

UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 96227 / November 4, 2022

WHISTLEBLOWER AWARD PROCEEDING

File No. 2023-09

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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 CLAIM**

The Claims Review Staff (“CRS”) issued a Preliminary Determination recommending the denial of the whistleblower award claim submitted by Redacted (“Claimant”) in connection with the above-referenced covered action (the “Covered Action”). Claimant filed a timely response contesting the preliminary denial. For the reasons discussed below, Claimant’s award claim is denied.

**I. Background**

**A. The Covered Action**

On Redacted the Commission filed an emergency action charging Redacted (collectively, the “Defendants”) Redacted. The Commission alleged that the Redacted Redacted. The Commission’s complaint also named Redacted Redacted.

The court entered Redacted judgment Redacted ordering \*\*\* to pay more than Redacted in disgorgement and prejudgment interest. On Redacted the court entered judgment against defendants Redacted ordering Redacted to pay more than Redacted in disgorgement and prejudgment interest, and ordering Redacted to pay more than Redacted in disgorgement and prejudgment interest. On Redacted the court ordered

defendant <sup>Redacted</sup> to pay more than <sup>Redacted</sup> in disgorgement and prejudgment interest. On <sup>Redacted</sup> the court ordered <sup>Redacted</sup> to pay approximately <sup>Redacted</sup> in disgorgement and prejudgment interest. The court also permanently enjoined <sup>Redacted</sup> from future violations of the securities laws.

On <sup>Redacted</sup> 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. Claimant filed a timely whistleblower award claim.

## **B. The Preliminary Determination**

On <sup>Redacted</sup> the CRS issued a Preliminary Determination recommending that Claimant’s claim be denied because Claimant 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 preliminarily determined that Claimant’s information did not either (1) cause the Commission to (a) commence an examination, open or reopen an investigation, or inquire into different conduct as part of a current Commission examination or investigation, and (b) thereafter bring an action based, in whole or in part, on conduct that was the subject of claimant’s information, pursuant to Rule 21F-4(c)(1); or (2) significantly contribute to the success of a Commission judicial or administrative enforcement action under Rule 21F-4(c)(2) of the Exchange Act. The CRS preliminarily determined that Claimant’s information was first submitted after the Commission filed the complaint in the Covered Action, and that Claimant’s information was either already known to the staff or was not used in the Covered Action. The CRS also denied Claimant’s request for any related action awards on the grounds that because Claimant was not eligible for an award in the Covered Action, he/she is not eligible for an award in connection with any related action.<sup>1</sup>

## **C. Claimant’s Response to the Preliminary Determination**

Claimant submitted a timely written response contesting the Preliminary Determination.<sup>2</sup> Claimant principally argues that the staff declaration supporting the CRS’s preliminary determination was not prepared by the purported “lead staff attorney” who communicated with the Claimant and whom Claimant contends was the “principal staff attorney responsible for the Covered Action.” Claimant argues that the staff declarant may have lacked full knowledge of the facts surrounding Claimant’s information. Claimant also argues that the information Claimant provided the staff in a <sup>Redacted</sup> telephone call and later in Claimant’s <sup>Redacted</sup> TCR submission was new and assisted the staff in a separate Commission administrative proceeding (the “Other Proceeding”) as well as in certain criminal proceedings. Claimant argues that the Other Proceeding should be treated as part of the Covered Action pursuant to Exchange Act Rule 21F-4(d)(2). Claimant further contends that the information Claimant provided, which supposedly led to the Other Proceeding and to a criminal plea and agreement to testify with an

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<sup>1</sup> See 15 U.S.C. § 78u-6(b); Exchange Act Rule 21F-3(b), (b)(1); Rule 21F-4(g) and (f); Rule 21F-11(a); *see also* Order Determining Whistleblower Award Claim, Release No. 34-86902 (Sept. 9, 2019).

<sup>2</sup> See Exchange Act Rule 21F-10(e), 17 C.F.R. § 240.21F-10(e).

individual (the “Individual”) not charged in the Covered Action, “contributed leverage to the Commission . . . and helped ‘lead to’ the successful conclusion of the Covered Action and the related actions.”

Claimant further argues that his/her information caused the Commission to inquire into different conduct and bring an action based on conduct that was a subject of Claimant’s information and/or significantly contributed to the success of the Commission’s action. In support of this argument, Claimant contends that the staff declaration relied on by the CRS failed to state the exact timing of the staff’s awareness of the Individual’s involvement in the misconduct or a description of how the staff first learned of the information that Claimant argues the staff learned from him/her. Claimant further argues that even if the staff learned of the information from another source, Claimant should be credited as the original source of the information.

Lastly, Claimant argues that Claimant assisted the court-appointed receiver in the Covered Action (the “Receiver”) by providing information on real estate holdings and other assets, among other things, and that Claimant’s assistance to the Receiver should be credited for award purposes.

