COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
FOURTH DIVISION

HAYNES PROPERTIES, LLC, et al. — PLAINTIFFS

v. — 20-CI-332

BURLEY TOBACCO GROWERS COOPERATIVE ASSOCIATION, et al. — DEFENDANTS

ENTERED
ATTEST, VINCENT RIGGS, CLERK
JUN 11 2021
FAYETTE CIRCUIT CLERK
BY [illegible] DEPUTY

Opinion and Order Awarding Service Fees and Attorneys' Fees and Nontaxable Costs

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This matter came before the Court at the Fairness Hearing on February 24, 2021, continued on March 1, 2021, and concluded on March 8, 2021, addressing, *inter alia*, (1) the Petition for Settlement Class Representative Service Awards filed by Settlement Class Representatives, Haynes Properties, LLC, Mitch and Scott Haynes dba Alvin Haynes & Sons, and S&GF Management, LLC ("S&GF"); (2) the Petition for Award of Attorney's Fees and Nontaxable Costs filed by McBrayer PLLC, as Class Counsel and as counsel for Plaintiffs and Settlement Class Representatives; and (3) the Billings Law Firm, PLLC's Motion for Award of Attorneys' Fees and Costs and Expenses. With respect to these fee requests, the Court has reviewed the record, heard sworn testimony during the hearing from Plaintiffs' principals Mitch Haynes and Penny Greathouse, and from attorney Robert E. Maclin, III, received representations from and heard the arguments of counsel, and is otherwise duly and sufficiently advised with respect to

these fee requests. The Court now does hereby find, opine, order, and adjudge as follows:

OPINION

Each Firm's Clients

1. From before the filing of the initial complaint in this case on January 29, 2020, the McBrayer firm has represented the three Plaintiffs-growers with respect to all claims and matters in this case. In the initial complaint and in all subsequent pleadings in the case, the named Plaintiffs are alleged to be acting on their own behalf and on behalf of all others similarly situated. Lawyers from the Billings firm have not represented the named Plaintiffs in this case,[1] either directly or indirectly.

2. The clients of the Billings firm were not involved in this lawsuit at the outset, though the attorneys for the Billings firm coordinated with the McBrayer firm from January to the mediation and settlement. These clients originally engaged the Billings firm "to obtain a copy of the KCARD Report and to continue the investigation of the BTGCA's purpose, management and finances since FETRA. The end goal of these inspection requests. . . was to seek a voluntary dissolution of BTGCA by its Members, pursuant to the cooperative dissolution statute, KRS 272.325."[2]

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[1] In response to questions from the Court, Penny Greathouse testified that S&GF has been represented throughout this case by Mr. Maclin and other lawyers from the McBrayer firm and had never been represented by Mr. Billings or other lawyers from the Billings firm.

[2] Mem. of Facts and Law in Supp. of Billings Law Firm, PLLC's Motion for Award of Att'ys' Fees and Costs and Expenses, p. 6.

3. While still seeking a non-judicial dissolution for its clients, the Billings firm provided the McBrayer firm with discovery documents from BTGCA as well as a written outline for discovery for the McBrayer firm to pursue. According to the Billings firm, the two firms recognized ". . .mutual benefit in seeking dissolution/distribution (albeit via different preferred legal mechanisms)..." and therefore, ". . .while none of [Billings firm]'s clients were parties to the litigation, [Billings firm] and McBrayer discussed the value of the substantial records in [Billings firm]'s possession."[3] The Billings firm clients were still not involved in the lawsuit when the Billings firm initiated mediation and settlement discussions. The Billings firm made clear during its discussions with the other parties that its clients had not given the firm the authority to agree to settle the dispute with BTGCA. No evidence in the record shows that the Billings firm advised its clients, other than Craddock, of settlement efforts prior to the reaching of a settlement agreement.

4. Named Plaintiffs added Greg Craddock as a party Defendant with their Third Amended Complaint, filed on April 28, 2020, corrected on May 5, 2020; Mr. Craddock was one of 70+ clients the Billings firm had been formally engaged to represent in efforts to dissolve the Co-op through non-judicial means. Mr. Craddock was named as a defendant individually and as a representative of others similarly

[3] Mem. of Facts and Law in Supp. of Billings Law Firm, PLLC's Motion for Award of Att'ys' Fees and Costs and Expenses, p. 20.

situated, which can be construed to encompass all the other Billings firm clients on the Co-op dissolution matter.

5. The Court finds that in May 2020, after there was general agreement among the parties on the principles for settlement, the Billings firm finally sent a letter to its 70+ clients asking for their affirmative consent to an outlined settlement that included a fee sharing agreement.[4] In this letter, the Billings firm represented to its clients that because it "believe[d] this settlement accomplishes the client goals of our engagement. . ." the Billings firm would have to "dis-engage any client who rejects/disapproves of this settlement framework."[5] The Billings firm has represented that some of its clients did not respond at all to this request and some indicated that they did not approve of the proposed settlement. These clients — over 20 in all — were sent disengagement letters by the Billings firm.[6] Thereafter, the Billings firm has continued to directly represent 52 clients in addition to Mr. Craddock, including with respect to the proposed settlement.[7]

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[4] *See* Billings law firm letter dated May 15, 2020, together with a listing of to whom the letter was sent (provided March 15, 2021 under seal).

[5] Billings law firm letter dated May 15, 2020, p. 2.

[6] *See* January 15, 2021 Billings Motion Memo. p.7 fn. 14; disengagement letters provided March 5, 2021 under seal.

[7] The Billings firm's January 15, 2021 Motion (pp. 1-2) lists 52 persons in addition to Defendant Craddock as settlement members represented by it with respect to the proposed settlement. Three of the listed persons — all with the last name of "Darnell" — have filed an objection to any fee award that exceeds 7.5% of the Co-op's net assets; this objection is in the form of a petition (signed by others as well). *See* Order entered January 25, 2021, stating that a petition signed by the Darnells et al. objecting to the proposed percentage amount for attorney's fees had been received by the Court.

6. The firms' respective clients who were named parties to this case signed the Stipulation and Settlement on or about June 10, 2020. The orders tendered to this Court at that time would have, *inter alia*, appointed the McBrayer firm and the Billings firm as class co-counsel for the proposed settlement class, and each firm subsequently filed a motion or petition that it be appointed class counsel for the proposed settlement class. On October 19, 2020, before the evidentiary hearing on those requests began, the motion for appointment of the Billings firm was withdrawn. By a ruling announced that day and the Preliminary Certification Order (¶3) entered November 10, 2020, as amended by Order entered November 17, 2020, attorneys of the McBrayer firm were appointed Class Counsel for the proposed settlement class.

7. Since the appointment, the McBrayer firm has directly represented the Plaintiffs-Settlement Class Representatives and, indirectly, all settlement class members — including Mr. Craddock, other remaining Billings clients, and former clients to whom the Billings firm sent disengagement letters in May-June 2020. The Billings firm continues to directly represent Mr. Craddock and the other 52 settlement class members listed in its January 15, 2021 Motion; it does not serve as class counsel and does not indirectly represent anyone in this matter.

Fee-Sharing Agreement

8. The Court turns first to the McBrayer and Billings firms' fee sharing agreement, as the matter is dispositive of certain other issues related to both firms' requests for attorneys' fees.

9. On October 16, 2020, attorneys for the Named Plaintiffs (the McBrayer firm) and for Defendant Craddock (the Billings firm) jointly filed a CR 23.05 Statement attaching a one-page letter agreement dated September 15, 2020, and signed by Robert E. Maclin, III, as a member of McBrayer PLLC, and by John N. Billings, as managing member of Billings Law Firm, PLLC. The written, signed agreement is a one-sentence paragraph as follows:

> By my signature below on behalf of McBrayer PLLC and by your signature below on behalf of Billings Law Firm, PLLC, this confirms our firms' agreement, based on and with our respective clients' consent and agreement, that any award of, or agreement for the payment or receipt of attorney's fees in this matter and/or by reason of the dissolution of the Burley Tobacco Growers Cooperative Association, whether by a vote of the members or by judicial decree, jointly or severally, to our firms, shall be shared equally between our firms.

The letter is expressed as a confirmation of an existing agreement—not filed with the Court or reduced to writing—and the operative language is that the two firms will share equally any award, payment, or receipt of attorney's fees in this matter or by reason of the dissolution of the Co-op. This agreement is hereinafter referred to as "the fee-sharing agreement."

10. Although the two firms requested fee awards based on different percentages of the net proceeds from the Co-op's dissolution, they each acknowledge that the total amount awarded in fees should not exceed 25% of the net proceeds.[8] That amount is in accord with the Stipulation and Settlement provisions that Class Counsel may apply to the Court for "an award of reasonable attorneys' fees" not more than 25% of the Co-op net dissolution proceeds and that the Co-op will not "corporately oppose" any motion by Class Counsel for an award of 25% or less.[9] In addition, the disclosed fee-sharing agreement would operate to make the amounts received by a firm equal to one-half of the fee amount awarded to both firms in total, regardless of the particular percentage requested or awarded to that firm.

