

**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO**

SECURITIES AND EXCHANGE  
COMMISSION,

Plaintiff,

v.

MICHAEL A. BODANZA and PREFERRED  
FINANCIAL HOLDINGS CO., LLC,

Defendants,

and

PREFERRED DRILLING CO., LLC,  
PREFERRED FINANCIAL INVESTMENT  
CO., LLC, PREFERRED FINANCIAL  
LEASING CO., LLC, and PREFERRED WELL  
MANAGEMENT CO., LLC,

Relief Defendants.

Civil Action No.1:12CV1954

**PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S MOTION TO  
APPOINT DISTRIBUTION AGENT AND APPROVE DISTRIBUTION  
PLAN**

Plaintiff United States Securities and Exchange Commission ("SEC" or "Commission") respectfully moves the Court to enter an Order: (1) appointing Commission employee, Nancy Chase Burton, Esq., as Distribution Agent; and (2) approving the Commission's distribution plan (the "Plan") to distribute the \$154,000.00 collected in the above-captioned matter to certain harmed investors.

## **MEMORANDUM OF LAW**

### **I. BACKGROUND**

This matter involves fraudulent misrepresentations and omissions in connection with the unregistered offer and sale of securities by Michael A. Bodanza ("Bodanza"), the former Chief Financial Officer and a founding member of Preferred Financial Holdings Co., LLC ("Preferred Holdings"), a company formed in 2006 to engage in oil and gas exploration, drilling, and leasing through operating subsidiaries. On July 31, 2012, the Commission filed a complaint<sup>1</sup> alleging that from June 2007 to August 2010, Bodanza and Preferred Holdings raised \$6,769,635 from at least 61 investors<sup>2</sup> through the unregistered sale of Preferred Holdings promissory notes. During this period, Preferred Holdings experienced a series of material operational problems and suffered significant losses through its operating subsidiaries. Bodanza nonetheless depicted Preferred Holdings' oil and gas operations in a positive light and failed to disclose to most investors that:

1. Preferred Holdings had suffered net losses of \$1 million in 2007, \$2.2 million in 2008, \$1.8 million in 2009, and \$1.3 million in 2010, according to consolidated financial statements prepared in 2011;
2. Preferred Holdings removed an individual who had served as Preferred Holdings' chief operating officer and was one of its founding members in early 2008 and sued him for causing Preferred Holdings to suffer between \$3 and \$4 million in damages;

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<sup>1</sup> The complaint also named Preferred Drilling Co., LLC, Preferred Financial Investment Co., LLC, Preferred Financial Leasing Co., LLC, and Preferred Well Management Co., LLC as relief defendants (the "Relief Defendants").

<sup>2</sup> Of the 61 investors, only 55 sustained losses.

3. Preferred Holdings' drilling subsidiary's sole drilling rig suffered an irreparable breakdown in August 2008;
4. Preferred Holdings was embroiled in an insurance coverage dispute to recover \$1 million in losses and expenses incurred as a result of the rig breakdown;
5. Preferred Holdings' drilling subsidiary incurred \$260,000 in drilling expenses above its original cost estimates in connection with a significant joint venture in 2009; and
6. Preferred Holdings' drilling subsidiary failed to acquire certain property in Tennessee that could have been used to drill and sell gas from producing wells.

Finally, Bodanza failed to inform at least three individuals who purchased promissory notes in 2010 that the proceeds of their investments would be used to make payments to other investors. Preferred Holdings failed to repay most of the investors whose notes have come due and is unable to pay the remaining investors.

The court entered a final judgement against Bodanza on July 31, 2012.<sup>3</sup> Bodanza was found liable for disgorgement of \$359,656 and prejudgment interest thereon in the amount of \$50,551, for a total of \$410,207. However, the court waived all but \$154,000 of disgorgement. The final judgement obliged Bodanza to pay a total of \$154,000 to the SEC in thirteen installments, with the final installment due on or before June 30, 2015. All payments were made and these funds are held at the Bureau of Fiscal Services of the United States Treasury Department ("Treasury").

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<sup>3</sup> Dkt. No. 4. Judgment was entered against the relief defendants but all have filed for bankruptcy and have made no payments. Dkt. No. 6. It is not anticipated that any funds will be available from the relief defendants for distribution.

On October 10, 2018, the Court appointed Miller Kaplan Arase LLP (“MKA”), as the Tax Administrator (“Tax Administrator”) to execute all the tax reporting and filing requirements for the Distribution Fund. Since the time of the Tax Administrator’s appointment, an agreed-upon flat fee of \$4,000.00 was reserved from the Distribution Fund, leaving a net total of \$150,000 available for distribution.

The final judgment against Bodanza and Preferred Holdings states that the Commission may propose a plan to distribute the funds collected.. The Commission now moves the Court to approve the Plan, so that the Distribution Fund can be distributed to the fifty-five (55) investors harmed by the Defendants’ misconduct.

