

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 97408 / May 1, 2023

WHISTLEBLOWER AWARD PROCEEDING
File No. 2023-54

In the Matter of the Claim for an Award

in connection with

Redacted

Redacted

Notice of Covered Action ^{Redacted}

ORDER DETERMINING WHISTLEBLOWER AWARD CLAIM

The Claims Review Staff (“CRS”) issued a Preliminary Determination recommending the denial of the 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 instituted a settled cease-and-desist proceeding ^{Redacted} ^{Redacted} (collectively, the “Company”). The Order Instituting Proceedings (“OIP”) charged the Company with ^{Redacted} ^{Redacted}

^{Redacted}

According to the OIP, ***

Redacted

Redacted

The Commission also charged the Company

Redacted

Redacted

Redacted

The Company consented to the entry of the SEC’s order finding that

Redacted

Redacted

Redacted

. As part of the

settled enforcement action, the Company agreed to pay

Redacted

Redacted

On

Redacted

, the Office of the Whistleblower (“OWB”) posted the Notice of Covered Action on the Commission’s public website inviting claimants to submit whistleblower award applications within 90 days.¹ Claimant filed a timely whistleblower claim.

B. The Preliminary Determination

The CRS issued a Preliminary Determination² recommending that Claimant’s claim be denied on the grounds that (1) Claimant did not provide original 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)(2) and 21F-4(b) thereunder, because the information provided by Claimant was already known to the Commission as the result of an examination conducted nearly a year before Claimant submitted information to the Commission; and (2) no information provided by Claimant 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), because none of the information Claimant submitted was reviewed by the staff handling the investigation of the Covered Action or otherwise contributed to the success of the Covered Action.

C. Claimant’s Response to the Preliminary Determination

Claimant submitted a timely written response (the “Response”) contesting the Preliminary Determination.³ In response to a request from OWB to provide proof that Claimant was the source of information contained in the Redacted (“Newspaper”), Claimant also provided an additional response with exhibits. In the Response, Claimant first contends that he/she provided original information to the Commission because (1) the SEC did not know or

¹ See Exchange Act Rule 21F-10(a), 17 C.F.R. § 240.21F-10(a).

² See Exchange Act Rule 21F-10(d), 17 C.F.R. § 240.21F-10(d).

³ See Exchange Act Rule 21F-10(e), 17 C.F.R. § 240.21F-10(e).

did not fully appreciate certain material features of ^{Redacted} prior to Claimant's tip, specifically, that the Company was continuing ^{Redacted}, and (2) Claimant was the original source of information published in the Newspaper on or about ^{Redacted} relating to the Company's continued violations with respect to ^{Redacted}. Thus, Claimant argues that his/her information was not already known to the Commission as a result of the earlier examination.

Second, Claimant argues that his/her information led to the success of the Covered Action. Claimant argues that providing his/her information regarding the Company's continued violations to the Newspaper resulted in a news article that prompted the staff to open the Covered Action investigation. Additionally, although the staff assigned to the Covered Action investigation states that they did not receive Claimant's information, Claimant asserts that he/she provided information directly to a staff member with direct managerial responsibility for the investigation and to a staff member in the Division of Examinations (formerly known as the Office of Compliance Inspections and Examinations) (hereinafter, "Exams") in *** and therefore, it must have been received by staff assigned to the investigation and utilized in connection with the Covered Action.

Third, Claimant requests to be allowed to depose certain members of the Commission staff and to review all emails, correspondence and other material regarding Claimant's tip, as well as the administrative file for the investigation. Claimant also seeks all emails and other correspondence from the investigative team regarding certain news articles, all notes, emails and other material related to Claimant's meetings with Commissions staff, and all emails and material from certain Commission staff related to this matter.⁴

⁴ As part of Claimant's request, Claimant noted that the Commission staff member with managerial responsibility for the investigation did not produce a declaration. However, the primary Enforcement attorney responsible for the Covered Action submitted a detailed declaration, which we credit. Claimant also alleges that the CRS acted improperly by relying upon a declaration from Exams staff that was signed after issuance of the Preliminary Determination. The unsigned and signed versions of the declaration are identical except for the signature such that the information relied upon by the CRS in its Preliminary Determination was not affected by the signature being affixed after the CRS met to approve the Preliminary Determination. *See Order Determining Whistleblower Award Claims*, Exchange Act Release No. 94743 at 2 n.6 (Apr. 18, 2022).

