NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-1652

JAMIE DOE (Claimant #2),
Petitioner

v.

SECURITIES AND EXCHANGE COMMISSION

On Petition for Review of an Order of
the Securities and Exchange Commission

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
February 6, 2023

Before: CHAGARES, Chief Judge, SCIRICA, and RENDELL, Circuit Judges

(Opinion filed: March 23, 2023)

OPINION*

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* This disposition is not an opinion of the full Court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

CHAGARES, Chief Judge.

The United States Securities and Exchange Commission (the "SEC") reached a settlement agreement in 2015 with Focus Media (the "Company") and its Chief Executive Officer after an SEC investigation uncovered improper conduct related to certain Company transactions. "John Doe" subsequently filed an application with the SEC for a whistleblower award based on Doe's alleged contributions to the SEC investigation. The SEC denied the application. Doe now petitions us to set aside the SEC's denial of his award application. For the following reasons, we will deny his petition as well as his attendant motion to expand the record.

I.

We write solely for the parties and so recite only the facts necessary to our disposition. On September 30, 2015, the SEC filed a settled cease-and-desist proceeding against the Company and its CEO for negligently failing to disclose its partial sale of a subsidiary to insiders at favorable pricing ahead of the Company's sale of that same subsidiary to a third party at a much higher price. The Company and CEO agreed to pay more than $55 million in penalties, disgorgement, and interest as part of the settlement.

Following that settlement, Doe timely submitted a whistleblower award application claiming to be a principal author of a November 2011 report (the "Report") that examined the Company and CEO, claiming that information therein "became the cornerstone of the [SEC's] case" against the Company and its CEO. Appendix ("App.") 121-22. The Report was published by Muddy Waters Research and contained detailed information concerning the activities of the Company and its CEO, including the sale of

the subsidiary implicated in the SEC's enforcement action. In his application, under the relevant section regarding the method of his tip submission to the SEC, Doe checked the "Other" box, writing in "News Media" as the manner via which his tip was submitted to the agency.

The SEC's Claims Review Staff ("CRS") issued a preliminary determination that recommended denying Doe's award claim. A sworn declaration by an SEC investigator acknowledged the Report played a role in her investigation into the Company. The CRS concluded, however, that "[e]nforcement staff obtained the online [Report] through its own initiative from a public website[,]" as opposed to from Doe directly and, as a result, he did not qualify as a whistleblower. App. 128 n.5. Doe requested that the CRS reconsider its determination, but upon reconsideration, CRS reaffirmed its initial recommendation that his claim be denied. Doe timely contested the CRS recommendation, arguing that the Report was provided directly to the SEC via email push notifications, social media postings, and news coverage.

The SEC's final order adopted the CRS recommendation to deny Doe's award claim. It noted the role of the Report in the SEC's investigation and eventual successful settlement and credited Doe as an author of the Report. But it ultimately concluded that Doe had failed to submit the Report in accordance with the relevant whistleblower procedures and, moreover, that he had failed to provide information directly to the SEC at all. He was thus not a "whistleblower" under the relevant regulations. Regarding the emails, social media postings, and news coverage that Doe specifically had pointed to following the initial CRS recommendation, the final order explained that "[Doe] does not

assert that [Doe] was the author or sender of these emails and postings and thus [Doe] has failed to show that [Doe] provided . . . information directly to the [SEC]." App. 11 (quotation marks omitted). Finally, the SEC considered whether to exercise discretionary authority to waive these procedural requirements and grant the award to Doe but concluded that such a waiver was unwarranted on the facts of his submission.

The SEC, however, granted whistleblower status to a different claimant ("Claimant 1") who also helped create the Report. It granted Claimant 1's application despite CRS's preliminary recommendation that it be denied alongside Doe's. In so doing, the SEC awarded Claimant 1 $14 million based on a percentage of the settlement achieved with the Company and its CEO. Claimant 1's whistleblower application faced many of the same procedural roadblocks as Doe's, with the primary substantive difference being the fact that Claimant 1 purportedly emailed the Report directly to an SEC enforcement attorney a few days after the report was published online. This email was the key justification for the SEC's granting of the award to Claimant 1 and not to Doe; it led the SEC to conclude that "it would be in the public interest" to waive the procedural requirements for Claimant 1 and grant him the award "in light of the unusual facts and circumstances here." App. 13. However, the final order also stated that Claimant 1's email to the SEC attorney played no role in instigating the investigation into the Company and CEO, since SEC investigators found the Report on their own.

Doe filed a petition for review of the SEC's final order. The SEC filed the administrative record. Doe submitted a filing suggesting the administrative record was incomplete, to which the SEC responded by claiming that the complete record had in fact

been filed. Doe, simultaneously with the filing of the opening brief, separately moved that the record be augmented to include, among other things, a declaration from petitioner, news articles, and emails between counsel. The SEC opposed the motion. Separately, Doe's merits brief also urges that the administrative record should be augmented to include more documents relating to the SEC's award determination regarding Claimant 1, particularly the email from Claimant 1 providing the Report directly to the SEC enforcement attorney.

II.[1]

A.

The SEC "shall pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of [a] covered judicial or administrative action." 15 U.S.C. § 78u-6(b)(1). To be eligible for an award, a whistleblower must submit information in accordance with the SEC's rules and regulations. Id. § 78u-6(a)(6), (c)(2)(D). Rule 21F-9 governs the procedures for submitting information as the basis of a claim for a whistleblower award. 17 C.F.R. § 240.21F-9; see also id. § 240.21F-2(b) (providing that eligibility for awards is conditioned in part on compliance with these procedures). It provides, in relevant part, that to be considered a whistleblower for these purposes, an individual must submit her or

[1] This Court has jurisdiction over this petition for review of the SEC's award denial under 15 U.S.C. § 78u-6(f). Per § 78u-6(f), we review the SEC's decisions concerning eligibility for a whistleblower award "in accordance with section 706" of the Administrative Procedure Act, which requires us to set aside an agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

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