

UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 96657 / January 13, 2023

WHISTLEBLOWER AWARD PROCEEDING

File No. 2023-26

In the Matter of the Claim for an Award

in connection with

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 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 a complaint in federal district court (“District Court”) against Redacted, alleging Redacted

Redacted. In a separate action filed with the District Court on Redacted, the Commission also alleged that Redacted engaged in Redacted

Redacted. The Commission charged each of the Redacted defendants in these actions with Redacted

Redacted. These two actions were consolidated as Redacted

The District Court issued final consent judgments against [Redacted]

[Redacted]

The District Court ordered defendants to pay a total of [Redacted] in disgorgement, prejudgment interest, and civil penalties.

On [Redacted] the 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. Claimant filed a timely whistleblower award claim.

B. The Preliminary Determination

On [Redacted], the CRS issued a Preliminary Determination recommending that Claimant’s award 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.² The CRS concluded 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.³ The CRS determined that Claimant’s information was not the impetus for opening the investigation that resulted in the Covered Action (“Investigation”) and did not significantly contribute to the success of the Covered Action because Claimant provided information that was vague, non-specific, and/or duplicative of information staff had already received from other sources. In addition, the CRS preliminarily determined that Claimant’s information did not contribute to or advance the Investigation or the Covered Action.

¹ Upon the stipulated request of the Commission and defendant [Redacted], the District Court dismissed all claims against [Redacted] with prejudice pursuant to Fed. R. Civ. P. 41(a)(2) on [Redacted].

² A separate claim for award for the Covered Action was submitted by a second claimant, but withdrawn prior to the issuance of the Preliminary Determination.

³ The record supporting the Preliminary Determination included the declaration (“Declaration”) of one of the primary Division of Enforcement (“Enforcement”) attorneys assigned to the Investigation. The whistleblower rules contemplate that the record upon which an award determination is made shall consist of, as relevant here, a sworn declaration provided by the relevant Commission staff, in addition to the publicly available materials related to the Covered Action, the claimant’s tip, the claimant’s award application, and any other materials timely submitted by the claimant in response to the Preliminary Determination. *See* Exchange Act Rule 21F-12(a), 17 C.F.R. § 240.21F-12(a).

C. Claimant's Response to the Preliminary Determination

Claimant submitted a timely written response (the "Response") contesting the Preliminary Determination.⁴ As an initial matter, Claimant does not assert in the Response that the information Claimant provided led to the opening of the Investigation or significantly contributed to the success of the Covered Action. Rather, Claimant principally argues that there was an unreasonable delay in forwarding Claimant's tips to investigative staff and Claimant's information "could have played a role in the enforcement actions" had the tips been reviewed and forwarded in what the Claimant considers a timely fashion. Claimant also questions the exact timeline between receipt of his/her tips and the start of the Investigation. Additionally, Claimant asserts that he/she could be considered "the original source" of the information or analysis that led to the enforcement actions. Claimant contends that the Commission should not make a final determination on the award claim without establishing the exact timeline and examining whether "this type of a situation" affects eligibility.

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.⁵ As relevant here, under Exchange Act Rules 21F-4(c)(1) and (2),⁶ respectively, the Commission will consider a claimant to have provided original information that led to the successful enforcement of a covered action if either (1) 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;⁷ or (2) the conduct was already under examination or investigation, and the original information "significantly contributed to the success of the action."⁸

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.⁹ For example, the Commission will consider a claimant's information to have significantly contributed to the success of an enforcement action if it allowed the Commission to bring the action in significantly

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

⁵ Exchange Act Section 21F(b)(1), 15 U.S.C. § 78u-6(b)(1).

⁶ We construe the Response as applicable only to subsections 1 and 2 of Rule 21F-4(c). Consequently, the analysis that follows addresses only those two subsections of the provision.

⁷ See Exchange Act Rule 21F-4(c)(1), 17 C.F.R. § 240.21F-4(c)(1).

⁸ See Exchange Act Rule 21F-4(c)(2), 17 C.F.R. § 240.21F-4(c)(2).

⁹ Order Determining Whistleblower Award Claims, Release No. 34-90922, at 4 (Jan. 14, 2021); *see also* Order Determining Whistleblower Award Claims, Release No. 34-85412, at 9 (Mar. 26, 2019).

less time or with significantly fewer resources, or to bring additional successful claims or successful claims against additional individuals or entities.¹⁰

Claimant does not qualify for an award under either of the above-described provisions. First, although Claimant provided two tips via the Commission’s Tips, Complaints, and Referrals system (“TCR System”) on the same date the staff opened the Investigation,¹¹ the record clearly demonstrates that Claimant’s tips were not the impetus for opening the Investigation. Rather, as noted in the Declaration, which we credit, Enforcement investigative staff opened the Investigation on ^{Redacted} as the result of ^{Redacted} review activity ^{Redacted} conducted by the Office of Market Intelligence (“OMI”) during which OMI ^{Redacted}

^{Redacted}.¹² The Investigation was already underway when Claimant’s tips were first received by investigative staff assigned to the Investigation. The Declaration acknowledged that investigative staff received Claimant’s tips on or around ^{Redacted}, and that, by that time, investigative staff was already familiar with the ^{Redacted} that were the subject of Claimant’s tips, and had already identified ^{Redacted} to recommend charging and against whom to seek ^{Redacted} based on information received from other sources.

