

*ELECTRONICALLY FILED*

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

HAYNES PROPERTIES, LLC, et al.

PLAINTIFFS

v.

**GRADY MOTION FOR AWARD OF ATTORNEY'S FEES  
AND NOTICE**

BURLEY TOBACCO GROWERS COOPERATIVE ASSOC., et al.

DEFENDANTS

\* \* \* \* \*

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

The Court has now modified these restrictions following the hearing on the Burley Tobacco Growers Cooperative Association’s (“BTGCA”) motion to alter or amend.

Where the current version of such restrictions includes the consent of these Objectors to deduct \$100,000 from the \$1.5 million in the first year and \$75,000 from the \$1.5 million in the second year and orders that all Class Members who have qualified for distribution of net Coop assets (filed W-9 etc.) shall be given a ballot to either receive their net respective share of the \$1.5 million or give their net respective share of the \$1.5 million to the new tobacco Nonprofit, the actions of Attorney Graddy and the Objector, Roger Quarles have added \$1.325 million to the Common Fund awarded to the Class Members.

On this date, Graddy files a separate motion to seek approval of the plan for notice of this motion for an award of attorneys' fees, a deadline to file objections and a fairness hearing date where this motion will be heard.

On this date, Graddy files a Motion to Alter or Amend the Order entered on July 28, 2021, to seek to expedite the distribution of these ballots to all qualified Class Members, and to enlarge the time period within which all Class Members have to return their ballots, and to address other matters where no agreement has been reached.

**WHEREFORE**, Graddy **MOVES** the Court to award attorneys' fees in an amount not to exceed 24% of the \$1.325 million that has been restored to the Common Fund and under the **CONTROL** of Class Members, to be distributed by the vote of the Class Members, including those Class Member who elect to give a portion of their distributive share to the new tobacco Nonprofit and those who do not.

### **BACKGROUND**

At the time Graddy entered this action on behalf of the Objector, Roger Quarles, on January 27, 2021, the sum of \$1.5 million of the fund from the liquidation of BGTCA and any distribution that remained unclaimed by class members after ninety days after final distribution would be

“gifted” to a new tobacco nonprofit entity. Quarles retained Graddy in 2020 with a small retainer and a contingent fee agreement that Graddy would be compensated if he was successful in restoring all or part of the \$1.5 million to the Class Members or if he was successful in giving all Class Members the opportunity to vote on receiving their share of the net \$1.5 million or giving their share to the new tobacco nonprofit, provided that Graddy’s contingent fee percentage would not exceed 24% of those sums that the Class Members would control – either putting in their pocket or giving to a new tobacco Nonprofit.

The affidavit of W. Henry (Hank) Graddy, IV affirms that Hank Graddy was requested by another attorney, Hon. Allan Chappell to look at this matter for Roger Quarles following a July 4, 2020, email from Mr. Quarles to Mr. Chappell, forwarded on the Mr. Graddy on July 16, 2020. Graddy worked diligently for Mr. Quarles from that period forward, allocating substantial time to review all pleadings, research, consult and advise Mr. Quarles what his legal options appeared to be. See Graddy affidavit. See Chappell affidavit.<sup>1</sup> Graddy followed these proceeding through the entry of orders setting deadlines to file objections and a date for a Fairness Hearing.

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

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<sup>1</sup> The undersigned has had technology difficulties with the office scanner. Attached are the affidavits, unsigned. The undersigned will rectify the scanning issues and file the scanned affidavits as soon as possible.

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

As a result of Graddy's work on this case from July 16, 2020, to the present, this Court's Opinion and Order Approving Partial Settlement amended the Settlement Agreement to require:

1. Two members of the Board of Directors of the new nonprofit must be from a list of persons identified by the Court;
2. Board members will receive no remuneration;
3. Reduced the amount of funds the new nonprofit could utilize from the principle \$1.5 million and limited the use of funds; and
4. At the conclusion of two years, if the organization became self-sufficient, all of the remainder of the \$1.5 million shall be "immediately" distributed to the Class Members, or if it did not become self-sufficient, a vote would be taken among Class Members for disposition of those funds, with the majority rule, rather than individual action per Class Member. Under this approach all of the fund would go to Class Members or all to the tobacco Nonprofit.

