

UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 96983 / February 27, 2023

WHISTLEBLOWER AWARD PROCEEDING

File No. 2023-39

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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 a complaint in federal district court in the Redacted (“District Court”) against Redacted (“Defendant 1”), Redacted (“Defendant 2”) and Redacted (“Defendant 3”), alleging that the defendants engaged in a fraudulent scheme to Redacted

Redacted. In Redacted, the Commission settled with Redacted and dismissed its claims against Redacted

Following a Redacted order granting Redacted (collectively, “Defendants”), the Commission reached settlement agreements with Defendants, and the District

Court issued final judgments against Defendants on <sup>Redacted</sup>. In total, the District Court ordered Defendants to pay <sup>Redacted</sup> in disgorgement, prejudgment interest, and civil penalties.

On <sup>Redacted</sup>, 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 <sup>Redacted</sup>, the CRS issued a Preliminary Determination recommending that the 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.<sup>1</sup> 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). The CRS preliminarily determined that Claimant’s information did not significantly contribute to the investigation that resulted in the Covered Action (the “Investigation”) because Claimant’s information was redundant of information already developed from other sources and therefore, staff did not rely on any information that Claimant provided, and Claimant’s information did not contribute in any way to the success of the litigation.

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

Claimant submitted a timely written response (the “Response”) contesting the Preliminary Determination.<sup>2</sup> Claimant principally argues that the materials Claimant provided to Enforcement staff and Claimant’s willingness to testify at trial were factors in securing the cooperation of <sup>Redacted</sup> and settlements with Defendants. The Response contends that Claimant provided information about a broader scheme and attempts to thwart the Commission’s investigation, as well as information the Commission would not otherwise have access to, and that this information helped revive a stalled investigation. Further, Claimant questions why staff would have asked Claimant to testify, or identified Claimant to Defendants and their counsel as a potential witness, if staff did not view Claimant as a helpful witness or the information Claimant

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<sup>1</sup> The record supporting the Preliminary Determination included the declaration (“Initial Declaration”) of one of the primary Division of Enforcement (“Enforcement”) attorneys assigned to the Covered Action. 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).

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

provided as materially helpful to the Commission’s case. Finally, the Response asserts that staff disclosed Claimant’s identity as a whistleblower to Defendants and their counsel.

## 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> As relevant here, under Exchange Act Rules 21F-4(c)(1) and (2),<sup>4</sup> 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;<sup>5</sup> or (2) 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 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>

Claimant does not qualify for an award under either of the above-described provisions. First, the record demonstrates that the Investigation was opened in <sup>Redacted</sup> more than three years before Claimant began providing information to the Commission. Accordingly, Claimant’s information did not cause the staff to open the Investigation. Moreover, as attested in a supplemental declaration provided by Enforcement staff, Claimant’s information did not cause the Commission to inquire into different conduct as part of the Investigation.

Second, although Claimant’s information related in part to conduct that formed the basis of the Covered Action, it did not significantly contribute to the success of the Covered Action. In the Response, Claimant takes issue with the statement in the Initial Declaration that

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

<sup>4</sup> 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.

<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 21F-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.

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

Enforcement staff did not view Claimant's documents as materially helpful to the Commission's case. Claimant asserts that while the Commission's complaint was filed several months prior to Claimant's initial contact with the Commission, Claimant provided information about a broader scheme involving additional entities and individuals, as well as attempts to thwart the Investigation. Claimant maintains that, after a meeting at <sup>Redacted</sup>, Enforcement staff told Claimant that the Investigation had been stalled and without the information and knowledge provided by Claimant, staff "never would have known who the key players were, where to look, or how the business operated." As stated under penalty of perjury in a supplemental declaration, Enforcement staff assigned to the Investigation has no recollection of having said this, and it is not consistent with the facts, given that the Commission had already filed its detailed complaint. As the record demonstrates, the documents provided by Claimant were largely redundant of materials already within the Commission's possession, and staff did not view the new documents Claimant provided as materially helpful.

Claimant further states that, given the variety of sources from which the documents and information provided by Claimant were derived, it is "highly unlikely" that the materials received from Claimant were "largely redundant" of materials that were already in the Commission's files.<sup>9</sup> Claimant contends that the Commission could not have previously been in receipt of all of the information provided by Claimant because the Commission "wouldn't have been aware of or have access to" some of the information. But it should be emphasized that the Commission's inquiry into eligibility under Rule 21F-4(c) does not relate to whether a claimant had special access to certain information. Rather, the Rule 21F-4(c) inquiry is focused on whether the information, regardless of its origin, actually led to the success of the action. Here, the record demonstrates that the information provided by Claimant that was not already within the Commission's files did not significantly contribute to the success of the Covered Action. In a supplemental declaration, Enforcement staff has confirmed that none of the information initially provided to the Commission by Claimant saved the Commission time or resources in conducting the Investigation, led the Commission to inquire into different conduct or bring additional charges or charges against additional individuals or entities, or was otherwise helpful. Further, as discussed below, the record demonstrates that Claimant's information did not otherwise significantly contribute to the success of the Covered Action.

