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COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
FOURTH DIVISION
CIVIL ACTION NO. 20-CI-00332

HAYNES PROPERTIES, LLC, et al. PLAINTIFFS

v. **RENEWED GRADDY MOTION FOR AWARD OF ATTORNEY'S FEES AND NOTICE**

BURLEY TOBACCO GROWERS COOPERATIVE ASSOC., et al. DEFENDANTS

* * * * * * *

The law firm of W.H. Graddy & Associates, W. Henry (Hank) Graddy, IV and Dorothy Rush, (collectively "Graddy") as counsel for the Objectors, Roger Quarles, W. Gary Wilson, Ian Horn, Richard Horn, Campbell Graddy and David Lloyd and others, now **MOVES** the Court pursuant to CR 23.08 and KRS 412.070, for an award of attorneys' fees in an amount not to exceed 7.5% of that sum of money in the amount of $1.5 million [less $175,000.00 per agreement and court order] that belongs to the Class Members, but that was removed from the sums to be distributed to Class Members as part of a mediated settlement between the parties (excluding these Objectors) and awarded to a new tobacco Non-profit, where Graddy and Roger Quarles filed timely written objection to such removal, were heard at the Fairness Hearing commencing on February 24, 2021, and where the Court has ordered approval of the partial settlement agreement provided that there were restrictions on the $1.5 million, initially awarding the net of the $1.5 million to the Class Members if the new tobacco Non-profit was self-sustaining after two years or ordering a vote of all qualified Class Members to either distribute the net of the $1.5 million to the Class Members or award it to the new tobacco Non-profit, based upon a majority vote of Class Members. The Court heard motions to amend and modified the restrictions.

The amended conditions include the consent of these Objectors to the deduction of $100,000 from the $1.5 million in the first year and $75,000 from the $1.5 million in the second year for the new tobacco Nonprofit. The restrictions include an order that all Class Members who have qualified for distribution of net Coop assets (filed W-9 etc.) shall be given a ballot to either receive their net respective share of the $1.325 million or give their net respective share of the $1.325 million to the new tobacco Nonprofit. The new tobacco Nonprofit was formed prior to the Fairness Hearing and is named the Burley and Dark Tobacco Producer Association, Inc., ("BDTPA").

Based upon the foregoing, the actions of Attorney Graddy and the Objector, Roger Quarles and other similar objectors have helped the Court to create a new "Common Fund" in the amount of $1.325 million to be awarded to the Class Members which each Class Member can elect to receive the share or can elect to give that share to the new tobacco Nonprofit.

> **Civil Rule 23.08. Attorney's fees and nontaxable costs**.
> In a certified class action the court shall approve or award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:
> (1) A claim for an award must be made by motion to be heard at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.
> (2) A class member, or a party from whom payment is sought, may object to the motion.
> (3) The court may hold a hearing and must find the facts and state its legal conclusions under CR 52.01.
> (4) The court may refer issues related to the amount of the award to a Commissioner, as provided in CR 53.

> **KRS 412.070 Compensation of party pressing claims in common interest for others -- Notice to interested persons.**
> (1) In actions for the settlement of estates, or for the recovery of money or property held in joint tenancy, coparcenary, or as tenants in common, or for the recovery of money or property which has been illegally or improperly collected, withheld or converted, if one (1) or more of the legatees, devisees, distributees or parties in interest has prosecuted for the benefit of others interested with him, and has been to trouble and expense in that connection, the court shall allow him his necessary expenses, and his attorney reasonable compensation for his services, in addition to

> the costs. This allowance shall be paid out of the funds recovered before distribution. The persons interested shall be given notice of the application for the allowance, provided, however, that if the court before whom the action is pending should determine that it is impracticable and too expensive to notify all of the parties individually, then by order of said court, personal notice may be dispensed with and in lieu thereof, notice of the application shall be given by an advertisement pursuant to KRS Chapter 424.

Based upon the requirements of CR 23.08 and KRS 412.070, the Court is requested to grant this Motion and find that Graddy is entitled to an award of reasonable legal fees for such legal effort to help create such fund and to hold a fairness hearing to hear from Class Members to determine the amount of such reasonable legal fees.

WHEREFORE, Graddy **MOVES** the Court to award attorneys' fees in an amount not to exceed 7.5% of the $1.325 million that has been restored to create a new "Common Fund" under the CONTROL of Class Members, to be distributed by the vote of the Class Members, including those Class Member who elect to give a portion of their distributive share to the new tobacco Nonprofit and those who do not.

FURTHER, Graddy **MOVES** the Court to schedule a Fairness Hearing with notice to all Class Members to permit comment on the Graddy petition for a fee award.

BACKGROUND

Graddy has previously filed a motion for an award of attorneys' fees which was heard on August 20, 2021, and denied, without words of finality. Therefore, this is a renewed motion.

On August 21, 2021, the Court entered a written order denying the earlier Graddy application for a fee award. The Court reasoned that "…there has been no change to the common fund available to the class members, though the distribution of certain assets has changed." The Court further reasoned that the Amended Opinion and Order of July 26, 2021, "treated the gross sum of $1.5 million as a pre-dissolution grant by the Board of Directors of BTGCA to the newly-

formed Burley and Dark Tobacco Producers Association…" that was not to be reduced by any claims for attorneys fees except to compensate Class Counsel for the time to oversee to postcard opt-out program. The Court continued "[a]t the core, what the Court did in response to the many objectors was to change the method and manner of distribution of the $1.5 million, without any guarantee it would be given to the class members." The Court described the amount potentially granted to the class is speculative, noting the possibility that all or most class members may choose to donate their share to the BDTPC. The Court held that Graddy did not create a common fund or increase the assets in the common fund. The Court further held that, "…it has not been shown that this [Graddy's] advocacy alone was the cause of the change in how the $1.5 million will be distributed."

The Court is requested to reconsider the August 20, 21, 2021 analysis. In that order, the Court noted that, "Therefore, while he [Graddy] was certainly an effective attorney for the sake of his clients, his role was largely tied to the desires of his clients – even if those desires were beneficial to the class." The Court is urged to reconsider that portion of the analysis that holds Graddy to the burden to prove that his legal effort "alone" created the benefit to the Class Members. Graddy asks the Court to apply CR 23.08 and KRS 412.070 to find that Graddy is entitled to an award of attorneys' fees if his efforts helped the advocacy of the other objectors and if it helped the Court arrive at a fair and reasonable method to restore Class Member CONTROL over each member's share of the $1,325,000 net grant to the BDFTPA. The Court is requested to find that Graddy's legal efforts helped the Court create a second "Common Fund" in the amount of $1.325 million that is now within the control of each Class Member

As set out in the Graddy 8/10/2021 Affidavit, attached, when Mr. Quarles was being introduced to the undersigned, he made his position clear:

> "On July 16, 2020, Mr. Chappell forwarded to me the email he had received from Mr. Quarles on July 4, 2020, which described Mr. Quarles' position as follows: *"My position is directors have no authority to gift assets. There was no debate that all assets belong to members/shareholders in the totality. So even though this $1.5 million is about 5% can it be proper to gift it to anyone – whether it be a church or another group or Disneyland? It should be a choice of the owner of the money."*

Giving each Class Member a choice to support the new tobacco Nonprofit or not was the legal objective the undersigned was retained to seek. The July 26, 2021, Amended Opinion and Order accomplished that objective.

Such assistance included the undersigned's Notice of Filing on February 23, 2021, which added thirty (30) additional names to the Objectors who were protesting the $1.5 million gift to the new tobacco Nonprofit. See Attached.

At the time Graddy entered this action on behalf of the Objector, Roger Quarles, on January 27, 2021, the Court had under consideration a proposed Settlement Agreement for the purpose of liquidating the Defendant, BURLEY TOBACCO GROWERS COOPERATIVE ASSOCIATION ("Cooperative" or "BTGCA") and distributing the net assets of the Cooperative to the qualified members of the Cooperative as settlement of a class action litigation brought by the above Plaintiffs. However, the proposed settlement agreement set aside the sum of $1.5 million of the Cooperative assets to be given to a new tobacco Nonprofit plus any distribution that remained unclaimed by class members after ninety days after final distribution, which would also be "gifted" to a new tobacco Nonprofit. Quarles retained Graddy in 2020 with a small retainer and a contingent fee agreement that Graddy would be compensated if he was successful in restoring all or part of the $1.5 million to the Class Members or if he was successful in giving all Class Members the opportunity to vote on receiving their share of the net $1.5 million or giving their share to the new tobacco nonprofit, provided that Graddy's contingent fee percentage would not exceed 25%

of those sums that the Class Members would control – either receiving or giving to a new tobacco Nonprofit.

The 8/10/2021 affidavit of W. Henry (Hank) Graddy, IV affirms that Hank Graddy was requested by another attorney, Hon. Allan Chappell to look at this matter for Roger Quarles following a July 4, 2020, email from Mr. Quarles to Mr. Chappell, forwarded on the Mr. Graddy on July 16, 2020. Graddy worked diligently for Mr. Quarles from that period forward, allocating substantial time to review all pleadings, research, consult and advise Mr. Quarles what his legal options appeared to be. See Graddy 8/10/2021 affidavit. See Chappell affidavit. Graddy followed these proceedings through the entry of orders setting deadlines to file objections and a date for a Fairness Hearing.

Graddy entered this action by correspondence on January 27, 2021, and by pleading a written Reply on February 23, 2021, before the commencement of the Fairness Hearing. Graddy advocated for Mr. Quarles and the other associated Objectors that the $1.5 million belonged to class members, that the "gift" to a new tobacco Nonprofit was illegal, constituted waste, and would treat class members differently and unfairly where some class members no longer raised tobacco. Graddy participated in the Fairness Hearing that commenced on February 24, 2021, continued on to March 1, 2021, and concluded on March 8, 2021. See Rush affidavit.

On February 22, 2021, two days prior to the commencement of the Fairness Hearing, Articles of Incorporation were filed for the Burley and Dark Tobacco Producer Association, Inc. The Articles indicated that the half of Board would be comprised of COOP Board members who had failed the COOP and Class Members. These Articles and a proposed business plan were filed with the Court on March 24, 2021. Graddy challenged this Board makeup where it appeared that the COOP was essentially gifting $1.5 million to itself under a different name. Graddy's work on

this case from July 16, 2020, assisted this Court make decisions concerning the $1.5 million ultimately resulting in the earlier 6/11/2021 Opinion and Order Approving Partial Settlement where the Court imposed certain restrictions on the $1.5 million and the subsequent 7/26/2021 Amended Opinion and Order Approving Partial Settlement, where the Court addresses the $1.5 million starting on page 15, at paragraph 22, noting the opposition of these Objectors and the Court's own concerns at paragraph 29, and sets forth the terms and conditions to allow all qualified Class Members to vote on the disposition of their respective net share of the $1.5 million through paragraph 36.

