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

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

vs. **FINDINGS and OPINION**

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

On January 27, 2020, Plaintiffs initiated this proceeding by filing a complaint against Defendant Burley Tobacco Growers Cooperative Association ("the Co-op"), alleging causes of action for breach of fiduciary duty, judicial dissolution, and declaratory judgment. The named Plaintiffs, Haynes Properties, LLC, Mitch and Scott Haynes d/b/a Alvin Haynes & Sons, and S&GF Management, LLC, represented in the complaint that they are engaged in the production of burley tobacco in Kentucky and all have been and are members in good standing of the Co-op. They asserted their claims on behalf of themselves and all other similarly situated grower-members of the Co-op. The complaint has been amended a number of times, with the operative pleading being the Corrected Third Amended Complaint ("3rd Am. Cmplt."), filed May 5, 2020. By that amendment, Greg Craddock was named as a party defendant, individually and on behalf of those similarly situated.

Prior to the May amendment which named Craddock as a party defendant, in March and April 2020, after oral arguments by counsel for the Plaintiffs and Defendants and a review of all

the pleadings and the relevant caselaw, the Court entered an Order, *inter alia,* that directed the Co-op to not:

> dissipate or distribute to its members or other persons ... any portion 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.

3/30/20 Order ¶5 (p.2). On April 21, 2020, the Court entered a superseding Agreed Order containing the same directive; that Order remains in force.

On June 10, 2020, the parties notified the Court that they had reached a partial settlement of the matter, and filed a Joint Motion to Enter an agreed order granting preliminary approval of the partial settlement, approving a notice program, and establishing approval procedures for the settlement and a proposed settlement-only class. As an attachment to the Joint Motion, the parties submitted a Stipulation and Agreement of Partial Settlement ("the Stipulation and Agreement"), signed by all the named parties. The partial settlement focused on dissolution of the Co-op and a *per capita* distribution of its net assets to a settlement class comprised of certain burley tobacco growers.

Pursuant to CR 23 and the law, the Court, to the consternation of the parties, refused to grant the Joint Motion, and instead, held hearings about the proposed partial settlement and settlement-only class on June 29, July 23, and August 13 and 20, 2020. After the Court questioned the parties about various aspects of the proposed settlement, and received and reviewed written submissions by the parties about the settlement agreement and certain other aspects of the agreement, the Court ruled from the Bench, then memorialized its rulings in the September 27, 2020 Findings and Opinion, ruling on an appropriate class definition,[1] and further

[1] Without the explanatory footnotes, the September 27, 2020 Opinion defined a settlement class member as: "A person 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

ruling that the dissolution and distribution claims and issues were appropriate matters for class treatment under CR 23.02(a) and (b), the non-opt-out class types.[2] These rulings were prefatory to hearings and determinations about whether the proposed settlement deserves consideration by the class, preliminary certification of the proposed settlement-only class, and notice to unnamed class members.

Then, the Plaintiffs and Defendant Craddock each moved for a ruling that the proposed settlement class met the CR 23.01 prerequisites and for appointment as a representative of the settlement class; in addition, application was made for CR 23.07 appointment of these parties' attorneys as class counsel. These motions or applications were accompanied by sworn affidavits and documents about the issues presented. On October 19, 2020, this Court held an evidentiary hearing on the motions and applications in two phases.

The first phase addressed the CR 23.01 prerequisites and appointment of class representatives. Witnesses provided in-court testimony, and a number of exhibits were received into evidence. The witnesses who testified were:

1. Mitch Haynes, as the representative of Plaintiff (and proposed class representative) Haynes Properties, LLC;
2. Penny Greathouse, as the representative of Plaintiff (and proposed class representative) S&GF Management, LLC;
3. Scott Haynes, as the representative of Plaintiff (and proposed class representative) Mitch and Scott Haynes d/b/a Alvin Haynes & Sons;
4. Al Pedigo, as the corporate representative of Defendant Burley Tobacco Growers Cooperative Association; and

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tobacco growing seasons." September 27, 2020 Opinion at 9. The definition was subsequently amended by the Amended Preliminary Certification Order entered November 17, 2020, to include those who grew in the 2020 growing season.

[2] The ruling on the appropriate class definition encompassed one of two tacit certification requirements — "that a definable class must exist." *Haynes*, 549 S.W.3d at 444 (internal quotation marks omitted). Part 3 below addresses the tacit requirement that "the representatives must be members of the class." *Id.*

5. Greg Craddock, Defendant and proposed class representative.

All these witnesses, except Mr. Pedigo, previously filed affidavits, and these affidavits were accepted as hearing exhibits and treated as part of the respective witnesses' direct testimony at the hearing. At the close of the evidence at this phase of the hearing, the parties were given an opportunity to present closings, but all waived that opportunity. This Court then announced its findings and rulings on the CR 23.01 prerequisites and class-representative appointments, which are now memorialized in parts 2 and 3 below, respectively.

As the second phase of the October 19, 2020 hearing began, counsel for Defendant Craddock requested a brief recess to consult with their client. At the end of the recess, his counsel announced that Mr. Craddock was withdrawing the application seeking the appointment of his attorneys as class counsel. The Court thus proceeded with a hearing on the remaining application, from Plaintiffs' counsel, for the appointment of McBrayer attorneys Katherine K. Yunker and Jason R. Hollon as class counsel for the proposed settlement class. In lieu of direct testimony, previously filed affidavits of Ms. Yunker, Mr. Hollon, and attorney Robert E. Maclin, III (as a representative of the McBrayer PLLC firm), were received into evidence as hearing exhibits and each of the affiants was present in the courtroom and available for further examination. The other parties stated their lack of opposition to the McBrayer application and did not pose questions to any of the affiants. Ms. Yunker was sworn in as a witness and responded to questions from the Court; the Court also addressed a question to Mr. Maclin as an officer of the court. This Court then announced its findings and rulings with respect to appointment of class counsel, which are now memorialized in part 4 of this opinion.

This Court's rulings announced at the October 19, 2020 hearing — concluding that the CR 23.01 prerequisites were met, appointing class representatives, and appointing class counsel — are memorialized in parts 2-4 below. In part 1, the Court describes the standards it used to

evaluate the evidence presented and reach its decisions. On the rulings announced at the hearing, it was appropriate to preliminarily certify the proposed settlement class, and this Court did so by its Preliminary Certification Order entered November 10, 2020, as amended by the Amended Preliminary Certification Order entered November 17, 2020.