Claimant also disputes the statement in the Initial Declaration that Enforcement staff did not view Claimant as a helpful witness given their belief that Claimant's demeanor would undermine Claimant's credibility. Claimant asserts that, following an interview with Enforcement staff, Claimant was asked if he/she would be willing to testify against the Defendants and Claimant agreed to do so. Sometime later, according to Claimant, Enforcement staff informed Claimant that Defendants had been notified of Claimant's cooperation and of the evidence Claimant had provided, and that Claimant's email address and phone number had been provided to counsel for Defendants <sup>Redacted</sup>. Claimant questions why staff would have asked

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<sup>9</sup> Claimant also contests the statement in the Initial Declaration that Claimant provided "several" bankers' boxes of documents to the Commission, asserting that <sup>Redacted</sup> boxes were provided. This detail is not material to our decision. In evaluating whether information provided by a Claimant has "significantly contributed to the success" of the covered action, we look not to the quantity of information provided, but rather to whether the information "made a substantial and important contribution" to the success of the covered action. *See* note 7, *supra*. Nevertheless, Enforcement staff has confirmed in a supplemental declaration that Claimant provided approximately <sup>Redacted</sup> boxes of materials to investigative staff.

Claimant to testify, or identified Claimant as a potential witness to Defendants and their counsel, if the staff did not view Claimant as a helpful witness or the information Claimant provided as materially helpful to the Commission's case. As previously discussed, and as supported by the supplemental declaration, the information Claimant provided had no impact on the charges brought in the Covered Action. Further, the supplemental declaration explains that staff disclosed Claimant's name and contact information, consistent with the Commission's obligations under Federal Rule of Civil Procedure 26(a) to disclose potential witnesses, before staff had finished evaluating Claimant's information.

Claimant also contends that the materials Claimant provided to the staff and the disclosure to Defendants and their counsel of Claimant's cooperation with the Investigation and willingness to testify at trial were factors in securing the cooperation of Redacted Redacted. The record does not support this assertion. Although the Commission obtained the cooperation Redacted Redacted, Enforcement staff has confirmed, in a supplemental declaration, that Enforcement staff did not raise the possibility of Claimant testifying, or otherwise discuss with Redacted Redacted any of the materials or information provided by Claimant prior to securing the cooperation of Redacted Redacted, nor did Redacted Redacted ever indicate or suggest that Claimant's willingness to testify or the materials Claimant provided played any role in the decision to cooperate.

Nor does the record support Claimant's assertion that Claimant's willingness to testify or the information Claimant provided played a meaningful role in securing settlement agreements with the Defendants. In the Initial Declaration, Enforcement staff confirmed that staff negotiated a resolution to the Covered Action without using Claimant as a witness or relying on any of the materials Claimant provided. Further, Enforcement staff has confirmed in a supplemental declaration that the settlement discussions were not based upon or aided by any information provided by Claimant. Rather, the record demonstrates that these discussions were facilitated by the receipt of a favorable ruling on Redacted Redacted in Redacted Redacted and neither the Claimant's identity nor any of the information Claimant provided was used by staff to support that motion. The supplemental declaration further confirms that the Redacted Redacted relied upon by staff in preparing that motion were developed independently of any information provided by Claimant and that neither the Defendants nor counsel for Defendants Redacted Redacted indicated or suggested, at any point during settlement negotiations, that Defendants' decisions to settle were influenced, even in part, by Claimant's willingness to testify or any of the materials Claimant provided.

Finally, Claimant asserts that staff disclosed Claimant's identity as a whistleblower to Defendants and their counsel and that such disclosure "is evidence that the information [Claimant] provided led to the cooperation, deal negotiation, and ultimately the SEC's enforceable action." According to Claimant, "the SEC's exposure of my identity as a whistleblower, the information I provided, and the evidence I provided would have caused opposing counsel to consider and take into account those facts when deciding and weighing the option of going to trial or negotiating a deal with the SEC." Claimant's assertion is not supported by the record. In a supplemental declaration, Enforcement staff has confirmed that, although Claimant was identified as a potential witness in the Commission's Rule 26(a) disclosures Redacted Redacted, staff Redacted Redacted, staff

responsible for the Covered Action never disclosed to Defendants or their counsel that Claimant was an SEC Whistleblower.

For these reasons, Claimant is not entitled to an award.

### **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.

By the Commission.

Vanessa A. Countryman  
Secretary