11. The evidence, including time records from both firms that have been placed under seal and which the Court has reviewed *in camera*,[10] as well as the testimony of both Mr. Maclin and Mr. Billings, is that the agreement was formed between the firms as early as March 2020 and no later than May 2020, prior to the named parties' execution of the Stipulation and Settlement and most likely prior to the Billings firm having any clients as parties to this action. The fee-sharing agreement is

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[8] McBrayer Petition p.2 fn. 1; Billings Motion p.4 fn. 5.

[9] Stipulation and Settlement, §§ 11.1, 11.2.

[10] Time records for the Billings firm, covering the period August 2019, through December 31, 2020, were submitted as Exhibit 35 to its January 15, 2021 Motion. Time records for the McBrayer firm, covering the period December 2018, through January 31, 2021, were submitted on February 25, 2021, by that firm, at the Court's request.

implicit in the Stipulation and Settlement provisions mentioning an award of fees and expenses "to Settlement Class Counsel" (defined as "McBrayer PLLC and Billings Law Firm, PLLC")[11] and the allowance of an application seeking a single award of an attorneys' fee, not to exceed 25% of the dissolution proceeds.[12] In fact, the Billings firm used this specific reference to the agreement as its only effort to notify its clients of the fee sharing agreement.

12. The fee sharing agreement was not reduced to writing and signed until September 15, 2020 and was not disclosed to the Court until the October 16, 2020 filing of a joint CR 23.05(3) Statement to which it was attached. The McBrayer firm represented to the Court that there had been proposed drafts of the fee-sharing agreement going back and forth for some time, but that "with the benefit of hindsight it might not have gotten documented as soon as it should have," and that the McBrayer firm otherwise had no "good explanation" as to why the fee-sharing agreement was not disclosed sooner, only "that as soon as [the McBrayer firm] got it documented, and appropriately, [the McBrayer firm] disclosed it in what [the McBrayer firm] perceived to be an expeditious and appropriate fashion".[13] Mr. Billings, on behalf of the Billings firm, acknowledged that the Billings firm should have memorialized the agreement but did

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[11] *See* Stipulation and Settlement § 1.0 (c) and (y).

[12] Stipulation and Settlement § 11.1.

[13] Mr. Maclin's statements for McBrayer Law Firm during the March 1, 2021 hearing (12:48:34 PM-12:52:25 PM).

not, and that "if [he] had paid closer attention to the Supreme Court rules in May, [he] would have required it to be in writing in May, and [he] didn't do it."[14] While the McBrayer firm never contended disclosure was not required by CR 23.05(3), the Billings firm argued that the fee-sharing agreement need not be disclosed under CR 23.05(3), and that while the Billings firm represented that it might be "a better practice" to inform the Court of fee-sharing agreements, it was not so required, citing *Flanagan, Lieberman, Hoffman & Swaim v. Ohio Public Empl. Ret. Sys.*, 814 F.3d 652 (2nd Cir. 2016).[15]

13. At the Fairness Hearing session held March 1, 2021, the Court asked the firms to produce evidence of their individual clients' "consent and agreement" to the fee sharing agreement, to be submitted under seal for *in camera* review, to show compliance with SCR 3.130(1.5)(e). After a break in that hearing, the McBrayer firm forwarded emails from each of the three named Plaintiffs, all dated September 10, 2020, indicating their assent to the fee sharing agreement.

14. The Billings firm did not provide consent documentation at the March 1, 2021 hearing session. The next day, the Court signed and sent to all counsel an Order, requiring the Billings firm to provide documentation of its engagement letters with its

[14] Mr. Billings's statements for Billings Law Firm during the March 1, 2021 hearing (2:08:00 PM-2:10:00 PM).

[15] *See* Mr. Billings's statements for Billings Law Firm during the March 1, 2021 hearing (2:11:00 PM-2:12:45 PM).

more than 70 Co-op dissolution clients,[16] its clients' knowledge and consent to the fee sharing agreement, its clients' consent to the partial settlement, and any disengagement letter sent upon a client's disapproval of the proposed settlement. On March 4, 2021, attorney David Tachau entered an appearance in this case on behalf of the Billings firm. On March 5, 2021, the Billings firm produced (a) a copy of a letter dated May 15, 2020, sent to its clients regarding a possible class action settlement that would incorporate a fee-sharing agreement, together with a listing of the letter's addressees, (b) documents described as reflecting the clients' knowledge of and consent to, *inter alia*, the fee sharing agreement, and (c) copies of client disengagement letters.

15. While no objection has been received regarding the fee sharing agreement, that agreement is not mentioned in the long-form or short-form notices or on the settlement website and the agreement has not been posted on the website, so there is no evidence that the majority of the Plaintiffs knew of its existence. The Billings Motion (p.4 fn. 5) and McBrayer Petition (p.2 fn. 1) requesting attorney's fee awards mention the fee sharing agreement only in footnotes.

16. The Court concludes that CR 23.05 required the disclosure of this fee sharing agreement. Among this rule's procedures applying to a proposed class settlement, is the mandate that the parties "file a statement identifying any agreement

[16] "During the inspection phase, and through the original date of the Special Meeting in April 2020, [the Billings firm] represented over seventy (70) tobacco farmers who supported the effort to dissolve the BTGCA and a distribution of its assets." January 15, 2021 Billings Memo. p.7 fn. 14.

made in connection with the proposal." CR 23.05(3). The Court finds that the fee sharing agreement was "made in connection with" the negotiation of the proposed class-wide, partial settlement, and therefore meets the express terms of this mandate.

17. Although an allocation of awarded attorneys' fees may be permitted to be made in accordance with an agreement reached between the attorneys,[17] the court presiding over class-action litigation or considering a proposed settlement on a class basis has a duty to scrutinize the allocation and the ultimate authority to determine how an awarded fee is allocated.[18] CR 23.08 requires that a court approve or award "reasonable attorney's fees ... that are authorized by law," and the CR 23.05(3) requirement for parties seeking approval of a proposed settlement to identify "any agreement made in connection with the proposal" requires a court consider and rule upon any such agreement as part of the CR 23.05 process, and make a determination of its reasonableness and whether it complies with all laws. Without the disclosure mandate, the Court could not fulfill its responsibilities.

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[17] *See, e.g., In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 216, 217 (2nd Cir. 1987) (noting, but not following, authority allowing court to award lodestar-based lump-sum fee to class counsel and permit them to divide it among themselves through a private fee sharing agreement); *In re Subway Footlong Sandwich Mktg. and Sale Pracs. Litig.*, 316 F.R.D. 240, 253 (E.D. Wis. 2016) (approving asymmetrical split between 10 firms).

[18] *See In re High Sulfur Content Gasoline Prods. Liab. Litig.*, 517 F.3d 220, 227 (5th Cir. 2008) (district court has responsibility "to closely scrutinize the attorneys' fee allocation"); *In re FPI/Agretech Secs. Litig.*, 105 F.3d 469, 473 (9th Cir. 1997) (Court "may refuse to accept a fee allocation agreement whenever there is good cause to do so."). *See also* 5 NEWBERG ON CLASS ACTIONS §15.23 (5th ed. 2012) (Court "has final authority on how the fee is allocated among counsel."). *Cf. B. Dahlenburg Boniar, P.S.C. v. Waite, Schneider, Bayless & Chesley Co., L.P.A.*, 373 S.W.3d 419, 423 (Ky. App. 2012) (attorney could not evade bar under contingency-fee rules by relying on a fee-split agreement with another attorney who was awarded a fee).

18. The Court finds that the fee sharing agreement provides for a "division of a fee between lawyers who are not in the same firm" and thus is subject to Kentucky Supreme Court Rule 3.130 (1.5(e)). Rule 1.5(e) plainly requires that any such agreement meet three conditions:

> (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation; (2) the client agrees to the arrangement and the agreement is confirmed in writing; and (3) the total fee is reasonable.

The dollar amount of the fee to be paid is not specified in the fee sharing agreement. This Court's award of an attorney's fee — whether under CR 23.08, KRS 412.070(1), or equitable principles — requires that the fee be reasonable. So, in the context of a judicial dissolution with court-awarded attorney's fees, the third condition will be met. However, neither the first nor second conditions are met in this case.

19. First, the fee division made in the agreement is 50-50 regardless of the proportion of services performed or joint responsibility for the representation by the respective firms "in this matter and/or by reason of the dissolution of the Burley Tobacco Growers Cooperative Association, whether by a vote of the members or by judicial decree." However, soon after the disclosure of the fee-sharing agreement, the Billings firm voluntarily withdrew its request to be appointed as class counsel and lawyers with the McBrayer firm alone were appointed as settlement class counsel. Ms. Greathouse's testimony was unequivocal that Plaintiff S&GF has not been represented by the Billings firm or its attorneys with respect to any issues in this case, and there is

no evidence that both firms assumed joint responsibility for the representation as to the matters covered by their fee-sharing agreement.

20. In addition, the services performed by the firms were neither of equal proportion nor on the same (or consistent) tasks and matters. Although at years' end 2020, professionals in each firm had expended more than 2100 hours,[19] the Billings firm's hours per month were tapering off and the McBrayer's firm monthly hours were holding steady or increasing because of Class Counsel work.[20] In addition, all or nearly all of the McBrayer hours were due to this case and the proposed settlement, while a substantial number of the Billings hours had been expended before May 2020, that is, before Mr. Craddock was named as a party to this case.[21] The vast majority of the work described by the Billings firm as contributing to the settlement was due to the Billings firm's efforts in seeking a non-judicial dissolution and actions taken outside of the lawsuit; many of the ways that Billings firm has represented itself as aiding the McBrayer firm has been due in large part to its actions taken outside of the judicial

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[19] Billings Motion, Exh. 7 p.16, ¶81 (2165.3 hours); McBrayer Petition p. 6 & Exh.B ¶ 13 (more than 2100 hours as of December 31, 2020).

