

16-934-ag
Cerny v. SEC

14 APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 7th day of September, two thousand seventeen.

PRESENT: DENNY CHIN,
SUSAN L. CARNEY,
*Circuit Judges.**

-----x

CHARLES M. CERNY, CLIFF BUXBAUM,
Petitioners,

16-934-ag

v.

U.S. SECURITIES AND EXCHANGE COMMISSION,
Respondent.

-----x

FOR PETITIONERS:

CHARLES M. CERNY, *pro se*, Brooklyn, New
York, and Cliff Buxbaum, *pro se*, Thousand
Oaks, California.

* Because Judge Ralph K. Winter, originally assigned to this panel, recused himself from this case, the remaining two judges issue this order in accordance with Second Circuit Internal Operating Procedure E(b).

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FOR RESPONDENT:

STEPHEN G. YODER, Senior Litigation Counsel, Anne K. Small, General Counsel, Sanket J. Bulsara, Deputy General Counsel, Michael A. Conley, Solicitor, Catherine A. Broderick, Securities and Exchange Commission, Washington, D.C.

Appeal from a final order of the Securities and Exchange Commission.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED,

ADJUDGED, AND DECREED that the petition for review is **DENIED**.¹

Petitioners Charles M. Cerny and Cliff Buxbaum, proceeding *pro se*, seek review of a March 14, 2016 final order of the Securities and Exchange Commission (the "Commission") denying as untimely their claims for whistleblower awards. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal.

After discovering a notice on the Commission's website advising of the case's resolution, a development that made them potentially eligible for whistleblower awards based on securities fraud judgments obtained by the Commission, petitioners filed claims with the Commission seeking such awards. The notice listed the deadline to file a claim as June 3, 2012, and petitioners submitted separate claims in 2014.² The Commission denied the claims, concluding that they were untimely and that petitioners

¹ Petitioners' motion to compel the Securities and Exchange Commission to complete the administrative record, and the motions of non-parties Denise Warren and Ahmed Amr for leave to file *pro se* amicus briefs in support of petitioners are also denied.

² Buxbaum filed his March 30, 2014 claim on behalf of himself and three other individuals, including Cerny. Cerny, who had not signed Buxbaum's claim, subsequently submitted his own claim on July 14, 2014.

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had not demonstrated extraordinary circumstances warranting relief from the time bar.

Petitioners timely petitioned for review.

We review the Commission's whistleblower award determinations "in accordance with section 706 of Title 5." 15 U.S.C. § 78u-6(f). Accordingly, we will set aside an agency action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or if it is "unsupported by substantial evidence." 5 U.S.C. § 706(2)(A), (E). A whistleblower who wishes to apply for an award must submit an application within ninety days of the publication of a "Notice of Covered Action" on the Commission's website, "or the claim will be barred." 17 C.F.R. § 240.21F-10(a). Nevertheless, "the Commission may, in its sole discretion, waive any of the[] procedures [described in § 240.21F-10] based upon a showing of extraordinary circumstances." *Id.* § 240.21F-8(a).

Petitioners acknowledge that they failed to meet the deadline, but argue that the quality of the information they provided to the Commission and the Commission's alleged failure to properly catalogue petitioners' submissions constituted extraordinary circumstances warranting relief from the filing deadline. An agency's interpretation of its regulations, "regardless of the formality of the procedures used to formulate it, is 'controlling unless plainly erroneous or inconsistent with the regulation[s].'" *Encarnacion ex rel. George v. Astrue*, 568 F.3d 72, 78 (2d Cir. 2009) (alteration in original) (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). The Commission has consistently interpreted "extraordinary circumstances" to require that a

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claimant demonstrate "that the reason for the failure to timely file was beyond the claimant's control." Special App'x at 3; *see also Claim for Awards in Connection with Redacted & Redacted*, Exchange Act Release No. 72,659, 2014 WL 3613224, at *3 (July 23, 2014); *Claim for Awards in Connection with Redacted Notice of Covered Action Redacted*, Exchange Act Release No. 72,178, 2014 WL 1998521, at *2 (May 16, 2014); *cf. Application of PennMont Secs.*, Exchange Act Release No. 61,967, 2010 WL 1638720, at *4-5 (Apr. 23, 2010) (comparing "extraordinary circumstances" in another Commission rule to the doctrine of equitable tolling), *pet. denied*, 414 F. App'x 465 (3d Cir. 2011). Petitioners fail to demonstrate how the Commission's interpretation is plainly erroneous or inconsistent with the regulations. Accordingly, we conclude that the Commission's interpretation is controlling, *see Encarnacion*, 568 F.3d at 78, and, therefore, that the Commission did not abuse its discretion by determining that petitioners had not established extraordinary circumstances warranting relief from the claim filing deadline.

