

**COMMONWEALTH OF KENTUCKY**  
**COURT OF APPEALS**  
**CASE NO. 2023-CA-0767**  
*{Electronically Filed}*

ROGER QUARLES, *et al.*

APPELLANTS

v.

On Appeal from Fayette Circuit Court  
Case No. 20-CI-00332  
Hon. Julie M. Goodman, Judge

HAYNES PROPERTIES, LLC, *et al.*

APPELLEES

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**MOTION TO DISMISS APPEAL**

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The Appellee, Burley Tobacco Growers Cooperative Association (“BTGCA”), by counsel, moves the Court to dismiss because (a) this Appeal is untimely under RAP 3, and (b) Appellants are not the real parties in interest and the real party in interest may not now be timely joined. As grounds BTGCA states the following:

**Nature of this Action**

The Burley Tobacco Growers Cooperative Association has been a tobacco marketing cooperative doing business in corporate form since its organization under the Bingham Act in 1922, now subject to the provisions of KRS 272.1001, *etc.* BTGCA has represented Burley tobacco growers in Kentucky, Missouri, Indiana, Ohio and West Virginia for decades. From 1941-2005, it did so as a designated “tobacco association” agent for the U.S. Department of Agriculture under the federal tobacco loan program. Congress ended the federal tobacco program in 2005, and paid landowners and tobacco growers “Tobacco Transition Payments” over a period of years

thereafter, causing the vast majority of what was formerly over 190,000 Burley growers to cease production of tobacco in BTGCA's five member states.

After 2008, BTGCA returned to its tobacco marketing cooperative functions, and for a period of about 10 years, it bought and sold Burley tobacco for farmers who signed contracts and thereby became members. It purged its old membership rolls and by 2019, considered approximately 3,000 tobacco farmers to be members. Members never paid dues to BTGCA throughout its history.

By 2019, the number of tobacco growers contracting to sell their tobacco to BTGCA was averaging less than 500 per year. The Board of Directors of BTGCA, representing 18 different districts (there was one vacancy), began discussing whether to dissolve the marketing cooperative. Several BTGCA members, including Mitch and Scott Haynes (doing business as Haynes Properties, LLC and Alvin Haynes & Sons), as well as S&GF Management, LLC (a farming entity owned by the Greathouse family in Midway) and separately, Greg Craddock, a farmer in Metcalfe County, wanted to dissolve the Cooperative, but each had a different plan. The Haynes-Greathouse group filed this action in Fayette Circuit Court on January 30, 2020, for dissolution, with claims against BTGCA's directors and officers. In early February 2020, the BTGCA Board of Directors passed a motion to liquidate itself over 18 months or so. Both the Haynes-Greathouse plaintiffs and Greg Craddock disagreed with the Board's plan. The Fayette Circuit Court had already issued a restraining order that precluded any distribution of net assets by the Board to any members, but allowed continuation of business in the ordinary course, including sale of its tobacco inventory and other assets. The Board then voted to enter into voluntary non-binding mediation with the Haynes-Greathouse plaintiffs. Craddock was invited to mediate, but declined. When a mediation settlement was reached, the Board of BTGCA voted to dissolve under judicial supervision by

overwhelming majority. Appellant Roger Quarles had always favored dissolution. The Board had voted to grant money before dissolution to an existing or new agricultural non-profit entity that would represent the interests of tobacco farmers of all types of tobacco (not just Burley, but also dark or flue-cured tobacco, grown primarily in Western Kentucky). Appellant Quarles was one of two BTGCA who voted against that grant in the 14-2 vote. (The other dissenter, Tim Tarter, wanted to grant more money to the new tobacco advocacy group.) \$1.5 million was allotted for that grant.

Meanwhile, Greg Craddock had filed his own suit against BTGCA and its directors in Metcalfe Circuit Court. The Haynes-Greathouse plaintiffs and BTGCA filed a joint motion asking the Court to approve the proposed settlement, accept jurisdiction over the judicial dissolution of the BTGCA, and treat the distribution of its net assets after payment of all creditors as a class action, in order to cutoff any and all other prospective lawsuits by present or former members of the Cooperative that would only dissipate its net assets available for distribution to its members. The plaintiffs (Haynes Properties, et al.) joined Greg Craddock as a defendant in the case to subsume all claims he had asserted.

Judge Julie M. Goodman, herself an experienced class action defense attorney prior to taking the Bench, conducted rigorous evidentiary hearings and received extensive briefings from all parties, and ultimately approved the proposed settlement with significant modifications of her own. On November 17, 2020, Judge Goodman entered an Amended Preliminary Certification Order and directed that notice of the class settlement be given to all purported settlement class members. She scheduled a Fairness hearing that allowed all Objectors to present written objections and to testify in opposition to the proposed class settlement, which included proposed percentage attorney's fees awards to the McBrayer law firm representing the Haynes and Greathouse Plaintiffs, and to the Billings law firm representing Craddock. In granting preliminary certification

to the Settlement Class, Judge Goodman appointed Katherine Yunker and Jason R. Hollon as Class Counsel.

The Fairness hearing was conducted over several days beginning February 24, 2021.

Appellant Roger Quarles and other persons not represented by counsel objected to the \$1.5 million grant which the Board of BTGCA had committed to make prior to the filing of the proposed joint settlement in court. These and other objections – including objections to payment of attorneys fees – were heard and denied by Judge Goodman as part of the Fairness Hearing.

When Judge Goodman approved the proposed settlement, first by Opinion and Order entered June 11, 2021, then by Amended Opinion and Order entered July 28, 2021), she modified the provisions regarding the charitable grant of \$1.5 million to the separate tobacco advocacy nonprofit with her own concept of fairness to the Settlement Class. **(Exhibit A, paras. 23-36)** The Burley and Dark Tobacco entity would receive \$100,000 start-up money in its first year, \$75,000 in its second year, and after its first year, notice was to be given to all Settlement Class members giving them the right to “opt-out” and claim a proportionate share of the remaining \$1.325 million if they wished to withdraw support from the new tobacco advocacy nonprofit. This was not a proposal made by Roger Quarles or any of the other Objectors, who outright opposed the entirety of the proposed \$1.5 million charitable donation to any agriculture-related entity. The new entity also agreed to other conditions the Court attached to the grant concerning composition of the Board and no director compensation. The new entity has separate counsel, English, Lucas, Priest & Owsley in Bowling Green, Kentucky. It is important to note that no persons, including the Objectors, took any appeal from any portion of the July 28, 2021 Amended Opinion and Order.

On August 6, 2021, the W. H. Graddy & Associates law firm (“Graddy law firm”), “as counsel for the Objector, Roger Quarles and others,” filed a motion with supporting affidavits seeking an award of not more than 24% of the \$1.325 million grant fund, as a “common fund” under KRS 412.070, claiming credit for Judge Goodman’s decision to allow an “opt-out” vote for Settlement Class Members to withdraw a proportionate share from the grant fund. The motion relied on Affidavits of Mr. Graddy and his associate, Dorothy Rush, with no copy of any fee contract with Roger Quarles or other client. On August 24, 2021, Judge Goodman denied the motion for attorney’s fees by the Graddy law firm, giving specific reasons. **(Exhibit B)** No appeal was taken by anyone from that Order.

Meanwhile, the BTGCA and the Dissolution Committee appointed by the Court were busy liquidating its tobacco inventory, selling its headquarters building on South Broadway in Lexington, Kentucky, liquidating its investment account and paying all known creditors. The Circuit Court approved two distributions from BTGCA net assets to Settlement Class Members (totaling 2,603 persons and entities) – one in December 2021, \$5,670 per Class Member, and another in November 2022, \$3,930 to each Class Member. There will be one final third distribution to Settlement Class Members from the net assets of BTGCA, planned to occur before the end of 2023, which is separate from the subject \$1.325 million grant fund from which attorney’s fees are claimed by the Graddy law firm in this appeal.

On March 13, 2023, the Circuit Court approved the form and content of a notice to all 2,603 Class Members with return postcard informing them of their right to “opt-out” and claim a proportionate share of the \$1.325 million grant fund, less Class Counsel fees (to be determined) and expenses. This notice was mailed to all Class Members, and told Class Members in part:

You have the option to request and be paid individually a proportionate share of the Fund remaining ... You also have the option to request that the proportionate share be left in place as part of the grant to the Association [Barley and Dark Tobacco Producer, not BTGCA]. If you do not send in a response to this notice, the proportionate share will be left in place for the Association.

On March 17, 2023, the Graddy law firm renewed its motion for award of attorney's fees, now seeking the reduced amount of \$99,375, representing 7.5% of the \$1.325 million. Again, no fee contract with Mr. Quarles or any other Objector was filed in the record. On April 5, 2023, the Circuit Court denied their Renewed Motion for attorney's fees. That Order contained "final and appealable" language, and gave specific reasons for the denial. **(Exhibit C)**

On April 17, 2023, the Graddy law firm filed a motion under CR 59.05 asking Judge Goodman to alter, amend or vacate her April 5 Order denying its request for attorney's fees, stating no new grounds.<sup>1</sup> The Circuit Court denied the motion of the Graddy law firm on June 1, 2023, by final Order. **(Exhibit D)** The Objectors, without making the Graddy law firm a co-Appellant, filed their Notice of Appeal on June 26, 2023.

## **ARGUMENT**

### **I. The Notice Of Appeal Was Untimely**

Plainly, the Objectors and the Graddy law firm should have appealed from the Circuit Court's Order on August 24, 2021 that denied the initial request by the Objectors and/or Graddy

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<sup>1</sup> That motion was not served upon the long list of unrepresented Objectors whom the Court treated as parties, who by letters to the Court had opposed any payment of attorneys fees. The Graddy law firm attempted to correct this oversight by issuing an amended Re-Notice of Hearing on May 1, 2023, served on all named parties and Objectors, but without certifying it had served the CR 59.05 motion itself upon those unrepresented Objectors. The Court heard the Graddy law firm's motion on May 5, 2023 (coincidentally, the arguable last day for a timely notice of appeal from the April 5, 2023 Order denying the Renewed Motion for attorneys fees). Whether the attempted Re-Notice was sufficient to allow relation-back and make the CR 59.05 motion of April 12, 2023 timely despite the failure to serve all parties is unclear. These Appellees preserve that argument, while believing there are other clear grounds for dismissal of this appeal.

law firm for attorney's fees to be paid out of the \$1.325 million grant fund. Although lacking CR 54.02 "final and appealable" language, that Order in all respects was fully dispositive on the limited subject of that claim for attorney's fees from that particular grant fund, distinct from the overall judicial dissolution and liquidation of remaining BTGCA assets for the benefit of all 2,603 Class Members, not just those who wanted to claim their share of the grant fund and not see the Burley and Dark Tobacco Producer Association, Inc. be funded. That Order followed the expressly final July 28, 2021 Amended Opinion and Order approving the terms of dissolution of BTGCA as a class settlement including the \$1.325 million grant, as modified. No appeal was taken from that primary judgment. Therefore, the August 24, 2021 Order denying attorneys fees to the Graddy law firm was a final judgment adjudicating that claim too. CR 54.01. There was nothing more for the Circuit Court to do with respect to the denied motion for attorneys fees. The Graddy law firm presented no new evidence or law, in 2021 or later when it filed its Renewed Motion for attorneys fees in March 2023.

