

UNITED STATES OF AMERICA

before the

SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 82181 / November 30, 2017

WHISTLEBLOWER AWARD PROCEEDING

File No. 2018-2

In the Matter of the Claims for Award

in connection with

Redacted

Redacted

Notice of Covered Action Redacted

ORDER DETERMINING WHISTLEBLOWER AWARD CLAIMS

On July 27, 2016, the Claims Review Staff (“CRS”) issued a Preliminary Determination related to Covered Action ^{Redacted} (“Covered Action”). The Preliminary Determination recommended that ^{Redacted} (“Claimant #1”) and ^{Redacted} (“Claimant #2”) each receive a whistleblower award of ^{****} in the Covered Action. The Preliminary Determination also recommended that the award applications submitted by ^{Redacted} (“Claimant #3”), ^{Redacted} (“Claimant #4”), ^{Redacted} (“Claimant #5”), ^{Redacted} (“Claimant #6”), and ^{Redacted} (“Claimant #7”) be denied. Claimants #3, #4, #5, #6, and #7 filed timely responses contesting the Preliminary Determination.¹

For the reasons stated below, we make the following determinations: Claimant #1’s claim is approved in the amount of ^{****} of the monetary sanctions collected in the Covered Action, for a payout of more than \$8,000,000; Claimant #2’s claim is approved in the amount of ^{****} of the monetary sanctions collected in the Covered Action, for a payout of more than \$8,000,000; and the applications submitted by Claimants #3, #4, #5, #6, and #7 are denied.

¹ The Preliminary Determination further recommended that the award applications submitted by two other claimants be denied. Those two claimants failed to submit a response contesting the Preliminary Determination and, therefore, the Preliminary Determination denying their claims for awards have become the final order of the Commission with respect to their award applications.

I. Background

A. The award program

In 2010, Congress added Section 21F to the Securities Exchange Act of 1934 (the “Exchange Act”). Among other things, Section 21F authorizes the Commission to pay monetary awards—subject to certain limitations, exclusions, and conditions—to individuals who voluntarily provide the Commission with original information about a violation of the securities laws that leads to a successful Commission judicial or administrative action in which the monetary sanctions exceed \$1,000,000. *See* Exchange Act §§ 21F(a) & (b). The total award amounts paid shall be “not less than 10 percent, in total, of what has been collected of the monetary sanctions” and “not more than 30 percent, in total, of what has been collected[.]”²

B. Relevant facts

On ^{Redacted}, the Commission filed a settled enforcement action against ^{Redacted} _{Redacted} (hereinafter, “the Company”). The Commission found that the Company ^{Redacted}

Redacted

² Exchange Act § 21F(b)(1). We note that, in the context of an award proceeding involving two or more meritorious whistleblower claimants, the award must be allocated among the claimants and may never exceed an aggregate percentage amount of 30% of the monetary sanctions collected. *See* Exchange Act Rule 21F-5(c) (explaining that “[i]f the Commission makes awards to more than one whistleblower in connection with the same action or related action,” then “in no event will the total amount awarded to all whistleblowers in the aggregate be ... greater than 30 percent of the amount the Commission or the other authorities collect”).

In settlement of the violations, the Company agreed to pay

Redacted

Because the monetary sanctions imposed on the Company exceeded the statutory threshold for a potential whistleblower award under Section 21F of the Exchange Act, the Office of the Whistleblower (“OWB”) posted Notice of Covered Action ^{Redacted} for the Covered Action.

II. Claimant #1

We find that Claimant #1 voluntarily provided original information to the Commission that led to the successful enforcement of the Covered Action pursuant to Section 21F(b)(1) of the Exchange Act and Rule 21F-3(a) promulgated thereunder, 17 C.F.R. § 240.21F-3(a).

Based on our review of the record, including declarations from Commission staff who handled the Covered Action, we find the following events occurred with respect to Claimant #1’s award application. The investigation into the Covered Action (hereinafter, “the Investigation”) was opened on ^{Redacted} by staff in the Commission’s Division of Enforcement ^{Redacted} (“Enforcement”). On that date,

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³ In finding that Claimant #1 acted voluntarily as required by the statute and our rules, we have relied on Exchange Act Rule 21F-4(a)(2), which states, as relevant here, that a claimant’s “submission of information to the Commission will be considered voluntary if [he/she] voluntarily provided the same information to” any authority of the federal government “prior to receiving a request, inquiry, or demand from the Commission.” That rule is satisfied here because Claimant #1 provided the same information to ^{Redacted} prior to the Commission learning of the information and contacting Claimant #1. We note that, in our view, the “same information” standard under Rule 21F-4(a)(2) is satisfied where, as here, a claimant’s submission of information to the other federal agency “relates to the subject matter of” the Commission’s later inquiry. *See* Rule 21F-4(a)(1).

