NO. 374A14-1 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

* *

KAYE W. FISHER, DAN LEWIS, GEORGE ABBOT, ROBERT C. BOYETTE, KYLE A. COX, C. MONROE ENZOR, JR., Executor of the Estate of Crawford Monroe Enzor, Sr., ARCHIE HILL, KENDALL HILL, WHITNEY E. KING, CRAY MILLIGAN, RICHARD RENEGAR, LINWOOD SCOTT, JR., ORVILLE WIGGINS, ALFORD JAMES WORLEY, Executor of the Estate of Dennis Anderson, CHANDLER WORLEY, HAROLD WRIGHT, and OTHERS SIMILARLY SITUATED Plaintiffs, v. FLUE-CURED TOBACCO COOPERATIVE STABILIZATION CORPORATION Defendant.	)	From Wake County No. 05 CVS 188 No. 05 CVS 1938 No. COA14-609

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BRIEF OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

I. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY CERTIFYING THE CLASS

INTRODUCTION

This appeal concerns a plaintiff class the likes of which no North Carolina court has hitherto contemplated, much less certified. For the reasons explained herein and in the *amicus curiae* brief filed by the North Carolina Chamber of Commerce ("NCCC Am. Br."), affirming the grant of class certification in this case would eradicate any limit on a trial court's discretion to certify a class pursuant to Rule 23 in North Carolina.

As certified, the class encompasses some 800,000 past and present tobacco farmers (plus family and heirs thereof) across five States who press nine assorted claims spanning several decades.[1] These hundreds of thousands of class members are all aligned, per the operative certification order, against an agricultural cooperative that has served flue-cured tobacco growers since 1946 pursuant to its statutory charter from North Carolina and direction from the Governor, who appoints a chosen Board member. Apart from seeking money from the same Defendant, however, these class members are more different than they are alike: some are still actively farming tobacco and relying on the Cooperative to buy their

[1] The class as certified encompasses plaintiffs (current and former members of the Cooperative) in North Carolina, South Carolina, Florida, Georgia, and Virginia.

crop, whereas others ceased farming decades ago (or, indeed, never farmed tobacco but are mere relations of those who once did); some sold tobacco to the Cooperative under one federal statutory regime, whereas others sold to the Cooperative under a substantially different, later regime; some sold tobacco for less than the Cooperative resold it for, whereas the vast majority did not; some have obtained (and redeemed) Certificates of Interest for tobacco they sold to the Cooperative, whereas others never did. The lines of distinction and division go on and on.

Such a sprawling, disparate class appears not only unprecedented but altogether irreconcilable with this Court's instruction earlier this year that a plaintiff class should not be certified where "800 [property] owners within the [transportation] corridor are [not] affected in the same way and to the same extent" by a defendant's conduct. *Beroth Oil Co. v. N.C. Dept. of Transp.*, ___ N.C. ___, ___, 757 S.E.2d 466, 474 (2014). Here, hundreds of thousands of plaintiffs press what amounts to a grab-bag of different claims, arising at different times, based on different facts and legal theories, translating to alleged damages that must be separately calculated individually, then distributed across estates of an untold number of persons now deceased. What is more, all these class members have been herded into a *single* class definition, without benefit of *any* sub-class or

separate representation, even though they divide into fundamentally different groups whose interests oppose one another. It is inconceivable that the disparate theories, proofs, and interests that run through this class could be tried and adjudicated together.

Although reasonable minds often disagree about the propriety and contours of a particular class, certification of *this* class is unsustainable under *any* sound view of North Carolina law, particularly after *Beroth*. Were this certification nonetheless to stand, trial courts would be free to disregard essential limits on class actions. If nothing else, a trial court confronting a class of such expansive, divergent, unwieldy proportions should be required to explain how and why it considers class treatment appropriate to decide the specific merits issues pending before it. Here, the trial judge not only omitted such explanation but ignored defects as glaring as outright adversity between class members.