*Webster County Soil Conservation District v. Shelton*, 437 S.W.2d 934 (Ky. 1969) presented the converse situation, but is instructive on both this and the second argument on real party in interest. There, members of the Conservation District sued to recover their share of assets of the district. The plaintiffs won judgment dated June 28, 1967, which expressly reserved the issue of attorneys fees for the plaintiffs' counsel. The District appealed on July 27, 1967. In an August 23, 1967 supplement judgment, the trial court awarded only half the amount sought by plaintiffs' counsel. The plaintiffs and their counsel Jerry Nall appealed, contending Nall had a written contract with 400 of the members for a 50% fee. The plaintiffs sought to dismiss the District's appeal from the first (main) judgment, arguing it was interlocutory, not final, because it had reserved the attorneys fee issue. The Court of Appeals disagreed. *Id.* at 937. As to the merits

of Nall's appeal for a larger fee, the appellate Court reversed and remanded, with instructions that his fee contract for 50% of the recovery by his clients be enforced, and that the trial court determine a reasonable fee payable out of the remaining fund by the noncontracting parties who were also members of the District. *Id.* at 940. Here, the Graddy law firm never produced a written fee contract with any of its listed clients. The *Shelton* case strongly indicates that denial of a request for attorneys fees in a "common fund" case is a final order, and that was the case here. The subsequent work of the Circuit Court, the Dissolution Committee and Class Counsel to implement the class settlement did not depend on further work by the Graddy law firm. The Order denying fees to the Graddy law firm became final after September 24, 2021, along with the main judgment that included the modified grant fund and opt-out process (the July 28, 2021 Amended Opinion and Order).

The filing of the Renewed Motion for attorney's fees on March 17, 2023 did not revive or start the clock again on the expired time to appeal the first denial of attorneys fees by the Circuit Court on August 24, 2021. It went unchallenged and became final. Compounding this error, the Graddy law firm filed an incomplete, and therefore, late motion to alter, amend or vacate the April 5, 2023 Order denying its Renewed Motion for attorney's fees by not properly serving all parties within ten days (plus 3 days) as required by CR 59.05. The bottom line is that the request for attorney's fees out of a "common fund" – denied by Judge Goodman on August 24, 2021 – is final and non-appealable. The Notice of Appeal is too late. Accordingly, the appeal should be dismissed.

In denying the Graddy law firm's motion for attorney's fees, the August 24, 2021 Order concluded "Graddy as counsel for certain objectors did not create a common fund or increase the assets of the common fund; rather, Graddy helped provide a different framework for the



distribution of the \$1.5 million.” (Order, p. 2). **No appeal was filed within thirty days after that Order.**

Kentucky Rules of Appellate Procedure (RAP) 3(A)(1)<sup>2</sup> requires the notice of appeal required by RAP 2 shall be filed with the clerk of the court from which the appeal is taken no later than 30 days from the date of notation of service of the judgment or order appealed from. The timely filing of a notice of appeal is a jurisdictional prerequisite to the validity of an appeal.

RAP 2(A)(3)<sup>3</sup> states that, “[t]he failure of a party to file timely a notice of appeal, cross-appeal, or motion for discretionary review shall result in a dismissal or denial.” As the Objectors’ Notice of Appeal is untimely, this Court does not have jurisdiction to hear the case.

In its Motion to Alter, Amend, or Vacate the Court’s April 5, 2023 Order, the Graddy law firm concedes that it asked the Court to reconsider its position in the August 24, 2021 Order during the 2023 hearing (that the common fund did not change, only the distribution of certain assets) by arguing that was not the standard for awarding attorney’s fees. The Court found no legal grounds to change its original decision to deny Graddy’s attorney’s fees (made in August 2021) based on the clear language of CR 23.08, governing class action settlements.

Thus, the Graddy law firm and its clients, if unhappy, should have appealed the August 24, 2021 Order, when the Judge held that it was not entitled to an award of attorney’s fees, within the required timeframe. They did not appeal that Order, so this appeal should be dismissed. The June 26, 2023 Notice of Appeal was untimely and this Court lacks jurisdiction.

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<sup>2</sup> RAP 3 became effective on January 1, 2023. Prior to that time, Kentucky Rules of Civil Procedure (“CR”) 73.02(1)(a) was controlling on this issue and, likewise, required that the notice of appeal be filed within 30 days from the entry of a final judgment.

<sup>3</sup> RAP 2 also went into effect on January 1, 2023. Prior to that time, CR 72.02(2) was controlling on this issue.

**II. The Objectors Are Not The Real Parties In Interest, The W. H. Graddy & Associates Law Firm Is The Real Party In Interest And Should Have Joined This Appeal As A Co-Appellant, But Did Not, So This Appeal Should Be Dismissed**

When the initial motion for attorney’s fees was filed in August 2021 by the Graddy law firm, it only contained an affidavit from Mr. Graddy, stating only that Mr. Quarles had paid Mr. Graddy a “small retainer”, and that Quarles had “approved” – as if Quarles had authority to do so for Settlement Class Members – that Graddy could later request up to 24% of the \$1.5 million grant fund as his attorney fee for representing Quarles and any other Objectors who opposed the grant fund. No copy of a fee contract or engagement letter between Roger Quarles (or any other Objector client) and the Graddy law firm was ever filed in the record or put into evidence in a hearing. Judge Goodman clearly rejected the fee request from the class settlement (part “B,” so to speak). There is no evidence in the record that Roger Quarles or any other Objector has any liability to pay any legal fees, past or future, to the Graddy law firm. Accordingly, none of the appealing Objectors have been harmed or are real parties in interest, and the only real party in interest, the Graddy law firm, did not name itself a party to this appeal. Accordingly, the appeal should be dismissed. *Webster County Soil Conservation District, supra* demonstrates how things should properly have been done.

Specifically, the Graddy law firm is and has been requesting that the attorney’s fee be made directly to it – not to Mr. Quarles or any other client. Kentucky case precedent dating back as far as sixty years indicates that appellate courts have declined to address the adequacy or reasonableness of attorney's fee awards unless the attorney is named as or makes himself a party in the appeal. *Carter v. Carter*, 382 S.W.2d 400, 402 (Ky. 1964). CR 17.01 provides that “every action shall be prosecuted in the name of the real party in interest...”.

The Kentucky Supreme Court in *Knott v. Crown Colony Farm, Inc.* held, “[d]ismissing an appeal for failure to name an attorney as a party is made on a case-by-case basis with a proper examination of whom the fees were awarded to and the authority for the award. 865 S.W.2d 326 (Ky.1993).

In *Neidlinger v. Neidlinger*, 52 S.W.3d 513 (Ky. 2001)<sup>4</sup> the Kentucky Supreme Court stated, “[i]f the ‘reasonable amount’ is ordered paid directly to the attorney, the attorney ‘may enforce the order in his own name’ and, thus is the real party in interest and a necessary and indispensable party to any appeal from that order.” *Id.* “If, however, the fees are awarded to the client as reimbursement for fees previously paid, the client is the real party in interest and the attorney need not be named.” *Id.* In this record, the Objectors have never sought reimbursement to them for any attorneys fees paid to the Graddy law firm.

The same result was upheld in *Fink v. Fink*, wherein the appellant failed to name the appellee’s attorney in the notice of appeal. 519 S.W.3d 384 (Ky. Ct. App. 2016). As a result, the Court of Appeals concluded that failure to name the attorney as an indispensable party was fatal to an appeal and dismissed the appeal. *Id.* at 385. The Court of Appeals noted that any attempt to amend the notice of appeal must have been accomplished within the normal time requirements for filing the notice of appeal. *Id.* *Neidlinger* and *Fink* were the governing cases when Judge Goodman

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<sup>4</sup> Notably, *Neidlinger* was overruled on other grounds by *Smith v. McGill*, 556 S.W.3d 552 (Ky. 2018). The *Smith* Court overruled *Neidlinger* **insofar** as it “required a financial disparity in order for attorney's fees to be awarded and return to the plain language of the statute [KRS 403.220].” *Smith*, 556 S.W.3d at 555. The *Smith* Court did not question the holding in *Neidlinger* that an attorney is the real party in interest when an award of attorney’s fees is directed to the attorney.

ruled in April 2023<sup>5</sup> Here, it is too late for the Graddy law firm to cure that deficiency, even if the June 1, 2023 Order denying its CR 59.05 motion was the pertinent final Order triggering the appeal time.

While *Neidlinger, Fink* and *Mahl* addressed attorney's fees awarded in divorce actions, cases of other types have also held that an attorney is the real party in interest concerning awards of attorney's fees directly to the attorney.

*Stevenson v. Bank of Am.*, 359 S.W.3d 466 (Ky. Ct. App. 2011) stated generally: “[w]e think every one [sic] would agree that ordinarily the real party in interest is the person who is the **beneficial owner** of the cause of action sought to be prosecuted.” *Id.* at 469. (Emphasis added). The Graddy law firm is admittedly the intended recipient of the legal fees sought in this appeal.

In *Hamm v. Workman*, the Kentucky Court of Appeals addressed the award of attorney's fees in an employment action with the Cabinet for Health and Family Services. The *Hamm* Court held, “[a] proper examination of the circumstances of this case, particularly the person to whom fees were awarded, reveals that Workman's attorney was directly awarded the attorney's fees. Therefore, the Cabinet's error in failing to name Workman's attorney as a party is fatal.” No. 2007-CA-000798-MR, 2008 WL 2468781, at 2 (Ky. Ct. App. June 20, 2008).

