

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Release No. 90059 / September 30, 2020

WHISTLEBLOWER AWARD PROCEEDING  
File No. 2020-39

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In the Matter of the Claims for an Award

in connection with

Redacted

Redacted

Notice of Covered Action Redacted

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**ORDER DETERMINING WHISTLEBLOWER AWARD CLAIMS**

The Claims Review Staff (“CRS”) issued a Preliminary Determination in connection with Covered Action <sup>Redacted</sup> (the “Covered Action”) recommending that <sup>Redacted</sup> (“Claimant 1”) receive a whistleblower award in the amount of approximately <sup>Redacted</sup>, which is equal to <sup>\*\*\*</sup> of the amounts collected in the Covered Action. The CRS also preliminarily determined to deny Claimant 1’s related action award claim in connection with an action brought by the <sup>Redacted</sup> against <sup>Redacted</sup>. (“the Company”), <sup>Redacted</sup>, dated <sup>Redacted</sup> (“Other Action”). Claimant 1 filed a timely response contesting the preliminary denial of Claimant 1’s award claim for the Other Action. The CRS also preliminarily determined to deny the award claims of <sup>Redacted</sup> (“Claimant 2”) and <sup>Redacted</sup> (“Claimant 3”) for the Covered Action. Claimants 2 and 3 submitted timely responses contesting the preliminary denial of their award claims.<sup>1</sup> For the reasons discussed below, and based on the Commission’s independent review of the materials before us, we choose to depart from the CRS’s award amount recommendation with respect to Claimant 1 in the Covered Action, and instead have determined to award Claimant 1 <sup>\*\*\*</sup> percent ( <sup>\*\*\*</sup> ) of the monetary sanctions collected or to be collected in the Covered Action, for a payout of nearly \$2.9 million. We also have determined to

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<sup>1</sup> Two other individuals also submitted award applications in connection with the Covered Action. These individuals did not contest the preliminary denial of their claims. The Preliminary Determinations with respect to their award claims accordingly became the Final Order of the Commission through operation of Exchange Act Rule 21F-10(f), 17 C.F.R. § 240.21F-10(f).

deny Claimant 1’s award claim for the Other Action, and to deny the award claims of Claimant 2 and Claimant 3.

**I. Background**

**A. The Covered Action**

On <sup>Redacted</sup> the Commission instituted <sup>Redacted</sup> settled administrative and cease-and-desist proceedings against <sup>Redacted</sup>

<sup>Redacted</sup> The Commission’s order found that <sup>Redacted</sup>

<sup>Redacted</sup> Commission ordered <sup>Redacted</sup> Among other relief, the <sup>Redacted</sup> which has been collected.

On <sup>Redacted</sup> the Commission instituted <sup>Redacted</sup> settled administrative and cease-and-desist proceedings against the Company. <sup>Redacted</sup>

<sup>Redacted</sup> The Commission’s order against the Company found the following: <sup>Redacted</sup>

Among other relief, the Commission ordered the Company to pay <sup>Redacted</sup> <sup>Redacted</sup> which has been collected.<sup>3</sup>

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<sup>2</sup> <sup>Redacted</sup>

<sup>3</sup> Exchange Act Rule 21F-4(d)(1) provides that, “[f]or purposes of making an award . . . the Commission will treat as a Commission action two or more administrative or judicial proceedings brought by the Commission if these proceedings arise out of the same nucleus of operative facts.” We find that an action brought against an individual, <sup>Redacted</sup> arises out of the same nucleus of operative facts as the action brought against the Company, <sup>Redacted</sup> For purposes of making an award in this matter, we will treat both actions as part of the Covered Action.

On <sup>Redacted</sup> the Office of the Whistleblower posted Notice of Covered Action <sup>Redacted</sup> on the Commission's public website inviting claimants to submit whistleblower award applications. Because award applications must be filed within 90 days of the posting of a Notice of Covered Action,<sup>4</sup> the Commission's invitation gave claimants until <sup>Redacted</sup> to file applications. Claimants 1 and 2 each filed a timely whistleblower award claim. Claimant 3 submitted an application in <sup>Redacted</sup> well after the 90-day deadline had expired.

