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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
SECURITIES EXCHANGE ACT OF 1934
Release No. 91165 / February 19, 2021
WHISTLEBLOWER AWARD PROCEEDING
File No. 2021-27

In the Matter of the Claim for Award

in connection with the

Award Application of Victor Hong dated September 5, 2019 (No Notice of Covered Action Identified)

ORDER DETERMINING WHISTLEBLOWER AWARD CLAIM

Pursuant to Section 21F of the Securities Exchange Act of 1934 (“Exchange Act”) and the rules thereunder, the Claims Review Staff (“CRS”) issued a Preliminary Determination recommending that the claim submitted by Victor Hong (“Claimant”) on September 5, 2019, in connection with the above-referenced whistleblower award application, be denied. Claimant filed a timely written response contesting the denial. For the reasons discussed below, we deny Claimant’s award claim.

I. Background

A. The Tips and Award Application

Victor Hong submitted two tips to the Commission. The first tip was submitted on July 28, 2014, and assigned the number “TCR 1406601219794.” The second tip was submitted on December 14, 2014, and assigned the number “TCR 1418585030083.”

Claimant submitted applications for an award from the Commission three times, starting in 2015. First, Claimant initially applied for an award on December 28, 2015, identifying the purported covered judicial or administrative action brought by the Commission (“Covered Action”) as a settlement in *FHFA v. Royal Bank of Scotland*, Case No. 3:11-cv-01383 (D. Mass). Claimant supplemented that application on July 19, 2016, providing additional information about *FHFA v. RBS*. On August 15, 2016, Claimant submitted an amended whistleblower application, which identified the purported Covered Action as a case purportedly brought by the Department of Justice against the Royal Bank of Scotland. In this second application, Claimant referred to a

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subpoena issued to Claimant as part of an “investigation by the U.S. Department of Justice . . . to determine whether there has been a violation of one or more of the provisions of Title 18, United States Code, enumerated in 12 U.S.C. § 1833a(a)(c), concerning the residential mortgage-backed securitization practices at the Royal Bank of Scotland.” On September 6, 2019, Claimant submitted a revised application for a whistleblower award that is the basis for the claim now before the Commission. This time, Claimant identified the purported Covered Action as an August 14, 2018, settlement agreement entered into by the Department of Justice and the Royal Bank of Scotland. In this third application, Claimant included a copy of the subpoena to which his August 15, 2016, application referred.

The Office of the Whistleblower (“OWB”) informed Claimant each time that Claimant had not submitted a properly filed whistleblower award application because the matters Claimant had identified were not Covered Actions as defined by Section 21F(a)(1) of the Exchange Act. Section D of Form WB-APP requires whistleblowers to identify 1) the “Date of Notice of Covered Action to which claim relates,” 2) the “Notice Number,” 3) “Case Name,” and 4) “Case Number.” The Claimant provided a “Date of Notice of Covered Action” of “8/14/18” and the “Case Name” “Royal Bank of Scotland/DOJ Settlement,” while leaving the “Notice Number” and “Case Number” sections blank. The Claimant listed similar information in Section E of the Form WB-APP for a Related Action award. OWB staff searched the Commission’s records of posted Covered Actions using both the case name and Covered Action date provided by Claimant. OWB staff were unable to identify any Covered Action brought by the Commission related to Royal Bank of Scotland (“RBS”).

Claimant filed a Petition for Review of OWB’s deficiency letter in the U.S. Court of Appeals for the Second Circuit on November 15, 2019. *Hong v. SEC*, Case No. 19-3886 (2d Cir.). The Commission then moved for a voluntary remand under Federal Rule of Appellate Procedure 27 on the grounds that Claimant never sought review by the Commission of OWB’s declination under the procedures provided in the whistleblower program rules. The Court of Appeals granted the Commission’s motion for remand on May 12, 2020, based on the Commission’s representation that it will, in good faith, proceed to issue preliminary and final determinations on Claimant’s application and address his arguments regarding the record and its rejection of his application.