This Court has previously held that an order granting class certification is not always immediately appealable, *see Frost v. Mazda Motor of Am*, 353 N.C. 188, 193, 540 S.E.2d 324, 327-28 (2000), but may take this occasion to correct an imbalance in the procedural law. *See* NCCC Am. Br. at 2-16. Otherwise, orders *denying* class certification may automatically be appealed (and thus potentially reversed) on an interlocutory basis while orders *granting* class certification may

not be. *See Stetser v. TAP Pharm. Prods., Inc.*, 165 N.C. App. 1, 10-11, 598 S.E.2d 570, 577-78 (2004); *see also Neil v. Kuester Real Estate Servs., Inc.*, No. 12-677, slip op. at 14 (N.C. Ct. App. Nov. 4, 2014) (unpublished) (App'x at A99). Whatever the default rule may be, however, the Cooperative has substantial rights at stake in this case so as to ground interlocutory appeal—particularly the right to face a non-conflicted class susceptible to a binding, final judgment as contemplated by Rule 23 and to be afforded the opportunity to resolve internal membership disputes in orderly fashion as contemplated by statute. Moreover, in a parallel petition for certiorari filed today, we elaborate upon why this Court should in any event exercise its discretion to decide the merits of this appeal. In sum, we respectfully ask this Court to review and reverse certification of the instant class.

STATEMENT OF THE CASE

The cases bound up in this appeal began in 2005. Plaintiffs-Appellees ("Plaintiffs") originally filed separate actions (*Lewis v. Flue-Cured Tobacco Cooperative Stabilization Corp.* & *Fisher v. Flue-Cured Tobacco Cooperative Stabilization Corp.*) but later combined them en route to a consolidated, amended complaint that now states nine separate claims: conversion, breach of contract (one count complaining of monies withheld and another complaining of loss of membership), imposition of constructive trust, accounting, distribution, declaratory judgment, *ultra vires* acts, and unfair trade practices. (R. 112-146.)

In July 2009, Defendant-Appellant the U.S. Tobacco Cooperative, Inc. ("Cooperative") moved to dismiss Plaintiffs' claims (then numbering 14, per the initial complaint). (R. 49-53.) Nearly three years later on March 30, 2012, the court below granted that motion in part, dismissing certain of Plaintiffs' claims. (R. 54-62.) Thereafter, the Cooperative answered, denying liability and asserting defenses against the remaining claims, as well as counterclaims against certain named Plaintiffs. (R. 174-199.)

On July 9, 2012, Plaintiffs amended their complaint (dropping claims for dissolution) (R. 112-146) and simultaneously moved to certify the class (R. 63-64). Shortly thereafter, however, certain Plaintiffs broke away over apparent disagreements surrounding which causes of action and how much damages to pursue against the Cooperative. On October 31, 2012, an overlapping putative class represented by separate counsel (now nonetheless conscripted into the class as defined) filed a parallel action against the Cooperative in the U.S. District Court for the Eastern District of North Carolina, captioned *Speaks v. United States Tobacco Cooperative Inc.*, advancing distinct claims and seeking the Cooperative's dissolution. (R. 204-245.) *Speaks* is currently stayed by the federal court pending resolution of this appeal. Order, *Speaks v. United States Tobacco Cooperative Inc.*, No. 12-00729 (E.D.N.C. Sep. 16, 2014), ECF No. 36.

The parties in this case undertook class discovery, followed by extensive briefing on Plaintiffs' motion for certification. (R. 63-111; R. 147-173; R. 204-245; RE. 1-891; RE. 900-3434.) In support of class certification, class counsel argued that the "primary factual question common to all class members [is] what reserve if any is reasonable such that monies in excess must be distributed." (R. 97.)

The trial court agreed in its initial order certifying a class on June 27, 2013. (R. 246-255.) Because the certification order omitted findings and conclusions essential to this Court's review, however, the court withdrew it at the parties' urging and directed Plaintiffs to submit a new proposed order. (R. 260-264.) On February 24, 2014, the trial court entered a new order largely adopting Plaintiffs' proposed class (hereinafter, the "Order"). (R. 267-282.) According to the Order, which credited Plaintiffs' framing of their core theory for purposes of obtaining class certification, the "central issue common to all Plaintiffs is whether they are entitled to share in the accumulated assets held by Defendant, which Defendant contends is held as a reasonable reserve." (R. 272.) Also according to the Order, the entire class is encompassed under a single definition, consisting of three categories:

> All individuals, proprietorships, partnerships, corporations, or their heirs, representatives, executors or assigns, and other proper entities

