

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 92355 / July 9, 2021

WHISTLEBLOWER AWARD PROCEEDING
File No. 2021-67

In the Matter of the Claim for an Award

in connection with

Redacted

Notice of Covered Action Redacted

ORDER DETERMINING WHISTLEBLOWER AWARD CLAIM

The Claims Review Staff (“CRS”) issued a Preliminary Determination recommending the denial of the whistleblower award application submitted by Redacted (“Claimant”) in connection with the above-referenced Covered Action (the “Covered Action”). Claimant filed a timely response contesting the preliminary denial. For the reasons discussed below, Claimant’s award claim is denied.

I. Background

A. The Covered Action

On Redacted, the Commission filed a civil enforcement action in federal district court charging Redacted (together, the “Initial Defendants”) with various violations of the securities laws, including Redacted

Redacted The complaint alleged, among other things, that Redacted

Redacted

On [Redacted], the Commission amended its complaint [Redacted] (together with [Redacted] the “Entity Defendants”).

[Redacted] On or about [Redacted] the District Court overseeing the Commission’s action ordered [Redacted]

[Redacted] (the “Other Action”). On or about [Redacted] following the Other Action, the District Court [Redacted] On [Redacted] the Commission filed [Redacted]

On [Redacted] the district court entered final judgments in favor of the Commission. The final judgments required [Redacted] to pay [Redacted] to pay [Redacted] each of the Entity Defendants to pay, [Redacted]

[Redacted]

B. The Preliminary Determination

The CRS issued a Preliminary Determination³ recommending that Claimant’s claim be denied for three reasons.

First, the CRS recommended that Claimant’s claim be denied because Claimant did not voluntarily provide original information to the Commission as defined by Rule 21F-4(a) of the Exchange Act. The CRS’s recommendation was supported, in part, by Claimant’s own acknowledgement that Claimant’s first direct communication with the Commission regarding the matter came following a request by [Redacted] (“Other Agency”) for Claimant to meet with the Other Agency and Commission staff, which Claimant did for the first time on [Redacted].

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

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

Second, the CRS recommended that Claimant's claim be denied because the information provided by Claimant was provided prior to July 21, 2010 and was, therefore, not "original information" pursuant to Rule 21F-4(b)(1)(iv) of the Exchange Act. This recommendation was supported by, among other things, the declaration of one of the primary attorneys in the Commission's Division of Enforcement who was responsible for the Covered Action (the "Staff Declaration"). According to the Staff Declaration, the staff obtained information from Claimant at a meeting attended by staff from the Commission and the Other Agency and through a limited number of communications following the Other Agency's action, with ^{Redacted} as the date of the last communication that Commission staff working on the Covered Action had with Claimant.

Third, the CRS recommended that Claimant's claim be denied because any information provided by Claimant for the first time after July 21, 2010 did not lead to successful enforcement of a covered judicial or administrative action within the meaning of Section 21F(b)(1) of the Exchange Act and Rules 21F-3(a) and 21F-4(c) thereunder. The CRS's recommendation was supported by the Staff Declaration which stated that "[Claimant's tip], which consists of [Claimant's] ^{Redacted} and ^{Redacted} submissions, did not contribute in any way to the Commission's original complaint, which had been filed nearly six years before [Claimant] submitted [the tip], nor the Commission's ^{Redacted} amended complaint, which had been filed in ^{Redacted}." The Staff Declaration concluded that "[w]hile [Claimant] provided limited assistance to us in the [Covered Action], all of [Claimant's] assistance was provided prior to July 21, 2010, with no assistance provided after this date that helped advance the Commission Action."

C. Claimant's Response to the Preliminary Determination

After requesting and receiving a copy of the record, Claimant submitted a timely written response contesting the Preliminary Determination.⁴ Claimant contests the Preliminary Determination's conclusions that Claimant's information was not provided voluntarily, that the information provided by Claimant prior to July 21, 2010 did not constitute "original information," and that information provided after July 21, 2010 did not lead to successful enforcement of a covered judicial or administrative action.

