not meet the requirements for filing award applications for related actions and are time-barred for late filing. *See* Exchange Act Rules 21F-11(b)(1), (2), 21F-10(b), 17 C.F.R. §§ 240.21F-11(b)(1), (2), 21F-10(b) (collectively establishing procedures and deadlines for submitting related action award claims).

[24] On Redacted , OWB received from Claimant 1 an award application that did not identify any covered action. In response, OWB sent Claimant 1 a notice, dated Redacted , which explained that because Claimant 1 "did not provide a Covered Action case name or notice number, [but r]ather … referenced a **** civil lawsuit that [Claimant 1] had brought against [the Parent Company]," Claimant 1 "has not submitted a properly filed whistleblower

deadline of Redacted, which was listed on the Notice of Covered Action posted on the Commission's public website.[25] Claimant 1's award application was thus untimely.[26] In responding to the Preliminary Determination, Claimant 1 argues that we should excuse this untimeliness because of extraordinary circumstances consisting of an amended award application submitted by Claimant 1 in Redacted. But we have consistently interpreted the "extraordinary circumstances" standard under our whistleblower rules[27] in narrow fashion as requiring a claimant to show that the reason for the failure to file was beyond the control of the claimant—such as attorney misconduct or serious illness.[28] Claimant 1's amended application in Redacted post-dates the untimely application in Redacted and thus cannot show that Claimant 1's failure to file an application by Redacted was beyond Claimant 1's control.[29] We therefore conclude that Claimant 1's award application should be denied for the independent reason that it was untimely.[30]

3. Any information submitted by Claimant 1 for the first time before July 21, 2010 is not original information.

Any information that Claimant 1 provided to the Commission for the first time before July 21, 2010, even if resubmitted after that date, is not "original information" that would support a whistleblower award.[31] In responding to the Preliminary Determination, Claimant 1 argues that information submitted before July 21, 2010 qualifies as "original information" as defined by statute (as opposed to Commission rule). But, as we previously have concluded, "the whistleblower statutory provisions [concerning "original

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award application and we cannot consider [Claimant 1's] claim for an award at this time." Several months after the Redacted deadline, Claimant 1 submitted a Form WB-APP identifying the Notice of Covered Action, which was postmarked Redacted.

[25] *See* Exchange Act Rule 21F-10(a), 17 C.F.R. § 240.21F-10(a).

[26] *See* Exchange Act Rule 21F-10(b), 17 C.F.R. § 240.21F-10(b).

[27] *See* Exchange Act Rule 21F-8(a), 17 C.F.R. § 240.21F-8(a).

[28] *See, e.g.*, *Claim for Award*, Release No. 34-77368, 2016 WL 1019130, at *2 (Mar. 14, 2016), *pet. denied sub nom. Cerny v. SEC*, 707 F. App'x 29 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 2005 (2018), *reh'g denied*, 138 S. Ct. 2715 (2018).

[29] *See Order Determining Whistleblower Award Claim,* Exch. Act Rel. No. 82181, 2017 WL 5969236, at *4 (Nov. 30, 2017) ("[S]ubsequent events cannot be used to retroactively excuse an untimely submission.").

[30] Furthermore, claimants cannot cure untimeliness merely by filing an amended application after a claim deadline expires because "[s]ubsequent events cannot be used to retroactively excuse an untimely submission." *Order Determining Whistleblower Award Claims* at 9, Exch. Act Rel. No. 82181 (Nov. 30, 2017).

[31] *See* Exchange Act Section 21F(a)(1), 15 U.S.C. § 78u–6(a)(1); Exchange Act Rule 21F-4(b)(1)(iv), 17 C.F.R. § 240.21F-4(b)(1)(iv).

information" under the Dodd-Frank Act] do not authorize awards for information originally provided prior to Dodd-Frank [Act]'s enactment" and the meaning of "original information" is not intended to "pay [awards] for information that was already in the Commission's possession on July 21, 2010."[32] We therefore conclude that any information submitted by Claimant 1 for the first time before July 21, 2010 will not support a whistleblower award for the independent reason that it is not "original information."

