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

ELECTRONICALLY FILED

HAYNES PROPERTIES, LLC, *et. al.* PLAINTIFFS

v.

BURLEY TOBACCO GROWERS COOPERATIVE ASSOCIATION, *et al.* DEFENDANTS

PETITION FOR AWARD OF ATTORNEY'S FEES AND NONTAXABLE COSTS

NOTICE

Please take notice that this motion will come on for consideration by the Court at the Fairness Hearing scheduled for Wednesday, February 24, 2021, beginning at 9:00 a.m.

PETITION

The law firm of McBrayer PLLC ("McBrayer"), as Class Counsel and as counsel for the Plaintiffs and Settlement Class Representatives, Haynes Properties, LLC, Mitch and Scott Haynes dba Alvin Haynes & Sons, and S&GF Management, LLC (collectively, the "Settlement Class Representatives"), pursuant to CR 23.08 and KRS 412.070, respectfully requests an award of attorney's fees in an amount equal to 25% of the net proceeds (as defined herein) from the liquidation of the Burley Tobacco Growers Cooperative Association (the "Co-op") and the reimbursement of its nontaxable costs advanced by it in the amount of $18,561.16 and as may subsequently be incurred. In support, McBrayer states as follows:

For more than a year, McBrayer has engaged in thousands of hours of work to further the interests of the members of the Settlement Class. McBrayer's efforts culminated in the settlement, the preliminary certification of the Settlement Class, McBrayer's appointment as

class counsel, and the submission of the settlement for consideration by the Settlement Class.[1] McBrayer's efforts, applied with the professional skill and experience of its attorneys and other personnel, have secured a significant result with substantial benefits for the Settlement Class members. McBrayer has represented the members of the Settlement Class in an efficient and responsible manner and has invested its time and resources into furthering their interests and will continue to do so.

For these reasons, and those stated in more detail below, McBrayer's request for 25% of the net proceeds[2] from the dissolution of the Co-op and reimbursement of its nontaxable costs is reasonable and appropriate.

I. McBrayer's request for 25% of the net proceeds of the Co-op's dissolution is reasonable.

A. The proposed settlement will create a common fund.

CR 23.08 governs the award of attorney's fees in a class action providing that, "[i]n a certified class action the court shall approve or award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." CR 23.08. This rule was introduced into the Kentucky Civil Rules of Procedure in 2010, to be effective in 2011 and, to date, only one unpublished opinion has discussed the requirements in any length. In *College Retirement Equities Fund, Corp. v. Rink*, No. 2012-CA-002050-MR, 2015 WL 226112 (Ky.

[1] It is anticipated that the Billings Law Firm ("Billings") will file a similar request seeking attorney's fees for furthering the interests of the Settlement Class. McBrayer notes that it does not seek award of a fee which combined with any award to Billings would total in excess of 25% of the net proceeds from the liquidation of the Co-op. As previously disclosed pursuant to Civil Rule 23.05(2), McBrayer and Billings entered into a fee splitting arrangement related to this matter in which the attorney's fees received by either or both firms would be split evenly between the firms.

[2] For the purposes of this Petition, the "net proceeds" from the dissolution of the Co-op are the proceeds that remain after the Co-op has liquidated its assets, paid its debts, and contributed the $1.5 million toward funding a nonprofit organization, in accordance with the settlement.

App. Jan. 16, 2015),[3] the Kentucky Court of Appeals examined an award of attorney's fees pursuant to CR 23.08. The *Rink* Court noted that "no Kentucky appellate court has addressed how a trial court is to determine a reasonable fee under CR 23.08" and it relied upon the federal courts' interpretation of the analogous Fed. R. Civ. P. 23(h).[4]

An award of a reasonable attorney's fees in this case is authorized by Kentucky law relating to common-fund recoveries. The common fund doctrine recognizes that a "lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). This doctrine has been codified in KRS 412.070(1) which, in part, provides:

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

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

---

[3] Pursuant to Civil Rule 76.28(4)(c), a copy of this unpublished opinion is attached hereto as **Exhibit A** for the Court's consideration.

[4] As Civil Rule 23 mirrors its federal counterpart, Fed. R. of Civ. Pro. 23, *see Hensley v. Haynes Trucking, LLC*, 439 S.W.3d 430, 436 (Ky. 2018), Kentucky courts rely upon federal case law when interpreting the Kentucky class action rule. *Curtis Green & Clay Green, Inc. v. Clark*, 318 S.W.3d 98, 105 (Ky. App. 2010).

The settlement provides for the dissolution of the Co-op and a liquidation of its assets. From the gross liquidated assets, the payment of any of the Co-op's debts and expenses will be made and there will be an allocation of $1.5 million for the formation of a non-profit advocacy group. The remaining net assets constitute a common fund for the benefit of the Settlement Class.[5] This common fund will be under the control and supervision of the Court as it stems from the litigation under this Court's jurisdiction.[6] McBrayer, as counsel for the Plaintiffs/Class Representatives, and more recently as appointed Class Counsel, is responsible for the creation of the common fund, and is thereby entitled to request a fee for its work in the creation of the common fund to "be paid out of the funds recovered before distribution." KRS 412.070(1).[7]

B. The Court should use a percentage of the fund to award McBrayer an attorney's fee.

As expressed in the plain language of both KRS 412.070 and CR 23.08, the core evaluation for an award of attorney's fees is reasonableness. It is vital that the awarded attorney's fee fairly compensate the attorneys for the amount of work done as well as the results achieved.[8] To determine the reasonableness of a fee award, courts generally employ one of two methods—the percentage of the fund method or the lodestar method—or a combination of the two.[9] Under the percentage of the fund method, a court must determine a percentage of the

---

[5] 5 Newberg on Class Actions § 15:56 (5th ed. 2012) ("The most straightforward common fund situation is that in which the defendant is ordered to pay—or agrees to pay through a settlement—a set amount of money to a group of litigants. The lump sum that the defendant pays constitutes the common fund.").

[6] *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("[j]urisdiction over the fund involved in the litigation allows a court to prevent [unjust enrichment of absent class members] by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit.").

[7] *See also* 5 Newberg on Class Actions § 15:56 (5th ed. 2012) ("If class counsel litigates a class action resulting in the establishment of a monetary settlement fund, they have most obviously recovered a common fund entitling them to a fee therefrom.").

[8] *Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993).

[9] Some courts, in utilizing the percentage of the fund method, also perform a lodestar cross-check on the reasonableness of the percentage award. 5 Newberg on Class Actions § 5:68 (5th ed. 2012). The cross-

settlement to be awarded to class counsel, with the focus of the inquiry being upon the benefit to the class; the lodestar method, on the other hand, awards a fee in relation to the hours reasonably expended by an attorney on the matter at a reasonable hourly rate of compensation.[10] Here, the percentage of the fund method is the appropriate method of awarding McBrayer an attorney's fee as it is consistent with Kentucky law, is justified by the circumstances of this case, recognizes the result achieved, and acknowledges the efficiency by which the result was obtained.[11]

In Kentucky, a percentage of the common fund is an appropriate request and courts have concluded that 25% of a common fund is reasonable.[12] Similarly, federal courts routinely employ the percentage of the fund method[13] and at least two federal Courts of Appeals *require* it for an award of attorney's fees in a common fund case.[14] Therefore, McBrayer's 25% request as a percentage of the fund is consistent with decisions of courts addressing this issue.

---

check requires courts to compare the hours reasonably expended in a matter multiplied by a reasonable rate and compare that number to the award proposed under the percentage of the fund method. Kentucky has rejected that such a cross-check is required. *See Rink*, 2015 WL 226112, at *8 (rejecting an argument that the lodestar cross-check was required). The cross-check requires courts to compare the hours reasonably expended in a matter multiplied by a reasonable rate and compare that number to the award proposed under the percentage of the fund method. Further, a cross-check is of limited value here because the dollar value of the common fund is uncertain and significant work on behalf of the class remains.

[10] *See Gascho v. Global Fitness Holdings, LLC*, 822 F.3d 269, 279 (6th Cir. 2016) (describing the methods).

[11] An award based upon the percentage of the fund is consistent with the general guidance in *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) that "[a] request for attorney's fees should not result in a second major litigation."

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

[13] *See, e.g., Spine and Sports Chiropractic, Inc. v. ZirMed, Inc.*, Civil Action No. 3:13-CV-00489, 2015 WL 197698, *3 (W.D. Ky. May 4, 2015) (noting that 25% is the benchmark for common fund cases, but approving fee of 33% of common fund).

[14] *See Fresh Kist Produce, L.L.C. v. Choi Corp.*, 362 F. Supp. 2d 118, 127 (D.D.C. 2005) (holding that attorney's fees in a common fund case are calculated under the percentage of the fund method); *see also*

An award based on the percentage of the fund also reflects the particular circumstances of this case and the common fund created. As the dissolution of the Co-op has not occurred, both the amount of the gross and net proceeds, and the number of hours that will be incurred in the future by McBrayer in furtherance of its duties, are unknowable at this time. As of December 31, 2020, McBrayer has expended more than 2,100 hours on this matter.[15] This amount does not reflect the substantial work that will be entailed in continuing to oversee the notices program, the receipt, review, and analysis of supporting documentation submitted by growers/class members, and other tasks attendant to moving the partial settlement forward to possible approval.[16] Moreover, significant additional time will be necessary if the settlement is approved, including facilitating and administering distributions to members of the Settlement Class. It is expected that the work involved in representing the Settlement Class will extend into at least 2022, and potentially longer.

Accordingly, at the time of the Fairness Hearing, the amount of time that will be necessary to implement the partial settlement if approved, including distributions to the Settlement Class, will be unknown. The percentage of the fund, which is focused upon results as opposed to hours worked, is appropriate where the hours that will be required to be expended are unknown.[17] Applying a lodestar method, on the other hand, would have the unwanted effect of

---

Camden I Condo. Ass'n, Inc. v. Dunkle, 946 F.2d 768, 774 (11th Cir. 1991) (percentage of the fund approach "better reasoned" in a common fund case).

[15] The factual background for this Petition, including the time and costs expended by McBrayer are supported by the Affidavit of Robert E. Maclin, III (attached hereto as **Exhibit B**). An equity partner will be available to testify at the Fairness Hearing in support of this Petition. As the percentage of the fund method does not focus on attorney time records, McBrayer has not provided them with this Petition. However, McBrayer can make such records available to the Court for *in camera* review.

[16] Accordingly, McBrayer expects this time will significantly increase over the months of January and February and intends to supplement its filing by the Court's deadline on February 17, 2021.

[17] *See Rawlings v. Prudential-Bache Properties, Inc.*, 9 F.3d 513, 516 (6th Cir. 1993) ("the percentage of the fund method more accurately reflects the results achieved.").

encouraging counsel to draw out the work required moving forward, without there being necessarily any additional benefit to the class members, as the ultimate reward will be dependent upon hours worked.[18]

Further, a percentage of the fund award accurately reflects the result McBrayer was able to achieve in the settlement. A percentage of the fund award recognizes and rewards counsel that have obtained a significant result for the class. It serves to align the interests of both counsel and the settlement class members as each will benefit from every dollar obtained for the common fund. Here, McBrayer obtained a settlement in which dissolution was secured and, aside from the $1,500,000 for a nonprofit advocacy group (which is intended to be of benefit to farmers in the Settlement Class), the net assets will be distributed to the Settlement Class. This provides members of the Settlement Class with more than the majority of the Co-op's assets and the Co-op's wasteful spending of its assets was cut off. This is a significant benefit for the members of the Settlement Class and warrants a percentage of the fund in recognition.[19]

Finally, an award of a percentage of the fund would encourage and recognize McBrayer's efficient litigation of the Co-op's dissolution.[20] Instead of running up its hours in litigation, McBrayer maximized pressure against the Co-op early in this lawsuit by filing a motion for injunctive relief, by serving extensive discovery, and issuing numerous subpoenas. These efforts

---

[18] *See Rawlings*, 9 F.3d at 516-17(finding that the lodestar method "has been criticized for being too time-consuming of scarce judicial resources," for "the emphasis it places on the number of hours expended by counsel rather than the results obtained," and because "it also provides incentives for overbilling and the avoidance of early settlement.").

[19] *See Rink*, 2015 WL 226112, at *3 (finding a $22.4 million recovery to be an "exceptional" result and affirming 25% percentage of the fund award); *see also In re DPL Inc., Sec. Litig.*, 307 F. Supp. 2d 947, 951 (S.D. Ohio 2004) (granting percentage of the fund request to recognize "outstanding settlement" of securities class action).

[20] *See In re Copley Pharmaceutical, Inc.*, 1 F.Supp.2d 1407, 1411 (D. Wyo. 1998) ("[T]he percentage of the fund method rewards efficiency, while the lodestar method rewards inefficiency.").

forced the Co-op to agree to engage in settlement discussions with an agreed stay of discovery. In doing so, McBrayer achieved efficiency in the Co-op's dissolution, stopped the waste of the Co-op's assets, and, if approved, will get money in the hands of the members of the Settlement Class in an expedited fashion. Moreover, McBrayer has undertaken significant steps to represent the members of the Settlement Class since the settlement was reached. All of these efforts benefited the Settlement Class and should be recognized by a percentage of the fund award.