B. The Preliminary Determination

On July 15, 2020, the CRS issued a Preliminary Determination in connection with Claimant’s award application submitted on September 5, 2019, recommending that the Commission deny Claimant’s claim. The CRS preliminarily found that Claimant was ineligible for an award under Section 21F(b)(1) of the Exchange Act and Rule 21F-10 thereunder because Claimant’s award application failed to identify any Covered Action brought by the Commission as the basis of an award. The CRS further preliminarily found that Claimant was ineligible for

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an award for a Related Action under Section 21F(b)(1) and Rule 21F-11 because Claimant had not demonstrated eligibility for an award for a Commission Covered Action. Such eligibility is a necessary precondition for eligibility for a Related Action award. Claimant subsequently filed a request for reconsideration of the Preliminary Determination on August 4, 2020.

II. Analysis

Claimant argues that Claimant is eligible for an award because Claimant provided detailed, original information to the Commission regarding RBS, which the Commission shared with the Federal Housing Finance Agency (“FHFA”) and Department of Justice (“DOJ”) and which led to settlements between FHFA and DOJ on the one hand and RBS on the other. Claimant does not argue that Claimant provided original information that led to the successful enforcement of an action *brought by the Commission*.

But to qualify for any award, a whistleblower must voluntarily provide the Commission with original information that leads to the successful enforcement of a covered judicial or administrative action *brought by the Commission*. To explain, Section 21F(b)(1) of the Exchange Act states that Commission may pay a whistleblower an award in two types of actions: a “covered judicial or administrative action, or related action.” 15 U.S.C. § 78u-6(b)(1). The Commission may only pay on a related action if the whistleblower is eligible for an award on a predicate “covered judicial or administrative action.”

This predicate requirement for an award on a related action is made clear in the definitions for a covered action and related action. “The term ‘covered judicial or administrative action’ means any judicial or administrative action *brought by the Commission* under the securities laws that results in monetary sanctions exceeding \$1,000,000.” Exchange Act Section 21F(a)(1); 15 U.S.C. § 78u-6(a)(1) (emphasis added). Whenever the Commission brings an action that qualifies as a Covered Action under this definition, OWB publishes on the Commission’s website a “Notice of Covered Action” inviting claimants to submit whistleblower award applications on Form WB-APP within 90 days. 17 C.F.R. § 240.21F-10(a).¹

In turn, Section 21F(a)(5) explicitly defines “Related Action” in relation to a Covered Action:

The term “related action”, when used with respect to any judicial or administrative action brought by the Commission under the securities laws, means any judicial or administrative action brought by an entity described in subclauses (I) through (IV) of subsection

¹ See also 17 C.F.R. § 240.21F-4(d) (“An action generally means a single captioned judicial or administrative proceeding brought by the Commission.”).

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(h)(2)(D)(i) that is based upon the original information provided by a whistleblower pursuant to subsection (a) that led to the successful enforcement of the Commission action.

15 U.S.C. § 78u-6(a)(5). A whistleblower may receive an award based on a Related Action only when there is a judicial or administrative action by the Commission that results in monetary sanctions of more than \$1 million – a Covered Action – and the whistleblower is eligible for an award for the Covered Action.²

Claimant identified in Claimant’s whistleblower applications, Request for Reconsideration, and the Second Circuit filings in *Hong v. SEC* two general matters that Claimant claims were Covered Actions or Related Actions entitling Claimant to an award: a settlement by FHFA with RBS in *FHFA v. RBS*, Case No. 11-cv-1383 (D. Conn. July 12, 2017); and a settlement by the DOJ with RBS in August 2018 (“DOJ/RBS Settlement”).