B. Claimants 2 and 3

The administrative record demonstrates that none of Claimant 2 and 3's information led to the successful enforcement of the Covered Action. First, Claimants 2 and 3 submitted their joint complaint to the Commission in Redacted, after the investigation was opened in Redacted and after the Second Track was initiated in Redacted, and so their tip did not cause the Enforcement staff to open the investigation or to initiate the Second Track. Second, the declaration of one of the primary Enforcement staff attorneys responsible for the Second Track and the Covered Action attests that the Enforcement staff for the Second Track did not receive any information from Claimants 2 and 3, that they had no communications with Claimants 2 and 3, and that Claimants 2 and 3 did not contribute in any way to the Second Track and Covered Action.

In their written response to the Preliminary Determination, Claimants 2 and 3 do not contest that their information did not lead to the success of the Covered Action. Rather, Claimants 2 and 3 argue only that they are eligible for a related action award on the theory that the information that they provided to the Commission in Redacted ultimately was sent to the DOJ and assisted the DOJ in overcoming Redacted. But as already noted, Claimants 2 and 3 are ineligible for a related action award because they have not demonstrated eligibility for a Covered Action award in the first instance.[33]

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[32] *Order Denying Whistleblower Award Claims*, Exch. Act Rel. No. 70772, 2013 WL 5819623, at *5-9 (Oct. 30, 2013), *pet. rev. denied sub nom. Stryker v. SEC*, 780 F.3d 163 (2d Cir. 2015).

[33] *See* Exchange Act Section 21F(b), 15 U.S.C. § 78u–6(b); Exchange Act Rules 21F-3(b), (b)(1), 21F-4(g) and (f), 21F-11(a), 17 C.F.R. §§ 240.21F-3(b), (b)(1), 21F-4(g) and (f), 21F-11(a); *Order Determining Whistleblower Award Claims*, Exch. Act Rel. No. 84506, 2018 SEC LEXIS 3031, at *8 n.5 (Oct. 30, 2018) (same); *Order Determining Whistleblower Award Claim*, Exch. Act Rel. No. 84503, 2018 SEC LEXIS 3030, at *7 n.4 (Oct. 30, 2018) (same); *Order Determining Whistleblower Award Claims*, Exch. Act Rel. No. 80596, 2017 SEC LEXIS 1318, at *8 n.5 (May 4, 2017) (same).

We therefore conclude that Claimant 2 and 3's information did not lead to the successful enforcement of the Covered Action, and that as a result, Claimants 2 and 3 are ineligible for an award with respect to either the Covered Action or any related action.[34]

C. Claimant 5

Claimant 5 submitted a tip to the Commission on Redacted , and later met with Enforcement investigative staff. In this tip and the subsequent meetings, Claimant 5 provided information that, by Claimant 5's own description, concerned tactics by the Parent Company Redacted

As asserted by Claimant 5, this behavior created the conditions Redacted

that led to the Parent Company's misstatements and omissions in the Securities offering documents.

The staff declarations in the administrative record, which we credit, demonstrate that none of Claimant 5's information led to the successful enforcement of the Covered Action. As described in those declarations, Claimant 5's tip was submitted well after the investigation was opened in Redacted and after the Second Track was initiated in Redacted . Since the Second Track's inception, and before the tip was received, the Enforcement staff on the Second Track had focused on the misconduct that was the basis for the Covered Action—specifically, misstatements and omissions by the Company and certain affiliated entities in the Securities offering documents Redacted

After receiving Claimant 5's tip, the Enforcement staff on the Second Track met with Claimant 5 and counsel in Redacted before concluding that Claimant 5's information was outside the focus of, and not relevant to, the Second Track. Although the staff for the Second Track further considered opening a new investigative path or separate investigation based upon Claimant 5's information, they ultimately determined it was not appropriate to do so. The declaration of one of the primary staff attorneys on the Second Track attests that Claimant 5's information did not contribute in any way to either the Second Track or the Covered Action.

[34] To the extent that Claimants 2 and 3 have requested additional documents outside the administrative record in connection with their reconsideration request, that request is denied. *See* Exchange Act Rule 21F-12, 17 C.F.R. § 240.21F-12 (authorizing a claimant to receive only the materials listed in Rule 21F-12(a) that formed the basis for the determination with respect to his or her own award application). Pursuant to Rule 21F-10(e)(1)(i), OWB already provided Claimants 2 and 3 with a copy of the entire record that formed the basis of the Preliminary Determination as to their joint claim.

In responding to the Preliminary Determination, Claimant 5 raises three arguments in an attempt to demonstrate that Claimant 5's information led to the successful enforcement of the Covered Action. All three arguments lack merit.