1. To protect absent class members, the Court applies a "preponderance of the evidence" standard to the issues presented.

A class may be certified only if the trial court is satisfied, after rigorous analysis, that the Civil Rule prerequisites have been met. *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 157, 161 (1982).[3] The burden of affirmatively demonstrating each of the certification prerequisites, subject to a rigorous analysis, requires a certification proponent "'to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc.'" *Hensley v. Haynes Trucking, LLC*, 549 S.W.3d 430, 445 (Ky. 2018) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011)). In adopting *Dukes* guidance, the Kentucky Supreme Court decided against the more demanding standard of the "substantial possibility" test, in which the proponent must show a substantial possibility of prevailing on the merits. *Hensley*, 549 S.W.3d at 445.

In the September 27, 2020 Opinion (at 5-6), this Court acknowledged that its duties to protect the interests and due process rights of absent class members are increased in the context of a settlement. **A court considering a request for settlement-only certification must give "undiluted, even heightened, attention" to Rule 23 specifications, "for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold."** *Amchem Products, Inc. v.*

[3] Federal law may guide a "class certification decision because CR 23 mirrors its federal counterpart, Federal Rules of Civil Procedure Rule (FRCP) 23." *Hensley v. Haynes Trucking, LLC*, 549 S.W.3d 430, 436 (Ky. 2018).

Windsor, 521 U.S. 591, 620 (1997) (emphasis added). Therefore, this Court undertook in the September 27, 2020 Opinion (at 6) to exercise the highest degree of vigilance in discharging its fiduciary duty to absent class members, and it does so now by applying the "preponderance of the evidence" standard to assess the sufficiency of the showing on the CR 23.01 prerequisites and the appointment of class representatives. It also applies that standard to the factors to be considered under CR 23.07 in appointing class counsel.[4] In the case at bar there was no litigation as defined by *Amchem Products*. The operative pleading (the Third Amended Complaint) was filed May 5, 2020 and this Court was notified a settlement was reached on June 10, 2020, only 36 days later. Since the settlement document is not dated the Court cannot confirm whether the settlement was actually reached on or before June 10, 2020.

2. The class-certification prerequisites in CR 23.01 are met.

The Court, having thoroughly reviewed the record and having conducted multiple hearings in this matter, hereby FINDS and RULES as follows:

The requirements of CR 23.01 ensure that named plaintiffs are appropriate representatives with respect to the class claims. *Dukes*, 564 U.S. at 349.[5] CR 23.01 provides:

> Subject to the provisions of Rule 23.02, one or more members of a class may sue or be sued as representative parties on behalf of all only if (a) the class is so numerous that joinder of all members is impracticable, (b) there are questions of law or fact common to the class, (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (d) the representative parties will fairly and adequately protect the interests of the class.

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[4] Appointment of class counsel is part of the certification of a class and so it would be natural to apply the same "rigorous analysis" standard that is applied to Rule 23(a) and CR 23.01 determinations by *Gen'l Tel. Co.*, 457 U.S. at 161, and *Hensley*, 549 S.W.3d at 442, respectively.

[5] *See also In re Whirlpool Corp. Front-Loading Washer Prod. Liab. Litig.*, 722 F.3d 838, 850 (6th Cir. 2013) ("These four requirements — numerosity, commonality, typicality and adequate representation — serve to limit class claims to those that are fairly encompassed within the claims of the named plaintiffs because class representatives must share the same interests and injury as the class members.").

Prior to certifying a class, a court must make findings that each of these four prerequisites (numerosity, commonality, typicality, and adequacy) is present. *Hensley*, 549 S.W.3d at 442-43. As described in more detail below, this Court finds that the settlement class may proceed with respect to the proposed settlement, because each of the four CR 23.01 prerequisites is met.

a. Numerosity

CR 23.01(a) requires that the class be so numerous that joinder of all members is impracticable. Impracticability does not mean impossibility and a proponent of class certification need only show "that it is extremely difficult or inconvenient to join all members of the class." *Hensley*, 549 S.W.3d at 443. The undisputed evidence is that approximately 4000 confirmed or probable members of the proposed settlement class have been identified[6] and that there are others — not yet identified — that meet the class definition.[7] Although the addresses of identified members were predominantly in Kentucky, some had addresses in and beyond the other four states (West Virginia, Ohio, Indiana, and Missouri) in which burley tobacco must be grown to qualify for class membership.[8]

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[6] Al Pedigo testified at the October 19, 2020 hearing from a cumulative list, compiled by Co-op employees, of approximately 4000 persons, most of whom were members during at least one of 2015-19 crop years— and that this is the best list the Co-op could provide. Although a print-out of the list was available at the hearing, it was not entered into evidence to protect the privacy of the persons listed. An unredacted copy of the spreadsheets compiling this data was provided to all counsel before the 10/19/20 hearing.

[7] Mr. Pedigo testified that it is up to each person to file the required documentation with the Co-op; the spreadsheet list reflects the documentation the Co-op has. Greg Craddock testified that he thought he was on the Co-op's membership roll, but discovered a few years ago that he was not (and corrected that situation); he testified that he encountered others whom he knew to be eligible for membership who also were not listed. Penny Greathouse testified that Co-op membership numbers declined from 2015 to 2018, and then rose for 2019-20 as growers were being encouraged to confirm their membership by both the Co-op and a grower group pressing for dissolution. *See also* P. Greathouse Affidavit (Pls. Hrg. Exh. 3) ¶13.

[8] Along the same lines, Mr. Craddock testified that he knew of persons residing in Tennessee, but who grew burley on Kentucky land.

