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

ELECTRONICALLY FILED

HAYNES PROPERTIES, LLC, ET AL. **PLAINTIFFS**

V. **PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION TO APPROVE SETTLEMENT PROVISIONS AND ENTER PARTIAL JUDGMENT**

BURLEY TOBACCO GROWERS COOPERATIVE ASSOCIATION, ET AL. **DEFENDANTS**

* * * * * * * * * * *

Come Plaintiffs, Haynes Properties, LLC, Mitch and Scott Haynes dba Alvin Haynes & Sons and S&GF Management, LLC, individually ("Plaintiffs") and as Settlement Class Representatives on behalf of the proposed Settlement Class, by counsel and submit this memorandum in support of the parties' Joint Motion to Approve Settlement Provisions and Enter Partial Judgement.

MEMORANDUM

CR 23.05 governs court approval of a proposed settlement, voluntary dismissal, or compromise of any claims in a class action and requires that a court may only approve the same "after a hearing and on finding that it is fair, reasonable, and adequate." CR 23.05(2). A Court continues to maintain its fiduciary obligations to the settlement class and has a responsibility to ensure that the proposed settlement is fair, not the product of collusion, and that the class was

represented adequately.[1] In this role, a court must protect the rights of absent class members.[2]

The method in which a Court does so is not specifically dictated by the Rule. The Rule's federal counterpart was amended in 2018 to provide four factors to evaluate the sufficiency of a proposed settlement: whether "the class representatives and class counsel have adequately represented the class;" whether "the proposal was negotiated at arm's length;" whether "the relief provided for the class is adequate, taking into account: (i) the costs, risks, and delay of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims; (iii) the terms of any proposed award of attorney's fees, including timing of payment; and (iv) any agreement required to be identified under Rule 23(e)(3);" and whether "the proposal treats class members equitably relative to each other." Fed. R. Civ. 23(e)(2).

Rule 23.05 mirrored the federal rule *prior* to the 2018 amendment and, under the pre-amendment language, federal courts employed a number of factors to evaluate whether a proposed settlement was fair, reasonable, and adequate.[3] Under the Sixth Circuit's approach, courts are required to consider: (1) the "risk of fraud or collusion," (2) the "complexity, expense and likely duration of the litigation," (3) the "amount of discovery engaged in by the parties," (4) the "likelihood of success on the merits," (5) the "opinions of class counsel and class representatives,"

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[1] *See Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 22 (2d Cir. 1987) ("In approving a proposed class action settlement, the district court has a fiduciary responsibility to ensure that 'the settlement is fair and not a product of collusion, and that the class members' interests were represented adequately.'"); *see also In re: Google Inc. Cookie Placement Consumer Privacy Litigation*, 934 F.3d 316, 326 (3d Cir. 2019) ("[A] district court has an obligation as a fiduciary for absent class members to examine the proposed settlement with care.").

[2] *In re Wireless Telephone Federal Cost Recovery Fees Litigation*, 396 F.3d 922, 932 (8th Cir. 2005) ("[T]he district court acts as a fiduciary, serving as a guardian of the rights of absent class members.").

[3] *See* 5 Newberg on Class Actions § 13:48 (5th ed. 2012).

(6) the "reaction of absent class members," and (7) the "public interest." *Does 1-2 v. Deja Vu Servs., Inc.*, 925 F.3d 886, 894–95 (6th Cir. 2019). The Advisory Committee's notes explain that the 2018 amendment was not intended to displace any factor previously considered by courts but instead was designed to refocus courts and lawyers on core concerns.[4] Consistently, Courts have applied both the enumerated considerations in 23(e)(2) and the pre-2018 factors.[5]

Utilizing the factors put forward by the Sixth Circuit, and those considerations enumerated in Rule 23(e)(2), the Joint Motion to Approve Settlement Provisions and Enter Partial Judgement should be granted as the Proposed Settlement is fair, reasonable, and adequate. The Proposed Settlement provides for the prompt dissolution of the Burley Tobacco Growers Cooperative Association ("BTGCA" or the "Co-op"), distributes the majority of the Co-op's assets to the Settlement Class, ceases the Co-op's expenditure of assets, and provides finality with respect to the Co-op's dissolution. Each factor will be considered in turn.[6]

1) Class Representatives and Class Counsel have adequately represented the class.