Following the hearing on BGTCA's Motion to Alter or Amend that Order, the Opinion and Order Approving Partial Settlement was amended and a modified Order was entered on July 28, 2021, to allow the new nonprofit access to \$100,000.00 from the principle in year 1 and \$75,000.00

from principle and accrued interest in year 2 and a vote among class members if they wish to receive their portion of the principle or donate it to the new nonprofit after year 2.

**All Class Members will see a benefit from the actions of Graddy in that they each will control his or her share of the net \$1.5 million, less agreed upon compromise awards to the Nonprofit of \$175,000.00.** Some will receive a larger distribution. Others will have the choice to support the new tobacco Nonprofit. In all cases, control is with the Class Members – not the BGTCA or the selected members of the Board of the BGTCA. Further the actions of Graddy have helped result in a new composition of the Board of Directors for the new tobacco Nonprofit.

### ARGUMENT

#### AWARD OF ATTORNEYS FEES TO GRADDY NOT TO EXCEED 24% OF \$1.325 MILLION RESTORED TO THE CONTROL OF ALL QUALIFIED CLASS MRMBERS IS REASONABLE

##### **I. OBJECTORS ADDED CLASS MEMBER CONTROL OF \$1.325 MILLION TO THE COMMON FUND.**

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

a “lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney’s fee from the fund as a whole.” *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980).

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

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

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

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

## **II. THIS COURT SHOULD USE PERCENTAGE TO AWARD GRADY AN ATTORNEYS’ FEE.**

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

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

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

An award based on the percentage of the fund also reflects the particular circumstances of this case and the common fund created. Graddy commenced work when the parties moved for approval of the Partial Settlement in July 2020, and appeared in this matter during the period Class Members were afforded to make objections, on January 27 and January 29, 2021, on behalf of Objecting class members (“Objectors”), Roger Quarles, W. Gary Wilson, Ian Horn, Richard Horn, Campbell Graddy and David Lloyd who objected to the \$1.5 million “gift” to the new nonprofit. No other attorney in this action took the position that the “gift” was contrary to law, unfair to class members and that the funds belong to the class members. Graddy was the only attorney to challenge BGTCA’s repeated arguments that BGTCA be allowed to retain the money to gift both before and after the fairness hearing. Graddy’s work directly led to the Amended Opinion and Order which created a fund of \$1.325 million to be given back to the class members.

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

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

### **III. GRADDY'S REQUEST FOR AN AWARD NOT TO EXCEED 24% IS REASONABLE.**

#### **a. Awards in similar cases.**

The requested 24% 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.* This is consistent with decisions of other courts. See *Fournier v. PFS Invs., Inc.*, 997 F.Supp. 828, 832 (E.D. Mich. 1998) (“The ‘benchmark’ percentage for this standard has been 25% [of the common fund], with the ordinary range for attorney’s fees between 20–30%”); *Spine and Sports Chiropractic, Inc. v. ZirMed, Inc.*, Civil Action No. 3:13-CV-00489, 2015 WL 197698, \*3 (W.D.

Ky. May 4, 2015) (noting that 25% is the benchmark, but approving fee of 33% of common fund); *Peck v. Air Evac EMS, Inc.*, Civil Action No. 5:18-615-DCR, 2020 WL 354307, \*7 (E.D. Ky. Jan. 21, 2020) (concluding that award “which is approximately 25% of the total settlement fund” is reasonable); *see also Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 273 (9<sup>th</sup> 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).

