

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION
SECURITIES EXCHANGE ACT OF 1934
Release No. 87662 / December 5, 2019
WHISTLEBLOWER AWARD PROCEEDING
File No. 2020-2

In the Matter of the Claims for Award

in connection with

Redacted

Notice of Covered Action Redacted

ORDER DETERMINING WHISTLEBLOWER AWARD CLAIMS

The Claims Review Staff (“CRS”) issued a Preliminary Determination recommending the denial of the whistleblower award applications submitted by the following individuals (collectively, the “Claimants”) in connection with the above-referenced proceeding (the “Covered Action”):

Redacted (“Claimant 1”);
Redacted (“Claimant 2”);
Redacted (“Claimant 3”);
Redacted (“Claimant 5”);
Redacted (“Claimant 8”); and
Redacted (“Claimant 10”).¹

Claimants filed timely responses contesting the preliminary denials. For the reasons discussed below, and upon careful consideration of the administrative record with respect to each contesting claimant, Claimants’ award applications are denied.

¹ Eight other individuals also submitted award applications in connection with the Covered Action. However, these individuals did not contest the preliminary denial of their claims and, as such, the Preliminary Determination with respect to their award claims became the Final Order of the Commission through operation of Exchange Act Rule 21F-10(f), 17 C.F.R. § 240.21F-10(f).

I. INTRODUCTION

A. The Covered Action

On ^{Redacted}, staff in the Commission's Division of Enforcement ("Enforcement") opened a matter under inquiry ("MUI") based on a corporate entity's tip to the Commission's Division of Trading and Markets two days earlier concerning misstatements and omissions by ^{Redacted} (the "Company") in public filings ^{Redacted}.

The MUI was converted to an investigation in ^{Redacted} and then a Formal Order of Investigation was issued in ^{Redacted}, entitled ^{Redacted}.

. Initially, the investigation included one investigative track, referred to in the administrative record as the ^{Redacted} (the "First Track"), which later culminated in the Covered Action.

In ^{Redacted}, the Enforcement staff initiated a second investigative track as part of the same investigation, referred to in the administrative record as the ^{Redacted} ^{Redacted} (the "Second Track"). The staff initiated the Second Track based upon the staff's own quantitative analysis of ^{Redacted}.

. This review consisted of a quantitative analysis that was independently devised and conducted by Commission staff as part of a broader initiative ^{Redacted}.

. The Second Track was conducted by a separate Enforcement team that investigated different facts and securities violations from the First Track and resulted in a separate enforcement action with different named defendants, underlying facts, and charged violations. Neither investigative track focused on any matters relating to the Company's and its affiliates' conduct ^{Redacted}.

The First Track focused on the Company's failure to inform its investors about ^{Redacted}.

. The First Track ultimately resulted in the Covered Action, which was a settled administrative proceeding instituted by the Commission on ^{Redacted}.

. In the Covered Action, the Commission found that the Company violated ^{Redacted}.

On ^{Redacted}, the Office of the Whistleblower (“OWB”) posted Notice of Covered Action ^{Redacted} on the Commission’s public website to notify interested individuals to file award applications with respect to the Covered Action within 90 days, by ^{Redacted}.³ OWB received whistleblower award applications from all of the Claimants.

B. The Preliminary Determination

The CRS issued a Preliminary Determination⁴ recommending that the Commission deny each of the Claimants’ award applications because none of the information provided by any of the Claimants led to the successful enforcement of the Covered Action.⁵ The record supporting that Preliminary Determination included the declarations of the primary Enforcement staff attorneys responsible for the First Track and Covered Action, which stated under penalty of perjury that the Claimants’ tips to the Commission were not used in the investigation, including the First Track, or enforcement of the Covered Action.

The CRS also preliminarily denied Claimant 1’s claim on the additional independent grounds that Claimant 1’s award application was untimely⁶ and that any information Claimant 1 provided to the Commission for the first time before July 21, 2010 was not “original information.”⁷ The CRS also preliminarily denied Claimant 8’s claim on the additional independent ground that Claimant 8 failed to qualify as a whistleblower by not submitting Claimant 8’s tips to the Commission on Form TCR.⁸

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

⁴ See Exchange Act Sections 21F(b), (c), 15 U.S.C. § 78u-6(b), (c); Exchange Act Rule 21F-10, 17 C.F.R. § 240.21F-10.

⁵ Exchange Act Section 21F(b)(1), 15 U.S.C. § 78u-6(b)(1); Exchange Act Rules 21F-3(a)(3) & 21F-4(c), 17 C.F.R. §§ 240.21F-3(a)(3) & 21F-4(c).

⁶ See Exchange Act Rule 21F-10(b), 17 C.F.R. § 240.21F-10(b).

⁷ See Exchange Act Section 21F(a)(1), 15 U.S.C. § 78u-6(a)(1); Exchange Act Rule 21F-4(b)(1)(iv), 17 C.F.R. § 240.21F-4(b)(1)(iv).

⁸ See Exchange Act Rules 21F-9(a)-(b), 17 C.F.R. §§ 240.21F-9(a)-(b).

The Claimants subsequently filed timely written responses contesting the Preliminary Determination.⁹

II. ANALYSIS

To qualify for a whistleblower award under Section 21F of the Exchange Act, an individual must voluntarily provide the Commission with original information that leads to the successful enforcement of a covered action.¹⁰ As relevant here, information leads to the success of a covered action if it: (1) causes the Commission staff to (i) open or reopen an investigation, or (ii) inquire into different conduct as part of a current Commission investigation;¹¹ or (2) significantly contributes to the success of a Commission judicial or administrative enforcement action.¹²

Having considered the administrative record with respect to each contesting claimant, including their responses to the Preliminary Determination, we conclude that Claimants 1, 2, 3, 5, 8 and 10 are not eligible for a whistleblower award because none of their respective information led to the successful enforcement of the Covered Action. In particular, we credit the staff declarations in the administrative record, which demonstrate that the information submitted by the Claimants did not cause the Commission staff to open the investigation that resulted in the Covered Action, did not cause the staff to initiate a new line of inquiry or reopen an investigation that resulted in the Covered Action, and did not significantly contribute to the success of the Covered Action.