*Leasure v. Coleman Am. Companies, Inc.* concerned attorney's fees awarded in a breach of contract and fraud lawsuit. No. 2006-CA-001673-MR, 2008 WL 2065235 (Ky. Ct. App. May 16,

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<sup>5</sup> *Fink* recently was tacitly overruled by *Mahl v. Mahl*, No. 2021-SC-0481-DG and 2021-SC-0487-DG (April 27, 2023), 2023 WL 3113308 at \*7. There, the appealing husband challenged that he had to pay his wife's attorney. As part of the modern trend of more liberal indulgence of appellate rule deficiencies, *Mahl* noted the wife's attorney received notice of the appeal, giving him a chance to intervene. It then said “the failure to name an indispensable party is no longer automatically fatal to an appeal.” *Id.* at \*8 (Emphasis added). Here, it is inescapable that the Graddy law firm is the real party in interest and hence, should have named itself as an Appellant where it is claiming fees that were denied by the Circuit Court for which and its clients are not liable to pay.

2008). The Court held, “[i]t is clear that the awards were made for their benefit and that the attorneys were the real party in interest regarding the awards.” *Id.* at 1.

Put simply, the award the Graddy law firm seeks is only for its benefit, therefore the Graddy law firm is the real party in interest on its fee request. But the Graddy law firm failed to name itself as a party to this appeal, thus the appeal must be dismissed. Without the law firm as an Appellant, this Court lacks jurisdiction to fully adjudicate the matter, and it is too late to correct this error.

Wherefore, these Appellees pray the Court to dismiss this Appeal as untimely, and because the Appellants (Objectors) are not the real parties in interest and the time has expired for the W. H. Grady & Associates law firm to join the appeal as Appellants.

Respectfully Submitted,

/s/ Kevin G. Henry

Kevin G. Henry (KBA Bar #31255)  
Megan L. Adkins (KBA Bar #97996)  
Sturgill, Turner, Barker & Moloney, PLLC  
333 West Vine Street, Suite 1500  
Lexington, KY 40507  
Email: khenry@sturgillturner.com  
Email: madkins@sturgillturner.com  
*Counsel for Appellee Burley Tobacco Growers  
Cooperative Association*

**CERTIFICATE OF SERVICE**

I hereby certify that on July 27, 2023, a true and accurate copy of the foregoing was served via Kentucky CourtNet 2.0 on all counsel of record and via U.S. Postal Service on the unrepresented objectors and parties listed below pursuant to Circuit Court Order that all documents be served on unrepresented objectors:

Robert E. Maclin, III  
Katherine Yunker  
Jason R. Hollon  
McBrayer, PLLC  
201 E. Main Street, Suite 900  
Lexington, KY 40507  
[remaclin@mcbayerfirm.com](mailto:remaclin@mcbayerfirm.com)  
[kyunker@mcbayerfirm.com](mailto:kyunker@mcbayerfirm.com)  
[jhollon@mcbayerfirm.com](mailto:jhollon@mcbayerfirm.com)

W. Henry Graddy, IV  
Dorothy T. Rush  
W. H. Graddy & Associates  
137 N. Main Street  
Versailles, KY 40383  
[hgraddy@graddylaw.com](mailto:hgraddy@graddylaw.com)

John S. Friend  
Friend Law, PSC  
908 Minoma Avenue  
Louisville, KY 40217  
[johnny@friendlawky.com](mailto:johnny@friendlawky.com)

**COURTESY COPY TO:**  
Hon. Julie M. Goodman  
Judge, Fayette Circuit Court, 4<sup>th</sup> Div.  
382 Robert F. Stephens Courthouse  
120 North Limestone Street  
Lexington, KY 40507  
[josephguthrie@kycourts.net](mailto:josephguthrie@kycourts.net)

Pursuant to the April 18, 2023, Order Re Service List, notice is also provided to these unrepresented persons by United States Mail on July 27, 2023, sent to the following:

Greg Craddock (Appellee)  
4677 Iron Mountain Road  
Center, KY 42214

Jennifer Darnell  
248 Gray Lane  
Cynthiana, KY 41031

Berkley Marks  
5399 Paris Pike  
Mt. Sterling, KY 40353

Jacob Barnes  
1088 Bowman Mill Road  
Barry, KY 41003

Brent Dunaway  
1547 KY Highway 1054 N  
Berry, KY 41003

Jerry Rankin  
4540 Perryville Road  
Danville, KY 40422

Ben Clifford  
3459 KY Highway 1284 E  
Cynthiana, KY 41031

William David Furnish  
1320 Highway 982  
Cynthiana, KY 41031

Richard Sparks  
1499 Thatchers Mill  
Paris, KY 40361

Lincoln Clifford  
3459 KY Highway 1284 E  
Cynthiana, KY 41031

Jarrod Stephens  
504 Commonwealth Lane  
Cynthiana, KY 41031

Wayne Cropper  
5350 Raymond Road  
Mayslick, KY 41055

Leonard Edwin Gilkerson  
345 Calloway White Road  
Winchester, KY 40391

George M. Darnell  
1593 Grays Run Pike  
Cynthiana, KY 41031

Dudley Wayne Hatcher  
648 Hood Road  
Morgantown, KY 42261

David Barnes  
678 Bowman Mill Road  
Berry, KY 41003

Addison Thomson  
2224 Mt. Vernon Park  
Cynthiana, KY 41031

William Thompson  
1809 Mt. Vernon Pike  
Cynthiana, KY 41031

Danny Townsend  
Judy Townsend  
11620 Main Street  
Jeffersonville, KY 40337

Josh Curtis  
1402 KY Highway 1940  
Cynthiana, KY 41031

Robert Barton  
4095 Huffman Mill Road  
Lexington, KY 40511

Bruce Quarles  
Steven Quarles  
Travis Quarles  
10570 Owenton Road  
Frankfort, KY 40601

/s/ Kevin G. Henry  
*Counsel for Appellee Burley Tobacco Growers  
Cooperative Association*

# **Exhibit A**



COMMONWEALTH OF KENTUCKY  
FAYETTE CIRCUIT COURT  
FOURTH DIVISION

HAYNES PROPERTIES, LLC, et al.

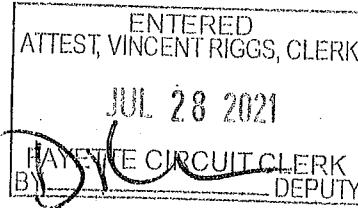
PLAINTIFFS

v.

20-CI-332

BURLEY TOBACCO GROWERS  
COOPERATIVE ASSOCIATION,  
et al.

DEFENDANTS



Amended Opinion and Order Approving Partial Settlement

This matter came before the Court at the Fairness Hearing on February 24, 2021, continued on March 1, 2021, and concluded on March 8, 2021, on the remaining provisions of the Parties' Stipulation and Agreement of Partial Settlement ("Partial Settlement") pursuant to CR 23.05(2).

In its original Opinion and Order Approving Partial Settlement, the Court modified the terms of the settlement regarding the disposition of the \$1.5 million. Following the entry of the original Opinion and Order, the BTGCA filed a Motion to Alter or Amend that was heard on July 9, 2021. During that hearing, the Court instructed counsel for BTGCA and the Roger Quarles Defendants to confer with their clients about the method of addressing the \$1.5 million distribution proposed by BTGCA in its Motion and discussed by the Parties and the Court during the hearing. The Court gave the Parties one week to file notice with the Court regarding the outcome of those discussions. Both Parties complied with the Court's order, and this Amended Opinion and Order

*DR*

Approving Partial Settlement follows. Only the section regarding the disposition of the \$1.5 million has been amended.

1. Present at the Fairness Hearing were: (i) Robert E. Maclin, III, Katherine K. Yunker, Jason R. Hollon, Drake W. Staples and Cary Howard, of McBrayer PLLC, counsel for Named Plaintiffs and Settlement Class Representatives; (ii) Named Plaintiffs and Settlement Class Representatives, Penny Greathouse of S&GF Management, LLC and Mitch Haynes and Scottie Haynes of Haynes Properties, LLC and Alvin Haynes & Sons; (iii) Kevin G. Henry of Sturgill, Turner, Barker & Moloney, PLLC and Jeremy S. Rogers of Dinsmore & Shohl LLP, counsel for Defendant Burley Tobacco Growers Cooperative Association ("BTGCA"); (iv) Kathy Sanford, administrative assistant for BTGCA, and Al Pedigo, president of BTGCA; (v) John N. Billings, Christopher L. Thacker, and Richard J. Dieffenbach of Billings Law Firm, PLLC, counsel for Defendant Greg Craddock and other members of the proposed settlement class; (vi) Defendant Greg Craddock, (vii) W. Henry Graddy, IV and Dorothy Rush of W.H. Graddy & Associates, counsel for Objectors Roger Quarles, W. Gary Wilson, Ian Horn, Richard Horn, Campbell Graddy and David Lloyd; (viii) Objector Roger Quarles; (ix) Darrell Varner, President of the Council for Burley Tobacco; (x) on February 24, 2021, Steve Weisbrot of the Angeion Group, LLC (Settlement Administrator per Order Directing Notice of Proposed Settlement in Settlement Class and Scheduling Fairness Hearing entered November 17, 2020); and (xi) on March 8, 2021, David B. Tachau of Tachau Meek PLC, counsel for the Billings Law Firm. Others attended

all or parts of the Fairness Hearing, as interested persons or members of the general public.

2. The Court heard and accepted sworn testimony from witnesses Mr. Weisbrot, Mr. Mitch Haynes, Ms. Greathouse, Mr. Pedigo, Mr. Varner, Mr. Quarles, and Mr. Maclin. The Court also thoroughly reviewed the entire record in this case, including all objections to provisions of the Partial Settlement filed by those persons set forth on Schedule A. The Court has heard the arguments of counsel and has otherwise been duly and sufficiently advised. At the close of the March 1, 2021 hearing, the Court, pursuant to Fayette Circuit Court Local Rule 19, instructed Class Counsel Katherine K. Yunker and BTGCA counsel Jeremy S. Rogers to prepare a proposed Opinion and Order and allowed seven days thereafter for any objections to the proposed Opinion and Order to be submitted to the Court for consideration. In response to the proposed Opinion and Order tendered by the Parties, the Court received the following objections: Named Plaintiffs objected only to the language of paragraph 25 of the proposed Opinion and Order Approving Partial Settlement; Greg Craddock and the Billings Law Firm objected only to the fact that Billings did not receive 7.5% in fees and that the fee sharing agreement was found invalid in the proposed Opinion and Order Awarding Service Fees and Attorneys' Fees and Nontaxable Costs; and Roger Quarles and those similarly situated objected to the proposed Opinion and Order Approving Partial Settlement, only as to the disposition of the \$1.5 million.

