

No. 24-_____

SUPREME COURT OF THE UNITED STATES

John Doe,

Petitioner,

v.

The Securities and Exchange Commission,

Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the District of Columbia Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

John Doe
Petitioner
Address Withheld

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-1161**September Term, 2023****SEC-2023-64****Filed On: May 16, 2024** [2054818]

John Doe,

Petitioner

v.

Securities and Exchange Commission,

Respondent

MANDATE

In accordance with the judgment of March 21, 2024, and pursuant to Federal Rule of Appellate Procedure 41, this constitutes the formal mandate of this court.

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Daniel J. Reidy

Deputy Clerk

[Link to the judgment filed March 21, 2024](#)

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23-1161**September Term, 2023****SEC-2023-64****Filed On: March 21, 2024**

John Doe,

Petitioner

v.

Securities and Exchange Commission,

Respondent

**PETITION FOR REVIEW FROM AN ORDER OF THE
SECURITIES AND EXCHANGE COMMISSION**

BEFORE: Henderson, Millett, and Walker, Circuit Judges

J U D G M E N T

This petition for review of an order of the Securities and Exchange Commission ("SEC") was considered on the briefs and appendix filed by the parties. See Fed. R. App. P. 34(a)(2); D.C. Cir. Rule 34(j). It is

ORDERED AND ADJUDGED that the petition for review be denied. Petitioner has not shown that the SEC's May 26, 2023 order denying his whistleblower award application was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. See 15 U.S.C. § 78u-6(f); 5 U.S.C. § 706(2). The declarations submitted by agency attorneys explain that the whistleblower information submitted by petitioner did not in any way assist or contribute to the covered action. Petitioner has provided no persuasive reason to question these assertions. See Doe v. SEC, 846 F. App'x 1, 4 (D.C. Cir. 2021).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

UNITED STATES OF AMERICA

Before the

SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 97601 / May 26, 2023

WHISTLEBLOWER AWARD PROCEEDING

File No. 2023-64

In the Matter of the Claims for Award

in connection with

Redacted

Notice of Covered Action Redacted and

Redacted

Notice of Covered Action Redacted

ORDER DETERMINING WHISTLEBLOWER AWARD CLAIMS

The Claims Review Staff (“CRS”) issued Preliminary Determinations recommending the denial of the whistleblower award claim submitted by Redacted (“Claimant 3”) in connection with Covered Action Redacted (the “First Action”). Claimant 3 filed a timely response contesting the preliminary denial. For the reasons discussed below, Claimant 3’s award claim with regard to the First Action is denied.

The CRS also issued Preliminary Determinations recommending the denial of whistleblower award claims submitted by Claimant 3 and joint claimants Redacted (together, “Claimant 4,” and collectively with Claimant 3, “Claimants”) in connection with Covered Action Redacted (the “Second Action”). The First Action and the Second Action arose from the same underlying enforcement investigation (the “Investigation”). Claimants filed timely responses contesting the preliminary denials. For the reasons discussed below, Claimants’ award claims with regard to the Second Action are denied.¹

¹ Claimant 3 submitted award applications in connection with both the First Action and the Second Action; for clarity, we refer to this claimant as “Claimant 3” in connection to both actions. Claimant 4 submitted an application only in connection with the Second Action. The CRS also recommended the denial of the award applications in connection with the Second Action from Claimants 1, 2, 5, and 6, none of whom contested the Preliminary Determinations. Accordingly, the Preliminary Determinations with respect to their award claims became the Final Orders of the Commission through operation of Exchange Act Rule 21F-10(f), 17 C.F.R. §240.21F-10(f).

I. Background

A. The Covered Actions

i. The First Action

On ^{Redacted} the Commission instituted settled administrative and cease-and-desist proceedings against ^{Redacted} (the “Respondent”) alleging that the Respondent ^{Redacted}

^{Redacted} (the “Company”). The Commission found that Respondent had violated ^{Redacted}

^{Redacted}
Respondent agreed to pay disgorgement of ^{Redacted}

On ^{Redacted} the Office of the Whistleblower (“OWB”) posted the Notice for the Covered Action on the Commission’s public website inviting claimants to submit whistleblower award applications within 90 days. Claimant 3 filed a timely whistleblower award claim.

ii. The Second Action

On ^{Redacted} the Commission instituted settled cease-and-desist proceedings against the Company alleging that employees of the Company ^{Redacted}

^{Redacted} The Commission found that the Company violated ^{Redacted} ***

agreed to pay disgorgement of ^{Redacted} and a civil monetary penalty of ^{Redacted} The Company ^{Redacted}

On ^{Redacted}, OWB posted the Notice for the Covered Action on the Commission’s public website inviting claimants to submit whistleblower award applications within 90 days. Claimants 3 and 4 each filed timely whistleblower award claims.

