

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

ELECTRONICALLY FILED

HAYNES PROPERTIES, LLC, *et. al.*

PLAINTIFFS

v.

BURLEY TOBACCO GROWERS
COOPERATIVE ASSOCIATION, *et al.*

DEFENDANTS

**RESPONSE TO OBJECTIONS REGARDING PETITION FOR
AWARD OF ATTORNEY'S FEES AND NONTAXABLE COSTS**

The law firm of McBrayer PLLC ("McBrayer"), as Class Counsel and as counsel for Named Plaintiffs and Settlement Class Representatives, Haynes Properties, LLC, Mitch and Scott Haynes dba Alvin Haynes & Sons, and S&GF Management, LLC (collectively the "Settlement Class Representatives"), respectfully responds to the objections regarding its Petition for Award of Attorney's Fees and Nontaxable Costs.

RESPONSE

McBrayer's strategy and efforts resulted in the partial settlement that provides the majority of the Co-op's assets to the members of the Settlement Class, ceases the Co-op's wasteful expenditure of its assets, and provides all involved with finality with respect to the Co-op's dissolution. In doing so, McBrayer has invested over 2,400 hours in time and anticipates that at least another 1,800 hours will be necessary should the proposed settlement be approved. As McBrayer's actions directly created a common fund that benefits the Settlement Class, it filed its Petition seeking attorney's fees in an amount of 25% of the net proceeds from the dissolution of the Co-op and reimbursement of its nontaxable costs.

Sixteen individuals have submitted written objections to the Court regarding the requests for attorney's fees. Fourteen of those individuals have argued that attorney's fees in an amount of 7.5% of the net proceeds is the appropriate amount of attorney's fees,¹ with the remaining two generally objecting to a 25% fee award.² For the reasons stated in its Petition and Supplement in Support filed contemporaneous herewith, McBrayer's request is reasonable and in conformity with applicable law. Furthermore, the assertion that 7.5% of the net proceeds is an appropriate attorney's fee award has no validity because McBrayer was not a party to the fee proposal that members of the Settlement Class received from other counsel and the objectors did not consider the investments of attorney time and risk undertaken by McBrayer. Accordingly, McBrayer requests that its Petition be granted.

I. McBrayer's requested fee is reasonable.

CR 23.08 governs an award of attorneys' 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. Further, "[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 common fund doctrine is codified in KRS 412.070(1).

McBrayer, through its Petition and Supplement thereto, has put forward a detailed analysis of the work it has done, the risk that it undertook in taking and bringing this action, and the benefit that has been conferred on the Settlement Class. The proposed settlement, which was made

¹ These individuals are Addison Thomson, Eddie Gilkison, Josh Curtis, Jacob Barnes, David Barnes, William A. Thomson, William Davis Furnish, Jennifer Darnell, Michael Furnish, George Darnell, Steve Lang, Clay M. Darnell, Jarrod Stephens, and Brent Dunaway.

² These individuals are Robert E. Barton and Richard Sparks.

possible by McBrayer's actions, results in money going directly into the hands of the Co-op's members in an accelerated fashion and stops the unnecessary expenditure of Co-op assets. Both before and after its appointment as Class Counsel, McBrayer has represented the members of the Settlement Class in an efficient and responsible manner and will continue to do so. The requested 25% attorney's fee is consistent with the determinations made by other courts,³ and adequately compensates McBrayer's work, the risk undertaken, and the results achieved.

II. The 7.5% proposal is not applicable to McBrayer's request for an attorney's fee award.

The majority of the objections submitted to the request for an attorney's fee award state that 7.5% is a reasonable fee. This 7.5%, that many of the objectors indicate was their "understanding" as to the fee to be awarded, stems from the efforts by Billings Law Firm, PLLC ("Billings") in seeking extrajudicial dissolution of the Co-op. Specifically, the 7.5% fee originated in the Plan of Distribution that could have been approved at a special meeting of the Co-op's members. In relevant part, the Plan states that a dissolution committee would be authorized to:

To engage Billings Law Firm, PLLC (the "Firm") as attorneys for the Association and Committee to handle legal work and representation in implementing and completing the Plan (but excluding litigation), and the Association and Committee (i) shall pay the Firm a fee equal to seven and one-half percent (7½%) of the Net Assets (as defined above) before distribution to the Distributees (as defined above) (the "Base Legal Fee"), but which Base Legal Fee shall be a minimum of \$1,000,000.00, and (ii) shall reimburse the Firm for all reasonable costs and expenses incurred, to be reimbursed on a monthly basis. However, in the event of an Approval Action (as defined above), or any person or entity (other than the Committee or the firm) commences a lawsuit or asserts any claim, or in the event any person or entity asserts any claims in an Approval Action or any other civil action for the purpose of contesting this Plan, or the dissolution of the Association, or the distribution of assets under this Plan or a similar related claim (a "Contest Action"), in addition to the Base Legal Fee, the Firm shall be entitled to an award of attorney's fees of seventeen and one-half percent (17½%) of the Net Assets, or such other amount as the Court may order or approve.

³ See *Webster County Soil Conservation Dist. v. Shelton*, 437 S.W.2d 934 (Ky. 1969) (25% fee in a common fund case); see also, e.g., *Spine and Sports Chiropractic, Inc. v. ZirMed, Inc.*, Civil Action No. 3:13-CV-00489, 2015 WL 197698, *3 (W.D. Ky. May 4, 2015) (noting that 25% is the benchmark for common fund cases, but approving a fee of 33% of a common fund).

See Plan of Dissolution (attached hereto as Exhibit A). Pursuant to these terms, in the event the dissolution committee came into existence as a result of a special vote, it had the authority to hire Billings at a fee equal to 7.5% of the Co-op's net assets. *Id.* It is believed that this proposed Plan was widely circulated by Billings among farmers.

While it is understandable that certain farmers believe that the 7.5% should apply to this litigation, the figure should be afforded little consideration by the Court in assessing McBrayer's request. McBrayer was not involved in any communication or extrajudicial plan of dissolution conveyed to potential members of the Co-op, and has never sought to achieve the extrajudicial dissolution of the Co-op. McBrayer did not attempt to be hired by any potential dissolution committee and has not entered into any agreements with anyone that would, in any way, limit its attorney's fee to 7.5%.

Further, the Plan of Dissolution never came into fruition and any proposed dissolution encapsulated by that Plan was necessarily canceled by the proposed settlement under consideration by the Court. Regardless, even the Plan itself provides for a total of 25% of the net assets as an attorney's fee if litigation occurs as a result of the dissolution. As such, the 7.5% figure is simply inapplicable to McBrayer's request for an award of attorney's fees.

To the extent these objectors generally allege that 7.5% is the appropriate figure, McBrayer's request for 25% is reasonable for all the reasons set forth herein, in its Petition, and Supplement. McBrayer, in investigating, initiating, and moving this litigation forward, undertook significant risk and invested substantial resources for the benefit of the Settlement Class. Its actions warrant an award reflecting this risk, investment, and benefit to the Settlement Class, and its request for 25% is reasonable and consistent with the law.

CONCLUSION

McBrayer's investment of time and resources in reaching the proposed settlement compels a conclusion that an award of attorney's fees in an amount equal to 25% of the net proceeds from the liquidation of the Co-op is reasonable, and McBrayer requests the same be ordered.

Respectfully submitted,

/s/Robert E. Maclin, III

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this filing was served this 17th day of February, 2021, via the KYeCourts e-filing system, and via U.S. Mail postage prepaid upon the following:

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**RESOLUTION
OF THE GROWER MEMBERS OF
THE BURLEY TOBACCO GROWERS CO-OPERATIVE ASSOCIATION**

We, the duly-certified Grower Members (the "Members") of the Burley Tobacco Growers Co-Operative Association (the "Association"), hereby adopt, approve, and assent to the following:

RESOLVED, that the Bylaws of the Association are amended to add a new Article XVIII:

**Article XVIII
Dissolution of the Association**

Section 1. Upon the affirmative vote of two-thirds, or more, of the votes entitled to be cast by the Grower Members present in person or by proxy, in accordance with KRS § 272.325(1), the Association shall discontinue its operations, settle its affairs, and voluntarily dissolve.

Section 2. In the event of such dissolution, the Association shall not engage in any business activities except as reasonably necessary to wind up and settle its affairs, in accordance with KRS § 272.325(2) and any resolution or plan of dissolution duly adopted or approved by the Grower Members in connection with such dissolution.

