**NONPRECEDENTIAL DISPOSITION**
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# United States Court of Appeals

**For the Seventh Circuit**
**Chicago, Illinois 60604**

Argued January 25, 2023
Decided February 22, 2023

**Before**

DIANE S. SYKES, *Chief Judge*

DIANE P. WOOD, *Circuit Judge*

DORIS L. PRYOR, *Circuit Judge*

No. 22-1692

EDWIN JOHNSON,
*Petitioner*,

*v*.

COMMODITY FUTURES TRADING COMMISSION,
*Respondent*.

Petition for Review of an Order of the Commodity Futures Trading Commission.

No. 22-WB-04

**O R D E R**

The Commodity Futures Trading Commission denied Edwin Johnson's application for a whistleblower award for disclosing information about disruptive trading practices at the company where he formerly worked. Under § 706 of the Administrative Procedure Act, Johnson seeks review of the agency's final decision. *See* 5 U.S.C. § 706(2). Because the Commission issued Johnson a document preservation request and several subpoenas before he submitted the information for which he seeks

compensation, the Commission correctly concluded that Johnson was ineligible. Thus, we deny Johnson's petition for review.

The Commodity Exchange Act (the "Act") and associated regulations prohibit various "disruptive" trading practices in futures markets. One such disruptive trading practice, known as spoofing, involves "bidding or offering with the intent to cancel the bid or offer before execution." 7 U.S.C. § 6c(a)(5)(C). Spoofing creates the false impression of movement in the market, which induces other market participants to place orders on the same side as the spoofer; this creates advantageous opportunities for the spoofer to cancel the original bid and place an order on the opposite side. *See generally United States v. Chanu*, 40 F.4th 528, 533–34 (7th Cir. 2022); *United States v. Coscia*, 866 F.3d 782, 786–87 (7th Cir. 2017). The Commodity Futures Trading Commission, which administers and enforces the Act and promulgates and enforces the implementing regulations, may file a civil enforcement action in federal court to enjoin or impose civil penalties for spoofing transactions. 7 U.S.C. § 13a-1(a), (d).

In October 2011, the Commission opened an investigation into the trading practices of 3Red Trading, LLC, a futures trading company, and Igor Oystacher, 3Red's founder and principal trader. (Doc. 8, ROA 179). The Commission suspected that Oystacher was spoofing in several different futures markets.

At the outset of the investigation, on November 23, 2011, the Commission sent a document preservation request to 3Red, Oystacher, and Edwin Johnson, who was then 3Red's Chief Risk Officer. The request instructed Johnson (and others) to preserve information about 3Red's trades in markets including, but not limited to, "E[-M]ini S&P 500, NASDAQ, crude oil, silver, natural gas, gold, and copper on an ongoing basis beginning December 2010." (Doc. 21, Am. ROA 143).

Over the next year or so, the Commission issued three subpoenas in the investigation. In March 2012, the Commission subpoenaed 3Red, Oystacher, and Johnson "Individually, and as Principal of 3 Red Trading, LLC" for production of company documents relating to crude oil, copper, and S&P 500 trading. (Am. ROA 145, 151). The second subpoena, which the Commission issued to the same targets in November 2012, sought documents relating to 3Red's corporate communications. (Am. ROA 159, 167). Both subpoenas described Johnson's obligations as "continuing" and ordered him to supplement his initial production if he obtained responsive documents in the future. (Am. ROA 149, 165).

In December 2012, pursuant to the third subpoena, Johnson gave sworn testimony to Commission staff about Oystacher's trading practices. Johnson testified that he did not believe Oystacher's trading was improper. But after the Commission issued its public guidance on disruptive trading in May 2013, *see* 78 Fed. Reg. 31890 (May 28, 2013), Johnson changed his mind and decided that Oystacher's trading was improper. According to documents he submitted to the Commission, Johnson was terminated from 3Red in June 2013 after he communicated his concerns to Oystacher and "attempted to prevent [him] from engaging in improper trading." (ROA 22; see Am. ROA 127; Johnson's Br. at 4).