First, no claimant can be credited for causing the Enforcement staff to open the investigation. The staff declarations demonstrate that the investigation, which included

⁹ Upon receiving executed confidentiality agreements from Claimants 2, 3, 5, and 10, OWB provided each of these claimants with a copy of the record that formed the basis of the Preliminary Determination as to their respective claims. *See* Exchange Act Rule 21F-10(e)(1)(i), 17 C.F.R. § 240.21F-10(e)(1)(i). Claimants 1 and 8 submitted their requests for reconsideration without having requested a copy of the record that formed the basis of the Preliminary Determination as to their claims.

¹⁰ *See* Exchange Act Section 21F(b)(1), 15 U.S.C. § 78u-6(b)(1).

¹¹ *See* Exchange Act Rule 21F-4(c)(1), 17 C.F.R. § 240.21F-4(c)(1).

¹² *See* Exchange Act Rule 21F-4(c)(2), 17 C.F.R. § 240.21F-4(c)(2). In determining whether information significantly contributed to an enforcement action, we consider “whether the information allowed us to bring: (1) Our successful action in significantly less time or fewer resources; (2) additional successful claims; or (3) successful claims against additional individuals or entities.” *Securities Whistleblower Incentives and Protections*, 76 Fed. Reg. 34300, 34325 (June 13, 2011). In other words, “[t]he individual’s information must have been ‘meaningful’ in that it ‘made a substantial and important contribution’ to the success of the covered action.” *Order Determining Whistleblower Award Claims*, Exch. Act Rel. No. 85412, 2018 SEC LEXIS 615, at *16 (Mar. 26, 2019); *Order Determining Whistleblower Award Claims*, Exch. Act Rel. No. 82897, 2018 SEC LEXIS 750, at *16 (Mar. 19, 2018).

the First Track from its inception, was opened on ^{Redacted}, based upon a non-whistleblower complaint, wholly separate from and independent of Claimants' tips.¹³

Second, none of the information submitted by Claimants caused the staff to initiate a new line of inquiry or significantly contributed to the successful enforcement of the Covered Action. The staff declarations demonstrate that the Enforcement staff for the First Track did not use any of the Claimants' information during the course of the First Track or as part of the Covered Action.

Third, for the reasons discussed below, we reject the contrary arguments raised in the Claimants' respective written responses to the Preliminary Determination, and we find additional grounds for denying the award applications of Claimants 1 and 8.

Moreover, we conclude that the related action award claims submitted by Claimants 1, 2, 3, and 10 should be denied because these claimants have not qualified for an award for the Covered Action, which is a necessary precondition for a related action award.¹⁴ Also, the civil and administrative cases that Claimants 1, 2, 3, and 10 submitted for related action award claims should be denied because the various matters identified by these claimants were not brought by designated non-Commission agencies and thus do not qualify as "related actions."¹⁵

¹³ For purposes of this analysis under Exchange Act Rule 21F-4(c)(1), we deem the investigation to have been opened the date that the MUI was opened—^{Redacted}—regardless of the fact that the MUI was converted to an "investigation" the following month. In addition, because the investigation was opened on ^{Redacted}, the Claimants' information could not have prompted its opening unless they had submitted their information on or prior to that date. But any information submitted in or before ^{Redacted} would not qualify as "original information" to support an award because it would have been submitted to the Commission for the first time before July 21, 2010. See Exchange Act Section 21F(a)(1), 15 U.S.C. § 78u-6(a)(1); Exchange Act Rule 21F-4(b)(1)(iv), 17 C.F.R. § 240.21F-4(b)(1)(iv); see also *Order Denying Whistleblower Award Claim*, Exch. Act Rel. No. 70772, 2013 WL 5819623, at *5-9 (Oct. 30, 2013), *pet. rev. denied sub nom. Stryker v. SEC*, 780 F.3d 163 (2d Cir. 2015).

¹⁴ See Exchange Act Section 21F(b), 15 U.S.C. § 78u-6(b); Exchange Act Rules 21F-3(b), (b)(1), 21F-4(g) & (f), 21F-11(a), 17 C.F.R. §§ 240.21F-3(b), (b)(1), 21F-4(g) & (f), 21F-11(a) (providing that related action awards 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); *Order Determining Whistleblower Award Claims*, Exch. Act Rel. No. 84506, 2018 SEC LEXIS 3031, at *8 n.5 (Oct. 30, 2018) (same); *Order Determining Whistleblower Award Claim*, Exch. Act Rel. No. 84503, 2018 SEC LEXIS 3030, at *7 n.4 (Oct. 30, 2018) (same); *Order Determining Whistleblower Award Claims*, Exch. Act Rel. No. 80596, 2017 SEC LEXIS 1318, at *11 n.10 (May 4, 2017) (same).

¹⁵ See Exchange Act Rules 21F-3(b)(1), 21F-4(f) & (g), 17 C.F.R. §§ 240.21F-3(b)(1), 21F-4(f), (g).