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

C. McBrayer's request of 25% of the common fund is reasonable.

In awarding attorney's fees in a common fund case, a court must first ascertain the size of the fund on which the percentage is requested.[21] Based upon current information, it is estimated that the Co-op's equity is approximately $29.7 million, rendering a common fund for distribution to the Settlement Class, after the allocation of $1.5 million for the formation of a non-profit advocacy group, of approximately $28.2 million.[22] Until the Co-op is dissolved, this figure cannot be known exactly; however, it is not expected to be more than the $29.7 million estimate. If the partial settlement is approved, the Court will retain jurisdiction over the common fund throughout the dissolution and distribution process and can re-evaluate any award at a later date if, for example, the size of the common fund makes the award unreasonable.

[21] 5 Newberg on Class Actions § 5:68 (5th ed. 2012).

[22] This is based upon the recent estimate of Wayne Stratton, a retained financial expert. Stratton's calculation is based on assets that have not been sold and includes a tobacco inventory valued at $13.3 million. *See December 18, 2020 Stratton Letter* (attached hereto as **Exhibit C**).

Once a court determines the size of the fund, and the method to utilize to calculate the attorney's fee, it must turn to the reasonableness of the requested fee. As the rule does not direct how the assessment of reasonableness is to be made, courts have employed various tests or analyses to do so, and Kentucky does not have a controlling test. Federal appellate courts have all developed differing approaches to reasonableness determinations.[23] A set of twelve factors[24] listed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)[25] is used by some courts in determining the reasonableness of a requested fee.[26] The *Johnson* factors closely track ABA Model Rule of Professional Conduct 1.5(a) and, as a result, closely track Kentucky Rule of Professional Conduct 3.130(1.5), which governs the reasonableness of an attorney's fee arrangement.[27] As such, the *Johnson* factors are particularly relevant to, and demonstrate that, McBrayer's request for 25% is reasonable.[28]

---

[23] *See* 5 Newberg on Class Actions § 15:82 (5th ed. 2012) (describing the differing approaches).

[24] The *Johnson* factors are: (1) time and labor required; (2) novelty and difficulty of issues; (3) skill required; (4) loss of other employment in taking the case; (5) customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by client or circumstances; (8) amount involved, and results obtained; (9) counsel's experience, reputation, and ability; (10) case undesirability; (11) nature and length of relationship with the client; and (12) awards in similar cases. *Johnson*, 488 F.2d at 717-19.

[25] *Johnson* was abrogated on other grounds by *Blanchard v. Bergeron*, 489 U.S. 87 (1989). *Johnson* is a statutory fund case and concluded that a litigant's contingency fee arrangement placed a limit on the amount of attorney's fees recoverable by the litigant's attorney under the Civil Rights Attorney's Fees Award Act; *Blanchard* reversed this part of the *Johnson* decision while commenting that "*Johnson's* 'list of 12' thus provides a useful catalog of factors to be considered in assessing the reasonableness of attorney's fees[.]". *Blanchard,* 489 U.S. at 93.

[26] *See, e.g., Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454-55 (10th Cir. 1988) (concluding because the *Johnson* "factors measure the attorneys' contributions, they are also appropriate in setting and reviewing percentage fee awards in common fund cases.")

[27] *See* SCR 3.130(1.5).

[28] One factor, the nature and length of the relationship with the client, has little application in class action context and will not be discussed. *See* 5 Newberg on Class Actions § 15:77 (5th ed. 2012). Others are combined for discussion below with similar factors.

1) Awards in similar cases.

The requested 25% award is in line with awards in common fund cases in various other courts. The *Rink* Court noted that "[f]ederal Courts within Kentucky and the Sixth Circuit universally recognize that the percentages awarded in common fund cases typically range from 20 to 50 percent of the common fund awarded." *Rink*, 2015 WL 226112, at *6 (internal quotations omitted). In *Rink*, an award that constituted 25% of the common fund was held to be reasonable. *Id*.[29] This is consistent with decisions of other courts.[30]

Furthermore, the Co-op, per the settlement, agreed that it will not object to any petition for attorney's fees that does not exceed 25% of the common fund. Federal Rule 23(h) states that "[i]n a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or *by the parties' agreement*." Fed. R. Civ. P. 23(h) (emphasis added). The Advisory Committee notes explain that "[t]he agreement by a settling party not to oppose a fee application up to a certain amount, for example, is *worthy of consideration*, but the court remains responsible to determine a reasonable fee." 2003 Advisory Committee Notes, 215

[29] *See also Webster County Soil Conservation Dist. v. Shelton*, 437 S.W.2d 934 (Ky. 1969) (25% fee in a common fund case).

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

F.R.D. at 233 (2003).[31] The Co-op's agreement not to oppose a request for 25% is another consideration in favor of awarding McBrayer's request for 25% of the common fund.

2) The time and labor required.

McBrayer's engagement in this matter has spanned the course of more than a year, has involved the substantial commitment of time by six McBrayer attorneys, with other attorneys, paralegals, and personnel contributing to moving this matter forward. Over 2,100 hours of attorney and paralegal time has been devoted to the matter so far.[32] This work has been significant and not only required a large investment of McBrayer's time and labor to achieve positive results but also required a significant amount of skill.[33] Through its efforts on behalf of its clients and others similarly situated, McBrayer secured an agreement regarding the Co-op's dissolution that is beneficial to each member of the Settlement Class and was able to stop the ongoing waste of Co-op assets.

McBrayer has participated in hearings and prepared court filings including motions to preliminarily certify the Settlement Class, to appoint Settlement Class Representatives, and to appoint Class Counsel. Once the Court authorized the submission of the settlement for consideration by the Settlement Class members, McBrayer developed a comprehensive notice program designed to reach the known and unknown members of the Settlement Class and sought out and located a Settlement Administrator. McBrayer personnel have worked to help members

---

[31] Materials relating to the 2003 amendments to the Federal Rules of Civil Procedure, including the Advisory Committee Notes, are published at 215 F.R.D. 158-376 (2003).

[32] This includes efforts prior to initiating this litigation. In common fund cases, class counsel should be awarded for work done prior to the Court's acquisition of jurisdiction over the matter if the work furthered the creation of the fund. *See Wininger v. SI Mgmt. L.P.*, 301 F.3d 1115, 1121 (9th Cir. 2002) ("[B]ecause the district court had jurisdiction over the resulting fund, it was within its equitable power to award fees for work that helped create the fund, even though the fees compensated for work done outside the strict confines of the litigation immediately before the court.").

[33] A description of efforts and summary of the hours put in by McBrayer are detailed in the attached affidavit of Robert E. Maclin, III.

of the Settlement Class submit W-9s and other supporting documentation and have answered their questions. McBrayer intends to continue to devote the necessary personnel and time to represent the Settlement Class in the future.

3) The novelty and difficulty of issues.

The claims asserted present difficult and novel issues as they involve breaches of fiduciary duties, the dissolution of an agricultural cooperative, and the inherent complexities that are generally presented by a large class action.[34] Courts have found, in the context of corporations, that in cases in which insolvency and agent misconduct are involved, there is manifest complexity.[35] Moreover, common fund cases, especially those in which millions of dollars are at stake, are often considered complex.[36] Because of this, the motions, orders, and petitions that McBrayer has filed have required significant legal research and analysis.

4) The skill required and counsel's experience and ability.

Given these complexities, there was significant skill and experience required to move this matter forward. As detailed in the attached Affidavit, the attorneys that have primarily been working on this case at McBrayer have extensive experience in complex litigation, class actions, and some have prior experience litigating against the Co-op. This experience and skill were necessary given that, in response to lawsuit, the Co-op retained seasoned lawyers who have many years' experience litigating and defending claims like those brought in this case. The Co-

[34] This is especially true given the relative lack of precedent on class actions in Kentucky.

[35] *See In re Investors Funding Corp. of New York Secur. Litig.*, 9 BR 962 (S.D. N.Y. 1981) (finding manifest complexity where a corporation's insolvency had been concealed, and where corporation agents were alleged to have known or recklessly disregarded facts putting them on notice that the corporation was in "precarious financial condition.").

[36] *See In re Thirteen Appeals arising out of San Juan Dupont Plaza Hotel Fire Litigation*, 56 F.3d 295, 307 (1st Cir. 1995) ("In complex litigation—and common fund cases, by and large, tend to be complex—the [percentage-of fund] approach is often less burdensome to administer than the lodestar method" and is therefore preferred.) (emphasis added).

op mounted a strong, multifaceted defense, requiring a high degree of skill and experience to be effective in advancing the interests of current and former Co-op members.

5) Loss of other employment in taking the case, the time limitations imposed, and the case undesirability.

McBrayer expended more than 2,100 hours and a number of its attorneys have spent significant time on this matter and will continue to do so. As a result, these attorneys were not available to work on other matters for which payment was not contingent. The McBrayer personnel that have worked on this matter have a full slate of other cases and matters that require their attention. Moreover, McBrayer personnel have been required to decline participation in representation of fee-paying clients as a result of their time commitments to this matter. Given this time limitation, the risk that the time would not ultimately be compensated, and the novel issues presented, this case could be considered undesirable.

6) Customary fee and whether the fee was fixed or contingent.

An attorney who takes on a matter on a contingency basis risks that the work done will go uncompensated (or undercompensated) if the result reached is not favorable. Here, McBrayer took this case on a contingent fee basis and risked hundreds of thousands of dollars of time and costs on this case without any guarantee that it would recoup the investment. The substantial risk associated with contingency litigation further justifies McBrayer's requested fee award.[37] In customary contingency fee cases, attorneys charge their clients anywhere from 33 to 40%. This is more than the 25% fee that is being requested by McBrayer despite its large investment of time and resources, and the risk of nonpayment.

[37] "A contingency fee arrangement often justifies an increase in the award of attorneys' fees." *In re Sunbeam Sec. Litig.*, 176 F.Supp.2d 1323, 1335 (S.D. Fla. 2001).

7) Amount involved and results obtained.

As discussed above, through extensive negotiations and as a result of the pressure placed upon the Co-op through McBrayer's litigation efforts, members of the Settlement Class stand to receive the majority of the Co-op's assets and the Co-op's wasteful spending of its assets was cut off.[38] This represents an "exceptional" result for the members, which courts have found to favor requested fee awards.[39] Further, this result was obtained with significant efficiency that allowed for the avoidance of prolonged litigation that would have done nothing but continue the Co-op's asset depletion resulting in a smaller common fund for the Settlement Class.[40] This efficiency further justifies the requested award.

McBrayer's request for a 25% award is reasonable. It is consistent with other cases, reflects McBrayer personnel's time and labor, and rewards the risk taken in pursuing the matter. The members of the Settlement Class, through McBrayer's efforts, have significantly benefited and will continue to benefit from McBrayer's efforts in the future.

---

[38] In assessing class action settlements, Courts can consider the "risk of depletion." *In re Teletectronics Pacing Systems, Inc.*, 138 F. Supp 2d 985, 1014 (S.D. Ohio 2001).

[39] *See Rink*, 2015 WL 226112, at *3 (finding a $22.4 million recovery to be an "exceptional" result); *see also In re DPL Inc., Sec. Litig.*, 307 F. Supp. 2d 947, 951 (S.D. Ohio 2004) (granting percentage of the fund request to recognize "outstanding settlement" of securities class action).

[40] Courts have noted that obtaining results with "superior efficiency or economy,"*e.g.*, "an early settlement or resolution of a case" provides valuable benefits to the Settlement Class and benefits the public interest. *See Mashburn v. Nat'l Healthcare, Inc.*, 684 F.Supp. 679, 702 (M.D. Ala. 1988); *see also In re Cardizem CD Antitrust Litigation*, 218 F.R.D. 508, 530 (E.D. Mich. 2003) ("[T]here is a strong public interest in encouraging settlement of complex litigation and class action suits because they are notoriously difficult and unpredictable and settlement conserves judicial resources.").

II. McBrayer should be reimbursed for its necessary costs.

McBrayer incurred a total of $18,561.16 in nontaxable costs pursuing this matter.[41] Civil Rule 54.04 allows a prevailing party its costs as a matter of course by filing a bill of costs.[42] The rule specifically provides examples of the costs recoverable in this manner including "filing fees, fees incident to service of process and summoning of witnesses."[43] These type of costs are known as taxable costs, and are awarded at or near the time of judgment.[44] McBrayer intends to file for its taxable costs at a later time including service costs and filing fees.

In addition to taxable costs, Civil Rule 23.08 provides that "[i]n a certified class action the court shall approve or award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Similarly, Kentucky's common fund statute provides that an attorney shall be allowed their "reasonable compensation for his services, in addition to the costs." KRS 412.070(1). In addition to any allowed recovery of taxable costs, an attorney that produced or preserved a common fund is entitled to the nontaxable costs of litigation.[45] Under the common fund doctrine, class counsel is entitled to reimbursement of reasonable out-of-pocket costs that would normally be charged to a fee-paying client.[46]

Here, the nontaxable costs incurred by McBrayer through January 15, 2021 are reasonable and are of the type that normally would be charged to a fee-paying client. McBrayer

---

[41] A listing of McBrayer's costs incurred to date is attached hereto as **Exhibit D.**

[42] S*ee also* KRS 453.040(1)(a) ("The successful party in any action shall recover his costs, unless otherwise provided by law.").