The approximately 4000 persons who are probable settlement class members, standing alone, might be a sufficiently large number to demonstrate the impracticability of joinder.[9] In this case, however, impracticability is reinforced by the probable existence of unidentified class members and the fact that class members reside or have a principal place of business beyond the five growing states. *See Hensley*, 549 S.W.3d at 443 (listing geographic dispersion and difficulties in identifying potential class members among the factors weighing against practicability). This Court thus finds, on the preponderance of the evidence, that the class is too numerous for joinder to be practicable.

b. Commonality

The CR 23.01(b) prerequisite of commonality is met if there is a question of law or fact that is capable of class-wide resolution. The commonality question focuses on "[w]hether the class plaintiffs' claims 'depend upon a common contention … that is capable of class wide resolution,'" *Haynes,* 549 S.W.3d at 443 (quoting *Dukes*, 564 U.S. at 350). "[E]ven if some individualized determinations may be necessary to completely resolve the claims of each putative class member … those are not the focus of the commonality inquiry." *Nebraska Alliance Realty Co. v. Brewer*, 529 S.W.3d 307, 312 (Ky. App. 2017) (internal quotation marks omitted). As to the dissolution and distribution proposed in the settlement, the only individual determination that might be required is whether a particular person is a member of the settlement class; all other legal and factual questions are in common. It is undisputed that the Co-op's 1922 Articles provide equal property rights to each member, and that this principle has been

[9] *See, e.g., Bacon v. Honda of Am. Mfg., Inc.*, 370 F.3d 565, 570 (6th Cir. 2004) (concluding that class of 800 current and former employees was well beyond point at which joinder would be feasible and stating that "sheer number of potential litigants in a class, especially if it is more than several hundred, can be the only factor needed to satisfy" numerosity).

consistently applied and comports with all applicable statutes about dissolution of an agricultural cooperative. In the 9/27/20 Opinion (at 14), this Court found "a practical need for one rule to be applied across the board … with respect to the dissolution of the Co-op and distribution of its net assets." This is more than enough to satisfy commonality.

c. Typicality

The typicality and commonality requirements "[b]oth serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Dukes*, 546 U.S. at 349 n.5. There is also overlap between the typicality and adequacy requirements.[10] Typicality requires that the proposed class representatives' claims arise from the same event, practice, or course of conduct that gives rise to the claims of other class members and are based on the same legal theory. *Hensley*, 549 S.W.3d at 443.[11]

The Plaintiffs' witnesses testified to the inclusion of a claim for judicial dissolution in their initial and amended complaints, and of the facts significant to the decision of each that the Co-op should be dissolved; their testimony also identified factual support for a post-dissolution distribution of Co-op assets to burley growers back to the 2015 crop year and on a per-capita basis.[12] Defendant Greg Craddock testified to the factors in his decision to press for dissolution

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[10] *See Nebraska Alliance*, 529 S.W.3d at 316 (remanding for further CR 23.01 analysis; noting that "the typicality, commonality, and adequacy prongs are interrelated"); *Summit Medical Group, Inc. v. Coleman*, 599 S.W.3d 445, 451 (Ky. App. 2019) (same).

[11] "'A necessary consequence of the typicality requirement is that the representative's interests will be aligned with those of the represented group, and in pursuing his own claims, the named plaintiff will also advance the interests of the class members.'" *Manning v. Liberty Tire Servs. of Ohio, LLC*, 577 S.W.3d 102, 114 (Ky. App. 2019) (quoting *In re American Med'l Sys., Inc.*, 75 F.3d 1069, 1082 (6th Cir. 1996)).

[12] Co-op president Al Pedigo provided additional testimony and introduced exhibits — particularly the current Bylaws (Co-op Hrg. Exh. 1) — supporting a per-capita distribution to Co-op members from recent years. He also testified that the Co-op ceased buying members' tobacco in the 2020 crop year and

of the Co-op,[13] including the "KCARD Report" (Craddock Hrg. Exh. 4) that is central to the Complaint allegations and was also a catalyst for the Plaintiffs' conclusion that the Co-op should be dissolved.[14]

On this evidence and an examination of the pleadings in this case, the Court finds that the Plaintiffs' and proposed class claims regarding dissolution and distribution are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. The Plaintiffs' claims arise from the same set of facts, practice, or course of conduct that gives rise to the claims of other class members and the same legal theories and statutes providing for dissolution of an agricultural co-operative. The typicality requirement thus is met for the proposed settlement class.

d. Adequacy

The adequacy prerequisite requires establishing attributes and conduct of the proposed class representatives to support a conclusion that representative parties can adequately protect the class. This prerequisite traditionally has been separated into two criteria: "(1) the representative must have common interests with unnamed members of the class[;] and (2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel." *Hensley*, 549 S.W.3d at 443 (internal quotation marks omitted); *Nebraska Alliance*, 529 S.W.3d

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is winding up its function as a marketing cooperative, with the announced desire to dissolve and distribute net assets to members.

[13] Mr. Craddock has not asserted a claim for judicial dissolution; his preferred path for dissolution was through a membership vote. *See, e.g.*, Craddock Aff. (Craddock Hrg. Exh. 1) ¶¶ 26-27. Although he did not individually assert a claim for judicial dissolution, Mr. Craddock has such a claim as a putative class member and supported that claim by signing the Stipulation and Agreement proposing the partial settlement. *Id.* ¶¶ 28, 33.

[14] *See, e.g.*, 3rd Am. Cmplt. ¶¶ 10-11; Affidavits (Pls. Hrg. Exhs. 2-4) ¶¶ 15-17. This 2018 report is referred to as "the Operational Review" in the complaints and these affidavits; "KCARD" refers to The Kentucky Center for Agriculture and Rural Development, Inc., a nonprofit organization that was a co-author of the report.

at 313 (same). A "representative must not have any significant interests antagonistic to or conflicting with those of the unnamed members of the class." *Hensley*, 549 S.W.3d at 443 (internal quotation marks omitted). The existence of adequate class representatives can be established through examination of the attributes and conduct of the Plaintiffs, and this Court addresses in part 3 of this opinion which of the candidates to appoint as class representatives.

The evidence is undisputed that the named Plaintiffs have common interests with the unnamed members of the class, and there is no evidence that they have any significant interests antagonistic to or conflicting with other settlement class members with respect to dissolution and distribution. As testified at the hearing and in affidavits, the Plaintiffs are multi-year members of the Co-op and their principals are life-long burley tobacco farmers whose parents were also life-long farmers.[15] They understand who the members of the settlement class are and their problems.[16] Each has looked to the Co-op to provide practical support for burley farmers, and witnessed the Co-op's effectiveness decline to the point where it provides no practical assistance.[17] They thus have a similar interest with other members in having the Co-op dissolved now, before there is additional depletion of its assets. Furthermore, under the proposed settlement's *per capita* distribution, each Plaintiff's interest in the dissolution and eventual distribution of the Co-op's net assets is identical to that of every other settlement class member.