## **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>3</sup> Among other things, to be considered original information the submission must be provided to the Commission for the first time after July 21, 2010.<sup>4</sup> Additionally, and as relevant here, original information will be deemed to lead to a successful enforcement action if either: (i) the original information caused the staff to open an investigation “or to inquire concerning different conduct as part of a current . . . investigation” and the Commission brought a successful action based in whole or in part on conduct that was the subject of the original information;<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 the 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

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<sup>3</sup> Exchange Act Section 21F(b)(1), 15 U.S.C. § 78u-6(b)(1).

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

<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 21-F-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 (same).

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> For the reasons discussed below, Claimant's information does not merit a whistleblower award in the Covered Action.

As an initial matter, Claimant first provided information to the staff in <sup>Redacted</sup> over four months after the staff opened the investigation that led to the Covered Action (the "Investigation") and more than one month after the Commission filed its complaint. Accordingly, Claimant cannot be credited with causing the staff to open an investigation.

Second, the record does not demonstrate that Claimant significantly contributed to the success of the Covered Action or caused the staff to inquire into different conduct that was later the subject of a successful Commission enforcement action. Enforcement staff have confirmed, in a sworn supplemental declaration, which we credit, that Claimant's information did not advance the Investigation: Claimant's information related to the Individual who was not charged in the Covered Action. And the staff confirmed that it first became aware of the Individual in approximately <sup>Redacted</sup> about four months before Claimant provided information, and the staff was aware of the Individual's involvement with <sup>Redacted</sup> (the "Firm") the following month, approximately three months before Claimant submitted his information.<sup>9</sup> The staff confirmed that Claimant's information was not a motivating factor in the decision to interview the Individual and that Claimant's information was either already known to the staff or did not advance the Investigation or contribute to the charges in the Covered Action.<sup>10</sup> The staff also confirmed that Claimant's information did not assist the staff during settlement discussions with any of the Defendants.<sup>11</sup>

Claimant's argument that the Other Proceeding should be treated as part of the Covered Action pursuant to Exchange Act Rule 21F-4(d)(2) is also misplaced. Rule 21F-4(d)(2) allows

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

<sup>9</sup> To the extent Claimant argues that he/she deserves credit as the "original source" of any information received by the staff from another source regarding the Individual or the Firm, Claimant does not meet the requirements of Rule 21F-4(b)(5), which states that a claimant will be considered an original source "of the same information that we obtain from another source" if, among other things, "the other source obtained the information from [the claimant] or [the claimant's] representative." Claimant has not provided information demonstrating another source obtained the information from Claimant or his/her representative. Accordingly, Claimant cannot be considered an "original source" under Rule 21F-4(b)(5).

<sup>10</sup> Claimant's argument that the staff declaration fails to state the exact timing of the staff's awareness of the Individual's involvement in the misconduct or a description of how the staff first learned of the information that Claimant argues the staff learned from him/her is unavailing. As noted above, the supplemental staff declaration confirms that the staff was aware of the Individual and knew of the Individual's involvement with the Firm prior to the receipt of the Claimant's tip. Regardless, Claimant is not entitled to all aspects of the Commission's investigative file in these whistleblower award proceedings. *See* Exchange Act Rule 21F-10(e)(1)(i), 17 C.F.R. § 240.21F-10(e)(1)(i); Exchange Act Rule 21F-12(b), 17 C.F.R. § 240.21F-12(b) (noting that the whistleblower rules "do not entitle claimants to obtain from the Commission any materials (including any pre-decisional or internal deliberative process materials that are prepared exclusively to assist the Commission in deciding the claim) other than those listed in paragraph (a) of this section").

<sup>11</sup> Claimant's Response also criticizes the CRS's preliminary determination because the CRS relied upon a staff declaration prepared by someone other than the Enforcement staff attorney to whom Claimant spoke, and whom

the Commission, “[f]or purposes of determining the payment on an award . . . , [to] deem as part of the Commission action upon which the award was based any subsequent Commission proceeding that . . . results in a monetary sanction of \$1,000,000 or less, and that arises out of the same nucleus of operative facts.”<sup>12</sup> Application of this rule, however, is predicated upon the Claimant qualifying for an award for the Covered Action, which as discussed above, Claimant does not. Further, Rule 21F-4(d)(2) applies to proceedings which result in a monetary sanction; the Other Proceeding did not order any monetary sanction. Accordingly, the Other Proceeding cannot be considered part of the Covered Action.