[43] KRS 453.050 provides for additional costs that are taxable.

[44] *See Brookshire v. Lavigne*, 713 S.W.2d 481, 481 (Ky. App. 1986) (describing CR 54.04 as "taxable costs.").

[45] *See Mills v. Elec. Auto-Lite Co.,* 396 U.S. 375, 392 (1970) (discussing costs in common fund context).

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

seeks reimbursement of the following costs which are reasonable: a financial expert, transcripts/videos, mileage, advertising, copying/printing, and telephone fees.[47] These costs are reasonable and are the type that would normally be paid by a fee-paying client. As such, McBrayer requests that they be awarded the same with the ability to move the Court for award of any additional costs incurred moving forward.

CONCLUSION

Accordingly, for these reasons, McBrayer respectfully requests an award of attorney's fees in an amount equal to 25% of the net proceeds from the liquidation of the Co-op and the reimbursement of its nontaxable costs advanced by it and as may subsequently be incurred.

Respectfully submitted,

/s/Robert E. Maclin, III

Robert E. Maclin, III
Katherine K. Yunker
Jason R. Hollon
McBrayer PLLC
201 E. Main Street, Suite 900
Lexington, KY 40507-1361
(859) 231-8780
remaclin@mcbrayerfirm.com
Counsel for Plaintiffs and Class Representatives

[47] *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 265 (N.D. Cal. 2015) (finding that class counsel litigation fees in an amount of $21,747.28 that included "filing and printing fees…costs associated with hiring an economic expert consultant…[and] hotel and travel costs" to be reasonable in common fund case); *Custom LED, LLC v. eBay, Inc*, No. 12-CV-00350-JST, 2014 WL 2916871, at *9 (N.D. Cal. June 24, 2014) (telephone fees are reasonable in a common fund case).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this filing was served this 15th day of January, 2021, via the KYeCourts e-filing system, and via U.S. Mail postage prepaid 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

Courtesy Copy To:
Hon. Julie Muth Goodman
c/o Alicia Dean
aliciadean@kycourts.net

Kevin G. Henry
Charles D. Cole
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

John N. Billings
Christopher L. Thacker
Richard J. Dieffenbach
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

/s/Robert E. Maclin, III
Counsel for Plaintiffs and Class Representatives

2015 WL 226112
Only the Westlaw citation is currently available.

Unpublished opinion. See KY ST RCP Rule 76.28(4) before citing.

NOT TO BE PUBLISHED
Court of Appeals of Kentucky.

COLLEGE RETIREMENT EQUITIES FUND, CORP., Appellant

v.

Richard Donald RINK, individually and on behalf of all others similarly situated; Stites & Harbison, PLLC; Joseph L. Hamilton; Marjorie A. Farris; Clark C. Johnson; Amy K. Jay; Cassandra Wiemken; Michael K. Kim; Vonda Kirby; Chadwick A. McTighe; Foley, Bryant, Holloway & Raluy, PLLC; Irvin D. Foley; Anthony Raluy; Stewart & Irwin, P.C.; Donn H. Wray; Bradley Skolnick; Nick Gahl; Mark Menkveld; Ray Biederman; M. Scott Barrett; and Barrett & Associates, Appellees

NO. 2012–CA–002050–MR

JANUARY 16, 2015; 10:00 A.M.

Synopsis

Background: After settlement of investors' class action against investment company arising out of company's delays in distributing investor funds, the Jefferson Circuit Court, Olu A. Stevens, J., awarded class counsel $7.5 million in attorney fees, calculated as approximately one-third of the total $22.4 million available to be claimed by class members. Company appealed.

Holdings: The Court of Appeals, Lambert, J., held that:

[1] fee order adequately stated trial court's findings of fact and conclusions of law;

[2] trial court did not abuse its discretion by awarding attorney fees calculated as a percentage of a common fund, rather than by the lodestar method;

[3] fee award was reasonable under the circumstances; and

[4] trial court's alleged failure to compare the attorney fee it awarded to an award calculated using the lodestar method did not render the award arbitrary.

Affirmed.

Procedural Posture(s): On Appeal.

West Headnotes (5)

|1| **Costs** ⇨ Duties and proceedings of taxing officer

Order awarding attorney fees to class counsel after settlement of investors' action against investment company arising out of company's delays in distributing investor funds adequately stated trial court's findings of fact and conclusions of law supporting award of $7.5 million in fees; trial court found the results obtained for the settlement class to be exceptional, stated that attorney fees would not reduce the recovery of the settlement class, and that class counsel was competent, experienced, and diligent, and held that an award under the common fund doctrine was warranted, and that a proper fee would be approximately one-third of the total fund available for payment to class members. Ky. Rev. Stat. Ann. § 412.070; Ky. R. Civ. P. 23.08(3), 52.01.

|2| **Attorneys and Legal Services** ⇨ Lodestar and percentage methods compared or combined

Attorneys and Legal Services ⇨ Securities regulation

Trial court did not abuse its discretion after settlement of investors' class action against investment company arising out of company's delays in distributing investor funds by awarding attorney fees to class counsel calculated as a percentage of a common fund, rather than by the lodestar method, despite contention that settlement did not create a common fund, but rather was a claims-made settlement with no cap on investment company's liability; class members received a far greater benefit than if a cap had been established, and class members'

recovery was not reduced to pay for the services provided by class counsel. Ky. Rev. Stat. Ann. § 412.070.

[3] **Attorneys and Legal Services** Specific Services and Particular Cases

Trial court's $7.5 million attorney fee award to class counsel after settlement of investors' action against investment company arising out of company's delays in distributing investor funds, which was calculated as approximately one-third of the total $22.4 million available to be claimed by class members, was compatible with statute codifying the common fund rule, even though it was not based on the amounts actually claimed by class members; statute provided for payment of attorney fees out of the funds recovered before distribution. Ky. Rev. Stat. Ann. § 412.070.

[4] **Attorneys and Legal Services** Reasonableness in general

Trial court's $7.5 million attorney fee award to class counsel after settlement of investors' action against investment company arising out of company's delays in distributing investor funds, which was calculated as approximately one-third of the total $22.4 million available to be claimed by class members, was reasonable under the circumstances, despite contention that 25% was a more appropriate percentage, and that $7.5 million was excessive in light of the fact that only $16.1 million was actually claimed. Ky. Rev. Stat. Ann. § 412.070.

[5] **Attorneys and Legal Services** Securities regulation

Trial court's alleged failure to compare the $7.5 million attorney fee it awarded to class counsel, after settlement of investors' action against investment company arising out of company's delay in distributing investor funds, to an award calculated using the lodestar method did not render the award arbitrary; company presented the lodestar method to the trial court, including its argument that trial court should use that method as a cross check, and trial court awarded the fee it thought reasonable given the complexity of the case and the effectiveness of class counsel. Ky. Rev. Stat. Ann. § 412.070.

APPEAL FROM JEFFERSON CIRCUIT COURT, HONORABLE OLU A. STEVENS, JUDGE, ACTION NO. 07–CI–010761

Attorneys and Law Firms

BRIEF FOR APPELLANT: Richard M. Sullivan, Kenneth A. Bohnert, Edward F. Busch, M. Tyler Reynolds, Louisville, Kentucky

BRIEF FOR APPELLEES, RICHARD DONALD RINK AND ALL OTHERS SIMILARLY SITUATED: Irvin D. Foley, Anthony Raluy, Louisville, Kentucky, Joseph L. Hamilton, Marjorie A. Farris, Clark C. Johnson, Louisville, Kentucky, Donn H. Wray, Indianapolis, Indiana

BEFORE: DIXON, LAMBERT, AND STUMBO, JUDGES.

OPINION

LAMBERT, JUDGE:

***1** College Retirement Equities Fund appeals from the Jefferson Circuit Court's award of $7.5 million in attorneys' fees to class counsel in the underlying class action litigation. After careful review, we affirm.

College Retirement Equities Fund (CREF) is a New York corporation organized in 1952 as an investment company to allow its participants (largely school teachers) to purchase retirement annuities through investments in common stock. Dr. Richard Rink is a professor who, during his employment with the University of Louisville, maintained a retirement account administered through CREF at the University.

On October 30, 2006, Rink requested CREF to liquidate his account and transfer the proceeds to a broker. On that date, the value of the securities in Rink's account was $688,951.15. While certain CREF investment documents state that funds will be distributed within seven days of a liquidation request, the funds in Rink's account were not distributed until December 15, 2006, at which time

CREF transferred $690,052.13 to his broker. This amount represented $688,951.15, the account value on October 30, 2006, plus $1,100.98 in interest. However, Rink contended that during the delay in receiving his funds, his account appreciated by $19,082.28, and he should have received $709,134.00, which he claims was the account value on December 15, 2006.

The delay in transfer of Rink's funds was due to problems that started in 2005 when CREF began to replace its obsolete computerized record-keeping system with a new system. Due to these problems, the transfer requests of other CREF investors were similarly delayed from 2005 to 2008. When CREF became aware of the issue, it implemented a program to compensate all participants who experienced such delays, which included interest payments and other compensation.

Instead of accepting CREF's compensation, Rink filed a class action complaint against CREF, alleging that it breached its fiduciary duties and contractual obligations by retaining the amount his and other class members' accounts appreciated during distribution delays exceeding the seven day limit set forth in CREF's form contract. Discovery eventually revealed that CREF used gains from appreciated accounts to offset losses from other participants' accounts that depreciated during the delays, which during the three-year duration of CREF's computer glitch was substantial.

After five years of contentious litigation, the parties executed a settlement agreement on May 10, 2012. The circuit court entered an order giving final approval to the settlement agreement on September 6, 2012. The agreement did not create a specified or fixed sum of money to distribute to class members. Instead, the agreement provided that each settlement class member who submitted a valid claim form during a ninety-day claim period would receive the difference between the amount actually received and that which would have been received if the securities had been priced as of the date of actual distribution (plus 4% interest per annum). The settlement provided that CREF would pay the costs of class notice and claims administration, as well as any reasonable attorneys' fees and expenses the circuit court might award. Any fees that CREF paid would be in addition to the payment of claims and did not reduce the amount any class member received for his or her claim.

***2** During the claims period, it was estimated that approximately 28,000 class members were eligible to file a claim and that if 100% did so, CREF would pay about $22.4 million in claims. These numbers were estimates; however, under the settlement, there was no limit on what CREF was required to pay any individual class member or the settlement class as a group. During the claim period, the settlement class members submitted $16.15 million in claims, which CREF has paid.

On July 2, 2012, class counsel filed a motion requesting that the circuit court award them $8.5 million in attorneys' fees and up to $150,000 in expenses. During briefing on the issue, class counsel reduced their fee request to $7.5 million. Counsel based their motion on a "percentage of fund" method, arguing that $7.5 million in fees was a reasonable percentage (one-third) of what counsel contended was a $22.4 million "common fund" that the settlement allegedly created for the class. CREF opposed the motion on the ground that the fee sought was excessive.

On September 6, 2012, the circuit court held a fairness hearing to address the motion for attorneys' fees. The circuit court entered an order on September 25, 2012, awarding class counsel $7.5 million in attorneys' fees and up to $150,000.00 in costs and expenses. The court stated that the fee award was warranted under the "common fund doctrine" as codified in Kentucky Revised Statutes (KRS) 412.070 and was determined based on a percentage of the fund, plus reasonable expenses. The court found that "[a] fee award of approximately one-third of the total fund available for a payment to the settlement class is well-within the range of appropriate percentage fees in an action of this nature."

In October 2012, CREF moved the circuit court to make additional findings with respect to its September 25, 2012, order. The circuit court denied that motion on November 1, and on November 16, 2012, CREF filed a notice of appeal seeking review of the September 25, 2012, and November 1, 2012, orders.

On appeal, CREF argues that the circuit court's award of attorneys' fees is erroneous and excessive for several reasons. First, CREF argues that the settlement in the underlying class action did not create a common fund but instead created a "claims-made" settlement with no cap, under which CREF paid the aggregate amount of all individual valid claims. Since the ultimate amount payable was not known at the time of the fee motion and fairness hearing and was not in a set/fixed amount against which claims were made and paid, CREF argues the circuit court should have used the lodestar method (multiply attorney hours by a reasonable hourly rate) to set the

fees, under which a reasonable fee would be, at most, $5.06 million.

Next, CREF alleges that the circuit court failed to conduct a lodestar crosscheck to ensure that its percentage award did not produce an excessive effective hourly rate. CREF contends that this crosscheck shows that the $7.5 million in fees, when divided by class counsel's 5,074 hours in the case, produces an exorbitant hourly rate of almost $1,500 for each hour of time recorded by each partner, associate, and paralegal of class counsel's three separate law firms.

CREF argues that the circuit court misapplied the percentage-of-fund method and KRS 412.070, since the rule is that the fee should have been based on a percentage of the $16.1 million in claims actually paid to class members, and not, as the court's fee was, on a theoretical $22.4 million "phantom fund" that only would have been paid if 100% of the members had filed claims.

***3** Finally, CREF argues that even if the percentage-of-fund method had been the proper method to apply, the circuit court's one-third (33%) percentage is excessive, because it is significantly higher than recently awarded percentages.