Enforcement staff thereafter contacted Claimant #1 and arranged to meet with Claimant #1 for the first time on ^{Redacted}. During that meeting, Claimant #1 alleged various potential misconduct by the Company, including that the Company ^{Redacted}

^{Redacted} This allegation would become the focus of staff's Investigation and the cornerstone of the Commission's subsequent action against the Company.⁴ Following the meeting, Enforcement staff arranged to meet with Claimant #1 again in ^{****} ^{Redacted} Although Claimant #1 may not have complied with Exchange Act Rule 21F-9(d) at this time—an omission which might normally require an award denial—the CRS recommended that the Commission waive that rule here given certain highly unusual circumstances.⁵ In total, Claimant #1 communicated with Enforcement staff approximately 5-6 times during the Investigation, and provided additional, critical information that advanced the Investigation, including the identification of potentially relevant documents and witnesses.

Based on the foregoing contributions that Claimant #1 made to the Commission's successful pursuit of this Covered Action, and considering the relative contributions of Claimant #1 vis-à-vis the other meritorious whistleblower in this matter, we adopt the Preliminary Determination's recommendation that Claimant #1 should receive ^{****} of the monetary sanctions collected in the Covered Action. In reaching this determination, we have carefully considered the award criteria specified in Exchange Act Rules 21F-5 and 21F-6 as they relate to Claimant #1's contributions to the Covered Action. In particular, we considered the facts that Claimant #1 ^{Redacted}

⁴ The information that Claimant #1 provided for the first time on or before July 21, 2010, does not constitute original information under our rules. *See* Exchange Act Rule 21F-4(b)(1)(iv).

⁵ Pursuant to Rule 21F-9(d), individuals such as Claimant #1 who provided tips to the Commission after July 21, 2010, the date of enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), but before August 12, 2011, the effective date of the whistleblower rules, are required to have submitted original information in writing to the Commission in order to qualify as a whistleblower who could potentially obtain an award. Claimant #1 did not submit the original information in writing to the Commission. Nonetheless, we find that it is appropriate in the public interest and consistent with the protection of investors that we utilize our discretionary authority under Section 36(a) of the Exchange Act to waive the Rule 21F-9(d) "in writing" requirement in this matter given a number of highly unusual circumstances. Those circumstances include the following: (1) the Commission's staff was already actively working with Claimant #1 before the enactment of the Dodd-Frank Act; (2) Claimant #1 provided the new post-Dodd-Frank Act information in the format that the Enforcement staff expressly requested—orally during an in-person meeting at the Commission's office; and (3) the indicia of reliability and the certainty as to the time that the information was provided, which are principal policy rationales underlying the Rule 21F-9(d) writing requirement, are clearly satisfied in the context of this claim because it is undisputed that Claimant #1 met on ^{Redacted}

Redacted; the information that Claimant #1 provided to the Commission was significant; and that Claimant #1 provided continuing and helpful assistance to the Enforcement staff during the Investigation that saved a substantial amount of time and resources in the Investigation.

III. Claimant #2

We find that Claimant #2 is an eligible whistleblower who voluntarily provided original information to the Commission that led to the successful enforcement of the Covered Action pursuant to Section 21F(b)(1) of the Exchange Act and Rule 21F-3(a) promulgated thereunder, 17 C.F.R. § 240.21F-3(a).

Based on our review of the record, including declarations from Commission staff who handled the Covered Action, we find the following events occurred with respect to Claimant #2's award application. In Redacted, Claimant #2, Redacted, first contacted the Commission by submitting a tip about the Company through the Commission's on-line Tips, Complaints, and Referrals ("TCR") system. In Redacted, Claimant #2 met with the staff on the Investigation to provide additional follow-up information in support of Claimant #2's earlier submission. In Redacted, Claimant #2 provided further additional information under a Form TCR (Tip, Complaint, or Referral). Because Claimant #2 had extensive experience in Redacted, Claimant #2's submissions and assistance enabled the Enforcement staff to more fully and quickly understand the misconduct and to assess the legal consequences.

On Redacted, Claimant #2 provided Enforcement staff with an expert report that Claimant #2 had commissioned from a Redacted firm Redacted by Claimants #3 and #4. Significantly, Claimant #2's attorney submitted this report as additional information under Claimant #2's Redacted Form TCR. Over the next year, the Redacted firm provided additional information in furtherance of Claimant #2's application, including through the submission of letters dated Redacted.

Based on Claimant #2's contributions (including the submissions made on Claimant #2's behalf by the Redacted firm that Claimant #2 had retained), and considering Claimant #2's contributions vis-à-vis Claimant #1, we are awarding Claimant #2 **** of the monetary sanctions collected in the Covered Action.⁶ In reaching this determination, we have

⁶ As we discuss further below in the context of our analysis of the award claims submitted by Claimants #3 and #4, Claimant #2 advised us in making the award application that Claimant #2 intended to forgo any claim to an award based on the information that the Redacted Redacted firm submitted so that Claimants #3 and #4 could recover an award based on that information. However, as we also discuss below, we have determined to deny an award to

carefully considered the award criteria specified in Exchange Act Rules 21F-5 and 21F-6. In particular, we considered the facts that Claimant #2

Redacted the information that Claimant #2 provided to the Commission was significant; and that Claimant #2 (directly and through the Redacted firm that Claimant #2 retained) provided continuing and helpful assistance to the Enforcement staff during the Investigation that saved a substantial amount of time and resources in the Investigation.

