

UNITED STATES OF AMERICA

before the

SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 89002 / June 4, 2020

WHISTLEBLOWER AWARD PROCEEDING

File No. 2020-20

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In the Matter of the Claim for Award

in connection with

Notice of Covered Action: Redacted

Redacted

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**ORDER DETERMINING WHISTLEBLOWER AWARD CLAIM**

The Claims Review Staff (“CRS”) issued a Preliminary Determination recommending that Redacted (“Claimant 1”) receive a whistleblower award in the amount of \*\*\* (\*\*\* ) of the monetary sanctions collected in Covered Action Redacted (the “Covered Action”) for a payout of nearly \$50 million, and that the award application submitted by Redacted (“Claimant 2”) be denied. Claimant 1 provided written notice of Claimant’s decision not to contest the Preliminary Determination and Claimant 2 submitted a timely notice contesting the preliminary denial of Claimant 2’s award claim. For the reasons discussed below, the recommendations of the CRS are adopted.

**I. Background**

**A. The Covered Action**

Redacted

On Redacted, the Office of the Whistleblower posted the above-referenced Notice of Covered Action on the Commission's public website inviting claimants to submit whistleblower award applications within 90 days, by Redacted.<sup>1</sup> Claimant 1 filed a timely whistleblower award claim. Claimant 2 filed an award claim on Redacted — nearly 10 months after the posted deadline.

## B. The Preliminary Determination

The CRS issued a Preliminary Determination<sup>2</sup> recommending that (1) Claimant 1 receive an award of \*\*\* of the monetary sanctions collected in the Covered Action,<sup>3</sup> and (2) the award claim of Claimant 2 be denied. The CRS recommended that Claimant 2's claim be denied for two reasons – first, because Claimant 2 was not a “whistleblower,” within the meaning of Section 21F(a)(6) of the Exchange Act and Rule 21F-2(a) thereunder, since there was no evidence showing that Claimant 2 provided information to the Commission relating to the above-referenced Covered Action, as required by Rule 21F-9(a) or (d); and second, because Claimant 2 failed to submit Claimant 2's claim for award on Form WB-APP within ninety (90) days of the Notice of Covered Action in this matter, as required under Rule 21F-10(b) of the Exchange Act in order to be considered for an award and, further, did not demonstrate that the Commission should waive, in its discretion, the filing deadline based on “extraordinary circumstances,” as provided under Rule 21F-8(a) of the Exchange Act.<sup>4</sup>

<sup>1</sup> See Securities Exchange Act of 1934 (“Exchange Act”) Rule 21F-10(a), 17 C.F.R. § 240.21F-10(a).

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

<sup>3</sup> The CRS also preliminarily determined to recommend that the Commission deny Claimant 1's award claims for Redacted by other federal agencies on the grounds that these actions did not constitute “related actions.” See Exchange Act Section 21F(a)(5), 15 U.S.C. § 78u-6(a)(5); Exchange Act Rule 21F-3(b)(1), 17 C.F.R. § 240.21F-3(b)(1)10(d). Claimant 1 has not contested these preliminary denials. As a result, the CRS's Preliminary Determination of the related action claims became the final determination of the Commission pursuant to Exchange Act Rule 21F-11(f).

<sup>4</sup> The Preliminary Determination noted that, because Claimant 2 should not be found eligible for an award in the Covered Action, Claimant 2 would not qualify for an award in any related action. A related action award 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. 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).

## C. Claimant 2's Response to the Preliminary Determination

On <sup>Redacted</sup>, Claimant 2 submitted a timely written response contesting the Preliminary Determination.<sup>5</sup> Claimant 2 argues in response to the Preliminary Determination that Claimant 2 was, in fact, a whistleblower because Claimant 2 had "jointly" provided the information that Claimant 1 provided in Claimant 1's tip to the Commission. Claimant 2 also argues that Claimant 1 filed the application for award on Form WB-APP for both of them, as there was no space for them to both sign. Finally, Claimant 2 asserts that there were "extraordinary circumstances" excusing Claimant 2's failure to file the award application before the posted deadline; namely that Claimant 2 does not have the resources, such as a computer or internet access, to monitor the SEC's website for the postings of Notices of Covered Action. Claimant 2 further notes that <sup>Redacted</sup>

## II. Analysis

### A. Claimant 1

The record demonstrates that Claimant 1, a whistleblower, voluntarily provided original information to the Commission that led to the successful enforcement of the Covered Action.<sup>6</sup> Accordingly, Claimant 1 qualifies for a whistleblower award.