The evidence and the record in this action also show that the Plaintiffs have more than adequately prosecuted the dissolution claim.[18] They assisted counsel in investigating the Co-

[15] *See* Affidavits (Pls. Hrg. Exhs. 2-4) ¶¶ 4-10.

[16] In particular, Mitch Haynes testified at the hearing that he had discussed issues about the Co-op with the more than 100 growers who bring burley tobacco to the receiving station business that he and his brother operate. *See also* Affidavits (Pls. Hrg. Exhs. 2-4) ¶¶ 17, 21-22, 31-33.

[17] *See* Affidavits (Pls. Hrg. Exhs. 2-4) ¶¶ 14, 17.

[18] The request for judicial dissolution is Count II of the complaint. *See* 3rd Am. Cmplt. ¶¶ 27-32.

op's situation before filing the complaint, supported the conduct of the litigation, participated in settlement negotiations, signed the settlement agreement, and support the proposed dissolution of the Co-op and distribution of its assets.[19] The named Plaintiffs have demonstrated their understanding of the importance of a class action and each has committed to putting the interest of the unnamed class members first.[20] It is clear that the named Plaintiffs will be able to be responsive to, and cooperate with, the Court in an effective manner. The past actions and the demeanor and forthrightness of Plaintiffs' witnesses in answering the Court's questions and in testifying at the hearing about their understanding of and acceptance of the responsibilities that come with being a class representative support a conclusion that they are parties who will adequately and fairly represent the interests of unnamed class members.

To the extent that it is still a part of the consideration about the adequacy of proposed class representatives,[21] this Court finds on the basis of hearing and affidavit testimony that named Plaintiffs through competent Counsel have always supported Judicial dissolution by a class action certification which would benefit 3,000 to 4,000 growers rather than through a non-judicial dissolution. For reasons that are more fully set forth in part 4 of the opinion, the Court addresses its determination that Plaintiffs' counsel are able to adequately protect the class's interests. Thus, by a preponderance of the evidence, the adequacy prerequisite has been met.

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[19] *See, e.g.,* Affidavits (Pls. Hrg. Exhs. 2-4) ¶¶ 15-19, 28-30.

[20] Each of the Plaintiff witnesses testified at the hearing and in their respective affidavits (*see id.* ¶¶ 25, 38, 31, 33-34) about their understanding of the duties of a class representative to the class members.

[21] The *Hensley* decision recites the two-criteria standard for the adequacy prerequisite, 549 S.W.3d at 443, but did not address a challenge to adequacy (of the class representative or counsel). *Nebraska Alliance* referred to questions about the competence and possible conflicts of class counsel as CR 23.01(d) adequacy issues, 539 S.W.3d at 315, and (like *Hensley*) did not mention CR 23.07, ruling that "[b]y failing to appoint class counsel in the order establishing the class, the trial court necessarily failed to determine the adequacy prong *in toto*." In *Summit Medical Group*, 599 S.W.3d at 451, the Court of Appeals vacated and remanded a litigating class certification to the trial court to analyze class counsel's ability under CR 23.01 and CR 23.07 and in the light of a proposed substitute for one of the initially-appointed class counsel — and required the trial court to re-analyze the 23.01(b)-(d) determinations as well.

Since all the CR 23.01 prerequisites have been satisfied and the Court ruled in the September 27, 2020 Opinion (at 12-14) that the proposed settlement class may be maintained under CR 23.02(a) and (b), the Court now concludes that the proposed settlement class should be preliminarily certified.

3. The named Plaintiffs, individually and together, will fairly and adequately protect the interests of the class.

As set forth previously, the Court finds that the CR 23.01 prerequisites to a class action had been met, including that the claims of the three Plaintiffs were typical of the claims of the proposed settlement class and that they were capable of fairly and adequately protecting the interests of that class. In the past, such findings might lead automatically to the appointment of the allegedly representative parties (here, the Plaintiffs) as class representatives and their attorneys (here, McBrayer lawyers) as class counsel. Even before the addition of federal Rule 23(g) and CR 23.07 specifying procedures and criteria for the appointment of class counsel, however, some courts distinguished between finding that class prerequisites were met and the determination of who and how many to appoint as class representatives.[22] The Court treats the decision to appoint one or more persons as class representatives as distinct from the question of whether the proposed settlement class should be certified.

The Court had before it requests to appoint four persons as class representatives: (1) a motion to appoint the named Plaintiffs, Haynes Properties, LLC, Mitch and Scott Haynes d/b/a

[22] *See, e.g., Shankroff v. Advest, Inc.*, 112 F.R.D. 190, 194 (S.D.N.Y. 1986) (granting class certification despite finding that named plaintiff was an inadequate representative, granting class certification subject to a timely request for another person to be appointed to represent the class); *cf. Weisman v. Darneille*, 78 F.R.D. 671, 673 (S.D.N.Y. 1978) ("Rejection of one plaintiff as an adequate class representative does not preclude our granting class certification to another representative plaintiff.").

Alvin Haynes & Sons, and S&GF Management, LLC;[23] and (2) a motion to appoint Greg Craddock, who was involuntarily made a party defendant in this suit a few months after it was initiated. These motions were in accordance with the Settlement and Stipulation, and none of the parties opposed these requests for appointment as class representatives. Having thoroughly reviewed the record and having conducted multiple hearings in the matter, the Court hereby FINDS and RULES as follows:

a. Only the Plaintiffs meet the criteria for appointment.

On the undisputed evidence, each person proposed to be a class representative meets the tacit requirement to be a member of the settlement class.[24] It is also undisputed that each has standing to pursue the dissolution/distribution claim brought here by Plaintiffs — although it is notable that Defendant Greg Craddock did not bring and has not joined in the claim brought by Plaintiffs. In parts 2.c and 2.d, of this opinion, the Court found that each of the named Plaintiffs met the definition of a settlement class member, had claims typical of those of the class, and would adequately represent the class. Plaintiffs' witnesses each pledged to cooperate with other appointed class representatives and to cooperate with the Court. The Court concluded that each Plaintiff understands the concerns of the burley growers who will be members of the settlement class and the responsibility and importance, particularly in the context of a settlement, of adequately and fairly representing the interests of class members who are not present in the case as parties. Each thus met the criteria and is eligible to be considered for appointment as a class representative.