IV. Claimants #3 and #4

A. Background

The award applications submitted by Claimants #3 and #4 are inextricably intertwined with Claimant #2's application. From approximately Redacted until Redacted, the Redacted firm Redacted by Claimants #3 and #4, acting as an expert retained by Claimant #2, provided information to the Commission in furtherance of Claimant #2's whistleblowing activities. During this period, there was never any suggestion to the Commission that Claimants #3 and #4 were themselves seeking to be whistleblowers, nor during this period did Claimants #3 and #4 undertake the steps required to perfect their status as whistleblowers eligible for an award.

This changed on or about Redacted, when Claimants #3 and #4—with Claimant #2's express consent—submitted a Form TCR to the Commission to become whistleblowers in their own right and asked to have the Redacted expert report prepared by their Redacted firm (and other follow-up assistance) credited to them for purposes of any future award consideration. Notably, Claimant #2's determination to authorize Claimants #3 and #4 to recover as whistleblowers in their own right for the expert assistance that their firm had originally provided on behalf of Claimant #2 occurred shortly after Redacted

Claimants #3 and #4. As a result, we are treating Claimant #2's decision to forgo an award based on that information as ineffective, as we believe that Claimant #2 based that decision on an (incorrect) expectation that Claimants #3 and #4 would be able to recover an award directly from the Commission. Were we to do otherwise, it is possible that Claimants #3 and #4 might be prejudiced in their ability to receive any compensation from Claimant #2 based on Claimant #2's award total. *See infra* at 6-7 (discussing Redacted

The CRS’s Preliminary Determination recommended that the Commission deny an award to Claimants #3 and #4.

B. Analysis

We find that the record does not support an award to Claimants #3 and #4. In discussing the grounds for our determination below, we address: (1) the submissions made (and information shared) with the Commission before Redacted, when Redacted firm was serving as an expert for Claimant #2; (2) the Claimants’ Redacted TCR submission; and (3) the information Claimants #3 and #4 provided after the Redacted submission.⁹

1. Information provided before

Redacted

With respect to the information and assistance that Claimants #3 and #4 provided in connection with the Covered Action before the submission of their Redacted Form TCR, Claimants #3 and #4 were not “whistleblowers” under Rule 21F-2(a)(1) of the Exchange Act.

To qualify as a whistleblower, an individual must (among other things) provide information regarding a potential securities law violation to the Commission in the form and manner required by Rule 21F-9(a) of the Exchange Act. This is an essential first step in the

⁸ We have observed that since

Redacted

⁹ As referenced above, *see supra* footnote 6, Claimant #2 sought to forgo an award on the expert report and other contributions from Claimants #3 and #4’s firm. Claimant #2’s apparent desire that Claimants #3 and #4 receive an award in their own right does not, however, impact our obligation to ensure that they meet the award criteria and conditions in Section 21F of the Exchange Act and our rules thereunder.

sequence of required events to become eligible for an award. Failure to do so can result in the denial of an award application, even if the individual voluntarily provided original information to the Commission and that information led to the success of a covered action.¹⁰

It is undisputed that Claimants #3 and #4 did not submit a Form TCR to become whistleblowers until ^{Redacted}.¹¹ In the period before their TCR submission, Claimants #3 and #4 (through ^{Redacted} firm that Claimant #2 had retained on behalf of Claimant #2's whistleblowing efforts) were acting as experts, and the information ^{Redacted} firm provided during this period was offered exclusively in furtherance of Claimant #2's whistleblowing activities.¹² Accordingly, they cannot seek an award based on those submissions or meetings.¹³

In their response to the Preliminary Determination, Claimants #3 and #4 request that we use our discretionary authority under Exchange Act Rule 21F-8(a) to excuse their untimely submission of the ^{Redacted} Form TCR and, in doing so, to deem them whistleblowers for the preceding period. In support of this relief, the Claimants identify various purported extraordinary circumstances that post-dated both their decision to have ^{Redacted} firm serve as an expert on behalf of Claimant #2 and their initial submission pursuant to that arrangement.¹⁴

¹⁰ See Exchange Act § 21F(c)(2)(D).

¹¹ See Exchange Act §§ 21F(a)(6), 21F(b)(1), & 21F(b)(2)(D). See also Rule 21F-2(a)(1) & (2); Rule 21F-8(a).

¹² With respect to the information provided during this period, we find that Claimant #3's and #4's award applications suffer from a separate, albeit related, defect. Specifically, neither claimant complied with the requirement in Exchange Act Rule 21F-9(b), which provides that, "to be eligible for an award, you must declare under penalty of perjury at the time you submit your information pursuant to paragraph (a)(1) or (2) of [Rule 21F-9] that your information is true and correct to the best of your knowledge and belief."

