

[Filed Electronically]

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

HAYNES PROPERTIES, LLC, et al.

PLAINTIFFS

v.

BURLEY TOBACCO GROWERS COOPERATIVE
ASSOCIATION, et al.

DEFENDANTS

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**BTGCA'S LIMITED RESPONSE AND DENIAL OF
BILLINGS LAW FIRM'S "MEMORANDUM OF FACTS AND LAW"
IN SUPPORT OF ITS PETITION FOR AWARD OF
ATTORNEYS FEES AND EXPENSES**

The Defendant Burley Tobacco Growers Cooperative Association ("the Association"), by counsel, makes this Limited Response and respectfully denies all allegations of wrongdoing or negligence against the Association from its directors, officers or employees contained in the "Factual Background" section of the Memorandum of Facts and Law (the "Memo") (pages 2-27) filed by the Billings Law Firm on January 15, 2021 in support of its petition for attorneys fees and expenses. In doing so, the Association is not challenging the entitlement of the Billings Law Firm to recover its reasonable expenses or to be awarded a reasonable attorney fee as determined by this Court and within the overall settlement parameters agreed to by all parties in May 2020 -- not to exceed 25% of the common fund in the aggregate for all legal services rendered by both the McBrayer law firm (both as Plaintiffs' counsel and Class Counsel) and Billings Law Firm. But the "Factual Background" section of the Memo contains many disputed facts, mischaracterizations and unsupported contentions that may impact future litigation against the

Association or its directors, officers or employees, and we cannot tacitly agree to them by silence or allow them to receive credence.

It is particularly troubling that the Memo at pages 3-4 misrepresents known facts and applicable law in alleging that the Board of Directors acted unlawfully in filing Articles of Amendment with the Secretary of State on August 13, 2014. First, KRS 272.211(2) was the basis for the amendment, with only the limitation that, “If an association transacts business with nonmembers, the same must not exceed in amount the total business transacted by the association for its members.” Second, the Association already refuted the same argument in Defendant’s April 5, 2020 Response in Opposition to Plaintiffs’ Motion for Temporary Injunctive Relief, at pages 3-5, and incorporates that explanation and exhibits by reference. Sadly, the instant Memo only quotes part of the relevant statute on amendments to articles of an agricultural cooperative, omitting the crucial last sentence of subsection (1) of KRS 272.141 (“The proposed amendment or amendments, shall be adopted by the affirmative vote of not less than a majority of the votes entitled to be cast by the members present in person or by proxy (if permitted by the bylaws), and voting at any such meeting.”) (emphasis added.) Thus, the Memo incorrectly argues at page 4 that “(1) the amendment was unlawful ... (2) a quorum of the entire Membership was not present, and (3) ... 2/3rds of its members did not adopt the resolution amending the articles.” None of these allegations is true. The August 2014 Articles of Amendment on their face recite how they were properly adopted, first by more than 2/3rds of the Board on May 14, 2014, then by more than a majority of members present in person or by proxy at a special meeting of members with a quorum on August 1, 2014. Those Articles of Amendment were appended as Exhibit D to Plaintiffs’ March 17, 2020 Memorandum in support of Motion for Temporary Injunctive Relief.

In fairness to the current Board of Directors of the Association, it passed a resolution on the recommendation of its Long-Range Planning Committee on August 15, 2019 that the Association should dissolve within two years. The August motion was adopted by 15-4 vote before any farmer had hired the Billings firm. The motion also required the Executive Committee to develop a plan of dissolution within six months, which it did. (August 15, 2019 Board Minutes produced as Burley 001607-001611 to Billings on January 30, 2020; page 001610 contained the above motion and discussion). Thus the Billings firm claims more credit than is due.

The Memo reveals or hints at settlement positions, negotiations and discussions which are intended to be kept confidential under KRE 408 and other guidance from the Supreme Court of Kentucky concerning mediations. It is counterproductive to engage in a debate of who forced whom to agree to what, who wore a white hat or a black hat, and who won or lost. All interested parties reached a proposed Partial Settlement, that is all that matters.

The “Factual Background” recitations are not essential or probative on the question for the Court of what amount of legal fees should be paid to the Billings Law Firm. The Association has no dispute with the claimed number of attorney hours or that expenses were incurred by the Billings firm in its campaign to “dissolve the Association.” There is no dispute that the Billings firm helped several hundred farmers document their 2015-2019 grower status on the books of the Association to entitle them to a distribution as members of the proposed Settlement Class. For these services, the Billings Law Firm may deserve reasonable compensation out of the common fund, directly or indirectly, within the agreed aggregate limit of 25%.¹

¹ The Association is informed that the McBrayer firm and the Billings Law Firm entered into a fee sharing agreement, as to which the Association has no basis to object, nor any intention to interfere with that agreement. It is entirely up to the Court to determine reasonable attorneys fees for each of the attorneys claiming compensation

It is important to note that when the April 8, 2020 special meeting of members could not be held because of the Emergency Order issued by the Governor of the Commonwealth on March 25, 2020, prohibiting large in-person gatherings based on CDC guidelines to minimize Coronavirus transmission risks, the Articles and Bylaws of the Association did not contain any provisions to allow mail-in voting by members. It would have required an in-person meeting of the members to amend its Articles or Bylaws to allow such mail-in member voting. Nothing nefarious happened in cancelling the April 8, 2020 meeting.