Section 3. In the event of dissolution, the net assets of the Association remaining after payment, satisfaction, or discharge of all taxes, debts, expenses, obligations, claims, or other liabilities of the Association shall be distributed in accordance with any resolution or plan of dissolution, liquidation, or distribution duly adopted or approved by the Grower Members in connection with such dissolution; provided, however, that if no such resolution or plan of dissolution, liquidation, or distribution is adopted or approved, the net assets of the Association shall instead be distributed on a pro rata basis to those persons certified as Grower Members under Article I of these Bylaws and of record immediately preceding such dissolution.

RESOLVED, that the Association is dissolved.

RESOLVED, that Roger Quarles, Eddie Gilkison, and Jerry Rankin are designated as the Dissolution Committee.

RESOLVED, that the attached Plan of Distribution is approved and will be completed by April 30, 2022 or as reasonably extended by notice to the Grower Members in accordance with the Bylaws of the Association.

IN WITNESS THEREOF, I certify that I am the duly appointed Secretary of the Burley Tobacco Growers Co-Operative Association; a special meeting of the Members of the Association was held on Tuesday, April 8, 2020 at 10:00 a.m. at the Association's office at 620 South Broadway, Lexington,



Kentucky, to vote on whether to amend the Bylaws and dissolve the Association; notice of the special meeting was given pursuant to KRS Chapter 272 and the Association's governing documents; there being a quorum, the above Resolution was adopted by the affirmative vote of not less than two-thirds (2/3) of the votes entitled to be cast by the Members present in person or by proxy pursuant to KRS Chapter 272 and the Association's governing documents; and such Resolution has been duly recorded in the minutes of the Association and is in full force and effect.

SECRETARY

DATE

PLAN OF DISTRIBUTION OF THE BURLEY TOBACCO GROWERS CO-OPERATIVE ASSOCIATION

This Plan of Distribution (the “Plan”) is intended to implement the Resolution of the Grower Members (“Members”) of the Burley Tobacco Growers Co-Operative Association (the “Association”), which was adopted at a Special Meeting of the Members on Tuesday, April 8, 2020 at 10:00 a.m.

- **Winding Up.** The Dissolution Committee (the “Committee”) is authorized to take such action, for the benefit of the Association, as reasonably necessary to:
 - **Marshal assets** of the Association (or make provision to do so) including but not limited to collecting, settling, or compromising contracts, accounts receivable, debts, and obligations to the Association and claims belonging to it, prosecuting lawsuits by the Association, as well as abandoning or rejecting assets of insufficient value to justify collection or distribution.
 - **Preserve its assets** pending liquidation and distribution, including but not limited to managing, maintaining, and insuring property against damage or loss, depositing cash into bank accounts, and, if not needed to meet debts and expenses currently payable and not immediately distributable, investing assets in investments that would be reasonable for trustees generally.
 - **Liquidate its assets**, including, but not limited to, selling, exchanging, or disposing, and converting non-cash property into cash or cash equivalents, in one or more sales or transactions, private or public, to one or more persons on terms and conditions as the Committee deems reasonably expedient in the interest of the Association.
 - **Reach fair and reasonable severance agreements** with the Association’s employees.
 - **Hire employees and independent contractors**, including but not limited to accountants, investment advisors, consultants, and attorneys, to advise and assist the Committee in implementing this Plan; act without independent investigation upon their recommendations; and instead of acting personally to employ them to perform any act of the Committee.
 - **Compensate the members of the Committee** in the same manner and rates as the Directors of the Association, or such reasonable amount as approved by a Court, in recognition of the extraordinary efforts they will be required to undertake, or actually undertake, in connection with the implementation of this Plan.
 - **Notify tax authorities and creditors of the dissolution**, including but not limited to following the notice procedures in KRS Chapter 271B for known and unknown claims.
 - **Discharge Association liabilities** (or make provision for discharge) including but not limited to paying, satisfying, settling, or compromising taxes, debts, expenses, liabilities, and obligations of the Association and contingent, conditional or unmatured contractual claims against the Association, and defending lawsuits against the Association.