¹³ The record indicates that the ^{Redacted} expert report and certain other assistance that Claimants #3 and #4 rely upon in seeking an award were provided by an incorporated entity—the ^{Redacted} firm ^{Redacted}—and not by Claimants #3 and #4 in their individual capacities. See ^{Redacted} Claimant #2's Expert Report, n.1. The ^{Redacted} firm itself would be ineligible for an award for those submissions, because only individuals can qualify as whistleblowers under Section 21F. These additional considerations further counsel against any determination that would retroactively deem Claimants #3 and #4 in their individual capacities as whistleblowers before their ^{Redacted} Form TCR.

¹⁴ The specific circumstances that they identified include difficulties in ^{Redacted}

Under Rule 21F-8(a), “the Commission may, in its sole discretion, waive any of [the] procedures [for submitting information or making a claim for an award] based upon a showing of extraordinary circumstances.” In determining whether a claimant has demonstrated extraordinary circumstances for purposes of Rule 21F-8(a) to excuse untimely submissions, we have previously looked to our decision in *In the Matter of the Application of PennMont Sec.*¹⁵ There, in determining whether extraordinary circumstances had been shown to permit an untimely filing under Commission Rule of Practice 420(b), 17 C.F.R. § 201.420(b), we explained that “the ‘extraordinary circumstances’ exception is to be narrowly construed and applied only in limited circumstances.”¹⁶ An extraordinary circumstance is one “where the reason for the failure timely to file was beyond the control of the applicant that causes the delay.”¹⁷ Moreover, subsequent events cannot be used to retroactively excuse an untimely submission.¹⁸ The critical question is whether the facts and circumstances that gave rise to the procedural deficiency were sufficiently beyond the control of the claimant to support an exercise of our discretionary authority under Rule 21F-8(a) to excuse the untimeliness.

We find that Claimants #3 and #4 have failed to establish the existence of any “extraordinary circumstances” at the time of their procedural failures that would justify a waiver of our procedural requirements. It is undisputed that the ^{Redacted} ^{Redacted} firm ^{Redacted} ^{Redacted} agreed to produce an expert report (and to provide other assistance) for Claimant #2 on behalf of Claimant #2’s whistleblowing activities at the Commission. We find that their deliberate decision does not constitute an extraordinary circumstance that might excuse their failure timely to comply with Rule 21F-9’s requirements for becoming whistleblowers

as to allow Claimants #3 and #4 to be treated as whistleblowers from the time that their firm’s expert report was first submitted to the Commission in ^{Redacted}.

¹⁵ Exchange Act Release No. 61967, 2010 WL 1638720 (Apr. 23, 2010), *aff’d PennMont Sec. v. SEC*, 414 F. App’x 465 (3d Cir. 2011).

¹⁶ *PennMont*, 2010 WL 1638720 at *4.

¹⁷ *Id.*; see also *Order Determining Whistleblower Award Claim*, Exchange Act Release No. 72178 (May 16, 2014); *Order Determining Whistleblower Award Claim*, Exchange Act Release No. 72659 (July 23, 2014); *Order Determining Whistleblower Award Claim*, Exchange Act Release No. 77368 (Mar. 14, 2016), *aff’d sub nom. Cerny v. SEC*, No. 16-934, 2017 WL 3911581 (2d Cir. Sept. 7, 2017).

¹⁸ Exchange Act Release No. 72178, 2014 WL 1998521 (May 16, 2014) (finding that subsequent events did not excuse an untimely whistleblower award application).

eligible for their own separate awards; accordingly, we decline to exercise our discretionary authority under Rule 21F-8(a).¹⁹

2. The ^{Redacted} TCR

As we explain below, the ^{Redacted} TCR cannot be the basis for an award because it neither contained original information nor led to the success of the Covered Action.

(i) The ^{Redacted} TCR did not contain original information.

Rule 21F-4(b)(1)(ii) provides *both* the general requirement that to qualify as original information, the information a whistleblower provides must “[n]ot already [be] known to the Commission from any other source,” *and* the exception for circumstances where the Commission already knows the information but the whistleblower is “the original source of the information.” Rule 21F-4(b)(5) defines “original source” in pertinent part as follows: “The Commission will consider you to be an original source of the same information that we obtain from another source if the information satisfies the definition of original information and the other source obtained the information from you or your representative.” Claimants #3 and #4 do not dispute that the Commission was already in possession of all of the information that they included in the ^{Redacted} ^{Redacted}, but instead argue that they were the “original source” of that information.²⁰ We reject that argument based on our determination that reading the original-source exception to cover Claimants #3 and #4 would be inconsistent with Rule 21F-4(b)(1)(ii)’s language and purpose and could undermine the proper functioning of our award program.

First, as a textual matter, Rule 21F-4(b)(5) is best read to foreclose the suggestion that an expert retained by and working on behalf of a whistleblower could be viewed as an “original source” of information developed in the context of that contractual relationship and submitted on behalf of the whistleblower to the Commission. By expressly distinguishing the “original source” from “the other source” that first provided the information to the Commission, the definition contemplates a degree of independence that is lacking in the relationship between a whistleblower and the whistleblower’s retained expert. In these circumstances, the expert is not reasonably viewed as an independent or separate “source”; rather, where an expert is hired to

¹⁹ Notably, as discussed above,

^{Redacted}

²⁰ See Claimants #3 and #4’s Response to the Preliminary Determination at 8 (“[W]hile it was indeed known to the Commission from another source prior to us filing our own TCR, the ‘other source,’ [Claimant #2], clearly obtained the information from us and has acknowledged this.”).

provide analysis and other services to assist a whistleblower in developing and presenting a claim to the Commission, the whistleblower is the only “source”—within the meaning of Rule 21F-4(b)—of information developed through or derived from the expert’s efforts and submitted to the Commission.