Petitioners also argue that the untimeliness of their applications should have been excused because they never received actual notice from the Commission of their potential eligibility for a whistleblower award. Under the relevant regulation, however, the Commission is not required to provide actual notice to potential claimants. It provides simply: "Whenever a Commission action results in monetary sanctions totaling more than \$1,000,000, the Office of the Whistleblower will cause to be published on the Commission's Web site a 'Notice of Covered Action.'" 17 C.F.R.

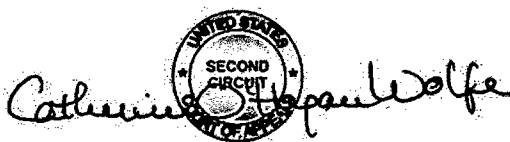
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§ 240.21F-10(a); *see also Securities Whistleblower Incentives and Protections*, 76 Fed. Reg. 34,300, 34,342-43 (June 13, 2011) (rejecting commenters' request that the Office of the Whistleblower be "required to contact whistleblowers directly to inform them [of] a covered action"). Accordingly, the Commission did not abuse its discretion by declining to excuse the untimeliness of petitioners' claims based on their failure to receive actual notice from the Commission. To the extent petitioners challenge the notice rule itself as arbitrary or capricious, adopting such a rule is within the scope of the Commission's discretion, 15 U.S.C. § 78u-6(j), and therefore lies beyond the scope of our current review.

We have considered petitioners' remaining arguments and conclude they are without merit. Accordingly, we **DENY** the petition for review.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

The block contains a handwritten signature, "Catherine O'Hagan Wolfe", in cursive script. Overlaid on the signature is the official seal of the United States Second Circuit Court of Appeals. The seal is circular with "UNITED STATES" at the top, "SECOND CIRCUIT" in the center, and "NEW YORK, N.Y." at the bottom.

19 APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 12th day of December, two thousand and sixteen

Before: DENNY CHIN,
SUSAN L. CARNEY,

*Circuit Judges.**

Charles M. Cerny, Cliff Buxbaum,

Petitioners,

v.

U.S. Securities and Exchange Commission,

Respondent.

ORDER

Docket No. 16-934

Charles M. Cerny, having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is DENIED.

For The Court:

Catherine O'Hagan Wolfe,
Clerk of Court

Catherine O'Hagan Wolfe



*Because Judge Ralph K. Winter, originally assigned to this panel, recused himself from this case, the remaining two judges issue this order in accordance with Second Circuit Internal Operating Procedure E(b).

20 APPENDIX C

PRELIMINARY DETERMINATION OF THE CLAIMS REVIEW STAFF

In response to the above-referenced Notice of Covered Action, the U.S. Securities and Exchange Commission received four whistleblower award claims from the following individuals (collectively, the "Claimants"):

Cliff Buxbaum ("Claimant 1")
Charles M. Cerny ("Claimant 2")
Ahmed Amr ("Claimant 3")
[REDACTED] ("Claimant 4")

Pursuant to Section 21F of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 21F-10 promulgated thereunder, the Claims Review Staff has evaluated the above claims in accordance with the criteria set forth in Rules 21F-1 through 21F-17. The Claims Review Staff has preliminarily determined to recommend that the Commission deny all of the above award claims. The basis for this determination is as follows:

Each of the Claimants failed to submit a claim for award on Form WB-APP within ninety (90) days of the above-referenced Notice of Covered Action, as required under Rule 21F-10(b) of the Exchange Act in order to be considered for an award. Further, none of the Claimants has demonstrated that the Commission should waive, in its discretion, the filing deadline based on "extraordinary circumstances," as provided under Rule 21F-8(a) of the Exchange Act.¹