- **Distribution of Net Assets.** The Association's assets remaining after payment, satisfaction, or discharge of all taxes, debts, expenses, obligations, claims, or other liabilities (the "Net Assets") will be distributed as follows:
 - **Identifying the Distributees.** The Distributees shall be those Members who are listed in the Association's records as Members of the Association at any time during calendar years 2016, 2017, 2018, 2019 and 2020. The Dissolution Committee is authorized, for the purpose of determining the identifies of Distributees, to retroactively accept from any producer such certifications for Membership in the Association for any of the calendar years 2016, 2017, 2018, 2019, or 2020 as set forth in Article I of the Association's Bylaws.
 - **Determining the division of Net Assets.** The Net Assets shall be distributed on a pro rata basis to the Distributees (one distribution share per Distributee, regardless of number of years as a Member). If deemed necessary, the Committee shall also have authority to commence a civil action, in the Association's name, to approve the proposed final settlement of the Dissolution Committee and division of the Net Assets, to determine the Distributees, to declare the rights of persons to receive their fair share of any Association assets, or otherwise to seek approval of the Committee's actions or proposed actions under this Plan (the "Approval Action").
 - **Set aside a Contingency Reserve or Liquidating Trust.** The Committee may make reasonable provisions to satisfy any obligations or claims against the Association that are the subject of pending lawsuits, that have not yet accrued but based upon facts known to the Association are likely to accrue following the dissolution, and potential unknown claims. This may include but is not limited to depositing with an escrow agent a reasonable amount of assets as a contingency reserve (the "Contingency Reserve") and/or with a trustee in trust for the Association's benefit (the "Liquidating Trust") to satisfy such claims and related expenses.
 - **Make an initial distribution** to the Distributees of all Net Assets, less any assets set aside as a Contingency Reserve, set aside as a Liquidating Trust, and payment of attorney fees or other amounts that are required to be paid out of the Net Assets before distribution.
 - **Submit a final settlement** to the Association providing an accounting of all transactions in implementing this Plan and file a report with the Kentucky Secretary of State, the Dean of UK College of Agriculture, and the Kentucky Commissioner of Agriculture.
 - **The escrow agent or trustee shall make a final distribution** to the Distributees of any assets remaining in the Contingency Reserve or Liquidating Trust after the satisfaction of claims against the Association, if any.
- **Actual Authority of the Dissolution Committee.** The Committee is authorized, without further action by the Association, its Board of Directors, or Grower Members:
 - To do and perform, or cause the Officers of the Association to do and perform, any and all acts, and to make, execute, deliver any and all agreements or other instruments of

every kind (which shall be binding on the Association) that are reasonably necessary in the interest of the Association to implement this Plan and the transactions contemplated under this Plan, including all filings or acts required by any state or federal law to wind up its affairs. Adoption of this Plan shall constitute approval of any such acts by the Association, its Board of Directors, or Grower Members.

- To engage Billings Law Firm, PLLC (the “Firm”) as attorneys for the Association and Committee to handle legal work and representation in implementing and completing the Plan (but excluding litigation), and the Association and Committee (i) shall pay the Firm a fee equal to seven and one-half percent (7½%) of the Net Assets (as defined above) before distribution to the Distributees (as defined above) (the “Base Legal Fee”), but which Base Legal Fee shall be a minimum of \$1,000,000.00, and (ii) shall reimburse the Firm for all reasonable costs and expenses incurred, to be reimbursed on a monthly basis. However, in the event of an Approval Action (as defined above), or any person or entity (other than the Committee or the firm) commences a lawsuit or asserts any claim, or in the event any person or entity asserts any claims in an Approval Action or any other civil action for the purpose of contesting this Plan, or the dissolution of the Association, or the distribution of assets under this Plan or a similar related claim (a “Contest Action”), in addition to the Base Legal Fee, the Firm shall be entitled to an award of attorney’s fees of seventeen and one-half percent (17½%) of the Net Assets, or such other amount as the Court may order or approve.
- To obtain and maintain insurance as may be necessary to cover the Association’s indemnification obligations. In addition, the Association shall continue to indemnify its officers, directors, employees, agents, the members of the Dissolution Committee, the escrow agent of the Contingency Reserve, and the trustee of the Liquidating Trust in accordance with the documents governing the Association, the Association’s existing directors’ and officers’ liability insurance policy and applicable law, and such indemnification shall apply to acts or omissions of such persons in connection with the implementation of this Plan and the winding up of the affairs of the Association.