That reading is also consistent with, and supported by, the rationale for the original-source exception provided during the rulemaking that produced Rule 21F-4(b). The proposing release identified two scenarios in which the Commission anticipated an “original source” satisfying the “original information” requirement: (1) where a whistleblower first reports the information to Congress, any other authority of the federal government, a state Attorney General or securities regulatory authority, any self-regulatory organization, or the Public Company Auditing Oversight Board, and that law-enforcement or regulatory authority provides the information to the Commission before the whistleblower does; or (2) where the whistleblower reports the information pursuant to an entity’s internal whistleblower, legal, or compliance procedures for reporting allegations of possible violations of law, and the entity then reports the information to the Commission before the whistleblower does. Applying the original-source exception in these two situations is consistent with the Commission’s interest in encouraging whistleblowers to come forward promptly by reporting to any appropriate law-enforcement or regulatory authority, or by reporting internally.²¹

In crafting the original-source exception, we also left open the possibility that it could be applied in the context of multiple whistleblowers where an initial whistleblower submitted information to the Commission that he or she had obtained from an individual who later submitted the same information as a whistleblower. Although we could have adopted a narrower definition of original source that might have precluded subsequent whistleblowers from recovering in this scenario under the original-information requirement, we did not do so. This determination was based on the recognition that there could be some potential situations where having the initial whistleblower’s source come forward—even if he or she did not present new information that was unknown to the Commission—could still significantly contribute to the success of the Commission’s action.²²

²¹ See *Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934*, Exchange Act Release No. 34-63237, 75 Fed. Reg. 70488, 70495 (Nov. 17, 2010). Notably, whistleblowers who first report to one of the listed authorities or internally, and then follow-up by reporting to the Commission within 120 days, will get the additional benefit of being deemed to have “provided [the] information [to the Commission] as of the date of [the] original disclosure, report, or submission” for purposes of any award analysis. See Rule 21F-4(b)(7) (original-source lookbackrule).

²² See *Securities Whistleblower Incentives and Protections (“Adopting Release”)*, Exchange Act Release No. 34-64545, 76 Fed. Reg. 34300, 34321 (June 13, 2011). For example, the

Claimants #3 and #4 do not fit within any of the circumstances for which we crafted the original source rule. In particular, we do not discern any programmatic benefit from permitting Claimant #2's hired experts to come forward separately as the original source of Claimant #2's information, and as we discuss further below, a contrary result could negatively affect the whistleblower program. Further, given that Claimants #3 and #4 knowingly chose to participate in the whistleblower process as Claimant #2's experts in the first instance, there is no inequity in not permitting Claimants #3 and #4 to fundamentally alter their role and claim to be the original source of Claimant #2's information.

Even apart from the foregoing rationale, we separately conclude that where an expert is retained by a whistleblower to provide information and analysis to the Commission on the whistleblower's behalf, the retained expert should be deemed to have forfeited and waived any subsequent claim to being the original source of that information if such information was previously provided to the Commission by or on behalf of the whistleblower who retained the expert. As a matter of policy, we believe that where an individual, such as an expert, is retained to perform services on behalf of a whistleblower or in furtherance of another's whistleblowing activities, that individual cannot subsequently claim that the information that he or she provided to the whistleblower, and that was correspondingly submitted to the Commission on behalf of the whistleblower, as his or her own information eligible for award consideration. A contrary result could create a perverse incentive in future cases for retained experts (or other professionals retained to assist whistleblowers) to abandon their contractual claims and obligations with whistleblowers in order to pursue an award on their own behalf, and we do not believe that this would be consistent with the proper functioning of our award program because, among other things, it could discourage whistleblowers from retaining professionals to help them refine and supplement their tips.²³

whistleblower who was the original source might have first-hand knowledge and thus be able to provide particularly compelling testimony at trial; or the original source could be someone that the Commission is unaware of or could not reach, and whose involvement with the investigation could lead the wrongdoers to agree to a settlement.

²³ With the exception of anonymous whistleblowers who are required to obtain counsel, *see* Exchange Act Rule 21F-7(b), we note that the Commission does not require whistleblowers to retain experts or other professionals to assist them in their whistleblowing. Moreover, nothing in our decision today is intended either to encourage or to discourage whistleblowers in seeking assistance from professionals. Whistleblowers who provide specific, credible, and timely information of securities law violations may be eligible for an award, including a full award of up to 30% of the monetary sanctions collected, whether or not their information is accompanied by expert knowledge or analysis, or provided with the assistance of a lawyer or other professional.

(ii) The ^{Redacted} TCR did not lead to the success of the Covered Action.