[20] McBrayer attorneys have averaged approximately 180 hours per month in 2020; for January 2021, there were over 300 hours recorded for all McBrayer professionals. February 17, 2021 Verified Supplement pp. 10-11.

[21] The Billings firm does not provide hour totals per months or for phases of the work done. The finding that a substantial portion of its total hours were expended before Greg Craddock was named as a party to the case is supported by (a) "Summary of Actions taken by BLF in pursuit of Dissolution," January 15, 2021 Motion Exh. 23, in which all but six entries are from before May 2020, and (b) comparison of the number of pages of time entries (53) before May 1, 2020, to the total number of pages of time entries (105) through December 31, 2021, *id.* Exh. 35.

context. At this point, the gap between the number of Billings and McBrayer hours is likely to increase throughout the implementation of the proposed settlement and any further litigation in this case.[22] This Court finds that condition (1) of Rule 1.5(e) has not been met, and that this failure is sufficient to declare the fee sharing agreement void and unenforceable.

21. The second Rule 1.5(e) condition for fee-sharing also has not been met. The two law firms do not dispute that express client consent was required for them to enter into an enforceable agreement per SCR 3.130(1.5)(e). The McBrayer firm's documentation of consent by its clients lagged the agreement by at least three months and maybe as much as six months;[23] furthermore, the informality of the emails exchanged regarding that consent are not reassuring that the clients had been fully informed of the agreement in a complete and timely manner. By its own admission, the Billings firm never received affirmative consent from a number of the individuals with whom it had a representation agreement at the time the fee sharing agreement was reached; approximately 20 of these Billings clients did not respond and were "disengaged" as clients by the firm. Furthermore, the disclosure does not go into any

[22] The McBrayer firm projects that its attorneys will spend an additional 1800 hours on this case from February through December 2021. February 17, 2021 Verified Supplement pp. 11-12.

[23] In response to questions from the Court, Penny Greathouse testified that she had consented to the fee sharing agreement on behalf of S&GF and, although she could not be specific about when she had been informed of the agreement, she stated that it was some period of time before she sent the 9/10/21 email confirming her assent.

real detail and does not disclose the full agreement but rather makes it appear it is simply part of the class action settlement, when in reality it was a separate agreement that created a 50/50 division whether it was a judicial or non-judicial dissolution. The exact language in the "disclosure" letter stated that the firms"will jointly ask the Court for a joint award of attorneys' fees *not to exceed 25% of the amount distributed*, and we agreed to split the fees award 50%-50%."[24]

22. More pertinent to this Court in the context of CR 23 than any failings with respect to obtaining consent from direct clients is the lack of care and attention shown for obtaining the consent of these firms' putative clients and McBrayer's current indirect clients — the members of the proposed settlement class who did not already have an attorney-client relationship with one of these firms. At the time the fee sharing agreement was reached (sometime between March and May 2020), when the Settlement and Stipulation document was presented to this Court on June 10, 2020, and up through the preliminary-certification hearing on October 19, 2020, the McBrayer firm and the Billings firm neither disclosed the fee sharing agreement to this Court until the last weekday before the hearing addressing their requests to be appointed as class counsel, and even then neither asked this Court to consider or approve the agreement on behalf of absent class members.

[24] Billings law firm letter dated May 15, 2020, p. 6 (emphasis in original).

23. In the class-action context, "full disclosure and consent are many times difficult and frequently impractical to obtain." *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 216, 224 (2nd Cir. 1987). Counsel should "inform the court of the existence of a fee sharing agreement at the time it is formulated." *Id.* at 226. If a class has been certified (as in *Agent Orange*), a trial court then has the opportunity to prevent potential conflicts from arising by disapproving the agreement or working with counsel to reshape the agreement. *Id.* If a settlement and settlement-only class are proposed, then the court could consider and rule on the fee sharing agreement as part of preliminary certification and appointment of class counsel and could include notice and objection opportunities for the settlement class as part of the consideration of the overall proposed settlement.[25]

24. In *Agent Orange*, 818 F.2d at 223, the appellate court rejected arguments that counsel must be allowed "to divide the [fee] award among themselves in any manner they deem satisfactory under a private fee sharing agreement," pointing out that this position overlooked the court's "role as protector of the class interests" and "of assuring reasonableness in the awarding of fees in equitable fund cases...." The *Agent Orange* court reversed the lower court's allowance of an internal fee-sharing agreement because the agreed distribution was not in proportion to the services rendered and created "a strong possibility of a conflict of interest between class counsel and those

[25] *See* CR 23.07(1)(d) (appointing order "may include ... provisions about the award of attorney's fees").

they were charged to represent...." *Id.* at 218.[26] In *Allapattah*, 454 F. Supp. 2d at 1227, the court found good cause not to follow the attorneys' division agreement because it "would result in a grossly disproportionate award among the five law firms in relation to services actually rendered, and benefits bestowed on the class, and would, even at this late date, prejudice the Class' interests."[27] This Court finds these cases to be persuasively reasoned and analogous to the situation here, in which the fee sharing agreement is not proportionate to services actually rendered or the benefits bestowed on the class by each law firm. Such a scenario creates incentives to act contrary to the best interests of the settlement class as a whole or in the alternative, to "disengage" those clients who would not agree to the fee-sharing agreement.

25. The decision cited by the Billings firm, *Flanagan, Lieberman, Hoffman & Swaim v. Ohio Public Empl. Ret. Sys.*, 814 F.3d 652 (2nd Cir. 2016), addresses the rules for fee awards set in a reform statute for federal securities litigation, and concludes that there is a rebuttable presumption of correctness to a securities-case lead counsel's intended allocation to a non-lead counsel who had been included in a capped

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[26] The *Agent Orange* agreement promised the firms that had advanced money for the payment of expenses repayment of three times the amount advanced from any fee award to members of the group, regardless of the amount of services the "investor attorneys" had rendered or how long it was before the advanced sum was repaid. 818 F.2d 216 at 218. The appellate court found that the arrangement gave the "investor attorneys" an obvious incentive to settle early and avoid the risk of continued litigation and expending more work. *Id.* at 224.

[27] *Allapattah* did not rule on the alternative grounds for invalidation — whether the agreement violated Florida Bar Rule 4-1.5(g) which required that the agreed-upon division be "in proportion to the services performed by each lawyer." 454 F.Supp. 2d at 1227 n.36.

percentage fee request. *Id.* at 658. This is not persuasive precedent for a class action outside of that specialized context. In the securities context it is lead counsel who decides the fee allocation, with court approval.[28] In a CR 23 class action no such authority is given to attorneys. Furthermore, *Flanagan* recognizes that the court "must act 'as a guardian of the rights of absent class members,' in assessing whether a presumption of correctness has been properly refuted and then, if indeed it has, determining on its own the appropriate fee allocation." *Id.* at 659.[29] More active scrutiny by a court may be required where, as here, no party steps forward to rebut a presumption of correctness or argue against a fee allocation. *Id.* at 659-60.

26. This Court cannot consent to the fee-sharing agreement on behalf of the settlement class members who are now clients of McBrayer PLLC and who were putative clients of both the McBrayer firm and the Billings firm at the time of its formation as set out by Rule 1.5(e) and discussed by *In re Agent Orange Prod. Liab. Litig.*[30]

27. This Court concludes that the fee sharing agreement is invalid because it does not satisfy two of the three preconditions for an enforceable fee division agreement

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[28] *See In re Cardinal Health Inc. Securities Litigations*, 528 F.Supp.2d 752, 757-60 (S.D. Ohio 2007).

[29] This Court notes that if this case were governed by *Flanagan*, then it would find that the presumption of correctness had been refuted through a *prima facie* showing that an allocation to the Billings firm of half the 25% fee requested by the McBrayer firm was "substantively improper because it was clearly excessive in the light of the actual contributions and reasonable expectations of non-lead counsel [*i.e.*, the Billings firm]." 814 F.3d at 659.

[30] An improper allocation of fees cannot be "cured" by a successful litigation outcome or a favorable settlement: "The test to be applied is whether, at the tie a fee sharing agreement is reached, class counsel are placed in a position that might endanger the fair representation of their clients and whether they will be compensated on some basis other than for legal services performed." *Agent Orange*, 818 F.2d at 224.

under SCR 3.130 (1.5(e)). In addition, a 50-50 split between the two firms is not an appropriate fee allocation and creates the potential and incentives for harm to class members' interests. Thus, this Court finds the agreement to be unenforceable and orders that the McBrayer and Billings firms not share or re-allocate the fees separately awarded to them. The determination of the appropriate fee to be awarded to each firm is made in the sections that follow. Because the basis for the fee awards to the McBrayer firm (which has prosecuted this case and been appointed as Class Counsel) and for the Billings firm (which has not) are different, the allocation to each firm is not directly comparable with the other. Although it is possible that the awarded fees may be equal or close in amount, that is not the purpose or intent behind the Court's awards, and no division, sharing, or equalizing between the firms of the fees awarded and received should occur — whether in accordance with the invalid fee sharing agreement or otherwise.