B. The Preliminary Determinations

i. The First Action

The CRS issued Preliminary Determinations in connection with the First Action recommending that Claimant 3’s claim be denied because Claimant 3 did not provide information that led to the successful enforcement of the First Action within the meaning of Section 21F(b)(1) of the Exchange Act and Rules 21F-3(a)(3) and 21F-4(c) thereunder. The CRS stated that Claimant 3’s information did not either (1) cause the Commission to (a) commence an examination, open or reopen an investigation, or inquire into different conduct as part of a current Commission examination or investigation, and (b) thereafter bring an action based, in whole or in part, on conduct that was the subject of claimant’s information, pursuant to Rule 21F-4(c)(1); or (2) significantly contribute to the success of a Commission judicial or administrative enforcement action under Rule 21F-4(c)(2) of the Exchange Act. The CRS

preliminarily determined that the Investigation was opened based on news reports and not based on Claimant 3's information. The CRS stated that Claimant 3's tip was forwarded to staff responsible for a separate and unrelated investigation. Enforcement staff responsible for the Investigation did not receive any information provided by Claimant 3 and did not have any communication or contact with Claimant 3.

ii. The Second Action

The CRS issued Preliminary Determinations in connection with the Second Action recommending that Claimants' claims be denied because neither Claimant provided information that led to the successful enforcement of the Second Action within the meaning of Section 21F(b)(1) of the Exchange Act and Rules 21F-3(a)(3) and 21F-4(c) thereunder. The CRS stated that Claimant 3's and Claimant 4's information did not either (1) cause the Commission to (a) commence an examination, open or reopen an investigation, or inquire into different conduct as part of a current Commission examination or investigation, and (b) thereafter bring an action based, in whole or in part, on conduct that was the subject of claimant's information, pursuant to Rule 21F-4(c)(1); or (2) significantly contribute to the success of a Commission judicial or administrative enforcement action under Rule 21F-4(c)(2) of the Exchange Act. The CRS stated that none of the Claimants provided any information that led to the opening of the Investigation or that was used in or contributed to the Investigation. The CRS preliminarily determined that staff responsible for the Investigation did not communicate with or receive any information from Claimant 3. The CRS preliminarily determined that while the staff reviewed Claimant 4's information, Claimant 4's information was submitted when the Investigation had already been substantially completed and after the First Action was brought and after settlement discussion had already begun with the Company. The CRS also stated that Claimant 4's information did not relate directly to the settlement negotiation and did not impact the negotiations or otherwise contribute to the Investigation or the Second Action.

C. Claimant 3's Response to the Preliminary Determinations

Claimant 3 submitted a timely written response contesting the Preliminary Determinations in connection with the First Action and the Second Action.² Claimant 3 principally argues that Claimant 3's information "led to the initiation [of] an investigation by the Commission that contributed to the recoveries made by the Commission and others, and/or otherwise provided information that contributed to such recoveries." Claimant 3 argues that the Preliminary Determinations "rest entirely on the declaration of an affiant who neither knows nor claims to know how the information [Claimant 3] shared was used in the investigation." Claimant 3 further argues that "it is clear that the information [Claimant 3] provided was communicated to [the Company] and that this information in turn contributed to the resolution of the Covered Actions." Claimant 3 states that his/her counsel met with, provided information to, and exchanged "numerous emails" with Commission staff in ^{Redacted} regarding his/her tips, and these communications call into question the CRS's Preliminary Determination that Claimant 3 did not have any contact with staff assigned to the Investigation. Claimant 3 also argues that he/she was denied access to "documents and information to which

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

[Claimant 3] is statutorily entitled and which would have demonstrated [Claimant 3's] right to the whistleblower award [Claimant 3] seeks.”