The ^{Redacted} submission cannot be the basis for an award for a second critical reason: The submission did not lead to the success of the Covered Action within Exchange Act Rule 21F-4(c)(2).²⁴ The Commission’s Investigation was already underway (and indeed nearly complete) when Claimants #3 and #4 made their ^{Redacted} submission. As a result, in order to satisfy the “led to” requirement, they must demonstrate that *their* “submission significantly contributed to the success of the action.”²⁵ Moreover, given Rule 21F-4(c)(2)’s use of the term “submission,” and not “information,” Claimants #3 and #4 may not piggyback off of the contributions to the Investigation that resulted from the earlier disclosures of the original information. Rather, they must demonstrate that something unique about their submission of information made an additional significant contribution to the success of the Covered Action.²⁶

But Claimants #3 and #4 have not shown that their ^{Redacted} submission itself contributed to the success of the action. And the declaration from the Enforcement staff member involved with the Covered Action explains that the investigative staff did not use the submission, as the same information was already in the staff’s possession. Nor is there any indication in the record that this is the rare situation where having an individual who claims to be the original source come forward to disclose information already known to the Commission somehow significantly contributed to the success of the Covered Action. Accordingly, we find that the ^{Redacted} TCR did not lead to the success of the Covered Action.

3. Information submitted after the ^{Redacted} TCR

After Claimants #3 and #4 submitted their Form TCR (and thus for the first time qualified as whistleblowers), they provided certain limited new information to the Commission. However, we find that the record demonstrates that none of the information provided by Claimants #3 and #4 following the submission of their TCR led to the successful enforcement of the referenced 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.

²⁴ The other prongs of Exchange Act Rule 21F-4(c) are not applicable here.

²⁵ Rule 21F-4(c)(2) (emphasis added). *See also Adopting Release*, 76 Fed. Reg. 34300, 34321/3-34322/2 (explaining that in the case of two competing whistleblowers where the second whistleblower to come forward to the Commission was the original source, the second whistleblower in order to obtain an award will need to demonstrate that his submission “significantly contributed” to the enforcement action if the investigation was already ongoing when he came forward).

²⁶ *See Adopting Release*, 76 Fed. Reg. 34322/1. *See also supra* discussion at footnote 22.

* * *

For the foregoing reasons, the award applications submitted by Claimants #3 and #4 are denied.

V. Claimant #5's Claim Is Denied

A. Preliminary Determination

The CRS preliminarily determined to deny Claimant #5's award claim because Claimant #5's information did not lead 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 because none of the information caused the Commission to: (i) commence an examination, (ii) open or reopen an investigation, or (iii) inquire into different conduct as part of a current Commission examination or investigation under Rule 21F-4(c)(1) of the Exchange Act; or significantly contributed to the success of a Commission judicial or administrative enforcement action under Rule 21F-4(c)(2) of the Exchange Act. In reaching this preliminary determination, the CRS considered record evidence—including a declaration from an Enforcement staff member assigned to the Investigation—that revealed that the information provided to the Commission by Claimant #5 did not help advance the Investigation and neither was used in nor affected the charges brought by the Commission in the Covered Action or the successful enforcement of the Covered Action.

Although Claimant #5 provided information to the Commission in ^{Redacted} _{Redacted}, that information was not received by the Enforcement staff working on the Investigation at that time. Rather, Claimant #5 met with Commission staff unrelated to the Investigation. The first time staff on the Investigation received any information from Claimant #5 was in ^{Redacted}. The information provided by Claimant #5 at that time, consisting of ^{Redacted}, was duplicative of information and materials that Enforcement staff already knew of or had obtained during the course of the Investigation.

Claimant #5 provided supplemental information to the staff on the Investigation in ^{Redacted} _{Redacted} (which was re-submitted in ^{Redacted}), met with staff in ^{Redacted}, and provided additional information and documents to staff in ^{Redacted}. However, the information provided by Claimant #5 in the supplemental submissions and during the ^{Redacted} meeting was largely duplicative of other information that staff had already received or had learned during the course of the Investigation. By the time staff received Claimant #5's supplemental submissions and met with Claimant #5 in ^{Redacted}, the Investigation had been ongoing for over two and a half years and staff had already conducted significant investigative steps. The Investigation also had been ^{Redacted}, and

much of Claimant #5's information was duplicative of information

Redacted

Redacted

B. Response

Claimant #5's Response and the declaration submitted by Claimant #5's counsel in support of the Response (hereinafter, "Counsel Declaration") make numerous arguments challenging the Preliminary Determination. We identify herein only several of the principal contentions.

First, Claimant #5 complains that Claimant #5 provided information to the Commission in ^{Redacted} concerning the conduct at issue in the Investigation—before Claimant #2—but that the CRS found Claimant #2's information to be worthy of an award while preliminarily denying an award to Claimant #5. Claimant #5 surmises that this is the result of bias against Claimant #5.

Second, Claimant #5 complains that not only did Claimant #5 submit information before Claimant #2, but that Claimant #5's information was qualitatively better than the information provided by Claimant #2 (as well as by Claimant #1).