All Class Members will see a benefit from the actions of Graddy in that they each will control his or her share of the net $1.5 million, less agreed upon compromise awards to BDTPA of $175,000.00. In all cases, control is with the Class Members – not the BGTCA or the selected members of the Board of the BGTCA.

Class Counsel has reported that "[i]n all, 2,602 Class members have been issued distributions in a total amount of up to $9,600.00 each." Settlement Class Counsel's Status Report filed February 16, 2023. Based upon this information, it appears that each Class Member will have control over an amount that will not exceed $509 (Five hundred nine dollars), as described in the proposed Notice to Class Members prepared by Class Counsel. The requested attorneys' fee of 7.5% of $1,325,000 would equal $99,375.00 (Ninety-nine thousand, three hundred seventy five dollars) total and would equal $38.19 (thirty eight dollars, nineteen cents) per class member.

Additionally, Quarles and Graddy assisted in the revision of the postcards to be sent to class members regarding their election with regard to the $1.325 million to reflect the vocabulary of "farmers" in order ensure that class members understood the decision being made.

ARGUMENT

AWARD OF ATTORNEYS' FEES TO GRADDY NOT TO EXCEED 7.5% OF $1.325 MILLION RESTORED TO THE CONTROL OF ALL QUALIFIED CLASS MEMBERS IS REASONABLE

I. OBJECTORS HELPED ADD CLASS MEMBER CONTROL OF $1.325 MILLION TO CREATE A SECOND "COMMON FUND."

CR 23.08 governs the award of attorney's fees in a class action providing that, "[i]n a certified class action the court shall approve or award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." CR 23.08. This rule was introduced into the Kentucky Civil Rules of Procedure in 2010, to be effective in 2011 and, to date, only one unpublished opinion has discussed the requirements in any length. In *College Retirement Equities Fund, Corp. v. Rink*, No. 2012-CA-002050-MR, 2015 WL 226112 (Ky. App. Jan. 16, 2015), the Kentucky Court of Appeals examined an award of attorney's fees pursuant to CR 23.08. The *Rink* Court noted that "no Kentucky appellate court has addressed how a trial court is to determine a reasonable fee under CR 23.08" and it relied upon the federal courts' interpretation of the analogous Fed. R. Civ. P. 23(h). An award of a reasonable attorney's fees in this case is authorized by Kentucky law relating to common-fund recoveries. The common fund doctrine recognizes that a "lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980).

This doctrine has been codified in KRS 412.070(1) which, in part, provides:

> (1) In actions for the settlement of estates, or for the recovery of money or property held in joint tenancy, coparcenary, or as tenants in common, or for the recovery of money or property which has been illegally or improperly collected, withheld or converted, if one (1) or more of the legatees, devisees, distributees or parties in interest has prosecuted for the benefit of others interested with him, and has been to trouble and expense in that connection, the court shall allow him his necessary expenses, and his attorney reasonable compensation for his services, in addition to

> the costs. This allowance shall be paid out of the funds recovered before distribution.

Id. "[A]n attorney who creates a common fund is entitled to enforce his contract against those with whom he contracted, and still collect a reasonable fee … from those with whom he did not contract, but realized a benefit from his efforts." *Kincaid v. Johnson, True & Guarnieri, LLP*, 538 S.W.3d 901, 919-20 (Ky. App. 2017).

The second issue is whether Graddy may be awarded fees and costs and expenses, even though he is not class counsel. The law requires an award of fees because Graddy has helped produce a beneficial result for, and substantially benefitted, the settlement class. CR 23.08 is not limited to fee petitions by class counsel and expressly contemplates motions being filed by (and awards to) non-class counsel:

> In a certified action **the court shall** approve or award reasonable attorney's fees and nontaxable costs that are **authorized by law** or by the parties' agreement. The following procedures apply. . . A claim for an award must be made by motion to be heard at a time the court sets. **Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner**.

(emphasis added). CR 23.08 was adopted in 2010 and was intended to be consistent with Fed. R. Civ. Pro. 23(h)[1], which includes substantially similar language.[2] The drafters of the federal rule stressed that it applies to non-class counsel:

> Fee awards are a powerful influence on the way attorneys initiate, develop and conclude class actions. . . Against that background, **it provides a format for all awards** of attorneys fees and nontaxable costs in connection with a class action,

[1] Report of the Ky. Sup.Ct. Mass Tort & Class Action Litig. Comm., March 2010 ("Kentucky Civil Rule 23 should be revised to be consistent with Federal Civil Rule 23. . . [B]y following the format and substance of FRCP 23, the proposed Kentucky Rules and our Courts will have the benefit of the body of federal cases interpreting a comparable Rule 23. . . [B]y following the format and substance of FRCP 23, the proposed Kentucky Rules and our courts will have the benefit of the body of federal cases interpreting a comparable Rule 23.")

[2] Notable, there is one substantive difference between the rules. CR 23.08 states that the court "shall approve or award" attorney's fees, while FRCP 23(h) states that the court "may award." Courts have held that "unless context otherwise requires, 'shall' is mandatory." *Dep't of Revenue v. Oldham Cty.,* 415 S.W.2d 386, 390 (Ky. 1967). No Kentucky case has addressed the difference between the rules, although the drafters of Kentucky's rule expressly stated that "Rule 23.08 requires judicial approval of reasonable attorney's fees and costs." *See College Retirement*, 2015 WL 226112 at 3 (holding that "Under CR 23.08, the trial court in a certified class action is to approve or award reasonable attorney fees and nontaxable costs that are authorized by law or by the parties' agreement.").

> **not only the award to class counsel**. In some situations, there may be a basis for making an award to other counsel **whose work produced a beneficial result for the class,** such as attorneys who acted for the class before certification but were not appointed class counsel, **or attorneys who represented objectors to a proposed settlement under Rule 23(e)** or to the fee motion of class counsel. . .

Fed. R. Civ. P. 23, Advisory Notes, 2003 Amend., Subdivision (h)(emphasis added).

The Amended Opinion and Order Approving Partial Settlement provides for a fund of approximately $1.325 million which will be returned to Class Members at the end of two years unless individual Class Members decide to gift their portion of that fund to the new Nonprofit.

The $1.5 million, now reduced to the $1.325 million, has not been included in the "net proceeds" used by other counsel in their earlier motions for an attorneys' fee award. See McBrayer, January 15, 2021, petition for fee award, defining "net proceeds" at footnote 2 as excluding the "contributed $1.5 million to funding a nonprofit." This exclusion is also discussed at page 4 before defining the "Common Fund" and at Page7 and page 8. This exclusion is also discussed in the Billings January 15, 2021, motion for attorneys' fee award, where Billings includes the history that the Cooperative Board initially sought $3.5 million to "keep going" with a new tobacco nonprofit but that through mediation this number was reduced to $1.5 million, so that Billings helped add the $2 million difference to the Common Fund. See pages 12, 24 -27.

II. THIS COURT SHOULD USE PERCENTAGE TO AWARD GRADDY AN ATTORNEYS' FEE.

As expressed in the plain language of both KRS 412.070 and CR 23.08, the core evaluation for an award of attorney's fees is reasonableness. It is vital that the awarded attorney's fee fairly compensate the attorneys for the amount of work done as well as the results achieved. *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993). To determine the reasonableness of a fee award, courts generally employ one of two methods – the percentage of the fund method or the lodestar method – or a combination of the two. Under the percentage fund

method, a court must determine a percentage of the settlement to be awarded to counsel focusing on the benefit to the class and under the lodestar method a court awards a fee in relation to the hours reasonable expended by an attorney on the matter a reasonable rate of compensation. *Gascho v. Global Fitness Holdings, LLC*, 822 F.3d 269, 279 (6th Cir. 2016).

In Kentucky, a percentage of the common fund is an appropriate request and courts have concluded that 25% of the common fund was reasonable. *See Webster County Soil Conservation Dist. v. Shelton*, 437 S.W.2d 934 (Ky. 1969) (25% fee in a common fund case); *Rink*, 2015 WL 226112, at *6 (concluding that the utilization of the percentage of the fund to calculate an award of 25% attorney's fees from a common fund was not an abuse of discretion); *Kincaid v. Johnson, True & Guarnieri, LLP*, 538 S.W.3d 901, 922 (Ky. App. 2017) (rejecting an argument that requesting a fee as a percentage of a common fund is an inappropriate request).

An award based on the percentage of the fund also reflects the particular circumstances of this case and the common fund created. Graddy commenced work when the parties moved for approval of the Partial Settlement in July 2020, and appeared in this matter during the period Class Members were afforded to make objections, on January 27 and January 29, 2021, on behalf of Objecting class members ("Objectors"), Roger Quarles, W. Gary Wilson, Ian Horn, Richard Horn, Campbell Graddy and David Lloyd who objected to the $1.5 million "gift" to the new nonprofit.

No other attorney in this action took the position that the "gift" was contrary to law, unfair to class members and that the funds belong to the class members. Graddy was the only attorney to challenge BGTCA's repeated arguments that BGTCA be allowed to retain the money to gift both before and after the fairness hearing. Graddy's advocacy helped the Court reach the initial conclusion set forth in the initial June 11, 2021 Order Approving, and after further motion practice, helped the Court reach the terms and conclusions in the July 26, 2021,

Amended Opinion and Order which created a second "Common Fund" of $1.325 million, control of which was given to the Class Members.

The percentage of the fund award accurately reflects the results Graddy was able to achieve in the settlement. A percentage of the fund award recognizes and rewards counsel that have obtained a significant result for the class. It serves to align the interests of both counsel and the class members as each will benefit from every dollar obtained for the fund. This provided Class Members with $1.325 million in assets to be distributed that was not previously available to Class Members. It further prevents moneys properly belonging to Class Members from being distributed to a new Nonprofit without any proven efficacy – unless that Class Member elects to make such contribution. It eliminates the risk that one person has the right to waste another person's money. This is a significant benefit for the members of the class and warrants a percentage of the fund in recognition.

Based upon Kentucky authority, the circumstances of this case, and in recognition of the result obtained and the efficiency by which it was obtained, this Court should award Graddy a percentage of the fund of $1.325 million as a reasonable attorney's fee.