First, Claimant 5 contends that the information Claimant 5 provided to the Commission bears some resemblance to certain Commission allegations in the Covered Action insofar as Claimant 5 alleged information about systematic and pervasive practices of the Parent Company that were unstated background facts for the Commission's Covered Action. But, as just discussed, the staff declarations demonstrate, and we find, that Claimant 5's **** tip was submitted after the staff already had opened the Second Track and had focused on the misconduct that was the basis for the Covered Action. Claimant 5 also has not demonstrated a factual nexus between the information that Claimant 5 provided to the Commission and the conduct underlying the Covered Action's claims.[35] In particular, Claimant 5 admits that the information Claimant 5 provided to the Commission "did not single out" the Securities. Instead, Claimant 5's information, summarized above, merely described alleged tactics by the Parent Company that created pressures that, according to Claimant 5, indirectly led to the Covered Action's violative conduct. Thus, by Claimant 5's own admission, Claimant 5 did not provide the Commission with information about any conduct by the Company and the affiliates relating to the Securities offering, which is the relevant conduct that the Complaint charged.[36] It follows that Claimant 5 has not shown the requisite factual nexus between Claimant 5's information and the Covered Action.

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[35] *See Order Determining Whistleblower Award Claim*, 2018 WL 495695, Exch. Rel. No. 82562, at *2 (Jan. 22, 2018) (to establish that their information led to a successful enforcement action claimants must "establish a nexus between the information Claimant submitted to the Commission and the misconduct charged in the underlying Covered Action"); *see also Order Determining Whistleblower Award Claims*, Exch. Act Rel. No. 84046, 2018 SEC LEXIS 3031, at *34 (Sept. 6, 2018) (similar); *Order Determining Whistleblower Award Claim,* Exch. Act Rel. No. 82181, 2017 WL 5969236, at *11 (Nov. 30, 2017) (similar).

[36] The Complaint for the Covered Action alleged that the Company and certain affiliates misstated or omitted certain material facts in the Securities offering documents. Redacted

Moreover, even if Claimant 5 could show some factual resemblance between Claimant 5's information and the Commission's allegations in the Covered Action, that nexus by itself would not undermine the staff declaration, described above, attesting that the staff assigned to the Second Track never actually used Claimant 5's information in either the Second Track or the Covered Action. Claimant 5 separately attacks the legal sufficiency of the staff declarations as "patently self-serving" and as executed "well after" Claimant 5's award application. But the staff declarations in the administrative record were signed under penalty of perjury and therefore are adequate to support our finding that Claimant 5's information did not contribute to either the Second Track or the Covered Action.[37]

Second, Claimant 5 argues that Claimant 5 provided information about "both Redacted industry in general and [the Parent Company's practices] in particular" at several in-person meetings with the Commission staff, and that the staff attending these meetings "were keenly interested in what [Claimant 5] had to say, and they asked salient follow-up questions afterwards." But even taking Claimant 5's account at face value, that account is wholly consistent the staff declarations in the administrative record. As described earlier, those declarations attest that the staff on the Second Track met twice with Claimant 5 before determining that Claimant 5's information was outside the focus of the Second Track and did not warrant opening a new investigative path or separate investigation. In short, Claimant 5's account does nothing to undermine our finding, based on the staff declarations in the record, that Claimant 5's information was never actually used to advance the Second Track or Covered Action.

Third, Claimant 5 argues that the staff on the Second Track purportedly informed Claimant 5's counsel that DOJ personnel were "taking the lead" and that Claimant 5's counsel was in contact with those DOJ personnel up through the day that the DOJ announced Redacted

Redacted

[37] *See Summers v. DOJ*, 999 F.2d 570, 572-73 (D.C. Cir. 1993) (discussing adequacy of unsworn declaration under 28 U.S.C. § 1746 to establish "any matter"); *see also Jifry v. FAA*, 370 F.3d 1174, 1181 (D.C. Cir. 2004) (affidavit of agency official constitutes substantial evidence).

Claimant 5 also requests the production of additional documents outside the administrative record, but our whistleblower rules entitle a claimant to receive only those record materials that formed the basis of the Preliminary Determination with respect to the claimant's award application. *See* Exchange Act Rules 21F-10(e)(1)(i), 21F-12, 17 C.F.R. §§ 240.21F-10(e)(1)(i), 21F-12. In other words, our whistleblower rules do not entitle claimants to seek discovery of the Commission's law enforcement files concerning a covered action. *See* Exchange Act Rule 21F-12(b), 17 C.F.R. § 240.21F-12(b). Because OWB has already provided Claimant 5 with all the record materials that formed the basis of the Preliminary Determination with respect to Claimant 5's award application, Claimant 5's request for the production of additional documents is denied.