Kentucky Rules of Civil Procedure (CR) 23.08 governs the award of attorneys' fees in a certified class action. CR 23.08(3) states that when a trial court awards fees in a class action, it must find the facts and state its legal conclusion under CR 52.01. Furthermore, when awarding fees in class actions, the trial court must also explain its "reasons for adopting a particular methodology." *Moulton v. U.S. Steel Corp.*, 581 F.3d 344, 352 (6th Cir.2009) (internal citation omitted).

|1| CREF initially argues that the circuit court's September 25, 2012, fee order does not specifically find facts and does not state separately any conclusions of law. Further, CREF argues that the circuit court did not explain its reasons for adopting the percentage method to award a fee, and that it instead simply stated in a conclusory fashion that "a proper award would be one based on a percentage of the fund." CREF argues that the circuit court then summarily denied its motion to make additional fact findings as to what factors the court used to determine the fee awarded and whether a lodestar crosscheck was used to award fees. CREF urges this Court to conclude that the circuit court's ruling was arbitrary and vacate it.

A review of the record indicates that the circuit court did adequately state its findings of fact and conclusions of law supporting the attorneys' fees awarded to class counsel in its September 25, 2012, order. In fact, in its order, the circuit court indicated that it found the results obtained for the settlement class by class counsel to be exceptional. The court noted that any attorneys' fees awarded would be on top of the payments to the settlement class and thus that any award of fees would not reduce the recovery to the settlement class.

The circuit court also explained that class counsel was competent and experienced in class action litigation and that they were diligent and competent in prosecuting the action. The court described the underlying class action as "hard-fought litigation in which CREF raised numerous challenges to the claims presented and to the class certification efforts and in which CREF's objections and actions additionally necessitated a number of discovery disputes."

The circuit court held that this was a case in which an award of attorneys' fees and expenses was warranted under the common fund doctrine, as codified in KRS 412.070, and a proper award would be one based on a percentage of the fund, plus reasonable expenses. The circuit court then held that an award of $7.5 million plus actual costs incurred up to a limit of $150,000.00 was reasonable. The court noted that a fee award of approximately one-third of the total fund available for payment to the settlement class was well within the range of appropriate percentage fees in an action of this nature.

A review of the court's order awarding attorneys' fees indicates that the circuit court did support its award with written findings of fact and conclusions of law supporting its award of fees to class counsel. Additionally, the court did explain its reasons for adopting a particular methodology. Therefore, we find CREF's argument that the order awarding attorneys' fees was arbitrary or was clear error to be without merit. We find no error in this regard.

***4** CREF next argues that the circuit court's use of the percentage method to award fees was arbitrary since the settlement in this case was a claims-made settlement that did not create a common fund.

In order to address this argument and CREF's remaining arguments on appeal, a brief background about attorneys' fees in class action cases is helpful. Under CR 23.08, the trial court in a certified class action is to approve or award "reasonable attorneys' fees and nontaxable costs that are

authorized by law or by the parties' agreement." When doing so, the court's primary concern should be to attract competent counsel but not produce windfalls to attorneys. *See Reed v. Rhodes,* 179 F.3d 453, 471 (6th Cir.1999). Even when fees are authorized by the parties' agreement, courts have an independent obligation to ensure that the award is reasonable. *In re Bluetooth Headset Products Liability Litig.,* 654 F.3d 935, 941 (9th Cir.2011).

While no Kentucky appellate court has addressed how a trial court is to determine a reasonable fee under CR 23.08, federal courts awarding fees in class actions use two methods, lodestar and percentage-of-fund. The lodestar method sets a fee by multiplying the reasonable hours expended by the reasonable hourly rate. In the percentage-of-fund method, the fee is expressed as a percentage of a set or fixed "common fund," whether the fund is obtained by judgment or settlement.

CREF contends that some courts express preference for the percentage method in class actions with a true common fund, while other courts hold that lodestar must be used. *See Longden v. Sunderman,* 979 F.2d 1095, 1099 (5th Cir.1992). CREF argues that a majority of courts hold that either method is acceptable in any case, even when a settlement creates a common fund. *See Rawlings v. Prudential–Bache Properties, Inc.,* 9 F.3d 513, 516 (6th Cir.1993); *Johnston v. Comerica Mort. Corp,* 83 F.3d 241, 246 (8th Cir.1996) (either method proper). CREF contends that the more appropriate method should be used in light of the unique circumstances of each case. CREF argues that even if the percentage-of-fund method is used, a trial court should use the lodestar method as a cross-check to ensure a percentage-of-fund award is not excessive and does not produce an effective hourly rate that is unreasonably high, citing *Goldberger v. Integrated Resources, Inc.* 209 F.3d 43, 50 (2nd Cir.2000).

|2| In support of its argument that the settlement award in this case did not create a common fund, CREF contends that the circuit court referred to a "total fund available for payment to the settlement class," referring to the $22.4 million CREF would have paid if 100% of the class members filed a claim, and awarded a fee of 1/3 of that amount ($7.5 million). CREF posits that the circuit court's order was based on a finding that this hypothetical $22.4 million "phantom fund," which was never paid because only $16.1 million in claims were filed during the claim period, was a common fund out of which a percentage-of-fund fee award could be made. CREF contends that this is clearly erroneous because a common fund exists only when a settlement specifies a specific or defined sum of money, which it argues is not the case here because the settlement is a claims-made agreement in which CREF's total money obligation was not specified and in fact was unlimited since every class member was to be paid the amount of their filed claim.

***5** CREF explains that the only "fund" ever created and explicitly named as such under the agreement was the money it deposited into an escrow account for distribution to class members. The amount to be deposited was not specified and not known until after the ninety-day claim period, at which time claims administrator BMC Group informed CREF of the total amount of the individually-approved claims. On the "funding date," (seven days after the final order approving the settlement became final), CREF deposited the total amount of the individually-approved claims ($16.1 million) into the escrow account of the claims administrator, which then issued a check to each claimant.

CREF contends that the $22.4 million "phantom fund" referred to by the circuit court was not a common fund, as it never actually existed. However, CREF argues the $16.1 million in escrow money also was not a common fund since the amount deposited was an aggregation of many previously-approved and individually-earmarked monies, which the claims administrator paid to each class member. Claims were not distributed from a set fund; rather, the escrow account was the accumulation of many individually-approved claims. CREF argues that such claims-based settlement funds are not considered by courts to be common funds.

The Appellees counter that the circuit court properly applied the percentage-of-fund method in determining the fee award. In support of this, the Appellees argue that in awarding attorneys' fees in class action litigation, courts have long recognized that a "lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorneys' fee from the fund as a whole." *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980). The Appellees posit that this common fund doctrine is codified under KRS 412.070(1). That statute states:

> (1) In actions for the settlement of estates, or for the recovery of money or property held in joint tenancy, coparcenary, or as tenants

> in common, or for the recovery of money or property which has been illegally or improperly collected, withheld or converted, if one (1) or more of the legatees, devisees, distributees or parties in interest has prosecuted for the benefit of others interested with him, and has been to trouble and expense in that connection, the court shall allow him his necessary expenses, and his attorney reasonable compensation for his services, in addition to the costs. This allowance shall be paid out of the funds recovered before distribution. The persons interested shall be given notice of the application for the allowance, provided, however, that if the court before whom the action is pending should determine that it is impracticable and too expensive to notify all of the parties individually, then by order of said court, personal notice may be dispensed with and in lieu thereof, notice of the application shall be given by an advertisement pursuant to KRS Chapter 424.

The Appellees contend that courts that have considered class settlements like the one at issue in this case have referred to them as "constructive common fund" cases and analyze fee entitlement as a percentage-of-fund created by the labors of counsel, citing *Guschausky v. Am. Family Life Assur. Co. of Columbus,* 851 F.Supp.2d 1252, 1257 (D.Mont.2012). [1]

The Appellees note that even though the exact amount available to settlement class members can be quantified to the penny and was fully known to the circuit court at the time it entered the fee award, CREF contends that it was a "hypothetical phantom fund." The Appellees argue that there was no hypothetical phantom fund, as the fund was easily ascertainable. In support of this, the Appellees note that prior to the hearing in this case, the court was presented with the affidavit of CREF's own employee, Sandra Kong, who verified that the total amount available for settlement class members was $22,406.753.27, which they contend is hardly "hypothetical" or "phantom." The court expressly stated in the fee award, "[t]he total value of the settlement for the approximately 26,188 settlement class members currently identified is approximately $18 million, before accounting for at least four years of interest which would increase that total to $22.4 million." The Appellees argue that although CREF's own witness verified the creation of this $22.4 million fund, CREF mistakenly asserts that a common fund only exists when a settlement specifies a specified or defined sum of money.

***6** The Appellees contend that CREF ignores the fact that the full amount available to settlement class members was readily ascertainable and known to the circuit court at the time it entered the fee award and misstates the law in its brief. They argue that courts *do* recognize the use of the percentage-of-fund methodology in awarding attorneys' fees in a class action *even if no formal fund is created,* so long as the court can reasonably determine the settlement value, citing *Shaffer v. Continental Cas. Co.,* 362 Fed.Appx. 627, 631 (9th Cir.2010). The Appellees argue that the fact that the settlement is uncapped or the fact that every class member will be paid upon filing a claim does not change the character of a settlement. What is important is that the value of the settlement can be ascertained. If so, the Appellees argue, it is appropriate to base a fee award upon a percentage of the benefits available to settlement class members.

The Appellees further argue that the constructive common fund doctrine was created to address the economic benefit conferred on settlement class members when attorneys' fees are paid separately. "The award to the class and the agreement on attorney fees represent a package deal. Even if the fees are paid directly to the attorneys, those fees are still best viewed as an aspect of the class recovery." *Johnston v. Comerica Mortgage Corp.,* 83 F.3d 241, 246 (8th Cir.1996). The Appellees contend that since each settlement class member receives a higher net recovery than if assessed a portion of the attorneys' fee from a "traditional" common fund, each settlement class member receives a quantifiable benefit. Accordingly, the attorneys' fees and class settlement proceeds are aggregated for determining the value of the constructive common fund. *Guschausky,* 851 F.Supp.2d at 1257 ("When attorneys' fees are paid independently, the aggregate amount of attorneys' fees and class settlement payments may be viewed as a 'constructive common fund' ").

We agree with the Appellees that CREF attempts to exalt form over substance in asking this Court to find that the circuit

court abused its discretion in awarding the attorneys' fees as a percentage-of-fund. The reality is that in the underlying settlement, the class members received a benefit that was far better than it would have been had a cap been established. The settlement in this case insured that the class members did not have their recovery reduced in any way to pay for the services provided by class counsel. Therefore, we find no error in the circuit court treating the settlement in this case as a constructive common fund.

A review of the record indicates that the constructive common fund in this settlement included the total amount available to settlement class members ($22,406,753.27), plus the $7,500,000.00 fee, plus expenses in the amount of $114,922.09, for a total constructive common fund of $30,021,675.36. The $7.5 million fee represents 25% of the constructive common fund. Federal Courts within Kentucky and the Sixth Circuit universally recognize that "the percentages awarded in common fund cases typically range from 20 to 50 percent of the common fund awarded." *New England Health Care Employees Pension Fund v. Fruit of the Loom, Inc.*, 234 F.R.D. 627, 633 (W.D.Ky.2006). *See also Enterprise Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240, 249 (S.D.Ohio 1991).

[3] CREF also argues that the fee award in the instant case is not compatible with KRS 412.070, because it is based on the amount available to settlement class members, instead of the amounts actually claimed by settlement class members. It is not disputed that the labors of class counsel created the $22,406.753.23 pool available for distribution to settlement class members. KRS 412.070 provides that attorneys' fees are to be paid "out of the funds recovered *before distribution.*" (Emphasis added). "The words of [a] statute are to be given their usual, ordinary, and everyday meaning." *Gateway Construction Co. v. Wallbaum*, 356 S.W.2d 247, 249 (Ky.1962) (internal citation omitted). We agree with the Appellees that the statute recognizes the practical reality that a common fund attorney fee under KRS 412.070 should be measured *before* determining payment to individual claimants. Indeed, this interpretation of KRS 412.070 is entirely consistent with United States Supreme Court precedent.

*7 In *Boeing, supra,* the United Supreme Court held that attorneys' fees were appropriately determined as a percentage of the entire amount obtained for the class even though some class members failed to make claims for their individual damages. "[Absentee class members'] right to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel." *Boeing,* 444 U.S. at 480–81. Because all class members receive a benefit with this type of settlement (including class members who choose not to take advantage of it) a majority of courts have awarded attorneys' fees based upon the amount that would be recovered if every class member makes a claim, regardless of whether the claims are filed. *See, e.g., Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423 (2nd Cir.2007); *Williams v. MGM–Pathe Commun. Co.*, 129 F.3d 1026 (9th Cir.1997).

Based on the above, we cannot say that the circuit court's decision to utilize a percentage-of-fund method based upon a constructive common fund was arbitrary or an abuse of discretion. A review of the applicable case law from the various jurisdictions indicates that either method was appropriate, as long as the circuit court based its decision on the facts presented by the underlying settlement and the benefits the class members received as a result of the efforts of class counsel, which was clearly the case here.