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[23] Plaintiffs' CR 23.01 Motion requests appointment of principals Mitch Haynes, Scott Haynes, and Penny Greathouse "on behalf of" the respective entities. Although these individuals have been the principals and witnesses for the Plaintiffs in this case and would personify the entities appointed as class representatives, this Court's appointment should be of the named party rather than its principal.

[24] A requirement not mentioned in the Rule, "presumably because [it is] self-evident, [is] that ... the representatives must be members of the class." *Hensley*, 549 S.W.3d at 444.

Mr. Craddock did not meet the standards for being a class representative. The Court finds that he is a member of the settlement class, on testimonial and documentary evidence that he grew burley tobacco in central/western Kentucky for more than 25 years, including in 2019.[25] However, on this record and the evidence before it, the Court finds that Mr. Craddock does not have claims typical of the proposed Settlement Class and that, even after signing the Stipulation and Agreement, he has acted adversely to the interests of the proposed settlement class and otherwise demonstrated that he will neither prosecute the interests of the class as a whole nor cooperate with the Court in safeguarding unnamed class members' interests.

The complaint filed by Plaintiffs seeks, and the settlement agrees to, judicial dissolution of the Co-op and distribution of its net assets to burley tobacco growers from the 2015-19 growing seasons. Mr. Craddock was named as a defendant in this suit because he and a number of other burley tobacco growers had been advocating and pursuing a competing program of an internal, corporate dissolution of the Co-op and an inconsistent Plan of Distribution in which, *e.g.*, the distribution of net assets would not include Co-op members who grew in 2015.[26] Thus, the uncontested allegations in this case[27] are that Mr. Craddock's claims and positions relating to dissolution of the Co-op and distribution are not typical of those for a settlement class based on the proposed judicial dissolution.

Furthermore, although he is a signatory to the Stipulation and Agreement, Mr. Craddock remains of the opinion that a better outcome would be corporate dissolution under the proposed

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[25] See October 5, 2020 Craddock Aff: (Craddock Hrg. Exh. 1), ¶¶ 3, 6, 41 & Exh. A (2019 FSA Form 578).

[26] Information and documents relating to the proposed vote for corporate dissolution, including the Plan of Distribution put forward by Mr. Craddock and others, are presented in a number of filings in this case. *See, e.g.*, 3rd Am. Complaint ¶ 6 & Exh. A; 10/9/20 Billings Affidavit Exh. 7-A; 10/9/20 Craddock Motion to Preliminarily Certify, etc. Exh. E.

[27] Defendant Craddock has not pleaded in response to the Complaint allegations.

Plan of Distribution he championed. *See* Craddock Aff. ¶26. There is thus reason to doubt whether he could be a whole-hearted advocate for a class and settlement based on what, to him, is a disfavored alternative.[28] Personally or through his counsel, Mr. Craddock has neither prosecuted the claims for judicial dissolution nor taken the other steps that support the finding of CR 23.01(d) adequate representation with respect to Plaintiffs. His efforts in pursuit of a non-judicial dissolution of the Co-op, *see* Craddock Aff. ¶¶ 9-25, are an insufficient basis for finding that he will adequately represent the interests of the proposed settlement class.

The Court, however, does not base its finding of inadequate representation with respect to Mr. Craddock solely on the lack of strong evidence in his favor. It is undisputed that on August 17, 2020, Mr. Craddock and another grower-member of the Co-op, allegedly on behalf of themselves and all others similarly situated,[29] filed a complaint in Metcalfe Circuit Court (No. 20-CI-00082) against the Co-op and the named Plaintiffs in this case.[30] The complaint sought: a declaratory judgment *inter alia* about the persons to whom the Co-op's net assets on dissolution should be distributed; enforcement of a settlement agreement, including certification of a settlement class; and the Metcalfe Circuit Court's supervision of any dissolution of the Co-op. The referenced written settlement agreement was not provided to the Metcalfe Judge, and there was no mention of this pending case, of Mr. Craddock's being a party both to this case and to a

[28] There is also evidence that his acquiescence to the settlement caused a rift among those growers who might formerly have been considered to be similarly situated to him. See 10/9/20 Billings Affidavit ¶¶ 19, 80 (stating that the more than one-third of its grower-clients who did not affirmatively approve of the settlement "were dis-engaged by Billings Law Firm").

[29] On August 25, 2020, these two filed an Amended Complaint adding another seven alleged grower-members as individual plaintiffs.

[30] The Court takes judicial notice of the docket and filings of record in Metcalfe Circuit Court Case No. 20-CI-00082. *See Commonwealth v. Carman*, 455 S.W.3d 916, 920 n.5 (Ky. 2015) (KRE 201(b) allows judicial notice of official court records); *Rogers v. Commonwealth*, 366 S.W.3d 445, 451 (Ky. 2012) (same). At an in-person hearing held August 20, 2020, the parties' counsel were apprised that the Court was aware of the Metcalfe Circuit action.

motion filed herein to approve the settlement agreement, or of this Court's in-force April 21, 2020 Order that the Co-op was not to dissipate or distribute any of its assets. Such failure to disclose the relevant information established that Mr. Craddock was less than candid with the Metcalfe Court and further established that Mr. Craddock did not intend to honor the terms and conditions of the agreement he had signed only 68 days before. Most glaring was the fact that he petitioned the Metcalfe County Circuit Judge to enforce a settlement agreement that was only within the purview of the Fayette Circuit Court. It did not go unnoticed by the Court that Craddock's attorney played a significant role in aiding Mr. Craddock's forum shopping by filing the Metcalfe County Complaint.

Despite the obvious significance of suing other members of the proposed Settlement class and this attempt to have a different court exercise jurisdiction over matters relating to the Co-op's dissolution and the proposed settlement, neither Mr. Craddock nor his attorneys (who have represented him in both cases) even mentioned their involvement in the Metcalfe Circuit complaint in the motion seeking appointment as a class representative and class counsel, respectively. No explanation or defense was offered for their actions.[31] When the Court asked Mr. Craddock about the Metcalfe Circuit case at the October 19, 2020 evidentiary hearing, his counsel responded only that the action had been voluntarily dismissed — unilaterally and without prejudice, it should be noted — four days before. Suing other class members in a different court over an alleged failure to follow a settlement agreement is the antithesis of representing the interests of the class with respect to the proposed settlement.[32] Filing the

[31] Given the serious lack of candor with this Court and the Metcalfe Circuit Court, it is not clear that the conduct of Mr. Craddock and his counsel is defensible. At the least, this lack of candor undermines Mr. Craddock's avowal that he would cooperate with the Court.