Redacted . But Claimant 5 has not applied for any related action awards for the Covered Action, nor has Claimant 5 argued that any DOJ actions were related to the Covered Action for award purposes.[38] Assisting a different enforcement action conducted by another agency does not demonstrate Claimant 5's assistance with the Covered Action. Nor does Claimant 5 identify any specific information that Claimant 5 provided to the DOJ that the DOJ, in turn, provided to the Commission for use in connection with the Covered Action. More importantly, claimants are eligible for a whistleblower award only if they voluntarily provide original information to the Commission that leads to a successful enforcement action.[39] If a claimant provides information only to another agency, even if that agency then passes it on to the Commission and the Commission uses it, the claimant would not be eligible for an award unless the claimant (or a claimant's representative) also provides that information directly to the Commission himself or herself.[40] Because we find that the Enforcement staff for the Second Track did not use the information that Claimant 5 provided directly to the Commission, any additional information that Claimant 5 may have provided to the DOJ does not support an award for the Covered Action.

We therefore conclude that Claimant 5's information did not lead to the successful enforcement of the Covered Action, and that as a result, Claimant 5 is ineligible for an award.

D. Claimant 8

1. Claimant 8's information did not lead to the successful enforcement of the Covered Action.

Claimant 8 submitted a single tip to the Commission dated Redacted, more than three years after the investigation was opened in Redacted and more than two years after the Second Track was initiated in Redacted. The staff declarations in the administrative record, which we credit, demonstrate that none of Claimant 8's information led to the successful enforcement of the Covered Action. The declaration of one of the primary Enforcement staff attorneys responsible for the Second Track and the Covered Action attests that the Enforcement investigative team did not receive any information from Claimant 8, that they did not have any communications with Claimant

[38] *See* Exchange Act Rule 21F-3(b)(1), 17 C.F.R. § 240.21F-3(b)(1) (defining a related action award as an action brought by [certain enumerated entities], and is based on the same original information that the whistleblower voluntarily provided to the Commission, and that led the Commission to obtain monetary sanctions totaling more than $1,000,000).

[39] *See* Exchange Act Rule 21F-3(a)(1)-(3), 17 C.F.R. § 240.21F-3(a)(1)-(3).

[40] *See* Exchange Act Rule 21F-4(b)(7), 17 C.F.R. § 240.21F-4(b)(7); *Order Determining Whistleblower Award Claims*, Exch. Act Rel. No. 80596, 2017 SEC LEXIS 1318, at *10 n.9 (May 4, 2017).

8, and that Claimant 8 did not assist or contribute in any way to the Second Track or the Covered Action. Moreover, the declaration of the OWB staff attorney corroborates, based on a review of the Commission's files, that Claimant 8's Redacted tip was not even shared with the Enforcement investigative team.[41]

Claimant 8 raises two arguments in challenge to the Preliminary Determination that Claimant 8's information did not lead to the successful enforcement of the Covered Action. Neither argument has merit.

First, Claimant 8 claims the Preliminary Determination does not refer to, and therefore does not apply to, Claimant 8. But the Preliminary Determination identifies Claimant 8 as a member of the group referred to as "Claimants" and states, "None of the Claimants provided information that led to the successful enforcement by the Commission of" the Covered Action. Accordingly, the Preliminary Determination sufficiently reflects the determination that Claimant 8's information did not lead to the Covered Action's success.[42]

Second, Claimant 8 argues that Claimant 8's information significantly contributed to the success of an enforcement matter unrelated to the Covered Action,[43] for which Claimant 8 previously applied for an award and was denied. But any alleged contributions Claimant 8 may have made to a different enforcement action are not relevant to whether Claimant 8's information led to the successful enforcement of this Covered Action.[44] Furthermore, Claimant 8 already applied for an award connected to the other enforcement action, and the Commission denied that claim.[45]

We therefore conclude that Claimant 8's information did not lead to the successful enforcement of the Covered Action, and that as a result, Claimant 8 is ineligible for an award with respect to either the Covered Action or any related action.