**b. Time and labor involved.**

Graddy has worked on this matter for approximately thirteen (13) months, attending the Fairness Hearings and Motion Practice since February, 2021. The work was significant and required a large investment of Graddy’s time and labor to achieve the result. Through its efforts on behalf of the Objectors, Graddy created a fund of \$1.35 million for the class that was previously unavailable.

Graddy participated in the three-day fairness hearing and other hearings on motions related to the \$1.5 million gift to the new nonprofit in addition to mediation in defending the stance that the \$1.5 million belonged rightfully to the class members.

**c. Novelty and difficulty.**

Graddy began participating in this action July, 2020, when the Hon. Allan Chappell requested that Graddy look at this matter for the purpose of advising Roger Quarles about his legal rights. Mr. Chappell informed the undersigned that he had provided Mr. Quarles with legal assistance from time to time over the years and that he highly recommended Mr. Quarles as a client. However, Mr. Chappell indicated that this action appeared to involve a Class Action and that he – Mr. Chappell – did not feel well-qualified to advise Mr. Quarles about his legal rights in this matter.

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

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

**d. Attorneys’ experience and ability.**

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

In 2008, Graddy began work on a case involving hog barns in Western Kentucky that were releasing noxious odors into the community and leaching ammonia and sulfates into the ground water. That action was filed in Benton Circuit Court and was removed to Federal District Court for the Western District of Kentucky. Graddy moved the Court to certify the action as a class action which was granted. The class was, in turn, decertified and recertified. Then, after motions for summary judgment, the only count remaining was one for permanent nuisance the Court again decertified. The Court reasoned that because permanent nuisance required proof of individualized damages, class certification was not appropriate.

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

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

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

hourly rate clients. As a consequence of taking this case on a contingent fee basis, Graddy lost other employment and compensation for that other employment.

**f. Results obtained.**

As discussed above, Graddy was able to reduce the “gift” to the new nonprofit from \$1.5 million to \$175,000.00 creating an additional fund of \$1.325 million that Class Members will now control by voting to receive their net share or donate it to the new Nonprofit. Graddy was the only attorney advocating for this position and it created a significant benefit to the class and did so starting with the January 27, 2021 letter of objection. This efficiency also justifies the award.

Graddy’s request for a 24% award is reasonable. It is consistent with other cases, reflects Graddy’s personnel’s time and labor and rewards the risk taken in pursuing this matter. The class members, through Graddy’s efforts, have significantly benefitted and will continue to benefit from Graddy’s efforts in the future.

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

On May 14, 2021, these Objectors filed a Supplemental Objection that asked the Court to consider the above request within the May 7, 2021 affidavit of Roger Quarles as follows: “Finally, Objectors will ask the Court to insure that the Dissolution Committee will distribute to

all Class Members their per capita portion of the over \$7 million Net Operating Loss described in the attached affidavit of Roger Quarles.”

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

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

### **CONCLUSION**

Based upon the foregoing, Graddy respectfully requests an award of attorney’s fees in an amount not to exceed 24% (twenty-four percent) of the \$1.35 million addition to the Common Fund created by recovery from the previous \$1.5 million that certain members of the BGTC Board sought to control. Where Graddy benefitted every qualified Class Member by restoring each Class Member to control over his/her net share of the \$1.325 million, and helped insure that each Class Member will receive his/her share of the financial benefit from distribution of the \$7 million Net Operating Loss of the BTGCA, Graddy respectfully asks the Court to determine the fair percentage attorney fee recovery, not to exceed 24% (twenty-four percent) of \$1.325 million.

### **NOTICE**

The parties will take notice that the foregoing Motion fir a Fee Award will come on for hearing at the Fairness Hearing to be scheduled pursuant to a motion to that effect filed herewith

to be heard before the Fayette Circuit Court, Fayette Circuit Courthouse [or via zoom] **at 10:00 am EDT, on August 20, 2021**, or as soon after that time as counsel can be heard

Respectfully submitted,

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

I hereby certify that a true and accurate of the foregoing was served via E-Mail, on this the 6th day of August, 2021 on the following:

Hon. Kevin G. Henry  
Hon. Charles D. Cole  
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Jeremy.rogers@dinsmore.com

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

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

HAYNES PROPERTIES, LLC, et al.