III. GRADDY'S REQUEST FOR AN AWARD NOT TO EXCEED 7.5% IS REASONABLE.

a. Awards in similar cases.

The requested 7.5% award is significantly less than awards in common fund cases in various other courts. However, it is reasonable in this case in light of this Court's order of June 11, 2021, awarding service fees, attorneys fees and costs.

The *Rink* Court noted that "[f]ederal Courts within Kentucky and the Sixth Circuit universally recognize that the percentages awarded in common fund cases typically range from 20 to 50 percent of the common fund awarded." *Rink*, 2015 WL 226112 at 6(internal quotations

omitted). In *Rink*, an award that constituted 25% of the common fund was held to be reasonable. *Id.* This is consistent with decisions of other courts. *See Fournier v. PFS Invs., Inc.*, 997 F.Supp. 828, 832 (E.D. Mich. 1998) ("The 'benchmark' percentage for this standard has been 25% [of the common fund], with the ordinary range for attorney's fees between 20–30%"); *Spine and Sports Chiropractic, Inc. v. ZirMed, Inc.*, Civil Action No. 3:13-CV-00489, 2015 WL 197698, *3 (W.D. Ky. May 4, 2015) (noting that 25% is the benchmark, but approving fee of 33% of common fund); *Peck v. Air Evac EMS, Inc.*, Civil Action No. 5:18-615-DCR, 2020 WL 354307, *7 (E.D. Ky. Jan. 21, 2020) (concluding that award "which is approximately 25% of the total settlement fund" is reasonable); *see also Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 273 (9th Cir. 1989) ("25 percent has been a proper benchmark figure" for class actions); *City of Pontiac General Employees' Retirement System v. Lockheed Martin Corp.*, 954 F.Supp.2d 276 (S.D.N.Y. 2013) (noting that 25% is an increasingly used benchmark).

However, these cases were previously cited to this Court in support of the January 15, 2021, McBrayer petition for award of attorneys' fees where McBrayer sought an award of up to 25% of the Common Fund. Some of these cases were also cited in the prior August 10, 2021 Graddy petition for award of attorney's fees where Graddy also sought an award of up to 25% of the second "Common Fund."

Where this Court has considered the McBrayer petition and denied the requested 25%, and where this Court has awarded the McBrayer firm 7.5% of the first "Common Fund" in this matter, Graddy asks the Court to apply a similar analysis and award 7.5% of the second "Common Fund" in the amount of $1.325 million.

b. Time and labor involved.

Graddy has worked on this matter since July, 2020, over a thirty two (32) month period, including filing objections in January 2021, and attending the Fairness Hearings and motion practice since February, 2021, through motion practice on February 24, 2023, seeking to make the election notice and postcard to the Class Members more "farmer speak" and less "lawyer speak." The work was significant and required a large investment of Graddy's time and labor to achieve the result. Through its efforts on behalf of the Objectors, Graddy helped the Court create a second "Common Fund" of $1.325 million for the Class Members that was previously unavailable prior to the Court's June 11, 2021, and July 26, 2021, orders approving.

c. Novelty and difficulty.

Graddy began participating in this action July, 2020, when the Hon. Allan Chappell requested that Graddy look at this matter for the purpose of advising Roger Quarles about his legal rights. Mr. Chappell informed the undersigned that he had provided Mr. Quarles with legal assistance from time to time over the years and that he highly recommended Mr. Quarles as a client. However, Mr. Chappell indicated that this action appeared to involve a Class Action and that he – Mr. Chappell – did not feel well-qualified to advise Mr. Quarles about his legal rights in this matter. Mr. Chappell informed the undersigned that Mr. Quarles was a member of the Board of Directors of the Burley Tobacco Growers Cooperative Association ("Cooperative") but that he was in a minority position. Mr. Chappell was aware that the undersigned has been involved in Class Action litigation, including seeking Class Action certification in Federal Court. The undersigned agreed to look into this matter and to discuss my conclusions with Mr. Quarles. On July 16, 2020, Mr. Chappell forwarded to the undersigned the email he had received from Mr. Quarles on July 4, 2020, which described Mr. Quarles' position as follows: *"My position is directors have no authority to gift assets. There was no debate that all assets belong to*

members/shareholders in the totality. So even though this $1.5 million is about 5% can it be proper to gift it to anyone – whether it be a church or another group or Disneyland? It should be a choice of the owner of the money."

The undersigned's investigation included reviewing court pleadings found on Courtnet, including the Complaint, the initiation of extensive discovery that appeared to be cancelled when the parties to the litigation began mediation and through the Motion to approve Partial Settlement, with the Partial Settlement attached. The undersigned located the problem sections without much difficulty, at Partial Settlement page 10, paragraph xiv and on page 12, paragraph K, discussing the "Residual Funds." Graddy held extensive discussion with Mr. Quarles. Graddy followed the proceedings on Courtnet, including the short-lived Metcalf Circuit Court proceeding. Graddy was aware of the Court orders concerning Definition of the Class, Selection of Class Counsel, Notice to Class Members, the time period and deadline to file Objections, and the date of the Fairness Hearing.

d. Attorneys' experience and ability.

Graddy was retained in this matter by Roger Quarles because Quarles other attorney, Hon. Allan Blaine Chappell, felt unqualified to represent him in this matter. Chappell Affidavit. Graddy 8/10/2021 Affidavit. Chappell was aware of Graddy's experience with complex litigation and class actions.

In 2008, Graddy began work on a case involving hog barns in Western Kentucky that were releasing noxious odors into the community and leaching ammonia and sulfates into the ground water. That action was filed in Benton Circuit Court and was removed to Federal District Court for the Western District of Kentucky. Graddy moved the Court to certify the action as a class action which was granted. The class was, in turn, decertified and recertified. Then, after motions for

summary judgment, the only count remaining was one for permanent nuisance the Court again decertified. The Court reasoned that because permanent nuisance required proof of individualized damages, class certification was not appropriate.

In 2014, Graddy was retained by citizens of Russell Springs, Kentucky regarding an animal rendering facility that had begun operations prior finalizing construction of the facility, i.e. odor management, installing perimeter fencing and carcass storing facilities. The complaint in that action requested that it be certified as a class action but Graddy was able to obtain an injunction preventing operation of the facility.

e. Loss of other employment to take contingent fee case.

Graddy agreed to accept this employment with a small retainer but with the attorneys' compensation to be primarily contingent on a recovery of Class Member control of all or a portion of the $1.5 million. That contingency included both the recovery of funds to a Class Members or the award of control over those funds to each Class Member. Each hour of time and attention spent on this matter from July 2020 to date is time and attention that cannot be used for other hourly rate clients. As a consequence of taking this case on a contingent fee basis, Graddy lost other employment and compensation for that other employment.

f. Results obtained.

As discussed above, Graddy was able to help the Court reduce the "gift" to the new Nonprofit from $1.5 million to $175,000.00, creating an additional "Common Fund" of $1.325 million that Class Members will now control by voting to receive their net share or donate it to the new Nonprofit, BDTPA. **Graddy was the only attorney advocating for this position and faced the opposition – or silence – from every other attorney. Graddy's persistent challenge to the legality of this "gift" appears to have helped the Court first adopt certain restrictions on the**

award, and, following motion practice and some willingness to compromise, ultimately enter the amended order approving on July 26, 2021. Graddy helped create a significant benefit to the Class Members and did so starting with the January 27, 2021 letter of objection. This efficiency also justifies the award.

Graddy's request for a 7.5% award is reasonable. It is consistent with other cases, reflects Graddy's personnel's time and labor and rewards the risk taken in pursuing this matter. The class members, through Graddy's efforts, have significantly benefitted and will continue to benefit from Graddy's efforts in the future.

In addition, Graddy has provided additional financial benefit to as Class members as follows: On May 7, 2021, Graddy filed the affidavit of Roger Quarles with the following: *"In addition, I want to use this opportunity to address Coop asset that has not been discussed during the Fairness Hearing process. The Coop has accumulated a $7 million dollar Net Operating Loss. This Net Operating Loss is valuable to the Coop Members to help offset tax impacts from the Coop distribution. I urge the Court to monitor the Dissolution Committee to insure that this valuable asset is distributed to the Coop Members."*

On May 14, 2021, these Objectors filed a Supplemental Objection that asked the Court to consider the above request within the May 7, 2021 affidavit of Roger Quarles as follows: "Finally, Objectors will ask the Court to insure that the Dissolution Committee will distribute to all Class Members their per capita portion of the over $7 million Net Operating Loss described in the attached affidavit of Roger Quarles."

The June 11, 2021 Opinion and Order Approving made an express reference to this issues on page 21 under ORDER, paragraph 3. The Amended Opinion and Order of July 28, 2021 includes the same language at page 24, under ORDER, paragraph 3.

Where Roger Quarles was sufficiently concerned that this financial benefit to all Class Members was not under discussion by other parties at least within the information available to him as a Board member, his role in raising the issue and the action of Graddy helped get this asset clearly on the table for the benefit of all Class Members. Objectors ask the Court to include consideration of this added financial benefit in the consideration of the Graddy Motion for a Fee Award.

CONCLUSION

Based upon the foregoing, Graddy respectfully requests an award of attorney's fees in an amount not to exceed 7.5% (seven point five percent) of the $1.325 million addition to the Common Fund created by recovery from the previous $1.5 million that certain members of the BGTCA Board sought to control. Where Graddy has helped the Court provide a benefit of not more than $509.00 (Five hundred nine dollars) per every qualified Class Member by restoring to each Class Member the control over his/her net share of the $1.325 million, and helped insure that each Class Member will receive his/her share of the financial benefit from distribution of the $7 million Net Operating Loss of the BTGCA, Graddy respectfully asks the Court to determine the fair percentage attorney fee recovery, not to exceed 7.5% (seven point five percent) of $1.325 million.

NOTICE

The parties will take notice that the foregoing Motion for a Fee Award will come on for hearing on March 24, 2023, before the Fayette Circuit Court, Fayette Circuit Courthouse at 10:00 am EDT, or as soon after that time as counsel can be heard.