A. Claimant 1

1. Claimant 1's information did not lead to the successful enforcement of the Covered Action.

Claimant 1 submitted numerous tips and additional information, which the Commission received in ^{Redacted} and on various dates in ^{****}. In those submissions Claimant 1 provided information concerning, among other things, a ^{****} criminal prosecution of the Company's employees and other individuals, as well as a ^{****} civil suit brought by Claimant 1 against the Company ^{Redacted}.

The underlying factual events discussed in Claimant 1's submissions allegedly occurred between 1982 and 1990. Claimant 1 also claims to have previously provided this same information to the Commission on two earlier occasions, specifically on or around ^{Redacted} and ^{Redacted}.¹⁶

The staff declarations in the administrative record, which we credit, demonstrate that none of Claimant 1's information led to the successful enforcement of the Covered Action. The declaration of one of the primary Enforcement staff attorneys responsible for the First Track and the Covered Action attests that the Enforcement investigative team did not receive any information from Claimant 1, that they did not have any communications with Claimant 1, and that Claimant 1 did not assist or contribute in any way to the First Track or the Covered Action. Moreover, the declaration of the OWB staff attorney corroborates, based on a review of the Commission's files, that none of the information submitted by Claimant 1 in ^{****} and ^{****} was shared with the Enforcement investigative team responsible for the First Track.¹⁷

Both the nature and the timing of Claimant 1's tips corroborate these staff declarations. The nature of the information that Claimant 1 provided, and claims to have provided, to the Commission about the criminal conduct of the Company's employees and about the Company's ^{Redacted}, on their face, do not relate to the claims that were asserted by the Commission in the Covered Action. Specifically, the Covered Action's claims are based upon events primarily occurring around ^{****} and ^{****}—decades after the facts alleged in Claimant 1's information—and concerned the Company's failure to make required disclosures ^{Redacted}.

With respect to timing, as reflected in the record, the ^{****} and ^{****} tips were submitted after the First Track had been opened

¹⁶ We assume without deciding that Claimant 1 did in fact make these submissions in ^{****} and ^{****}, although the record reflects that the Commission's files do not contain any such earlier submissions from Claimant 1.

¹⁷ The OWB staff declaration explains that the submissions were reviewed by other Commission staff and determined either to be not relevant or otherwise not warranting further action or investigation.

and the Covered Action had concluded, and so could not have been used during the First Track or enforcement action. Likewise, Claimant 1’s purported ^{Redacted} tip was sent to the Commission after the investigation was opened in ^{Redacted}.

Moreover, Claimant 1’s written response offers no factual evidence or legal arguments that rebut the Preliminary Determination that Claimant 1’s information did not lead to the successful enforcement of the Covered Action. Rather, Claimant 1 offers two objections to the Preliminary Determination in this regard, neither of which has merit.

First, Claimant 1 argues, without invoking specific facts or legal authority, that the CRS’s preliminary denial of the award claim violated Claimant 1’s rights under the Constitution and Bill of Rights, Claimant 1’s civil rights, and Claimant 1’s human rights. Claimant 1 also claims that the CRS violated two criminal statutes involving false statements and embezzlement, and violated the civil and uniformed services oath of office. But the Exchange Act and our whistleblower rules do not authorize granting Claimant 1’s award claim based upon any of those grounds.¹⁸ Furthermore, and specific to Claimant 1’s constitutional argument, there is no constitutional right to receive a Commission whistleblower award, and the grounds for denying Claimant 1’s claims are based upon Claimant 1’s failure to qualify for an award based on criteria that do not implicate Claimant 1’s constitutionally protected interests.¹⁹ Claimant 1 has not demonstrated eligibility for an award based on the neutral, objective criteria in the Exchange Act and our whistleblower rules.

Second, Claimant 1 argues that Claimant 1 deserves an award because Claimant 1 is a victim of ^{Redacted} the Company and the Company retaliated against Claimant 1, because Claimant 1 has been a longtime whistleblower to federal agencies about the Company, and because Claimant 1’s ^{***} tip to the Department of Justice (“DOJ”) led to the criminal prosecution of the Company’s employees and others. But even accepting these assertions as true for the sake of argument, they have no bearing on whether Claimant 1 qualifies for a whistleblower award for the Covered Action, since these arguments do not show Claimant 1 was a whistleblower who voluntarily provided

¹⁸ See Exchange Act Section 21F, 15 U.S.C. § 78u–6; Dodd-Frank Act Section 924, 15 U.S.C. §78u–7; Exchange Act Rules 21F-1 to 21F-17, 17 C.F.R. §§ 240.21F-1 to 21F-17 (authorizing awards when whistleblower voluntarily provided the SEC with original information that led to a successful enforcement action resulting in an order of monetary sanctions exceeding \$1 million, among other requirements); see also *Order Determining Whistleblower Award Claim*, Exch. Act Rel. No. 85273, 2019 WL 1098914, at *2 n.11 (Mar. 8, 2019) (permitting a limited and discretionary exemption from an award eligibility requirement if claimant satisfies the requirements that exemption is “necessary or appropriate in the public interest, and is consistent with the protection of investors”).