The problem for Claimant is that Claimant has not identified a Covered Action *brought by the Commission*. Claimant has only identified settlements by other federal agencies (FHFA and DOJ). Moreover, the staff declaration from OWB makes clear that OWB has not failed to post a Notice of Covered Action for a Commission action involving RBS. In fact, searches of Commission records failed to identify any action brought by the Commission that corresponds to the same nucleus of facts as described in the information provided by Claimant.

Claimant advances in Claimant’s Request for Reconsideration and Second Circuit filings in *Hong v. SEC*, which Claimant incorporated by reference into Claimant’s Request for Reconsideration (p. 4), four interrelated theories as to why Claimant is nevertheless entitled to a whistleblower award from the Commission.³

First, Claimant argues that the DOJ/RBS Settlement or settlement in *FHFA v. RBS* constitute Covered Actions or Related Actions that entitle Claimant to an award.⁴ However, the

² See 15 U.S.C. § 78u-6(a)(5); 17 C.F.R. § 240.21F-11(a); *Matter of the Claims for Award in Connection with Redacted Notice of Covered Action Redacted*. Release No. 34-87662, 2019 WL 6609459, at *9 (Dec. 5, 2019) (related action awards may be made only if claimant first satisfies eligibility criteria for an award for the Commission covered action).

³ Claimant also asserts that Claimant was improperly denied an award in the Preliminary Determination because the Commission had not *posted* a notice of Covered Action. Claimant argues that the Commission cannot deny Claimant an award by failing to post a notice of what should otherwise be recognized as a Covered Action because the act of posting a notice is neither necessary nor consistent with the statute. Request for Reconsideration at 8. However, the denial of an award to Claimant was not based on the act of not posting a Covered Action but based on the fact that no Covered Action was ever identified by Claimant – to the contrary, as mentioned above, after a search of Commission records, we found no action that corresponded to the same nucleus of facts as described in the information provided by Claimant.

⁴ See Request for Reconsideration at 6 (“The DOJ Settlement is a ‘Covered Action’ or ‘Related Action.’”); Request for Reconsideration at 7 (“These efforts ultimately culminated in ‘successful enforcement’ of ‘judicial or administrative action brought by the Commission,’ within the meaning of the Dodd-Frank Wall Street Reform and

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plain language of Section 21F disproves Claimant's argument.⁵ Claimant ignores the definitions of and critical distinction between Covered Actions and Related Actions. A Covered Action is a judicial or administrative action *brought by the Commission* (15 U.S.C. § 78u-6(a)(1)), and Claimant has not identified one and cannot identify one. A Related Action cannot be a basis for an award absent a Covered Action. The definition of a Related Action clearly and specifically presumes the existence of a Covered Action; moreover, the whistleblower's original information must have led to the successful enforcement of that action.⁶ The relevant definitions in Section 21F and the Commission's rules do not permit the Commission to make a whistleblower award unless there is a judicial or administrative action *brought by the Commission* regardless of the success of actions brought by other agencies.

Second, Claimant also makes a more general appeal for an award, arguing that Claimant provided "troves" of original information precisely as Congress had intended, and denying Claimant an award would violate the Congressional intent and spirit of the whistleblower program.⁷ However, Section 21F, as explained above, clearly requires a judicial or administrative action *brought by the Commission* for a claimant to be eligible for an award. Notwithstanding Claimant's appeal that Claimant is the sort of person Congress intended to incentivize, the Commission is bound by the clear language of the statute.⁸

Third, Claimant asserts that there is no requirement that the Commission commence a formal judicial or administrative proceeding for there to be a Covered Action for which Claimant

Consumer Protection Act ('Dodd-Frank'), under section 21F of the Securities Exchange Act of 1934, 15 U.S.C. § 778u-6, and the Commission's regulations, 17 CFR § 240.21F-4(c), through the DOJ Settlement (with monetary sanctions of \$4.9 billion."); Motion to Complete Record, *Hong v. SEC.* at 18, ¶ 48 ("The plain language . . . of the Dodd-Frank whistleblower incentive program, encompasses Commission actions, such as those culminating in the DOJ Settlement and the FHFA Settlement"); Petitioner's Opening Brief, *Hong v. SEC.* at 23-35).