Respectfully submitted,

/s/ W. Henry Graddy, IV
W. Henry Graddy, IV (KBA # 26350)

Dorothy T. Rush (KBA # 95721)
W. H. Graddy & Associates
137 N. Main Street
Versailles, KY 40383
(859) 879-0020 - Office
(859) 229-4033 – Cell Phone
(855) 398 4562 - Facsimile
hgraddy@graddylaw.com

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate of the foregoing was served via E-Mail, on this the 17th day of March, 2023 on the following:

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Hon. Charles D. Cole
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Hon. Robert E. Maclin, III
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Hon. Jason R. Hollon
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ENGLISH, LUCAS, PRIEST & OWSLEY, LLP
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Bowling Green, KY 42102-0770
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/s/ W. Henry Graddy, IV
W. Henry Graddy, IV

ELECTRONICALLY FILED

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
FOURTH DIVISION
CIVIL ACTION NO. 20-CI-00332

HAYNES PROPERTIES, LLC, et al. PLAINTIFFS

v. **NOTICE OF FILING**

BURLEY TOBACCO GROWERS COOPERATIVE ASSOC., et al. DEFENDANTS

* * * * * * *

Come now W. Henry Graddy, IV and Dorothy T. Rush, for and on behalf of Objecting Class Members ROGER QUARLES, W. GARY WILSON, IAN HORN, RICHARD HORN, CAMPBELL GRADDY and DAVID LLYOD and hereby give NOTICE OF FILING OF ADDITIONAL OBJECTORS to the award of $1.5 Million to a new or existing Tobacco Liaison/Advocacy Nonprofit who have expressed support for the Objection of Roger Quarles directly to Roger Quarles.

Respectfully submitted,

/s/ W. Henry Graddy, IV
W. Henry Graddy, IV
Dorothy T. Rush
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate of the foregoing was served via E-Mail, on this the 23rd day of February, 2021 on the following:

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Hon. Richard J. Dieffenbach
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Louisville, KY 40202
Jeremy.rogers@dinsmore.com

/s/ W. Henry Graddy, IV
W. Henry Graddy, IV

ADDITIONAL OBJECTORS:

1. John Farris Lackey, 214 West MainStreet, Richmond, KY 40475
2. Rick Lawson 3547 Doylesville Road, Richmond KY 40475
3. Donna Lawson, 3547 Doylesville Road, Richmond KY 40475
4. Phillip Ecton, 591 E. Headquarters Road, Carlisle KY
5. Robert Barton is already on the list of objectors wishes to add Opposition to the $1.5.
6. Eddie Gilkison is already on the list of objectors, wishes to add Opposition to $1.5.
7. Mike Furnish is on the list of objectors, wishes to add Opposition to $1.5.
8. James and Mary Sexton, Edmonton, KY
9. Billy Harmon, Columbia, KY
10. Dan Furnish, Cynthiana, KY
11. Roy Livingood, Carlisle, KY
12. Marion Livingood, Carlisle, KY
13. Robert Livingood, Carlisle, KY
14. David Livingood, Carlisle, KY
15. Donald Livingood, Carlisle, KY
16. Mary Heighton, 5280 White Oak Road, Junction City, KY 40440
17. Durand Hensley, Calmen, KY
18. Harry Sparks, Winchester, KY
19. Steve Kinkade, 114 Thomason, Ave., Leitchfield, KY 42754
20. Roman Barrett, Glasgow, KY
21. Carey Barrett, Glasgow, KY
22. Robert Barrett, Glasgow, KY
23. Kenneth Sartin, - Past Co-op Director
24. Vic King, Maysville, KY
25. Ashley King, Maysville, KY
26. Andrew King, Maysville, KY
27. Phillip Coyle, Maysville, KY
28. Phillip Coyle, II, Maysville, KY
29. Richard Mattingly, 540 Haydon Lane, Springfield, KY
30. Janet Mattingly, 540 Haydon Lane Springfield, KY

ELECTRONICALLY FILED

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
FOURTH DIVISION
CIVIL ACTION NO. 20-CI-00332

HAYNES PROPERTIES, LLC, et al. PLAINTIFFS

v. **AFFIDAVIT OF W. HENRY (HANK) GRADDY, IV**

BURLEY TOBACCO GROWERS COOPERATIVE ASSOC., et al. DEFENDANTS

* * * * * *

Comes the affiant, after first having been duly sworn, and states as follows:

1. My name is W. Henry (Hank) Graddy, IV. I am the owner of the law firm, W.H. Graddy & Associates located at 137 North Main Street, Versailles, Kentucky, 40383. and as such I have personal knowledge as to this action and as to the matters about which I state herein. I have been admitted to the Kentucky Bar Association and have practiced law in Woodford County, Kentucky (in Versailles and in Midway) since 1975. My KBA # is 26350.
2. I hereby offer this Affidavit in support of W.H. Graddy & Associates' ("Graddy") Motion for Award of Attorneys' fees.
3. I began participating in this action July, 2020, when the Hon. Allan Chappell requested that I look at this matter for the purpose of advising Roger Quarles about his legal rights. Mr. Chappell informed me that he had provided Mr. Quarles with legal assistance from time to time over the years and that he highly recommended Mr. Quarles as a client. However, Mr. Chappell indicated that this action appeared to involve a Class Action and that he – Mr. Chappell – did not feel well-qualified to advise Mr. Quarles about his legal rights in this matter. Mr. Chappell informed me that Mr.

Quarles was a member of the Board of Directors of the Burley Tobacco Growers Cooperative Association ("Cooperative") but that he was in a minority position. Mr. Chappell was aware that I have been involved in Class Action litigation, including seeking Class Action certification in Federal Court. I agreed to look into this matter and to discuss my conclusions with Mr. Quarles. On July 16, 2020, Mr. Chappell forwarded to me the email he had received from Mr. Quarles on July 4, 2020, which described Mr. Quarles' position as follows: *"My position is directors have no authority to gift assets. There was no debate that all assets belong to members/shareholders in the totality. So even though this $1.5 million is about 5% can it be proper to gift it to anyone – whether it be a church or another group or Disneyland? It should be a choice of the owner of the money."*

4. My investigation included reviewing court pleadings found on Courtnet, including the Complaint, the initiation of extensive discovery that appeared to be cancelled when the parties to the litigation began mediation and through the Motion to approve Partial Settlement, with the Partial Settlement attached. I located the problem sections without much difficulty, at Partial Settlement page 10, paragraph xiv and on page 12, paragraph K, discussing the "Residual Funds." I held extensive discussion with Mr. Quarles. I followed the proceedings on Courtnet, including the short-lived Metcalf Circuit Court proceeding. I was aware of the Court orders concerning Definition of the Class, Selection of Class Counsel, Notice to Class Members, the time period and deadline to file Objections, and the date of the Fairness Hearing.

5. I made conclusions known to Mr. Quarles and we entered into a written engagement agreement that required a retainer and that provided that I would seek to assist Mr.

Quarles file a timely Objection to the gift of $1.5 million to a new or existing Nonprofit, and that if our efforts were successful in restoring all or any part of the $1.5 million to the Class Members or if we were successful in obtaining the right for all Class Members to vote to either receive their net share of the $1.5 million as part of their distribution OR gift their net share to the Nonprofit, that Graddy would move the Court for a fee award that would not exceed 24% of the sums that were subject to such a vote or were distributed to Class Members without the need for such vote.

6. I made telephone contact with the counsel for the Plaintiffs, Hon. Rob Maclin, for Craddock, Hon. Nathan Billings, and counsel for the Cooperative, Hon. Kevin Henry, prior to filing our Objection on January 27, 2021.

7. On January 27, 2021, I filed a written Objection on behalf of Roger Quarles with his letter to the Court attached to my letter to the Court. Mr. Quarles also filed his letter of Objection directly with the Court. On January 29, 2021, I supplemented our objection with the additional Objectors, W. Gary Wilson, Ian Horn, Richard Horn, Campbell Graddy and David Lloyd.

8. The Objectors objected to BGTCA retaining $1.5 million of its assets to fund a new tobacco nonprofit advocacy group on the basis that it was an illegal gift under Kentucky law, that it was a continuing waste of Cooperative assets that belong exclusively to Class Members, and that it was unfair, unreasonable and not adequate where it treated Class Members differently, rewarding a few with a non-monetary action with no benefit to those Class Members who no longer raise any tobacco, and based on the experience of Roger Quarles and his knowledge of the of the state of the tobacco industry that the

new Nonprofit would fail to perform just as BGTCA has failed to perform in recent years such that it needed to be judicially dissolved.

9. To that end, W.H. Graddy & Associates zealously tendered objections in pleadings and provided rebuttals to BGTCA's attempts to persuade this Court that the partial settlement was fair, reasonable and adequate to all class members and was consistent with Kentucky law. No other advocate involved in this litigation argued against BTGCA's control and gift of these funds but W.H. Graddy & Associates.

10. W.H. Graddy & Associates participated in the Fairness Hearing on February 24, 2021, March 1, 2021 and March 8, 2021. Thereafter, at the request of the undersigned, the parties agreed to participate in another mediation concerning the $1.5 million. This effort was unsuccessful.

11. W.H. Graddy & Associates efforts helped inform this Court's June 11, 2021 Opinion and Order Approving Partial Settlement. That ruling led to a more diverse Board of Directors for the new nonprofit rather than the "New Board" hand-picked by the existing BGTCA Board leadership. Paragraph 30. That ruling required Board members to be on a volunteer basis. Paragraph 30. That ruling limited the availability of BGTCA assets in supporting the new Nonprofit overhead and yearly expenses, [Paragraph 31, 32]. That ruling gave the new Nonprofit two years of use of BGTCA assets to become self-sufficient and if that goal was met, "the $1.5 million will be immediately distributed t class members." Paragraph 33. If the new Nonprofit did not achieve self-sufficiency in two years, Class Members would vote on the disposition of the $1.5 million – to be distributed to Calls Members OR given to endow the new Nonprofit, with the majority vote to decide. Paragraph 33. **This ruling created an addition to**

the Common Fund of money that Class Members control, that was not previously available in the Partial Settlement reached between the parties prior to the Objectors participating in the suit.

12. Thereafter, BGTCA asked this Court to reconsider these portions of its Opinion and Order requiring W.H. Graddy & Associates to defend that decision in litigation.

