

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

Case No. 02-74634

v.

Honorable Patrick J. Duggan

KEITH MOHN, MOHN ASSET
MANAGEMENT, L.L.C., MOHN
FINANCIAL GROUP, L.L.C., J. PATRICK
KISOR, PDK INTERNATIONAL, INC.,
AGAVE, LTD, GENESIS TRADING
ASSOCIATES, L.L.C.,

Defendants, and

NBC INVESTMENTS, INC., PCM, L.L.C.,
JASON MALKIN, GILBERT HOWARD,

Relief Defendants.

OPINION AND ORDER:
GRANTING IN PART AND DENYING IN PART
DEFENDANTS KEITH MOHN AND MOHN ASSET MANAGEMENT, LLC'S
MOTION FOR WAIVER OF DISGORGEMENT

At a session of said Court, held in the U.S.
District Courthouse, City of Detroit, County of
Wayne, State of Michigan, on November 8, 2005 .

PRESENT: THE HONORABLE PATRICK J. DUGGAN
U.S. DISTRICT COURT JUDGE

The Securities and Exchange Commission ("SEC") filed suit against Defendants for
their activities from April 1998 through August 2002, during which they raised \$34.7 million

from investors through the fraudulent offer and sale of unregistered securities. On September 9, 2005, this Court issued an Opinion and Order ordering that Defendants Keith Mohn and Mohn Asset Management, LLC (“Defendants”) pay disgorgement of \$381,420, prejudgment interest of \$73,219, and waiving civil penalties against Defendants. Presently before the Court is Defendants’ Motion for Waiver of Disgorgement, filed on September 17, 2005. In their Motion, Defendants ask the Court to grant partial waiver of the amount of disgorgement, limiting the disgorgement to \$130,000, based on inability to pay. In addition, Defendants seek to have the amount of prejudgment interest reduced or recalculated.

Disgorgement has been defined as “an equitable remedy designed to deprive defendants of all gains flowing from their wrong, rather than to compensate the victims of the fraud. The purpose of disgorgement is to deter violations by making them unprofitable” *SEC v. AMX Int’l, Inc.*, 872 F. Supp. 1541, 1544 (N.D. Tex. 1994). A court has “broad discretion in fashioning the equitable remedy of a disgorgement order.” *SEC v. Huffman*, 996 F.2d 800, 803 (5th Cir. 1995). After a court has ordered disgorgement, “[i]t is the defendant’s burden to prove an inability to pay by a preponderance of the evidence, i.e., to prove ‘the extent to which he is unable to pay the disgorgement order.’” *SEC v. Johnston*, 922 F. Supp. 1220, 1222 (E.D. Mich. 1996), *rev’d on other grounds*, 143 F.3d 260 (6th Cir. 1998), *quoting Huffman*, 996 F.2d at 803.

In its September 9, 2005 Opinion and Order, this Court noted that Mohn has a negative net worth of \$3,707. (Sep. 9, 2005 Op. and Or. at 18). In addition, Mohn has been permanently enjoined from the securities industry and has recently lost his insurance license (Defs.’ Mot., Ex. A). Defendants contend that the amount of disgorgement should be

reduced to \$130,000: \$172,360 that was frozen under this Court's asset freeze order dated November 21, 2002, minus \$42,765 needed to pay Defendant Mohn's 2002 federal income tax liability.

Plaintiff SEC argues that the Court should decline to waive disgorgement. The SEC contends that despite Mohn's claim that he cannot presently pay full disgorgement, his financial circumstances may change in the future.

Balancing Mohn's current negative net worth against the deterrent effect of disgorgement and the chance that Mohn may be able to earn an income in the future, the Court believes that the amount of disgorgement should be reduced to \$220,000.

In addition, Defendants argue that the prejudgment interest amount should be reduced or recalculated. First, Defendants argue that the Court should reduce the prejudgment interest amount if it reduces the disgorgement amount. The Court agrees.