This Court having heard the arguments of counsel, received testimony from parties, reviewed all pleadings and memorandums of law, reviewed the relevant law and applied same to the facts of this case, and being otherwise sufficiently advised hereby, finds, opines, orders, and adjudges as follows:

**FACTUAL FINDINGS, PROCEDURAL BACKGROUND, AND STANDARD**

3. Named Plaintiffs filed their first Complaint on January 27, 2020, subsequently filed three Amended Complaints, and on May 5, 2020 filed their final pleading that was a Corrected Third Amended Complaint. Therefore, the operative pleading is the Corrected Third Amended Complaint that was filed on April 28, 2020 and added Greg Craddock, and others similarly situated, as defendants. These newly named defendants were opposed to a judicial dissolution and instead sought, through their counsel, the Billings Law Firm, a non-judicial dissolution. Among other claims, the Corrected Third Amended Complaint sought the judicial dissolution of BTGCA (Count II) and the distribution of its net assets to the appropriate members of BTGCA (Count III). On April 21, 2020, prior to the Craddock Defendants being parties to the action, the Court stayed all discovery, at the request of the parties, so they could engage in mediation. The above described claims are the subject of the Partial Settlement, which was mediated and settled approximately 25 days later on or about May 15, 2020.<sup>1</sup> Unfortunately, the parties

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<sup>1</sup> See Billings law firm letter dated May 15, 2020, informing the Billings firm's clients of a proposed settlement.

did not date the actual settlement agreement, though some documents filed in the Record allege the settlement was effectuated on or about that date.

4. The undated Agreement was filed in the record on June 10, 2020 along with a petition requesting this Court's approval pursuant to CR 23.05. Since that time, the Court has conducted numerous hearings on the matter. Through the Court's Orders, for reasons stated on the Record, certain non-essential provisions of the Partial Settlement have been modified or waived by the Parties and the Court. Despite this, the essential elements of the Partial Settlement remain intact.<sup>2</sup> All prior Orders of the Court regarding the Partial Settlement remain effective, and the following prior Orders and Opinions are incorporated herein and made a part hereof as if set forth at length: (i) the Findings and Conclusions entered on September 27, 2020, as amended by Amended Preliminary Certification Order entered November 17, 2020; (ii) the Preliminary Certification Order entered on November 10, 2020 as amended by Amended Preliminary Certification Order entered November 17, 2020; (iii) the Order Directing Notice of Proposed Settlement in Settlement Class and Scheduling Fairness Hearing entered November 17, 2020; (iv) the Findings and Opinion entered February 7, 2021; and (v) that separate Opinion and Order addressing the award of attorneys' fees and costs, as well as class representative service awards that is entered simultaneously with this Opinion and Order.

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<sup>2</sup> See, e.g., October 16, 2020 Joint Stipulated Summary of Partial Settlement; November 17, 2020 Amended Preliminary Certification Order.

## ANALYSIS OF FAIRNESS OF CLASS SETTLEMENT

Rule 23.05 mandates that claims of a certified class may be settled only with the Court's approval and only after the Court finds that the applicable procedures set forth in the controlling rule are followed and met. The Court hereby addresses each of the relevant procedures and explains the actions that were taken to effectuate the mandated compliance.

### Adequate Notice to Settlement Class Members.

5. CR 23.05(1) requires the Court to direct notice in a reasonable manner to all class members who would be bound by the proposal. "Due process requires that notice to the class be reasonably calculated, under all the circumstances, to appraise intended parties of the pendency of the class action and afford them an opportunity to present their objection." *Does 1-2 v. Déjà Vu Services, Inc.*, 925 F.3d 886, 900 (6th Cir. 2019) (quoting *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 759 (6th Cir. 2013)). The Court directed this in its Order entered November 17, 2020.

6. The sworn declarations and exhibits put into evidence by Class Counsel, in addition to Mr. Weisbrot's testimony, established that the Notice Program and Notices to members of the Settlement Class of the Partial Settlement satisfy all Due Process, statutory, and Civil Rules requirements and are sufficient and binding on the Parties, including the named Parties, all participating Settlement Class Members, all non-participating Settlement Class members, and all other interested parties. The Notice

Program utilized the best available updated mailing list of BTGCA members in the relevant time period, multiple publications and postings in all the states where the members reside; additionally, the notice targeted publications and locations where the members tended to gather or read,<sup>3</sup> all of which exceeds the minimum standard of "notice in a reasonable manner to all class members who would be bound by the proposal."<sup>4</sup> Receipt of Form W-9's from over 50% of the addresses demonstrates that the Notice was adequate. *See, e.g., Sabo v. United States*, 102 Fed.Cl. 619, 629 (2011) (approving notice of settlement where, of the 2,176 class members, 517 responded to the notice, representing about 22.8% of the total class). Additionally, the Court will note that none of the objections questioned the adequacy of the notice.

The Partial Settlement is Fair, Reasonable, and Adequate.

7. Most importantly, the Court may approve a proposed settlement that would bind class members who are not named parties and did not negotiate or sign it "only after a hearing and on finding that it is fair, reasonable, and adequate." CR 23.05(2). That hearing has now been held, and the Court herein addresses the factors it considered

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<sup>3</sup> For example: in the newspapers the Lexington Herald-Leader, the Owensboro Messenger-Inquirer, the Charleston Gazette-Mail, The Columbus Dispatch, The Indianapolis Star, The Kansas City Star, and The Tennessean; through the settlement website at [www.btgcasettlement.com](http://www.btgcasettlement.com); in two consecutive issues of Farmer's Pride; and disseminated in an outreach campaign to agencies and organizations interacting with burley farmers in the five-state area covered by the Co-op.

<sup>4</sup> CR 23.05(1).

and determined had been met, thus allowing it to find that the proposed settlement as to the dissolution is “fair, reasonable, and adequate.” *Id.*

8. Prior to its 2018 amendment, the text of federal Rule 23(e) mirrored the text of Kentucky’s current CR 23.05.<sup>5</sup> In 2019, the U.S. Court of Appeals for the Sixth Circuit set forth seven factors courts in its jurisdiction must consider when determining whether a settlement is “fair, reasonable, and adequate”: (1) the “risk of fraud or collusion”; (2) the “complexity, expense and likely duration of the litigation”; (3) the “amount of discovery engaged in by the parties”; (4) the “likelihood of success on the merits”; (5) the “opinions of class counsel and class representatives”; (6) the “reaction of absent class members”; and (7) the “public interest.”<sup>6</sup> Some of these were then codified in the 2018 amendment of Rule 23(e)(2), which lists factors federal courts must consider, without limiting the consideration of other factors. Under the current Rule, a federal court must consider whether:

- (A) the class representatives and class counsel have adequately represented the class;
- (B) the proposal was negotiated at arm’s length;
- (C) the relief provided for the class is adequate, taking into account:
  - (i) the costs, risks, and delay of trial and appeal;

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<sup>5</sup> “It is well established that Kentucky courts rely upon Federal case law when interpreting a Kentucky rule of procedure that is similar to its federal counterpart. .... Federal Rule of Civil Procedure 23 is the federal counterpart of CR 23, and is similar. Thus, federal case law is persuasive in interpreting CR 23.” *Manning v. Liberty Tire Servs. of Ohio, LLC*, 577 S.W.3d 102, 109 n.3 (Ky. App. 2019) (citing *Curtis Green & Clay Green, Inc. v. Clark*, 318 S.W.3d 98, 105 (Ky. App. 2010); see also, e.g., *Hensley v. Haynes Trucking, LLC*, 549 S.W.3d 430, 436 n.4 (Ky. 2018).

<sup>6</sup> *Does 1-2 v. Deja Vu Servs., Inc.*, 925 F.3d 886, 894-95 (6th Cir. 2019).



- (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
  - (iii) the terms of any proposed award of attorney's fees, including timing of payment; and
  - (iv) any agreement required to be identified under Rule 23(e)(3); and
- (D) the proposal treats class members equitably relative to each other.

FED. R. CIV. P. 23(e)(2). In order to discharge its fiduciary duty to class members by determining whether the proposed Partial Settlement is fair, reasonable, and adequate, this Court considered the factors developed by the Sixth Circuit and those enumerated in current Rule 23(e)(2). The Court hereby finds that:

9. A sufficient showing has been made from the testimony, affidavits, and exhibits submitted by all parties that the Partial Settlement, as to the dissolution of BTGCA is fair, reasonable, and adequate. Furthermore, there has been a clear showing that Class Counsel have adequately represented the proposed Settlement Class, and that the Partial Settlement was negotiated at arm's length. There is no evidence in the written record or oral arguments that indicate any "risk of fraud or collusion" in connection with the dissolution as part of the Partial Settlement.<sup>7</sup>

10. Further, the Partial Settlement provides relief to the proposed Settlement Class that is adequate. The Partial Settlement reflects shared common goals of all Parties and Class Members, including: a prompt, efficient liquidation of remaining BTGCA

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<sup>7</sup> See *Does 1-2*, 925 F.3d at 894-95.

assets and payment of its debts, leading to a prompt, equal distribution of net assets to eligible participating Class Members, thus avoiding the risk of multiple, inconsistent, and expensive litigation, particularly since BTGCA members are in five states and relevant membership encompasses multiple crop years in the Settlement Class (now 2015-2020); a forbearance covenant to partially relieve past and present BTGCA directors, officers, and employees from risk to their personal and business assets, which relieves BTGCA of a duty to reserve as much as \$10 million of its net assets to honor indemnification and advancement demands by such persons, therefore enabling a greater sum to be distributed sooner to participating Class Members; and funding from BTGCA assets of a \$1.5 million to create a tobacco advocacy group (now identified as the Burley and Dark Tobacco Producers Association, Inc.) under the terms and conditions set forth in this opinion.

11. The complexity, expense, and likely duration of the litigation as well as questions concerning the likelihood of success on the merits of the relevant claim for judicial dissolution, all factor in favor of the fairness, reasonableness, and adequacy of the Partial Settlement.<sup>8</sup>

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<sup>8</sup> See *Does 1-2*, 925 F.3d at 894-95.