Service Awards for Settlement Class Representatives

28. Plaintiffs and Settlement Class Representatives, Haynes Properties, LLC, Mitch and Scott Haynes dba Alvin Haynes & Sons, and S&GF, filed a Petition for Settlement Class Representatives Service Awards on January 15, 2021, requesting that each of the three be awarded $5,000 in recognition of their service as Settlement Class Representatives from the net proceeds of the liquidation of Defendant Burley Tobacco Growers Cooperative Association ("Co-op"). The "net proceeds" from the dissolution

are defined herein as the amounts that remain after the Co-op has liquidated its assets, paid its debts, and made any contribution toward funding a nonprofit organization in accordance with the Court's Opinion and Order regarding approval of the proposed partial settlement. In support of the requested award, Plaintiffs cited the hours spent and efforts made toward the litigation and settlement by their principals (Mitch Haynes, Scott Haynes, and Penny Greathouse) and presented an affidavit of their counsel (Robert E. Maclin, III) about their contributions.

29. The Stipulation and Agreement of Partial Settlement attached as Exhibit B to the Joint Motion to Enter filed June 10, 2020 ("the Stipulation and Settlement") provides for payments to compensate the settlement class representatives for their efforts on behalf of the settlement class, subject to Court approval and not to exceed $5,000 per representative.[31] The mailed notice packets and the FAQ page of the settlement website include a statement that the payments to be made from the Co-op's assets — "before the payments to settlement class members" — was an "award for their service to each of the three Class Representatives of up to $5,000, at the discretion of the Court...."[32] The short-form (publication) notice mentions that the proposed settlement

[31] Stipulation and Settlement, § 1.0 (cc) ("Service Awards" definition) and § 11.1 (allowing an application requesting service awards of $5,000 "as a lump sum to each of the Class Representatives" from the dissolution proceeds. A copy of the Stipulation and Settlement has been available on the settlement website's *Important Documents* page, https://www.btgcasettlement.com/important-documents.php (last visited April 29, 2021).

[32] The statement is in subpart B of the answer to Question #5 ("What are the terms of the proposed settlement?"). *See* Long-form (mailed) Notice p.3, Exh. 1, Declaration of Stephen M. Weisbrot (Angeion Group,

"provides for a service award to representatives of the settlement class," but does not specify an amount.[33]

30. In addition to inclusion in notices about the proposed settlement, generally, the proposed service awards to class representatives were a subject of notice given in accordance with the Orders relating to attorney's and service fee requests. The Petition for the award was included on the *Important Documents* page on the settlement website,[34] and notice about the briefing schedule and consideration of any service-award request was provided on the website's home page. The anticipated service-award request was also included in the notices published in newspapers in each of the five Co-op states and Tennessee.[35]

31. There has been no objection, from a named party or a settlement class member, to the request for an award of $5,000 per representative. In accordance with the Stipulation and Settlement,[36] the Co-op did not oppose the request for a service award of $5,000 to each settlement class representative. No party or any attendee of the Fairness Hearing voiced an objection to the requested award.

LLC) — Exh.A to the February 16, 2021 Settlement Class Representatives' Motion for Ruling re Sufficiency of Notice ("February 16, 2021 Notice Sufficiency Motion"); BTCGA Settlement FAQs webpage, https://www.btgcasettlement.com/frequently-asked-questions.php (last visited April 29, 2021).

[33] Short-form (publication) Notice, Exh. 2 p.4, Weisbrot Declaration.

[34] *See* https://www.btgcasettlement.com/important-documents.php (last visited April 29, 2021).

[35] See Exhibits 1-7, Declaration of Kimberly Kidd (Exh.C to February 16, 2021 Notice Sufficiency Motion).

[36] Stipulation and Settlement, § 11.2.

32. "Incentive awards serve an important function, particularly where the named plaintiffs participated actively in the litigation." *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1218 (S.D. Fla. 2006). Service awards are an effective way "of encouraging members of a class to become class representatives and rewarding individual efforts taken on behalf of the class." *Hadix v. Johnson*, 322 F.3d 895, 896 (6th Cir. 2003). The following factors are those considered by some federal courts in determining whether to grant service-award requests:[37]

> (1) the action taken by the Class Representatives to protect the interests of Class Members and others and whether these actions resulted in a substantial benefit to Class members; (2) whether the Class Representatives assumed substantial direct and indirect financial risk; and (3) the amount of time and effort spent by the Class representatives in pursuing the litigation.

Enterprise Energy Corp. v. Columbia Gas Transmission Corp., 137 F.R.D. 240, 250 (S.D. Ohio 1991); *see also Allapattah*, 454 F. Supp. 2d at 1222 (citing, *inter alia*, "time, money and effort incurred" and risks incurred by class representatives).

33. Based on the law, this Court finds that the requested service awards of $5,000 are fair, reasonable, and appropriate. The Settlement Class Representatives stepped forward to bring this action, participated in negotiation of the proposed settlement, provided testimony and other information for preliminary certification and

[37] CR 23 mirrors its federal counterpart, FED. R. CIV. PRO. 23, *see Hensley v. Haynes Trucking, LLC*, 439 S.W.3d 430, 436 (Ky. 2018), so Kentucky courts rely upon federal case law when interpreting the Kentucky class action rule. *See Curtis Green & Clay Green, Inc. v. Clark*, 318 S.W.3d 98, 105 (Ky. App. 2010).

notice to the proposed class, and otherwise supported consideration of class issues involved with the proposed settlement. Based on testimony and other evidence provided during the Fairness Hearing, it is anticipated that a participating class-member's share in distribution of Co-op net assets will be greater than the $5,000 amount of the service award; therefore, the requested awards would not be disproportionate to benefits expected for class members.

34. As requested, the three Settlement Class Representatives should each be awarded a service fee of $5,000.00 for their respective service as class representatives.

Awards of Attorneys Fees' and Costs

35. On January 15, 2021, the McBrayer firm and the Billings firm each filed a CR 23.08 request to be awarded a percentage of the net proceeds from the dissolution of the Co-op and certain non-taxable costs. Each firm accompanied its request with a memorandum of law and affidavits, documents, and other evidence, including evidence of the hours spent by that firm's lawyers and paralegals on this case and allegedly related matters.

36. The mailed notice packets and the FAQ page of the settlement website include a statement that among the payments to be made from the Co-op's assets "before the payments to settlement class members," would be amounts "awarded at the discretion of the Court (up to 25% of the net assets) as attorney's fees to Class Counsel

or other attorneys representing named parties in the case."[38] This information was repeated and more detail about the possible attorney's fee requests and how to object to them was given in response to a later question: "19. How will the lawyers be paid?"[39] In addition, the short-form (publication) notice specifically stated that "attorney's fees up to 25% of the net assets may be awarded by the Court."[40]

37. Notice relating to the fees/costs requests was also given in accordance with Court orders entered December 15, 2020, and January 11, 2021, pursuant to CR 23.08 (relating to such requests in class actions) and KRS 412.070(1) (relating to fees/costs applications to be paid out of a common fund). The complete McBrayer Petition and Billings Motion and the firms' subsequent filings were included on the *Important Documents* page on the settlement website,[41] and notice about the briefing schedule and consideration of any attorney's fee/costs request was provided on the website's home page.[42] The schedule, deadline for objections, and a clear statement that the request might be for a fee in "an amount up to 25% of the net assets in addition to expenses and/or class service representative's service awards" were all included in notices published in newspapers in each of the five Co-op states and Tennessee.

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[38] The statement is in subpart B of the answer to Question #5 ("What are the terms of the proposed settlement?"). *See* Long-form (mailed) Notice p.3, Exh. 1, Weisbrot Declaration; BTGCA Settlement FAQs page, https://www.btgcasettlement.com/frequently-asked-questions.php (last visited April 29, 2021).

[39] *Id.*, FAQs page; Long-form (mailed) Notice, Weisbrot Declaration Exh. 1, pp. 6-7.

[40] Short-form (publication) Notice, *id.* Exh. 2 p.4.

[41] *See https://www.btgcasettlement.com/important-documents.php* (last visited April 29, 2021).

[42] *See https://www.btgcasettlement.com* (last visited April 29, 2021).

38. On the evidence presented, this Court finds that the notice given to the class about the requests for fees and costs meets the requirements of due process and CR 23.03(4), 23.05(1), and 23.08(1), as well as KRS 412.070(1). The notice also complies with this Court's Orders regarding notice entered November 17, 2020, December 15, 2020, and January 11, 2021.

39. While there were no objections received to the firms' respective requests for reimbursement of non-taxable costs, there were 17 objections received relating to the attorney-fee requests. These objections can be summarized as complaints generally that (a) the requests were too high, (b) lawyer "rewards" should be minimal, and (c) a fee of no more than 7.5% of the net dissolution assets would be plenty, was expected, or had been promised.[43]

40. On February 17, 2021, supplement/updates to the January 15, 2021 requests and responses to the objections received to the attorney fee requests were filed by the McBrayer firm and the Billings firm.[44]

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[43] Twelve objectors signed a petition "in support of reducing the attorney's fees from 25% to 7.5% .... We feel that the attorneys are well compensated at 7.5% or approximately $2.1 million."