¹⁹ See, e.g., *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (recognizing that “a person has no ‘right’ to a valuable governmental benefit and . . . the government may deny him the benefit for any number of reasons” unless denial is on grounds that infringe constitutionally protected interests).

the Commission with original information that led to a successful enforcement of the Covered Action²⁰; nor do these arguments show that Claimant 1 meets any of the other requirements necessary to qualify for whistleblower awards.²¹

We therefore conclude that Claimant 1's information did not lead to the successful enforcement of the Covered Action, and that as a result, Claimant 1 is ineligible for an award with respect to either the Covered Action or any related action.²²

2. Claimant 1's whistleblower award application was untimely.

Claimant 1 first submitted an award application identifying the Covered Action (Redacted) by U.S. Mail postmarked Redacted.²³ This date was several months after the 90-day deadline of Redacted, which was listed on the Notice of Covered Action posted on the Commission's public website.²⁴ Claimant 1's award application was thus untimely.²⁵ In responding to the Preliminary Determination, Claimant 1 argues that we should excuse this untimeliness because of extraordinary circumstances consisting of an amended award application submitted by Claimant 1 in Redacted. But we have consistently interpreted the "extraordinary circumstances" standard under our whistleblower rules²⁶ in narrow fashion as requiring a claimant to show that the reason for the failure to file was beyond the control of the claimant—such as attorney

²⁰ See Exchange Act Rule 21F-3(a), 17 C.F.R. § 240.21F-3(a).

²¹ See Exchange Act Section 21F, 15 U.S.C. § 78u-6; Dodd-Frank Act Section 924, 15 U.S.C. § 78u-7; Exchange Act Rules 21F-1 to 21F-17, 17 C.F.R. §§ 240.21F-1 to 21F-17.

²² We also determine that the five new related action awards that Claimant 1 seeks in the request for reconsideration do not meet the requirements for filing award applications for related actions and are time-barred for late filing. See Exchange Act Rules 21F-11(b)(1), (2), 21F-10(b), 17 C.F.R. §§ 240.21F-11(b)(1), (2), 21F-10(b) (collectively establishing procedures and deadlines for submitting related action award claims).

²³ On Redacted, OWB received from Claimant 1 an award application that did not identify any covered action. In response, OWB sent Claimant 1 a notice, dated Redacted, which explained that because Claimant 1 "did not provide a Covered Action case name or notice number, [but r]ather ... referenced a "" civil lawsuit that [Claimant 1] had brought against [the Company]," Claimant 1 "has not submitted a properly filed whistleblower award application and we cannot consider [Claimant 1's] claim for an award at this time." Several months after the Redacted deadline, Claimant 1 submitted a Form WB-APP identifying the Notice of Covered Action, which was postmarked Redacted.

²⁴ See Exchange Act Rule 21F-10(a), 17 C.F.R. § 240.21F-10(a).

²⁵ See Exchange Act Rule 21F-10(b), 17 C.F.R. § 240.21F-10(b).

²⁶ See Exchange Act Rule 21F-8(a), 17 C.F.R. § 240.21F-8(a).

misconduct or serious illness.²⁷ Claimant 1’s amended application in ^{Redacted} post-dates the untimely application in ^{Redacted} and thus cannot show that Claimant 1’s failure to file an application by ^{Redacted} was beyond Claimant 1’s control.²⁸ We therefore conclude that Claimant 1’s award application should be denied for the independent reason that it was untimely.²⁹

3. Any information submitted by Claimant 1 for the first time before July 21, 2010 is not original information.

Any information that Claimant 1 provided to the Commission for the first time before July 21, 2010, even if resubmitted after that date, is not “original information” that would support a whistleblower award.³⁰ In responding to the Preliminary Determination, Claimant 1 argues that information submitted before July 21, 2010 qualifies as “original information” as defined by statute (as opposed to Commission rule). But, as we previously have concluded, “the whistleblower statutory provisions [concerning “original information” under the Dodd-Frank Act] do not authorize awards for information originally provided prior to Dodd-Frank [Act]’s enactment” and the meaning of “original information” is not intended to “pay [awards] for information that was already in the Commission’s possession on July 21, 2010.”³¹ We therefore conclude that any information submitted by Claimant 1 for the first time before July 21, 2010 will not support a whistleblower award for the independent reason that it is not “original information.”

B. Claimants 2 and 3

The administrative record demonstrates that none of Claimant 2 and 3’s information led to the successful enforcement of the Covered Action. First, Claimants 2 and 3 submitted their joint complaint to the Commission in ^{Redacted}, four years

²⁷ See, e.g., *Claim for Award*, Release No. 34-77368, 2016 WL 1019130, at *2 (Mar. 14, 2016), *pet. denied sub nom. Cerny v. SEC*, 707 F. App’x 29 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 2005 (2018), *reh’g denied*, 138 S. Ct. 2715 (2018).

²⁸ See *Order Determining Whistleblower Award Claim*, Exch. Act Rel. No. 82181, 2017 WL 5969236, at *4 (Nov. 30, 2017) (“[S]ubsequent events cannot be used to retroactively excuse an untimely submission.”).

²⁹ Furthermore, claimants cannot cure untimeliness merely by filing an amended application after a claim deadline expires because “[s]ubsequent events cannot be used to retroactively excuse an untimely submission.” *Order Determining Whistleblower Award Claims* at 9, Exch. Act Rel. No. 82181 (Nov. 30, 2017).

³⁰ See Exchange Act Section 21F(a)(1), 15 U.S.C. § 78u–6(a)(1); Exchange Act Rule 21F-4(b)(1)(iv), 17 C.F.R. § 240.21F-4(b)(1)(iv).

³¹ *Order Denying Whistleblower Award Claims*, Exch. Act Rel. No. 70772, 2013 WL 5819623, at *5-9 (Oct. 30, 2013), *pet. rev. denied sub nom. Stryker v. SEC*, 780 F.3d 163 (2d Cir. 2015).

after the investigation was opened in [Redacted], and so their tip did not cause the Enforcement staff to open the investigation. Second, the declaration of one of the primary Enforcement staff attorneys responsible for the First Track and the Covered Action attests that the Enforcement staff for the First Track did not receive any information from Claimants 2 and 3, that they had no communications with Claimants 2 and 3, and that Claimants 2 and 3 did not contribute in any way to the First Track and Covered Action.