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[41] The OWB staff declaration explains that the submission was reviewed by other Commission staff and determined not to warrant further action or investigation.

[42] Even if the Preliminary Determination had not identified Claimant 8, that omission would not affect our own conclusion, based on the record evidence summarized above, that Claimant 8's information did not lead to the success of the Covered Action.

[43] Specifically, Claimant 8 asserts that Claimant 8's information significantly contributed to the success of the enforcement matter referred to in Notice of Covered Action Redacted .

[44] *See* Exchange Act Rule 21F-3(a), 17 C.F.R. § 240.21F-3(a).

[45] *See Order Determining Whistleblower Award Claim*, Exch. Rel. No. 79604, 2016 WL 7367248 (Dec. 19, 2016).

2. Claimant 8 failed to submit information in the form and manner required to qualify as a whistleblower.

The administrative record, which includes a declaration from an OWB staff attorney, reflects that Claimant 8 submitted Claimant 8's Redacted tip to the Commission by mail without a Form TCR. Because Claimant 8 did not submit this information either on a Form TCR or through the Commission's online TCR portal, and thus did not include the required declaration, Claimant 8 failed to submit information in the form and manner required by our whistleblower rules[46] and cannot qualify as a whistleblower.[47] In responding to the Preliminary Determination that Claimant 8 was not a whistleblower, Claimant 8 argues that Claimant 8 complied with the statutory requirements of the Dodd-Frank Act and was not subject to any further requirements in the Commission's whistleblower rules at the time Claimant 8 submitted tips. But Section 21F of the Exchange Act, which was added by the Dodd-Frank Act, expressly conditions whistleblower status on providing information to the Commission "in a manner established, by rule or regulation, by the Commission,"[48] and further directs that "[n]o award . . . shall be made . . . to any whistleblower who fails to submit information to the Commission in such form as the Commission may, by rule, require."[49] Moreover, our rules specifying the form and manner of submission took effect on August 12, 2011, almost Redacted before Claimant 8's initial tip in Redacted .[50]

We therefore conclude that Claimant 8's award application should be denied for the independent reason that Claimant 8 never qualified as a whistleblower by submitting Claimant 8's information in the form and manner required by our whistleblower rules.

3. Claimant 8 failed to submit a timely application for a whistleblower award and used a false document in responding to this issue in the Preliminary Determination.

The administrative record reflects that Claimant 8 first submitted an award application identifying Notice of Covered Action Redacted on a Form WB-APP that was signed Redacted , and faxed to the Commission on Redacted . This submission was several months after the 90-day deadline of Redacted , which was

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[46] *See* Exchange Act Rules 21F-8(a) and 21F-9(a)-(b), 17 C.F.R. §§ 240.21F-8(a), 21F-9(a)-(b).

[47] *See* Exchange Act Section 21F(a)(6), 15 U.S.C. § 78u–6(a)(6), and Exchange Act Rule 21F-2(a)(1), 17 C.F.R. § 240.21F-2(a)(1).

[48] Exchange Act Section 21F(a)(6), 15 U.S.C. § 78u-6(a)(6).

[49] Exchange Act Section 21F(c)(2)(D), 15 U.S.C. § 78u-6(c)(2)(D).

[50] *See Securities Whistleblower Incentives and Protections*, 76 Fed. Reg. 34,300, 34,313 (June 13, 2011).

posted on the Commission's public website for Notice of Covered Action Redacted .[51] Although Claimant 8 previously submitted a separate award application by fax to the Commission on Redacted , that submission failed to identify Notice of Covered Action Redacted (and instead identified a different covered action) as the basis for an award. Because Claimant 8 failed to identify Notice of Covered Action Redacted in the Redacted application and did so for the first time only in the Redacted application—several months after the Redacted deadline—Claimant 8's award application was untimely.[52]

In responding to the Preliminary Determination, Claimant 8 does not attempt to explain why Claimant 8's award application for Notice of Covered Action Redacted was untimely.[53] Rather, Claimant 8 asserts, "I submitted my WB-APP within ninety (90) days of the notice date for Notice of Covered Action Redacted ," and encloses what Claimant 8 describes as "copies of original WB-APP for Notice of Covered Action **** ." The document enclosed by Claimant 8 comprises a fax cover sheet dated Redacted , together with what appears to be a two-page award application for the Covered Action (Redacted) signed and dated by Claimant 8 also on Redacted (the "Copy").