Claimant contends that his/her provision of information was "voluntary" despite the fact that he/she did not provide any information regarding the fraud directly to the Commission before he/she was asked by the Other Agency to meet with the Other Agency and Commission staff. Claimant asserts that he/she voluntarily informed his/her ^{Redacted} who was a victim of the fraud, of the misappropriation from the ^{Redacted} accounts before Claimant was requested to meet with the government and that Claimant's ^{Redacted} then informed the Commission of the fraud that Claimant uncovered. According to Claimant, the provision of information regarding a securities fraud to the victim of that fraud constitutes the "voluntary" provision of information to the Commission pursuant to Rule 21F-4(a) of the Exchange Act where the victim, in turn, relays the information to the Commission even where, as in Claimant's case, the provider of the information to the victim does not directly and voluntarily submit the information to the

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

Commission him/herself. In the alternative, Claimant argues that the Commission should exercise its discretionary authority under Section 36(a) of the Exchange Act to grant a waiver of the Rule 21F-4(a) requirement.

Claimant next argues that Rule 21F-4(b)(1)(iv) of the Exchange Act,⁵ which defines “original information” to include only information provided to the Commission for the first time after July 21, 2010 is contrary to the definition of “original information” contained in Section 21F of the Dodd-Frank Act (“Dodd-Frank”)⁶ and should therefore be precluded.

Finally, Claimant disputes the CRS’s recommendation that Claimant’s claim be denied because any information Claimant provided for the first time after July 21, 2010 did not lead to successful enforcement of a covered judicial or administrative action within the meaning of Section 21F(b)(1) of the Exchange Act and Rules 21F-3(a) and 21F-4(c) thereunder.⁷ In his/her response, Claimant repeats his/her contention that Rule 21F-4(b)(1)(iv) of the Exchange Act⁸ does not apply and thus information he/she claims to have provided prior to July 21, 2010 should be considered. Claimant asserts that information he/she provided prior to July 21, 2010 led to the successful enforcement of the Covered Action and should qualify him/her for a whistleblower award.

II. Analysis

To qualify for an award under Section 21F of the Exchange Act, a whistleblower must voluntarily provide the Commission with original information that leads to the successful enforcement of a covered action.⁹ We find that Claimant’s information was (i) not provided “voluntarily,” (ii) not “original information” to the extent it was first provided to the Commission prior to July 21, 2010, and (iii) did not lead to the successful enforcement of the Covered Action to the extent it was provided on or after July 21, 2010.

A. Voluntariness

To be considered voluntary, a claimant’s information must have been submitted “before a request, inquiry, or demand that relates to the subject matter of [the] submission is directed” to the claimant or his/her representative, by the Commission, or by certain other enumerated entities (including the Other Agency) in connection with an investigation.¹⁰

The relevant facts here are not in dispute. Claimant acknowledges that he/she did not directly provide information to the Commission prior to receiving a request from the Other Agency to meet with the Other Agency and Commission staff regarding the fraud on Claimant’s

⁵ See Exchange Act Rule 21F-4(b)(1)(iv), 17 C.F.R. § 240.21F-4(b)(1)(iv).

⁶ See Exchange Act Section 21F(a)(3), 15 U.S.C. § 78u-6(a)(3).

⁷ See Exchange Act Section 21F(b)(1), 15 U.S.C. § 78u-6(b)(1); Exchange Act Rules 21F-3(a) and 21F-4(c), 17 C.F.R. §§ 240.21F-3(a) and 240.21F-4(c).

⁸ See Exchange Act Rule 21F-4(b)(1)(iv), 17 C.F.R. § 240.21F-4(b)(1)(iv).

⁹ See Exchange Act Section 21F(b)(1), 15 U.S.C. § 78u-6(b)(1).

¹⁰ See Exchange Act Rule 21F-4(a)(1), 17 C.F.R. § 240.21F-4(a)(1).

Redacted Instead, Claimant argues that, prior to receiving the Other Agency’s request to meet, he/she voluntarily disclosed the fraud to his/her [redacted] and that the [redacted], in turn, reported the information to the Commission. Only after Claimant’s [redacted] reported the information to the Commission did the government contact Claimant’s employer and request to meet with Claimant.

According to Claimant, once a whistleblower has voluntarily disclosed information about a fraud to a victim it should be immaterial whether the government later requested information from the whistleblower prior to the whistleblower’s submission of the information to the Commission itself. However, Section 21F(a)(6) of the Exchange Act plainly requires that for information to be the basis for award eligibility it must be provided by the submitter either “alone or acting jointly” with another submitter.¹¹ There is nothing in the record to suggest that Claimant’s [redacted] was acting “jointly” with Claimant when the [redacted] provided information regarding the fraud to the government.