II. Analysis

A. Claimant Did Not Provide Original Information

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 Among other things, to be considered “original information,” information must be “[n]ot already known to the Commission from any other source, unless you are the original source of the information.”⁶

The record demonstrates that the information provided by Claimant relating to the Company’s ^{Redacted} was not original because it was already known to the Commission as a result of a Commission examination conducted nearly a year prior to Claimant’s submission. Claimant contends that the purported original information was not just the ^{Redacted}, but that the Company was continuing ^{Redacted} even after Exams’ deficiency letter to the Company in ^{Redacted}. However, the Response offers no evidence for its assertion that the SEC did not know about or fully appreciate certain material features of ^{Redacted} and their continuing nature prior to his/her submission. Contrary to this argument, the record, which includes a supplemental declaration from Enforcement staff which we credit, demonstrates that the same ^{Redacted} ^{Redacted} issues that formed the basis for the Covered Action were already known to Commission staff from the examination. Moreover, the OIP charged the Company for, among other things, ^{Redacted} dating back to ^{Redacted}. Thus, the charges in the Covered Action were based on the same conduct already known to the staff as a result of the examination and were not focused on conduct by the Company occurring subsequent to the examination as argued by Claimant. The supplemental declaration by Enforcement staff also confirms that the Covered Action investigation was not prompted by any belief by the Commission or its staff that the Company had taken or not taken action in response to any direction or correspondence from Exams staff. Rather, the ^{Redacted} ^{Redacted} issues were known to the Commission as an ongoing practice ^{Redacted} since being identified in ^{Redacted}.⁷ Enforcement staff further confirmed that neither the timing of the investigation nor the resulting Covered

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

⁶ See Exchange Act Rule 21F-4(b)(1)(ii), 17 C.F.R. § 240.21F-4(b)(1)(ii).

⁷ In fact, in ^{Redacted} ^{Redacted} gave a speech about the ^{Redacted} ^{Redacted}

^{Redacted} (“^{Redacted} Speech”).

Action were impacted in any way by the information provided by Claimant to the Commission. Furthermore, Claimant asserts that he/she provided examples of Company agreements that included ^{Redacted} provisions relating to ^{Redacted} by the Company subsequent to the examination. However, the declaration from the Exams staff and its exhibit, which we credit, demonstrates that Exam staff reviewed the Company's ^{Redacted} as part of the examination. Because these agreements provided for ^{Redacted}, Claimant has not demonstrated that the Company's practices with respect to these agreements were unknown to Commission staff.

Claimant also argues that he/she provided original information because he/she was the original source of information published in the Newspaper concerning the Company's ^{***} ^{Redacted} occurring subsequent to the examination. In Claimant's award application he/she stated that the information that formed the basis of the Newspaper article was a ^{Redacted} Company ^{Redacted} ^{Redacted} describing ^{Redacted}. Claimant further clarified that he/she obtained the ^{Redacted} Company ^{***} pursuant to a FOIA request and then shared it with the Newspaper staff. Nevertheless, Claimant is ineligible for an award under Exchange Act Rule 21F-4(c) because the record demonstrates that the staff responsible for the Covered Action investigation never received a copy of the Company ^{***}, which was not attached to Claimant's submissions. Consequently, even if Claimant was the source of the Newspaper article, because Claimant did not provide the Commission the same information he/she gave to the Newspaper staff, Claimant cannot be considered the original source of information that led to the success of the Covered Action under Exchange Act Rule 21F-4(c).⁸

Furthermore, even if Claimant satisfies Exchange Act Rule 21F-4(b)(1)(iii) as a result of being the source of the Newspaper article, Claimant is unable to satisfy Exchange Act Rule 21F-4(b)(1)(ii) because, according to a supplemental staff declaration that we credit, the Newspaper article did not present new information regarding continued violations since the staff was already aware of the practice as evidenced by the ^{Redacted} Speech.

⁸ We also note that to the extent Claimant relies on the information procured pursuant to a FOIA request as the basis for an award, such information cannot form a basis for an award because it is publicly available and therefore does not satisfy the definition of "independent knowledge" or, without more, the definition of "independent analysis" under Exchange Act Rule 21F-4(b)(2).

B. Claimant's Information Did Not Lead to The Successful Enforcement of the Covered Action

Claimant's information also did not lead to the successful enforcement of the Covered Action. As relevant here, under Exchange Act Rules 21F-4(c)(1) and (2), 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;"⁹ or (ii) the conduct was already under examination or investigation, and the original information "significantly contributed to the success of the action."¹⁰

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."¹¹ 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 individuals or entities.¹²

The Response contends that the Commission launched and went forward with its investigation based on Claimant alerting the Commission staff via the Newspaper article of the Company's continued violations. Furthermore, Claimant contends that it was not necessary to provide the same document that formed the basis for the Newspaper article to the Commission because the SEC launched and went forward with its investigation based on Claimant alerting the Commission staff of Company's continued violations and not due to any particular document. As discussed above, Claimant's argument that he/she prompted the opening of the investigation by being the source of the information published in the Newspaper article is without merit because the Commission staff was aware of the information in the Newspaper article from other sources. The declaration from the Enforcement staff, which we credit, explains that Enforcement staff did not open the investigation based on specific information contained in the Newspaper article or any other press article; rather it was news media attention following the Redacted

⁹ See Exchange Act Rule 21F-4(c)(1), 17 C.F.R. § 240.21F-4(c)(1).

