

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Release No. 90388 / November 10, 2020

WHISTLEBLOWER AWARD PROCEEDING  
File No. 2020-20

In the Matter of  
RICHARD J. HERBER

ORDER DENYING STAY

Claimant Richard J. Herber moves for a stay of the Commission’s Order Determining Whistleblower Award Claim (the “Order”)<sup>1</sup> pending resolution of his appeal to the U.S. Court of Appeals for the Seventh Circuit.<sup>2</sup> That Order denied Herber’s whistleblower award claim and granted the award claim of another claimant.<sup>3</sup>

The party requesting a stay pending appeal has the burden of establishing that a stay is justified.<sup>4</sup> Our consideration of such requests is governed by the traditional, four-factor standard—namely, “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the

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<sup>1</sup> *Order Determining Whistleblower Award Claim*, Exchange Act Release No. 89002, 2020 WL 3030497 (June 4, 2020).

<sup>2</sup> Petition for Review, *Richard J. Herber v. SEC*, No. 20-2174 (7th Cir. July 2, 2020) (Doc. No. 1-1).

<sup>3</sup> 2020 WL 3030497, at \*1. The Order denied the award claim submitted by Herber as “Claimant 2” and granted the claim of another individual as “Claimant 1” to protect the confidentiality of both claimants. Herber has since appealed in his own name and thus has waived confidentiality.

<sup>4</sup> See, e.g., *Nken v. Holder*, 556 U.S. 418, 433-34 (2009); *Steven Altman*, Exchange Act Release No. 63665, 2011 WL 52087, at \*2 (Jan. 6, 2011).

proceeding; and (4) where the public interest lies.”<sup>5</sup> Because the first two factors are the most critical,<sup>6</sup> an applicant’s failure to demonstrate the requisite likelihood of success or irreparable harm ordinarily will be dispositive of the stay inquiry.<sup>7</sup>

Herber makes no attempt to establish that a stay is justified under any of these factors but simply requests “that no money or award be paid to [the other, successful claimant] in this matter until my Petition for Review is completely heard and final judgment determined by the Court of Appeals.” We therefore conclude that Herber has not carried his burden on the stay factors.

Moreover, our whistleblower rules already prevent the payment of any whistleblower award in this matter until “[t]he completion of the appeals process for all whistleblower awards claims arising from” the covered action.<sup>8</sup> As a result, a stay is unwarranted because there is no possibility that Herber will suffer irreparable injury absent a stay.

Accordingly, it is ORDERED that Herber’s stay motion is DENIED.

By the Commission.

Vanessa A. Countryman  
Secretary

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<sup>5</sup> *Nken*, 556 U.S. at 434; *Steven Altman*, 2011 WL 52087, at \*2.

<sup>6</sup> *Nken*, 556 U.S. at 434.

<sup>7</sup> *See, e.g., Winter v. NRDC*, 555 U.S. 7, 22 (2008); *Sherley v. Sebelius*, 644 F.3d 388, 393 (D.C. Cir. 2011); *Raymond J. Lucia Cos.*, Exchange Act Release No. 76241, 2015 WL 6352089, at \*1 (Oct. 22, 2015).

<sup>8</sup> Exchange Act Rule 21F-14(c)(2), 17 C.F.R. § 240.21F-14(c)(2).