Claimant contends that failing to credit a whistleblower’s voluntary disclosure of a fraud to the victim of the fraud as a “voluntary” submission under Section 21F of the Exchange Act would act as a disincentive to future whistleblowers from disclosing information regarding a fraud to the victim of the fraud. Claimant’s argument is unavailing. As Claimant acknowledges, a whistleblower may make a voluntary disclosure to the victim of a fraud without losing eligibility for a whistleblower award. If a whistleblower is the “original source” of the information, the whistleblower may still be eligible for an award even if the Commission first learned of the information from the victim of the fraud or another source.¹² Thus, nothing in the Rules disincentivizes a whistleblower from notifying both the victim of the fraud and the Commission at or around the same time and before any request for information from the whistleblower is made.

The determination of whether a whistleblower’s submission was “voluntary” hinges on when the whistleblower him/herself provided the information to the Commission and whether it was before any request for information from the whistleblower is made. Here, Claimant does not contest that he/she was asked to meet with the Other Agency regarding the fraud on his/her [redacted] prior to Claimant’s submission of any information to the Commission.

¹¹ See Exchange Act Section 21F(a)(6) (The term ‘whistleblower’ means any individual who provides, or two or more individuals acting jointly *who provide*, information relating to a violation of the securities laws *to the Commission* in a manner established, by rule or regulation, by the Commission) (emphasis added), 15 U.S.C. § 78u-6(a)(6); See also Rule 21F-2(a)(1) (you are a whistleblower for purposes of Section 21F of the Exchange Act (15 U.S.C. § 78u-6) if, “alone or jointly with others, *you provide* the Commission with information in writing that relates to a possible violation of the federal securities laws” (emphasis added)), 17 C.F.R. § 240.21F-2(a)(1).

¹² See Rule 21F-4(b)(5) (“The Commission will consider [the whistleblower] 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 . . .”), 17 C.F.R. § 240.21F-4(b)(5) (emphasis in original).

Finally, Claimant has asked that we invoke our exemptive authority under Section 36(a) of the Exchange Act to waive the voluntary requirement. We decline to do so. Section 36(a) grants the Commission the authority in certain circumstances to “exempt any person ... from any provision or provisions of this title or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.” However, one of the principal objectives of Section 21F of the Exchange Act “is to promote effective enforcement of the federal securities laws by providing incentives for persons with knowledge of misconduct to come forward and share their information with the Commission.”¹³ Granting an exemption to the “voluntary” requirement under these circumstances is inconsistent with the statutory purpose of incentivizing whistleblowers to come forward early rather than waiting for authorities to “come knocking on the door.”¹⁴ As a result, we do not believe that Claimant has met his/her burden to demonstrate any considerations that would satisfy the requirements for us to exercise our Section 36(a) exemptive authority.

We find that Claimant’s provision of information to the Commission was not “voluntary” as required by Section 21F of the Exchange Act.¹⁵

B. Pre-Dodd Frank Information Is Not Original

For a submission to qualify as “original information” it must have been “[p]rovided to the Commission for the first time after July 21, 2010,” the date of enactment of Dodd-Frank.¹⁶ Here, even if Claimant’s disclosure of the fraud to his/her were sufficient to qualify as a “voluntary” submission of information to the Commission (for the reasons described above, we find that it is not), the information at issue was provided prior to July 21, 2010 and therefore does not constitute “original information” as defined by Rule 21F-4(b)(1)(iv).

Claimant does not dispute that the information at issue was provided to the Commission prior to July 21, 2010. Instead, Claimant argues that Rule 21F-4(b)(1)(iv)’s definition of “original information” to exclude information provided prior to July 21, 2010 is precluded by the definition of “original information” contained in the statute itself, which contains no such limitation.¹⁷ The Second Circuit rejected that argument in *Stryker v. S.E.C.*, 780 F.3d 163 (2d

¹³ See Adopting Release for Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, 34,308 (June 13, 2011).

¹⁴ See Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, 70,490 (November 3, 2010).

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

¹⁶ See Exchange Act Rule 21F-4(b)(1)(iv), 17 C.F.R. § 240.21F-4(b)(1)(iv).

¹⁷ Section 21F defines “original information” as information that:

- (A) is derived from the independent knowledge or analysis of a whistleblower;
- (B) is not known to the Commission from any other source, unless the whistleblower is the original source of the information; and
- (C) is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the

Cir. 2015), upholding Rule 21F-4(b)(1)(iv)'s exclusion of information provided to the Commission prior to July 21, 2010 from the definition of "original information."