## **B. The Other Action**

On <sup>Redacted</sup> <sup>Redacted</sup> determined that the Company violated <sup>Redacted</sup>

<sup>Redacted</sup> The Company consented to <sup>Redacted</sup>

<sup>Redacted</sup> The Other Action did not relate to <sup>Redacted</sup>  
<sup>Redacted</sup>

## **C. The Preliminary Determinations**

The CRS issued Preliminary Determinations<sup>5</sup> recommending that Claimant 1 receive a whistleblower award in the amount of <sup>\*\*\*</sup>, and that Claimant 1's award claim for the Other Action be denied. The CRS preliminarily determined that Claimant 1 was not eligible for a related action award because the Other Action was not based on the same original information that led to the successful enforcement of the Covered Action. While Claimant 1 provided information to the staff in the Division of Enforcement responsible for the Covered Action during an August <sup>\*\*\*</sup> meeting concerning the <sup>Redacted</sup>, the underlying conduct that formed the basis for the Other Action, Enforcement staff were already investigating issues surrounding the <sup>Redacted</sup> before receiving such information from Claimant 1. The CRS preliminarily determined that none of the information Claimant 1 provided during the August <sup>\*\*\*</sup> meeting concerning the <sup>Redacted</sup> substantially advanced the investigation or meaningfully contributed to the success of the enforcement action. Nor did it

<sup>4</sup> See Exchange Act Rule 21F-10(a), 17 C.F.R. § 240.21F-10(a).

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

cause Enforcement staff to develop any new investigative leads as a result of Claimant 1's information.

The CRS also preliminarily determined to recommend that Claimant 2's claim and Claimant 3's claim be denied. The record reflects that Enforcement staff responsible for the Covered Action received no information from, nor had any communications with, Claimant 2 or Claimant 3. Nothing in Claimant 2's or Claimant 3's award application indicates any connection to the Covered Action or that either claimant submitted any information to the Commission concerning the subject of the Covered Action. The CRS also preliminarily determined to deny Claimant 3's award claim on the alternative ground that it was submitted after the 90-day deadline for submitting claims for the Covered Action.

### **C. Claimants' Responses to the Preliminary Determinations**

Claimant 1 submitted a timely written response contesting the Preliminary Determination with respect to the denial of Claimant 1's award claim for the Other Action.<sup>6</sup> Claimant 1 argued that Claimant 1 submitted two tips to the Commission in <sup>Redacted</sup> ("Earlier Tips") alleging the same violations at issue in the Other Action, including the Company's use of <sup>Redacted</sup> and speculates that Enforcement staff responsible for the Covered Action may have learned of those issues from Claimant 1's Earlier Tips.

Claimant 2 submitted a timely written response contesting the Preliminary Determination denying Claimant 2's award claim for the Covered Action. Claimant 2 submitted what appears to be two documents that relate to the payment of taxes and/or mortgages, which on their face have no relation to, or connection with, the Covered Action.

Claimant 3 submitted a timely written response to the Preliminary Determination. Claimant 3 appears to argue that the posting of the Covered Action was premature because at that point the Commission had not collected all the funds in the Covered Action, excusing Claimant 3's failure to file an award application within 90 days of the date of the Notice. Claimant 3 also argues that the application was timely because the Commission was put on notice when Claimant 3 submitted a tip to the Commission that Claimant 3 wished to be considered for an award. Finally, Claimant 3 appears to argue that the Covered Action could not have been brought until Claimant 3 provided "certain evidence," but does not identify the evidence and does not point to any information or other communication Claimant 3 had with Enforcement staff regarding the Covered Action.

## **III. Analysis**

### **A. Claimant 1**

#### **1. The Covered Action**

The record demonstrates that Claimant 1 voluntarily provided original information to the

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<sup>6</sup> See Exchange Act Rule 21F-11(e), 17 C.F.R. § 240.21F-11(e).