> that have been members/shareholders of the [Cooperative] at any time from its inception through the end of crop year 2004, and any heirs, representatives, executors, successors or assigns, and;
>
> (a) had not requested cancellation of their membership and whose membership was cancelled by [the Cooperative] without a hearing, and/or
>
> (b) were issued a certificate of interest in capital reserve by [the Cooperative] for any of the tobacco crop years between and including 1967-1973, and/or
>
> (c) delivered, consigned for sale, or sold flue-cured tobacco and paid an assessment for deposit into the No Net Cost Tobacco Fund or No Net Cost Tobacco Account during any tobacco crop years between and including 1982-2004. (R. 282.)

Individual dissenters may opt out, but all other class members are represented by the same counsel. Thus, the breadth of the class definition is such that it includes, *e.g.*: (i) an overlapping class that is expressly dissenting and complaining of conflicts in federal court (R. 204-245); (ii) current members of the Cooperative who support and benefit from the Cooperative (RE. 1669; RE. 1674); and (iii) a named representative who is an active "board member of Defendant" and thus responsible for the very business judgments the class challenges (R. 276-277).

On March 10, 2014, the Cooperative noticed an appeal to the Court of Appeals (R. 283-284), and the appellate record was timely served and filed with that court on June 2, 2014 (R. 290-291). On October 10, 2014, this Court *sua sponte* certified the Cooperative's appeal "for review prior to determination in the

Court of Appeals." Order, *Fisher v. Flue-Cured Tobacco Coop. Stabilization Corp.*, No. 374A14-1 (N.C. Oct. 10, 2014).

STATEMENT OF FACTS

As matters presently stand, the Cooperative faces suit by a class consisting of all current and former tobacco farmers (and/or all of their heirs and assigns) who have ever sold flue-cured tobacco to the Cooperative since its inception. (R. 282.) According to the shared account of class counsel and the trial judge, these class members all stake claim to the reserve accumulated and retained by the Cooperative. (R. 97-99.) To grasp the dimension and thrust of this class action, it is important to consider this Cooperative's history.

The Cooperative was formed in 1946 as an agricultural marketing association serving growers of flue-cured tobacco, authorized as such by North Carolina. (R. 269.) Pursuant to the 1921 statute under which it was formed, its mission has long been to "promote, foster, and encourage the intelligent and orderly producing and marketing of agricultural products through cooperation." N.C. Cooperative Marketing Act, N.C. GEN. STAT. § 54-129, *et seq*. The Cooperative continues that mission today, promoting high-quality tobacco farming and marketing by pooling tobacco leafs and production in order to benefit growers

of flue-cured tobacco, help drive a fair price for flue-cured tobacco, and support North Carolina's larger economy. (RE. 2300-2302; RE. 2315-2316.)[2]

Membership in the Cooperative has always been predicated on selling flue-cured tobacco to the Cooperative. *See* N.C. GEN. STAT. § 54-145 (membership available "only to persons engaged in the production of agricultural products"). To become a member, a grower historically needed only to pay the Cooperative a nominal fee of $5 and sell it some amount of tobacco meeting specified quality requirements. (RE. 2434-2435.)

For much of its history, the Cooperative helped to implement the federal price-stabilization program, which established a floor for tobacco prices. (RE. 2300.) The first Tobacco Price Support Program was part of the Agricultural Adjustment Act of 1938, which ensured a minimum price for tobacco farmers. (RE. 82.) If farmers could not find a better price elsewhere, then the Cooperative was positioned to buy their tobacco at the minimum price. (RE. 2306.) To the extent that an individual grower opted to sell to the Cooperative, the Cooperative

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[2] Flue-cured tobacco (*i.e.*, tobacco that is cured with heat transmitted through a flue, without resort to smoke or fumes in order to achieve desired chemical and biological changes) is grown primarily in North Carolina, Georgia, South Carolina, Virginia, and Florida. North Carolina produces over 75 percent of the domestic crop each year, while Florida, Georgia, South Carolina, and Virginia combine for the remaining 25 percent. About Tobacco, CENTER FOR TOBACCO GROWER RESEARCH, http://www.tobaccogrowerresearch.org/tobacco.html (last visited Nov. 12, 2014).

would pay the agreed price and, in exchange, take title and possession over the tobacco it purchased. (RE. 2306; RE. 372-447.)