It is entirely speculative and unproductive to debate who would have won the “proxy war” discussed in the Memo. While the Billings Law Firm represents it had 750 voting proxies in the hands of its certified public accountant, another 500 signed proxy cards were sent by members to the Association’s CPA firm, Dean Dorton Allen, PLLC, the appointed Teller for the special meeting of members. No proxies have been opened or tabulated, as there was no special meeting. We will never know whether some proxy cards for either side revoked and cancelled out earlier proxies by signing farmers, and we certainly cannot know what the results of the overall vote would have been at a special meeting of members that was never held. Some farmers would have attended the special meeting in person, who may not have made up their minds how they would vote until they heard all of the discussion. Again, the purpose of the mediation and resulting Partial Settlement was simply the common desire by all parties to achieve the calm and orderly dissolution of the Association and distribution of its net assets to members in a prompt and efficient manner. The Board acted in the best interests of the Association and its members when it mediated and agreed to the Partial Settlement, consistent with its motion passed in August 2019 to dissolve within two years from that date.

out of the common fund of the Association’s net assets when available based upon well-known principles of class action law and SCR 3.130(1.5).

The Partial Settlement that is currently before the Court is only partial, intended to accomplish the orderly dissolution of the Association and distribution of its net assets as they are liquidated. What remains in this case thereafter are various claims against the Association for alleged breach of fiduciary duties and/or mismanagement and purported losses. The Association objects to the inclusion of alleged facts and mischaracterizations of Board actions or omissions and to alleged imputed bad intentions of the Board, which have no place in the Memo (pages 2-27). At the appropriate time, if necessary, the Association and/or its directors and officers can and will defend those allegations, which are either simply incorrect, barred by the reasonable business judgment rule, caused no monetary damage to the Association, time-barred by applicable statute of limitations, or barred by other defenses such as lack of standing, failure to state a claim, or equitable defenses. For now, the so-called “Factual Background” should not be considered, as it contains unproven and self-serving assertions. The Billings Law Firm has already stated that it does not seek to be the firm prosecuting any claims for breach of duties or mismanagement against the Association or its directors or officers. Accordingly, all such allegations, even though made in the context of the presentation of “all that the Billings firm did for farmers” must be disregarded.

No bad faith, improper motives, or collusion should be implied or inferred from the mediated Partial Settlement. Section 4.2 of the Stipulation signed by the Billings Law Firm clearly stated, “The BTGCA’s agreement on behalf of the BTGCA Parties [past and present directors, officers and employees], to provisional certification does not constitute an admission of wrongdoing, fault, liability, or damage of any kind to Named Plaintiffs, Named Defendant [Gregory Craddock] or any of the Settlement Class Members.” (Page 12 of Stipulation and Agreement of Partial Settlement, appended to June 10, 2020 Joint Motion to Enter).

The Association has not been required yet to answer the Third Amended Complaint, and thus has not yet asserted all its denials and defenses to any matters such as are alleged in the Memo's "Factual Background." It does not benefit the members of the Association or Settlement Class to delay approval of the motion for judicial dissolution to litigate those disputes first. No one opposes dissolution of the Association as proposed; all objections only relate to who receives how much from its net assets. Any litigation over alleged breach of fiduciary duty can come later.

We fully expect that any challenged transactions or actions taken by the Board are protected by the reasonable business judgment rule of corporate law. The Association has never been required by law to "make a profit" in order to justify its continued existence. No member has ever invested a dime in the Association. The Board has managed the Association's investment portfolio in a safe, sound and prudent manner, which will benefit the members when they receive net asset distributions.

In conclusion, this Limited Response is not meant to oppose the award of reasonable legal fees and expenses to the Billings Law Firm by the Court within the agreed limit of the Partial Settlement. The Association reserves all objections, disagreements and defenses relating to the unproven contentions and disputed "facts" in the subject Memo (pages 2-27), since no responsive pleading has been filed to the Third Amended Complaint.

Respectfully submitted,

/s/ Kevin G. Henry

Kevin G. Henry, Esq.

STURGILL, TURNER, BARKER & MOALONEY, PLLC

333 West Vine Street, Suite 1500

Lexington, Kentucky 40507

khenry@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*

CERTIFICATE OF SERVICE

I hereby certify that on February 17, 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

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

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*

/s/ Kevin G. Henry

Attorney for BTGCA

Courtesy Copy to:

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

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