Finally, Claimant #5 contends that the CRS credited Claimant #2 (through Claimant #2's retained experts, Claimants #3 and #4) for providing information to staff in ^{Redacted} concerning ^{Redacted}, but that Claimant #5 had earlier provided the same information to the staff in Claimant #5's ^{Redacted} submissions, ^{Redacted} submission, and even in Claimant #5's initial submissions in ^{Redacted}

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²⁷ Claimant #5 raises several unpersuasive contentions concerning the administrative record. *First*, Claimant #5 argues that certain documents provided to Claimant #5 following the issuance of the Preliminary Determination, including an Enforcement staff declaration, were over-redacted, which Claimant #5 contends impaired Claimant #5's ability to contest the Preliminary Determination. We have reviewed the redactions in the documents that Claimant #5 has identified and find that Claimant #5 was not prejudiced as a result of those redactions, particularly given that the unredacted information that was provided to Claimant #5 not only sufficiently explained why the information Claimant #5 provided did not contribute to the Investigation, but also included substantial information demonstrating the value of the information provided by the other claimants. (Indeed, we think it fair to observe that the unredacted information that was provided to Claimant #5 enabled Claimant #5's counsel to prepare a thorough and comprehensive Response to the Preliminary Determination.) *Second*, Claimant #5 contends that Claimant #5 should have been permitted to review the submissions made by other claimants, but here again we find that Claimant #5 was not prejudiced by the determination to withhold these materials from Claimant #5. *Third*, Claimant #5 contends that the staff should have included within the record internal SEC documents and communications

C. Analysis

We find that the record firmly demonstrates that Claimant #5 did not provide information that led to the success of the Covered Action. In reaching this conclusion, we have carefully considered the entire record as it relates to Claimant #5's award application, including the materials that Claimant #5 submitted in response to the Preliminary Determination and the detailed supplemental declaration prepared by an Enforcement staff member from the Investigation ("Supplemental Enforcement Declaration"). We find that the Supplemental Enforcement Declaration is comprehensive and persuasive, and incorporate the factual statements therein as our findings of fact.

With respect to those contentions raised by Claimant #5 that we expressly identified above, we note that the Supplemental Enforcement Declaration demonstrates the following. *First*, the Enforcement staff on the Investigation received information from Claimant #2 (as well as from Claimant #1) before receiving *any* information from Claimant #5.²⁸ *Second*, the information provided by Claimant #5 was not of a higher quality than the information provided by Claimant #2 (or Claimant #1). Lastly, the information that Enforcement staff on the Investigation received from Claimant #5 concerning Redacted
Redacted was not the same information that the staff subsequently received from Claimants #3 and #4, was not of the same high quality, and did not lead to the success of the Covered Action.

evaluating the importance, value and merits of the various claimants' submissions, and that without these materials, Claimant #5 cannot test the descriptions and conclusions contained in the Enforcement staff's declaration. We reject this contention, as our whistleblower rules were carefully designed to prevent such broad-based discovery into the internal deliberative process files relating to Commission investigations and enforcement actions, and instead have provided that staff declarations should be the primary vehicle for relaying the staff's assessment of the value and relevance of information provided by whistleblowers. *Finally*, Claimant #5 suggests that certain of Claimant #5's supplemental submissions (specifically the submissions made in Redacted) were not included in the administrative record, but we find based on the declaration prepared by an OWB staff member that these materials were not in fact excluded from the record.

²⁸ Claimant #5 re-submitted the Redacted information to the Enforcement staff on the Investigation in Redacted. According to the Supplemental Enforcement Declaration, Claimant #5's re-submitted information contained very little detail on the relevant issues and primarily consisted of publicly-available documents. As such, the information provided by Claimant #5 in Redacted and re-submitted in Redacted did not add meaningfully to the information and materials that the Enforcement staff on the Investigation already knew of or which were publicly-available to the staff.

VI. Claimant #6's Claim Is Denied

A. CRS Preliminary Denial

The CRS preliminarily determined to recommend that Claimant #6's award claim be denied because Claimant #6's information did not lead to the successful enforcement of the Covered Action. In ^{Redacted}, Enforcement staff on the Investigation received Claimant #6's Form TCR, and on ^{Redacted}, had a conference call with Claimant #6 and Claimant #6's counsel. Staff also received a supplemental submission from Claimant #6 in ^{Redacted}. At the time Enforcement staff received Claimant #6's submission in ^{Redacted} they were close to finishing the Investigation. Claimant #6 did not provide any new information in the written submissions or during the conference call that added value to the case. Claimant #6's information was largely duplicative of other information that staff had already received or had learned during the course of the Investigation.

B. Response

Claimant #6 contends that notwithstanding that Claimant #6 submitted information later than other whistleblowers and that much of the information may have been known, Claimant #6 must have contributed to the success of the Covered Action given Claimant #6's ^{Redacted} coupled with Claimant #6's analysis and explanations. As an example, Claimant #6 contends that during the call with the Enforcement staff in ^{Redacted}, the staff was very interested in Claimant #6's ^{Redacted}. Claimant #6 then points to the Commission Order which states that ^{Redacted} during the relevant time period, and Claimant #6 surmises that Claimant #6's information during the call somehow contributed to this part of the Order.