[4] Next, CREF argues that the percentage awarded by the circuit court was too high. CREF argues that regardless of what the proper size of the fund was, the circuit court's use of one-third (33%) as the proper percentage was erroneous. In support of this, CREF argues that in securities class actions that awarded fees based off the percentage-of-fund method, the recent trend is for courts to award less than 20% of a common fund. CREF contends that even courts that award slightly more than 20% consider 25% as the benchmark percentage in securities cases, citing *City of Pontiac General Employees Retirement Systems,* 2013 WL 3796658 (S.D.N.Y.). There, the court reduced a fee request of 33% of $19.5 million to a "fee award at the increasingly used benchmark of 25%." CREF contends that the $7.5 million awarded as fees in this case is 46% of the $16.1 million that class members received under the settlement, which is excessive.

Again we agree with the Appellees that the attorneys' fees awarded by the circuit court were reasonable under the circumstances and were supported by the record in this case. Given the varying amounts of attorneys' fees awarded in similar types of class action litigation, we cannot say that an award of one-third of the constructive common fund was erroneous. Had the circuit court determined that the circumstances of this litigation warranted fees of only 25% of

the settlement amount, it would have been in its discretion to do so. Awarding 25–30% of the settlement amount was not arbitrary and was supported by the evidence in this case.

[5] Finally, CREF argues that the circuit court should have checked the award of attorneys' fees by comparing it to an award of fees calculated using the lodestar method. CREF alleges that its failure to compare the two methods in its written order renders the circuit court's order arbitrary and therefore an abuse of discretion.

In support of this argument, CREF contends that a lodestar fee is determined by multiplying the reasonable attorney hours expended by a reasonable hourly rate. CREF notes that the base lodestar for the three law firms comprising class counsel is $1.685 million for 5,073.9 hours time, giving a blended hourly rate of $332.00. In this case, the circuit court awarded a percentage fee of $7.5 million, which is 4.45 times the base lodestar fee ($7.5 million divided by 1.685 million). The 4.45 figure is known as a "multiplier" because the lodestar of $1.65 million is "multiplied" by 4.45 to reach the $7.5 million fee awarded by the circuit court. In effect, this means the circuit court awarded a fee that is 4.45 times what class counsel's legal services are worth in the legal market. CREF contends that even if a modest lodestar multiplier was appropriate, the 4.45 multiplier that the circuit court's $7.5 million fee produces results in an effective hourly rate of $1,500.00.

***8** CREF urges this Court to consider the court's analysis in *Hall v. Children's Place Retail Stores,* 669 F.Supp.2d 399 (S.D.N.Y.2009), where the court awarded a fee of 15% (instead of the requested 27% herein) of a $12 million settlement fund. The awarded fee produced a lodestar multiplier of 2.08, while the requested fee would have produced a 3.75 multiplier. The court noted that "more recent cases reveal[ ] a trend toward awarding more modest fees" and that "an award of one-third of the settlement fund is not always justified where that percentage amounts to a lodestar multiplier of substantially more than 2.0." *Id.* at 403–404. CREF contends that this action was a typical securities and breach of contract case and did not present any difficult or complex issues. Therefore, any multiplier of more than 2.0 over lodestar is difficult to justify since it would still produce a base lodestar fee of $3.3 million (2.0 × $1.685 million) and an effective hourly rate of $650 ($3.3 million divided by 5,074 hours).

CREF argues that because the $7.5 million fee awarded produces an unreasonable $1,500.00 hourly rate, the circuit court's refusal to use the lodestar method, at least as a cross-check to avoid that outcome, is arbitrary and should be reversed.

The record in this case indicates that CREF presented the lodestar method to the circuit court in its arguments below. Furthermore, CREF presented its argument that the circuit court should utilize the lodestar at least as a cross-check to the court below. Accordingly, the circuit court considered CREF's arguments regarding the reasonableness of the attorneys' fees and awarded the fee it thought reasonable, given the complexity of the case and the effectiveness of class counsel. The circuit court specifically detailed this reasoning in its written order, which it was required to do. Because the circuit court supported its conclusions of law with substantial findings of fact, we cannot say that its reasoning was arbitrary.

It is well-settled that the circuit court has discretion to determine the "appropriate method for calculating attorneys' fees in light of the unique characteristics of class actions in general, and of the unique circumstances of the actual cases before them." *Rawlings,* 9 F.3d at 516. This Court reviews an award of attorneys' fees for an abuse of discretion. *Id.* This highly deferential standard of review recognizes the trial court's superior understanding of the litigation. *Hensley v. Eckerhart,* 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). Absent a clear abuse of discretion that is not supported by the record and the facts of the underlying litigation, we will not disturb a circuit court's award of attorneys' fees in a complex class action.

Finding no abuse of discretion, we affirm the circuit court's September 25, 2012, order.

STUMBO, JUDGE, CONCURS.

DIXON, JUDGE, CONCURS IN RESULT ONLY.

All Citations

Not Reported in S.W. Rptr., 2015 WL 226112

Footnotes

1 *Guschausky* was later vacated based on AFLAC's motion for relief under Federal Rule of Civil Procedure (FRCP) 60.02(b)(6), which showed that the common fund amount was erroneous. However, the court did not retract its analysis on the constructive common fund.

End of Document

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

HAYNES PROPERTIES, LLC, *et. al.* PLAINTIFFS

v.

BURLEY TOBACCO GROWERS COOPERATIVE ASSOCIATION, *et al.* DEFENDANTS

AFFIDAVIT OF ROBERT E. MACLIN, III

Comes the Affiant, Robert E. Maclin, III, and after being first duly sworn, deposes and states as follows:

1. I am one of the attorneys at McBrayer PLLC representing the Plaintiffs/Settlement Class Representatives, Haynes Properties, LLC, Mitch and Scott Haynes dba Alvin Haynes & Sons, and S&GF Management, LLC (collectively, the "Settlement Class Representatives"), and as such I have personal knowledge as to this action and as to the matters about which I depose and state herein.

2. I hereby offer this Affidavit in support of McBrayer's Petition for Award of Attorney's Fees and Costs.

3. I am an equity partner with McBrayer, PLLC ("McBrayer"), and I have been licensed to practice law in the Commonwealth of Kentucky since 1984, and in Texas since 1991. I practice law throughout Kentucky in state and federal court.

4. I have reviewed the Affidavit of Katherine K. Yunker and the Affidavit of Jason R. Hollon, both dated October 16, 2020, which were previously filed in support of the CR 23.07 Application for Appointment as Class Counsel. I hereby attach said Affidavits hereto and offer the Affidavits in further support of McBrayer's Petition for Award of Attorney's Fees and Costs.

5. I have reviewed the prior Affidavit that I executed on September 29, 2020, and which was filed in support of Named Plaintiffs Motion Pursuant to CR 23.01 for Preliminary Class Certification and Appointment of Settlement Class Representatives. I hereby incorporate said Affidavit herein, attach said Affidavit hereto, and offer said Affidavit in further support of McBrayer's Petition for Award of Attorney's Fees and Costs.

6. In addition to this information, I represent that I have been involved with this action since the preliminary investigation and initial preparation of the initiating document and I am familiar with the facts and circumstances giving rise to the statements made herein.

7. McBrayer serves as class counsel for the Settlement Class in this matter.

8. This matter has presented novel and difficult issues of law given the uniqueness of a dissolution of an agricultural cooperative and the complexities generally presented by class action lawsuits.

9. The novel and difficult issues required a substantial amount of skill and experience to move this matter forward and the attorneys that have been working on this case have extensive experience in complex litigation, class actions, and some have prior experience in litigating against the Co-op. This skill and experience are described and set forth in the previously filed Affidavits that are attached hereto.

10. McBrayer's engagement in this matter has spanned the course of more than a year. McBrayer's efforts are detailed herein and in the previously filed Affidavits that are attached hereto. Through its efforts, McBrayer secured an agreement regarding the Co-op's dissolution that is beneficial to each member of the Settlement Class and was able to stop the ongoing waste of Co-op's assets.

11. McBrayer has prepared for and participated in hearings and mediations, and prepared court filings including motions to preliminarily certify the Settlement Class, to appoint Settlement Class Representatives, and to appoint Class Counsel. McBrayer developed a comprehensive notice program designed to reach the known and unknown members of the Settlement Class and sought out and located a Settlement Administrator. McBrayer has supervised the Settlement Administrator and taken steps to further expand notice to members of the Settlement Class. McBrayer personnel have worked to help members of the Settlement Class submit W-9s and other supporting documentation and have answered their questions about the settlement and the process for its consideration and approval. McBrayer set up a dedicated phone line for members of the Settlement Class and the public to inquire about the potential settlement, and has a staff committed to answering calls that are received.

12. In cooperation with counsel for the other settling parties, McBrayer will prepare a motion for final approval of the settlement and take all actions reasonably necessary for the settlement's approval as appropriate.

13. Through December 31, 2020, McBrayer has expended over 2,100 hours of attorney and paralegal time in its representation in this matter and, as of January 15, 2021, has expended over $18,561.15 in costs. This includes the substantial commitment of time by six McBrayer attorneys (James H. Frazier, III, Jaron P. Blandford, Katherine K. Yunker, Jason R. Hollon, Drake W. Staples, and myself) with other attorneys, paralegals, and personnel contributing to pushing this matter forward in the past and moving forward.

14. This matter significantly reduced McBrayer's attorneys' ability to work on matters for fee-paying clients. The attorneys that have worked on this matter have a full slate of

cases and matters that require their attention involving fee paying clients in addition to this matter.

15. McBrayer took this matter on a contingency fee arrangement and customarily sets its contingency fee agreements at anywhere from 33.3% to 40% of the recovery plus costs.

16. McBrayer's work was substantial and required a significant amount of time and resources and given the contingent nature of the case, there was a substantial risk that the time and resources would not be recouped.

17. On behalf of the Plaintiffs, McBrayer was able to maximize pressure against the Co-op early in this lawsuit with a motion for injunctive relief, by serving extensive discovery, and by issuing several subpoenas, and thereby forced the Co-op to agree to a stay of discovery to go to mediation.

18. During lengthy mediation sessions, the settlement was reached which stopped the waste of Co-op's assets, and, if approved, will get the majority of the assets of the Co-op in the hands of the members of the Settlement Class in an expedited fashion.

19. McBrayer's request for a 25% attorney's fee award is reasonable as it is consistent with Kentucky law, is justified by the circumstances of this case, recognizes the result achieved, and acknowledges the efficiency by which the result was obtained.

20. McBrayer has incurred a total of $18,561.15 in nontaxable costs in this matter. These costs are for a financial expert , transcripts/videos, mileage, advertising, and copying/printing. These costs were incurred in McBrayer's representation in this matter and are the type of costs that would normally be paid by a fee-paying client.

21. McBrayer has the financial resources to continue to prosecute and is fully prepared to continue prosecute this action on behalf of the Plaintiffs (as representatives of all

others similarly situated) and to take steps to obtain approval of the settlement and secure its benefits for the Settlement Class.

22. If the settlement is approved, McBrayer will continue to represent the interests of the Settlement Class in the implementation of the settlement.

Further the Affiant sayeth naught this 15 day of January, 2021.

Robert E. Maclin, III

COMMONWEALTH OF KENTUCKY)
) SCT
COUNTY OF FAYETTE)

The foregoing Affidavit was acknowledged, subscribed to, and sworn to before me by Robert E. Maclin, III on this the 15 day of January, 2021.

Notary Public, Kentucky State at Large

Notary ID No.: 599166

My Commission Expires: 4/29/22

DONNA M. FRITZ
My Commission Expires 04-29-2022
NOTARY PUBLIC
Notary ID # 599166
STATE AT LARGE, KENTUCKY

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
FOURTH DIVISION
Civil Action No. 20-CI-00332
electronically filed

HAYNES PROPERTIES, LLC, Mitch and Scott HAYNES d/b/a ALVIN HAYNES & SONS, and S&GF MANAGEMENT, LLC, on behalf of themselves and all others similarly situated — PLAINTIFFS

v.

BURLEY TOBACCO GROWERS COOPERATIVE ASSOCIATION, *et al.* — DEFENDANTS

Affidavit of Katherine K. Yunker

The Affiant, Katherine K. Yunker, after being first duly sworn, states as follows:

1. I am an attorney who is Of Counsel to McBrayer PLLC ("McBrayer"), and I have been licensed to practice law in the Commonwealth of Kentucky since 1982. A summary of my educational and professional history is Attachment 1 hereto and incorporated herein by reference.

2. McBrayer serves as counsel for Named Plaintiffs Haynes Properties, LLC, Mitch and Scott Haynes dba Alvin Haynes & Sons, and S&GF Management, LLC in the matter styled *Haynes Properties, LLC et al. v. Burley Tobacco Growers Cooperative Association*, Fayette Circuit Court No. 20-CI-00332 ("the Co-op Case").

3. This Affidavit presents facts of which I have personal knowledge that are relevant to this Court's appointment of class counsel for the settlement-only class proposed in the Co-op

Case. These include matters listed in CR 23.07(1)(a) and other matters "pertinent to counsel's ability to fairly and adequately represent the interests of the class" (CR 23.07(1)(b)).