13. During a hearing on BGTCA's motion to alter or amend, the Court described a possible resolution and asked the parties to discuss with clients whether an agreement could be reached. The undersigned consulted with clients and consented to the following:

    a. Order Approving, paragraph 32 would be modified to read as follows: "The sum of $1.5 million will be disbursed to the new organization, and it may fund $100,000 from the principal for salary and overhead costs in the first year of operation and it may fund $75,000 from accrued interest and principal in the second year of operation. The above described $100,000 in year one and so much of the principal as is needed to pay $75,000 in year two are the only permitted uses of the principal."

    b. The Order Approving paragraph 33 would be modified to read as follows: "Class Counsel shall prepare a cover letter and postcard to be sent to every Class Member who has submitted the required documentation for distribution of Cooperative proceeds to allow each Class Member to vote either: YES, I agree that my net share of the $1.5 million shall be paid to the new Burley and Dark Tobacco Producers Association, OR, NO, I request that my net share of the $1.5 million shall be distributed to me. The postcard must be signed and mailed back to Class Counsel. Following the return of the postcards, Class Counsel shall

report to the Court on the amount of the principal that the Burley and Dark Tobacco Association may retain and on the amount to be returned to be distributed to Class Members. The Court will conduct a hearing and enter appropriate orders."

c. The Order Approving paragraph 34 would be modified read as follows: "The McBrayer firm, as Class Counsel, will receive legal fees and expenses based upon time spent and a lodestar analysis."

14. This **resolution created an addition to the Common Fund of $1.325 million which Class Members control**, and they can receive their share, if they so choose. This is a demonstrable benefit to all class members not just objecting class members.

15. On July 28, 2021, the Court entered an Amended Opinion that amended Paragraphs 31, 32, 33, 34 and 35, in some ways as the parties had agreed and in several respects at variance with the consent of the Objectors. The Objectors have filed their Motion to Alter or Amend to seek to address the area where there is not agreement.

16. Without regard for the remaining areas of lack of agreement, the amended paragraph 32 retains the ruling that the remainder of the $1.5 million grant funds after deducting $175,000.00 given to the Nonprofit aby agreement, and other approved deductions shall be given to the control of the Class Members who have the option to "be paid their share of the net remainder of the grant fund or they may wish to leave their share in place as part of the permanent endowment grant to fund the nonprofit." Paragraph 32. This **language in the July 28 Amended Order creates an addition to the Common Fund of $1.325 million which Class Members control**, and they can

receive their share, if they so choose. This is a demonstrable benefit to all class members, not just objecting class members.

17. I have previous experience in class action litigation. Graddy was the initiating counsel and co-counsel with Garmer and Prather in *Powell v. Tosh*, 5:09-CV-00121, Federal District Court for the Western District of Kentucky. This action was initially filed in the Marshall Circuit Court but was removed to Federal Court by the Defendants. We organized and catalogued discovery involving over 20 plaintiffs and 6 defendants. We filed pleadings and kept clients informed of the progress of the action. We moved the District Court, Judge Russell presiding, to certify the action as a Class Action for all property owners surrounding the Jimmy Tosh Swine Barns in Marshall, Hickman, and Fulton Counties. Judge Russell initially agreed to certify the matter as a class action for all property owners and residents within a mile and a half radius around the Ron Davis Swine Barn in Marshall County. He subsequently decertified that class. He was asked to reconsider and he again certified the action as a class action. However, a few months before trial Judge Russell again decertified the class, based upon his analysis that Plaintiffs' claims were proceeding to trial as permanent nuisance claims and that tort requires an individualized determination of nuisance, so that class actions were not available. See *Powell v. Tosh*, 942 F. Supp. 2d 678 *, 2013 U.S. Dist. LEXIS 32231, 2013 WL 900789 (W.D. Ky. 2013). These cases are discussed in his article, "If Cafos Are Point Sources, What Went Wrong?", *Journal of Animal and Environmental Law*, Louis D. Brandeis School of Law, University of Louisville, Volume 8-Symposium Edition, Summer 2017.

18. Graddy filed suit in *Robertson, et al. v. A & S Protein, Inc, et al.*, Russell Circuit Court, 14-CI-138. The complaint in that action requested that it be certified as a class action. However, that was unnecessary when the Court granted an injunction preventing operation of the rendering facility at issue.

19. Graddy was successful in obtaining a Class Action certification by order of the Court of Appeals in *Rosenbalm v. Commercial Bank of Middlesboro*, 838 S.W.2d. 423 (Ky. App. 1992). This case involved a claim on behalf of representative taxpayers of Bell County seeking a refund of proceeds collected and held by the Commercial Bank of Middlesboro from a tax imposed on the residents of Bell County to pay the debt owed by the Bell County Garbage and Refuse Disposal District to the bank. The Circuit Judge dismissed the Taxpayers motion to intervene as untimely. The Court of Appeals reversed the Circuit Court, ordered that intervention be granted and ordered the Circuit Court to certify the action as a class action under Civil Rule 23. The undersigned was able to accomplish a complete refund to the Bell County taxpayers ad was approved for a fee award based on a percentage of recovery at a percentage in excess of the percentage requested herein. Case attached.

20. Graddy was successful in settling a class action claim against the City of Middlesboro for the pollution of Yellow Creek. Aspects of this case went to the Court of Appeals in *Carl Hopper v. Yellow Creek Concerned Citizens, Larry Wilson, et al.*, Court of Appeals Case No. 1988-CA-2528, and *Paul Lee v. Yellow Creek Concerned Citizens, Larry Wilson, et al.*, Court of Appeals Case No. 1989-CA-0384.

21. Graddy was successful in trying a related case to the above in a pollution tort claim against the Middlesboro Tanning Company to reach a jury verdict of seven figures,

which was by then virtually uncollectable where all defendants were in bankruptcy. See: *Dirk Anderson v. Yellow Creek Concerned Citizens, Larry Wilson*, Court of Appeals Case No. 1996-CA-1993, and related Court of Appeals cases.

22. On the basis of this experience and on the basis of the success in this case over the opposition of every other litigant in the courtroom, where the efforts of Graddy have taken control over the $1.35 million grant fund away from the Defendants in this action and the Court has awarded control over that fund to the Class Member equally, W.H. Graddy & Associates is entitled to an Award of Attorneys' Fees in this action.

23. In addition, Graddy has provided additional financial benefit to as Class members as follows: On May 7, 2021, Graddy filed the affidavit of Roger Quarles with the following: *"In addition, I want to use this opportunity to address Coop asset that has not been discussed during the Fairness Hearing process. The Coop has accumulated a $7 million dollar Net Operating Loss. This Net Operating Loss is valuable to the Coop Members to help offset tax impacts from the Coop distribution. I urge the Court to monitor the Dissolution Committee to insure that this valuable asset is distributed to the Coop Members."*

24. On May 14, 2021, these Objectors filed a Supplemental Objection that asked the Court to consider the above request within the May 7, 2021 affidavit of Roger Quarles as follows: "Finally, Objectors will ask the Court to insure that the Dissolution Committee will distribute to all Class Members their per capita portion of the over $7 million Net Operating Loss described in the attached affidavit of Roger Quarles."

25. The June 11, 2021 Opinion and Order Approving made an express reference to this issues on page 21 under ORDER, paragraph 3. The Amended Opinion and Order of July 28, 2021 includes the same language at page 24, under ORDER, paragraph 3.

26. Where Roger Quarles was sufficiently concerned that this financial benefit to all Class Members was not under discussion by other parties at least within the information available to him as a Board member, his role in raising the issue and the action of Graddy helped get this asset clearly on the table for the benefit of all Class Members. Objectors ask the Court to include consideration of this added financial benefit in the consideration of the Graddy Motion for a Fee Award.

CONCLUSION

27. We request that such fee award be based upon a percentage of the sums that have been brought within the **control** of every qualified Class Members by the action of Graddy, and that have been added to the Common Fund previously created by the Plaintiffs in this action, which percentage should not exceed 24% (twenty-four per cent).

Further the affiant sayeth naught.

Dated this 6 day of August, 2021.

W. HENRY (HANK) GRADDY, IV

COMMONWEALTH OF KENTUCKY
COUNTY OF WOODFORD

Subscribed, sworn to, and acknowledged before me this 6th day of August, 2020.

NOTARY PUBLIC – STATE AT LARGE

Marlene T. Davis
NAME

443609
NOTARY ID #

My commission expires: June 10, 2023

Respectfully Submitted,

/s/ W. Henry Graddy, IV
W. Henry Graddy, IV
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served via email to the following:

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This the 6 day of August, 2021.

/s/ W. Henry Graddy, IV
W. Henry Graddy, IV

Rosenbalm v. Commercial Bank of Middlesboro

Court of Appeals of Kentucky

May 29, 1992, RENDERED

No. 90-CA-002546-MR, No. 90-CA-002652-MR

Reporter
838 S.W.2d 423 *; 1992 Ky. App. LEXIS 131 **

KENNY ROSENBALM; WILL ED KIRK; VIOLA HURST; SYLVIA WILLIAMS; LARRY WILSON; and WILLIAM MASON, APPELLANTS v. COMMERCIAL BANK OF MIDDLESBORO; BELL COUNTY GARBAGE AND REFUSE DISPOSAL DISTRICT; BLAKEMAN & SONS, INC.; CITY OF MIDDLESBORO; CITY OF PINEVILLE; JOAN ASHER CAWOOD, BELL COUNTY COURT CLERK; and BELL COUNTY FISCAL COURT, APPELLEES AND COMMERCIAL BANK OF MIDDLESBORO, CROSS-APPELLANT, v. KENNY ROSENBALM; WILL ED KIRK; VIOLA HURST; SYLVIA WILLIAMS; LARRY WILSON; WILLIAM MASON; and W. HENRY GRADDY IV, CROSS-APPELLEES

Subsequent History: As Corrected June 10, 1992. Discretionary Review Denied by the Supreme Court of Kentucky November 11, 1992. Released for Publication November 12, 1992.

Prior History: **[**1]** APPEAL FROM BELL CIRCUIT COURT. HONORABLE STEPHEN M. SHEWMAKER, SPECIAL JUDGE. CIVIL ACTION No. 82-CI-000385.

Disposition: AFFIRMING IN PART, REVERSING IN PART AND REMANDING.

Counsel: ATTORNEYS FOR APPELLANTS: W. Henry Graddy IV, Todd Evan Leatherman, Reeves & Graddy, Versailles, Kentucky.

ATTORNEYS FOR APPELLEES:

ATTORNEY FOR COMMERCIAL BANK OF MIDDLESBORO: William A. Watson, Middlesboro, Kentucky.

ATTORNEY FOR BELL COUNTY, GARBAGE AND REFUSE DISPOSAL DISTRICT: Frank A. Atkins, Scoville, Cessna, Crawford & Atkins, London, Kentucky.

ATTORNEY FOR BLAKEMAN & SONS, INC.: Lloyd R. Edens, Cline & Edens, Middlesboro, Kentucky.