Commission that led to the successful enforcement of the Covered Action.<sup>7</sup> As relevant here, information leads to the success of an enforcement action if it: (1) was “sufficiently specific, credible, and timely to cause the staff to commence an examination, open an investigation ... or to inquire concerning different conduct as part of a current... investigation, and the Commission brought a successful judicial or administrative action based in whole or in part on conduct that was the subject of [this] information” or (2) significantly contributed to the success of a Commission judicial or administrative enforcement action.<sup>8</sup> Claimant 1 voluntarily submitted a tip to the Commission in <sup>Redacted</sup> that alleged <sup>Redacted</sup>

<sup>Redacted</sup> This tip caused staff in the Division of Enforcement to open the Covered Action investigation, and the charges brought by the Commission in the Covered Action were based, in part, on the conduct alleged by Claimant 1 in the <sup>Redacted</sup> tip.

Applying the award criteria in Rule 21F-6 of the Exchange Act to the specific facts and circumstances here, we have determined to increase the proposed award amount.<sup>9</sup> In reaching that determination, we assessed the following facts: Claimant 1’s information alerted Commission staff to the alleged wrongdoing, which would have been difficult to detect in the absence of Claimant 1’s tip. Claimant 1 provided critical information and supporting evidence early in the investigation that conserved Commission time and resources. And Claimant 1 met with Enforcement staff during the investigation. We have determined to award Claimant 1 nearly \$2.9 million, which is equal to <sup>\*\*\*</sup> percent ( <sup>\*\*\*</sup> ) of amounts collected in the Covered Action.

## 2. The Other Action

We find that Claimant 1 is not eligible for a related action award based on the Other Action. Under the whistleblower rules, the Commission will pay an award based on amounts collected in “related actions” brought by certain other authorities, which includes actions brought by <sup>Redacted</sup>. To constitute a “related action” under the Exchange Act, the action by the other authority must be “based upon the original information provided by a whistleblower [to the Commission] that led to the successful enforcement of the Commission action.”<sup>10</sup> The record

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<sup>7</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>8</sup> See Exchange Act Rule 21F-4(c)(1), (2), 17 C.F.R. § 240.21F-4(c)(1), (2).

<sup>9</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.

<sup>10</sup> 15 U.S.C. § 78u-5(a)(5) *see also* Exchange Act Rule 21F-3(b)(2), 17 C.F.R. § 240.21F-3(b)(2) (To make an award in connection with a related action, “the Commission must determine that *the same*

reflects that Claimant 1 is not eligible for a related action award because the Other Action was not based on the same original information that led to the successful enforcement of the Covered Action.

Here, as noted, Claimant 1 <sup>Redacted</sup> tip that caused the opening of the Covered Action investigation related to <sup>Redacted</sup> and did not touch upon <sup>Redacted</sup>

Further, Enforcement staff responsible for the Covered Action provided a detailed declaration affirming that, while Claimant 1 made allegations about the Company's <sup>Redacted</sup> <sup>\*\*\*</sup> to the staff during an August <sup>\*\*\*</sup> meeting, staff was already investigating potential wrongdoing in connection with the <sup>Redacted</sup> months before this meeting through their own investigative efforts. For example, by June <sup>\*\*\*</sup> staff had already received documents from the Company addressing policies relating to <sup>Redacted</sup> and had taken testimony from a witness which related, in part, to the Company's use of <sup>Redacted</sup>. As a supplemental declaration obtained by the Commission's Office of the Whistleblower confirms, by the time Claimant 1 met with Enforcement staff responsible for the Covered Action in August <sup>\*\*\*</sup> Claimant 1 did not provide important new facts staff was not previously aware of, did not identify key witnesses or important documents, and did not suggest additional lines of inquiry that staff pursued. Thus, information that Claimant 1 provided about <sup>Redacted</sup> at the August <sup>\*\*\*</sup> meeting did not significantly contribute to the success of the Covered Action.