PLAINTIFFS

v.

AFFIDAVIT OF ALLAN BLAINE CHAPPELL

BURLEY TOBACCO GROWERS COOPERATIVE ASSOC., et al.

DEFENDANTS

\* \* \* \* \*

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

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

Further the affiant sayeth naught.

Dated this \_\_\_\_ day of \_\_\_\_\_, 2021.

\_\_\_\_\_  
ALLAN BLAINE CHAPPELL

COMMONWEALTH OF KENTUCKY  
COUNTY OF WOODFORD

Subscribed, sworn to, and acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_,  
2020.

\_\_\_\_\_  
NOTARY PUBLIC – STATE AT LARGE

\_\_\_\_\_  
NAME

\_\_\_\_\_  
NOTARY ID #

My commission expires: \_\_\_\_\_

Respectfully Submitted,

/s/ W. Henry Graddy, IV  
W. Henry Graddy, IV  
Dorothy T. Rush  
W. H. Graddy & Associates  
137 North Main Street  
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(859) 879-0020  
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hgraddy@graddylaw.com  
dtrush@graddylaw.com

**CERTIFICATE OF SERVICE**

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

Hon. Kevin G. Henry  
Hon. Charles D. Cole  
Sturgill, Turner, Barker & Maloney PLLC

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This the 6th day of August, 2021.

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

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v.

**AFFIDAVIT OF W. HENRY (HANK) GRADY, IV**

BURLEY TOBACCO GROWERS COOPERATIVE ASSOC., et al.

DEFENDANTS

\* \* \* \* \*

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

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

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

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

- Quarles file a timely Objection to the gift of \$1.5 million to a new or existing Nonprofit, and that if our efforts were successful in restoring all or any part of the \$1.5 million to the Class Members or if we were successful in obtaining the right for all Class Members to vote to either receive their net share of the \$1.5 million as part of their distribution OR gift their net share to the Nonprofit, that Graddy would move the Court for a fee award that would not exceed 24% of the sums that were subject to such a vote or were distributed to Class Members without the need for such vote.
6. I made telephone contact with the counsel for the Plaintiffs, Hon. Rob Maclin, for Craddock, Hon. Nathan Billings, and counsel for the Cooperative, Hon. Kevin Henry, prior to filing our Objection on January 27, 2021.
  7. On January 27, 2021, I filed a written Objection on behalf of Roger Quarles with his letter to the Court attached to my letter to the Court. Mr. Quarles also filed his letter of Objection directly with the Court. On January 29, 2021, I supplemented our objection with the additional Objectors, W. Gary Wilson, Ian Horn, Richard Horn, Campbell Graddy and David Lloyd.
  8. The Objectors objected to BGTCA retaining \$1.5 million of its assets to fund a new tobacco nonprofit advocacy group on the basis that it was an illegal gift under Kentucky law, that it was a continuing waste of Cooperative assets that belong exclusively to Class Members, and that it was unfair, unreasonable and not adequate where it treated Class Members differently, rewarding a few with a non-monetary action with no benefit to those Class Members who no longer raise any tobacco, and based on the experience of Roger Quarles and his knowledge of the of the state of the tobacco industry that the