In their written response to the Preliminary Determination, Claimants 2 and 3 do not contest that their information did not lead to the success of the Covered Action. Rather, Claimants 2 and 3 argue only that they are eligible for a related action award on the theory that the information that they provided to the Commission in [Redacted] ultimately was sent to the DOJ and assisted the DOJ in overcoming [Redacted]. But as already noted, Claimants 2 and 3 are ineligible for a related action award because they have not demonstrated eligibility for a Covered Action award in the first instance.³²

We therefore conclude that Claimant 2 and 3's information did not lead to the successful enforcement of the Covered Action, and that as a result, Claimants 2 and 3 are ineligible for an award with respect to either the Covered Action or any related action.³³

C. Claimant 5

Claimant 5 submitted a tip to the Commission on [Redacted], and later met with Enforcement investigative staff. In this tip and the subsequent meetings, Claimant 5 (i) alleged that in [Redacted] the Company

and (ii) described Claimant 5's [Redacted] experience with, and observations of, the Company's [Redacted]

In addition,

³² See Exchange Act Section 21F(b), 15 U.S.C. § 78u-6(b); Exchange Act Rules 21F-3(b), (b)(1), 21F-4(g) and (f), 21F-11(a), 17 C.F.R. §§ 240.21F-3(b), (b)(1), 21F-4(g) and (f), 21F-11(a); *Order Determining Whistleblower Award Claims*, Exch. Act Rel. No. 84506, 2018 SEC LEXIS 3031, at *8 n.5 (Oct. 30, 2018) (same); *Order Determining Whistleblower Award Claim*, Exch. Act Rel. No. 84503, 2018 SEC LEXIS 3030, at *7 n.4 (Oct. 30, 2018) (same); *Order Determining Whistleblower Award Claims*, Exch. Act Rel. No. 80596, 2017 SEC LEXIS 1318, at *8 n.5 (May 4, 2017) (same).

³³ To the extent that Claimants 2 and 3 have requested additional documents outside the administrative record in connection with their reconsideration request, that request is denied. See Exchange Act Rule 21F-12, 17 C.F.R. § 240.21F-12 (authorizing a claimant to receive only the materials listed in Rule 21F-12(a) that formed the basis for the determination with respect to his or her own award application). Pursuant to Rule 21F-10(e)(1)(i), OWB already provided Claimants 2 and 3 with a copy of the entire record that formed the basis of the Preliminary Determination as to their joint claim.

Claimant 5's information did not mention ^{Redacted}, which played a significant role in the Covered Action. Indeed, Claimant 5's award application describes Claimant 5's information similarly.

The staff declarations in the administrative record, which we credit, demonstrate that none of Claimant 5's information led to the successful enforcement of the Covered Action. As described in those declarations, Claimant 5's tip was submitted two years after the investigation was opened in ^{Redacted}. As a result, the Enforcement staff on the First Track, since the First Track's inception, had focused on the misconduct that was the basis for the Covered Action—specifically, the Company's failure to disclose to investors in its public filings with the Commission, ^{Redacted}

As attested in the staff declarations, the Enforcement staff on the First Track received and reviewed Claimant 5's tip and met once with Claimant 5 before determining that Claimant 5's information was outside the focus of and thus would not advance the First Track. The staff on the First Track then referred Claimant 5's tip to the staff for the Second Track. Although the staff for the First Track was aware that Claimant 5 subsequently twice met with the staff for the Second Track in ^{Redacted}, the staff for the First Track did not attend either of those meetings. The staff declarations further attest that Claimant's 5 information was not used by the staff on the First Track and did not contribute in any way to either the First Track or the Covered Action.

In responding to the Preliminary Determination, Claimant 5 raises three arguments in an attempt to demonstrate that Claimant 5's information led to the successful enforcement of the Covered Action. All three arguments lack merit.

First, Claimant 5 contends that the information Claimant 5 provided to the Commission bears some resemblance to certain Commission findings in the Covered Action insofar as Claimant 5 alleged information about systematic and pervasive practices of the Company that were unstated background facts for the Commission's Covered Action. But, as just discussed, the staff declarations demonstrate, and we find, that Claimant 5's ^{****} tip was submitted after the staff already had initiated the First Track and had focused on the misconduct that was the basis for the Covered Action. Claimant 5 also has not demonstrated a factual nexus between the information that Claimant 5 provided to the Commission and the conduct underlying the Covered Action's claims.³⁴ Claimant 5 admits to having merely reported certain observable effects of the

³⁴ See *Order Determining Whistleblower Award Claim*, 2018 WL 495695, Exch. Rel. No. 82562, at *2 (Jan. 22, 2018) (to establish that their information led to a successful enforcement action claimants must “establish a nexus between the information Claimant submitted to the Commission and the misconduct charged in the underlying Covered Action”); see also *Order Determining Whistleblower Award Claims*, Exch. Act Rel. No. 84046, 2018 SEC LEXIS 3031, at

conduct underlying the Covered Action’s charges, rather than reporting the underlying violative conduct itself:

[Claimant 5] reported ... the effects that occurred outside [the Company] as a result of its internal machinations – effects that [Claimant 5] personally observed ^{Redacted}. While [Claimant 5] concedes [Claimant 5] *did not allege* that ^{Redacted}, those facts are plainly what led to the behavior [Claimant 5] was able to observe and report to the Commission – ^{Redacted}

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The conduct described in Claimant 5’s information does not resemble the misconduct described in the Commission’s findings in the Covered Action, which focused on the Company’s failure in ^{****} to make disclosures ^{Redacted}

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By Claimant 5’s own admission, the conduct described in these Commission findings was not the subject of the information Claimant 5 provided to the Commission, and thus Claimant 5 has not shown the requisite factual nexus between Claimant 5’s information and the Covered Action.