By: Claims Review Staff

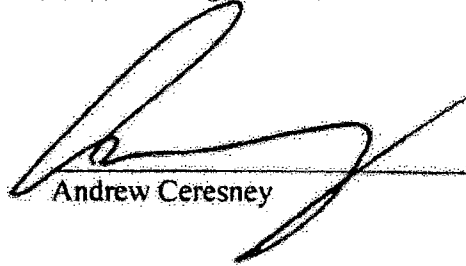
Date: June 5, 2015

¹ See *Order Determining Whistleblower Award Claim*, Exchange Act Release No. 72659, Whistleblower Award Proceeding File No. 2014-7 (July 23, 2014) ("[A] lack of awareness about the program does not ... rise to the level of an extraordinary circumstance as a general matter [since] potential claimants bear the ultimate responsibility to learn about the program and to take the appropriate steps to perfect their award applications"). We also preliminarily find that none of the Claimants has identified any compelling reason that might justify the Commission, in its sole discretion, exercising its exemptive authority under Section 36(a) of the Exchange Act.

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SEC v. James Li, et al., 11-cv-01712 (D. Ariz. Aug. 30, 2011)
Notice of Covered Action 2012-21

This document may be signed in counterparts, each of which shall be deemed an original, all of which together shall constitute one and the same agreement.



Andrew Ceresney

Eric Bustillo

Antonia Chion

Gerald Hodgkins

Michele Layne

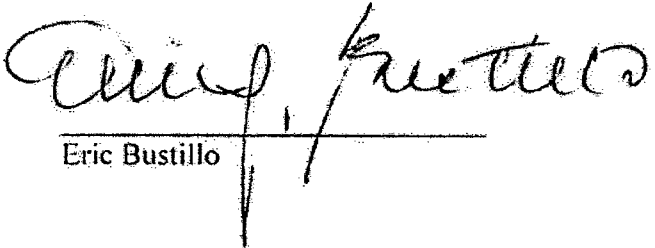
Dated: June 5, 2015

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SEC v. James Li, et al., 11-cv-01712 (D. Ariz. Aug. 30, 2011)
Notice of Covered Action 2012-21

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Andrew Ceresney



Eric Bustillo

Antonia Chion

Gerald Hodgkins

Michele Layne

Dated: June 5, 2015

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SEC v. James Li, et al., 11-cv-01712 (D. Ariz. Aug. 30, 2011)
Notice of Covered Action 2012-21

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Andrew Ceresney

Eric Bustillo



Antonia Chion



Gerald Hodgkins

Michele Layne

Dated: June 5, 2015

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SEC v. James Li, et al., 11-cv-01712 (D. Ariz. Aug. 30, 2011)
Notice of Covered Action 2012-21

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Andrew Ceresney

Eric Bustillo

Antonia Chion

Gerald Hodgkins



Michele Layne

Dated: June 5, 2015

NON-PUBLIC

(25) APPENDIX D

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 77368 / March 14, 2016

WHISTLEBLOWER AWARD PROCEEDING
File No. 2016-5

In the Matter of the Claim for Award

in connection with

SEC v. James Li, et al.,
11-cv-01712 (D. Ariz. Aug. 30, 2011)
Notice of Covered Action 2012-21

ORDER DETERMINING WHISTLEBLOWER AWARD CLAIM

Cliff Buxbaum ("Claimant 1"), Charles M. Cerny ("Claimant 2"), and Ahmed Amr ("Claimant 3") (collectively, "Claimants") failed to submit their claims for an award for Notice of Covered Action 2012-21 to the Office of the Whistleblower ("OWB") within ninety (90) calendar days of the date of the Notice of Covered Action ("NoCA"), as Rule 21F-10(b) of the Securities Exchange Act ("Exchange Act") requires for award consideration.¹ As a result, the Claims Review Staff ("CRS") issued a Preliminary Determination recommending that each Claimants' untimely claim be denied.²

For the reasons set forth below, each Claimant's award claim is denied.

I. Background

¹ Rule 21F-10(b), 17 C.F.R. § 240.21F-10(b), provides:

To file a claim for a whistleblower award, you must file Form WB-APP, Application for Award for Original Information Provided Pursuant to Section 21F of the Securities Exchange Act of 1934 (referenced in § 249.1801 of this chapter). You must sign this form as the claimant and submit it to the Office of the Whistleblower by mail or fax. All claim forms, including any attachments, must be received by the Office of the Whistleblower within ninety (90) calendar days of the date of the Notice of Covered Action in order to be considered for an award. 17 C.F.R. § 240.21F-10(b).

² The Preliminary Determination also denied an award to [REDACTED] did not contest that denial, and thus it became the final order of the Commission pursuant to Exchange Act Rule 21F-10(f).