D. Claimant 4's Response to the Preliminary Determinations

Claimant 4 submitted a timely written response contesting the Preliminary Determinations in connection with the Second Action. Claimant 4 principally contends that Claimant 4 “identified a witness for the SEC and provided assistance in obtaining the cooperation of that witness.” Claimant 4 states that the Second Action Preliminary Determinations do not provide any discussion of the value of that witness's information or whether it was used in the Investigation. Claimant 4 argues that the witness's information “appeared to be extremely valuable” and Claimant 4 should receive credit for providing that information to the Commission. Claimant 4 also asks that the Commission exercise its exemptive authority under Exchange Act Section 36(a) and grant Claimant 4 an 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.³ As relevant here, under Exchange Act Rules 21F-4(c)(1) and (2), respectively, the Commission will consider a claimant to have provided original information that led to the successful enforcement of a covered action if either: (i) the original information caused the staff to open an investigation “or to inquire concerning different conduct as part of a current . . . investigation” and the Commission brought a successful action based in whole or in part on conduct that was the subject of the original information;⁴ or (ii) the conduct was already under examination or investigation, and the original information “significantly contributed to the success of the action.”⁵

In determining whether information “significantly contributed” to the success of the action, the Commission will consider whether the information was “meaningful” in that it “made a substantial and important contribution” to the success of the covered action.⁶ For example, the Commission will consider a claimant's information to have significantly contributed to the success of an enforcement action if it allowed the Commission to bring the action in significantly less time or with significantly fewer resources, or to bring additional successful claims or successful claims against additional individuals or entities.⁷

³ Exchange Act Section 21F(b)(1), 15 U.S.C. § 78u-6(b)(1).

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

⁵ See Exchange Act Rule 21F-4(c)(2), 17 C.F.R. § 240.21F-4(c)(2).

⁶ Order Determining Whistleblower Award Claims, Exchange Act Rel. No. 90922 (Jan. 14, 2021) at 4; *see also* Order Determining Whistleblower Award Claims, Exchange Act Rel. No. 85412 (Mar. 26, 2019) at 9.

⁷ Exchange Act Rel. No. 85412 at 8-9.

A. Claimant 3

Claimant 3 does not qualify for a whistleblower award in the First Action or the Second Action because his/her information did not cause the staff to open the Investigation, nor did Claimant 3's information cause the staff to inquire into different conduct or significantly contribute to the ongoing Investigation. First, the record demonstrates that the Investigation was opened in ^{Redacted} based on public news reports, not based upon any information from Claimant 3. Claimant 3 submitted his/her TCR to the Commission in ^{Redacted} more than fifteen months after the Investigation was opened.

Second, Claimant 3's information did not cause the staff to inquire into different conduct or significantly contribute to the Investigation. Staff assigned to the Investigation confirmed that the staff had no contact or communication with Claimant 3 before or during the Investigation, nor did staff assigned to the Investigation receive any information provided by Claimant 3 before or during the Investigation. Further, a supplemental staff declaration from the primary staff attorney assigned to the Investigation, which we credit, confirms that Commission staff who communicated with Claimant 3 (the "Other Staff") were not assigned to the Investigation. And while staff assigned to the Investigation spoke with the Other Staff during the Investigation, that discussion did not relate to Claimant 3's information, nor did any of the information shared in that discussion relate to the focus of the Investigation, advance the Investigation, or lead to the findings in the First or Second Action.⁸ The record also does not support Claimant 3's contention that "information [Claimant 3] provided was communicated to [the Company] and that this information in turn contributed to the resolution of the Covered Actions." Other Staff communicated with Claimant 3's counsel regarding a separate investigation, and Other Staff submitted document requests to the Company in ^{Redacted}. However, Other Staff confirmed that they did not share Claimant 3's information with the Company.⁹ Accordingly, Claimant 3's information did not significantly contribute to the Investigation or cause the staff to inquire into different conduct.

⁸ Claimant 3's argument regarding the supposed deficiencies of the staff declaration is unpersuasive. That staff member confirms in a supplemental declaration that he/she was the "primary Enforcement attorney assigned to the [I]nvestigation." Claimant 3 states that the staff was not aware of how Claimant 3's information was used and argues that whether the "[declarant], personally, did not use the information [he/she] apparently obtained from the Separate Investigation, in order to advance the results of the case against [the Company] is . . . of no moment." We disagree. As an initial matter, contrary to Claimant 3's assertion, and as the supplemental declaration confirms, the staff did not obtain anything that advanced the Investigation from the other Commission staff who communicated with Claimant 3. Regardless, as the primary Enforcement attorney assigned to the Investigation, the staff has unique insight into the Investigation, how it progressed, and how the findings in the First and Second Actions came about. We find his/her declarations highly relevant and on point to a key question in this proceeding of whether the Claimants provided information that significantly contributed to the Investigation. The fact that the primary staff attorney assigned to the Investigation did not learn of Claimant 3's information until after the First and Second Actions were instituted supports, along with other facts in the record, that Claimant 3's information did not lead to the success of those actions.