Moreover, even if Claimant 5 could show some factual resemblance between Claimant 5’s information and the Commission’s findings in the Covered Action, that nexus by itself would not undermine the staff declarations, described above, attesting that the staff assigned to the First Track never actually used Claimant 5’s information in either the First Track or the Covered Action. Claimant 5 separately attacks the legal sufficiency of the staff declarations as “patently self-serving” and as executed “well after” Claimant

*34 (Sept. 6, 2018) (similar); *Order Determining Whistleblower Award Claim*, Exch. Act Rel. No. 82181, 2017 WL 5969236, at *11 (Nov. 30, 2017) (similar).

³⁵ Form WB-APP by Claimant 5 for Notice of Covered Action ^{Redacted} (emphasis added).

³⁶ Specifically, the Commission found as follows:

^{Redacted}

^{Redacted}

5's award application. But the staff declarations in the administrative record were signed under penalty of perjury and therefore are adequate to support our finding that Claimant 5's information did not contribute to either the First Track or the Covered Action.³⁷

Second, Claimant 5 argues that Claimant 5 provided information about "both ^{Redacted} industry in general and [the Company's practices] in particular" at several in-person meetings with the Commission staff, and that the staff attending these meetings "were keenly interested in what [Claimant 5] had to say, and they asked salient follow-up questions afterwards." But even taking Claimant 5's account at face value, that account is wholly consistent the staff declarations in the administrative record. As described earlier, those declarations attest that the staff on the First Track met once with Claimant 5 before determining that Claimant 5's information was outside the focus of the First Track and referring Claimant 5's tip to the staff on the Second Track. After that point, the staff on the First Track was aware of later meetings by Claimant 5 with the staff on the Second Track but did not attend those later meetings. In short, Claimant 5's account does nothing to undermine our finding, based on the staff declarations in the record, that Claimant 5's information was never actually used to advance the First Track or Covered Action.

Third, Claimant 5 argues that the staff on the Second Track purportedly informed Claimant 5's counsel that DOJ personnel were "taking the lead" and that Claimant 5's counsel was in contact with those DOJ personnel up through the day that the DOJ announced ^{Redacted}

But Claimant 5 has not applied for any related action awards for the Covered Action, nor has Claimant 5 argued that any DOJ actions were related to the Covered Action for award purposes.³⁸ Assisting a different enforcement action conducted by another agency does not demonstrate Claimant 5's assistance with the Covered Action. Nor does Claimant 5 identify any specific information that Claimant

³⁷ See *Summers v. DOJ*, 999 F.2d 570, 572-73 (D.C. Cir. 1993) (discussing adequacy of unsworn declaration under 28 U.S.C. § 1746 to establish "any matter"); see also *Jifry v. FAA*, 370 F.3d 1174, 1181 (D.C. Cir. 2004) (affidavit of agency official constitutes substantial evidence). Claimant 5 also requests the production of additional documents outside the administrative record, but our whistleblower rules entitle a claimant to receive only those record materials that formed the basis of the Preliminary Determination with respect to the claimant's award application. See Exchange Act Rules 21F-10(e)(1)(i), 21F-12, 17 C.F.R. §§ 240.21F-10(e)(1)(i), 21F-12. In other words, our whistleblower rules do not entitle claimants to seek discovery of the Commission's law enforcement files concerning a covered action. See Exchange Act Rule 21F-12(b), 17 C.F.R. § 240.21F-12(b). Because OWB has already provided Claimant 5 with all the record materials that formed the basis of the Preliminary Determination with respect to Claimant 5's award application, Claimant 5's request for the production of additional documents is denied.

³⁸ See Exchange Act Rule 21F-3(b)(1), 17 C.F.R. § 240.21F-3(b)(1) (defining a related action award as an action brought by [certain enumerated entities], and is based on the same original information that the whistleblower voluntarily provided to the Commission, and that led the Commission to obtain monetary sanctions totaling more than \$1,000,000).

5 provided to the DOJ that the DOJ, in turn, provided to the Commission for use in connection with the Covered Action. More importantly, claimants are eligible for a whistleblower award only if they voluntarily provide original information to the Commission that leads to a successful enforcement action.³⁹ If a claimant provides information only to another agency, even if that agency then passes it on to the Commission and the Commission uses it, the claimant would not be eligible for an award unless the claimant (or a claimant's representative) also provides that information directly to the Commission himself or herself.⁴⁰ Because we find that the Enforcement staff for the First Track did not use the information that Claimant 5 provided directly to the Commission, any additional information that Claimant 5 may have provided to the DOJ does not support an award for the Covered Action.

We therefore conclude that Claimant 5's information did not lead to the successful enforcement of the Covered Action, and that as a result, Claimant 5 is ineligible for an award.

D. Claimant 8

1. Claimant 8's information did not lead to the successful enforcement of the Covered Action.

Claimant 8 submitted a single tip to the Commission dated ^{Redacted}, more than three years after the investigation was opened. The staff declarations in the administrative record, which we credit, demonstrate that none of Claimant 8's information led to the successful enforcement of the Covered Action. The declaration of one of the primary Enforcement staff attorneys responsible for the First Track and the Covered Action attests that the Enforcement investigative team did not receive any information from Claimant 8, that they did not have any communications with Claimant 8, and that Claimant 8 did not assist or contribute in any way to the First Track or the Covered Action. Moreover, the declaration of the OWB staff attorney corroborates, based on a review of the Commission's files, that Claimant 8's ^{Redacted} tip was not even shared with the Enforcement investigative team.⁴¹

Claimant 8 raises three arguments in challenge to the Preliminary Determination that Claimant 8's information did not lead to the successful enforcement of the Covered Action. None of these arguments has merit.