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On August 30, 2011, the Commission filed a complaint in the U.S. District Court for the District of Arizona against James Li ("Li"), Thomas Chow ("Chow"), Roger Kao ("Kao"), Christopher Liu ("Liu"), and Wayne Pratt ("Pratt") for engaging in financial fraud to overstate Syntax-Brilliant Corporation's ("SB") financial condition. Between September 2, 2011 and April 4, 2012, the district court entered final judgments against Liu, Kao, Pratt, Chow, and Li ordering, among other sanctions, that Liu and Kao pay a civil penalty of \$100,000, Pratt pay disgorgement and prejudgment interest of \$105,000 and a civil penalty of \$90,000, and Chow and Li pay disgorgement, prejudgment interest and civil penalties of \$48,467,752.28 and \$11,599,396.93, respectively.

On March 5, 2012, the OWB posted NoCA 2012-21 for this covered action. On June 3, 2012, the 90-day period established by Rule 21F-10(b) to submit an award claim expired without any of the three Claimants having made a submission. Instead, the three Claimants submitted their award claims approximately two years after the deadline.³ On June 5, 2015, the CRS issued a Preliminary Determination recommending that each Claimant's award claim be denied due to untimeliness.

Pursuant to Rule 21F-10(e),⁴ the three Claimants subsequently submitted written responses contesting the Preliminary Determination.⁵ In their responses the Claimants did not dispute that their claims were late. Rather, they argued that the Commission should excuse their untimely filings due to certain purported "extraordinary circumstances." While the Claimants each raise different contentions as to why extraordinary circumstances excused their late submissions, none of the Claimants' claims that the delay was caused by factors outside his control. Rather, the Claimants assert that extraordinary circumstances should be found because of purported mistakes committed by the Commission in its investigation and in the prosecution of the enforcement action, the purported importance of the information the claimants provided to the staff during its investigation and continue to provide in the subsequent SB bankruptcy proceeding, and the Commission's failure to directly notify the Claimants of the posting of the NoCA and the deadline for submitting an award application.

II. Analysis

At the outset, we think it is important to observe that the 90-day deadline set forth in Rule 21F-10(b) serves several important programmatic functions. The deadline ensures fairness to potential claimants by giving all an equal opportunity to have their competing claims evaluated at the same time. The deadline also brings finality to the claims process so that we can make

³ Claimant 1 filed an award application on Form WB-APP dated March 31, 2014, almost two years after the application deadline. Claimant 1's application stated that it was also made on behalf of Claimants 2 and 3, although it was only signed by Claimant 1. Claimants 2 and 3 subsequently submitted their own award applications on Forms WB-APP on July 14, 2014 and July 15, 2014, respectively.

⁴ Rule 21F-10(e), 17 C.F.R. § 240.21F-10(e), provides that a claimant seeking to contest a Preliminary Determination may submit a written response within the specified period under the rule "setting forth the grounds for your objection to either the denial of an award or the proposed amount of an award."

⁵ Claimants 1 and 2 requested oral argument before the Commission. We are denying those requests because we find that argument would not benefit the Commission's consideration of their award applications.

timely awards to meritorious whistleblowers.⁶

Notwithstanding these important programmatic functions, we recognize that there may be rare situations where an exception should be made. To allow for this, Rule 21F-8(a) provides that “the Commission may, in its sole discretion, waive” the 90-day filing requirement “upon a showing of extraordinary circumstances.”⁷ We do not find that any of the three Claimants has made the necessary showing to trigger our discretionary authority to waive the deadline.

In determining whether a claimant has demonstrated extraordinary circumstances to excuse an untimely submission under Rule 21F-8(a), we have explained that “the ‘extraordinary circumstances exception is to be narrowly construed and applied only in limited circumstances.’”⁸ We have further explained that an extraordinary circumstance in the context of a late filing requires a claimant to show that the reason for the failure to timely file was beyond the claimant’s control.⁹ Further, we identified attorney misconduct or serious illness that presented the applicant from making a timely filing as two examples of the demanding showing an applicant must make for us to consider exercising our discretionary authority to excuse an untimely filing.¹⁰

Applying that demanding standard here, we find that that none of the three Claimants has demonstrated that their failure to timely file an award application was caused by factors beyond their control. For example, neither the purported mistakes made by the Commission in its investigation and enforcement action, nor the purported importance of the information provided by the Claimants during the Commission’s investigation and the SB bankruptcy proceeding, explains why circumstances beyond the Claimants’ control prevented them from timely filing their award claims.