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

¹¹ 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).

¹² Exchange Act Rel. No. 85412 at 8-9.

Speech concerning ^{Redacted} that caused the opening of the investigation. Accordingly, Claimant's information did not cause the opening of the investigation.¹³

Additionally, although Claimant argues that SEC managerial staff and Exams staff¹⁴ attended meetings with Claimant, which concerned ^{Redacted}, the standard for significant contribution is not whether Enforcement staff received a claimant's information, but whether the information was new and meaningfully advanced the investigation. Thus, even if certain SEC staff received Claimant's information and shared it with the Enforcement staff handling the investigation, that does not mean that the information meaningfully advanced the investigation. Rather, the record reflects that the Enforcement staff responsible for the investigation received critical information and materials from Exams staff who had conducted an exam a year prior to Claimant's tip and further received cooperation from the Company's counsel. While Claimant surmises that his/her information must have been utilized in the Covered Action investigation, the record does not demonstrate how his/her information made a significant or meaningful contribution to the investigation. As we have stated, "the standard for award eligibility is not what the staff would have, or could have done in hypothetical circumstances but, rather, what impact the whistleblower's information actually had on the investigation."¹⁵ Consequently, Claimant's information was not used in the Covered Action investigation, did not cause staff to inquire into different conduct, and did not significantly contribute to the Covered Action.¹⁶

C. Claimant's Request for Extra-Record Materials Is Denied

Claimant argues that in order to ensure a complete record for review, he/she should be permitted to depose certain SEC staff members and to review emails, correspondence, and other material regarding Claimants' filing, the administrative record for the Covered Action investigation, emails and correspondence regarding certain news articles, materials relating to Claimant's meetings with SEC staff, and all emails and materials of certain SEC staff relating to the matter. The whistleblower rules permit an award claimant to request and receive a copy of

¹³ The Response did not contest the CRS's preliminary determination rejecting Claimant's assertion that the information Claimant provided to the news media prompted the Company's self-remediation of its ^{Redacted} _{Redacted}

¹⁴ While the record reflects that the Exams staff, who provided a declaration in this matter, was involved in the examination of the Company and provided materials from the exam to the responsible Enforcement staff, the Exams staff was not a member of the Covered Action investigation, despite Claimant's contrary conclusions.

¹⁵ Order Determining Whistleblower Award Claims, Exchange Act Rel. No. 92542 at 4 (Aug. 2, 2021) (quoting Order Determining Whistleblower Award Claims, Exchange Act Rel. No. 90872 at 4 (Jan. 7, 2021)) (internal quotation marks omitted).

¹⁶ The record demonstrates that Claimant's information was considered in connection with a separate and unrelated investigation that was ultimately closed without enforcement action.

the materials that form the basis of the Preliminary Determination.¹⁷ Claimant made such a request and received a copy of the materials. The whistleblower rules, however, do not authorize a claimant to go on a fishing expedition to depose staff and to obtain copies of the SEC's entire investigative file.¹⁸ Moreover, the declaration of the Division of Enforcement staff is clear that Claimant's information was not reviewed in connection with the Covered Action investigation and did not cause the staff to open its investigation, inquire into different conduct, or significantly contribute to the success of the Covered Action. Thus, we deny Claimant's request for discovery of additional information.¹⁹

III. Conclusion

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

By the Commission.

Vanessa A. Countryman
Secretary

¹⁷ See Exchange Act Rule 21F-10(e)(1)(i); 17 C.F.R. § 240.21F-10(e)(1)(i).

¹⁸ *Id.* See also 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 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”).

¹⁹ See *Doe v. SEC*, 729 F. App'x 1, 3 (D.C. Cir. 2018) (concluding that the Commission did not err by rejecting a claimant's request to include additional materials in the administrative record, where the Commission's determination was reviewable on the basis of materials already in the record); Order Determining Whistleblower Award Claim, Release No. 34-79294 (Nov. 14, 2016) (denying whistleblower award to claimant who argued that staff errors resulted in improper processing of submission, because information submitted did not actually lead to successful enforcement covered action), *pet. rev. denied sub nom. Doe v. SEC, supra.*