[44] Response to Objections regarding Petition for Award of Attorney's Fees and Nontaxable Costs *and* Verified Supplement in support of Petition for Award of Attorney's Fees and Nontaxable Costs; both filings are also available on the *Important Documents* page of the settlement website, *see https://www.btgcasettlement.com/important-documents.php* (last visited April 29, 2021); Billings Law Firm, PLLC's Combined Response to Objections regarding Fees and Supplemental Memorandum in Support of Motion for Award of Attorney's Fees and Costs and Expenses, also available from the *Important Documents* page of the settlement website. Exhibit A to the Combined Response is a table listing the objectors to that date and the substance of each objection.

McBrayer Fee and Costs Award

41. In its January 15, 2021 Petition, McBrayer PLLC sought a fee award of 25% of the net proceeds plus payment of $ 18,561.16 in advanced non-taxable costs and expenses. The McBrayer firm contends that it may be awarded a percentage of the net proceeds from the Co-op's dissolution under Kentucky law relating to common-fund recoveries, and that a 25% award would be a reasonable fee.

42. Civil Rule 23.08 is not itself a basis for awarding an attorney's fee. It sets out applicable procedures in a class action and mandates that a court approve or award reasonable fees and non-taxable costs "that are authorized by law or by the parties' agreement." Such an award is not authorized here by the parties' Stipulation and Settlement, which is an agreement only among the named parties and contains only the Co-op's "clear sailing" agreement not to contest an attorney-fee request of 25% or less of the net proceeds. For an award of fees and costs in a common fund recovery, KRS 412.070(1) provides a statutory basis and there may also be a basis in equitable principles (including quasi-contract and guards against unjust enrichment).

43. KRS 412.070(1) authorizes an award of attorney's fees and non-taxable costs to McBrayer for its work in this action. This Court finds that the terms of the first sentence in KRS 412.070(1) apply to the named Plaintiffs and their attorneys and, thus,

the McBrayer firm is to be allowed its necessary expenses and reasonable compensation for its services:[45]

a. This action includes claims for judicial dissolution and distribution of the Co-op's assets, *i.e.*, "for the recovery of money or property held in joint tenancy, coparcenary, or as tenants in common." As noted in the Opinion and Order entered September 27, 2020 (pp.12-15), the settlement class members' rights relating to the dissolution and distribution of the Co-op are inseparable, and they hold in common their interests in the net proceeds.

b. The three named Plaintiffs are "parties in interest" to that common fund and "have prosecuted [the action] for the benefit of others interested" in the matter and have gone to the "trouble and expense . . ." in said prosecution of the action. Named Plaintiffs are members of the settlement class, initiated and prosecuted this action putatively and on behalf of all others who would share in a distribution of net proceeds, and have been to trouble and expense in doing so.

c. The McBrayer firm's attorneys are the named Plaintiffs' attorneys, to whom "the court shall allow ... reasonable compensation for [their] services."[46]

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[45] In the alternative, if KRS 412.070(1) did not apply to the McBrayer Petition, this Court concludes under equitable principles that it should be reimbursed for its reasonable expenses and compensated with a reasonable attorney's fee paid from the net assets.

[46] KRS 412.070(1)

44. The Court also concludes that a percentage of the fund is the appropriate basis for awarding an attorney's fee to the McBrayer firm for its efforts on behalf of Plaintiffs and the proposed class in bringing this suit, negotiating the proposed settlement for judicial dissolution of the Co-op and distribution of its net proceeds, advocating for certification of the class and approval of the settlement, and serving as Class Counsel. A percentage award is consistent with Kentucky law,[47] is justified by the circumstances of this case, recognizes the result achieved, and acknowledges the efficiency by which that result was obtained. The negotiated settlement secured the dissolution of the Co-op and the distribution of its net assets to growers with a right thereto, and stopped the dissipation of Co-op assets through ineffective or wasteful operations and expenditures or through extended litigation. An award of a percentage of the common fund also aligns the interests of the settlement class with the McBrayer firm during the implementation phase for the settlement in which the Co-op's assets will be marshalled, its obligations paid, and the net proceeds distributed to eligible class members. A percentage amount makes the McBrayer firm incentivized to maximize any gains to the Co-op's assets or reductions to its obligations or expenses of dissolution.

[47] *See, e.g., College Retirement Equities Fund Corp. v. Rink*, No. 2012-CA-002050-MR, 2015 WL 226112, at *3, 8 (Ky. App. Jan. 17, 2015) (affirming award of a sum certain calculated as a percentage of the total amount available to settlement class members in a constructive common fund); *Kincaid v. Johnson, True & Guarnieri, LLP*, 538 S.W.3d 901, 922 (Ky. App. 2017) (rejecting argument that fee award based on a percentage of a common fund would be inappropriate).

45. However, the Court concludes that the requested fee of 25% of the net proceeds is not reasonable in the circumstances. This is not a situation in which the Co-op will be a continuing enterprise and settlement class members might receive benefits or recover other amounts from the Co-op in the future. The net proceeds will be all these settlement class members receive or recover from this point forward with respect to a cooperative association that has been in existence for almost a century and has acquired assets over a long period of time. Attorneys' efforts may have "unlocked" the net value for settlement class members to enjoy now and with finality, but those efforts did not create or increase the value of the Co-op's current assets.

46. In addition, this Court has assessed the reasonableness of a 25% award according to other factors listed in *Johnson v. Georgia Highway Express, Inc.*, 488 F. 2d 714 (5th Cir. 1974), among other cases, and which closely track Kentucky's Rule of Professional Conduct governing the reasonableness of fee arrangements. *Compare with* SCR 3.130 (1.5). Most of these factors weigh against the requested percentage. Litigation of the case was for a limited period of time and did not involve issues of any particular novelty or complexity; no depositions were taken and within five months of filing the initial complaint the parties had reached a proposed settlement. All the parties to the settlement negotiations favored dissolution of the Co-op, so it is not an exceptional result that the settlement accomplished its dissolution. The value of assets held by the Co-op at this point is not a result of the lawyers' efforts or their exercise of particular

skill or experience; with that said, the Court does recognize the value of the knowledge and experience Mr. Maclin brought to the litigation due to his successful, hard fought *Congleton* common fund litigation against BTGCA. The negative factors are somewhat offset by the McBrayer firm's willingness to accept the risk of taking this matter on a contingency basis and the time demands are such that the firm may have had to decline or limit its representation of fee-paying clients.

47. On the evidence before it, this Court concludes that 7.5% of the net proceeds is a reasonable fee to the McBrayer firm for formulating and prosecuting the suit, negotiating the settlement, and consistently supporting certification of the settlement class and approval of the proposed settlement. This percentage takes into account that McBrayer professionals have spent significant time on post-settlement class issues and have used their considerable skill and experience to shepherd this class through certification procedures and to protect absent class members' interests and due-process rights, all without any guarantee that its time and efforts would be compensated if the settlement was not approved. It also takes into account that appointment as Class Counsel has imposed additional responsibilities and constraints on the firm. The facts that there were settlement class members who affirmatively chose to support a dissolution plan in which 7.5% of the net proceeds would be paid to attorneys even without litigation and that many objectors support a reduction of the award to 7.5% of net assets (see fn. 15 above), support finding that this percentage is

viewed as reasonable by an appreciable number of settlement class members and objectors.[48]

48. If multiple partial distributions are made over time, and to further align the McBrayer firm's interests with those of settlement class members, payment of this fee award should be in proportion to each partial distribution.[49] This treats the net proceeds each distribution as a common fund to which the percentage will be applied and allows for payment of the fee award to precede distribution, in accordance with KRS 412.070(1).[50]

49. Civil Rule 23.08 provides that, in addition to a reasonable attorney's fee, the court shall approve or award reasonable nontaxable costs that are authorized by law. Similarly, Kentucky's common fund statute provides that prosecutors of actions for a common-fund recovery shall be allowed "necessary expenses" in addition to (taxable) costs. KRS 412.070(1). The expenses allowed for reimbursement under CR 23.08 and

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[48] More than 750 growers voted for a dissolution plan which provided for a 7.5% fee to be paid to the firm by the Co-op's Dissolution Committee. *See* January 15, 2021 Billings Memo. pp. 39-40 and Exh.7 (John N. Billings Affidavit) p.12 ¶ 58; February 17, 2021 Billings Combined Response p.5 (firm's clients "and hundreds of other farmers supported and voted for Petitioners Plan").

[49] *See Howell v. Highland Cemetery Co.*, 297 Ky. 659, 181 S.W.2d 44, 45 (1944) (finding no just reason to allow the attorney to recover the entire fee awarded before the clients were entitled to a recovery of both interest and principal); *Allapattah*, 454 F. Supp. 2d at 1241 (providing for payment of class counsel's fee in stages matched to processing of class members' claims, as an incentive to proceed expeditiously).