12. In addition, both Class Counsel and Class Representatives have unequivocally advocated for approval of the Partial Settlement, which also weighs heavily in favor of its fairness, reasonableness, and adequacy.<sup>9</sup>

13. Likewise, the reaction of absent Class Members to the proposed Partial Settlement weighs in favor of approval.<sup>10</sup> As discussed in more detail later in this Opinion, several Class Members filed objections to specific portions of the Partial Settlement. However, those objections represent a relatively small fraction of the total number of Class Members who have been provided notice and an opportunity to object. Moreover, no Class Member has objected to the Partial Settlement as a whole, to its basic conceptual framework, or to its basic terms about dissolution of BTGCA and distribution of its net assets to appropriate members. Nor has any Class Member objected to the releases and the accompanying forbearance covenant that protect BTGCA and its current and former directors, officers, employees, and agents in connection with the Partial Settlement and allow for prompt distribution of BTGCA's net assets.

14. The Court further finds that the public interest will be best served by implementation of the remaining essential terms of the Partial Settlement.<sup>11</sup> The public interest would not be served by continuing this litigation on the issue of how the dissolution should occur, as such protracted litigation would further deplete BTGCA's

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

assets, which are already diminishing. The public interest is best served by expediting the dissolution of BTGCA, the liquidation of its assets, and the prompt distribution of its net assets to its appropriate members sooner rather than later.

15. The Court has looked to Kentucky and federal law, and the Court finds and concludes that the Partial Settlement meets all core factors. It avoids the cost and delay of litigation over any disputes concerning whether judicial or non-judicial dissolution would be forced upon a solvent agricultural cooperative and the likelihood of appeal thereafter. The Partial Settlement provides an effective means of equal distribution of BTGCA net assets to participating Class Members in accordance with the controlling law,<sup>12</sup> and is therefore fair and equitable.

Disclosure of Agreement Made in Connection with the Proposed Partial Settlement.

16. CR 23.05(3) requires that the parties file "a statement identifying any agreement made in connection with the proposal." The Statement filed by the McBryer and Billings firms on October 16, 2020, technically satisfied the notice requirement. The identified agreement is addressed in more detail in a separate Opinion and Order concerning the requests for attorneys' fees, costs, and class representative service awards.

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<sup>12</sup> E.g., KRS 272.325 (dissolution procedures for agricultural cooperative association).

Allowance of Class Member Objections.

17. CR 23.05(5) requires allowance of class member objections. The notice given pursuant to CR 23.05 and 23.08 about the proposed settlement and fee requests informed the class members of the opportunity to object and how to do so.<sup>13</sup> More than 25 class members submitted written objections to the Court, clearly demonstrating that this requirement has also been satisfied.

18. The Court received, reviewed, and carefully analyzed all objections to the Partial Settlement. The objections fall into three general categories: (a) objections to the potential award of attorneys' fees and costs; (b) objections to the definition of the Settlement Class; and (c) objections to the BTGCA's expenditure of \$1.5 million of the assets to fund a nonprofit tobacco advocacy organization. The objections to requests for award of attorneys' fees and costs are addressed in a separate Opinion and Order.

Class Definition.

19. After extensive review and careful consideration, the Court overrules the objections to the definition of the Settlement Class. A few objectors take issue with the fact that the Settlement Class does not include those who ceased their involvement with burley tobacco prior to the 2015 crop year. Other objectors take issue with the fact that the Settlement Class includes farmers who were recently involved with burley tobacco

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<sup>13</sup> While no objections were filed as to the fee-sharing agreement specifically, said agreement was not included in the notice to class members. This is discussed in more detail in the Opinion and Order Awarding Service Fees and Attorneys' Fees and Nontaxable Costs.

only in the 2020 crop year. These objections are not supported by the controlling law, primarily the five-year membership window established in KRS 272.325(3).<sup>14</sup>

20. Upon the dissolution of an agricultural cooperative association such as BTGCA, after payment of debts, the law provides for the association's net assets to be distributed to its members "as shown by the association books over the preceding five (5) fiscal years," if "no provision is made in the association's articles of incorporation, bylaws, or contracts with members" as to the manner or amounts of distribution. KRS 272.325(3). Here, BTGCA's Articles, Bylaws, and past contracts with members contain no provision for distribution of its net assets in the event of dissolution, so the Court is mandated to follow the statutes.

21. The dissolution statute does not specify what the five fiscal years of membership are to "preced[e]" for distribution purposes—whether it is the date of formal dissolution, the date dissolution proceedings are first initiated, or the date on which the association's assets are finally liquidated or distributed. *See* KRS 272.235. Here, judicial dissolution was requested in January 2020 by the Named Plaintiffs with the filing of this lawsuit. Yet, due to the delays attendant with litigation, exacerbated by the

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<sup>14</sup> The five-year membership window provided by KRS 272.325(3) is also consistent with KRS 272.291, which provides that any unclaimed book equities in an agricultural cooperative association organized under KRS Chapter 272 may be recovered by, and placed in the income of, the association after a period of five years. It is further consistent, generally, with Kentucky's statutes of limitations, which provide for five or fewer years for a person to initiate action to claim funds withheld. *See, e.g.,* KRS 413.120 (five year limitation for implied or unwritten contract, other liability created by statute, trespass to personal property, damages for withholding personal property, or injury to the rights of plaintiff not arising on contract); KRS 413.125 (two year limitation for taking, detaining, or injuring personal property, including action for specific recovery or conversion).

COVID-19 pandemic, the order to dissolve BTGCA is being issued in 2021. Accordingly, the Parties have agreed, and the Court has ruled after discussions with all counsel that the BTGCA members entitled to distribution of net assets are those who engaged in relevant burley farming activities in the appropriate states during crop years 2015-2020. There is no statutory or other basis in law to extend the eligible membership years to before 2015. Further, as a practical matter, the Court notes that the vast majority of eligible Class Members have been engaged in relevant burley tobacco farming activities in more than one of the years 2015-2020, such that defining class membership to encompass all of those years is not only required by law but also fair and equitable as among the Class Members. In addition, those persons who were involved in burley tobacco farming in the 2020 crop year but not in the 2015-2019 crop years appear to comprise an extremely small percentage of Class Members. As such, it is only equitable to find the years 2015-2020 to be the relevant years for defining class members, in spite of any ambiguity as to how these five years should be measured.

#### The \$1.5 Million Nonprofit Funding.

22. The majority of the class member objections opposed the provision in the Partial Settlement that BTGCA would spend \$1.5 million of its assets, to fund a nonprofit tobacco advocacy entity in order to perpetuate part of BTGCA's mission. The objections raised the concern that such funds should be included in BTGCA's net assets and distributed to its members rather than paid to fund a nonprofit tobacco advocacy entity.

Some objections also raised the concern that such an expenditure of BTGCA funds would be unlawful under KRS 272.235 or otherwise. Another concern expressed at the Hearing was that the expenditure could be construed as inequitable to Class Members who have ceased to grow tobacco and would therefore receive no benefit from the advocacy of the funded nonprofit organization.

23. At the time of the initiation of this lawsuit, BTGCA's duly elected board of directors had resolved to reserve \$3.5 million for future operations, focusing on advocacy for tobacco farmers, while distributing the remainder of net assets to members.<sup>15</sup> In the course of the mediation, the Parties agreed to the \$1.5 million provision involving funding of a separate nonprofit tobacco advocacy entity. The Court finds that this concept was a good-faith compromise and is commendable in theory.

24. Furthermore, this provision strikes a balance between the interests of Class Members, such as its Board Members, who did not want BTGCA to be dissolved, and those who did. The proposed funding of a broader tobacco grower nonprofit advocacy group could continue important parts of the authorized and stated purposes of an agricultural cooperative under Sections 111 and 211 of KRS chapter 272. The Court heard testimony and argument concerning the advocacy efforts of BTGCA on behalf of tobacco farmers, which resulted in substantial benefits to such farmers as part of the federal

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<sup>15</sup> See, e.g., First Am. Compl., ¶11.h; March 17, 2021 Named Plaintiffs' Verified Mot. and Supporting Memo. for Temp. Injunctive Relief, at Exh. A.



stimulus package associated with the COVID-19 pandemic and that continuing such efforts is a driving force behind the desire to fund a tobacco advocacy nonprofit. In addition, the funding of the nonprofit tobacco advocacy entity as part of the Partial Settlement avoids a situation in which the competing interests of Class Members who continue to grow tobacco or will grow tobacco in the future would be inequitably disadvantaged by the complete loss of BTCGA's advocacy function relative to those who have ceased to grow tobacco. Based on the evidence presented, the Court acknowledges that some members will continue to grow tobacco, even if it is not burley, and may desire an advocacy organization. However, the Court notes that no strong support was voiced by any grower members to fund such an organization.

25. Pursuant to KRS 272.111, an agricultural cooperative association such as BTGCA is authorized "to engage in *any activity* in connection with the production, harvesting, marketing, selling, preserving, drying, processing, canning, packing, grading, storing, handling, shipping or utilization of the agricultural products owned, leased, handled or marketed by its members and other farmers, with the manufacture or marketing of the by-products thereof, in connection with the manufacturing, selling, or supplying to its members and other farmers of machinery, equipment or supplies, in the financing of the above-enumerated activities, in performing or furnishing services of economic or educational nature, on a cooperative basis for those engaged in agriculture, or in any one or more of the activities specified herein." (Emphasis added.) KRS chapter

272 provides further, broader authority for an agricultural cooperative association like BTGCA, “[t]o engage in any activity in connection with ... furnishing services of economic or educational nature” relating to the relevant agricultural products, “[t]o establish and accumulate reasonable reserves,” and

[t]o do each and every thing necessary, suitable, or proper for the accomplishment of any one (1) or more of the purposes, or the attainment of any one or more of the objectives [t]herein enumerated; or conducive to or expedient for the interest or benefit of the association; and to contract accordingly; and to exercise and possess all powers, rights, and privileges necessary or incidental to the purposes for which the association is organized or to the activities in which it is engaged; and in addition, any other rights, powers, and privileges granted by the laws of this state to corporations generally, except such as are inconsistent with the express provisions of KRS 272.101 to 272.341, and to do any such thing anywhere.”

KRS 272.211.

26. Given the broad statutory authority for a wide range of activities by BTGCA, the Court finds that BTGCA, through action of its duly elected board of directors, has the legal authority to spend \$1.5 million of its dissolution assets to fund a nonprofit entity that advocates for tobacco farmers. The dissolution statute, KRS 272.325, does not prohibit such expenditure. More importantly, the Court recognizes it is a compromise reached by the Board and the Plaintiffs as part of a settlement agreement that would result in subsequent dissolution of BTGCA only if effectuated (including the expenditure). Moreover, KRS 272.325(3) demonstrates a basic public policy in favor of—and, at a minimum, not inconsistent with—spending of part of a dissolving agricultural

cooperative association's net assets to fund "any nonprofit farm organization operating within the areas served by the cooperative."