⁵ See *In the Matter of Salvatore F. Sodano*, Release No. 34-59141, 2008 WL 5328801 (SEC Dec. 22, 2008) ("The Supreme Court has made clear that, in interpreting the applicability of any statute, we should look first to the language of the statute."), citing *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

⁶ 15 U.S.C. § 78u-6(a)(5) ("The term 'related action', when used with respect to any judicial or administrative action brought by the Commission under the securities laws, means any judicial or administrative action brought by an entity . . . that is based upon the original information provided by a whistleblower pursuant to subsection (a) that led to the successful enforcement of the Commission action.") (emphasis added); see also 17 C.F.R. § 240.21F-11(a) ("If you are eligible to receive an award following a Commission action that results in monetary sanctions totaling more than \$1,000,000, you also may be eligible to receive an award based on the monetary sanctions that are collected from a related action (as defined in § 240.21F-3 of this chapter).").

⁷ See Request for Reconsideration at 7, Motion to Complete Record, *Hong v. SEC.* at 18, ¶ 48 ("The plain language, as well as the spirit of the Dodd-Frank whistleblower incentive program, encompasses Commission actions, such as those culminating in the DOJ Settlement and the FHFA Settlement").

⁸ *Salvatore F. Sodano*, Release No. 34-59141, 2008 WL 5328801, at * 1 n.6 (order reversing and remanding for additional proceedings) ("where statutory language is clear and unambiguous, even 'contradictory indications in the statute's legislative history will not be allowed to alter the plain meaning of the text.'"), quoting *Ratzlaf v. U.S.*, 510 U.S. 135, 147-48 (1994).

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is entitled to an award. But the definition of a Covered Action in Section 21F(a)(1) squarely contradicts Claimant's argument. Moreover, to the extent there was any ambiguity, Exchange Act Rule 21F-4 clearly explains that "[a]n *action* generally means a single captioned judicial or administrative proceeding brought by the Commission." 17 C.F.R. § 240.21F-4(d) (emphasis added). Claimant has not identified an error in the Commission's interpretation of Section 21F. Rather, Claimant asserts that the Commission's 2018 proposed rulemaking demonstrates that a rigid interpretation of "action" as requiring a proceeding is contrary to the language and intent of Congress in the whistleblower provisions.⁹ However, the Commission's comments in that rulemaking release do not support Claimant's argument. The proposed rule amendment at issue would have clarified that an "administrative action" could include a deferred-prosecution agreement ("DPA") or non-prosecution agreement ("NPA") entered into by DOJ or a state attorney general in a criminal case, which are often entered outside the context of a judicial proceeding, or a settlement agreement entered into by the Commission outside of the context of a judicial or administrative proceeding to address violations of the securities laws. *Id.* at 34705.¹⁰ Neither this limited proposed amendment and its explanation, nor the final versions as adopted, alter the clause "brought by the Commission" in the definition of a Covered Action. Moreover, Claimant's proposed definition of an action would ignore the clause "judicial or administrative" in the definition. While acknowledging that an "action" may be broader than formal adjudicatory proceedings (*id.* at 34706), the revision—as is even apparently recognized by Claimant (Brief at 9)—is limited to specific types of agreements that should be considered successful enforcement of administrative actions under Section 21F. The revision does not more broadly expand the meaning of an administrative action to include within the definition of Covered Actions activities like referrals, evidence-sharing, and coordination with other federal law enforcement agencies by the Commission, as suggested by Claimant.¹¹

It should also be emphasized that ultimately, regardless of how broadly the term "action" may be applied, it cannot be interpreted so as to eliminate the statutory requirement that a Covered Action be *brought by the Commission*.

