

**COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
FOURTH DIVISION
CIVIL NO. 20-C1-00332
[ELECTRONICALLY FILED]**

HAYNES PROPERTIES, LLC ET AL.

PLAINTIFFS

**v. MOTION TO ALTER OR AMEND OPINION AND ORDER
APPROVING PARTIAL SETTLEMENT**

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

DEFENDANTS

* * * * *

The Defendant, Burley Tobacco Growers Cooperative Association (the “Cooperative”), by counsel, moves the Court to alter or amend the Opinion and Order Approving Partial Settlement entered June 11, 2021. In support of this motion, the Cooperative states the following:

First, the \$1.5 million sum negotiated in the April-May 2020 mediation to be allowed as the Cooperative’s last “grant funding” was a compromise to assure continued representation of present and future tobacco growers (likely the children of existing grower-members of the Cooperative). It was not just one piece, but part and parcel of what was agreed to be one integrated CR 23 class settlement. The Cooperative hopes the Court will reconsider and not revise individual parts of the settlement. No attorneys fees were deducted from the \$1.5 million. The grant was to be made “before dissolution.” That too was a negotiated term of the overall settlement.

The Cooperative has previously referenced the direct precedents of *BTGCA v. Tipton*, 11 S.W.2d 119 (1928) and *BTGCA v. Brown*, 17 S.W.2d 1007 (1929), holding that the courts should defer to the Cooperative’s board of business directors’ judgment about an adequate reserve for

future needs and activities of benefit for tobacco growers, even if there is a period of dormancy. The Court's findings correctly noted that the Cooperative's Board first reduced its \$25 million reserve to \$3.5 million at its February 5, 2020 meeting in order to distribute surplus assets to its members, and then agreed in mediation to further reduce that figure to \$1.5 million and shift that reserve as a grant to a qualified agriculture-related nonprofit to serve the interests of tobacco growers going forward by lobbying, representation to tobacco companies, education, and funding research. Should the Burley & Dark Tobacco organization dissolve, its assets are required by law (enforceable by the Kentucky Attorney General) to be distributed to another agriculture-related nonprofit or a University having an agriculture department no different than if the Cooperative dissolves. This restricted grant for continued representation and other services for tobacco growers represents less than 5% of the Cooperative's present net assets. The Board of the Cooperative had the authority to determine this necessity and to use such a fraction of the reserve to continue serving tobacco growers; objections by approximately 30 out of 3,000 past and present members should not negate the reasonable business judgment of its elected directors.

As to other numbered paragraphs in the Opinion and Order, the Cooperative states:

28. No evidence has been taken or subjected to cross-examination, and the new Burley & Dark Tobacco Producers organization has an entirely different board of directors that is not dominated by directors of the Cooperative and includes Plaintiff-Class Representative Penny Greathouse. Further, the Burley & Dark Producers offered to execute a grant agreement with the Cooperative and a restricted endowment agreement with a community foundation, each in a form to be approved by Class Counsel and the Court. A qualified community foundation would hold and invest the grant funds as fiduciary and disburse only the requested start-up funds of up to \$99,000 in year one, and thereafter a sum equal to 5% per year of the annually adjusted portfolio

value to the Burley & Dark Tobacco organization. The new organization's financial statements will be available to anyone to inspect: as a Kentucky nonprofit, its Form 990 must be filed with the Kentucky Attorney General's Office. It has adopted Bylaws and a Conflict of Interest Policy that do not allow any salary or compensation to its volunteer directors. Therefore, no allegations about misuse of funds in the Cooperative contained in the Corrected Third Amended Complaint are applicable to the new nonprofit. No Answer has been required to those allegations, but they will be denied. Moreover, Plaintiffs have not had any concerns about the Cooperative Board in the last 18 months of this litigation, as the Board has continued to oversee its orderly liquidation and conclude its remaining business.

30. The Burley & Dark Tobacco entity is not a party to this litigation and is not under the present jurisdiction of this Court. Its initial board of nine (9) directors has been elected. Only two (2) directors are also Cooperative directors, Dale Seay and Al Pedigo. Its counsel has indicated to us that its board will consider adding two more directors from the Court's list (Schedule A to its June 11, 2021 Opinion and Order), subject to them being active tobacco growers and committing to regular attendance. Individuals who object to its very existence and funding and believe that "tobacco is dead" have no business on the new board. Its Bylaws require directors to be active growers of tobacco. As already noted, its Bylaws and Conflict of Interest Policy assure that no director will receive remuneration from the new organization for board service.

31-32. The Court's prescribed first year budget limit of \$60,000 is not only well below the good-faith budget developed by the Burley & Dark Tobacco entity, it is less than the average annual budget for the Council for Burley Tobacco which its president Darrell Varner testified has been insufficient to serve burley growers. The \$15,000 limit on overhead costs set by the Court is not enough to fund travel costs, research and grower meeting expenses to discuss research, GAP

training and other matters of interest and benefit to all tobacco growers. Moreover, with \$45,000 only committed for one year to pay a part-time executive employee, it will be extremely difficult to attract good candidates. A two year sunset looming and a limit to “interest-only” funding in the second year, will make the position look like a dead-end. Funding at the 5% level as proposed would create more stability to encourage an executive of the new entity and inspire the confidence to pursue some longer-range goals of substance and importance, not just go through the motions for a year expecting to then leave a sinking ship. Good things don’t often happen overnight.