The Copy offered by Claimant 8 lacks credibility, both on its face and by visual comparison side-by-side with the fax actually received by OWB on Redacted . The fax cover sheet on Claimant 8's Copy, both in the handwritten notes and in the "Transmission Verification Report," states that five pages were sent, and yet Claimant 8's Copy comprises only three pages total. What is more, the first page of Claimant 8's Copy reflects the same fax cover sheet that OWB received, and the third page reflects the same signature page that OWB received on Redacted , but the second page of Claimant 8's Copy is entirely different from what OWB received. Specifically, this second page in Claimant 8's Copy purports to be a page from Form WB-APP identifying Notice of Covered Action Redacted as the basis for an award, whereas the Form WB-APP actually received by OWB instead identifies a different covered action and contains two additional handwritten pages (for five pages total rather than three). Moreover, each page in the fax actually received by OWB bears a transmission header reflecting the date and time of transmission (" Redacted 17:40") and a unique page number of "01/05"

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[51] *See* Exchange Act Rule 21F-10(a), 17 C.F.R. § 240.21F-10(a).

[52] *See* Exchange Act Rule 21F-10(b), 17 C.F.R. § 240.21F-10(b).

[53] In other matters where such an argument has been raised, we have considered, under Exchange Act Rule 21F-8(a), whether the claimant has demonstrated that "extraordinary circumstances" beyond the claimant's control caused the late filing. *See, e.g.*, *Claim for Award*, Release No. 34-77368, 2016 WL 1019130, at *2 (Mar. 14, 2016), *pet. denied sub nom. Cerny v. SEC*, 707 F. App'x 29 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 2005 (2018), *reh'g denied*, 138 S. Ct. 2715 (2018).

through "05/05"—thus confirming that the five-page document in OWB's files is what was actually submitted on that date.

Accordingly, we credit the fax actually received by OWB on Redacted , and we reject the Copy submitted by Claimant 8 as containing a false and fictitious second page. We find that Claimant 8 submitted the Copy to OWB knowing that the second page was false, and not by mistake or accident, in light of all the evidence detailed above, including Claimant 8's awareness of Claimant 8's own prior correspondence with OWB.[54] We further find that Claimant 8 submitted this document with intent to mislead the Commission, since the Preliminary Determination had given Claimant 8 notice that the date of the award application was at issue and Claimant 8's insertion of an entirely new second page in the Copy appears to have been designed to mislead as to the true date of the award application for the Covered Action (Redacted).[55] We therefore conclude that Claimant 8's award application should be denied for the independent reasons that the application was untimely[56] and that Claimant 8 knowingly used a false document in Claimant 8's written response to the Preliminary Determination with intent to mislead the Commission.[57]

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[54] *See* Exchange Act Section 21F(i)(2), 15 U.S.C. § 78u-6(i)(2) (addressing a claimant who "uses any false writing or document knowing the writing or document contains any false, fictitious, or fraudulent statement or entry"); Exchange Act Rule 21F-8(c)(7), 17 C.F.R. § 240.21F-8(c)(7) (same).

In defining "knowing" conduct under these provisions, we look for guidance to analogous provisions of the False Claims Act. That statute proscribes "knowingly" presenting a false claim for payment to the Government or using false records or statements material to a false claim. 31 U.S.C. § 3729(a)(1). The statute also explains that element of acting "knowingly" is satisfied by either actual knowledge, deliberate ignorance, or reckless disregard with respect to the truth or falsity of the information. *Id.* § 3729(b)(1). Here, the record evidence supports a finding of either reckless disregard or actual knowledge by Claimant 8 with respect to the false second page.

[55] *See* Exchange Act Rule 21F-8(c)(7), 17 C.F.R. § 240.21F-8(c)(7) (requiring "intent to mislead or otherwise hinder the Commission or another authority" in connection with submitting a false writing or document).

[56] *See* Exchange Act Rule 21F-10(b), 17 C.F.R. § 240.21F-10(b).

[57] *See* Exchange Act Section 21F(i)(2), 15 U.S.C. § 78u-6(i)(2); Exchange Act Rule 21F-8(c)(7), 17 C.F.R. § 240.21F-8(c)(7).

III. CONCLUSION

Accordingly, it is hereby ORDERED that Claimant 1, 2, 3, 5, and 8's claims for awards are denied.

By the Commission.

Vanessa A. Countryman
Secretary