Fourth, Claimant asserts that the Commission cannot avoid Section 21F's mandatory award provisions by the Commission referring Claimant's whistleblower tips and evidence to other agencies, which then use those tips and evidence to obtain monetary sanctions. Claimant argues that the Commission and those agencies with whom it shares information cannot elect a form of enforcement in which the Commission does not bring an action, thereby precluding an

⁹ Request for Reconsideration, at 8-9, citing 83 Fed. Reg. 34702 (July 20, 2018).

¹⁰ The final rule, which includes revisions making DPAs and NPAs entered into by the DOJ and similar settlement agreements entered into by the Commission "administrative action[s]", was adopted on September 23, 2020. SEC Release 34-89963, 2020 WL 5763381 at *8-9, 85 Fed. Reg. 70898 (Nov. 5, 2020). The final rule did not extend to DPAs and NPAs entered into by state attorneys general in criminal cases. *Id.*

¹¹ See Petitioner's Opening Brief, *Hong v. SEC*, at 28.

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award to Claimant.¹² As recognized by Claimant, the Commission shares information consistent with its confidentiality obligations and its authority to refer possible violations of law to other law enforcement authorities.¹³ As a preliminary matter, Claimant also acknowledges the separate, pre-existing, ongoing investigations by the FHFA and DOJ.¹⁴

To the extent Claimant argues that the Commission should have brought an action under its own authority based on the information Claimant provided, we would note that a decision not to bring an enforcement action is squarely in the Commission's discretion and is not reviewable by a court.¹⁵

Similarly, the Commission's decision to share information with other agencies is authorized by the statute and in the Commission's discretion. Section 21F authorizes the Commission, *in its discretion*, to make information submitted by a whistleblower available to the DOJ and agencies like the FHFA. 15 U.S.C. § 78u-6(h)(2)(D).¹⁶ And Exchange Act Rule 21F-7 specifically contemplates conveying information to the DOJ and other agencies.¹⁷ Claimants providing information to the Commission cannot dictate how the Commission allocates its resources, such as by bringing an action, particularly when other federal agencies have already begun investigations of the subject matter and may have particular expertise regarding the subject.

Accordingly, we conclude that the Claimant has not shown that there is a Covered Action or Related Action for which Claimant is eligible for an award.

¹² Request for Reconsideration at 12; Mot. to Complete Record at 18, ¶ 49.

¹³ See Mot. to Complete Record at 10, ¶ 26.

¹⁴ See Request for Reconsideration at 10 (“[T]he FHFA and DOJ had already commenced investigations into securities law violations at RBS related to RMBS, and other securitized products, when Claimant came forward to the Commission and supplied original information that significantly contributed to the success of the enforcement action.”).

¹⁵ See, e.g., *Heckler v. Churney*, 470 U.S. 821, 828 (1985); *Leighton v. SEC*, 1995 WL 364084, at *1 (D.C. Cir. May 16, 1995) (“a Commission decision not to institute a proceeding under section 8(d) of the Securities Act, 15 U.S.C. § 77h(d), is discretionary and therefore unreviewable by the court”); *SEC v. AmTrust Fin. Servs., Inc.*, 2020 WL 4390745, *4 (S.D.N.Y. July 31, 2020) (rejecting whistleblower’s motion to intervene in SEC action, noting that SEC has discretion as to whom and what to charge and that its “decision not to bring an enforcement action against a person or entity is ‘presumed immune from judicial review.’”).

¹⁶ 15 U.S.C. § 78u-6(h)(2)(D) (“[A]ll information referred to in subparagraph (A) may, in the discretion of the Commission, when determined by the Commission to be necessary to accomplish the purposes of this chapter and to protect investors, be made available to” certain other agencies.).

¹⁷ 17 C.F.R. § 240.21F-7(a)(2) (“When the Commission determines that it is necessary to accomplish the purposes of the Exchange Act (15 U.S.C. 78a) and to protect investors, it may provide your information to the Department of Justice, [or] an appropriate regulatory authority . . .”).