Claimant’s argument that Claimant contributed to the Covered Action through providing assistance to the Receiver also lacks merit.<sup>13</sup> While Claimant describes hardships experienced while assisting the Receiver and argues that the Commission staff oversimplified the Receiver’s actions and diminished the amount of Claimant’s assistance to the Receiver, Claimant does not qualify for an award on these grounds. Claimant’s argument rests on the provision of information to the Receiver, not to the Commission. As noted above, Section 21F of the Exchange Act allows the Commission to award claimants if, among other things, the claimants provide useful information to the Commission that leads to a successful enforcement action by the Commission.<sup>14</sup> But a receiver does not work for the Commission or represent the interests of the Commission. As we stated in another context:

Although the Commission may seek the appointment of a receiver in an enforcement action filed in federal court, a receiver does not work for the Commission, represent the interests of the Commission, or even represent the interests of investors. Rather, a receiver is an officer of the court, appointed by the court to take custody of assets over which the court asserts jurisdiction (the receivership estate), for the benefit of all persons whom the court may later adjudge to have rights in the property.<sup>15</sup>

Because the Receiver does not work for the Commission or represent the interests of the Commission, any information Claimant provided to the Receiver does not qualify Claimant for a whistleblower award. Pursuant to Rules 21F-3(a) and 21F-4(c)(2), to

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Claimant believes was the “principal staff attorney” assigned to the Investigation. We also find no merit in this argument. The CRS relied upon a declaration from one of the primary staff attorneys responsible for the Covered Action. Further, the staff confirmed in a supplemental declaration that he regularly consulted and exchanged information with the staff attorney who spoke with Claimant, and the declarant learned of the information Claimant provided shortly after <sup>Redacted</sup>

<sup>12</sup> Exchange Act Rule 21F-4(d)(2), 17 C.F.R. § 240.21F-4(d)(2).

<sup>13</sup> While not an independent ground for denial, we also note that the information Claimant argues he/she provided to the Receiver appears to consist of publicly-available information, such as real estate and personal property holdings, among other things. Such publicly-available information, without any further analysis, would likely not qualify as independent knowledge or independent analysis and thus would not constitute original information. *See* Exchange Act Rule 21F-4(b), 17 C.F.R. § 240.21F-4(b).

<sup>14</sup> Exchange Act Section 21F(b)(1), 15 U.S.C. § 78u-6(b)(1).

<sup>15</sup> Whistleblower Program Rules, 85 Fed. Reg. 70898, 70905 (Nov. 5, 2020).

warrant an award, Claimant's information must lead to the successful enforcement of an action "by the Commission" rather than a receiver as an officer of the Court.<sup>16</sup>

For these reasons, Claimant is not entitled to a whistleblower award in connection with the Covered Action.<sup>17</sup>

### III. Conclusion

Accordingly, it is hereby ORDERED that the whistleblower award application of Claimant in connection with the Covered Action be, and it hereby is, denied.<sup>18</sup>

By the Commission.

Vanessa A. Countryman  
Secretary

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<sup>16</sup> Claimant also contends that the CRS or OWB never spoke with individuals assigned to the criminal proceedings related to the Covered Action. However, no such contact is necessary here. While OWB may speak with representatives of other agencies to determine if a claimant qualifies for a related action award, Claimant does not merit a related action award here. A related action award may be made only if, among other things, the claimant satisfies the eligibility criteria for an award for the applicable Commission covered action in the first instance. *See* 15 U.S.C. § 78u-6(b); Exchange Act Rule 21F-3(b), (b)(1); Rule 21F-4(g) and (f), and Rule 21F-11(a); Order Determining Whistleblower Award Claims, Release No. 34-84506 (Oct. 30, 2018); Order Determining Whistleblower Award Claims, Release No. 34-84503 (Oct. 30, 2018). Because Claimant is not qualified for an award in connection with the Covered Action, Claimant is ineligible for a related action award.

<sup>17</sup> Claimant also makes a conclusory request that the Commission exercise our discretionary authority pursuant to Section 36(a) of the Exchange Act to grant Claimant an award because of the various policy considerations, such as, among others, the Commission's policy interest in encouraging whistleblowers to provide information and assistance to receivers. We decline to do so. 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." However, "the broad objective of the whistleblower program is to enhance the Commission's law enforcement operations . . . [by incentivizing whistleblowers] to provide the Commission with timely, useful information that the Commission might not otherwise have received." Securities Whistleblower Incentives and Protections, 76 Fed. Reg. 34300, 34326 (June 13, 2011). Granting an exemption under circumstances where a whistleblower did not provide information that was in fact "useful" and the information did not lead to the success of a covered action is contrary to the purpose of the whistleblower program, the public interest, and the protection of investors. As a result, we find that Claimant has not met his/her burden to demonstrate any considerations that would satisfy the requirements for us to exercise our Section 36(a) authority.

<sup>18</sup> Claimant also argues that because Claimant submitted his/her tip prior to the adoption of the 2020 Whistleblower Rules amendments and interpretive guidance addressing "independent analysis," the amendments do not apply to Claimant. Claimant contends that any application of the amendment to his/her claim would be a violation of his/her due process rights, among other things. However, as discussed herein, Claimant is not entitled to an award because Claimant did not provide information that led to the success of the Covered Action. Accordingly, Claimant's argument is moot.