[50] The *CREF v. Rink* decision suggests that this should be interpreted as recognizing "the practical reality that a common fund attorney fee under KRS 412.070 should be measured before determining payment to individual claimants." No. 2012-CA-002050-MR, 2015 WL 226112, at *6 (Ky. App. Jan. 17, 2015)

common-fund principles are those reasonable, out-of-pocket costs that would normally be charged to a fee-paying client.[51]

50. The Court finds that the McBrayer firm's request for an award of $ 18,561.16 in non-taxable costs and expenses incurred or expended as of January 8, 2021, seeks reimbursement of expenses necessary to the firm's work toward creation/recovery of the common fund and that the expenses are reasonable in amount and of a type that would normally be borne by a fee-paying client.[52] The Court thus concludes that the requested amount should be awarded to the McBrayer firm as a full and final reimbursement of its expenses on or before January 8, 2021. The firm may apply to this Court for approval of reimbursement of its reasonable, necessary, and typical expenses subsequently incurred in support of the proposed settlement, its implementation, or as Class Counsel.

Billings Fee and Costs Award

51. In its January 15, 2021 Motion as supplemented by its filings on February 17, 2021, Billings Law Firm, PLLC seeks a fee award of 7.5% of the Co-op's net assets after dissolution (less any amounts to be paid to the non-profit tobacco organization as

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[51] *Cf. Driscoll v. George Washington Univ.*, 55 F. Supp. 3d 106, 124 (D.D.C. 2014) (compensable costs awarded under a fee-shifting statute include "all reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client in the course of providing legal services").

[52] Affidavit of Robert E. Maclin, III (January 14, 2021 Petition Exh.B), p.4 ¶20. The amount sought is for mileage, transcripts/videos, fees charged by a financial consultant/expert, a printing and newspaper publication charges for notices to the settlement class members. *See* January 15, 2021 Petition Exh.D (listing expenses requested).

contemplated by the Stipulation and Settlement),[53] plus payment of $24,010.39 in non-taxable costs and expenses.[54] The Billings firm contends that it is entitled to a percentage of the net-proceeds common fund because its legal services contributed to the eventual settlement by which the Co-op would be dissolved and the net proceeds would become a common fund to be distributed to the class members. It supports its request in part by presenting evidence of a lodestar amount of $538,890.50, made up of 2165.3 hours of attorney and paralegal time in 2019 and 2020, with each professional's hours multiplied by the corresponding hourly rate.[55]

52. As acknowledged in the Billings firm's January 15, 2021 Memorandum (p.2), a large portion of the time spent and legal services performed that allegedly benefited the class and led to the proposed settlement "were done outside of the lawsuit [*i.e.*, this case] and are not in the record." However, the firm alleges it was originally

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[53] It is unclear whether the Billings firm contemplated that this 7.5% award would be kept by that firm and not shared with the McBrayer firm, or whether the 7.5% was to be pooled with any award to the McBrayer firm and divided equally per the fee sharing agreement. The Billings firm suggested as an alternative request that "the Court could grant a *joint award* of attorneys' fees to McBrayer and [Billings firm], in which case both firms would apportion the fee between them pursuant to their separate fee splitting agreement." January 15, 2021 Motion p.4 fn.5 (emphasis original). The Court's conclusion that the fee sharing agreement should not and cannot be enforced or followed moots this alternative.

[54] *See* Billings firm's January 15, 2021 Memorandum (pp. 59-61) and February 17, 2021 Combined Response and Supplemental Memorandum (pp. 2, 16). Exhibit 38 to the January 15, 2021 Memorandum provides itemized detail for these costs and expenses; *see also* John N. Billings Affidavit (Exh. 7) ¶ 88 (breaking down the total into component categories). Confusingly, the January 15, 2021 Motion (p.4) refers to a costs and expenses total of $22,602.29; this appears to be in error.

[55] *See* January 15, 2021 Billings Memorandum p.49 and John N. Billings Affidavit (Exh. 7) ¶¶ 81 & 83; *see also* March 30, 2021 Notice of Filing, showing the calculation of the lodestar. At the hearing session on March 8, 2021, the Court stated that its calculations had yielded a lower total ($460,619.29). After reviewing the March 30, 2021 Notice of Filing, the Court accepts the calculations and total of $ 538,890.50.

engaged by "Greg Craddock, initially, and dozens of other tobacco farmers, subsequently . . . starting in early October 2019 to obtain a copy of the KCARD Report and to continue the investigation of the BTGCA's purpose, management and finances since FETRA."[56] This representation would later expand as the Billings firm gained new clients and expanded its representation to seek "a 'voluntary dissolution' of the Association," which the Billings firm expected would consist of seeking a special meeting of the Members "to vote to adopt a Resolution to voluntary [sic] dissolve the Association, to amend the Association's Bylaws to provide for dissolution, to adopt a Plan of Distribution (**the "Plan"**) of the Association's assets, to designate a Dissolution Committee to implement the Plan . . ." and any other actions necessary to carry out the dissolution and Plan.[57]

53. The Billings firm's January 15, 2021 Memorandum in support of its fee request described work done primarily in 2019 and early 2020, seeking a non-judicial dissolution of BTGCA. These actions include obtaining the aforementioned KCARD Report, 2019 Membership List, and other financial data and information; hosting large public meetings to present the idea of calling for a Special Meeting of the members to vote for dissolution and distribution; regular interactions with BTGCA in pursuit of

[56] January 15, 2021 Billings Memorandum p. 6.

[57] Billings law firm letter dated January __, 2020, p. 1 (emphasis in original).

documents or for planning purposes; and other activities that tended to work towards a dissolution of BTGCA without judicial oversight.

54. The Billings firm continued to seek non-judicial dissolution by pushing for a Special Meeting of the members to hold a vote as well as seeking proxy votes from members for such a meeting, even after the Named Plaintiffs in this case had filed this lawsuit. While continuing to seek non-judicial dissolution, per his client agreements, the Billings firm "coordinate[d] with and provided substantial support to McBrayer in multiple respects from January through the mediation and Settlement."[58] According to the Billings firm's January 15, 2021 Memorandum, "while none of BLF's clients were parties to the litigation, BLF and McBrayer discussed the value of the substantial records in BLF's possession."[59] The Billings firm represented to the Court that during this time when it had been retained only to represent clients seeking a non-judicial dissolution, the Billings firm provided documents from BTGCA to McBrayer, provided a guide for what discovery to seek, and coordinated over motions to be filed in the present matter, including for the motion to enjoin the BTGCA from implementing the Board's plan adopted on February 5, 2020, where "BLF attorneys even edited and revised that motion, because of their expansive knowledge of facts, documents, law and background."[60] At that time, the Billings firm represented no clients named in the

[58] January 15, 2021 Billings Memorandum p. 20.

[59] *Id.*

[60] *Id.* at 21.

present lawsuit, but actually represented many clients who sought an outcome that was mutually exclusive with that sought by the Named Plaintiffs and the McBrayer firm. There is no evidence in the record that would establish Billings firm ever disclosed to its clients it was assisting attorneys whose clients' interests were adverse to its clients, or that it sought their permission to do so.

55. In fact, the documents provided by the Billings firm prove otherwise; while the Billings firm advised the Court that it "[r]ecogniz[ed] potential mutual benefit" from working with the McBrayer firm in litigating this case, assisting Named Plaintiffs' counsel with motion practice and sitting in on hearings before it represented any party in this matter, it was telling its clients another story. In the May 15, 2020 letter informing its clients of the potential settlement, the Billings firm represented to its clients that the Billings firm "had[d] been forced, against our desire and will, to participate in the Haynes litigation."[61] This is despite the fact that, as it informed the Court, it had been assisting the Named Plaintiffs for several months.

56. It is undisputed that the Billings firm took credit for initiating mediation efforts in the current litigation, corresponding with both Named Plaintiffs and BTGCA during the months of March and April in order to set up a mediation between the parties. At these preliminary discussions, the Billings firm was "very explicit with all parties and the mediator that we have not been given authority to agree to settle the

[61] Billings law firm letter dated May 15, 2020, p. 6.

dispute with the Co-Op Parties, the Co-Op's insurance company, or the Haynes Parties, that we (as the lawyers) cannot settle those disputes. . ." and that any proposed settlement would need to be approved by the clients.[62] In the same letter where the Billing firm informed its clients of the proposed settlement, the Billings firm informed those clients that "[b]ecause we have multiple clients who are in favor of this settlement proposal, and because we believe this settlement accomplishes the client goals of our engagement . . . our firm will need to dis-engage any client who rejects/disapproves of this settlement framework."[63] The Billings firm represented to the other Parties that it "maintained the position that if a settlement was reached, one or more of its clients would consent to the settlement . . . ."[64] In so doing, the Billings firm may very well have exceeded the authority granted to it by its clients, per SCR 3.130(1.2), which states that:

> . . . a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter.

Its clients had not given the Billings firm authority to enter into settlement negotiations, nor did they give the Billings firm the authority to pursue a judicial dissolution. The

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[62] *Id.* at 2.

[63] *Id.*

[64] January 15, 2021 Billings Memorandum p. 25.

Billings firm only sought authorization after the settlement terms had been reached, but at that point it appears to have already exceeded the authority granted to it by its clients—clients who, at that time, were not even members of the present lawsuit.