33. The proposed grant recipient, Burley & Dark Tobacco, has agreed to periodic reporting to Class Counsel and the Court. Class Representative Penny Greathouse will be on the new organization’s board. However, a two year time deadline to become self-sufficient is unrealistically short. Its board is set up on a three (3) year class cycle. Under paragraph 33, success of the new organization would result in it losing all funding from the grant, without even a vote of the active growers. When tobacco growers received additional compensation from Phillip Morris in 2019 and substantial Coronavirus Food Assistance payments in September 2020 because of the combined lobbying efforts of the Cooperative and the Council for Burley Tobacco (with travel expenses funded by the Cooperative), no tobacco growers offered to pay any fees or reimbursements to those organizations for these accomplishments. Farmers are hard-working but frugal. That is why both Darrell Varner of the Council and the Cooperative’s president testified that, to be successful, the new entity needs the \$1.5 million endowment. The Court heard testimony that the Council’s own reserves have dropped from over \$700,000 to about \$200,000, spent largely on tobacco research. Its directors are volunteers and receive no compensation. For long-term stability and success a tobacco growers entity needs an endowment.

While the number of tobacco farmers has decreased, tobacco still has a future. The biggest

critic in this case, Roger Quarles, is still growing the same 10 or more acres of tobacco in 2021 as he did in 2015. (The Cooperative has his FSA Form 578's, provided by him each year to certify his eligibility to be a director under Cooperative bylaw requirements.) He and his companies and partnership have not abandoned tobacco. He admitted receiving the 2020 Coronavirus payment, and grows roughly the same amount as Penny Greathouse, who testified she received about \$14,000 on about 70,000 pounds grown.

33. and 35. We ask that the Court not impose a two-year review and sunset upon funding for the Burley & Dark Tobacco entity. Any qualified tobacco producer will have standing under KRS Chapter 273 to contact the Kentucky Attorney General and complain if he/she thinks the new entity is not fulfilling its purposes or if there are perceived conflicts of interest, financial abuses or other violations by standards of conduct. There is a statutory process for dissolution that the Attorney General or any member or director may initiate. Class Counsel and Penny Greathouse can monitor the new entity.

However, it will be the kiss of death for the new entity to allow that the objectors here, most of whom are already out of the tobacco business, to vote in two years on the narrow choice of distributing the balance of approximately \$1.4 million to themselves, or allowing the Burley & Dark Tobacco entity to continue to receive interest income from that fund. The persons in the best position to judge the efforts and accomplishments of the new entity for tobacco growers will be the active growers themselves, not present Class Members, many of whom will be two years farther removed from tobacco by then.

It will be equally discouraging to tell the new organization that if it approaches "self-sufficiency," it has to return the balance of about \$1.4 million to this case and no longer have the benefit of earnings from that endowment. All parties should want the new organization to succeed.

34. Allowing attorneys fees to be deducted from the balance of \$1.5 million funding intended for use by Burley and Dark Tobacco is contrary to the Settlement Agreement. It is improper to give Class Counsel an incentive to undo or advocate against the settlement they agreed to a year ago.

If after considering all of the above, the Court is unwilling to approve the Partial Settlement without a “return” of the approximately \$1.3 – \$1.4 million to this case, the Cooperative at least asks the Court to modify paragraphs 33-34 to provide instead that rather than a preordained vote with a 7.5% legal fee involved, the Settlement Administrator and Class Counsel (compensated for their actual time) simply mail to all Class Members who have filed W-9’s a notice and return postcard on which each Class Member may request his/her share of the remaining balance of the endowment as a supplemental distribution. Class Members would be given sixty (60) days after the initial mailing date to return any request for payment, or be deemed to have donated their share to the new nonprofit. This would help keep the case on track to a timely conclusion, and would not prolong the uncertainty for the future of the new entity, or put it through an unpleasant court battle to prove its worth with absolutely no reward in sight.

WHEREFORE, the Cooperative respectfully prays the Court to reconsider and alter or amend paragraphs 28-35 of its Opinion and Order to uphold the Partial Settlement as a whole, consistent with the above.

Respectfully submitted,

/s/ Kevin G. Henry

Kevin G. Henry, Esq.

Charles D. Cole, Esq.

STURGILL, TURNER, BARKER & MOLONEY, PLLC

333 West Vine Street, Suite 1500

Lexington, Kentucky 40507

khenry@sturgillturner.com

ccole@sturgillturner.com

and

/s/ Jeremy S. Rogers

Jeremy S. Rogers, Esq.

DINSMORE & SHOHL LLP

101 South Fifth Street, Suite 2500

Louisville, Kentucky 40202

Jeremy.rogers@dinsmore.com

Counsel for Defendant Burley Tobacco

Growers Cooperative Association

NOTICE

The foregoing Motion shall come for hearing on July 9, 2021 at the hour of 10:00 a.m., via Zoom conference call, before the Honorable Julie Muth Goodman, or as soon thereafter as the same may be heard. The Court will provide the Zoom login details to the parties.

CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2021, the foregoing document was electronically filed with the Clerk of this Court using the e-filing system and served electronically by the Clerk of this Court upon the following:

Robert E. Maclin, III, Esq.
 Katherine K. Yunker, Esq.
 Jason R. Hollon, Esq.
 McBrayer PLLC
 201 E. Main Street, Suite 900
 Lexington, KY 40507-1361
 remaclin@mcbrayerfirm.com
 kyunker@mcbrayerfirm.com
 jhollon@mcbrayerfirm.com
Counsel for Plaintiffs

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

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

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

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

Courtesy Copy to:

Hon. Julie Muth Goodman
 c/o Alicia Dean (aliciadean@kycourts.net)

x:\wdox\clients\63798\0010\pleading\01487333.docx