Work done in identifying or investigating claims (CR 23.07(1)(a)(i))

4. McBrayer attorneys have done extensive work in identifying and investigating potential claims in this matter, and initiated this action on behalf of the Named Plaintiffs on behalf of them individually and all others similarly situated. Among the McBrayer personnel involved in this work were attorneys Robert E. Maclin, III, Jaron P. Blandford, Jason R. Hollon, and Drake W. Staples. Documents obtained through that investigation and formal discovery, court filings made, and other work product for the Co-op Case are part of McBrayer's cloud-based filing system and are fully available to me and other McBrayer personnel wherever we have the ability to access the Internet.

5. I have reviewed the filings made in the Co-op Case and am acquainted with the documents and other information gathered to support the claims alleged. My direct role in the case began after the parties entered into a partial settlement as of June 10, and has focused on supporting the settlement and implementing the proposed settlement-only class and associated procedures necessary to effect the settlement. In that role, I have become thoroughly familiar with the proposed settlement, the law and facts supporting that settlement, and the parties' positions as to the elements of the settlement. In addition, I have spent significant time in researching, drafting, commenting on, assisting with, and coordinating filings and other presentations to the Court regarding the proposed settlement and settlement class, including hearings and conferences with the Court.

6. Within McBrayer, I have become the lead attorney on the Co-op Case with respect to procedures required or provided for in Civil Rule 23 and relevant to the proposed

settlement and settlement-only class. This is typical of my work on McBrayer teams, where I often lead appellate work, substantive motions practice, or other phases/aspects of a case even though others have had and continue to have the lead as to the case overall. I then draw on the case-experience and the substantive background of the McBrayer attorneys who have been working on the case all along in preparing the strategy and filings for the phase or aspects in which I have particular skill and expertise. I have been ably supported in the work for the Co-op Case by McBrayer resources and personnel; in particular, attorneys Jason R. Hollon and Peter J. Rosene have assisted me with formulating, researching, and drafting filings to be made on class-action issues.

Experience in class actions/complex litigation and the types of claims (CR 23.07(1)(a)(ii))

7. From the first year in law school, I have been interested in civil procedure. This was in part because I was taught procedure from a constitutional perspective, in which the focus was on the realization of due-process abstractions like notice and an opportunity to be heard and on the benefits and costs of particular rules. I may also have grasped that skill with the civil rules would be useful to a litigator in whatever subject matter, and might be my entrée to participation in a wide variety of litigation in my career. Indeed, in my first summer clerkship, with AppalReD in its Pikeville office, one of my major projects was an assessment of bringing clients' claims as a class action and preparation of a draft class-action complaint therefor.

8. I have extensive experience in representing clients with respect to class actions (alleged or certified) and other complex litigation, which began in 1984. In Attachment 2 hereto, and incorporated herein by reference, I outline that experience by era, type of litigation, forum, and role. Since 1987, one theme of my work relating to class actions is whether unnamed class

members or other third parties can have their rights affected by a settlement to which they did not actually assent or an adjudication in which they were not participants.

9. In my time at McBrayer, in addition to my work on the Co-op Case, I have worked on class action litigation on behalf of defendants who were the class opponents. I also have experience at McBrayer representing clients in complex litigation in state and federal trial and appellate courts, including commercial and business litigation, and practicing before state regulatory agencies. I have represented clients including local governments and state agencies, small and large businesses (including healthcare organizations, insurance companies, contractors, trucking companies, and utility service providers), non-profit organizations, and individuals — whose claims or interest I have defended or prosecuted. In that work, I have been supported and assisted by other McBrayer personnel (attorneys, paralegals, and other staff). In particular, I have worked on a variety of matters with attorney Jason R. Hollon and have observed him to be careful to identify or investigate the relevant facts, research the applicable law, and consider the client's directives, opinions, and interests in practicing those cases.

10. I also have experience in handling the type of claims asserted in the Co-op Case and in the types of relief involved in the proposed partial settlement. Over the years, I have litigated, on both the plaintiff and defense sides, cases involving claims for breach of fiduciary duty, injunctive relief, and declaratory judgement. I have also represented clients and provided legal counsel with respect to nonprofits, and the particular constraints and operation of such entities. More occasionally, I have provided legal counsel with respect to the large-scale divesti-ture of assets or complete dissolution of corporate entities (including non-stock nonprofits).

Knowledge of the applicable law (CR 23.07(1)(a)(iii))

11. Due to my interest in procedural matters and my background and continuing practice in complex civil litation, I have extensive knowledge about class-action law. I am familiar with the law surrounding and applicable to claims for breach of fiduciary duty, injunctive relief, and declaratory judgment, through my numerous representations in litigation of such claims. Like any civil litigator, I also routinely use and consult the law applicable to settlements, including that relating to releases and issue/claim preclusion.

12. I do not use the law applicable to dissolution of corporate entities frequently enough that I consider myself to be generally knowledgeable about it. However, as with any other area of law, I apply the framework of legal concepts I have developed over time and my research skills to acquire the knowledge needed to make sure I provide my clients with good legal representation. Case-specific research is a part of every area of my practice, even if the area is routine for me.

13. It is my observation and experience from working with Jason R. Hollon that he has good research skills, and that — through research — he confirms or expands his general knowledge of the law in a particular area as it become relevant to the issues or problems his clients face.

14. As McBrayer attorneys, however, neither Mr. Hollon nor I must rely solely on our own knowledge and understanding of the law. We may draw on the experience and knowledge of other McBrayer attorneys, including those in the transactions, corporate, or other non-litigation practice areas, to assist us with issues that may arise with respect to dissolution and liquidation of assets, distribution of net assets, and other aspects of the proposed settlement.

Resources committed to representing the class (CR 23.07(1)(a)(iv))

15. I have an understanding of the time and organizational/logistical resources that it may take to fairly and adequately represent the proposed settlement class, particularly its unnamed (or "absent") members. I am prepared to commit my time, skill, and resolve to that responsibility. If I were the only appointed class counsel (which is not my preference), that commitment together with the resources the McBrayer firm brings would be sufficient to fairly and adequately represent the class.

16. In paragraphs 4, 6, 9, and 14, above, I have already mentioned resources that McBrayer makes available to me (and other McBrayer attorneys); these would be available in representing the interests of class members. In addition, McBrayer has the personnel and technological resources to support representations that involve a large group of clients and to process or sustain large-scale notice programs and communications with or information flows to interested persons. I have observed this generally, and within the past six months have worked with McBrayer professional and support staff to successfully accomplish a complicated notice program despite the pandemic's disruptions and to set up and implement an efficient system for providing required information to unrepresented (and adverse) persons or directing them to where they could voice their complaints.

17. Furthermore, McBrayer has the financial resources to continue to prosecute the Co-op Case, including through to a final determination about the proposed settlement and the implementation of the proposed settlement if approved. Since I have become an attorney at McBrayer, the firm has demonstrated this financial ability in lengthy, often multi-party cases in which no remuneration was available for the firm's work and out-of-pocket expenditures until the litigation was resolved.

Other pertinent matters (CR 23.07(1)(b))

18. The matters addressed in ¶¶ 4-17 above are those the Court must consider in appointing class counsel. These remaining paragraphs address four other matters that the Court might find pertinent to the ability to fairly and adequately represent the class.

19. *First*, my interest in the "why" of procedural rules and their constitutional due-process dimensions, together with my frequent scrutiny of class certification and settlement procedures from the perspective of the absent, unnamed class member, have given me an orientation to think of due-process implications first and to respect the value of notice and an opportunity to be heard. This orientation aligns with the responsibility of class counsel to represent the interests of the class as a whole, not just those members who have direct representation or are named parties or appointed class representatives.

20. *Second*, since 1984, a significant part of my practice has been before the Kentucky Public Service Commission ("PSC"), which decides utility-service matters. In many of the PSC proceedings, *e.g.*, those relating to proposed rate increases, there are hundreds or thousands of interested persons who are neither named parties nor directly represented in the proceeding — the utility's customers. The PSC has regulations about required notice and systems or customary procedures to facilitate the input of such "absent persons"; in addition, it permits collective entities to participate as parties. These parallels to class treatment in litigation have given me additional experience with indirect/partial participation in disputed adjudications, and the example of a different, workable system than that in the Civil Rules. Similarly, I have recent experience with the "collective" form of action provided for claims under the federal Fair Labor Standards Act, 29 U.S.C. § 216(b).

21. *Third,* I would prefer not to be appointed as sole class counsel from the McBrayer firm. Although I would be able to continue to rely on Jason R. Hollon's support and assistance if I were appointed but he were not, that reliability is strengthened if he also is designated as having duties and responsibilities with respect to the class. In addition, there would then be no lapse or pause in the McBrayer effort to support representation of the class if there were a disruption to my availability due to illness or otherwise.

22. *Fourth,* I have an existing attorney-client relationship with the three Named Plaintiffs, who have been requested to be appointed as settlement class representatives. I do not have an existing attorney-client relationship with the Named Defendant, Greg Craddock, for whom there is a pending motion to appoint him as a settlement class representative. I am willing to serve as class counsel along with anyone the Court appoints to be a class representative, even if that does not include all or any of the Named Plaintiffs. I am also willing to serve as class counsel along with anyone else the Court appoints to be class counsel.

Further the Affiant sayeth not this 16th day of October, 2020.

Katherine K. Yunker

COMMONWEALTH OF KENTUCKY)
) SCT
COUNTY OF FAYETTE)

The foregoing Affidavit was acknowledged, subscribed to, and sworn to before me by Katherine K. Yunker on this the 16th day of October, 2020.

Notary Public, Kentucky State at Large

My Commission Expires: 11-2-23

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
FOURTH DIVISION
Civil Action No. 20-CI-00332
electronically filed

HAYNES PROPERTIES, LLC, Mitch and Scott HAYNES d/b/a ALVIN HAYNES & SONS, and S&GF MANAGEMENT, LLC, on behalf of themselves and all others similarly situated — PLAINTIFFS

v.

BURLEY TOBACCO GROWERS COOPERATIVE ASSOCIATION, *et al.* — DEFENDANTS

Affidavit of Jason R. Hollon

The Affiant, Jason R. Hollon, after being first duly sworn, states as follows:

1. I am an attorney who is an Associate with McBrayer PLLC ("McBrayer"), and I have been licensed to practice law in the Commonwealth of Kentucky since 2014. A summary of my educational and professional history is Attachment 1 hereto and incorporated herein by reference.

2. McBrayer serves as counsel for Named Plaintiffs Haynes Properties, LLC, Mitch and Scott Haynes dba Alvin Haynes & Sons, and S&GF Management, LLC in the matter styled *Haynes Properties, LLC et al. v. Burley Tobacco Growers Cooperative Association*, Fayette Circuit Court No. 20-CI-00332 ("the Co-op Case").

3. Myself and Attorney Katherine Yunker have applied to the Court be appointed as class counsel in the Co-Op Case pursuant to CR 23.07.

4. This Affidavit presents facts of which I have personal knowledge that are relevant to this Court's appointment of class counsel for the settlement-only class proposed in the Co-op Case. These include matters listed in CR 23.07(1)(a) and other matters "pertinent to counsel's ability to fairly and adequately represent the interests of the class[.]" CR 23.07(1)(b).

5. McBrayer attorneys have done extensive work in identifying and investigating potential claims in this matter and initiated this action on behalf of the Named Plaintiffs on behalf of themselves and all others similarly situated. Among the McBrayer personnel involved in this work, in addition to myself, are attorneys Robert E. Maclin, III, Jaron P. Blandford, and Drake W. Staples.

6. I have reviewed the filings made in the Co-op Case and am acquainted with the documents and other information gathered to support the claims alleged. My direct role in the case began immediately prior to the filing of the first complaint. In my role, I have become thoroughly familiar with the complaint, the discovery requests, and the motions and responses that were filed near the beginning of the action. I was heavily involved in drafting the motion for injunctive relief, and responding to the motion to dismiss filed by the Co-op.

7. Once a settlement was reached, I became more involved in the Co-op Case after the initial filing of the stipulation and agreement of settlement, to provide support to the certification process of a settlement only class. Within McBrayer, I have become the primary supporting attorney on the Co-op Case with respect to research, drafting, and preparation of pleadings required by CR 23 and relevant to the proposed settlement and settlement-only class. In this role, I have spent significant amounts of time drafting pleadings, and researching issues related to class certification, appointment of class counsel, and other issues attendant to class

actions. Further, I have assisted with filing of pleadings with the Court, and participated in, and contributed to, numerous strategy meetings with counsel of record.

8. This is typical of my work at McBrayer, where I frequently take the lead on research and initial drafting of substantive motions, while acting as the primary supporting attorney to those who act as lead counsel to the case overall. I often participate and contribute to litigation strategy meetings and draw upon my case-experience and the substantive background to be an asset to the representation of our diverse clients.

9. In my time at McBrayer, in addition to my work on the Co-op Case, I have worked on class action litigation on behalf of defendants who were the class opponents. Moreover, I represent numerous entities, including some asserting class action claims, in litigation related to the opioid epidemic in a Multi-District Litigation currently pending in the Northern District of Ohio. I also have experience at McBrayer representing clients in litigation in state and federal trial and appellate courts, including commercial and business litigation, and practicing before state regulatory agencies. I have represented clients including local governments and state agencies, small and large businesses (including healthcare organizations, insurance companies, contractors, and trucking companies), non-profit organizations, and individuals — whose claims or interest I have defended or prosecuted. In that work, I have been supported and assisted by other McBrayer personnel (attorneys, paralegals, and other staff).