[32] *Cf. Kurczi v. Eli Lilly & Co.*, 160 F.R.D. 667, 678 (N.D. Ohio 1995) (questioning whether proposed representatives who had also filed individual state court actions would adequately represent absent class members who did not join the parallel state action).

Metcalfe Circuit Court case demonstrated that Mr. Craddock has interests "antagonistic to or conflicting" with the unnamed class members' and cannot reasonably be expected to "vigorously prosecute the interests of the class through qualified counsel" as required by CR 23.01(d). *Hensley,* 549 S.W.3d at 443 (internal quotation marks omitted); *Nebraska Alliance*, 529 S.W.3d at 313 (same).

Defendant Greg Craddock failed both the CR 23.01(d) adequacy test and the CR 23.01(c) typicality test. The Court thus concluded that Mr. Craddock cannot be appointed as a representative of the proposed settlement class. His motion for appointment as a class representative is denied.

b. The three Plaintiffs are an adequate and efficient group of class representatives.

The Court's ruling left the three named Plaintiffs as the only eligible candidates for appointment as class representatives. Their Motion requested, and makes the case for, the appointment of all three and represented that the individuals who will act for the respective Plaintiffs with respect to class representative duties are Mitch Haynes (for Haynes Properties, LLC), Scott Haynes (for Alvin Haynes & Sons, a general partnership), and Penny Greathouse (for S&GF Management, LLC). The remaining question is which one or more of them should be appointed.

There is relatively little caselaw discussing how many or which of a number of eligible candidates should be appointed as class representatives. When multiple individuals have been proposed as class representatives, there is no set number of representatives that are necessary, and courts should focus on quality rather than quantity.[33] There is consensus that one class

[33] *Buchholtz v. Swift & Co.,* 62 F.R.D. 581, 598 (D. Minn. 1973) ("adequacy of representation is largely a matter of quality, not quantity."); *see also* 7A Wright & Miller, FED. PRAC. AND PROC. CIV. § 1766 (3d ed., 2020 update), and cases cited therein.

representative can be sufficient, no matter how large the class,[34] and that the number of appointed representatives should be kept manageable.[35] It is recognized that there can be benefits from having more than one appointed class representative, *e.g.*, ensuring that adequate resources and experience are available to the prospective class and bringing different perspectives to the case;[36] however, too many representatives may unnecessarily complicate the proceedings.[37] If asked to appoint more than one representative, many courts consider whether the group is "able to operate in concert and manage the litigation and the lawyers, which is accomplished most successfully by a single plaintiff or small group of plaintiffs." *Howard Gunty Profit Sharing Plan v. Care-Matrix Corp.*, 354 F.Supp.2d 18, 24 (D. Mass. 2000) (declining to appoint the four persons proposed, because not "a cohesive enough unit to adequately represent other plaintiffs").[38]

The three Plaintiffs are appointed as class representatives. Three is not an unmanageable number, and these three parties have shown throughout the course of the litigation that they can

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[34] CR 23.01 ("one or more members of a class may sue or be sued as representative parties on behalf of all"); *Grasty v. Amalgamated Clothing and Textile Workers Union*, 828 F.2d 123, 127 (3rd Cir. 1987) ("[I]n most cases as long as one of the representatives is adequate, the adequacy of representation requirement is met."); *Buchholtz*, 62 F.R.D. at 598 (appointing only two representatives, and noting that one person represented a class of 3.7 million in the *Eisen v. Carlisle & Jacquelin* litigation); *Shulman v. Ritzenberg*, 47 F.R.D. 2020, 206 (D.D.C. 1969) ("Even one member of a class can provide the kind of representation for all that is contemplated by the class suit.").

[35] Increasing the number of class representatives presents a trade-off: "[T]he larger the number..., the greater the dilution of the control that those [class representatives] can maintain over the conduct of the putative class action, ... [but] when more greatly numbered [they] can more effectively withstand any supposed effort by the class counsel to seize control of the class claims." *Chill v. Green Tree Fin'l Corp.*, 181 F.R.D. 398, 408-09 (D. Minn. 1998).

[36] *Olsen v. New York Cmty. Bancorp, Inc.*, 233 F.R.D. 101, 107 (E.D.N.Y. 2005) (citing benefits of a not-unwieldy group of plaintiffs to lead the litigation)

[37] *See, e.g., Chill*, 181 F.R.D. at 409 (restricting the number of class representatives because the nearly 300 proposed would not actively represent the class and their number would unnecessarily complicate the proceedings); *Gill v. Monroe County Dept. of Social Services*, 79 F.R.D. 316, 330 (W.D.N.Y. 1978) (proposed 28 class representatives would unnecessarily complicate and delay proceedings).

[38] *See also Tanne v. Autobytel, Inc.*, 226 F.R.D. 659, 673 (C.D. Cal. 2005) (second person was unnecessary and might divide responsibility for supervising class counsel); *Arkansas Teacher Ret. Sys. v. Insulet Corp.*, 177 F. Supp. 3d 618, 623 (D. Mass. 2016) (appointing group of three which had worked out among themselves how duties would be shared and how they would communicate with each other).

be effective, cohesive, and efficient as a group. At the evidentiary hearing, Ms. Greathouse and the Messrs. Haynes (who are brothers) testified to their working relationship and the benefits of being able to discuss developments and proposals with each other. Therefore, Plaintiffs' Motion pursuant to CR 23.01 for Preliminary Class Certification and Appointment of Settlement Class Representatives is granted, and all three are appointed as representatives of the proposed settlement class.

4. McBrayer Attorneys Katherine K. Yunker and Jason R. Hollon will adequately and fairly represent the interests of the class as a whole.