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Claimant is also incorrect that the CRS had an inadequate evidentiary basis for its Preliminary Determination with respect to Claimant's whistleblower award claim. Exchange Act Rule 21F-12 identifies the materials that form the basis of an award determination,¹⁸ but does not entitle a claimant to obtain any materials other than those listed in Rule 21F-12(a).¹⁹ And the rules permit an award claimant to request and to receive a copy of the materials that form the basis of the Preliminary Determination. 17 C.F.R. § 240.21F-10(e)(1)(i). Claimant made such a request and received a copy of these materials from OWB. But Claimant is not entitled to more general discovery of the Commission's law enforcement files.²⁰

Claimant argues, however, that the record on which the CRS rested its Preliminary Determination improperly excluded certain relevant documents.²¹ Claimant asserts, in particular, that the Commission should consider "all documents and information concerning the Commission's processing of and referral to other agencies, of Claimants TCR1406601219794."²² Claimant's description of the materials Claimant seeks to have considered²³ and the documents attached to Claimant's Second Circuit filings in *Hong v. SEC*²⁴ may demonstrate the scope and substance of Claimant's cooperation, particularly Claimant's assistance to FHFA and DOJ attorneys and agents. And those materials may be relevant to the underlying investigations, referrals, and settlements by those other agencies. However, the additional materials are not relevant to the basis for the determination with respect to Claimant's award application, which is that Claimant has not demonstrated eligibility for an award because Claimant has not identified an action brought by the Commission within the statutory definition

¹⁸ See 17 C.F.R. § 240.21F-12(a), *In the Matter of the Claims for Award in Connection with Redacted Notice of Covered Action Redacted*, Release No. 87662, 2019 WL 6609459 (Dec. 5, 2019).

¹⁹ 17 C.F.R. § 240.21F-12(b) ("These rules do not entitle claimants to obtain from the Commission any materials (including any pre-decisional or internal deliberative process materials that are prepared exclusively to assist the Commission in deciding the claim) other than those listed in paragraph (a) of this section. . . .").

²⁰ See *In the Matter of the Claims for Award in Connection with Redacted Notice of Covered Action Redacted*, Release No. 87662, 2019 WL 6609459 (Dec. 5, 2019). "[T]he whistleblower rules do not authorize a claimant to go on a fishing expedition to depose staff and to obtain copies of the SEC's entire investigative file." *In the Matter of the Claim for an Award in Connection with Redacted Notice of Covered Action Redacted*, Release No. 88973, 2020 WL 2847054 (May 29, 2020).

²¹ Request for Reconsideration at 5-6.

²² *Id.*; see also Mot. to Complete Record at 7 & 13, ¶¶ 18, 33-34. Claimant specifically argues that the Commission should consider: all communications between the Commission, FHFA, the DOJ, partner-agencies in the Residential Mortgage-Backed Securities Working Group of the Financial Fraud Enforcement Task Force, and any other government agencies regarding RBS; all interagency communications regarding RBS; all communications with Claimant; all documents and information supplied by Claimant to any agency; all documents related to the DOJ/RBS settlement; and all documents related to the settlement in *FHFA v. RBS*. Request for Reconsideration at 5; Mot. to Complete Record at 7, ¶ 18.

²³ See Request for Reconsideration at 7-8; Mot. to Complete Record.

²⁴ See, e.g., Aff. of Victor Hong. Mot. to Complete Record.


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of a Covered Action. The decision about whether there is a Covered Action for which Claimant may apply for an award is readily determined on the record that was before the CRS and does not need further factual development. Thus, we deny Claimant's request for inclusion and consideration of additional information in the record.

III. CONCLUSION

For the foregoing reasons, it is ORDERED that the whistleblower award claim from Claimant be, and hereby is, denied.

By the Commission.

A handwritten signature in black ink that reads "Vanessa A. Countryman". The signature is written in a cursive style with a large initial "V" and "C".

Vanessa A. Countryman
Secretary