ATTORNEY FOR CITY OF MIDDLESBORO: Charles E. Sigmon, Jr., Middlesboro, Kentucky.

ATTORNEY FOR CITY OF PINEVILLE: Stephen C. Cawood, Barbourville, Kentucky.

ATTORNEY FOR JOAN ASHER CAWOOD, BELL COUNTY COURT CLERK: Lowell W. Lundy, Pineville, Kentucky.

Judges: BEFORE: GUDGEL, HUDDLESTON and McDONALD, Judges.

Opinion by: HUDDLESTON

Opinion

[*424] HUDDLESTON, JUDGE. Appellants, taxpayers of Bell County, appeal from an order and judgment rendered by Bell Circuit Court dismissing, for lack of timeliness, their motion to intervene in a long-pending lawsuit which has ultimately resulted in the imposition of a tax on **[**2]** the County's citizens to pay the debts of the

[*425] Bell County Garbage and Refuse Disposal District. Because we determine that the record will not support this ruling, we reverse.

The ***Commercial Bank*** of ***Middlesboro*** cross-appeals from the denial of its motion for sanctions. Because we believe that the record supports the view that sanctions are inappropriate in the matter before us, we affirm on this issue.

This case features a lengthy factual and procedural history. The pertinent facts are as follows: The Bell County Garbage and Refuse Disposal District was created by Bell County Fiscal Court in 1971. During the 1970's the District enjoyed substantial federal assistance to underwrite its cost of operation. This assistance was provided in order that the District might quickly become a self-sustaining entity. Lamentably, self-sustenance was slow in coming, and as federal funding became non-existent in the twilight of the 1970's, the District found itself in dire financial straits. At this point the District's Board of Commissioners determined to embark upon a "Resource Recovery Project" utilizing a grant from the Environmental Protection Agency. The Project involved the building **[**3]** of a waste-to-energy incinerator, which would produce electricity that could then be sold to provide revenue to operate the District. One William Yeary was retained to administer the Recovery Project. The District's financial problems notwithstanding, Mr. Yeary set about to modernize its operations, incurring approximately $ 400,000.00 in debt by way of loans from the ***Commercial Bank*** of ***Middlesboro*** (hereinafter "***Bank***") from May, 1980, through August, 1982. Although the District and the Recovery Project were ostensibly to be operated as separate entities, the distinction between the two quickly became blurred, evidenced notably by the fact that the Project was allowed by the ***Bank*** to borrow on the District's credit.

Mr. Yeary and the District's board members may have intended to use the income anticipated to be generated by the Recovery Project to satisfy the District's debts. Whatever the case, by 1982 the District had become wholly unable to meet its operating obligations. On September 14, 1982, Blakeman and Sons, Inc., an appellee in this action, sued the District on a fuel account, seeking judgment for $ 10,984.70. After obtaining judgment by default and issuing execution, **[**4]** Blakeman learned that the ***Bank*** held liens upon most District Property. Blakeman amended its complaint to join the ***Bank*** as a party defendant. The ***Bank*** immediately cross-claimed against the District and Bell County seeking satisfaction on notes issued in 1980 through 1982.

By early 1983 the Board had totally defaulted in its management of the District, resulting in all District services being terminated. In July, 1983, Bell Circuit Court issued a "declaratory judgment" in the District litigation. This judgment, advisory in tone, essentially detailed the court's opinion as to the manner in which the parties ought to resolve their disputes. The court did, however, conclude that the county was not liable for the District's debts, that the District should activate itself again or dissolve, and that the District was not responsible for proceeds of loans which had been recklessly spent or wasted by Mr. Yeary. (The court was particularly scathing in its assessment of Mr. Yeary's character and administrative skills.) The ***Bank*** appealed this declaratory judgment, but the appeal was dismissed by agreement of the parties as being premature in view of the fact that the court had not disposed **[**5]** of all issues before it.

The District's "orphan status" continued throughout 1983 and into 1984; its Board having "fled for the hills," its operations ceased. In June, 1984, a receiver was appointed for the District on the ***Bank***'s motion. The ***Bank*** then renewed its motion for summary judgment against the District, to which the District filed no affirmative response. The receiver advised the court that, "in his judgment," [1] no defense existed against the ***Bank***'s claim. The court agreed in a summary fashion and on **[*426]** October 11, 1984, granted a default judgment in the ***Bank***'s favor.

The record details in predictably haphazard fashion the on-going dialogue in Bell County concerning the manner in which the District might satisfy its debts. One option appears to have been consistently and categorically **[**6]** rejected by the county leaders, often in the most strident and bellicose terms: the imposition of a tax. The 1983 declaratory judgment mentions the tax option in an advisory fashion, but it orders no tax levy and no steps toward

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[1] The receiver's May, 1990, affidavit recounts that in 1984 he considered the possibility that *Ky. Const. § 157* (see below) could be raised as a defense to the ***Bank***'s claim, but determined that it would not be a viable defense.

such end were undertaken by the county. The 1984 default judgment avoids mentioning the tax issue entirely. With a newly-appointed board, the District investigated in late 1984 and early 1985 the possibility of implementing a new garbage collection system which could fund a debt repayment plan. When this option proved untenable, the District sought bankruptcy protection without, evidently, even considering utilizing the taxing power to fund debt repayment.

The District filed a Chapter 9 bankruptcy petition in the United States Bankruptcy Court for the Eastern District of Kentucky in the summer of 1985. The case was held in abeyance for over three years until the bankruptcy court ruled, in February, 1989, that the District's petition would be rejected on the ground that it possessed the taxing authority to satisfy its debts -- an authority, again, whose utilization the District continued to vehemently reject.

On the ***Bank***'s motion the case was redocketed **[**7]** in Bell Circuit Court in March, 1989. On June 5, 1989, the circuit court ordered the county to satisfy the ***Bank***'s 1984 default judgment through a tax levy, bond issue, or some combination of the two. During the remainder of the year the county went to extraordinary lengths to resist the imposition of the tax, resulting in the ***Bank*** seeking to have District and County executives held in contempt. On November 29, 1989, the circuit court ordered that county officials cease all efforts to resist the imposition of the tax and proceed to collect it, under penalty of contempt. At this point the county relented, and the tax was placed on the county's 1989 tax bills. Taxpayers received notice of the tax levy in December, 1989.

On February 27, 1990, six Bell County taxpayers, the appellants, attempted to intervene as of right in the case under consideration pursuant to CR 24.01. The taxpayers contended, *inter alia*, that the debt accumulated by the District between 1980 and 1982, violated the "pay as you go" plan of public financing memorialized in *Section 157 of the Kentucky Constitution*. [2] The taxpayers further sought a declaration of rights pursuant to Chapter 418 of the Kentucky **[**8]** Revised Statutes. [3] The circuit court ordered all issues briefed. On April 3, 1990, the ***Bank*** moved for sanctions against the taxpayers, contending that their intervention was being pursued in bad faith. **[*427]** The ***Bank*** also sought dismissal of the taxpayers' intervening petition. On April 23, 1990, the taxpayers moved for summary judgment, then, in June, moved to certify their cause as a class action under CR 23.01.

[9]** Oral argument regarding all issues was heard on August 28, 1990. On September 13, 1990, the taxpayers moved to amend their complaint "to conform to oral argument." At the same time, the taxpayers withdrew their motion for summary judgment against Blakeman & Sons, and restated their motion for summary judgment against the ***Bank***. On September 14, 1990, the court overruled the taxpayers' motion for summary judgment, granted the ***Bank***'s motion to dismiss the intervening complaint with prejudice, and overruled the ***Bank***'s motion for sanctions. In doing so, the court said:

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[2] *Ky. Const. § 157* provides, in pertinent part: "* * * No county, city, town, taxing district, or other municipality, shall be authorized or permitted to become indebted, in any manner or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year, without the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose; and any indebtedness contracted in violation of this section shall be void. Nor shall such contract be enforceable by the person with whom made; nor shall such municipality ever be authorized to assume the same."

[3] *KRS 418.040* provides: **Plaintiff may obtain declaration of rights if actual controversy exits.** "In any action in a court of record of this commonwealth having general jurisdiction wherein it is made to appear that an actual controversy exists, the plaintiff may ask for a declaration of rights, either alone or with other relief; and the court may make a binding declaration of rights, whether or not consequential relief is or could be asked."

KRS 418.045 provides: **Persons who may obtain declaration of rights - Enumeration not exclusive.** "Any person interested under a deed, will or other instrument of writing, or in a contract, written or parol; or whose rights are affected by statute, municipal ordinance, or other government regulation; or who is concerned with any title to property, office, status or relation; or who as fiduciary, or beneficiary is interested in any estate, provided always that an actual controversy exists with respect thereto, may apply for and secure a declaration of his right or duties, even though no consequential or other relief be asked. The enumeration herein contained does not exclude other instances wherein a declaratory judgment may be prayed and granted under *KRS 418.040*, whether such other instance be of a similar or different character to those so enumerated."

> It appears from the record the intervenors' [taxpayers'] interests were represented by [the receiver] for the district. The intervenors were aware of the litigation.
> This action was the subject of extensive publicity by the local newspaper. Many articles, usually on the front page, were written in detail about this litigation. The intervenors had every opportunity to join in this litigation years ago and chose not to do so. The attempt to join now is not timely, and is unfairly prejudicial to the other litigants.

The taxpayers moved for reconsideration and made various other motions. By final order **[**10]** and judgment, on November 7, 1990, the circuit court overruled the taxpayers' motion to certify a class, their motion to file a second petition for a declaration of rights, and their motion to set aside the 1984 default judgment against the District. It also overruled the ***Bank***'s renewed motion for sanctions. It is from this final judgment that the taxpayers and the ***Bank*** seek review in this Court.

The taxpayers attempted to intervene in this case pursuant to CR 24.01, entitled "Intervention of right." The rule provides, in pertinent part:

> Upon timely application anyone shall be permitted to intervene in an action . . . (b) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by exiting parties.

An attempted intervention clearly must be undertaken in a timely fashion. The timeliness of a motion for intervention is a question of fact, the determination of which ordinarily fails to the presiding judge. *Ambassador College v. Combs, Ky.App., 636 S.W.2d 305, 307 (1982)*. **[**11]** An applicant who moves for intervention after judgment carries a special burden of justifying the apparent lack of timeliness. *Monticello Elec. Plant Bd. v. Board of Educ., Ky., 310 S.W.2d 272, 274 (1958)*.