Flue-cured tobacco farmers who were eligible for the Cooperative had access to a prized benefit not generally available to other market participants—the option to sell at a federally guaranteed price.[3] To pay them that price, the Cooperative received loans from the Commodity Credit Corporation ("CCC"), an agency of USDA; tobacco purchased by the Cooperative served as collateral on the loans. (RE. 2306.) Proceeds from the Cooperative's sale of tobacco went first to repay outstanding loans from the CCC. (RE. 2306.)

As a general rule, the Cooperative sold tobacco for *less* than the minimum price it paid. (RE. 2306-2307.) On balance, those sales resulted in large losses for the U.S. Government, which taxpayers covered for the benefit of tobacco growers. (*Id.*) The only crop years for which the Cooperative recognized a net profit on its sales under the initial regime were 1967-73. (*Id.*) The Cooperative issued dividends to its members from these profits and issued Certificates of Interest for the balance, approximately $27 million, which the Board voted in 1975 to retain as a reserve, just as the contracts it signed with members expressly permitted it to do. (RE. 2307-2308; RE. 372-409.) The Board has since opened redemption periods

[3] In exchange, farmers committed to limit their production according to quotas enforced by the U.S. Department of Agriculture ("USDA"). (RE. 2306.)

for Certificates of Interest and has been receiving and redeeming those outstanding Certificates during specified windows. (RE. 2307; RE. 2316.)

In an effort to stem continuing losses, the U.S. Congress in 1982 passed the No Net Cost Act, which imposed an assessment fee on all tobacco remitted to the Government. These fees were accumulated to help reimburse the Government for losses resulting from the price-stabilization program. (RE. 2309.) Initially, from 1982 to 1985, the assessment fees were paid only by tobacco growers. In 1986, however, Congress amended the No Net Cost Act to require tobacco buyers as well as tobacco growers to pay assessment fees. (*Id*.) Then, in 1993, Congress passed another amendment subjecting importers of tobacco to the assessment fees. (*Id.*) Thus, the assessment funds that the Government accumulated over time largely reflected the contributions of buyers and importers, rather than those of growers alone. (*Id.*)

Despite the assessments paid under the No Net Cost Act, the Government continued to suffer overwhelming losses on the tobacco price-stabilization program—losses totaling approximately $2 billion since 1946. (RE. 2306.) In 2004, USDA ended the price-stabilization program. At that time, the CCC had over $200 million in assessment funds that it had accumulated to pay off outstanding balances from its loans. (RE. 2312-2313; RE. 2474-2475; RE. 2477.)

USDA then released approximately 83 million pounds of actual tobacco (which had been held as collateral on its loans) from the 2001-2004 crops to the Cooperative, and the Cooperative sold those pounds of tobacco for approximately $81 million. (RE. 2313-2314.)

Later, in 2007, USDA separately released to the Cooperative $7 million that it had not used to pay off balances from government loans, specifying that the Cooperative should release those funds to its member growers, which the Cooperative did. (RE. 2310-2311.) As the price-stabilization era came to a close, therefore, the Government decided to return to the Cooperative, as a gift, tobacco that the Government was otherwise entitled to retain as collateral, while separately specifying a smaller assessment refund ($7 million) that the Cooperative was to disperse to its member growers. (RE. 2310-2311; RE. 2474.) In accordance with the Government's direction, the Cooperative's Board distributed the $7 million in assessment refunds to relevant members. And the Cooperative's Board retained the proceeds separately resulting from the sale of gifted tobacco as a reserve, thereby ensuring that the Cooperative could continue to pursue its mission of providing a good price for farmers, now without government subsidies. (RE. 2313.)

Since 2005, the Cooperative's reserves have reached the neighborhood of $340 million. (RE. 2314.) That reserve derives primarily from three different sources: (1) net gains from the 1967-1973 crop years, while the federal price-stabilization program remained in place in its initial form; (2) left-over tobacco from the 1982-1984 crop years that USDA released to the Cooperative in the early 1990s in order to clear out accumulated inventory under the No Net Cost Act, at which point the Cooperative sold the tobacco for approximately $110 million; and (3) the 83 million pounds of tobacco from the 2001-2004 crops that served as collateral until the USDA released it back to the Cooperative at the close of federal price stabilization. (RE. 2311; RE 2314.)