³⁹ See Exchange Act Rule 21F-3(a)(1)-(3), 17 C.F.R. § 240.21F-3(a)(1)-(3).

⁴⁰ See Exchange Act Rule 21F-4(b)(7), 17 C.F.R. § 240.21F-4(b)(7); *Order Determining Whistleblower Award Claims*, Exch. Act Rel. No. 80596, 2017 SEC LEXIS 1318, at *10 n.9 (May 4, 2017).

⁴¹ The OWB staff declaration explains that the submission was reviewed by other Commission staff and determined not to warrant further action or investigation.

First, Claimant 8 claims the Preliminary Determination does not refer to, and therefore does not apply to, Claimant 8. But the Preliminary Determination identifies Claimant 8 as a member of the group referred to as “Claimants” and states, “None of the Claimants provided information that led to the successful enforcement by the Commission of” the Covered Action. Accordingly, the Preliminary Determination sufficiently reflects the determination that Claimant 8’s information did not lead to the Covered Action’s success.⁴²

Second, Claimant 8 argues that Claimant 8’s information significantly contributed to the success of an enforcement matter unrelated to the Covered Action,⁴³ for which Claimant 8 previously applied for an award and was denied. But any alleged contributions Claimant 8 may have made to a different enforcement action are not relevant to whether Claimant 8’s information led to the successful enforcement of this Covered Action.⁴⁴ Furthermore, Claimant 8 already applied for an award connected to the other enforcement action, and the Commission denied that claim.⁴⁵

Third, Claimant 8 claims that the Preliminary Determination did not address Claimant 8’s purported application for a related action award. But Claimant 8 failed to identify any case as a related action in the relevant section of Claimant 8’s award application on Form WB-APP for Notice of Covered Action ^{Redacted}, and thus Claimant 8 did not apply for a related action award.⁴⁶ Even accepting, without deciding, that Claimant 8 intended to apply for a related action award, Claimant 8 would not be entitled to one because Claimant 8 has not demonstrated eligibility for an award with respect to the Covered Action.⁴⁷

⁴² Even if the Preliminary Determination had not identified Claimant 8, that omission would not affect our own conclusion, based on the record evidence summarized above, that Claimant 8’s information did not lead to the success of the Covered Action.

⁴³ Specifically, Claimant 8 asserts that Claimant 8’s information significantly contributed to the success of the enforcement matter referred to in Notice of Covered Action ^{Redacted}.

⁴⁴ See Exchange Act Rule 21F-3(a), 17 C.F.R. § 240.21F-3(a).

⁴⁵ See *Order Determining Whistleblower Award Claim*, Exch. Rel. No. 79604, 2016 WL 7367248 (Dec. 19, 2016).

⁴⁶ Rather, Claimant 8 merely provided the names of individuals and entities to whom Claimant 8 allegedly sent a tip by letter—the Director of the Office of Professional Responsibility at the Internal Revenue Service, the Federal Bureau of Investigation, a state’s Attorney General, a state governor, and a U.S. senator—but Claimant 8 entered “N/A” on Claimant 8’s Form WB-APP for the Covered Action for the sections for identifying a related action’s date filed, case name, and case number.

⁴⁷ See Exchange Act Section 21F(b), 15 U.S.C. § 78u-6(b); Exchange Act Rules 21F-3(b), (b)(1), 21F-4(g) and (f), 21F-11(a), 17 C.F.R. §§ 240.21F-3(b), (b)(1), 21F-4(g) and (f), 21F-11(a); *Order Determining Whistleblower Award Claims*, Exch. Act Rel. No. 84506, 2018 SEC LEXIS

We therefore conclude that Claimant 8's information did not lead to the successful enforcement of the Covered Action, and that as a result, Claimant 8 is ineligible for an award with respect to either the Covered Action or any related action.

2. Claimant 8 failed to submit information in the form and manner required to qualify as a whistleblower.

The administrative record, which includes a declaration from an OWB staff attorney, reflects that Claimant 8 submitted Claimant 8's ^{Redacted} tip to the Commission by mail without a Form TCR. Because Claimant 8 did not submit this information either on a Form TCR or through the Commission's online TCR portal, and thus did not include the required declaration, Claimant 8 failed to submit information in the form and manner required by our whistleblower rules⁴⁸ and cannot qualify as a whistleblower.⁴⁹ In responding to the Preliminary Determination that Claimant 8 was not a whistleblower, Claimant 8 argues that Claimant 8 complied with the statutory requirements of the Dodd-Frank Act and was not subject to any further requirements in the Commission's whistleblower rules at the time Claimant 8 submitted tips. But Section 21F of the Exchange Act, which was added by the Dodd-Frank Act, expressly conditions whistleblower status on providing information to the Commission "in a manner established, by rule or regulation, by the Commission,"⁵⁰ and further directs that "[n]o award . . . shall be made . . . to any whistleblower who fails to submit information to the Commission in such form as the Commission may, by rule, require."⁵¹ Moreover, our rules specifying the form and manner of submission took effect on August 12, 2011, almost ^{Redacted} before Claimant 8's initial tip in ^{Redacted} ⁵²

3031, at *8 n.5 (Oct. 30, 2018) (same); *Order Determining Whistleblower Award Claim*, Exch. Act Rel. No. 84503, 2018 SEC LEXIS 3030, at *7 n.4 (Oct. 30, 2018) (same); *Order Determining Whistleblower Award Claims*, Exch. Act Rel. No. 80596, 2017 SEC LEXIS 1318, at *8 n.5 (May 4, 2017) (same).

