NOT FOR PUBLICATION

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DEUCE EVERHART; BRIAN BOLL; HOWARD DAL MONTE,

Petitioners,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Respondent.

No. 22-2049

Securities and Exchange Commission

MEMORANDUM*

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

Argued and Submitted October 6, 2023
Honolulu, Hawaii

Before: BERZON, MILLER, and VANDYKE, Circuit Judges.

Deuce Everhart, Brian Boll, and Howard Dal Monte (collectively, Everhart) petition for review of a decision of the Securities and Exchange Commission denying their whistleblower award claim. We have jurisdiction under 15 U.S.C. § 78u-6(f), and we may set aside the agency's decision if it was "arbitrary,

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

capricious, an abuse of discretion," "not in accordance with law," or "unsupported by substantial evidence." *Id.*; 5 U.S.C. § 706(2)(A), (E). We deny the petition.

Under 15 U.S.C. § 78u-6(b)(1), whistleblowers are entitled to an award if they provide the Commission with "original information . . . that led to the successful enforcement" of federal securities law. Despite some suggestion to the contrary in his briefs, Everhart made clear at oral argument that he does not challenge the Commission's factual findings that it (1) opened its investigation because of the Wells Fargo companies' decision to self-report and (2) did not rely on Everhart's tip. In any event, substantial evidence supports the Commission's findings: The declaration of a lead attorney involved in the matter that Everhart's tip had no bearing on the investigation is "relevant evidence [that] a reasonable mind might accept as adequate to support a conclusion." *Western Truck Manpower, Inc. v. United States Dep't of Lab.*, 12 F.3d 151, 153 (9th Cir. 1993) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

In his briefs, Everhart principally argued that the Commission applied the wrong legal standard and that the relevant question is whether his tip was of the kind that *should have* caused the Commission to open an investigation, regardless of whether the tip in fact had that effect. At oral argument, however, he expressly disclaimed that theory. Given that concession, we accept the Commission's interpretation of the statute—which provides for the grant of awards to

whistleblowers who offered information "that led to the successful enforcement" action—as requiring that the information have caused or contributed to the investigation. 15 U.S.C. § 78u-6(b)(1).

At oral argument, Everhart argued that even though the Commission's staff did not directly rely on his tip, the tip still led to the successful enforcement action by triggering the Wells Fargo companies' self-reporting. As Everhart acknowledged, that theory was not raised before the agency or in his opening brief. Because the argument was not raised until Everhart's reply brief, it is forfeited. *Vasquez v. Rackauckas*, 734 F.3d 1025, 1054 (9th Cir. 2013) ("Because we do not consider issues raised for the first time in reply briefs, we deem this late-raised argument forfeited.").

PETITION DENIED.