10. I also have experience in handling the type of claims asserted in the Co-op Case and in the types of relief involved in the proposed partial settlement. Throughout my career, I have been involved in the litigation of claims for breach of fiduciary duty, declaratory judgment, and injunctive relief. In these cases, I have researched, drafted, and participated in court hearings regarding a variety of issues.

11. Prior to McBrayer, I served as a law clerk for the Honorable Hanly A. Ingram, Magistrate Judge for the Eastern District of Kentucky. In this capacity, I was involved in all aspects of federal pretrial procedure both on the civil and criminal side. I assisted in the resolution of discovery disputes, participated in discovery conferences, researched and drafted opinions regarding substantive and dipositive motions, and did other tasks to assist the Court in managing its docket. These matters included complex business litigation and other matters relevant to the claims asserted herein.

12. Based upon my background, I am familiar with the law surrounding and applicable to class actions and claims for breach of fiduciary duty, injunctive relief, and declaratory judgment, through my representations in litigation of such actions/claims. Moreover, as a litigator, I have been involved in numerous settlements and am familiar with the law surrounding releases, final judgments, and res judicata.

13. To the extent I lack familiarity with any other area of law that applies or presents itself, I frequently draw upon the experience and knowledge of other McBrayer attorneys to assist with any issues that may arise and, as any other litigator would do, I utilize my experience and research skills to acquire the knowledge needed to provide effective representation to clients.

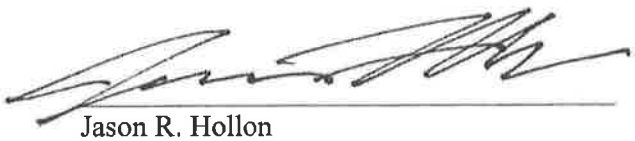
14. If appointed as class counsel in this matter, I intend to utilize my skills, experience, and resources at McBrayer to effectively and adequately represent the proposed settlement class. In doing so, I will have available to me the vast experience and knowledge of other McBrayer attorneys, including those in the transactions, corporate, or other non-litigation practice areas, to assist with any issues that may arise with respect to dissolution and liquidation of assets, distribution of net assets, and other aspects of the proposed settlement.

15. I am aware of the significant time and resources that will be required to effectively and adequately represent the proposed settlement class, and I am committed to dedicating my time, skill, and resources to that requirement. This commitment together with the similar commitment of Attorney Katherine Yunker and the resources McBrayer brings would be sufficient to fairly and adequately represent the class.

16. It is my understanding that the resources McBrayer makes available to me (and other McBrayer attorneys) would be available in representing the interests of class members. These include the personnel and technological resources to support a representation of a large class of individuals, to facilitate a notice program to potential class members, and to communicate with those interested in the Co-op Case. Moreover, it is my understanding that McBrayer has the financial resources to continue its representation in the Co-op Case. It has been my experience, in numerous cases, that McBrayer has the financial ability to fund required work and expenses in cases in which no funds were available until the resolution of the litigation.

17. I have an existing attorney-client relationship with the three Named Plaintiffs, who have been requested to be appointed as settlement class representatives. I do not have an existing attorney-client relationship with the Named Defendant, Greg Craddock, for whom there is a pending motion to appoint him as a settlement class representative. I am willing to serve as class counsel along with anyone the Court appoints to be a class representative, even if that does not include all or any of the Named Plaintiffs.

Further the Affiant sayeth naught this 16th day of October, 2020.



Jason R. Hollon

COMMONWEALTH OF KENTUCKY)
) SCT
COUNTY OF FAYETTE)

The foregoing Affidavit was acknowledged, subscribed to, and sworn to before me by Jason R. Hollon on this the 12 day of October, 2020.

Notary Public, Kentucky State at Large

My Commission Expires: 11-2-23

JASON R. HOLLON
jhollon@mcbrayerfirm.com

[McBRAYER]

201 EAST MAIN STREET, SUITE 900
LEXINGTON, KY 40507
859.231.8780 EXT. 1147
FAX: 859.960.2917

Practice Experience

2016-Present	McBRAYER PLLC Litigation Associate	Lexington, KY

Clerkships

2014-2016	U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY Law Clerk to Judge Hanly A. Ingram	London, KY

Education

2011-2014	UNIVERSITY OF KENTUCKY COLLEGE OF LAW Juris Doctor, summa cum laude, Order of the Coif	Lexington, KY
2007-2011	UNIVERSITY OF KENTUCKY B.A., summa cum laude, history and political science	

Bar Admissions

Commonwealth of Kentucky

The United States Court of Appeals for the Sixth Circuit

United States District Court for the Eastern District of Kentucky

United States District Court for the Western District of Kentucky

Representative Cases

Overstreet v. Mayberry, 603 S.W.3d 244 (Ky. 2020)

Gearhart v. Express Scripts, Inc., 422 F.Supp.3d 1217 (E.D. Ky. 2019)

Red Hed Oil, Inc. v. H.T. Hackney Co., 92 F.Supp.3d 764 (E.D. Ky. 2017)

Breedlove v. Smith Custom Homes, Inc., 530 S.W.3d 481 (Ky. App. 2017)

Rider v. Bluegrass Oxygen, Inc., No. 5:18-456-DCR, 2019 WL 4934187 (E.D. Ky. Oct. 7, 2019)

Pioneer Credit Company v. Whelan, No. 18-80-HRW, 2018 WL 5659910 (E.D. Ky. Oct. 31, 2018)

ATTACHMENT 1

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

HAYNES PROPERTIES, LLC,
MITCH AND SCOTT HAYNES DBA
ALVIN HAYNES & SONS AND
S&GF MANAGEMENT, LLC
ON BEHALF OF THEMSELVES AND ALL
OTHERS SIMILARLY SITUATED — PLAINTIFFS

v. AFFIDAVIT OF ROBERT E. MACLIN, III, ESQ.

BURLEY TOBACCO GROWERS COOPERATIVE
ASSOCIATION — DEFENDANTS

AND

GREG CRADDOCK
ON BEHALF OF HIMSELF AND
ALL OTHERS SIMILARLY SITUATED

** ** ** ** ** **

Comes the Affiant, Robert E. Maclin, III, Esq., and after being first duly sworn, deposes and states as follows:

1. I am lead co-counsel in this Action, and as such I have personal knowledge as to this Action and as to the matters about which I depose and state herein.

2. I am a member of the law firm of McBrayer, PLLC ("McBrayer"), and I have been licensed to practice law in the Commonwealth of Kentucky since 1984 and in Texas since 1991. I practice law extensively across Kentucky and in Texas.

3. McBrayer serves as counsel for Named Plaintiffs Haynes Properties, LLC, Mitch and Scott Haynes dba Alvin Haynes & Sons, and S&GF Management, LLC in this Action.

4. Named Plaintiffs, through their representatives Mitch Haynes, Scott Haynes, and Penny Greathouse, by the motion to which this affidavit is attached and made a part thereof, have

moved the Court for appointment as Settlement Class Representatives.[1] This Affidavit is respectfully submitted in support of that motion, and such other motions as may properly come before the Court and as the Court may otherwise determine appropriate.

5. Named Plaintiffs, Haynes Properties, LLC, Mitch and Scott Haynes dba Alvin Haynes & Sons, and S&GF Management, LLC, and their families have been for decades and are engaged in the production and marketing of burley tobacco in Kentucky and Named Plaintiffs, Haynes Properties, LLC, Mitch and Scott Haynes dba Alvin Haynes & Sons, and S&GF Management, LLC have been and are members in good standing of Defendant Burley Tobacco Growers Cooperative Association (the "Co-Op").

6. Preceding the filing of this Action, Named Plaintiffs and members of their families participated with McBrayer PLLC in the process of pre-litigation research and analysis involving the current state of the burley tobacco industry and its decline, the past and current operations (and inactions and actions and conduct of officers and directors) and purposes of the Co-Op and its decline in purpose and usefulness, and the ways or means in which the members of the Co-Op could and should receive compensation for their interests in the Co-Op.

7. Ultimately, the Named Plaintiffs with McBrayer concluded that instituting this Action was the best method in which to preserve and protect the rights and interests of the members of the proposed Settlement Class (as determined in the Court's September 22, 2020 Findings and Opinion). So, on January 27, 2020, Named Plaintiffs initiated this proceeding by filing a complaint against the Co-Op alleging causes of action for breach of fiduciary duty, judicial dissolution, and declaratory judgment.

[1] Mitch Haynes is requesting appointment on behalf of Named Plaintiff, Haynes Properties, LLC, Scott Haynes is requesting appointment on behalf of Named Plaintiff, Mitch and Scott Haynes dba Alvin Haynes & Sons, and Penny Greathouse is requesting appointment on behalf of Named Plaintiff, S&GF Management, LLC.

8. Named Plaintiffs have asserted their claims on behalf of themselves and all other similarly situated members of the Co-Op. The complaint has been amended a number of times, and the operative pleading at this time is the Corrected Third Amended Complaint, filed May 5, 2020. The amendments, inter alia, added Named Defendant Greg Craddock ("Craddock") as a party, individually and on behalf of similarly situated Co-Op members, and a request for injunctive relief.

9. Since the filing of the Action on January 27, 2020, a Complaint and three Amended Complaints have been filed and served, discovery has been served on the Co-Op and responded to in part, over twenty subpoenas have been issued, a motion to dismiss has been filed and responded to, a motion for injunctive relief has been filed and responded to, numerous orders have been entered, numerous emails and letters have been exchanged among counsel, and numerous meetings have occurred among counsel. Named Plaintiffs have reviewed substantive communications between counsel, have participated in and reviewed each and every substantive pleading filed on their behalf in this Action, and have been regularly kept abreast of the formal and informal discovery in this Action.

10. In March and April 2020, the Court addressed Named Plaintiffs' motion for temporary injunctive relief to prevent further dissipations of the Co-Op's assets, including by making contracts to purchase burley tobacco for the crop year 2020 and the Co-Op's motion to dismiss the complaint. After oral arguments and a review of all the pleadings and the relevant caselaw, the Court entered an Order on the Named Plaintiffs motion, essentially sustaining that motion, and ordering that the Co-Op shall "not dissipate or distribute to its members or other persons (except its secured lender) any portions of net sale proceeds of its securities portfolio, its real property at 620 South Broadway or its Tobacco Inventory, but it may continue to pursue sales

of each such asset in the ordinary course of its business." On April 21, 2020, the Court entered a superseding Agreed Order containing the same directive. In these Orders, the Court further accepted and maintained jurisdiction over the Co-Op's assets. Named Plaintiffs, in consultation with McBrayer, thereafter began intense settlement negotiations involving the Co-Op,[2] Craddock, and their respective counsel.

11. Mediation sessions were ongoing and conducted by Robert F. Houlihan, Jr., Esq., a well-respected mediator and former litigator in central Kentucky. Named Plaintiffs with McBrayer and the other parties through their respective counsel, engaged in settlement negotiations led by Mr. Houlihan from April 21, 2020 through June 9, 2020, which culminated in the Stipulation and Agreement of Partial Settlement.

12. The mediation consisted of video conference sessions that occurred multiple times per week wherein counsel caucused in separate rooms and met amongst each other to negotiate the terms of the Stipulation and Agreement of Partial Settlement. Throughout the settlement negotiations, the Co-Op's attorneys maintained a hard stance and made shrewd negotiation efforts. Ultimately Named Plaintiffs with Craddock, prevailed and obtained a partial settlement providing for the Co-Op's dissolution and estimated to have a value to the members of the proposed Settlement Class in the range of twenty-five to thirty million dollars.

13. Following the Stipulation and Agreement of Partial Settlement, the parties jointly notified the Court that a partial settlement had been reached and filed a Joint Motion to Enter an agreed order granting preliminary approval of the partial settlement, approving a notice program,

---

[2] The Co-Op has five seasoned trial lawyers at three separate law firms. The Co-Op's attorneys include Charles E. English, Esq. and D. Gaines Penn, Esq. of English, Lucas, Priest & Owsley, LLP, Kevin G. Henry, Esq. and Charles D. Cole, Esq. of Sturgill, Turner, Barker & Moloney, PLLC, and Jeremy S. Rogers of Dinsmore & Shohl, LLP. English, Penn, Henry, Cole, and Rogers each, individually, have many years' experience litigating and defending claims like those brought by McBrayer on their clients' behalves and mounted a strong, collective defense on the Co-Op behalf in this case. Jeremy S. Rogers, Esq. did not participate in the Mediation sessions.

and establishing approval procedures for the settlement and a proposed settlement-only class. The partial settlement provides for the dissolution of the Co-Op and a *per capita* distribution of its net assets to a proposed settlement class comprised of current and former 2015-2019 crop year burley tobacco producer members of the Co-Op.