As this Court stated in its Opinion and Order:

"The decision whether to grant prejudgment interest and the rate used if such interest is granted are matters confided to the district court's broad discretion, and will not be overturned on appeal absent an abuse of that discretion." *Endico Potatoes, Inc. v. CIT Group/Factoring, Inc.*, 67 F.3d 1063, 1071-72 (2d Cir. 1995) (internal quotation omitted). In deciding whether an award of prejudgment interest is warranted, a court should consider "(i) the need to fully compensate the wronged party for actual damages suffered, (ii) considerations of fairness and the relative equities of the award, (iii) the remedial purpose of the statute involved, and/or (iv) such other general principles as are deemed relevant by the court." *Wickham Contracting Co. v. Local Union No. 3*, 955 F.2d 831, 833-34 (2d Cir. 1992).

(Sep. 9, 2005, Op. and Or. at 13).

In this case, the Court has determined that the amount of disgorgement should be reduced to \$220,000 because of Defendants' inability to pay. Therefore, applying the same

formula the Court applied in its September 9, 2005 Opinion and Order:

$$T = P(1 + (\frac{K}{M}))^{(M*N)}$$

T = the total amount Plaintiff is owed after a certain time period

P = the initial principal that carries over from the previous time period

K = the annual interest rate

M = the number of times per year that the interest is compounded—4 times per year

N = the period length in years—0.25 since the time period was always one quarter of a year.¹

Period Start	Period End	Period Interest Rate	Balance at period end	
			\$	220,000.00 <i>Starting Balance</i>
4/1/2001	6/30/2001	2.00%	\$	224,400.00
7/1/2001	9/30/2001	1.75%	\$	228,327.00
10/1/2001	12/31/2001	1.75%	\$	232,322.72
1/1/2002	3/31/2002	1.50%	\$	235,807.56
4/1/2002	6/30/2002	1.50%	\$	239,344.68
7/1/2002	9/30/2002	1.50%	\$	242,934.85
10/1/2002	12/31/2002	1.50%	\$	246,578.87
1/1/2003	3/31/2003	1.25%	\$	249,661.11
4/1/2003	6/30/2003	1.25%	\$	252,781.87
7/1/2003	9/30/2003	1.25%	\$	255,941.64
10/1/2003	12/31/2003	1.00%	\$	258,501.06
1/1/2004	3/31/2004	1.00%	\$	261,086.07
4/1/2004	6/30/2004	1.25%	\$	264,349.65
7/1/2004	9/30/2004	1.00%	\$	266,993.14
10/1/2004	12/31/2004	1.25%	\$	270,330.56
1/1/2005	1/11/2005	1.25%	\$	270,733.84 <i>Ending Balance</i>
			\$	50,733.84 <i>Total accrued Interest</i>

Therefore, the Court concludes that prejudgment interest in the amount of \$50,733.84 is appropriate.

¹ However, for the last period (January 1-January 11, 2005), N will be 0.03 instead of 0.25 since 11 days is only three percent of a year and not one-quarter.

Second, Defendants argue that the prejudgment interest should only be calculated for the period from April 1, 2001 to October 2002, because Mohn contends that in October 2002, he advanced \$167,981 for the benefit of investors. Alternatively, Mohn asks the Court to apply prejudgment interest to the date this Court entered the freeze order, November 21, 2002. However, as the Court noted in its September 9, 2005 Opinion and Order, the time frame for the imposition of prejudgment interest usually begins with the date of the unlawful gain and ends at the entry of judgment. *See First Jersey Sec., Inc.*, 101 F.3d 1450, 1477 (2d Cir. 1996). Thus, prejudgment interest should run from April 1, 2001 to January 11, 2005.

Accordingly,

IT IS ORDERED that Defendant Keith Mohn and Mohn Asset Management, LLC's Motion for Waiver of Disgorgement is **GRANTED IN PART AND DENIED IN PART**.

IT IS FURTHER ORDERED that Defendants Keith Mohn and Mohn Asset Management, LLC, are jointly and severally liable for \$220,000 in disgorgement and \$50,733.84 in prejudgment interest.

s/PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

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