The Court also had before it a request to appoint two attorneys from the McBrayer PLLC firm as class counsel. The portion of Defendant Craddock's October 9, 2020 Motion requesting the appointment of attorneys from Billings Law Firm PLLC as class counsel was withdrawn on the record before the start of the evidentiary hearing about the appointment of class counsel and so is moot. Having thoroughly reviewed the record and having conducted multiple hearings with counsel, the Court hereby FINDS and RULES as follows:

Effective January 1, 2011, a new section was added to Kentucky's class-action civil rule to provide specifically for the appointment of class counsel. CR 23.07. Before the addition of such specific provisions, appointment of class counsel had usually been treated as a subpart of the CR 23.01(d) or federal Rule 23(a)(iv) prerequisite that "the representative parties will fairly and adequately protect the interest of the class." The addition of class-counsel rules acknowledged the independent importance of class counsel, and emphasized that class counsel is selected by the court rather than by the class representatives or lead plaintiffs.[39]

[39] This separation is illustrated by the decision in *Henderson v. Bank of New York Mellon*, 322 F.R.D. 432, 436 (D. Mass 2017), to appoint Ms. Henderson as class representative despite her personal reliance on an attorney the court refused to appoint as class counsel.

The Civil Rules require this Court to appoint class counsel upon certification of a class. CR 23.07(1). Only an applicant who is adequate under CR 23.07(1) and (4) may be appointed. CR 23.07(2). Adequacy requires that the appointee "fairly and adequately represent the interests of the class." CR 23.07(1), (4). The primary responsibility of class counsel is to represent the interests of the class as a whole rather than of any individual members of the class, so the Court, at the hearing, assessed the applicants' ability to fairly and adequately represent the best interests of the whole class rather than with respect to any potentially conflicting interest of individual class members.

A court's considerations in making the appointment are focused on ensuring that class counsel will fairly and adequately represent the interests of the class. *See* CR 23.07(1)(b), (2), and (4); *Summit Med. Grp., Inc. v. Coleman*, 599 S.W.3d 445, 451 (Ky. App. 2019). Subpart (1)(a) of CR 23.07 set out four factors that must be considered by a court in appointing class counsel:

> (i) the work counsel has done in identifying or investigating potential claims in the action;
>
> (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;
>
> (iii) counsel's knowledge of the applicable law; and
>
> (iv) the resources that counsel will commit to representing the class....

A court is also permitted to "consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." CR 23.07(1)(b). This provision has been used to incorporate "much if not all of the case law developed under traditional Rule 23(a)(4) adequacy of class counsel analysis." 1 NEWBERG ON CLASS ACTIONS (5th ed.) § 3.81.[40] Thus, although no

[40] CR 23.07(1)(c) specifically permits a court to order applicants to provide information on any pertinent subject and "to propose terms for attorney's fees and nontaxable costs." The record before the Court at the time of the hearing already included a Settlement and Stipulation provision for a fee of up to 25% of

Kentucky precedent addresses the interplay of CR 23.01(d) and CR 23.07 in appointing class-counsel (see footnote 21, above) this Court has followed both by considering the four CR 23.07(1)(a) mandated factors and other factors traditionally used in Rule 23(a)(4) analysis. No one factor is necessary or sufficient for appointment as class counsel; "the court should weigh all pertinent factors." 2003 Rules Amendments, Advisory Committee Notes, 215 F.R.D. 158, 227. The mandatory and other pertinent factors are considered holistically in concluding whether an applicant is able to — and will — fairly and adequately represent the interests of the class.

The McBrayer firm proposes that two of its attorneys be appointed as class counsel. To the extent that this presents a situation in which "more than one adequate applicant seeks appointment," then the Court "must appoint the applicant best able to represent the interests of the class." CR 23.07(2) (emphasis added). However, it is evident from the CR 23.07 Application filed by McBrayer attorneys, the affidavits of Ms. Yunker and Mr. Hollon, and the testimony of Ms. Yunker at the October 19, 2020 hearing that the appointment request depends upon their both being appointed and their being attorneys at McBrayer, able to access and rely on other McBrayer attorneys, personnel, and resources.[41] The Court thus considered Ms. Yunker and Mr. Hollon together and as attorneys within the McBrayer firm as a single, specific applicant for CR 23.07(2) purposes, and then determined whether that applicant "is adequate under CR 23.07(1) and (4)."

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the net proceeds from the dissolution of the Co-op, and a CR 23.05(3) Statement filed October 16, 2020, disclosing that the Billings and McBrayer firms had a fee-sharing agreement.

[41] *See, esp.*, Yunker Affidavit ¶¶ 4, 6, 9, 14-17, 21; Hollon Affidavit ¶¶ 13-14, 16. At the hearing, Ms. Yunker testified to the benefits of also appointing Mr. Hollon as class counsel.

a. work identifying/investigating potential claims

It is undisputed that the McBrayer firm identified, investigated, brought, and prosecuted the claims in this action (including the claim for judicial dissolution of the Co-op).[42] The Court has had the opportunity directly to observe and review McBrayer attorneys' efforts prosecuting the claims in this case, which are also reflected in the case record.

b. experience with class actions, other complex litigation, and types of claims asserted

The Court found that, standing alone, Ms. Yunker's considerable experience with class actions and other complex litigation made this a strong factor in favor of granting the application. Her affidavit showed,[43] and it is this Court's own observation and direct experience, that Ms. Yunker has extensive and long-running involvement in class actions and other complex litigation, and she understands the law and the nuances of class actions and procedures; more importantly in the Court's estimation, she understands the due process requirements of a class and what is involved in protecting the rights of class members who are not named parties or otherwise present in the proceedings. The background and experience of Mr. Hollon and other McBrayer attorneys complements Ms. Yunker's in the area of complex litigation, and supports a finding that there is substantial experience at the McBrayer firm with the type of claims that are raised in the complaint, including the ones that would be resolved in the proposed settlement.[44]

c. knowledge of applicable law

As noted in the preceding paragraph, Ms. Yunker thoroughly understands the law relating to class actions and procedures and the McBrayer firm has substantial experience with the type

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[42] Yunker Aff. ¶¶ 4-5; Hollon Aff. ¶¶ 5-7; Maclin Aff. ¶¶ 6, 7, 9, 16. Mr. Hollon's direct role in the case began prior to its initiation (Aff. ¶ 6); Ms. Yunker's, after the parties' settlement (Aff. ¶ 5).

[43] Yunker Aff. ¶¶ 7-9, 11 & Attachment 2.