Claimant 1 contends that, even if Enforcement staff responsible for the Covered Action already knew the information Claimant 1 provided at the August <sup>\*\*\*</sup> meeting, it is possible that Enforcement staff's knowledge derived from information Claimant 1 had earlier provided to the Commission. Specifically, Claimant 1 contends that the Earlier Tips, submitted to the Commission in <sup>Redacted</sup> included the same original information that was later used by <sup>Redacted</sup> in the Other Action and might also have assisted the Commission in its Covered Action investigation. But the record conclusively demonstrates that Claimant 1's Earlier Tips played no role whatsoever in the successful enforcement of the Covered Action.

Enforcement staff declarations unambiguously demonstrate that Claimant 1's Earlier Tips did not assist the successful enforcement of the Covered Action and were not directly or indirectly provided to, or used by, Enforcement staff responsible for the Covered Action. Claimant 1's Earlier Tips were received by the Commission in <sup>Redacted</sup> and were assigned <sup>Redacted</sup> to staff in the <sup>Redacted</sup> ("Regional Office Staff") for review. In early <sup>Redacted</sup> two Regional Office Staff interviewed Claimant 1 on the phone. Based on how Claimant 1 described the alleged misconduct, Regional Office Staff determined that the allegations did not appear to allege a violation of applicable rules or regulations, and recommended that the Earlier

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*original information* that the whistleblower gave to the Commission *also* led to the successful enforcement of the related action under the same criteria described in these rules for awards made in connection with Commission actions.") (emphasis added)

Tips be closed with a disposition of No Further Action (or “NFA”).<sup>11</sup> The recommendation was reviewed and approved by a supervisor, and the Earlier Tips were closed with an NFA disposition in <sup>Redacted</sup> The Regional Office Staff did not forward the Earlier Tips to any other investigative staff, including Enforcement staff responsible for the Covered Action. Further, Enforcement staff responsible for the Covered Action did not learn of the information in the Earlier Tips from Regional Office Staff or from any other internal Commission sources. Indeed, Enforcement staff responsible for the Covered Action did not become aware of the Earlier Tips until reviewing Claimant 1’s award application. Finally, Enforcement staff responsible for the Covered Action confirmed that during the investigation they did not receive from the Company any internal complaints that Claimant 1 may have made about <sup>Redacted</sup>  
<sup>Redacted</sup>

The Regional Office Staff likewise did not forward the Earlier Tips to any other government entity, including <sup>Redacted</sup> As a result, <sup>Redacted</sup> action was not related in any way to the Earlier Tips Claimant 1 submitted to the Commission. And, as the supplemental declaration confirms, none of the information at issue in the Commission’s action relating to <sup>Redacted</sup> or other issues raised in Claimant 1’s Earlier Tips was learned from <sup>Redacted</sup>

Based on our review of the record, including declarations from Commission staff, we conclude that Enforcement staff did not obtain, directly or indirectly, any information related to <sup>Redacted</sup> or other issues in the Earlier Tips from Regional Office Staff, and that Claimant 1’s Earlier Tips had no effect on the Commission’s successful enforcement of the Covered Action. Put simply, if Claimant 1 had never submitted the Earlier Tips or mentioned <sup>Redacted</sup> <sup>\*\*\*</sup> or any related issues at the August <sup>\*\*\*</sup> meeting with Enforcement staff, the Covered Action investigation and the resulting enforcement action would not have been different in any way. Claimant 1 offers no reason to call into question the veracity or accuracy of any of the staff declarations. Nor has the Commission found any reason to doubt the contents of the declarations. We therefore find that Claimant 1 is not eligible for a related action award because the information Claimant 1 provided to the Commission concerning the conduct at issue in the Other Action was not used in any way by the Enforcement staff responsible for the Covered Action. Accordingly, the Other Action was not based on any information that Claimant 1 provided to the Commission that also led to the successful enforcement of the Covered Action.