C. Analysis

After reviewing the record, including Claimant #6's Response, we find that the record conclusively shows that Claimant #6 did not provide original information that led to the successful enforcement of the Covered Action. The record shows that by the time Enforcement staff had their conference call with Claimant #6 in ^{Redacted}, staff had already obtained from the Company documents ^{Redacted}, and two internal Commission industry experts had already ^{Redacted} 29

²⁹ Furthermore, we find that during their call in ^{Redacted}, staff did not ask Claimant #6 for Claimant #6's opinion on ^{Redacted} but in fact Claimant #6, without solicitation or questioning from staff, volunteered Claimant #6's belief that ^{Redacted}

Contrary to Claimant #6's supposition, the ^{Redacted} stated in the Commission's Order was based on a ^{Redacted}, and was not based on any information provided by Claimant #6 during the conference call or in the written submissions.

None of the information provided by Claimant #6, including Claimant #6's views about ^{Redacted}, helped advance the Investigation and was not used in or affected the charges brought by the Commission in the Covered Action or the successful enforcement of the Covered Action.

VII. Claimant #7's Claim is Denied

A. CRS Preliminary Denial

The CRS preliminarily determined to deny Claimant #7's claim because Claimant #7's information did not lead to the successful enforcement of the Covered Action. In doing so, the CRS relied on record evidence that demonstrated the facts described below. The first contact by the Enforcement staff on the Investigation with Claimant #7 was in ^{Redacted} at which point staff was almost finished with the Investigation. Most of the information provided by Claimant #7 was duplicative of other information that staff had already received or had learned during the course of the Investigation. However, there was one allegation made by Claimant #7 which staff was not aware, concerning certain incriminating statements purportedly made by ^{Redacted} ^{Redacted}. Staff took additional investigative steps to follow-up on Claimant #7's allegation, but the staff was ultimately unable to substantiate this allegation.

B. Claimant #7's Response

In the response, Claimant #7 contends that shortly after Claimant #7 provided information to the Enforcement staff about the incriminating statements, staff re-interviewed a witness. Relying on the Commission's award determination in *In the Matter of the Claim for Award*, File No. 2016-09, Exchange Act Release No. 77833 (May 13, 2016) ("May 2016 Order"), Claimant #7 contends that even if staff was not able to corroborate the incriminating statements, Claimant #7 still significantly contributed to the Covered Action because the evidence provided by Claimant #7, even though uncorroborated by the staff, contributed to accelerating resolution by generating sufficient concerns among Company personnel to motivate (or further motivate) a settlement of the Covered Action.

C. Analysis

Claimant #7's argument that Claimant #7's unsubstantiated allegations increased the Company's willingness to more quickly settle the matter is based mainly on Claimant #7's speculation and is inconsistent with the factual record. In ^{Redacted}, several months before

staff re-interviewed the witness, staff and counsel for the Company had already commenced settlement discussions, and before the re-interview, counsel for the Company had expressed a willingness and desire to engage in settlement discussions to bring a resolution to the matter. At no point during the settlement negotiations did the Company indicate that it was motivated to settle the charges or that it would agree to the penalty amount because of staff's re-interview of the witness.

Furthermore, there was nothing meaningful or of significance that the witness said during the re-interview that in any way affected the core findings of the Investigation that staff was discussing with the Company before the re-interview. And Company counsel did not indicate to staff, either during the re-interview or afterwards, that the information provided by the witness during the re-interview was alarming, surprising, or in any way changed the dynamics of the case or of their settlement position.

As such, this case is unlike the Commission's award determination in the May 2016 Order. There, the Enforcement staff following the issuance of the Preliminary Determination provided additional record evidence that demonstrated that the claimant's "information was meaningful and that it made a substantial and important contribution to the successful resolution of the Covered Action" in that it "caused Enforcement staff to focus on [the misconduct] when staff might otherwise not have done so, and this evidentiary development strengthened the Commission's case by meaningfully increasing Enforcement staff's leverage during the settlement negotiations."³⁰

Here, there is no support in the record demonstrating that the unsubstantiated allegations had any effect whatsoever on the resolution of the Covered Action.

But in any event, to be eligible for a whistleblower award as we interpret the relevant language of the statute and our rules, there must be some nexus between the information provided and the successful claims in the underlying enforcement action. We find that there is simply no such connection between the unsubstantiated allegations offered by Claimant #7 and the settled claims in the Covered Action.

VIII. Conclusion

Accordingly, it is ORDERED that Claimant #1 shall receive an award of ^{Redacted} percent _{Redacted} of the monetary sanctions collected in the Covered Action.

³⁰ May 2016 Order at 3.

ORDERED that Claimant #2 shall receive an award of ^{Redacted} percent ^{Redacted} of the monetary sanctions collected in the Covered Action.³¹

ORDERED that Claimant #3's, Claimant #4's, Claimant #5's, Claimant #6's, and Claimant #7's whistleblower award claims are denied.

By the Commission.

Brent J. Fields
Secretary

³¹ We are aware that on

Redacted