Claimant contends in the response that there was an unreasonable delay in reviewing and directing Claimant’s tips to Enforcement and that the information Claimant provided “could have played a role in the enforcement actions” had the tips been reviewed and forwarded more quickly. Claimant also asserts that it is not possible to establish the exact timeline of “morning TCR receipt vs. the OMI investigation start time,” and that it “is very likely that the Commission was in possession of relevant voluntary original information and analysis (my TCR) and, later, decided to look at the ^{Redacted} on its own.” Claimant further states that “[t]his would be a situation where my Claim is deemed ineligible simply due to the lack of expeditious processing by the WBO and not through a fault of my own, or any TCR deficiencies.” Without further explanation, Claimant also asserts that Claimant “could be considered ‘the original source’ of the information/analysis that led to the enforcement actions.”

As a threshold matter, whether or not Claimant’s information could have led to a successful enforcement action had it been routed to investigative staff more expeditiously is not relevant to Claimant’s eligibility to receive an award. The standard for award eligibility is not what the staff would have or could have done in hypothetical circumstances but, rather, what impact the claimant’s information actually had on the Investigation.¹³ In this case, the record

¹⁰ See Release No. 34-85412, *supra* note 9, at 8-9.

¹¹ The Commission received two tips from Claimant on ^{Redacted}, assigned TCR submission numbers ^{Redacted}

¹² The OMI staff member who referred the matter to investigative staff following OMI’s ^{Redacted} review activity has confirmed, in an additional sworn declaration, which we credit, that he was unaware of Claimant’s tips at the time of the referral and that the decision to refer the matter was not influenced by any tip submitted by Claimant.

¹³ 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, on grounds that the information submitted did not actually lead to successful enforcement of covered action), *pet. rev.*

does not support a finding that Claimant’s information actually led to the opening of the Investigation.¹⁴ Moreover, Claimant has provided no information in the Response to dispute the declaration of the Enforcement staff assigned to the Investigation, which stated, under penalty of perjury, that the Investigation was opened based on OMI’s ^{Redacted} review activity. Accordingly, we conclude that Claimant’s information did not cause the staff to open the Investigation.

We also see no basis for Claimant’s assertion that Claimant could be considered “the original source” of the information that led to the Investigation or Covered Action. Under Whistleblower Program rules, in order for a claimant to be considered the “original source” of information the Commission obtains from another source, the information must satisfy the definition of original information and the other source must have obtained the information from the claimant or the claimant’s representative.¹⁵ Even assuming the information Claimant provided could be considered “original information,” Claimant has not alleged or provided any information in the Response to suggest that any of the information relied upon by the Commission in opening the Investigation or bringing the successful enforcement action was initially supplied by Claimant to another source and then provided by that other source to the Commission. Therefore, to the extent Claimant contends that Claimant is the original source of any information received by the Commission from another source that led to the successful enforcement of the Covered Action, we find that argument without merit.

Second, because Claimant’s information did not cause the staff to open the Investigation, Claimant would be eligible for an award only if Claimant’s tips (1) caused the staff to inquire concerning different conduct as part of the ongoing Investigation and the Covered Action was based in whole or in part on that conduct, or (2) significantly contributed to the success of the action. We find that neither of these criteria is satisfied in this case. The record demonstrates that because Claimant admitted in his/her tips that Claimant lacked knowledge of ^{Redacted} Redacted investigative staff did not interview Claimant or otherwise follow up on Claimant’s information. The Declaration also stated that none of the information provided by Claimant helped advance the Investigation or had any impact on the charges brought by the Commission in the Covered Action. Claimant’s Response does not dispute the absence of contact between investigative staff and Claimant following submission of the two tips.

We therefore conclude that Claimant did not provide information that led to the successful enforcement of the above-referenced Covered Action within the meaning of Section

denied sub nom. Doe v. SEC, 729 F. App’x 1 (D.C. Cir. 2018); *see also* Order Determining Whistleblower Award Claim, Release No. 34-88667 (Apr. 16, 2020) (“We must look to whether the Claimant’s information actually contributed to the success of the Covered Action, not whether ‘it should have or could have,’ as Claimant urges us to do.”).

¹⁴ We decline to provide further information on the exact timeline between the Commission’s receipt of Claimant’s tips and the start of the Investigation. The whistleblower rules entitle a claimant to receive only those materials that formed the basis of the Preliminary Determination with respect to the claimant’s award application. Claimant made a request for, and received, a copy of those materials. The 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).

¹⁵ *See* Exchange Act Rule 21F-4(b)(5), 17 C.F.R. § 240.21F-4(b)(5).

21F(b)(1) of the Exchange Act and Rules 21F-3(a)(3) and 21F-4(c) thereunder. As a result, Claimant is ineligible for an award with respect to the Covered Action.

III. Conclusion

Accordingly, it is hereby ORDERED that Claimant's whistleblower award application be, and hereby is, denied.

By the Commission.

J. Matthew DeLesDernier
Deputy Secretary