The first consideration set forth in Rule 23(e)(2) evaluates the adequacy of representation provided by Class Representatives and Class Counsel. Fed. R. Civ. P. 23(e)(2). Despite its similarity to the determination made under Rules 23(a)(4) and 23(g), this consideration should focus upon the "actual performance of counsel acting on behalf of the class."[7] As set forth in detail

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[4] *See Advisory Committee's Notes to 2018 Amendment.*

[5] *See In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 692 (S.D.N.Y. 2019) (applying Rule 23(e)(2) and Second Circuit factors); *Macy v. GC Servs. Ltd. P'ship*, No. 3:15-CV-819-DJH-CHL, 2019 WL 6684522, at *2 (W.D. Ky. Dec. 6, 2019) (noting that the "Sixth Circuit does not appear to have considered the new version of Rule 23(e)(2)" and applying both sets of factors); *Bills v. TLC Homes Inc.*, No. 19-CV-148-PP, 2020 WL 5982880, at *4 (E.D. Wis. Oct. 8, 2020) (applying Rule 23(e)(2) and Seventh Circuit factors).

[6] As there is overlap between the considerations, certain factors are considered together.

[7] *See Advisory Committee's Notes to 2018 Amendment.*

in Class Counsel's Petition for Award of Attorney's Fees and Nontaxable Costs, the Supplement in Support, and the Motion for Ruling re Sufficiency of Notice, and the affidavits and declarations attached to those pleadings, Class Counsel and the Class Representatives have more than adequately represented the interests of the Settlement Class.

Class Counsel investigated and examined the potential claims to be put forward in this matter, took the steps necessary to file this action, and has since taken action to protect the interests of the Settlement Class. Class Counsel developed a comprehensive notice plan designed to reach the members of the Settlement Class, both known and unknown, and located a Settlement Administrator. McBrayer personnel have worked closely with members of the Settlement Class to submit W-9s and other supporting documentation and have answered hundreds of their questions. Class Counsel has also, with the assistance of the Settlement Administrator, begun the process of reviewing and analyzing the documentation received from potential unknown or unconfirmed members of the Settlement Class.

Similarly, the Class Representatives took on considerable risk bringing this action and addressing the issues with the Co-op. Since their appointment, they have interacted with hundreds of farmers, answered questions, and have listened to input from those farmers. The Class Representatives have been engaged with their counsel, have testified at a court hearing, and were directly involved in settlement negotiations.

2) The proposal was negotiated at arm's length, there is no risk of fraud or collusion, and the Parties engaged in a sufficient amount of discovery to make an evaluation of the Proposed Settlement.

Under Rule 23(e)(2) a court must also consider whether the settlement was negotiated at an arm's length which "aims to root out settlements that may benefit the plaintiffs' lawyers at the class's expense, sometimes called collusive settlements." 5 Newberg on Class Actions § 13:50

(5th ed. 2012). Similarly, federal courts of appeal have required that their courts consider the risk of fraud or collusion in assessing the appropriateness of a proposed settlement.[8] Depending on the circumstances, courts have found that a settlement, following sufficient discovery and arm's length negotiations with experienced, capable counsel, is *presumed* to be fair.[9] Moreover, when there is no evidence of fraud or collusion, courts often presume there is no fraud or collusion when there is a lack of evidence to the contrary.[10]

Here, the parties litigated the claims brought forth herein and engaged in contested motion practice before the Court and there is simply nothing to suggest fraud or collusion. These motions involved complex issues of law that were fiercely contested by each party. As a result, Plaintiffs were able to achieve a number of victories that were opposed by the Co-op including an order that the Co-op could not dissipate or distribute its assets to its members or other persons, and that the Co-op could not offer 2020 tobacco contracts.

While this was going on, Plaintiffs sought and received thousands of pages of documents as a result of discovery requests and subpoenas. In evaluating a proposed settlement, courts should take in to account the "nature and amount of discovery" and the "actual outcomes of other cases" to assess "whether counsel negotiating on behalf of the class had an adequate information base" in the negotiations.[11] The thousands of pages of documents, along with the extensive experience of

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[8] *Deja Vu,* 925 F.3d at 894.