Furthermore, all but one of the individuals and entities whom Claimant 8 allegedly tipped could not bring "related actions" in the first instance since they are not the specific entities that can bring related actions as designated by the Exchange Act. *See also* Exchange Act Rules 21F-3(b)(1), 21F-4(f), (g), 17 C.F.R. §§ 240.21F-3(b)(1), 21F-4(f),(g).

⁴⁸ *See* Exchange Act Rules 21F-8(a) and 21F-9(a)-(b), 17 C.F.R. §§ 240.21F-8(a), 21F-9(a)-(b).

⁴⁹ *See* Exchange Act Section 21F(a)(6), 15 U.S.C. § 78u-6(a)(6), and Exchange Act Rule 21F-2(a)(1), 17 C.F.R. § 240.21F-2(a)(1).

⁵⁰ Exchange Act Section 21F(a)(6), 15 U.S.C. § 78u-6(a)(6).

⁵¹ Exchange Act Section 21F(c)(2)(D), 15 U.S.C. § 78u-6(c)(2)(D).

⁵² *See Securities Whistleblower Incentives and Protections*, 76 Fed. Reg. 34,300, 34,313 (June 13, 2011).

We therefore conclude that Claimant 8's award application should be denied for the independent reason that Claimant 8 never qualified as a whistleblower by submitting Claimant 8's information in the form and manner required by our whistleblower rules.

E. Claimant 10

Claimant 10 submitted a tip to the Commission on or about Redacted, and made five supplemental submissions in **** and early ****. The staff declarations in the administrative record, which we credit, demonstrate that none of Claimant 10's information led to the successful enforcement of the Covered Action. The declaration of one of the primary Enforcement attorneys assigned to the First Track attests that he received and reviewed information submitted by Claimant 10 on multiple occasions between Redacted and Redacted but concluded each time that Claimant 10's information was outside the focus of, and therefore would not advance, the First Track. Both this declaration and another from a second attorney assigned to the First Track further attest that the Enforcement team on the First Track did not use any information from Claimant 10, that they had no communications with Claimant 10, and that Claimant 10 neither assisted nor contributed in any way to either the First Track or the Covered Action. In addition, a separate declaration from an OWB staff attorney describes, based on a review of the Commission's files, the submissions the Commission received from Claimant 10, including certain additional submissions that were never even shared with the Enforcement staff on the First Track.⁵³

In challenging the Preliminary Determination, Claimant 10 raises three main arguments, none of which has merit.

First, Claimant 10 asserts for the first time, without substantiation, that Claimant 10 allegedly submitted information in Redacted⁵⁴ that caused the staff to open the investigation and "created pressure" for the Commission to file a complaint in a different enforcement action on Redacted. But any information submitted by Claimant 10 in Redacted would not qualify as "original information" to support an award because it was provided for the first time before July 21, 2010.⁵⁵ Moreover, the action filed by the Commission on Redacted was the subject of a different Notice of Covered Action

⁵³ The OWB staff declaration explains that the submissions were reviewed by other Commission staff and determined not to warrant further action or investigation.

⁵⁴ Claimant 10 claims to have submitted the report without providing contemporaneous evidence to establish that this alleged report was ever sent to or received by the Commission. Our determination to deny Claimant 10's award claim assumes, without deciding, that Claimant 10 sent the Commission the report on or around Redacted.

⁵⁵ See Exchange Act Section 21F(a)(1), 15 U.S.C. § 78u-6(a)(1); Exchange Act Rule 21F-4(b)(1)(iv), 17 C.F.R. § 240.21F-4(b)(1)(iv); see also *Order Denying Whistleblower Award Claim*, Exch. Act Rel. No. 70772, 2013 WL 5819623, at *5-9 (Oct. 30, 2013), *pet. rev. denied sub nom. Stryker v. SEC*, 780 F.3d 163 (2d Cir. 2015).

for which Claimant 10 did not apply for an award. Any contributions Claimant 10 might have made to that action would do nothing to establish that Claimant 10's information led to the successful enforcement of this Covered Action.

Second, Claimant 10 also asserts that Claimant 10 provided several additional reports identifying potential securities violations and discussed these reports when contacted in "" by attorneys in OWB and Enforcement. But the staff declarations in the administrative record unequivocally attest that the staff opened the First Track based on a non-whistleblower complaint, that the staff had no communications with Claimant 10, and that none of the information submitted by Claimant 10 was found to be relevant or contributed in any way during either the First Track or the Covered Action. Accordingly, we credit the account in these staff declarations.

Third, Claimant 10 accuses the Enforcement staff for the First Track of intentionally limiting the scope of the Covered Action by ignoring potential securities violations purportedly identified by Claimant 10's reports and argues that the staff declarations are inconsistent with the information provided in Claimant 10's reports, as well as with the charges filed in the unrelated "" enforcement action. But Claimant 10 offers no evidence to substantiate the accusation that the staff limited the Covered Action or acted with any improper motive. Rather, Claimant 10's contention that the staff overlooked Claimant 10's reports bolsters the conclusion that Claimant 10's information did not contribute to the First Track and Covered Action. Likewise, whatever may have happened in a different action is irrelevant to whether Claimant 10's information led to the successful enforcement of this Covered Action.

We therefore conclude that Claimant 10's information did not lead to the successful enforcement of the Covered Action, and that as a result, Claimant 10 is ineligible for an award with respect to either the Covered Action or any related action.

III. CONCLUSION

Accordingly, it is hereby ORDERED that Claimant 1, 2, 3, 5, 8 and 10's claims for awards are denied.

By the Commission.

Vanessa A. Countryman
Secretary