Finally, we disagree with the Claimants’ contention that the Commission had a duty to notify the Claimants of the posting of the NoCA and the deadline for submitting an award application, and that the failure to provide such notice constituted an extraordinary circumstance justifying a waiver of the timing requirement. Rule 21F-10(a) provides for constructive, not actual, notice of the posting of a covered action and of the deadline for submitting a claim.¹¹ The

⁶ See *Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934*, Release No. 34-64545, at 172 (May 25, 2011), available at <http://www.sec.gov/rules/final/2011/34-64545.pdf> (“Implementing Release”).

⁷ 17 C.F.R. § 240.21F-8(a).

⁸ *Order Determining Whistleblower Award Claim*, Exchange Act Release No. 72659, Whistleblower Award Proceeding File No. 2014-7, at 4 (July 23, 2014), available at <http://www.sec.gov/rules/other/2014/34-72659.pdf> (citation and internal quotation marks omitted) ; see also *Order Determining Whistleblower Award Claim*, Exchange Act Release No. 72178, Whistleblower Award Proceeding File No. 2014-4, at 3 (May 16, 2014), available at <http://www.sec.gov/rules/other/2014/34-72178.pdf> (including same language).

⁹ Exchange Act Rel. No. 72659 at 5; Exchange Act Rel. No. 72178 at *3.

¹⁰ Exchange Act Rel. No. 72659 at 6; Exchange Act Rel. No. 72178 at *3.

¹¹ Rule 21F-10(a), 17 C.F.R. § 240.21F-10(a), states that “[w]hen a Commission action results in monetary

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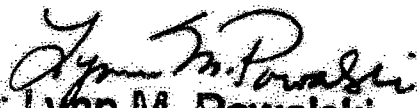
NoCA for this matter was clearly posted on the Commission's website, along with the filing deadline, which constitutes the requisite notice. As we have previously explained, "a lack of awareness about the [whistleblower award] program does not . . . rise to the level of an extraordinary circumstance as a general matter [since] potential claimants bear the ultimate responsibility to learn about the program and to take the appropriate steps to perfect their award applications."¹² A potential claimant's responsibility includes the obligation to regularly monitor the Commission's web page for NoCA postings and to properly calculate the deadline for filing an award claim. Here, the Claimants failed to do that, and their failures were not caused by an extraordinary circumstance that might excuse the untimely award applications.¹³

III. Conclusion

Accordingly, upon due consideration under Rule 21F-10(h), 17 C.F.R. § 240.21F-10(h), it is hereby ORDERED that the claims for whistleblower awards by Claimant 1, Claimant 2, and Claimant 3 be, and hereby are, denied.

By the Commission.

Brent J. Fields
Secretary


y: Lynn M. Powalski
Deputy Secretary

sanctions totaling more than \$1,000,000, the Office of the Whistleblower will cause to be published on the Commission's website a 'Notice of Covered Action' . . . [and that] [a] claimant will have ninety (90) days from the date of the Notice of Covered Action to file a claim for an award based on that action, or the claim will be barred." In our release adopting the final whistleblower rules, we explained that the constructive notice procedure of Rule 21F-10(a) "provides the best mechanism to provide notice to all whistleblower claimants who may have contributed to the action's success." Implementing Release at *171.

¹² Exchange Act Release No. 72659 at *5 ("The Commission is under no duty to provide Claimant . . . with direct notice of the filing deadline.").

¹³ Although the Claimants have not requested that we invoke our separate exemptive authority under Section 36(a) of the Exchange Act, we would decline to do so if they had. 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." We believe that none of the Claimants has met their burden to demonstrate any considerations that would satisfy the requirements for us to exercise our Section 36(a) exemptive authority.

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APPENDIX E

UNITED STATES OF AMERICA

before the

SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 81857 / October 12, 2017

WHISTLEBLOWER AWARD PROCEEDING

File No. 2018-1

In the Matter of the Claim for Award

in connection with

Redacted

Redacted

Notice of Covered Action ^{Redacted}

ORDER DETERMINING WHISTLEBLOWER AWARD CLAIM

On April 21, 2017, the Claims Review Staff issued a Preliminary Determination related to Notice of Covered Action ^{Redacted} which was issued in connection with the Commission's successful resolution of the above-referenced enforcement action (the "Covered Action"). The Preliminary Determination recommended that ^{Redacted} ("Claimant") receive a whistleblower award because Claimant voluntarily provided original information to the Commission that led to the successful enforcement of the Covered Action pursuant to Section 21F(b)(1) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78u-6(b)(1), and Rule 21F-3(a) thereunder, 17 C.F.R. § 240.21F-3(a).