## **II. ARGUMENT**

### **A. The Applicable Standard**

Nearly every plan to distribute funds obtained in a Commission enforcement action requires choices to be made regarding the allocation of funds between and among potential claimants within the parameters of the amounts recovered. In recognition of the difficulty of this task, Courts historically have given the Commission significant discretion to design and set the parameters of a distribution plan. *See SEC v. Wang*, 944 F.2d 80, 83-84 (2d Cir. 1991); *SEC v. Levine*, 881 F.2d 1165, 1182 (2d Cir. 1989). Courts have historically deferred to the Commission’s decision regarding whether and how to distribute disgorgement and prejudgment interest. *SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997). The Court’s review of a proposed distribution plan focuses on whether the plan is fair and reasonable. *See Official Committee of Unsecured Creditors of WorldCom, Inc. v. SEC*, 467 F.3d 73, 81 (2d Cir. 2006) (citing *Wang*, 944 F.2d at 85 (“[u]nless the consent decree specifically provides otherwise[,]

once the district court satisfies itself that the distribution of proceeds in a proposed SEC disgorgement plan is fair and reasonable, its review is at an end.”)) For the reasons articulated below, the Commission submits that the Plan for the Distribution Fund constitutes a fair and reasonable allocation of the small amount of funds available for distribution, and should be approved.

**B. The Commission’s Plan Provides a Fair and Reasonable Allocation of the Distribution Fund**

The Commission’s principal goal in fashioning a distribution plan for the Distribution Fund was to identify a methodology that would allocate the available funds fairly and reasonably, in a manner proportional to the injury that investors suffered as a result of Bodanza and the other Defendants’ actions as detailed in the complaint. Here, the total losses suffered by the investors identified by Commission staff during its investigation exceed \$4,400,000 and the amount of money recovered is only \$154,000.00 (approximately 3.5%). The amount of money lost by the harmed investors is significantly more than the amount of funds that are available for distribution. Normally, in this situation, the Commission would send the funds to the U.S. Treasury as not feasible to distribute. However, the Commission staff desires to do a small, but meaningful payment as cost-effectively as possible to the harmed investors. Commission staff has determined that: (1) fifty-five (55) harmed investors who made investments should be compensated; (2) a *pro rata* distribution to this group would range from \$114.44 to \$19,494.41; (3) their losses comprise approximately 100% of all investor losses from investments; and (4) these fifty-five (55) investors were not officers or directors of the defendant or relief defendant companies (or any of their affiliates, distributes, spouses, parents, children, siblings, or controlled entities) and were not directly involved in any of the conduct detailed in the complaint. The

Commission's Plan calculates payments to these fifty-five (55) harmed investors on a *pro rata* basis, and thereby allocates the available funds fairly and reasonably, in a manner proportional to the economic harm they sustained.

**C. The Court Should Appoint a Distribution Agent**

The Commission proposes Nancy Chase Burton, Esq., Supervisory Assistant Chief Litigation Counsel of the Commission's Office of Distributions, as Distribution Agent to administer and implement the Plan, as described below. The Distribution Agent shall receive no compensation for her services in administering the Distribution Fund other than her regular salary as a Commission employee. As the harmed investors are limited in number and known, the appointment of a Commission employee will enable a distribution process and avoid the costs and expenses that would ordinarily be incurred by appointing a third-party administrator, thus allowing the maximum return to investors.

**D. The Court Should Approve the Plan**

The Commission seeks approval of its Plan (attached hereto as Exhibit A) to distribute the funds collected from Bodanza. The Plan provides for a distribution to certain individuals (the "Eligible Recipients") who were harmed by the Defendants' misrepresentation to investors. The Plan contemplates that \$150,000.00 (the \$154,000.00 paid, less a \$4,000.00 reserve for taxes, fees, and expenses of the Tax Administrator) will be distributed to Eligible Recipients on a *pro rata* basis for the harm caused by the Defendants' misconduct. The Distribution Agent plans to distribute the net available fund of \$150,000.00 on a *pro rata* basis to Eligible Recipients, subject to the Court's approval of the Plan. Prior to distributing the payments, the Commission will send a notice substantially in the form of Exhibit C to each Eligible Recipient setting forth each

Eligible Recipient's payment amount and requesting confirmation of contact information sufficient to issue the distribution payment. The Notice will be sent to each Eligible Recipient with a copy of the court-approved Plan and Exhibit B.

### III. CONCLUSION

For the reasons stated above, the Commission hereby moves the Court to:

- A. Appoint Commission employee, Nancy Chase Burton, Esq., as Distribution Agent; and
- B. Approve the Commission's Plan.

Attachments:

EXHIBIT A—Distribution Plan

EXHIBIT B—Eligible Recipients *Pro Rata* Share Calculation Chart - Redacted

EXHIBIT C—Eligible Recipient Notice of Distribution

Respectfully submitted,

/s/ Nancy Chase Burton

Nancy Chase Burton, Esq.

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**CERTIFICATE OF SERVICE**

I hereby certify that on November 20, 2018, a copy of the Plaintiff Securities and Exchange Commission's Motion to Appoint Distribution Agent and Approve Distribution Plan along with the Proposed Order were filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.

/s/ Nancy Chase Burton  
Nancy Chase Burton