Applying the award criteria specified in Rule 21F-6 of the Securities Exchange Act of 1934 to the specific facts and circumstances here, we find the proposed award amount is appropriate.<sup>7</sup> In reaching that determination, we positively assessed the following facts: (i) Claimant 1's information was highly significant and Claimant 1 provided first-hand observations of misconduct by the Company that was previously unknown to the staff; (ii) Claimant 1 laid out in detail substantial aspects of the scheme and provided a roadmap for the investigation; and (iii) Claimant 1's information helped the Commission further significant law enforcement interests as Claimant 1's information allowed the Commission to bring an enforcement action that, <sup>Redacted</sup>

, returned a significant amount of money to those harmed by the Company's misconduct.

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<sup>5</sup> See Exchange Act Rule 21F-10(e), 17 C.F.R. § 240.21F-10(e).

<sup>6</sup> See Exchange Act Section 21F(b)(1), 15 U.S.C. § 78u-6(b)(1); Exchange Act Rule 21F-3(a), 17 C.F.R. § 240.21F-3(a).

<sup>7</sup> In assessing the appropriate award amount, Exchange Act Rule 21F-6 provides that the Commission consider: (1) the significance of information provided to the Commission; (2) the assistance provided in the Commission action; (3) law enforcement interest in deterring violations by granting awards; (4) participation in internal compliance systems; (5) culpability; (6) unreasonable reporting delay; and (7) interference with internal compliance and reporting systems. 17 C.F.R. § 240.21F-6.

## B. Claimant 2

### 1. Claimant 2 was not a whistleblower under the applicable rules

The Commission is authorized to pay an award or awards to “1 or more *whistleblowers* who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action, or related action.”<sup>8</sup> The Commission’s whistleblower rules define a whistleblower as a person who “alone or jointly with others, . . . provide[s] the Commission with information pursuant to the procedures set forth in § 240.21F-9(a) of this chapter, and the information relates to a possible violation of the federal securities laws (including any rules or regulations thereunder) that has occurred, is ongoing, or is about to occur.”<sup>9</sup>

There is no evidence in the record that Claimant 2 submitted any information to the Commission relating to the Covered Action pursuant to the required procedures or otherwise, and Claimant 2 has not identified any submissions that Claimant 2 made.<sup>10</sup> Instead, Claimant 2 argues that Claimant 2 should be credited as a “joint” whistleblower with Claimant 1 on the theory that Redacted

However, there is no evidence in the record to support a finding that Claimant 2 was a participant in any manner in Claimant 1’s tip. Accordingly, Claimant 2 does not qualify as a whistleblower and is thus not eligible to receive an award.

### 2. Claimant 2 did not show “extraordinary circumstances” excusing the late-filing of Claimant 2’s award application

Exchange Act Rule 21F-10(a) states that “[a] claimant will have ninety (90) days from the date of the Notice of Covered Action to file a claim for an award based on that action, or the claim will be barred.”<sup>11</sup> Claimant 2’s award application was filed nearly 10 months after the deadline.

The requirement that claimants file whistleblower award claims within ninety days of the posting of a Notice of Covered Action serves important programmatic functions. The deadline ensures fairness to potential claimants by giving all an equal opportunity to have their competing claims evaluated at the same time. The deadline also brings finality to the

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<sup>8</sup> Exchange Act Section 21F(b)(1), 15 U.S.C. § 78u-6(b)(1) (emphasis added).

<sup>9</sup> Exchange Act Rule 21F-2(a), 17 C.F.R. § 240.21F-2(a).

<sup>10</sup> Claimant 2 acknowledges that Claimant 2 “does not remember if [Claimant 2] filed a whistleblower complaint with the SEC.” A search of the Commission’s records reveals only that, after the date of the Covered Action, Claimant 2 submitted a whistleblowertip regarding unrelated issues.

<sup>11</sup> 17 C.F.R. § 240.21F-10(a).

claim process so that the Commission can make timely awards to meritorious whistleblowers.<sup>12</sup>

Under Exchange Act Rule 21F-8(a), “the Commission may, in its sole discretion, waive” certain procedural requirements, including the ninety-day filing deadline, “upon a showing of extraordinary circumstances.”<sup>13</sup> In determining whether a claimant has demonstrated extraordinary circumstances that would trigger the Commission’s discretion to waive the ninety-day filing deadline, we have previously looked to our decision in *In the Matter of the Application of PennMont Securities*.<sup>14</sup> There, in determining whether applicants had demonstrated extraordinary circumstances that would trigger the Commission’s discretion to waive the thirty-day filing deadline under Commission Rule of Practice 420(b),<sup>15</sup> we explained that “the ‘extraordinary circumstances’ exception is to be narrowly construed and applied only in limited circumstances.”<sup>16</sup> An extraordinary circumstance is one “where the reason for the failure timely to file was beyond the control of the applicant....”<sup>17</sup> Further, “[e]ven when circumstances beyond the applicant’s control give rise to the delay,...an applicant must also demonstrate that he or she promptly arranged for the filing...as soon as reasonably practical thereafter.”<sup>18</sup> We have declined requests to waive the ninety-day filing deadline for whistleblower award claims because of claimants’ failures to meet the *PennMont* standard.<sup>19</sup>

While Claimant 2 may have been limited by Claimant 2’s lack of a home computer and internet connection and Claimant 2’s <sup>Redacted</sup>, Claimant 2 has not shown that the failure to timely file was beyond the control of Claimant 2. Access to the Commission’s website can be obtained at any computer or electronic device that has an Internet connection.