Following his termination, Johnson spoke with Rosemary Hollinger, the Deputy Director of the Commission's Division of Enforcement, who was involved in the 3Red investigation. Johnson would later attest under penalty of perjury in his April 2017 application for a whistleblower award, that, during his telephone conversation with Hollinger, she told him that "if he voluntarily provided information relevant to the CFTC's investigation [of 3Red and Oystacher], . . . he would qualify as a whistleblower and possibly be entitled to a whistleblower award." (ROA 26–27).

On August 15, 2013, Johnson executed a settlement agreement with 3Red "ostensibly to settle all outstanding claims and disputes" between him and his former employer. (ROA 27). According to Johnson, however, his primary reason for executing the settlement agreement—which had "onerous confidentiality provisions"—was his concern that 3Red would take legal action against him if he disclosed information to the Commission about Oystacher's trading practices. (Id.). To remain in compliance with the agreement, Johnson, through counsel, asked the Commission to subpoena him so that he could provide information without risking retaliation. The Commission issued yet another subpoena to Johnson in September 2013.

Over the next three years, "until at least April of 2016," Johnson provided information to the Commission about Oystacher's trading practices. (ROA 28). In addition to reporting on Oystacher's spoofing in the three markets listed in the March 2012 Subpoena, Johnson reported on Oystacher's trades in the natural gas market, which the Commission had mentioned in the 2011 document preservation request but not the 2012 subpoenas. Johnson also described Oystacher's trades of volatility index (VIX) futures contracts, which the Commission had not mentioned at all in its investigation.

The Commission filed a civil enforcement action in federal court against Oystacher and 3Red in October 2015, alleging improper trading in several futures markets, including crude oil, copper, natural gas, S&P 500, and VIX. *See U.S. Commodity Futures Trading Comm'n v. Oystacher*, No. 15-cv-09196, 2016 WL 8256391, at *1 (N.D. Ill. Dec. 20, 2016). Finding that Oystacher and 3Red had repeatedly engaged in spoofing, the district court entered a consent order and imposed a $2,500,000 penalty. *Id.* at *7.

Following the district court's order, Johnson applied for a whistleblower award under the Commodity Exchange Act. The Act authorizes compensation for persons who "voluntarily" provide the Commission with "original information" that leads to a successful enforcement action and sanctions exceeding $1,000,000. *See* 7 U.S.C. § 26(a)–(b). The Commission alone determines "whether, to whom, or in what amount" to make these awards. *Id.* § 26(f)(1); *see* 17 C.F.R. § 165.5(a).

A purported whistleblower acts "voluntarily" by supplying information "prior to any request from the Commission … to the whistleblower … about a matter to which the information in the whistleblower's submission is relevant." 17 C.F.R. § 165.2(o). If the Commission "makes a request, inquiry, or demand to the whistleblower or the whistleblower's representative first," then information that the whistleblower submits thereafter is not voluntary, "even if the whistleblower's response is not compelled by subpoena or other applicable law." *Id.*

On May 19, 2020, the Commission's Claims Review Staff preliminarily determined that Johnson was ineligible for an award because he did not voluntarily give information. They noted that Johnson provided information about Oystacher's improper trading *after* the Commission sent him a document preservation request and multiple subpoenas as part of an existing investigation into 3Red.

In an unsworn letter submitted by his attorney to the Commission, Johnson contested the preliminary determination, making three arguments: that his submissions were voluntary; that his information was critical to achieving the agency's consent order with Oystacher and 3Red; and that Hollinger had "promised him that he would be entitled to whistleblower compensation" in June 2013 when she advised him that if he "provided relevant information and cooperated with the CFTC's investigation into 3Red, he would be treated as a whistleblower." (ROA 194).

On March 28, 2022, the Commission entered a final order denying Johnson's claim for a whistleblower award. First, the agency rejected Johnson's voluntariness

argument, noting that he did not (and could not) dispute that he provided information related to the spoofing inquiry after having received requests and demands from the Commission. Second, because Johnson provided information after having received a request, the value of his information was irrelevant to the determination of whether he qualified for a whistleblower award. Finally, there was no evidence supporting Johnson's assertion that he had been promised an award and, even if there had been, such a promise could not override the statutory eligibility requirements. This appeal followed.