57. It is clear that the Billings firm decided its preferred course of action, regardless of the preferences of its clients, was to become part of the settlement in this case and fire its own clients if they would not agree to the settlement that was potentially more lucrative for the Billings firm. The Billings firm ended its May 15 letter by reasserting to the client that if the firm had not heard back from the client on or before May 25, 2021, or if they rejected the settlement, that the Billings firm would be forced to disengage that client, and the representations made to other Parties indicate that the Billing firm had independently decided that it would proceed with the Settlement Agreement, and pick its remaining clients from among those who did not object to the settlement. This could be construed as violating the mandate of SCR 3.130(1.8)(g), which states that an attorney who represents two or more clients may not engage in the settlement of the clients' claims "unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement."

58. Though the engagement letters sent out by the Billings firm reference possible conflicts of interest that may arise in the future, they do not go into any detail

about said conflicts, failing to properly satisfy the mandate of SCR 3.130(1.7), requiring "each affected client [to give] informed consent, confirmed in writing. The consultation shall include an explanation of the implications of the common representation and the advantages and risks involved." These engagement letters only referenced possible conflicts in the vaguest terms and did not properly apprise each client of what the conflict might entail and how it would impact that client. As referenced in the Supreme Court Commentary to SCR 3.130(1.7), if a conflict arises after the representation has been undertaken, the attorney must determine whether consent can be given—is it a conflict that can be consented to, or can the attorney actually obtain consent—and if not, then the attorney must withdraw from representation. This commentary goes on to state:

> Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client.

Whether the Billings firm would have been able to comply with its duties is an unnecessary question, as it is clear that the Billings firm did not properly inform its clients of the conflict and how that conflict impacted them.

59. Mr. Craddock and his company of fellow clients were not added as Parties to this case until April 28, 2020, after the Parties had created a settlement plan. Mr. Craddock did not intervene earlier than this due to the strategic reason that ". . . until a

settlement was reached, [the Billings firm] did not want to risk undertaking any action that could place the Special Meeting in jeopardy, by, for example, intervening in the lawsuit, and asserting claims that were contrary to the Special Meeting effort."[65] As such, it is clear that the Billings firm represented clients with interests that were manifestly different from the McBrayer firm's clients, requiring different litigation tactics. In the Billings firm's January 15, 2021 Memorandum, the Billings firm stated that it ". . . did not believe it could, on one hand, pursue a voluntary dissolution by a vote of the Members, and on the other hand, also voluntarily engage in litigation that would, arguably justify a higher fee under the Plan."[66] This conflict was created by the Billings firm when it chose to take part in the underlying action while representing clients who had engaged the firm to obtain a different outcome.

60. Even after being joined in the underlying action, the Billings firm took actions that tended to undermine the disposition of the settlement. On August 17, 2020, the Billings firm filed a complaint in Metcalfe County attempting to have the Metcalfe Court enforce the settlement, a settlement that was already properly before this Court, both due to the underlying action here as well as the express terms of the settlement, which placed jurisdiction over the settlement agreement solely in the Fayette County

[65] *Id.* at 26.

[66] *Id.*

Circuit Court. This is pursuant to the Stipulation and Agreement of Settlement, which states in relevant part:

> The Court shall retain jurisdiction over the implementation, enforcement, and performance of this Agreement, and shall have exclusive jurisdiction over any suit, action, proceeding, or dispute arising out of or relating to this Agreement that cannot be resolved by negotiation and agreement by counsel for the Parties. The Court shall retain jurisdiction with respect to the administration, consummation, and enforcement of the Agreement and shall retain jurisdiction for the purpose of enforcing all terms of the Agreement. The Court shall also retain jurisdiction over all questions and/or disputes related to the Notices Program and the Settlement Administrator. As part of its agreement to render services in connection with this Settlement, the Settlement Administrator shall consent to the jurisdiction of the Court for this purpose.[67]

61. Therefore, pursuant to the Settlement Agreement, of which the Billings firm was a signatory, all matters concerning the lawsuit were to be addressed and resolved by this Court. Despite the clear language of the Settlement Agreement, the Billings firm unilaterally attempted to engage in what could be referred to as "judge shopping."[68] In a letter to its clients, dated October 13, the Billings firm confirmed its intent to dismiss the Metcalfe County case, not because that court did not hold jurisdiction over the settlement, but rather because it had previously been dissatisfied with the Court's rulings, stating:

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[67] Stipulation and Agreement of Settlement, p. 20. The Stipulation and Agreement of Settlement was drafted and filed in the underlying matter, meaning that "Court" in the text refers to this Court, Fayette County Circuit Court Division 4.

[68] Counsel for the Named Plaintiffs and BTGCA denied involvement in the filing of the Metcalfe lawsuit, stating that it has always been their belief that this Court has exclusive jurisdiction over the settlement agreement.

> . . . the Fayette Circuit Court has, thankfully, reconsidered its prior comments and findings made during hearings in June, July and August . . . which resulted in the filing of the Metcalfe Lawsuit. . . . In other words, contrary to the Court's early direction, it now appears the Court is headed back in the right direction towards approving the material terms of the Settlement. As a result, the Metcalfe Circuit Court action is no longer necessary."[69]

Forum shopping such as this attempts to deny the class members the protections granted by CR 23.05, which requires the Court to determine whether the settlement is fair, reasonable, and equitable.[70]

62. Neither the Billings firm nor any of its clients "prosecuted" this action — for themselves or "for the benefit of others interested with [them]" — within the meaning of the common-fund statute, KRS 412.070(1). Therefore, the law authorizing an attorney's fee award to the Billings firm under CR 23.08 are the court-recognized equitable principles behind KRS 412.070:

> It would be unfair to permit one member of a class interested in the outcome of a lawsuit brought for his benefit to stand by and permit another member to bear all the costs and expense of the litigation. When a fund is recovered for the benefit of several parties in interest each should bear his share of the burden incident to recovery in proportion to the benefits derived therefrom.

Howell v. Highland Cemetery Co., 297 Ky. 659, 181 S.W.2d 44, 45 (1944).[71] Thus, class members who did not directly contract for representation by the Billings firm but who

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[69] Billings law firm letter dated October 13, 2020, p. 1.

[70] Notably, the letter is dated only a week before the Court held a hearing to determine the preliminary certification of the class and appointment of class counsel.

[71] *See also Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 392 (applying "judge-created exception" to award

realized a benefit from legal services it provided to others may be required to contribute toward a reasonable fee for those services.

63. This Court finds that efforts of the Billings firm on behalf of Mr. Craddock and other clients in seeking a non-judicial dissolution of the Co-op and distribution of its assets, participation in the case-settlement negotiations, and the signing of the Stipulation and Settlement were among other "but-for" causes of the partial settlement and the proposed establishment of a common fund of the net proceeds from the Co-op's judicial dissolution; these efforts were of benefit to all members of the settlement class. The Billings firm also spent time and effort after the June 2020 signing of the Stipulation and Settlement on issues relating to certification of a settlement class, notice, and approval of the settlement that were of benefit to the settlement class as a whole. However, this Court finds from the evidence, including what it has observed from proceedings in this case, that the Billings firm's efforts (a) were not consistently supportive of the proposed settlement and beneficial to the settlement class and (b) were not crucial to the eventual rulings regarding class certification, notice, and settlement approval. Therefore, although the Court concludes that the Billings firm should be paid a reasonable fee as a pre-distribution deduction from the common fund

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attorney's fees from a common recovery; "To allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly....").

of net proceeds, it does so solely on the basis of the Billings firm's efforts through June 2020.[72]

64. The Court concludes that it would not be reasonable or equitable to award the Billings firm the requested fee of 7.5% of the net proceeds or to make the fee award based on a percentage of the net proceeds. The factors supporting the Court's award of a percentage to the McBrayer firm are not present with respect to the Billings firm,[73] and any percentage award would likely result in a fee between three and four times the lodestar amount.[74] The multiplier "... represents the risk of the litigation, the complexity of the issues, the contingent nature of the engagement, the skill of the attorneys, and other factors,"[75] and is used to determine if a percentage fee is a fair and reasonable award, one that would not represent a "windfall" for counsel.[76] In common

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[72] *See, e.g., In re Syngenta AG MIR 162 Corn Litig.*, 2018 WL 6839380 *6, *7 (D. Kan. 2018) (allocating a portion of the total attorneys' fees award to a pool for individually retained private attorneys, because "sheer number of private suits ... created enormous pressure on Syngenta, and thus ... contributed in a meaningful way to the ultimate resolution that benefits the entire settlement class"; noting that such attorneys could also seek an allocation of fees from common benefit pools for work done that benefitted the overall litigation and recovery).

[73] As the Billings firm is not Class Counsel it does not need to involve itself with the bulk of the administrative issues involving notice and enforcement of the settlement; furthermore, the Billings firm did not bring the underlying action or lead what little litigation there was in the matter. Though the Billings firm has assisted the McBrayer firm, the Court found the McBrayer firm alone to be qualified to be Class Counsel and did so on its own merits. Furthermore, what aid the Billings firm has given to Class Counsel has been undercut by its actions in seeking a separate objective as well as violating the express terms of the Settlement Agreement.

[74] *See* January 15, 2021 Billings Memo. pp. 51 (calculating that a multiplier of four (4) would produce an amount equal to 7.7% of the expected common fund value).