[9] *See Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004) ("A settlement following sufficient discovery and genuine arms-length negotiation is presumed fair."); *see also In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 693 (S.D.N.Y. 2019) ("If a class settlement is reached through arm's-length negotiations between experienced, capable counsel knowledgeable in complex class litigation, the Settlement will enjoy a presumption of fairness.") (internal quotations omitted).

[10] *Thacker v. Chesapeake Appalachia, LLC*, 695 F. Supp. 2d 521 (E.D. Ky. 2010) ("Courts presume the absence of fraud or collusion in class action settlements unless there is evidence to the contrary.").

[11] *See Advisory Committee's Notes to 2018 Amendment.*

counsel in similar cases, provided Plaintiffs with sufficient knowledge and information to gauge the strengths and weaknesses of their case allowing for an understanding of the adequacy of the proposed settlement.[12]

Using this knowledge, and as a result of the contested motion practice, the parties engaged in mediation occurring over approximately 1 1/2 months before Bobby Houlihan, a well-respected mediator, involving five independent and separate law firms and three separate groups of parties comprised of some six persons. The use of Mr. Houlihan, a neutral, experienced third party, and the history of these negotiations, further demonstrates the fairness and lack of collusion.[13] There is simply no evidence of fraud or collusion and the parties have reached a Proposed Settlement as to the dissolution claim that will benefit the members of the Settlement Class.

3) The Proposed Settlement provides for adequate relief to the Settlement Class.

A court must also assess the adequacy of the relief afforded to the class by the proposed settlement through the consideration of four subfactors. Before considering the subfactors, a court should generally ask whether the proposed relief is adequate.[14] It is fundamental that courts must conduct an evaluation of relief that will be afforded to the class.[15] Here, the relief provided to the settlement class by the Proposed Settlement is adequate as it represents the liquidation and distribution of the majority of the Co-op's assets to the Settlement Class. The Proposed Settlement

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[12] *New York State Teachers' Ret. Sys. v. Gen. Motors Co.*, 315 F.R.D. 226, 236 (E.D. Mich. 2016) (Courts should evaluate "whether the plaintiff has obtained a sufficient understanding of the case to gauge the strengths and weaknesses of the claims and the adequacy of the settlement.")

[13] *See In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 693 (S.D.N.Y. 2019) ("a mediator's involvement in settlement negotiations can help demonstrate their fairness").

[14] 5 Newberg on Class Actions § 13:51 (5th ed. 2012).

[15] *See In re Compact Disc Minimum Advertised Price Antitrust Litigation*, 216 F.R.D. 197, 207 (D. Me. 2003) ("Obviously, the first and fundamental question is how the value of the settlement compares to the relief the plaintiffs might recover after a successful trial and appeal, discounted for risk, delay and expense.").

stops the continued depletion of the Co-op's resources and gets the money in the hands of the Settlement Class as expeditiously as possible.

In comparison to the potential relief that the class could receive should litigation continue, the benefit and adequacy of the Proposed Settlement is clear. While Plaintiffs believe that they would be successful in achieving a Court ordered dissolution of the Co-op, the relief achieved would not likely be any more significant than that secured by the Proposed Settlement. Accordingly, given the continued depletion of Co-op assets with ongoing litigation, the benefit to the Settlement Class is clear.

A) The costs, risks, and delay of trial and appeal, and the likelihood of success on the merits.

"[T]he most important of the factors to be considered in reviewing a settlement is the probability of success on the merits. The likelihood of success, in turn, provides a gauge from which the benefits of the settlement must be measured." *Poplar Creek Dev. Cop. v. Chesapeake Appalachia, LLC*, 636 F.3d 235, 245 (6th Cir. 2011). Plaintiffs believe there is a substantial likelihood they would ultimately be successful in their dissolution claim against the Co-op. However, class action litigation is inherently complex, and this complexity creates a risk that they ultimately might not be successful.[16] As detailed in the numerous pleadings before this Court, the parties have each taken adversarial positions regarding the appropriateness of the dissolution claim. This complexity would necessarily cause significant delay in ultimately reaching success on the claim for dissolution.[17]

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[16] The complexity is well demonstrated by the complex web of corporate law adopted under decades old statutes governing non-stock cooperative associations like the Co-op.