The elements of a taxpayer action may generally be defined as:

> (1) a wrongful act on the part of a public body or its officers, (2) injury to the complaining taxpayer or to the public body, and (3) a right to seek the relief prayed for.

74 Am.Jur.2d *Taxpayers' Actions* § 2 (1974) at 185. Taxpayers' actions are viewed generally as being equitable in nature, and have traditionally been governed to a large extent by equitable principles. *Id.* This state has long recognized that a valid taxpayers' action may be properly maintained. *Breathitt County v. Cockrell, 250 Ky. 743, 63 S.W.2d 920, 923 (1933)*; *Commonwealth, to Use of Wiggins v. Scott, 112 Ky. 252, 65 S.W. 596, 598-599 (1901)*.

Here, the taxpayers sought, *inter alia*, a declaration of rights. A declaratory judgment action proceeds under *KRS 418.040*, **[**12]** [4] and

> ... may be brought to declare rights under a municipal ordinance only where the rights of the plaintiff are affected by the ordinance and an actual controversy exists. . . . An "actual controversy" is not one which involves a question which is academic or hypothetical or which calls for nothing more than an advisory opinion. . . . **[*428]** Rather, it is a controversy over present rights, duties, and liabilities.

Bischoff v. City of Newport, Ky.App., 733 S.W.2d 762, 763-764 (1987). The earlier case of *Dravo v. Liberty Nat'l Bank & Trust Co., Ky., 267 S.W.2d 95, 97 (1954)* observes that a declaratory judgment should not address merely a "present controversy," but a "justiciable controversy." "Justiciability" in the context of a taxpayers' action has

[4] See Note 3.

generally necessitated that taxpayers possess a pecuniary interest in the subject matter of their action. Cooper v. Kentuckian Citizen, Ky., 258 S.W.2d 695, 696 (1953); and see Doremus v. Board of Education, 342 U.S. 429, 433-435, 72 S.Ct. 394, 397-398, 96 L.Ed. 475, 479-480 (1952). **[**13]** It is generally true, however, that such damage or injury may be presumed when a public contract or similar public act is undertaken in violation of statute. Cooper at 696.

The taxpayers argue that during a 27-month period in 1980-1982, the District "received $ 408,769.64 in loans that the District had no ability to pay out of general revenues within the fiscal year incurred," and, consequently, that such debt violates the "pay as you go" plan of public financing established in Ky. Const. § 157. Since there is no indication in the record that a tax was contemplated as a viable method of financing the District's debt repayment prior to the circuit court's June 5, 1989, order -- indeed, there is every indication that the tax option was consistently and vehemently rejected -- it is arguably the case that the pecuniary interest of the taxpayers was not sufficiently jeopardized until that time, so that an attempted intervention on their part prior to that date would have been premature.

The taxpayers, **[**14]** however, necessarily argue that the levied 1989 tax is unconstitutional, precisely because it is being used to fund the unconstitutional *debt* of 1980-1982. This being the case, under general principles of taxpayer relief, the litigation which began in 1982, resulting in the appointment of a receiver in 1984, could technically be deemed sufficient to have put the taxpayers of Bell County "on notice" that the issue of unconstitutional public indebtedness was afoot in their county. In this formal context, the failure of the taxpayers to intervene prior to the October 11, 1984, default judgment could be seen to result in the taxpayers losing any opportunity for a timely subsequent intervention. [5] This Court, however, is fully cognizant of the equitable nature of taxpayer actions. We therefore refuse to embrace such hypertechnical, formalistic conclusions.

[15]** In finding the taxpayers' attempted intervention untimely, the circuit court judgment inevitably raised the issue of laches. The laches doctrine essentially provides that:

> neglect or omission to assert one's rights within a reasonable period of time, where it causes prejudice, injury, disadvantage or a change of position to the other party, will bar enforcement of that claimant's rights.

Wigginton v. Commonwealth ex rel. Caldwell, Ky.App., 760 S.W.2d 885, 887 (1988). In the context of taxpayers' actions,

> . . . even though the governing authorities of a city, town, county, or other public body may be proceeding in a matter affecting taxpayers without warrant of law, so as to justify the interference of the court on the application of a taxpayer, the remedy of taxpayers may be lost by laches on their part in applying for relief.

74 Am.Jur. 2d *Taxpayers' Actions* § 37 (1974) at 245-246. However, the "degree of laches necessary to make it inequitable to enforce the plaintiff's action must be determined according to the facts of each particular case." Wigginton at 887. Furthermore, the laches doctrine has traditionally **[**16]** not been applied against a taxpayer who undertakes an action on behalf of a public body or other taxpayers to the same extent that it is applied to an individual plaintiff. Courts have observed that the passing of time does not diminish the illegality of an impermissible public act, and **[*429]** that other taxpayers or the taxing unit should not suffer due to the laches of plaintiff taxpayers. Thornton v. Village of Ridgewood, 17 N.J. 499, 511, 111 A.2d 899, 905 (1955); Harfst v. Hoegen, 349 Mo. 808, 817, 163 S.W.2d 609, 614 (1942).

We are not prepared to deny the taxpayers of Bell County an opportunity to legally redress a situation directly impacting their pecuniary interest simply because they lacked the lawyerly acumen to recognize the possibility of advancing a sophisticated constitutional argument at a time when their pecuniary interest was by all appearances *not* in jeopardy. The record is undisputed that the taxpayers moved with speed to secure counsel and seek

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[5] Since the **Bank** insists that the October 11, 1984, default judgment is *res judicata* regarding all issues in this litigation, it inferentially concedes that an attempted intervention by the taxpayers on October 12, 1984, or subsequently, would have been precluded.

intervention in this case after the Bell County tax was levied -- the tax was levied in December, 1989; the taxpayers moved for intervention **[**17]** in February, 1990. Accordingly, we reverse the order/judgment denying the taxpayers the right to intervene in this case. We further hold, in accord with Bischoff v. City of Newport, Ky.App., 733 S.W.2d 762, 763 (1987), that "[a] class action is an appropriate vehicle for a declaratory judgment as to the validity of a tax assessment or rate," and order the certification of a class action by the circuit court according to CR 23.

The **Bank** contends that the default judgment it obtained on October 11, 1984, is *res judicata* regarding all issues which "were litigated, *or which might have been litigated*." (**Bank**'s emphasis.) The record reveals that the District was in receivership at the time the default judgment was issued; the District's directors had resigned, resulting in no answer being filed by the District; the court-appointed receiver advised the court that, "in his judgment," no defense existed against the **Bank**'s claims, which "judgment" the court embraced as a finding. In this circumstance, a default judgment issued as a matter of course.

The *res judicata* doctrine may be summarized as follows:

[18]**

> [A] final judgment rendered upon the merits . . . by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction.

46 Am.Jur. 2d Judgments § 394 (1969) at 558-559. Collateral estoppel, a subdivision of the *res judicata* doctrine, precludes the relitigation of issues from a prior adjudication. *Revenue* Cabinet v. Samani, Ky.App., 757 S.W.2d 199, 201 (1988). Each of the elements mentioned in the definition above must be demonstrated if *res judicata* is to be successfully invoked, "including the existence of a final judgment rendered upon the merits, an identity of the subject matter, and an identity of the parties." *BTC Leasing, Inc.* **v.** Martin, Ky.App., 685 S.W.2d 191, 1987 (1984).

The District's receiver refused to defend against the **Bank**'s motion for default judgment. The receiver opined that no defenses existed, a fact repeatedly emphasized by the **Bank**. The circuit court order dismissing the taxpayers' complaint **[**19]** notes that "it appears from the record the intervenors' interests were represented by [the receiver]." Through this ruling the court defeats the CR 24.01 intervention, and at least raises the *res judicata* issue. However, the Supreme Court and this Court have consistently made it clear that a receiver is in *no sense* a representative of any party involved in a litigation; a receiver represents the appointing court, and only the court. *Rapp Lumber Co.* **v.** Smith, 243 Ky. 317, 48 S.W.2d 17, 19 (1932); *Crump &* Field v. First Nat'l **Bank** of Pikeville, 229 Ky. 526, 17 S.W.2d 436, 439 (1929); Moren v. Ohio Valley Fire & Marine Ins. Co.'s Receiver, 224 Ky. 643, 6 S.W.2d 1091, 1093 (1928); Cerwin v. Taub, Ky.App., 552 S.W.2d 675, 678 (1977). Accordingly, we decline to accept the **Bank**'s contention that the defenses rejected by a receiver in the context of a default judgment should preclude the privy of a defaulting party from later raising such defense. We hold, for CR 24.01 **[**20]** purposes, that the taxpayers' interests were not adequately represented in 1984 by "existing parties." Our decision is supported by 56 Am.Jur. 2d *Municipal Corporations* § 873 (1971) at 852:

> **[*430]** [Municipal] officers cannot, by their refusal to act or to defend, give conclusive validity to their own unlawful acts or accomplish purposes which they are without power to accomplish by direct action. When it is sought to bind a governmental body or its citizens or taxpayers by a judgment rendered against it by default or consent or which it otherwise failed to defend in good faith, this fact is always material and will often be received as a sufficient reason for not treating the judgment as res judicata, on the ground that, substantially, there has never been any litigation and decision of the questions involved.

Both this Court and the Supreme Court have traditionally adopted a liberal attitude regarding motions to set aside default judgments when good cause and equity so dictate. Holcomb v. Creech, 247 Ky.199, 56 S.W.2d 998 (1933); Crowder v. Commonwealth ex rel. Gregory, Ky.App., 745 S.W.2d 149 (1988). We continue **[**21]** this tradition and

direct that the default judgment rendered against the District be set aside. Of course, once the judgment upon which a plea of *res judicata* is set aside, the issue is no longer a viable one.

The notion that "litigation should end" is an important principle of jurisprudence. However, its impact is eclipsed in the present context by the notion that "rights should be vindicated." Although on-going, complex litigation spawns protracted inconvenience for all concerned, we do not believe, in the present context, that the taxpayers' intervention will have the kind of prejudicial impact prohibited by the laches doctrine.

The final order/judgment from which this appeal is prosecuted is revised and this case is remanded to Bell Circuit Court with directions (1) to grant the appellants-taxpayers' motion to intervene; (2) to certify this as a class action according to CR 23; (3) to set aside the 1984 default judgment rendered in favor of the ***Bank*** against the District; and (4) to conduct further proceedings consistent with this opinion. Additionally, Bell Circuit Court shall order the ***Bank*** to forthwith deposit with the clerk of that court monies collected by it **[**22]** pursuant to the 1984 default judgment to be held in an interest-bearing account during the pendency of this action, or, in the alternative, the court shall order the ***Bank*** to post a suitable bond to secure repayment of said monies and interest in the event it does not ultimately prevail in this action.