- new Nonprofit would fail to perform just as BGTCA has failed to perform in recent years such that it needed to be judicially dissolved.
9. To that end, W.H. Graddy & Associates zealously tendered objections in pleadings and provided rebuttals to BGTCA's attempts to persuade this Court that the partial settlement was fair, reasonable and adequate to all class members and was consistent with Kentucky law. No other advocate involved in this litigation argued against BGTCA's control and gift of these funds but W.H. Graddy & Associates.
  10. W.H. Graddy & Associates participated in the Fairness Hearing on February 24, 2021, March 1, 2021 and March 8, 2021. Thereafter, at the request of the undersigned, the parties agreed to participate in another mediation concerning the \$1.5 million. This effort was unsuccessful.
  11. W.H. Graddy & Associates efforts helped inform this Court's June 11, 2021 Opinion and Order Approving Partial Settlement. That ruling led to a more diverse Board of Directors for the new nonprofit rather than the "New Board" hand-picked by the existing BGTCA Board leadership. Paragraph 30. That ruling required Board members to be on a volunteer basis. Paragraph 30. That ruling limited the availability of BGTCA assets in supporting the new Nonprofit overhead and yearly expenses, [Paragraph 31, 32]. That ruling gave the new Nonprofit two years of use of BGTCA assets to become self-sufficient and if that goal was met, "the \$1.5 million will be immediately distributed to class members." Paragraph 33. If the new Nonprofit did not achieve self-sufficiency in two years, Class Members would vote on the disposition of the \$1.5 million – to be distributed to Class Members OR given to endow the new Nonprofit, with the majority vote to decide. Paragraph 33. **This ruling created an addition to**

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

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

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

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

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

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

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

14. This **resolution created an addition to the Common Fund of \$1.325 million which Class Members control**, and they can receive their share, if they so choose. This is a demonstrable benefit to all class members not just objecting class members.
15. On July 28, 2021, the Court entered an Amended Opinion that amended Paragraphs 31, 32, 33, 34 and 35, in some ways as the parties had agreed and in several respects at variance with the consent of the Objectors. The Objectors have filed their Motion to Alter or Amend to seek to address the area where there is not agreement.
16. Without regard for the remaining areas of lack of agreement, the amended paragraph 32 retains the ruling that the remainder of the \$1.5 million grant funds after deducting \$175,000.00 given to the Nonprofit aby agreement, and other approved deductions shall be given to the control of the Class Members who have the option to “be paid their share of the net remainder of the grant fund or they may wish to leave their share in place as part of the permanent endowment grant to fund the nonprofit.” Paragraph 32. This **language in the July 28 Amended Order creates an addition to the Common Fund of \$1.325 million which Class Members control**, and they can

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

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

18. Graddy filed suit in *Robertson, et al. v. A & S Protein, Inc, et al.*, Russell Circuit Court, 14-CI-138. The complaint in that action requested that it be certified as a class action. However, that was unnecessary when the Court granted an injunction preventing operation of the rendering facility at issue.
19. Graddy was successful in obtaining a Class Action certification by order of the Court of Appeals in *Rosenbalm v. Commercial Bank of Middlesboro*, 838 S.W.2d. 423 (Ky. App. 1992). This case involved a claim on behalf of representative taxpayers of Bell County seeking a refund of proceeds collected and held by the Commercial Bank of Middlesboro from a tax imposed on the residents of Bell County to pay the debt owed by the Bell County Garbage and Refuse Disposal District to the bank. The Circuit Judge dismissed the Taxpayers motion to intervene as untimely. The Court of Appeals reversed the Circuit Court, ordered that intervention be granted and ordered the Circuit Court to certify the action as a class action under Civil Rule 23. The undersigned was able to accomplish a complete refund to the Bell County taxpayers and was approved for a fee award based on a percentage of recovery at a percentage in excess of the percentage requested herein. Case attached.
20. Graddy was successful in settling a class action claim against the City of Middlesboro for the pollution of Yellow Creek. Aspects of this case went to the Court of Appeals in *Carl Hopper v. Yellow Creek Concerned Citizens, Larry Wilson, et al.*, Court of Appeals Case No. 1988-CA-2528, and *Paul Lee v. Yellow Creek Concerned Citizens, Larry Wilson, et al.*, Court of Appeals Case No. 1989-CA-0384.
21. Graddy was successful in trying a related case to the above in a pollution tort claim against the Middlesboro Tanning Company to reach a jury verdict of seven figures,