[17] The potential expense and delay of this action may best be viewed by reviewing the expenses and duration associated with *Congleton v. Burley Tobacco Growers Cooperative Association*, Fayette Circuit Court Civil Action No. 06-CI-00069. In that case over approximately $280,000.00 in expenses and over 8,400 hours

Moreover, the longer the delay in ultimately reaching the point of dissolution and distribution to the members of the Co-op, the less money would be available for distribution. The members of the Co-op are seeking to recover their interests in the Co-op's assets, a limited fund that is reduced by each day of litigation in costs and expenses. An expedited settlement, such as the Proposed Settlement, avoids the continued expenditure of litigation costs by the Co-op, and favors approval.[18]

B) The effectiveness of the distribution method including the method of processing class member claims.

Another consideration required by Rule 23(e)(2)(c) is an assessment of the distribution method of the proposed settlement including the method of processing member's claims. The Advisory Committee's notes indicate that "[o]ften it will be important for the court to scrutinize the method of claims processing to ensure that it facilitates filing legitimate claims. A claims processing method should deter or defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding." *Advisory Committee's Notes to 2018 Amendment*. The plan of allocation must be fair and adequate and is only required to have a reasonable and rational basis.[19]

The Proposed Settlement requires confirmed members of the Settlement Class to fill out and return a W-9, and unconfirmed or unknown members must establish their membership by

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of attorney time was incurred by the plaintiff firms. Moreover, the case took some three or more years of litigation until judgement was entered and did not end until the final distribution occurred in or around 2014.

[18] *See In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292-93 (2d Cir. 1992) (considering limited fund and its diminution in value through litigation costs and expenses as a factor in approving settlement).

[19] *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 344 (S.D.N.Y. 2005) (a distribution plan "need only have a reasonable, rational basis, particularly if recommended by experienced and competent class counsel.").

submission of documentation. It is not burdensome to require class members to fill out and return the W-9 to receive a distribution.[20] Moreover, the requirement that unconfirmed or unknown members establish their membership by submission of documentation that they are likely to possess is not onerous.[21] This process is effective and not unreasonable.

C) The terms and timing of the proposed award of attorney's fees.

While courts are required to assess any request for attorney's fees under CR 23.08, such a request does factor in the CR 23.05 analysis as an excessive fee could be a sign that counsel made a deal for fees at the expense of the class.[22] A defendant's willingness to pay higher fees could indicate that the settlement undervalues the claim of the class, and this factor is especially relevant when the attorney's fees are considerable, but the class's recovery is questionable.[23]

The Proposed Settlement makes no specific guarantee of attorney's fees and there is no evidence that the attorney's fees played a role in the Co-op's decision making. Instead, the Proposed Settlement provides that the Co-op will not oppose any fee request up to and including 25% of the net assets, and such a figure has been repeatedly found to be reasonable.[24] Further, this is not a situation in which the attorney's fees are considerable but the recovery of the class

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[20] *See In re Toyota Motor Crop. Unintended Acceleration Marketing, Sales Practices, and Products Liability Litigation*, No.8:10ML 02151 JVS (FMOx), 2013 WL 3224585, at *18 (C.D. Cal. June 17, 2013) ("The requirement that class members download a claim form or request in writing a claim form, complete the form, and mail it back to the settlement administrator is not onerous.").

[21] *See generally McKinnie v. JP Morgan Chase Bank, N.A.*, 678 F. Supp. 2d 806, 814 (E.D. Wis. 2009) ("[T]he court does not believe that requiring claimants to verify on the claim forms that they meet class requirements is improper.").

[22] 5 Newberg on Class Actions § 13:54 (5th ed. 2012).

[23] *Id.*

[24] *See Webster County Soil Conservation Dist. v. Shelton*, 437 S.W.2d 934 (Ky. 1969) (25% fee in a common fund case; *see, 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 fee of 33% of common fund);

questionable as the Settlement Class stands to receive the large majority of the remaining assets regardless of any fee awarded.

D) Any agreement required to be identified.