27. The mission of the new nonprofit entity, if successful, includes (i) serving and acting as a liaison on behalf of tobacco growers of all types of tobacco with tobacco leaf dealers and tobacco purchasers, (ii) advocacy and lobbying for tobacco producers/growers and land owners involved in the production of all types of tobacco, and (iii) other services and support of education and research beneficial to growers of tobacco.<sup>16</sup>

28. The Court has been mindful of the allegations in this lawsuit concerning waste of BTGCA's assets by certain Parties and some Objectors—indeed, this belief was alleged as a primary justification for the January lawsuit requiring class certification and dissolution. It is also apparent that such a distribution may benefit certain members of the class more than others; members who no longer grow burley tobacco but are otherwise part of the class would not benefit from this disposition of funds, though they have just as much claim to the settlement funds as any other class member.

29. Due to the objections and the Court's own concerns it reserved its ruling on the \$1.5 million distribution at the close of the Fairness Hearing and requested the Parties and the objectors mediate. The Court advised the Parties if they could not reach an

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<sup>16</sup> See March 24, 2021 Supplemental Filing Re: Initial Corporate Actions by Burley and Dark Tobacco Producers Association, Inc., at Bylaws for Burley and Dark Tobacco Producers Association, Inc., at Article I.

agreement at this mediation, that the Court would make a ruling, based on what disposition would be most fair, reasonable, and equitable to all of the class members. Unfortunately, the mediation proved unsuccessful, so the Court took on the task of adding those governors it believed would allow the disbursement to be fair, reasonable, and equitable. Following the entry of the original Opinion and Order, including the Court's new framework for handling the \$1.5 million, the BTGCA filed a Motion to Alter or Amend the Opinion and Order, first arguing for a return to the original terms of the agreement and, in the alternative, setting out an acceptable procedure along the lines of that which the Court ordered in its Opinion and Order. The Court ordered counsel for BTGCA and the Roger Quarles Defendants to confer with their clients over the acceptability of the proposed changes. The Court enters the present order following acknowledgement by both Parties that this is an acceptable disposition. Therefore, the Court hereby modifies the terms of the Settlement Agreement to provide:

30. The Burley and Dark Tobacco Producers Association, Inc. shall have two directors on its Board chosen from the list of objectors set out in Schedule A. Furthermore, Board members will receive no remuneration for their position on the Board—all hours dedicated to this new non-profit must be on a volunteer basis.

31. The Court approves the Parties' agreed compromise to the Stipulation and Agreement of Partial Settlement to include the grant of \$1.5 million of assets for the benefit of the nonprofit entity Burley and Dark Tobacco Producers Association, Inc. The

\$1.5 million grant fund shall be held and administered by the Dissolution Committee after entry of this Order, with initial distributions to Burley and Dark Tobacco Producer Association, Inc. ("Burley and Dark Tobacco" or the "nonprofit") in the sum of (a) \$100,000 for its first year of operations and then (b) \$75,000 for its second year of operations. The remaining grant fund shall be invested by the Dissolution Committee as a "prudent investor," and investment account statements for the fund shall be given to Class Counsel regularly. During the first two years of its operation, Burley and Dark Tobacco may make use of the interest income on that \$1.5 million. Burley and Dark Tobacco will be expected to provide its financial statements and Form 990 to Class Counsel and the Dissolution Committee.

32. Within ninety (90) days following the end of Burley and Dark Tobacco's first full year of operations, Class Counsel shall prepare a mailing to all "qualified class members," meaning those in the Settlement Class who have current, valid W-9's on file with the Settlement Administrator and who shared in the primary distribution of net assets of the Cooperative. This mailing will provide those class members the option to request and be paid individually their proportionate share of the remainder of the grant fund (less the sum of all approved costs of administration, including the hourly fees of Class Counsel and the Dissolution Committee, and fee to the Settlement Administrator and expenses of mailing and processing) by returning a signed postcard to the Settlement Administrator, stating either that they wish to withdraw their support for

the nonprofit and be paid their share of the net remainder of the grant fund or they wish to leave their share in place as part of the permanent endowment grant to fund the nonprofit. Class Counsel shall cause these mailings to be sent out no later than eight months into Burley and Dark Tobacco's second operating year. The form and content of such mailing and return postcard shall be created by Class Counsel, with approval from the Court.

33. Qualified class members shall be given 60 (sixty) days after the mailing date to return their signed postcard to Class Counsel or Class Counsel's designee (such as the Settlement Administrator). After the 60-day period, Class Counsel and the Settlement Administrator shall verify the returns. After all fees and costs of administration have been determined and approved, Class Counsel and the Settlement Administrator shall determine the shares of the grant fund payable to each of the qualified class members who returned the postcard indicating they wish to withdraw and be paid their net share of the grant fund, subject to any tax documentation needing to be updated.

34. The remainder of the grant fund shall then be transferred to the Burley and Dark Tobacco non-profit, to use in furtherance of its mission, in keeping with its bylaws and the laws governing non-profit organizations. No restriction will be placed on these funds by the Court, other than those already in place by operation of law. The new non-profit will, at that time, no longer need to provide financial statements and

Form 990 documentation to the Court or Class Counsel.

35. The McBrayer Firm, as Class Counsel, will receive legal fees and expenses based on time spent working on this portion of the Settlement Agreement, which will follow a lodestar analysis.

36. This method of implementation of the \$1.5 million grant incorporates the business judgment of the elected Board of Directors of BTGCA and considers the testimony from the Fairness hearing and is intended to ensure that Burley and Dark Tobacco will have sufficient resources to be a benefit to those members of the Settlement Class who grow tobacco in the future while also allowing qualified class members to directly voice their support for, or to withdraw from, the nonprofit. As such, this is a fair, reasonable and equitable outcome for all qualified class members, giving them the right to be members of the nonprofit or not, preserving their withdrawal rights, while honoring the terms of the Partial Settlement.

#### **ORDER**

1. Consistent with the prior Orders of this Court, the Partial Settlement is hereby approved pursuant to CR 23.05.

2. The sum of \$1.5 million from BTGCA's pre-dissolution assets shall be distributed to the Burley and Dark Tobacco Producers Association, Inc. consistent with the terms of this Opinion and Order and subject to further monitoring by the Court and Class Counsel and further Orders of this Court.

3. Beginning immediately after the entry of this Opinion and Order, the business of BTGCA shall be concluded, and BTGCA shall be judicially dissolved and its net assets liquidated and distributed, including an equitable distribution of the \$7 million net operating loss to help offset tax impact from the dissolution distribution as allowed by law, after applicable costs and expenses, to the Settlement Class, under the auspices of the BTGCA Dissolution Committee, which shall have all powers and authorities of a dissolution committee or a board of directors of a Kentucky agricultural cooperative association under Kentucky law, including standing and control of all causes of action of the BTGCA and full power to compromise any debts and claims, and shall undertake such actions to wind up and dissolve BTGCA as the Dissolution Committee deems may be reasonable and necessary, subject to monthly reports, monitoring, and further Orders of this Court.

4. The Settlement Class, each on behalf of itself, himself, or herself and on behalf of its/his/her respective heirs, assigns, beneficiaries, and successors, shall be deemed to have:

- (i) partially released BTGCA and partially released the BTGCA's past and present officers, directors, and employees and their personal representatives, heirs and assigns (collectively, "the Partially Released Parties") from any and all liabilities, rights, claims, actions, causes of action, demands, damages, penalties, costs, attorneys' fees, losses, and remedies, whether known or



unknown, existing or putative, suspected or unsuspected, liquidated or unliquidated, legal, statutory, or equitable, including those that result from, arise out of, are based upon, or relate to conduct that was alleged or could have been alleged in this action, including direct, joint, or several derivative or other claims of any and all Settlement Class, however they may exist or arise—except and only to the extent of and up to \$5 million in coverage under BTGCA insurance policy # NY 19DOLV03934NV (and renewals and extensions thereof) underwritten by Navigators Insurance Company and any other available insurance coverages for any Partially Released Parties; and

(ii) expressly reserved and not released to the extent of and up to \$5 million in coverage under BTGCA insurance policy # NY 19DOLV03934NV (and renewals and extensions thereof) underwritten by Navigators Insurance Company and any other available insurance coverages, the Partially Released Parties of or from any and all other liabilities, rights, claims, actions, causes of action, demands, damages, penalties, costs, attorneys' fees, losses, and remedies, whether known or unknown, existing or putative, suspected or unsuspected, liquidated or unliquidated, legal, statutory, or equitable, including those that result from, arise out of, are based upon, or relate to conduct that was alleged or could have been alleged in this lawsuit, including direct, joint or several derivative or other claims, however they may exist or

arise, against the Partially Released Parties, Navigators Insurance Company, and any other insurance carrier at any time providing insurance coverage(s) for the Partially Released Parties, jointly or severally.

5. The Settlement Class members, each on behalf of itself, himself, or herself and on behalf of its/his/her respective heirs, assigns, beneficiaries, and successors, shall be deemed to have partially and irrevocably released and forever discharged for all time, the Partially Released Parties of and from any and all liabilities, rights, claims, actions, causes of action, demands, damages, penalties, costs, attorneys' fees, losses, and remedies, whether known or unknown, existing or putative, suspected or unsuspected, liquidated or unliquidated, legal, statutory, or equitable, for the judicial, non-judicial, or other dissolution or liquidation of BTGCA.

6. The Settlement Class, each on behalf of itself, himself or herself and on behalf of its/his/her respective heirs, assigns, beneficiaries, and successors, shall be deemed to have covenanted and agreed not to execute any judgment on, and to forebear from collection remedies against past and present officers, directors and employees of BTGCA or their personal and business assets over, above, except, and other than to the extent of available insurance coverage under any Insurance Policies, such covenant including an agreement not to record any judgment liens against BTGCA or BTGCA's past or present officers, directors, or employees, not to report any judgment against them to any credit reporting or similar agencies, and waiving any execution as to any assets

(personal, business or otherwise) of BTGCA's past and present officers, directors and employees. This covenant shall not be read, construed or considered to discharge or release any Insurance Carrier from any duty to defend, duty to indemnify or liability upon the claims reserved and not released herein.

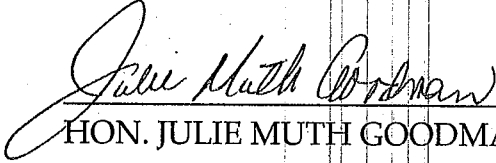
7. No Special Meeting of the Members of BTGCA shall be held to vote on a non-judicial dissolution and liquidation of the assets of BTGCA, having been made moot and obviated by the final approval herein of the Partial Settlement for judicial dissolution that is fair, reasonable and adequate to all Settlement Class Members.