[75] *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 586 F.Supp.2d 732, 751 (S.D. Tex. 2008) (*quoting In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 468 (S.D.N.Y.)).

[76] *Id.*

fund cases, a multiplier between 1 and 4 is frequently awarded.[77] Although an amount greater than the lodestar amount can be a reasonable fee, that is not true here for a firm whose lawyers did not bring the case, are not Class Counsel, and who have not acted throughout in the best interests of the settlement class as a whole. The Billings firm has provided evidence to support its hourly rates and that the hours claimed were spent in pursuit of dissolution of the Co-op, negotiation of the Stipulation and Settlement, and subsequent proceedings relating to class issues and settlement approval.[78] A fee award of $ 538,890.50 to the Billings firm thus compensates it fully for every hour expended that resulted in the proposed settlement or that might have otherwise been beneficial to the settlement class.[79] This Court concludes that anything more would not be reasonable.

65. Because the Billings firm's request was for a fee of 7.5% of the net proceeds and the firm has current clients who have filed written objections with this Court to any fee award above 7.5%, this fee award is capped at 7.5% of the net proceeds. Therefore, the fee awarded to the Billings firm is the sum certain of $538,890.50 or 7.5%

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[77] *Id.* (*quoting In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 742 (3d Cir.2001)).

[78] Affidavit of John N. Billings (Exh.7, January 15, 2021 Memo.), pp.15-17 ¶¶ 80, 81, 83. The firm avows that none of the 2165.3 hours claimed were spent in connection with the suit brought on behalf of Mr. Craddock and other Billings firm clients in Metcalfe Circuit Court or in preparing the firm's application for a fee award, see *id.* p.16 ¶81 — work that was, respectively, to the detriment of most class members or of no benefit to the class as a whole.

[79] *See Blum v. Stenson*, 465 U.S. 886, 901 (1984) (ruling that a fully compensatory fee, encompassing "all hours reasonably expended on the litigation" at rates reflecting any special skill and experience of counsel, was a reasonable fee to be awarded when excellent results were obtained).

of the net proceeds from the Co-op's dissolution, whichever is less. The fee should be deducted from the net proceeds but only after the necessary calculation is made to verify the award is less than 7.5%.

66. The Court also finds that the Billings firm's request for an award of $24,010.29 in non-taxable costs and expenses is for necessary and reasonable expenses that are of a type that would normally be charged to a fee-paying client[80] and concludes that the requested amount should be awarded.

Disposition of the Objections

67. The combination of the percentage award to the McBrayer firm with the dollar sum awarded to the Billings firm makes the total fee award in excess of 7.5% of the common fund created by the net assets from the Co-op's dissolution. This result may conflict with objectors' positions that 7.5% of the net proceeds is the maximum that should be awarded in attorney's fees. For example, a petition signed by 12 objectors claims that the attorneys would be "well compensated" by a 7.5% fee. Objections to "anything more than minimal lawyer rewards" are less specific, but probably would consider the amounts awarded as more than "minimal."

68. The Court finds that the objections that attorneys' fees should not exceed 7.5% stem from a provision in the plan for the Co-op's dissolution that was championed by the Billings firm and its clients, to have been put to a vote at the special meeting of

[80] *See* ¶¶ 48-49 and footnote 44 above.

the Co-op's members scheduled for April 8, 2020, but never held. That "Plan of Dissolution of the Burley Tobacco Growers Co-operative Association" (1/15/21 Billings Memo., Exh.12) specified that the Billings firm was to be engaged to provide legal services to the Co-op about the dissolution and be paid a fee equal to 7.5% of the net assets of the Co-op but no less than $1 million; if litigation ensued over the dissolution or distribution, then the Billings firms was to be entitled to an award of 25% "or such other amount as the Court may order or approve." *Id.* Plan p.3. The provision about a 7.5% fee was inapplicable to a judicially-ordered dissolution and, by its own terms, the Plan allowed for a higher percentage if there was litigation. To the extent that some class members feel that they had been promised a particular limit on attorney's fees, that was a promise found only in representations made by the Billings firm to some potential clients the firm was attempting to recruit and the Court has concluded that the fee award to that firm is indeed to be less than $1 million and less than 7.5% of the net proceeds.

69. The Court has neither assumed that the fee requests were appropriate nor accepted assertions about the work done by the requesting firms or the benefits to the settlement class thereby. Instead, the Court examined the time sheet entries of each firm and other information submitted by the requesting firms and required the production of additional information to allow it to fully assess the requests for attorney's fee awards. The objections were taken seriously and the requests scrutinized closely. The

Court has concluded that the amounts awarded herein are reasonable and equitable and overrules any objections to the contrary.

ORDER

Based on the findings, conclusions, and opinions stated above, the Court hereby ORDERS as follows:

1. The "fee sharing agreement" memorialized by the one paragraph agreement dated September 15, 2020, between McBrayer PLLC and Billings Law Firm, PLLC and made of record herein by the CR 23.05(3) Statement filed on October 16, 2020, is declared void and is and shall not be enforced or followed by either the McBrayer or Billings firm.

2. The Settlement Class Representatives are each awarded a service fee of $5,000.00 for their respective service as class representatives.

3. McBrayer PLLC is awarded attorneys' fees in an amount equal to 7.5% of the net proceeds from the dissolution of the Co-op. For the purposes of calculating this award, "net proceeds" are the proceeds that remain after the Co-op has liquidated its assets, paid its debts,[81] and contributed any and all funds to a nonprofit organization in accordance with this Court's order regarding the proposed settlement. This award is payable to the McBrayer firm in proportion to any partial or final distribution to

[81] Such debts may include settlement-administration costs undertaken to be paid directly by the Co-op and the costs of the dissolution.

settlement class members. This fee award is for work the McBrayer firm has done in the past to the benefit of the class and does not foreclose the possibility of an additional award by this Court for further Class Counsel work by the firm.

4. McBrayer PLLC is also awarded its non-taxable costs through December 31, 2020, in the amount of $ 18,561.61, payable from the net proceeds from the dissolution of the Co-op and immediately before the first distribution to members of the settlement class. Non-taxable costs incurred by the McBrayer firm after January 8, 2021, may also be reimbursable from the net proceeds, subject to periodic review and approval by this Court.

5. From the net proceeds from the dissolution of the Co-op (as defined in ordering paragraph 3 above), Billings Law Firm, PLLC is awarded an attorney's fee using the lodestar method and a multiplier of one (1.0), in an amount equal to its attorneys' time spent in this matter through December 31, 2020, at the represented hourly rates, totaling $ 538,890.50, subject to a cap of 7.5% of the net proceeds. It is also awarded its nontaxable costs in the requested amount of $ 24,010.39. This award of fees and costs is payable to the Billings firm once the Co-op has liquidated its assets, paid its debts, and contributed the funds to the non-profit organization, thus establishing the net assets and the percentage of the lodestar award to these assets to guarantee it is less than 7.5%.

So found, ordered, and adjudged this 11th day of June, 2021.

Julie Muth Goodman

Hon. Julie Muth Goodman
Judge Fayette Circuit Court

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this filing was served this 11 day of JUN 2021 June, 2021, upon the following:

Robert E. Maclin, III.
Katherine K. Yunker
Jason R. Hollon
McBRAYER PLLC
201 E. Main Street, Suite 900
Lexington, Kentucky 40507-1361
Counsel for Named Plaintiffs and Settlement Class Representatives

Kevin G. Henry
Charles D. Cole
STURGILL, TURNER, BARKER & MALONEY PLLC
333 West Vine Street, Suite 1500
Lexington, Kentucky 40507
Counsel for Defendant Burley Tobacco Growers Cooperative Association

Jeremy S. Rogers
DINSMORE & SHOHL LLP
101 South Fifth Street, Suite 2500
Louisville, Kentucky 40202
Counsel for Defendant Burley Tobacco Growers Cooperative Association

John N. Billings
Christopher L. Thacker
Richard J. Dieffenbach
BILLINGS LAW FIRM, PLLC
145 Constitution Street
Lexington, Kentucky 40507
Counsel for Defendant Greg Craddock

W. Henry Graddy, IV
Dorothy T. Rush
W.H. GRADDY & ASSOCIATES
137 N. Main Street
Versailles, Kentucky 40383
Counsel for Objectors Roger Quarles et al.

David Tachau
TACHAU MEEK PLC
PNC Tower Ste. 3600
101 S. Fifth Street
Louisville, KY 40202-3120
Counsel for Billings Law Firm, PLLC

J.B. Amburgey
David Barnes
Jacob Barnes
Robert E. Barton
Ben Clifford
Lincoln Clifford
Wayne Cropper
Josh Curtis
Clay Darnell
George M. Darnell
Jennifer Darnell

Billy G. Hall
Dudley Wayne Hatcher
Steve Lang
Berkley Mark
Ben Quarles
Bruce Quarles
Steven Quarles
Travis Quarles
Jerry Rankin
Richard Sparks
Jarrod Stephens

Brent Dunaway
Michael Furnish
William David Furnish
Leonard Edwin Gilkison
Addison Thomson
William A. Thomson
Danny Townsend
Judy Townsend

Objectors (at the mailing addresses given in their respective objections)

Vincent Riggs
FAYETTE CIRCUIT CLERK
Clerk, Fayette Circuit Court