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<sup>12</sup> See *Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934*, Release No. 34-64545, at 172 (Effective Aug. 12, 2011) (available at <http://www.sec.gov/rules/final/2011/34-64545.pdf>); Order Determining Whistleblower Award Claims, Release No. 34-85412 (Mar. 26, 2019).

<sup>13</sup> 17 C.F.R. § 240.21F-8(a).

<sup>14</sup> *PennMont Sec.*, Release No. 34-61967 (Apr. 23, 2010), *pet. for rev. denied sub nom. PennMont Sec. v. SEC*, 414 F. App’x 465 (3rd Cir. 2011).

<sup>15</sup> 17 C.F.R. § 201.420(b).

<sup>16</sup> *PennMont Sec.* at 8-9.

<sup>17</sup> *Id.* at 9.

<sup>18</sup> *Id.*

<sup>19</sup> See Order Determining Whistleblower Award Claim, Release No. 34-77368 (Mar. 14, 2016), *pet. for rev. denied sub nom. Cerny v. SEC*, 708 F. App’x 29 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 2005 (2018), *reh’g denied*, 138 S. Ct. 2715 (2018) (“Release No. 34-77368”); see also Order Determining Whistleblower Award Claim, Release No. 34-85273 (Mar. 8, 2019); Order Determining Whistleblower Award Claim, Release No. 34-82181 (Nov. 30, 2017); Order Determining Whistleblower Award Claim, Release No. 34-72659 (July 23, 2014); Order Determining Whistleblower Award Claim, Release No. 34-72178 (May 16, 2014).

For example, nearly every U.S. public library offers free access to computers and the Internet.<sup>20</sup> Moreover, we note that Claimant 2 filed an online tip with the Commission in <sup>Redacted</sup> – eight months before Claimant 2’s award application was filed. Thus, even assuming for the sake of argument that circumstances beyond Claimant 2’s control gave rise to an <sup>Redacted</sup> initial delay between <sup>Redacted</sup>, Claimant 2 has not demonstrated that “he or she promptly arranged for the filing...as soon as reasonably practical thereafter.”<sup>21</sup> For these reasons, we conclude that Claimant 2 has not met the heavy burden of demonstrating that extraordinary circumstances prevented Claimant 2 from timely submitting an award application for the Covered Action.<sup>22</sup>

#### IV. Conclusion

Accordingly, it is hereby ORDERED that: (1) Claimant 1 shall receive an award of <sup>\*\*\*</sup> ( <sup>\*\*\*</sup> ) of the monetary sanctions collected, or to be collected, in the Covered Action; and (2) Claimant 2’s whistleblower award application is denied.

By the Commission.

Vanessa A. Countryman  
Secretary

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<sup>20</sup> See 2005 study commissioned by the American Library Association and the Bill and Melinda Gates Foundation, available at <http://www.ala.org/news/news/pressreleases2005/june2005/librariescomputeraccess>. See also Quotable Facts About America’s Libraries – January 2019, American Library Association (noting that “[n]early 100% of public libraries provide Wi-Fi and have no-fee access to computers”), available at <http://www.ala.org/advocacy/sites/ala.org.advocacy/files/content/Quotable%20Facts...Jan.19.FINAL.ANNOTATED.pdf>.

<sup>21</sup> We also reject Claimant 2’s argument that Claimant 1 filed Claimant 1’s application for award on Form WB-APP for both of them. There is no evidence in the record supporting Claimant 2’s contention. Moreover, Claimant 1’s attorney has advised the Commission’s staff that Claimant 1’s attorney only represented Claimant 1 in this matter and that Claimant 1 is the sole whistleblower.

<sup>22</sup> Claimant 2 also argues that Claimant 2 assisted another agency on a purported related action and, because of Claimant 2’s experience and background, provided that agency with more credible evidence and information than Claimant 1 had provided. This argument has no merit because, in order to be eligible for an award, a whistleblower is required to have provided information to the Commission. See 15 U.S.C. § 78u-6 and 17 C.F.R. § 240.21F-3(a)(1).