8. Distributions to Settlement Class Members shall require each person or entity to file a W-9 with the settlement Administrator. Any amounts from a distribution payment made to the Settlement Class that remain unclaimed 90 days after distribution of the checks to the Settlement Class shall revert back for re-distribution to the Settlement Class; provided that any unclaimed amounts (residual funds) remaining 90 days after the last round of distribution payment to the Settlement Class Members, shall be held pending further orders of this Court.

9. Pursuant to CR 54.02, and other applicable law, this is a final and appealable judgment as to the above matters, and there is no just cause for delay. Provided, however, the Court retains jurisdiction for oversight of the judicial dissolution, the distribution process, determination of any Class Member eligibility, Burley and Dark Tobacco

Producers Association, Inc., and other unresolved portions of the Plaintiffs' pleadings, all being subject to further Orders of the Court.

Entered this 26<sup>th</sup> day of June, 2021.

  
HON. JULIE MUTH GOODMAN  
JUDGE FAYETTE CIRCUIT COURT

**CLERK'S CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of this filing was served ~~this~~ **JUL 28 2021** of June, 2021, via mail upon the objectors listed on Schedule A at the addresses given in their respective objections and via the Court Net e-filing system and via electronic mail upon the following

Jeremy S. Rogers  
Dinsmore & Shohl LLP  
101 South Fifth Street, Suite 2500  
Louisville, Kentucky 40202  
jeremy.rogers@dinsmore.com  
*Counsel for Defendant Burley Tobacco  
Growers Cooperative Association*

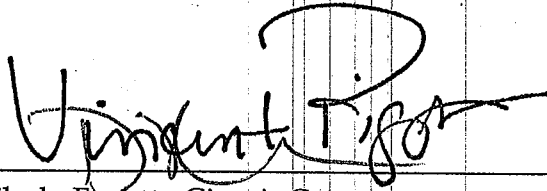
Kevin G. Henry, Esq.  
Charles D. Cole, Esq.  
Sturgill, Turner, Barker & Maloney PLLC  
333 West Vine Street, Suite 1500  
Lexington, Kentucky 40507  
khenry@sturgillturner.com  
ccole@sturgillturner.com  
*Counsel for Defendant Burley Tobacco  
Growers Cooperative Association*

Robert E. Maclin, III, Esq.  
Katherine K. Yunker, Esq.  
Jason R. Hollon, Esq.  
McBrayer PLLC  
201 E. Main Street, Suite 900  
Lexington, Kentucky 40507-1361  
remaclin@mcbayerfirm.com  
kyunker@mcbayerfirm.com  
j.hollon@mcbayerfirm.com  
*Counsel for Named Plaintiffs and Settlement  
Class Representatives*

W. Henry Graddy, IV, Esq.  
Dorothy Rush, Esq.  
W.H. Graddy & Associates  
137 N. Main Street  
Versailles, Kentucky 40383  
hgaddy@graddylaw.com  
dtgrush2@gmail.com  
*Counsel for Objectors Roger Quarles,  
W. Gary Wilson, Ian Horn, Richard Horn,  
Campbell Graddy and David Lloyd, and  
Objector Roger Quarles*

John N. Billings, Esq.  
Christopher L. Thacker, Esq.  
Richard J. Dieffenbach, Esq.  
Billings Law Firm, PLLC  
145 Constitution Street  
Lexington, Kentucky 40507  
nbillings@blfky.com  
cthacker@blfky.com  
rich.dieffenbach@blfky.com  
*Counsel for Defendant Greg Craddock*

David B. Tachau  
Tachau Meek PLC  
101 S. Fifth St., Ste. 3600  
PNC Tower  
Louisville, Kentucky 40202-3120  
dtachau@tachaulaw.com  
*Counsel for Billings Law Firm, PLLC*

  
Clerk, Fayette Circuit Court

Schedule A

J.B. Amburgey

David Barnes

Jacob Barnes

Robert E. Barton

Ben Clifford

Lincoln Clifford

Wayne Cropper

Josh Curtis

Clay Darnell

George M. Darnell

Jennifer Darnell

Brent Dunaway

Michael Furnish

William David Furnish

Leonard Edwin Gilkison

Billy G. Hall

Dudley Wayne Hatcher

Steve Lang

Berkley Mark

Ben Quarles

Bruce Quarles

Steven Quarles

Travis Quarles

Jerry Rankin

Richard Sparks

Jarrod Stephens

Addison Thomson

William A. Thomson

Danny Townsend

Judy Townsend

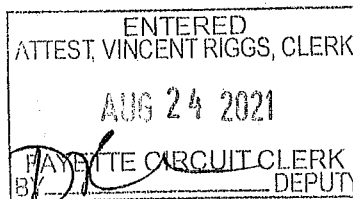
# **Exhibit B**

COMMONWEALTH OF KENTUCKY  
FAYETTE CIRCUIT COURT  
FOURTH DIVISION

HAYNES PROPERTIES, LLC, et al.

v.

BURLEY TOBACCO GROWERS  
COOPERATIVE ASSOCIATION,  
et al.



PLAINTIFFS

20-CI-332

DEFENDANTS

ORDER

---

The above-styled matter came before the Court on August 20, 2021, on a Motion for Entry of Order of Method and Manner of Actual Notice of Petition for Allowance of Attorneys' Fees and Notice and a Motion for Award of Attorneys' Fees and Notice, both filed by W.H. Graddy & Associates, W. Henry (Hank) Graddy, IV and Dorothy Rush, counsel for the Roger Quarles, et al., Objectors. Having reviewed the Record, relevant case law, and memorandums of parties, as well as having heard the arguments of counsel, this Court **HEREBY DENIES** the motions for the following reasons:

A common fund recovery is only applicable to attorneys who create a common fund. *See Kincaid v. Johnson, True & Guarnieri, LLP*, 538 S.W.3d 901, 919-20 (Ky. App. 2017). In this case, there has been no change in the common fund available to the class members, though the distribution of certain assets has changed. The mediated Partial Settlement as approved by the Court in its 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, under certain modified terms, that was not to be reduced by any claim for attorneys' fees except to compensate the actual time spent by Class Counsel overseeing the postcard opt-out program.

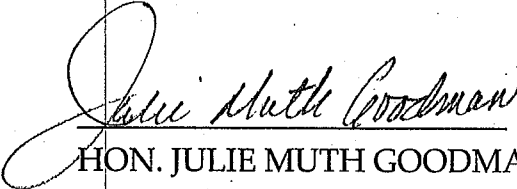
At the core, what the Court did in response to the many objectors was to change the method and manner of distribution of the \$1.5 million, without any guarantee it would be given to the class members. While the class members may, upon the conclusion of two years, withdraw their contribution, this is entirely dependent on the individual and is consistent with a member's right to withdraw their contribution. Therefore, the amount potentially granted to the class is speculative, as it is possible that all or most class members will choose to donate their share to the Burley and Dark Tobacco Producers Association and remain members of said organization. This means that Graddy as counsel for certain objectors did not create a common fund or increase the assets of the common fund; rather, Graddy helped provide a different framework for the distribution of the \$1.5 million.

Graddy was not involved in the prosecution of this action; he was neither class counsel nor did he take part in the original settlement in this case. He became involved in this case after the Court asked for objections from the class, and though he was involved in many hearings and proceedings following his clients' objections, he was ultimately involved in the narrow issue objected to by his clients. Therefore, while he

was certainly an effective attorney for the sake of his clients, his role in this case was largely tied to the desires of his clients—even if those desires were beneficial to the class.

While Graddy advocated for its clients' position on the settlement, it has not shown that this advocacy alone was the cause of the change in how the \$1.5 million will be distributed. The Court took into consideration the concerns raised by the unrepresented objectors regardless of their pro se status. Aside from the Objectors represented by Graddy, there were at least ten (10) other objections filed in opposition to the 1.5 million distribution. Graddy has not established that its actions "created" something more than did the pro se objectors or that, absent its presence in the case, the Court would not have sustained the objections. The Court has been extremely cognizant throughout this process of its position as the fiduciary for the class. As such, the Court paid great care to ensuring that the class members were heard and properly protected, as demonstrated by the Court's decision to deviate from other terms of the settlement, such as the other firms' awards of attorneys' fees and the proposed class definition.

Given under my hand this 27<sup>th</sup> day of August 2021.



HON. JULIE MUTH GOODMAN  
JUDGE, FAYETTE CIRCUIT COURT

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been served on this \_\_\_\_\_ day of August, 2021, via U.S. Mail, first class, to the following:

**AUG 24 2021**  
Katherine K. Yunker  
Jason R. Hollon  
McBrayer PLLC  
201 E. Main Street, Suite 900  
Lexington, KY 40507-1361  
*Settlement Class Counsel*

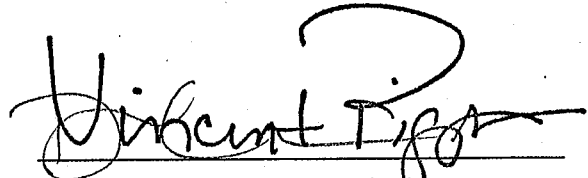
Jeremy S. Rogers  
Dinsmore & Shohl LLP  
101 South Fifth Street, Suite 2500  
Louisville, KY 40202  
jeremy.rogers@dinsmore.com  
*Counsel for Defendant Burley Tobacco  
Growers Cooperative Association*

Kevin G. Henry  
Charles D. Cole  
Sturgill, Turner, Barker & Maloney  
PLLC  
333 West Vine Street, Suite 1500  
Lexington, KY 40507  
khenry@sturgillturner.com  
ccole@sturgillturner.com  
*Counsel for Defendant Burley Tobacco  
Growers Cooperative Association*

John N. Billings  
Christopher L. Thacker  
Richard J. Dieffenbach  
Billings Law Firm, PLLC  
145 Constitution Street  
Lexington, KY 40507  
nbillings@blfky.com  
cthacker@blfky.com  
rich.dieffenbach@blfky.com  
*Counsel for Defendant Greg Craddock on  
behalf of himself and all others similarly  
situated*

W. Henry Graddy, IV  
137 North Main St.  
Versailles, KY 40383  
*Counsel for Objector Roger Quarles*

David Tachau  
101 S. Fifth St., Ste. 3600  
PNC Tower  
Louisville, KY 40202-3120  
(502) 238-9900  
dtachau@tachaulaw.com  
*Counsel for Billings Law Firm, PLLC*

  
Fayette Circuit Court Clerk

# **Exhibit C**

COMMONWEALTH OF KENTUCKY  
FAYETTE CIRCUIT COURT  
FOURTH DIVISION

Civil Action No. 20-CI-00332

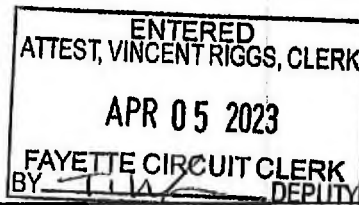
HAYNES PROPERTIES, LLC,  
*et al.*

PLAINTIFFS

vs.