The Cooperative has been putting its robust reserve to good use. When the price-stabilization program ended, the Cooperative reinvented itself to become a global, competitive, vertically-integrated player within the international tobacco market. And it has necessarily done so on its own dime, without further support from the U.S. Treasury. This has been neither easy nor cheap. Purchasing, processing, storing, and marketing entails up-front investments and substantial waits before returns are achieved. In the meantime, the reserve enables the Cooperative to pay its growers, sustain its operations, and continue building and improving them. (RE. 1691-1692; RE. 2315.)

The Cooperative is governed by growers, for growers. Its Board of Directors, like its membership, is comprised of growers who actively farm and sell to the Cooperative. (RE. 1345.) One Director is appointed directly by the Governor. (*Id.*) The others are elected from districts representing roughly similar volumes of tobacco production. (*Id.*)

As of 2004, the Cooperative's roster of members had grown to 800,000. (RE. 2302.) This number was not an accurate reflection of the Cooperative's active membership. Instead, it was an artifact of the Cooperative's long history dating back to 1946, throughout which the Cooperative freely assigned membership numbers to families, assignees, partnership participants, *etc*., all without limit and without ever updating its rolls. (RE. 2302-2303; RE. 2320-2322.) In 2004, the Board recognized the need to update its membership to limit it to those who were actually selling to the Cooperative (R. 185; RE. 704)—consistent with the governing statute that limits its membership. *See* N.C. GEN. STAT. § 54-145.

As a result of that process, some 800,000 names came off the rolls—all of which are now included, by definition, within this class as certified. (R. 282.) Today, the Cooperative has some 1,000 active members, representing at least a quarter of all active flue-cured tobacco farmers nationwide. (RE. 908.) These

farmers work hard to grow their crop each year, just as the Cooperative works hard to enable them to sell their crop at a fair price each year. Only with the benefit of its reserve can the Cooperative successfully promote, process, and sell its members' flue-cured tobacco within the competitive global marketplace.

GROUNDS FOR APPELLATE REVIEW

Although this Court has held that grant of class certification is not always subject to interlocutory appeal, *see Frost*, 353 N.C. at 193, 540 S.E.2d at 327-28, there is good reason here to overturn that rule and permit appeal from orders granting class certification no less than from orders denying class certification: Doing so would correct asymmetry that has developed in the procedural law, *see Stetser*, 165 N.C. App. at 10-11, 598 S.E.2d at 577-78, and prevent a skewing effect whereby *grants* of class certification are effectively *favored* over *denials*—with only the latter likely to be reviewed (and thus potentially reversed) by interlocutory appeal. *See* NCCC Am. Br. at 12-14. In any event, even if grants of class certification are not immediately appealable as a matter of course, *this* Order is extraordinary in multiple respects that implicate substantial rights and otherwise warrant urgent attention. This Court has taken a salutary step in these respects by taking this appeal up for itself. *See* N.C. GEN. STAT. § 7A-31 (specifying that this Court will grant review prior to determination by the Court of Appeals in cases where "(1) [t]he subject matter of the appeal has significant public interest, or (2)

[t]he cause involves legal principles of major significance to the jurisprudence of the State, or (3) [d]elay in final adjudication is likely to result from failure to certify and thereby cause substantial harm, or (4) [t]he work load of the courts of the appellate division is such that the expeditious administration of justice requires certification").

In particular, the Order under appeal threatens the Cooperative's substantial rights. A "substantial" right is "a legal right affecting or involving a matter of substance as distinguished from matters of form." *Oestreicher v. Am. Nat'l Stores, Inc.*, 290 N.C. 118, 130, 225 S.E.2d 797, 805 (1976). "The decision of whether an interlocutory appeal affects a substantial right is made on a case-by-case basis," including for class actions. *Dunn v. State*, 179 N.C. App. 753, 757, 635 S.E.2d 604, 606 (2006) (citing *Milton v. Thompson*, 170 N.C. App. 176, 178, 611 S.E.2d 474, 476 (2005)). Interlocutory orders are appealable whenever a substantial right would otherwise be "lost, prejudiced or . . . less than adequately protected by exception to entry of the interlocutory order." *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 6, 362 S.E.2d 812, 815 (1987) (citations omitted). In this case, the prospect of ultimate appeal from final judgment somewhere down the road affords no succor.