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

22. On the basis of this experience and on the basis of the success in this case over the opposition of every other litigant in the courtroom, where the efforts of Graddy have taken control over the \$1.35 million grant fund away from the Defendants in this action and the Court has awarded control over that fund to the Class Member equally, W.H. Graddy & Associates is entitled to an Award of Attorneys' Fees in this action.
23. In addition, Graddy has provided additional financial benefit to as Class members as follows: On May 7, 2021, Graddy filed the affidavit of Roger Quarles with the following: *"In addition, I want to use this opportunity to address Coop asset that has not been discussed during the Fairness Hearing process. The Coop has accumulated a \$7 million dollar Net Operating Loss. This Net Operating Loss is valuable to the Coop Members to help offset tax impacts from the Coop distribution. I urge the Court to monitor the Dissolution Committee to insure that this valuable asset is distributed to the Coop Members."*
24. On May 14, 2021, these Objectors filed a Supplemental Objection that asked the Court to consider the above request within the May 7, 2021 affidavit of Roger Quarles as follows: "Finally, Objectors will ask the Court to insure that the Dissolution Committee will distribute to all Class Members their per capita portion of the over \$7 million Net Operating Loss described in the attached affidavit of Roger Quarles."

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

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

**CONCLUSION**

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

Further the affiant sayeth naught.

Dated this \_\_\_\_ day of \_\_\_\_\_, 2021.

\_\_\_\_\_  
W. HENRY (HANK) GRADDY, IV

COMMONWEALTH OF KENTUCKY  
COUNTY OF WOODFORD

Subscribed, sworn to, and acknowledged before me this \_\_\_\_ day of \_\_\_\_\_,  
2021.

\_\_\_\_\_  
NOTARY PUBLIC – STATE AT LARGE

\_\_\_\_\_  
NAME

\_\_\_\_\_  
NOTARY ID #

My commission expires:\_\_\_\_\_

Respectfully Submitted,

/s/ W. Henry Graddy, IV  
W. Henry Graddy, IV  
Dorothy T. Rush  
W. H. Graddy & Associates  
137 North Main Street  
Versailles, Kentucky 40383  
(859) 879-0020  
(859) 855-3628 – facsimile  
hgraddy@graddylaw.com  
Dtrush@graddylaw.com

**CERTIFICATE OF SERVICE**

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

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This the 6th day of August, 2021.

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

*ELECTRONICALLY FILED*

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

HAYNES PROPERTIES, LLC, et al.

PLAINTIFFS

v.

**AFFIDAVIT OF DOROTHY RUSH**

BURLEY TOBACCO GROWERS COOPERATIVE ASSOC., et al.

DEFENDANTS

\* \* \* \* \*

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

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

- new Nonprofit would fail to perform just as BGTCA has failed to perform in recent years such that it needed to be judicially dissolved.
5. To that end, W.H. Graddy & Associates zealously tendered objections in pleadings and provided rebuttals to BGTCA's attempts to persuade this Court that the partial settlement was fair, reasonable and adequate to all class members and was consistent with Kentucky law. No other advocate involved in this litigation argued against BGTCA's control and gift of these funds but W.H. Graddy & Associates.
  6. W.H. Graddy & Associates participated in the Fairness Hearing on February 24, 2021, March 1, 2021 and March 8, 2021. Thereafter, at the request of the undersigned, the parties agreed to participate in another mediation concerning the \$1.5 million. This effort was unsuccessful.
  7. W.H. Graddy & Associates efforts helped inform this Court's June 11, 2021 Opinion and Order Approving Partial Settlement. That ruling led to a more diverse Board of Directors for the new nonprofit rather than the "New Board" hand-picked by the existing BGTCA Board leadership. Paragraph 30. That ruling required Board members to be on a volunteer basis. Paragraph 30. That ruling limited the availability of BGTCA assets in supporting the new Nonprofit overhead and yearly expenses, [Paragraph 31, 32]. That ruling gave the new Nonprofit two years of use of BGTCA assets to become self-sufficient and if that goal was met, "the \$1.5 million will be immediately distributed to class members." Paragraph 33. If the new Nonprofit did not achieve self-sufficiency in two years, Class Members would vote on the disposition of the \$1.5 million – to be distributed to Calls Members OR given to endow the new Nonprofit, with the majority vote to decide. Paragraph 33. **This ruling created an addition to**