Order  
re Renewed Graddy Motion

BURLEY TOBACCO GROWERS  
COOPERATIVE ASSOCIATION,  
*et al.*



DEFENDANTS

This matter came before the Court on March 24, 2023, to hear the Renewed Graddy Motion for Award of Attorney's Fees and Notice ("Renewed Motion"), filed by the law firm of W.H. Graddy & Associates ("the Graddy firm") and seeking an award of attorney's fees in an amount up to \$99,375. Class Counsel and the Co-op having filed responses thereto, the parties having had an opportunity to be heard, and the Court being duly and sufficiently advised, IT IS HEREBY ORDERED as follows:

1. The Court DENIES the Renewed Motion, declining to make any award of attorney's fees to the Graddy firm.

2. This Order is final and appealable, there being no just cause for delay.

Given under my hand this 3/28 <sup>March</sup> day of April, 2023.

/S/ JULIE MUTH GOODMAN  
A TRUE COPY  
ATTEST: VINCENT RIGGS, CLERK  
FAYETTE CIRCUIT COURT  
BY: [Signature] DEPUTY

Hon. Julie Muth Goodman  
Judge Fayette Circuit Court

PREPARED and ATTESTED BY the undersigned that this proposed Order was prepared in conformity with rulings made at the hearing and circulated on 3/27/23 to counsel present at the

TW

hearing pursuant to RFCC 19B, and that attorney W. Henry Graddy, IV authorized signing for him as "have seen," but not "agreed."

/s/ Katherine K. Yunker

Katherine K. Yunker (KBA # 79592)

Jason R. Hollon (KBA # 96148)

MCBRAYER PLLC

201 E. Main Street, Suite 900

Lexington, KY 40507-1361

*Counsel for Settlement Class*

HAVE SEEN:

/s/ W. Henry Graddy, IV (w/ permission)

W. Henry Graddy, IV

W.H. GRADDY & ASSOCIATES

137 N. Main Street

Versailles, KY 40383

*Counsel for Objectors Roger Quarles et al.  
and representative of the Movant firm*

### **CLERK'S CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of this filing has been served on this 5th day of April, 2023, via U.S. Mail, first class, to the following:

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

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

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

John N. Billings  
Richard J. Dieffenbach  
BILLINGS LAW FIRM, PLLC  
145 Constitution Street  
Lexington, KY 40507  
*Counsel for Defendant Greg Craddock*

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

And to the following unrepresented objectors to the proposed Settlement, listed on Schedule A of the 6/11/21 Opinion and Order, at the addresses given in their respective objections:

J.B. Amburgey  
David Barnes  
Jacob Barnes  
Robert E. Barton  
Ben Clifford  
Lincoln Clifford  
Wayne Cropper  
Josh Curtis  
George M. Darnell  
Jennifer Darnell  
Brent Dunaway  
Michael Furnish  
William David Furnish  
Leonard Edwin Gilkison

Billy G. Hall  
Dudley Wayne Hatcher  
Steve Lang  
Berkley Mark  
Bruce Quarles  
Steven Quarles  
Travis Quarles  
Jerry Rankin  
Richard Sparks  
Jarrod Stephens  
Addison Thompson  
William A. Thomson  
Danny Townsend  
Judy Townsend



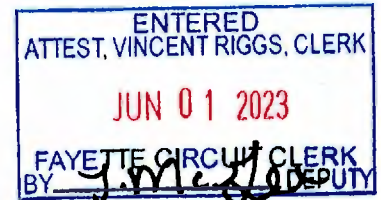
Clerk, Fayette Circuit Court

# Exhibit D



COMMONWEALTH OF KENTUCKY  
FAYETTE CIRCUIT COURT  
FOURTH DIVISION

Civil Action No. 20-CI-00332



HAYNES PROPERTIES, LLC,  
*et al.*

PLAINTIFFS

vs.

**Order denying Graddy CR 59 Motion to Alter, Amend  
or Vacate this Court's Order of April 5, 2023**

BURLEY TOBACCO  
GROWERS COOPERATIVE  
ASSOCIATION, *et al.*

DEFENDANTS

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This matter came before the Court on May 5, 2023, to hear the CR 59 Motion to Alter, Amend or Vacate this Court's Order of April 5, 2023 ("CR 59 Motion"), filed by the law firm of W.H. Graddy & Associates (the "Graddy firm") and seeking this Court alter, amend, or vacate its April 5, 2023 Order denying the Graddy firm's Renewed Motion for Award of Attorney's Fees. Class Counsel having filed a response thereto, the parties having had an opportunity to be heard, and the Court being duly and sufficiently advised, IT IS HEREBY ORDERED as follows:

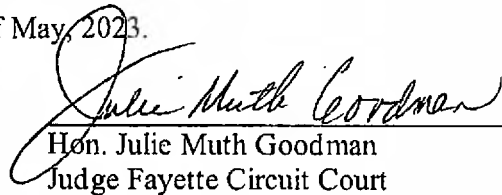
1. The Court DENIES the CR 59 Motion. For the reasons stated in the Court's April 5, 2023 Order and its August 24, 2021 Order, both of which are expressly adopted and incorporated herein, and for those reasons stated on the record on May 5, 2023, March 24, 2023, and August 20, 2021, the Court CONCLUDES that the Graddy firm is not entitled to an award of attorney's fees or costs as such an award is not authorized by law or by any agreement of the parties. In response to allegations made or positions taken in the CR 59 Motion or during the hearing, the Court also FINDS that the Graddy firm's representation on behalf of its clients was not a "but for" cause of any modification to the settlement agreement provisions relating to the \$1.5 million grant or any benefit to the class as a whole because (a) the Court had raised issues

with the settlement agreement provisions about the \$1.5 million before any written objections were filed, (b) there were objectors to the provisions about the \$1.5 million other than the persons the Graddy firm represented, and (c) the Court's exercise of its fiduciary responsibilities to the class were the actual and sufficient reason for any modifications ordered in the Amended Opinion and Order Approving Partial Settlement entered July 28, 2021.

2. The Court further DENIES as MOOT the Graddy firm's request in its CR 59 Motion for leave to negotiate an award of attorney's fees and costs with class counsel and the parties, it being represented at the hearing that there had been unsuccessful negotiations following the filing of the CR 59 Motion.

3. This order is final and appealable, there being no just cause for delay.

Given under my hand this 25<sup>th</sup> day of May, 2023.

  
Hon. Julie Muth Goodman  
Judge Fayette Circuit Court

PREPARED BY:

/s/ Jason R. Hollon  
Katherine K. Yunker (KBA # 79592)  
Jason R. Hollon (KBA # 96148)  
MCBRAYER PLLC  
201 E. Main Street, Suite 900  
Lexington, KY 40507-1361  
*Counsel for Settlement Class*

HAVE SEEN, in conformity  
with the rulings made at hearing:

/s/ W. Henry Graddy, IV (w/permission)

W. Henry Graddy, IV  
W.H. GRADDY & ASSOCIATES  
137 N. Main Street  
Versailles, KY 40383

*Counsel for Objectors Roger Quarles et al.  
and representative of the Movant firm*

/s/ Kevin G. Henry (w/permission)

Kevin G. Henry  
Charles D. Cole  
STURGILL, TURNER, BARKER &  
MALONEY PLLC  
333 West Vine Street, Suite 1500  
Lexington, KY 40507

*Counsel for Defendant Burley Tobacco  
Growers Cooperative Association*

### CLERK'S CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been served on this 1st day of June 2023, via U.S. Mail, first class, to the following counsel and unrepresented objectors to the proposed settlement:

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

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

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

J.B. Amburgey  
P. O. Box 47  
Means, KY 40346

David Barnes  
768 Bowman Mill Road  
Berry, KY 41003

Jacob Barnes  
1088 Bowman Mill Road  
Berry, KY 41003

Ben Clifford  
2459 Ky. Hwy. 1284 E  
Cynthiana, KY 41031

Lincoln Clifford  
Ky Hwy 1284 E  
Cynthiana KY 41031

Wayne Cropper  
5350 Raymond Road  
Mayslick, KY 41055

Josh Curtis  
1402 KY Hwy 1940  
Cynthiana, KY 41031

Robert E. Barton  
Barton Bros. Farm  
4095 Huffman Mill Pike  
Lexington, KY 40511

George M. Darnell  
1593 Grays Run Pike  
Cynthiana, KY 41031

Jennifer Darnell  
248 Gray Lane  
Cynthiana, KY 41031

Brent Dunaway  
1547 KY Highway 1054 N  
Berry KY 41003

William David Furnish  
1320 Highway 982  
Cynthiana, KY 41031

Michael Furnish  
750 Smith Martin Ln.  
Cynthiana, KY 41031-6997

Leonard E. Gilkison  
345 Calloway White Road  
Winchester, KY 40391

George M. Darnell  
1593 Grays Run Pike  
Cynthiana, KY 41031

Dudley Wayne Hatcher  
648 Hood Rd.  
Morgantown, KY 42261

Bruce Quarles  
Steven Quarles  
Travis Quarles  
10570 Owenton Road  
Frankfort, KY 40601

Steve Lang  
703 Gray Lane  
Cynthiana, KY 41031

Berkley Marks  
5399 Paris Pike  
Mt. Sterling KY 40353

Jerry Rankin  
4540 Perryville Road  
Danville, KY 40422


Richard Sparks  
1499 Thatchers Mill  
Paris, KY 40361

Jarrold Stephens  
504 Commonwealth Lane  
Cynthiana KY 41031

Addison Thomson  
2224 Mt. Vernon Park  
Cynthiana, KY 41031

William A. Thomson  
1809 Mt. Vernon Pike  
Cynthiana, KY 40131

Danny Townsend  
Judy Townsend  
11620 Main St.  
Jeffersonville, KY 40337

  
Clerk, Fayette Circuit Court

J.M. Lee