A. The Order Disregards Fundamental Safeguards Under Rule 23

The grant of class certification in this case transgresses basic protections of Rule 23 (*see infra* at 27-49) in ways that cannot be adequately vindicated via an appeal from final judgment. In particular, the class is racked by fundamental conflicts that foreclose proper conduct of this litigation by class counsel, injure the interests of growers whom the named Plaintiffs supposedly represent (including current members of the Cooperative and even Directors on the Board), and stand to call into question *any* judgment favoring the Cooperative. Those conflicts cannot be cured following final judgment. To the contrary, continuing to litigate in the current posture exposes the Cooperative to the risk of an adverse class-wide judgment *against* it even while any favorable class-wide judgment *for* it would arguably violate the due-process rights of absent, aggrieved plaintiffs whose interests ostensibly conflict. *See, e.g.*, *Gonzales v. Cassidy*, 474 F.2d 67, 74 (5th Cir. 1973). Proceeding in this posture unfairly subjects the Cooperative to a "heads you lose, tails it's a do-over" coin flip. It also denies absent "members of the class" much the same "right to . . . representation" that animates interlocutory review of orders *denying* class certification. *Perry v. Cullipher*, 69 N.C. App. 761, 762, 318 S.E.2d 354, 356 (1984).

In addition, the class is so unmanageable that this case cannot be resolved any time in the foreseeable future. With a class that numbers in the hundreds of

thousands, facts that span decades, various liability theories that run in parallel, and proof that will differ for *both* liability *and* damages across this class, there is every reason to question whether and how this case can *ever* be litigated through final judgment. Any prospect of final judgment could be more than a decade away, if ever attainable, given the numerosity and variability of the individualized issues now slated for merits adjudication across this class. To delay review under Rule 23 in these circumstances would prejudice substantial rights, including those of absent class members. *Cf. EQT Prod. Co. v. Adair*, 764 F.3d 347, 357 (4th Cir. 2014) (explaining that interlocutory review of class certification should be granted where "manifestly erroneous and virtually certain to be reversed on appeal") (internal quotations and citation omitted); *Schmidt v. Fuller Brush Co.*, 527 F.2d 532, 535 (8th Cir. 1975) (collecting cases that reviewed interlocutory orders granting class certification, recognizing "that class actions place an enormous burden of costs and expense upon the parties").[4]

Notably, even prior to FED. R. CIV. P. 23(f), federal courts of appeals undertook interlocutory review of problematic certifications. *See In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, J.) ("Judge

[4] As the Court of Appeals has explained, "the reasoning in [federal class action] cases can be instructive," even though "North Carolina's [Rule 23] . . . is quite different from the present federal Rule 23." *Scarvey v. First Fed. Sav. & Loan Ass'n.*, 146 N.C. App. 33, 41, 552 S.E.2d 655, 660 (2001) (citations omitted).

Friendly, who was not given to hyperbole, called settlements induced by a small probability of an immense judgment in a class action 'blackmail settlements.' Judicial concern about them is legitimate . . . .") (citation omitted); *see also Stillmock v. Weis Markets, Inc.*, 385 F. App'x 267, 281 (4th Cir. 2010) (Wilkinson, J., concurring) ("[H]ere we face the risk of forcing a defendant to settle in the face of billions in liability for actions that resulted in not a single instance of identity theft."). The Court should similarly police class certification orders that stretch Rule 23 past the breaking point, as this one so clearly does.