The ***Bank***'s cross-appeal relating to sanctions is, in light of our decision allowing intervention, moot. Accordingly, the circuit court's refusal to impose sanctions is affirmed.

The order of October 24, 1990, directing payment of the District's indebtedness to Blakeman & Sons is unchallenged on appeal and is, therefore, affirmed.

Concur by: GUDGEL

Concur

McDONALD, J., CONCURS.

GUDGEL, J., CONCURS IN PART AND DISSENTS IN PART.

GUDGEL, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: The majority opinion goes far beyond what is necessary to resolve this appeal. Nevertheless, I concur in the result reached by the majority opinion to the extent that it holds that the court erred by finding that appellants' attempted intervention was untimely. However, I would limit the scope of our decision to that issue and would remand this case for further proceedings, leaving it to the trial court to first address **[**23]** the other procedural and/or substantive issues which remain as a result of our decision. For this panel to usurp the trial court's function and discretion in that vein is both unwarranted and unjustified. In short, I do not believe that it is a proper function of this Court to try cases. Therefore, I dissent from the majority opinion to the extent that it adjudicates issues other than the issue as to the timeliness of appellants' attempted intervention.

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COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
FOURTH DIVISION
CIVIL ACTION NO. 20-CI-00332

HAYNES PROPERTIES, LLC, et al. PLAINTIFFS

v. **AFFIDAVIT OF ALLAN BLAINE CHAPPELL**

BURLEY TOBACCO GROWERS COOPERATIVE ASSOC., et al. DEFENDANTS

* * * * * *

Comes the affiant, after first having been duly sworn, and states as follows:

1. My name is Allan Blaine Chappell. I am licensed to practice law in the Commonwealth of Kentucky.
2. I have represented Roger Quarles previously on matters unrelated to the instant action. When Roger Quarles approached me about the instant action, I did not feel qualified to provide legal assistance in this matter.
3. I was aware of the legal assistance Hank Graddy had provided to previous clients in complex class action litigation and in Federal courts. As such, I asked Mr. Graddy to review the matter for Mr. Quarles.
4. On that basis, Mr. Quarles retained Mr. Graddy to represent him in the instant action.

Further the affiant sayeth naught.

Dated this 6th day of August, 2021.

ALLAN BLAINE CHAPPELL

COMMONWEALTH OF KENTUCKY
COUNTY OF WOODFORD

Subscribed, sworn to, and acknowledged before me this 6th day of August, 2020.

Marlene T. Davis
NOTARY PUBLIC – STATE AT LARGE

Marlene T. Davis
NAME

443609
NOTARY ID #

My commission expires: June 10, 2023

Respectfully Submitted,

/s/ W. Henry Graddy, IV
W. Henry Graddy, IV
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served via email to the following:

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This the 6 day of Augusty, 2021.

/s/ W. Henry Graddy, IV
W. Henry Graddy, IV

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COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
FOURTH DIVISION
CIVIL ACTION NO. 20-CI-00332

HAYNES PROPERTIES, LLC, et al. PLAINTIFFS

v. **AFFIDAVIT OF DOROTHY RUSH**

BURLEY TOBACCO GROWERS COOPERATIVE ASSOC., et al. DEFENDANTS

* * * * * *

Comes the affiant, after first having been duly sworn, and states as follows:

1. My name is Dorothy Rush, I am an associate at W.H. Graddy & Associates located at 137 North Main Street, Versailles, Kentucky and as such I have personal knowledge as to this action and as to the matters about which I state herein. My KBA # is 95721
2. I hereby offer this Affidavit in support of W.H. Graddy & Associates' ("Graddy") Petition for Award of Attorneys fees.
3. I began participating in this action on February 15, 2021 on behalf of Objecting class members ("Objectors"), Roger Quarles, W. Gary Wilson, Ian Horn, Richard Horn, Campbell Graddy and David Lloyd.
4. The Objectors objected to BGTCA retaining $1.5 million of its assets to fund a new tobacco nonprofit advocacy group on the basis that it was an illegal gift under Kentucky law, that it was a continuing waste of Cooperative assets that belong exclusively to Class Members, and that it was unfair, unreasonable and not adequate where it treated Class Members differently, rewarding a few with a non-monetary action with no benefit to those Class Members who no longer raise any tobacco, and based on the experience of Roger Quarles and his knowledge of the of the state of the tobacco industry that the

new Nonprofit would fail to perform just as BGTCA has failed to perform in recent years such that it needed to be judicially dissolved.

5. To that end, W.H. Graddy & Associates zealously tendered objections in pleadings and provided rebuttals to BGTCA's attempts to persuade this Court that the partial settlement was fair, reasonable and adequate to all class members and was consistent with Kentucky law. No other advocate involved in this litigation argued against BTGCA's control and gift of these funds but W.H. Graddy & Associates.

6. W.H. Graddy & Associates participated in the Fairness Hearing on February 24, 2021, March 1, 2021 and March 8, 2021. Thereafter, at the request of the undersigned, the parties agreed to participate in another mediation concerning the $1.5 million. This effort was unsuccessful.

7. W.H. Graddy & Associates efforts helped inform this Court's June 11, 2021 Opinion and Order Approving Partial Settlement. That ruling led to a more diverse Board of Directors for the new nonprofit rather than the "New Board" hand-picked by the existing BGTCA Board leadership. Paragraph 30. That ruling required Board members to be on a volunteer basis. Paragraph 30. That ruling limited the availability of BGTCA assets in supporting the new Nonprofit overhead and yearly expenses, [Paragraph 31, 32]. That ruling gave the new Nonprofit two years of use of BGTCA assets to become self-sufficient and if that goal was met, "the $1.5 million will be immediately distributed to class members." Paragraph 33. If the new Nonprofit did not achieve self-sufficiency in two years, Class Members would vote on the disposition of the $1.5 million – to be distributed to Calls Members OR given to endow the new Nonprofit, with the majority vote to decide. Paragraph 33. **This ruling created an addition to**

the Common Fund of money that Class Members control, that was not previously available in the Partial Settlement reached between the parties prior to the Objectors participating in the suit.

8. Thereafter, BGTCA asked this Court to reconsider these portions of its Opinion and Order requiring W.H. Graddy & Associates to defend that decision in litigation.

9. During a hearing on BGTCA's motion to alter or amend, the Court described a possible resolution and asked the parties to discuss with clients whether an agreement could be reached. The undersigned consulted with clients and consented to the following:

   a. Order Approving, paragraph 32 would be modified to read as follows: "The sum of $1.5 million will be disbursed to the new organization, and it may fund $100,000 from the principal for salary and overhead costs in the first year of operation and it may fund $75,000 from accrued interest and principal in the second year of operation. The above described $100,000 in year one and so much of the principal as is needed to pay $75,000 in year two are the only permitted uses of the principal."

   b. The Order Approving paragraph 33 would be modified to read as follows: "Class Counsel shall prepare a cover letter and postcard to be sent to every Class Member who has submitted the required documentation for distribution of Cooperative proceeds to allow each Class Member to vote either: YES, I agree that my net share of the $1.5 million shall be paid to the new Burley and Dark Tobacco Producers Association, OR, NO, I request that my net share of the $1.5 million shall be distributed to me. The postcard must be signed and mailed back to Class Counsel. Following the return of the postcards, Class Counsel shall

report to the Court on the amount of the principal that the Burley and Dark Tobacco Association may retain and on the amount to be returned to be distributed to Class Members. The Court will conduct a hearing and enter appropriate orders."

c. The Order Approving paragraph 34 would be modified read as follows: "The McBrayer firm, as Class Counsel, will receive legal fees and expenses based upon time spent and a lodestar analysis."

10. This **resolution created an addition to the Common Fund of $1.325 million which Class Members control**, and they can receive their share, if they so choose. This is a demonstrable benefit to all class members not just objecting class members.

11. On July 28, 2021, the Court entered an Amended Opinion that amended Paragraphs 31, 32, 33, 34 and 35, in some ways as the parties had agreed and in several respects at variance with the consent of the Objectors. The Objectors have filed their Motion to Alter or Amend to seek to address the area where there is not agreement.

12. Without regard for the remaining areas of lack of agreement, the amended paragraph 32 retains the ruling that the remainder of the $1.5 million grant funds after deducting $175,000.00 given to the Nonprofit aby agreement, and other approved deductions shall be given to the control of the Class Members who have the option to "be paid their share of the net remainder of the grant fund or they may wish to leave their share in place as part of the permanent endowment grant to fund the nonprofit." Paragraph 32. This **language in the July 28 Amended Order creates an addition to the Common Fund of $1.325 million which Class Members control**, and they can

receive their share, if they so choose. This is a demonstrable benefit to all class members, not just objecting class members.

13. I have previous experience in class action litigation. As a legal assistant at W.H. Graddy & Associates I worked on *Powell v. Tosh*, 5:09-CV-00121, Federal District Court for the Western District of Kentucky. I organized and catalogued discovery involving over 20 plaintiffs and 6 defendants. I proof read pleadings and kept clients informed of the progress of the action. That action was initially class action but later decertified.

14. As an associate at W.H. Graddy & Associates, I worked on *Robertson, et al. v. A & S Protein, Inc, et al.*, Russell Circuit Court, 14-CI-138. The complaint in that action requested that it be certified as a class action. However, that was unnecessary when the Court granted an injunction preventing operation of the rendering facility at issue. I assisted in drafting the complaint and the motion for an injunction.

15. On this basis, W.H. Graddy & Associates is entitled to an Award of Attorneys Fees in this action.

Further the affiant sayeth naught.

Dated this 6th day of August, 2021.

Dorothy Rush
DOROTHY RUSH

COMMONWEALTH OF KENTUCKY
COUNTY OF WOODFORD

Subscribed, sworn to, and acknowledged before me this 6 day of August, 2021.

W H Grad
NOTARY PUBLIC – STATE AT LARGE

W Henry Graddy IV
NAME

589726
NOTARY ID #

My commission expires: Nov 2 2021

Respectfully Submitted,

/s/ W. Henry Graddy, IV
W. Henry Graddy, IV
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served via email to the following:

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This the 6th day of August, 2021.

/s/ W. Henry Graddy, IV
W. Henry Graddy, IV