14. After several hearings on and following this motion, the Court entered a Findings and Opinion on September 22, 2020 related to the proposed Settlement Class and preliminary certification of the Action as a class action. The Court determined that this Action is appropriate and suitable for certification of a class action under CR 23.02(a) and (b) and defined the proposed Settlement Class as follows:

> A person[3] who was a landowner, operator, landlord, tenant, or sharecropper growing burley tobacco in Indiana, Kentucky, Missouri, Ohio, or West Virginia during one or more of the 2015-19 annual burley tobacco growing seasons[4].

The determination by this Court that this Action is appropriate and suitable for certification of a class action under CR 23.02(a) and (b) and of the proposed Settlement Class is a consistent with the relief requested by Named Plaintiffs and the definition of the proposed Settlement Class advocated by Named Plaintiffs, by counsel, in their Corrected Third Amended Complaint and during the partial settlement negotiations.

15. Mitch Haynes, Scott Haynes and Penny Greathouse (and presumably Craddock to which no objection is made) have requested to be appointed as proposed Settlement Class Representatives. Each have spent a considerable amount of time and effort in assisting in the litigation of this Action. But for the willingness of Mitch Haynes, Scott Haynes and Penny

---

[3] A "person" means an individual, partnership, limited liability company, corporation, trust, joint venture, or other recognized business entity.

[4] The annual burley tobacco growing season commences on or about March 1 with the tobacco cut, harvested, and hung in barns to close the season prior to September 30 of the same year, such that each growing season falls within a fiscal year of the Co-Op.

Greathouse to represent the proposed Settlement Class in this Action and the actions they directed, including the various motions seeking to stop dissipation of moneys, the Co-Op would have been left to its own devices, including expending and dissipating funds for operations during 2020 and the members of the proposed Settlement Class may have not received any significant payment or certainly less from its dissolution.

16. Since late 2018, McBrayer has analyzed, strategized, and prosecuted this Action on behalf of Named Plaintiffs and the proposed Settlement Class, both before and after filing of the Action, and, in doing so, it has expended a tremendous amount of time and resources. McBrayer accepted, has continued and will continue the representation of Named Plaintiffs' on a contingency fee basis, and accordingly has incurred and fully expects to incur substantial attorney time and advanced expenses, and thus a substantial amount of risk in prosecuting this complex, multi-faceted case.

17. McBrayer does have experience handling complex litigation cases in all state and federal trial and appellate courts, including commercial and business litigation, and before state and federal regulatory agencies. McBrayer's clients include local governments, small and large businesses, including healthcare organizations, feed stores/agricultural service providers, horse and livestock farms and ranches, horse owners, banks, insurance companies, developers and contractors, utility companies, restaurants, hotels, and trucking companies, whose claims are defended and prosecuted in a zealous and responsible manner. McBrayer has served as defense counsel on numerous putative class action cases, including *McKenzie, et al. v. Allconnect, Inc.*, U.S. District Court, Eastern District of Kentucky, Central Division at Lexington, Case No. 5:18-cv-00359-JMH; *Ware v. CFK Enterprises, Inc.*, U.S. District Court, Eastern District of Kentucky, 5:19-cv-00183-DCR-EBA, *Gearhart v. Express Scripts, Inc.*, U.S. District Court, Eastern District

of Kentucky, No. 0:18-cv-00002-HRW; *Anthony, et al. v. Winterwood, Inc. a/k/a Winterwood Property Management*, Commonwealth of Kentucky, Jefferson Circuit Court, Division Three, Civil Action No. 17-CI-004548; *Hensley, et al. v. Haynes Trucking, LLC, et al.*, Commonwealth of Kentucky, Fayette Circuit Court, Division Seven, Civil Action No. 10-CI-03986; *James R. Turner, et al. v. Grant County Detention Center, et al.*, U.S. District Court, Eastern District of Kentucky, Northern Division at Covington, Case No. 05-CV-148-DLB; *Grubb, et al. v. Marcum, et al.*, U.S. District Court, Eastern District of Kentucky, Southern Division as London, Case No. 05-CV-498-DCR; and *Wilson, et al. v. Franklin Co., Kentucky*, U.S. District Court, Eastern District of Kentucky, Frankfort Division, Case No. 97-35. McBrayer has served as plaintiff's counsel on several putative class action cases, including *Triad Health Systems, Inc., et al. v. Purdue Pharma L.P., et al.*, U.S. District Court, Northern District of Ohio, Eastern Division, Case No. 1:19-op-45780-Dap; *Family Practice Clinic of Booneville, Inc., et al. v. Purdue Pharma L.P., et al.*, U.S. District Court, Northern District of Ohio, Eastern Division, Case No. 1:18-op-45390-DAP; *Hays, et al v. Comm. of Kentucky, Cabinet for Health and Family Services, Dep't for Medicaid Services, et al.*, Commonwealth of Kentucky, Franklin Circuit Court, Division Two, Civil Action No. 13-CI-00117; and *Congleton, et al. v. Burley Tobacco Growers Cooperative Association, et al.*, Commonwealth of Kentucky, Fayette Circuit Court, Division Four, Civil Action No. 06-CI-00069.

18. In addition to McBrayer's professional accomplishments, I have research and educational training and experience in burley tobacco production. I hold both a B.S. (Agricultural Economics -1977) from the University of Kentucky and an M.S. in Agricultural Economics from the University of Kentucky (1979). My Master's thesis, entitled "Underproduction of Burley Tobacco Quotas in Kentucky 1971-1977," focused on underproduction of burley tobacco under

the federal price support quota system. I am the author or co-author of several reference publications used in tobacco agricultural studies, including "Effectiveness of Burley Tobacco Poundage Quotas in Kentucky Production and Supply," *Tobacco Science*, Vol XXIV, pp 73-76, an additional article on the same subject matter in *Tobacco International*, Vol. 182, No. 13, pp. 85-88, and "Burley Tobacco Costs, Now and Next Year," which appeared in the December, 1980 issue of *Progressive Farmer*. I was employed by the University of Kentucky, Department of Agricultural Economics, as a Farm Management Instructor from 1980-81.

19. Beyond my role as an attorney, throughout my entire life I have been involved in various farming and ranching operations, including periodically being involved in burley tobacco production. Currently, my wife and I own and operate Merefield Farm (horses, livestock and grain) in Midway, Kentucky.

20. I am very familiar with the law surrounding and applicable to claims for breach of fiduciary duty, judicial dissolution, injunctive relief, and declaratory judgments. I have litigated, both on plaintiff and defense side, cases involving these types of claims both in federal and state court. This work has required me to become and remain familiar with the applicable procedural and substantive law.

21. In two previous cases, my expertise as an attorney and farm background resulted in favorable outcomes. I served as plaintiff's class counsel in the case of *Dolan v. Land*, 667 S.W.2d 684 (1984), in which a group of farmers successfully challenged the method of assessment by the Property Valuation Administrator of agricultural land located in Fayette County, Kentucky. I also represented burley tobacco farmers in *Congleton*, Fayette Circuit Court, Civil Action No. 06-CI-00069 and obtained a summary judgment and of the largest recoveries recorded in the history of Fayette County, Kentucky.

22. McBrayer presently has fifty-two attorneys, and, over the past seven months, eight attorneys have worked on this case. The majority of the attorney hours devoted by McBrayer to this case have been from five of the attorneys who have worked on this matter: Robert E. Maclin, III; Katherine K. Yunker; Jaron P. Blandford; Jason R. Hollon; and Drake W. Staples. Each of these attorneys has significant litigation experience throughout the Commonwealth of Kentucky including the complex litigation described herein. Through their experience, each of these attorneys has knowledge of the applicable law relating to the causes of action asserted herein.

23. McBrayer has the financial resources to continue to prosecute and is fully prepared to prosecute this Action on behalf of the Named Plaintiffs and the proposed Settlement Class.

Further the Affiant sayeth naught this 29th day of September, 2020.

Robert E. Maclin, III

COMMONWEALTH OF KENTUCKY)
) SCT
COUNTY OF FAYETTE)

The foregoing Affidavit was acknowledged, subscribed to, and sworn to before me by Robert E. Maclin, III on this the 29th day of September, 2020.

ELLEN M. GREEN
My Commission Expires 07-21-2021
NOTARY PUBLIC
Notary ID # 582710
STATE AT LARGE, KENTUCKY

Notary Public, Kentucky State at Large
Notary ID#: 582710
Commission Expiration Date: 7-21-2021

JNM

Jones, Nale & Mattingly PLC

December 18, 2020

Mr. Robert E. Maclin
McBrayer PLLC
201 East Main Street, Suite 900
Lexington, KY 40507

Dear Mr. Maclin,

I have made certain adjustments to the balance sheet of Burley Tobacco Growers Cooperative Association. The balance sheet is an internal document as of October 31, 2020 (attached). I have not audited or reviewed the balance sheet; therefore, certain adjustments may exist that have not been identified. However, I did identify certain adjustments to more appropriately reflect the values as follows:

	October 31, 2020	Adjustments	Adjusted Balance Sheet
Cash	$2,098,716.76		$2,098,716.76
Accounts receivable	985,233.00		985,233.00
Prepaid expenses	28,223.65		28,223.65
Investments	15,532,052.79		15,532,052.79
Accrued interest	3,724.45		3,724.45
Tobacco Inventory	13,324,061.06		13,324,061.06
Allowance	(908,950.89)	(3,088,267.47)	(3,997,218.36)
Property & equipment	461,674.79	1,788,325.21	2,250,000.00
Cash value life insurance	495,158.59	(495,158.59)	
other assets	1,632.08		11,632.08
Total	$32,021,526.28	($1,795,100.85)	$30,236,425.43
Accounts payable & accrued expenses	495,087.69		495,087.69
Deferred compensation	313,117.45	(495,158.59)	
		182,041.14	0.00
	808,205.14	(313,117.45)	495,087.69
Equity	31,223,321.14	(1,481,983.40)	29,741,337.74
Total	32,031,526.28	(1,795,100.85)	30,236,425.43

EXHIBIT
C

I made three significant adjustments to the balance sheet. The first was to adjust the realizable value of the tobacco inventory to 70% of its historical cost. The second adjustment was to adjust for the future sale of the real estate to its sales price. The third was to remove the cash surrender value of the life insurance and the deferred compensation liability to Danny McKinney. These adjustments did result in an decrease in Equity of $1,481,983.40. After the adjustments the equity of the Cooperative is $29,741,337.74 and cash & investments of $17,630,769.55.

Should you have any questions, please call.

Very truly yours,

R. Wayne Stratton, CPA, ABV, CFE

Date	Matter	SM/Task	Service Code	Description	Orig Qty	Orig Amt	Vendor	Narrative
05/01/2020	1		00032	Transcripts	0.00	282.65	Collins Sowards Lennon Reporting, LLC	ABHA Corporation hearing transcript
05/07/2020	1		00036	Professional Services	0.00	5,975.00	Jones, Nale & Mattingly	Wayne Stratton services rendered through 04/30/2020
06/10/2020	1		00003	Travel (mileage)	3.20	1.84	Ellen Green	Travel (mileage) Travel to and from Haynes Brothers to consult with Mich and Scott Haynes and explain and obtain execution of settlement documents
06/25/2020	1		00036	Professional Services	0.00	3,542.50	Jones, Nale & Mattingly	Services rendered by Wayne Stratton from May 8-18 2020
10/14/2020	1		00003	Travel (mileage)	70.00	40.25	Robert E. Maclin, III	Travel (mileage) Travel to Mt. Sterling to meet with Mitch and Scottie Haynes
10/27/2020	1		00063	Video Services	0.00	25.00	Fayette Circuit Court	Video of Hearing on 10/19/2020
12/01/2020	1		00036	Professional Services	0.00	25.44	PrintLEX	24 burley gloss posters
12/31/2020	1		00071	Newspaper Ad	0.00	228.75	Farmland Publications	Newspaper Ad, Farmland Publications, 12/31/2020, 20201231
01/07/2021	1		00064	Fee for Legal Notice	0.00	1,308.86	Columbus Dispatch	Fee for Legal Notice, Columbus Dispatch, 1/7/2021, 0006271579
01/07/2021	1		00071	Newspaper Ad	0.00	150.79	Charleston Gazette	Newspaper Ad, Charleston Gazette, 1/7/2021, 104175
01/07/2021	1		00071	Newspaper Ad	0.00	565.50	Owensboro Messenger-Inquirer, Inc.	Newspaper Ad, Owensboro Messenger-Inquirer, Inc., 1/7/2021, 754471
01/07/2021	1		00071	Newspaper Ad	0.00	1,925.00	The Tennessean	Newspaper Ad, The Tennessean, 1/7/2021, 8595513662MCBR
01/07/2021	1		00071	Newspaper Ad	0.00	1,096.92	The Kansas City Star Media Co	Newspaper Ad, The Kansas City Star Media Co, 1/7/2021, 801521
01/07/2021	1		00071	Newspaper Ad	0.00	147.02	Indianapolis Star	Newspaper Ad, Indianapolis Star, 1/7/2021, 4544629
01/07/2021	1		00071	Newspaper Ad	0.00	1,023.00	Lexington Herald-Leader	Newspaper Ad, Lexington Herald-Leader, 1/7/2021, 0004847637-01
01/08/2021	1		00071	Newspaper Ad	0.00	2,222.64	The Kansas City Star Media Co	Newspaper Ad, The Kansas City Star Media Co, 1/8/2021, 0004848186
					73.20	18,561.16