Nevertheless, Claimant argues that the Commission must reconsider its reliance on the holding in *Stryker* in light of the Supreme Court's decision in *Digital Realty Tr., Inc. v. Somers*, ___ U.S. ___, 138 S. Ct. 767 (2018). In *Digital Realty*, the Supreme Court held that the Dodd-Frank definition of "whistleblower" was "clear and conclusive" and therefore declined to adopt a broader interpretation of the term with respect to the anti-retaliation provisions of Dodd-Frank.¹⁸

Claimant argues that Dodd Frank's definition of "original information" is similarly "clear and conclusive" and thus the Commission's rule excluding from the definition information provided before July 21, 2010 must be rejected. We disagree.

Unlike the definition of "whistleblower" that the Supreme Court held was limited to those who provided information *to the Commission* because that language is explicitly included within Dodd-Frank's statutory definition of a "whistleblower," Dodd Frank's definition of "original information" is silent as to the time period in which the information must be provided. As the Second Circuit in *Stryker* noted, Congress recognized that the definition of "original information" left "a number of loose ends" and therefore provided that "a putative whistleblower must provide the requisite information in the form and manner required by SEC's rules and regulations."¹⁹ Rule 21F-4(b)(1)(iv)'s definition of "original information" is thus consistent with the statute as well as legislative intent.²⁰

We therefore conclude that the information provided by Claimant prior to July 21, 2010 does not qualify as "original information" as required by Rule 21F-4(b)(1)(iv) and that, as a result, Claimant is ineligible for an award with respect to the Covered Action.

C. Post-Dodd Frank Information Did Not Lead to the Success of the Covered Action

To qualify for an award, the original information provided by a whistleblower must lead to the successful enforcement of a covered action.²¹ Original information "leads to" a successful enforcement action if either: (i) the original information caused the staff to commence an examination, open an investigation, or reopen an investigation that was closed or inquire concerning different conduct as part of a current examination or investigation, and the Commission brought a successful action based in whole or in part on conduct that was the subject of the original information; or (ii) the conduct was already under examination or investigation, and the original information significantly contributed to the success of the action.²²

whistleblower is a source of the information.

15 U.S.C. § 78u-6(a)(3).

¹⁸ *Digital Realty Tr., Inc. v. Somers*, ___ U.S. ___, 138 S. Ct. 767, 781-82 (2018).

¹⁹ *See Stryker v. S.E.C.*, 780 F.3d 163, 166 (2d Cir. 2015).

²⁰ *Id.* at 166-67.

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

²² Rule 21F-4(c)(1)-(2), 17 C.F.R. § 240.21F-4(c)(1)-(2).

We find that none of the information submitted to the Commission by Claimant after July 21, 2010 led to the successful enforcement of the Covered Action. While Claimant provided information to the Commission after July 21, 2010, in the form of submissions on Form TCR in ^{Redacted} and ^{Redacted}, the Staff Declaration states that the information contained in those submissions “did not contribute in any way to the Commission’s original complaint ... nor the Commission’s ^{***} amended complaint.” Moreover, the Staff Declaration attests that the Claimant’s submissions “did not impact, affect, or contribute in any way to the Commission’s ^{***} the prosecution of the Commission’s Action, the judgments or orders entered by the District Court, or any other efforts by the Commission after the filing of the original complaint.”

Claimant argues that the Staff Declaration is based on mistaken legal assumptions as to what information qualifies for a whistleblower award under Dodd-Frank. Specifically, Claimant claims that the Staff Declaration improperly discounts information provided by Claimant prior to July 21, 2010, and that Claimant should be credited for the information Claimant provided in meetings and communications with the staff prior to that time. For the reasons discussed above, we find that the information provided by Claimant before July 21, 2010 was not provided “voluntarily” and did not constitute “original information.”

Claimant does not demonstrate that any information contained in Claimant’s ^{***} tips contributed in any way to the successful enforcement of the Covered Action. We therefore conclude that, with respect to information provided by Claimant on or after July 21, 2010, Claimant’s information did not lead to the successful enforcement of the Covered Action and that, as a result, Claimant is ineligible for an award.

IV. Conclusion

Accordingly, it is hereby ORDERED that Claimant’s whistleblower award application be, and hereby is, denied.

By the Commission.

Vanessa A. Countryman
Secretary