⁹ The record shows that the separate investigation was closed without any enforcement action by the Commission, and that Enforcement staff assigned to the separate investigation concluded that Claimant 3's information did not include evidence of specific misconduct.

Lastly, Claimant 3's argument that the Commission failed to provide certain information to Claimant 3 is not meritorious. Exchange Act Rule 21F-12(a) lists the materials that form the basis for the Preliminary Determinations and that Claimant 3 may request from the Commission.¹⁰ "These rules do not entitle [Claimant 3] to obtain from the Commission any materials . . . other than those listed in paragraph (a) of this section."¹¹ Claimant 3 requested and received the materials to which he/she was entitled under Rule 21F-12(a) and is entitled to no more.¹²

Accordingly, Claimant 3 is not eligible for an award in connection with the First Action or the Second Action.¹³

B. Claimant 4

Claimant 4 is not eligible for a whistleblower award because Claimant 4's information did not cause the staff to open the Investigation, to inquire into different conduct as part of an existing investigation, or significantly contribute to the Investigation. As previously stated, the Investigation was opened based upon news reports, not based upon information provided by any claimant. Claimant 4 submitted their first TCR in ^{Redacted} more than three years after the staff opened the Investigation and approximately one month after the First Action was filed, making public the findings with respect to the Respondent in the First Action and the factual basis for the findings in the Second Action with respect to the Company.

The information provided by Claimant 4 did not significantly contribute to the Investigation or cause the staff to inquire into additional conduct. At the time of Claimant 4's submission, the Investigation was substantially complete and settlement negotiations with the Company were in progress. Claimant 4's information, including information in their subsequent TCR submissions, was already known to the staff and did not assist the Investigation, nor did it otherwise impact the settlement negotiations with the Company. The staff reached out to the witness identified by Claimant 4 in ^{Redacted} approximately two months after the submission of Claimant 4's initial tip, and had a teleconference with the witness in ^{Redacted} approximately three months later. The witness provided the staff with documents shortly after the teleconference. However, to the extent the information from the witness was relevant to the Investigation, the record shows the information was duplicative of information already known to the staff. By that time, the staff's Investigation was substantially complete, and the witness's

¹⁰ See Exchange Act Rule 21F-10(e)(1).

¹¹ Exchange Act Rule 21F-12(b).

¹² Claimant 3 also states that 24 of 41 paragraphs of the staff declaration are redacted, and the Commission may not "arbitrarily redact information that otherwise should be provided." To the extent that Claimant 3 is seeking an unredacted copy of the staff declaration, Claimant 3 is not entitled to it. We find the redactions in the staff declaration were properly made and in accordance with law to protect the identity of other claimants in this proceeding. See Exchange Act Rule 21F-12(b).

¹³ We find no basis in the record supporting Claimant 3's argument that his/her information was shared with the Company. Regardless, even if certain information was shared with the Company, there is no evidence that it had any impact on the Investigation, the settlement with the Company in the Second Action, or the findings in the First or Second Action.

information did not contribute to the Investigation or otherwise impact the settlement negotiations with the Company.¹⁴

Accordingly, Claimant 4 is not eligible for an award in connection with the Second Action.

III. Conclusion

Accordingly, it is hereby ORDERED that (1) Claimant 3's whistleblower award applications in connection with the First Action and the Second Action be, and hereby are, denied; and (2) Claimant 4's whistleblower award application in connection with the Second Action be, and hereby is, denied.

By the Commission.

J. Lynn Taylor
Assistant Secretary

¹⁴ Claimant 4 has also requested that we invoke our exemptive authority under Section 36(a) of the Exchange Act to waive the eligibility requirements, arguing that Claimant 4 acted promptly even though Claimant 4 submitted information late in the Investigation, and therefore should receive an award. 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." The circumstances here do not warrant invoking Section 36(a). One of the principal objectives of the whistleblower program is to incentivize individuals to come forward with potentially new and useful information that the staff may use in an investigation. As discussed above, Claimant 4 provided their information years after the Investigation was opened and one month after the First Action made public the factual basis of the findings in the Second Action. While Claimant 4 may have acted promptly, Claimant 4's information was not useful to the staff and did not contribute to the Investigation. We also do not find that Claimant 4 presented any other compelling factors warranting the use of our exemptive authority under Section 36(a). Granting an exemption under these circumstances "is inconsistent with the statutory purpose of incentivizing whistleblowers to come forward early." Order Determining Whistleblower Award Claim, Exchange Act Rel. No. 92355 (July 9, 2021).