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

8. Thereafter, BGTCA asked this Court to reconsider these portions of its Opinion and Order requiring W.H. Graddy & Associates to defend that decision in litigation.
9. During a hearing on BGTCA's motion to alter or amend, the Court described a possible resolution and asked the parties to discuss with clients whether an agreement could be reached. The undersigned consulted with clients and consented to the following:
  - a. Order Approving, paragraph 32 would be modified to read as follows: "The sum of \$1.5 million will be disbursed to the new organization, and it may fund \$100,000 from the principal for salary and overhead costs in the first year of operation and it may fund \$75,000 from accrued interest and principal in the second year of operation. The above described \$100,000 in year one and so much of the principal as is needed to pay \$75,000 in year two are the only permitted uses of the principal."
  - b. The Order Approving paragraph 33 would be modified to read as follows: "Class Counsel shall prepare a cover letter and postcard to be sent to every Class Member who has submitted the required documentation for distribution of Cooperative proceeds to allow each Class Member to vote either: YES, I agree that my net share of the \$1.5 million shall be paid to the new Burley and Dark Tobacco Producers Association, OR, NO, I request that my net share of the \$1.5 million shall be distributed to me. The postcard must be signed and mailed back to Class Counsel. Following the return of the postcards, Class Counsel shall

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

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

10. This **resolution created an addition to the Common Fund of \$1.325 million which Class Members control**, and they can receive their share, if they so choose. This is a demonstrable benefit to all class members not just objecting class members.
11. On July 28, 2021, the Court entered an Amended Opinion that amended Paragraphs 31, 32, 33, 34 and 35, in some ways as the parties had agreed and in several respects at variance with the consent of the Objectors. The Objectors have filed their Motion to Alter or Amend to seek to address the area where there is not agreement.
12. Without regard for the remaining areas of lack of agreement, the amended paragraph 32 retains the ruling that the remainder of the \$1.5 million grant funds after deducting \$175,000.00 given to the Nonprofit by agreement, and other approved deductions shall be given to the control of the Class Members who have the option to “be paid their share of the net remainder of the grant fund or they may wish to leave their share in place as part of the permanent endowment grant to fund the nonprofit.” Paragraph 32. This **language in the July 28 Amended Order creates an addition to the Common Fund of \$1.325 million which Class Members control**, and they can

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

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

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

Further the affiant sayeth naught.

Dated this \_\_\_\_ day of \_\_\_\_\_, 2021.

\_\_\_\_\_  
DOROTHY RUSH

COMMONWEALTH OF KENTUCKY  
COUNTY OF WOODFORD

Subscribed, sworn to, and acknowledged before me this \_\_\_\_ day of \_\_\_\_\_,  
2021.

\_\_\_\_\_  
NOTARY PUBLIC – STATE AT LARGE

\_\_\_\_\_  
NAME

\_\_\_\_\_  
NOTARY ID #

My commission expires:\_\_\_\_\_

Respectfully Submitted,

/s/ W. Henry Graddy, IV  
W. Henry Graddy, IV  
Dorothy T. Rush  
W. H. Graddy & Associates  
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(859) 879-0020  
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Dtrush@graddylaw.com

**CERTIFICATE OF SERVICE**

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

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This the 6th day of August, 2021.

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