Further, the Claims Review Staff recommended that Claimant's award be set in the amount of ^{Redacted} percent ^{Redacted} of the monetary sanctions collected or to be collected in the Covered Action, which will yield an award of more than \$1,000,000. In reaching this recommendation, the Claims Review Staff considered the factors set forth in Rule 21F-6, 17 C.F.R. § 240.21F-6, in relation to the facts and circumstances of Claimant's application.

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On April 24, 2017, Claimant provided written notice to the Commission of Claimant's decision not to contest the Preliminary Determination within the 60-day deadline set out in Rule 21F-10(e), 17 C.F.R. § 240.21F-10(e).

Upon due consideration under Rules 21F-10(f) and (h), 17 C.F.R. § 240.21F-10(f) and (h), the Preliminary Determination of the Claims Review Staff is adopted, including the award determination. The record demonstrates that Claimant has satisfied all criteria for award.¹ Claimant, a company outsider, provided the Commission with new information and substantial corroborating documentation of a securities law violation by a registered entity that impacted retail customers. Claimant's tip prompted staff to

¹ Specifically as to the facts and circumstances of Claimant's claim for an award, the Commission hereby finds that extraordinary circumstances exist to warrant a waiver of the requirement in Rule 21F-9(b), 17 C.F.R. § 240.21F-9(b), that to be eligible for an award, a claimant must have signed a declaration under penalty of perjury at the time that the initial tip was submitted to the Commission. *See* 17 C.F.R. § 240.21F-8(a). Under Rule 21F-8(a), "the Commission may, in its sole discretion, waive any of [the] procedures based upon a showing of extraordinary circumstances." In determining whether a claimant has demonstrated extraordinary circumstances for purposes of Rule 21F-8(a), we have previously looked to our decision in *In the Matter of the Application of PennMont Sec.*, Exchange Act Release No. 61967, 2010 WL 1638720 (April 23, 2010), *aff'd PennMont Sec. v. SEC*, 414 F. App'x 465 (3d. Cir. 2011). There, in determining whether extraordinary circumstances were shown to permit an untimely filing under Commission Rule of Practice 420(b), 17 C.F.R. § 201.420(b), we explained that "the 'extraordinary circumstances' exception is to be narrowly construed and applied only in limited circumstances." *PennMont*, 2010 WL 1638720 at *4. An extraordinary circumstance is one "where the reason for the failure timely to file was beyond the control of the applicant that causes the delay." *Id.*; *see also Order Determining Whistleblower Award Claim*, Exchange Act Release No. 72178 (May 16, 2014); *Order Determining Whistleblower Award Claim*, Exchange Act Release No. 72659 (July 23, 2014); *Order Determining Whistleblower Award Claim*, Exchange Act Release No. 77368 (Mar. 14, 2016), *aff'd sub nom. Cerny v. SEC*, No. 16-934, 2017 WL 3911581 (2d Cir. Sept. 7, 2017). Moreover, the existence of an extraordinary circumstance is assessed based on the facts as they existed at the time that the failure occurred with the critical question being whether those then-existing facts and circumstances were sufficiently beyond the control of the claimant to justify the procedural deficiency. Although Claimant did not submit a declaration at the time of the initial submission of the tip, Claimant's failure was the result of the Commission's online configuration and beyond Claimant's control. Furthermore, when staff alerted Claimant to the issue, Claimant promptly submitted a signed declaration at the staff's request. Thus, we have determined that a waiver of the requirement to submit a signed declaration at the time of the initial tip's submission is appropriate given the specific facts and circumstances of this case.

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that ultimately led to the claims that were the basis of the Commission's successful Covered Action against the entity.

Conclusion

Accordingly, it is hereby ORDERED that Claimant shall receive an award of Redacted percent Redacted of the monetary sanctions collected in this Covered Action, including any monetary sanctions collected after the date of this Order.

By the Commission.

Brent J. Fields
Secretary