McBrayer previously disclosed, pursuant to CR 23.05(3), an agreement it has with Billings Law Firm, PLLC ("Billings") to split any attorney's fees awarded to either firm between the two firms. The agreement does not reduce any amounts that would be awarded to the Settlement Class, and instead constitutes an agreement between the firms to split any fees received *only* to the extent that any such fees are received. As this agreement does not reduce the amounts to be provided to the Settlement Class, it does not suggest any sort of improper collusion or fraud in the Proposed Settlement.

4) The Proposed Settlement treats class members equitably.

The Proposed Settlement treats each member of the Settlement Class equally to all others. So long as an individual or entity meets the requirements for membership, they are entitled to the same per capita distribution from the net proceeds of the Co-op following dissolution. This demonstrates the fair and reasonable nature of the Proposed Settlement, and the lack of any element of fraud or collusion.

The only treatment of differing members of the class is the requested Class Representative service awards of $5,000. These typically do not raise any issues with respect to approval of proposed settlements.[25] As detailed in their request, the $5,000 service award for each of the Class Representatives would represent and account for the risk and work the Class Representatives undertook in stepping forward and bringing this suit. Their request is not unreasonable and the difference between what a typical class member receives and what the Class Representatives

[25] *See* 5 Newberg on Class Actions § 13:56 (5th ed. 2012).

would receive is not excessive.[26] Accordingly, each member of the Settlement Class is to be treated equitably under the Proposed Settlement.

5) Counsel and Class Representatives support the Proposed Settlement.

The experience of counsel is set forth in the previously filed Affidavits of Robert E. Maclin, III, Katherine Yunker and Jason Hollon, and the experience and involvement of the Class Representatives in burley tobacco production in general is set forth in the previously filed Affidavits of Mitchell Haynes, Scott Haynes and Penny Greathouse, as well in their testimony before this Court occurring on October 19, 2020. It is the opinion of counsel and Class Representatives that the dissolution of the Co-op and distribution to its members is fair, reasonable and adequate. This further supports a conclusion that the Proposed Settlement should be approved.[27]

6) There have been few objections to the substantive terms of the Proposed Settlement.

To date, there have been objections that fall into one of four categories: objections about the $1.5 million to a nonprofit advocacy group, the inclusion of 2020 growers in the Settlement Class, the exclusion of pre-2015 growers from the Settlement Class, and to the attorney's fees requests. The objections regarding the $1.5 million to a nonprofit advocacy group, the inclusion of 2020 growers, and the exclusion of pre-2015 growers has been addressed in more detail by the Co-op. However, Settlement Class Representatives support these terms of the Proposed Settlement to the extent they form an essential term of the agreement. McBrayer will address the

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[26] *See Staton v. Boeing Co.*, 327 F.3d 938 (9th Cir. 2003) ("Because the very large differential in the amount of damage awards between the named and unnamed class members is not justified on this record, the district court abused its discretion in finding the settlement agreement to be fair, adequate and reasonable under Rule 23(e).").

[27] *UAW v. Ford Motor Co.*, No. 07-CV-14845, 2008 WL 4104329, at *26 (E.D. Mich. Aug. 29, 2008) ("The endorsement of the parties' counsel is entitled to significant weight and supports the fairness of the class settlement.")

objections to attorney's fees in a separate response. Importantly, no member has objected to the dissolution of the Co-op or the release.

7) The public interest is furthered by the Proposed Settlement.

Finally, the public interest is served by the settlement of complex litigation.[28] The Proposed Settlement provides for the partial resolution of the litigation, for the expeditious and orderly dissolution of the Co-op, and the legal finality that all parties desire. All parties involved, including all members of the Settlement Class, are thereby benefitted by its terms.

CONCLUSION

For these reasons, the Proposed Settlement should be given final approval as it is fair, reasonable, and adequate, and a final and appealable judgment should be entered approving the same.

Respectfully submitted,

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[28] *In re Cardizem CD Antitrust Litigation*, 218 F.R.D. 508, 530 (E.D. Mich. 2003) ("[T]here is a strong public interest in encouraging settlement of complex litigation and class action suits because they are 'notoriously difficult and unpredictable' and settlement conserves judicial resources.").

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 Court Net e-filing system, and via electronic mail and U.S. Mail as indicated, upon the following:

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