We review the Commission's decision under Section 706 of the Administrative Procedure Act, 5 U.S.C. § 706. *See* 7 U.S.C. § 26(f)(2), (3); *Witter v. Commodity Futures Trading Comm'n*, 832 F.3d 745, 748–49 (7th Cir. 2016). Johnson argues that we should apply the "substantial evidence" standard from 5 U.S.C. § 706(2)(E), whereas the Commission argues for the "arbitrary [and] capricious" standard from 5 U.S.C. § 706(2)(A). When this issue arose before, we declined to choose between the two standards because the difference between them "brings to mind angels dancing on the head of a pin," and moreover, "[t]he Commission's findings [we]re supportable either way." *Witter*, 832 F.3d at 749. The same is true here.

Johnson makes two arguments to support his contention that his submissions to the Commission were voluntary.[1] He first cites the VIX information he provided, emphasizing that he proffered this information even though the Commission never mentioned the VIX index in the document preservation request or the 2012 subpoenas. Further, he asserts, Oystacher did not make improper trades in the VIX futures market until spring 2013, and the Commission could not have requested information about events that had not yet occurred. He contends that his submissions went beyond the scope of any request or subpoena by the Commission and were, therefore, voluntary.

Even assuming the VIX information was beyond the scope of every request and demand made by the Commission, it was *relevant* to them. 17 C.F.R. § 165.2(o)(1). Relevant submissions after a request from the Commission are not voluntary "even if the whistleblower's response is not compelled by subpoena or other applicable law." *Id.* By asserting that his information "was critical to the overall success of the action against

[1] The Commission argues that Johnson forfeited certain voluntariness arguments, but these arguments—about the scope of the subpoenas, VIX information, and the effect of the subpoena received by 3Red—largely came up before the agency and can be resolved on the merits, as explained in the agency's final order.

Defendants," (ROA 33), Johnson essentially concedes that the information was relevant to the existing investigation. Thus, Johnson's argument fails.

Johnson next argues that his submissions were voluntary because 3Red failed to respond to a subpoena that it received, so the Commission would not have gotten the requested information without Johnson's cooperation. He relies on a portion of the regulation stating that a person "will be considered to have received" inquiries and demands received by his employer, "*unless*, after receiving the documents or information from the whistleblower, the whistleblower's employer fails to provide the whistleblower's documents or information to the requesting authority in a timely manner." 17 C.F.R. § 165.2(o)(1) (emphasis added). Johnson's argument, though not entirely clear, appears to be that, because the Commission issued 3Red a request and subpoena, and he (not 3Red) submitted the responsive information, he should not be considered to have received a request from the Commission. In other words, Johnson argues that the subpoena issued to 3Red somehow cancelled out the subpoena issued to him in his individual capacity, and thus his submissions were "voluntary." That reading is untenable. This part of the regulation says that certain persons *will* be considered to have received a request unless the exception applies. And here, there is no need to contemplate whether Johnson should be "considered" to have received a request, because it is undisputed that he *personally* received a request and subpoenas from the Commission.

Johnson makes two arguments in addition to voluntariness, neither of which have merit. He first contends that the Commission improperly disregarded evidence of his "invaluable assistance" in ending 3Red's spoofing practices. He concedes, however, that the value of his assistance bears only on the amount of a potential award, *see* 17 C.F.R. § 165.9, not his eligibility. Because Johnson was not eligible, there was no need for the Commission to consider this evidence.

Finally, Johnson argues that he detrimentally relied on Hollinger's promise of an award, when she said that "if he voluntarily provided information … he would qualify as a whistleblower and possibly be entitled to an award." (ROA 27). The Commission reasonably rejected Johnson's argument because no member of the agency was "authorized to make any offer or promise … with respect to the payment of any award." 17 C.F.R. § 165.1. Even if Hollinger was so authorized, by Johnson's own account of the promise, she indicated that Johnson would "possibly" be eligible for an award if he "voluntarily provided information." And, as discussed previously, Johnson's submissions were not voluntary under the regulations. *See* 17 C.F.R.

§ 165.2(o)(1). Johnson also invokes *Santobello v. New York*, 404 U.S. 257, 262 (1971), which requires a prosecutor to honor promises made to a criminal defendant to induce a guilty plea. Concerns about "safeguards" in "the process of criminal justice," *id.*, however, have no bearing on Johnson's efforts to obtain a whistleblower award.

We DENY the petition for review.