[44] Hollon Affidavit ¶¶ 9-12; Yunker Affidavit ¶ 10; Maclin Affidavit ¶¶ 17, 20-22.

of claims involved in this action. Some of that experience was obtained during its involvement in the prior Congleton common fund litigation against the Co-op, which distributed in excess of $90 million to the burley growers. Attorneys at the McBrayer firm provide foundational knowledge in the applicable law, and Ms. Yunker and Mr. Hollon have attested in their affidavits and demonstrated in the course of this proceeding that they are willing and able to research and analyze the law as issues arise and must be addressed.[45]

d. resources counsel will commit to representing the class

Ms. Yunker testified at the hearing that the internal resources and capabilities of the firm were sufficient to discharge the responsibilities of representing the best interests of the class, and that the firm would engage outside resources (such as a settlement administrator) as necessary or efficient to perform certain tasks (*e.g.*, conducting a notice campaign, document processing). Robert Maclin, an equity member of the McBrayer firm, stated in his affidavit that the firm has the financial resources, personnel, and experience to prosecute the litigation and the interests of the proposed settlement class and would devote the resources necessary to do so.[46] In their affidavits, Ms. Yunker and Mr. Hollon each attested to the resources the firm makes available to them, and to a personal commitment to dedicate the time, skill, and resources to effectively and adequately represent the class.[47]

e. other pertinent considerations

Applicants testified to complementary skills and experience, involvement in the proceedings in this case regarding certification and other class issues, more than adequate prosecution of the Plaintiffs' claims, the firm's work toward negotiating the proposed settlement, and their

[45] Yunker Aff. ¶¶ 6, 12-14; Hollon Aff. ¶¶ 7-8, 13-14; Maclin Aff. ¶¶ 17, 20.
[46] Maclin Aff. ¶¶ 16, 22-23.
[47] Yunker Aff. ¶¶ 15-17; Hollon Aff. ¶¶ 14-16.

existing attorney-client relationship with the named Plaintiffs / Settlement Class Representatives.[48] At the hearing, Ms. Yunker testified that she and Mr. Hollon worked well with other counsel in this matter, but would be advocates for what was in the best interest of the class members even if that meant disputing positions taken by other counsel. These are matters "pertinent to the applicants' ability to fairly and adequately represent the interests of the class," CR 23.01(b),[49] and weigh in favor of granting the application.

The Court asked questions at the hearing about whether the McBrayer firm had and would devote the resources to adequately represent the class members, the benefit of appointing Mr. Hollon in addition to Ms. Yunker, and the ability and willingness of the proposed appointees to cooperate with other parties' counsel — and received satisfactory answers to those questions. The other counsel declined the opportunity to ask questions of any of the McBrayer attorney-witnesses and made statements on the record supportive of the requested appointment.[50] There is no evidence of any negative factors, and in particular, no evidence of a conflict of interest[51] between the proposed class counsel and members of the proposed settlement class.

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[48] Yunker Aff. ¶¶ 5-6, 9, 19-20, 22 & Attachment 1; Hollon Aff. ¶¶ 7-8, 11-13, 17 & Attachment 1; Maclin ¶¶ 3, 6-13, 17-21

[49] These are among the factors that have been considered under the parallel catch-all provision of federal Rule 23(g)(1)(b). *See, e.g., In re Parking Heaters Memo. Antitrust Litig.*, 310 F.R.D. 54, 57 (E.D.N.Y. 2015) (quality of the pleadings, vigorousness of the prosecution of the claims, and ability to work cooperatively with the court and other counsel); *Zeno v. Ford Motor Co., Inc.*, 238 F.R.D. 173, 188 (W.D. Pa. 2006) (diligence and competence in representation to date); *White v. Experian Info. Sol'ns*, 993 F. Supp. 2d 1154, 1175 (C.D. Cal. 2014) (work in negotiating a settlement), *aff'd*, 818 F.3d 537 (9th Cir. 2016); *see also* MANUAL FOR COMPLEX LITIGATION (4th) § 21.272, p.279 (existing attorney-client relationship with a named party).

[50] *Parking Heaters*, 310 F.R.D. at 57 (internal quotation marks omitted), cites applicants' "ability to command the respect of their colleagues" as a factor to consider.

[51] An actual conflict of interest may disqualify an applicant from appointment as class counsel, when weighed against other considerations. *See, e.g., Radcliffe v. Hernandez*, 818 F.3rd 537 (9th Cir. 2016) (conflict found did not require automatic disqualification of class counsel); *Prof'l Firefighter's Ass'n of Omaha, Local 385 v. Zalewski*, 678 F.3d 640, 646-48 (8th Cir. 2012) (potential conflicts between subclasses did not require appointing separate counsel for each subclass).

The McBrayer attorneys made an affirmative and sufficient showing on each of the factors the Court must consider in making an appointment and have provided evidence of other matters pertinent to and supporting appointment as class counsel. The Court concluded that Ms. Yunker and Mr. Hollon, along with the McBrayer firm as a whole, would give all deference to the due process rights of absent class members and would fairly and adequately represent the interests of the settlement class. Granting the McBrayer application is the best option presented for the fair and adequate representation of the interests of the class as a whole. Ms. Yunker and Mr. Hollon, specifically, and the McBrayer firm in general, were therefore appointed as class counsel.

The Court acknowledges that its fiduciary duties to the class do not end with the appointment of class counsel.

> Unlike other civil litigation, many class action suits do not involve a client who chooses a lawyer, negotiates the terms of the engagement, and monitors the lawyer's performance. Those tasks, by default, fall to the judge, who creates the class by certifying it and must supervise those who conduct the litigation on behalf of the class.

MANUAL FOR COMPLEX LITIGATION (4th) § 21.27 (p.278). Federal Rule 23(g) and CR 23.07 drop the conventional pretense that the class representatives can and will pick and then monitor class counsel, recognizing that the court should exercise continuing oversight of class counsel's performance. 1 NEWBERG § 3.82. In appointing class counsel, a court must find that the appointee is able to fairly and adequately represent the interests of the class and, from the evidence presented, predict that the appointee will do so; CR 23.07(4) requires that appointed class counsel fulfill that prediction. Therefore, to ensure this Court meets its fiduciary obligations to this class, it will continue to exercise the highest degree of vigilance in discharging this duty to absent class members, by taking all steps necessary to guarantee class counsel fairly and

adequately represent the interests of the class throughout all aspects of this action until its conclusion.

Given under my hand this 5th day of February 2021.

Julie Muth Goodman

Hon. Julie Muth Goodman
Judge, Fayette Circuit Court