## **B. Claimant 2**

Claimant 2 did not provide information that caused the investigation to open. It was Claimant 1’s <sup>Redacted</sup> tip that caused Enforcement staff to open the Covered Action investigation. Claimant 2’s information also did not significantly contribute to the success of the Covered Action. Enforcement staff responsible for the Covered Action affirmed that they

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<sup>11</sup> An NFA disposition generally means that the Commission will take no additional action based on that particular tip, unless subsequent information leads Enforcement staff to reopen or reexamine the tip.

received no information from, and did not have any communications with, Claimant 2 before or during the course of the investigation.

Claimant 2 has submitted two additional documents in support of the claim: (1) a letter addressed to Claimant 2 concerning certain property-related tax deficiencies; and (2) a link to a publicly available website containing what appears to be a tax opinion from 2005 on a certain mortgage-related agreement.<sup>12</sup> Neither of these documents has any apparent bearing on or relation to the conduct at issue in the Covered Action. Because Claimant 2 did not provide any information that led to the successful enforcement of the Covered Action, Claimant 2's award claim is denied.

### **C. Claimant 3**

Like Claimant 2, Claimant 3 did not provide information that caused the investigation to open, as it was opened based on information provided by Claimant 1.

Nor did Claimant 3 provide information that significantly contributed to the success of the Covered Action. Enforcement staff affirmed that they received no information from, and did not have any communications with, Claimant 3 before or during the course of the investigation.

Claimant 3 does not identify any specific information Claimant 3 provided to Enforcement staff responsible for the Covered Action. Rather, Claimant 3 states that "it was not until certain evidence filed by" Claimant 3 "that sufficient evidence could allow for what became the 'Covered Action' in this case." Claimant 3 does not explain what "certain evidence" Claimant 3 is referring to. We credit Enforcement staff's declaration that unambiguously states that staff responsible for the Covered Action received no information from nor had any communication with Claimant 3.

Claimant 3 also contends that Claimant 3's failure to comply with the 90-day deadline to file an award application by five months should be excused. 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> An extraordinary circumstance is one "where the reason for the failure to timely file was beyond the control of the applicant."<sup>14</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>15</sup>

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<sup>12</sup> A link to a publicly-available website, standing alone, would not qualify as "original information."

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

<sup>14</sup> *See Order Determining Whistleblower Award Claim*, Release No. 34-85273 (Mar. 8, 2019).

<sup>15</sup> *Id.*



We conclude that Claimant 3 did not comply with the deadline and we decline to excuse that failure to comply. Claimant 3 contends that Claimant 3's submission was not untimely filed because the Commission's collection efforts have supposedly not been completed in the Covered Action, and because, in any event, Claimant 3's tip put the Commission on notice of Claimant 3's interest in an award.<sup>16</sup> But a Notice of Covered Action is posted when a Commission action results, through entry of a final judgment or order, in monetary sanctions totaling more than \$1 million, independent of the status of any collections in the action.<sup>17</sup> Moreover, a claimant must file a timely award claim on a Form WB-APP to qualify for an award; the filing of a tip does not suffice.<sup>18</sup> Finally, Claimant 3 has not offered any extraordinary circumstance that would justify the 90-day deadline to be excused.

#### IV. Conclusion

Accordingly, it is ORDERED that Claimant 1 shall receive an award of \*\*\* percent (\*\*\*) of amounts collected, or to be collected, in the Covered Action. It is further ORDERED that Claimant 1's whistleblower award application for a related action award for the Other Action be, and hereby is, denied.

It is further ORDERED that Claimant 2's and Claimant 3's whistleblower award applications be, and hereby are, denied.

By the Commission.

Vanessa A. Countryman  
Secretary

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<sup>16</sup> Claimant 3 made these same arguments in a previous whistleblower award matter, and we previously rejected those contentions as a basis for waiving the filing deadline. *See Order Determining Whistleblower Award Claim*, Release No. 34-85273 (Mar. 8, 2019).

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

<sup>18</sup> *See id.* ("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.").