B. The Order Denies Special Statutory Protections

Furthermore, the rights of this particular Cooperative deserve special scrutiny. The Cooperative possesses, just as "ordinary corporations" do, N.C. GEN. STAT. § 54-151(7), an absolute right to be free from lawsuits based on derivative claims that have not been presented to its Board as required by law. North Carolina prohibits shareholders from so much as commencing a derivative proceeding until 90 days after "[a] written demand has been made upon the corporation to take suitable action." N.C. GEN. STAT. § 55-7-42. This enables the Cooperative to investigate any such membership grievance before confronting a lawsuit over it. Notably, the North Carolina Legislature took care to omit the common-law futility exception to the demand requirement in order to forestall what it saw as "excessive and unnecessary litigation on a preliminary point." *Allen*

ex rel. Allen & Brock Const. Co., Inc. v. Ferrera, 141 N.C. App. 284, 289, 540 S.E.2d 761, 765 (2000) (citation omitted). Moreover, any such suit must be dismissed if the Board "determines in good faith after conducting a reasonable inquiry . . . that the maintenance of the derivative proceeding is not in the best interest of the corporation." N.C. GEN. STAT. § 55-7-44. Thus, the Cooperative is immune from any derivative suit not routed through the Board, much as the State is immune from any suit as to which it has not waived immunity. *See Hedrick v. Rains*, 121 N.C. App. 466, 468, 466 S.E.2d 281, 283 (1996), *aff'd per curiam*, 344 N.C. 729, 477 S.E.2d 171 (1996).

By Plaintiffs' own account, the theory underlying the class is one of derivative liability, even though they presented no such claim to the Board. With their initial fourteen claims, Plaintiffs largely disguised their derivative theory. (R. 10-48.) But their façade collapsed when they framed their arguments for class certification: Plaintiffs argued (R. 97), and the trial court agreed (R. 272), that the "central issue common to all Plaintiffs is whether they are entitled to share in the accumulated assets held by Defendant, which Defendant contends is held as a reasonable reserve." *Id.* To challenge the reasonableness of the Board's maintenance of the reserve is to challenge the Board's business judgment—and such challenge constitutes a prototypical derivative claim. *See* N.C. GEN. STAT.

§§ 55-6-40, 55-7-42; *see also Jordan v. Hartness*, 230 N.C. 718, 719, 55 S.E.2d 484, 485 (1949) (claims concerning disposition of corporate assets are derivative); 11 WILLIAM MEADE FLETCHER ET AL., THE FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 5326.10 (West 2014) ("Courts have generally treated the right of shareholders to bring suit to compel the declaration and payment of a dividend as derivative in nature."). Considering that the Cooperative has an absolute right to be free from *any* derivative suit that does not comply with statutory requirements, it surely deserves protection against a *class-wide* derivative suit. *See Ferrera*, 141 N.C. App. at 289, 540 S.E.2d at 765.

Notably, this very problem proved fatal to a sister suit in Tennessee in which, as here, a putative class of current and former tobacco farmers unsuccessfully challenged the ongoing operation and accumulated reserve of the Burley Stabilization Corporation ("BSC"). *See Lay v. Burley Stabilization Corp.* (*Lay I*), No. 06-CV-111, 2007 WL 788316 (E.D. Tenn. Mar. 14, 2007) (dismissing complaint brought by members of BSC that sought recovery of BSC's accumulated funds because (i) the claims of the putative class were derivative, and (ii) the putative class had failed to satisfy mandatory, procedural requirements for bringing any such claim) (unpublished) (App'x at A38); *see also Lay v. Burley Stabilization Corp.*, No. 07-CV-259, 2007 WL 3120800 (E.D. Tenn. Oct. 23, 2007) (dismissing

based on collateral estoppel similar complaint that sought distribution of accumulated funds from the BSC) (unpublished) (App'x at A42), *aff'd*, 312 F. App'x. 752 (6th Cir. Feb. 12, 2009).

The trial court's only answer to this problem has been to disavow analysis of the merits (R. 271), while hanging class certification on its view that the merits boil down to the theory, derivative in nature, that Plaintiffs "are entitled to share in the accumulated assets held by Defendant, which Defendant contends is held as a reasonable reserve." (R. 272.) Having gone so far as to embrace an assertedly unifying merits theory for class certification, the court should have assessed whether the theory is plausible. It cannot adopt a class-wide theory of commonality—*i.e.*, that the Cooperative is retaining an unreasonable reserve—as justification for certifying the class, while looking past the obvious reason why any such theory is foreclosed as derivative. Indeed, the court lacks jurisdiction even to entertain an improper derivative theory because Plaintiffs lack standing to bring it. *See Gusinsky v. Flanders Corp.*, Nos. 12-CVS-337, 12-CVS-463, 2013 WL 5435788, at *6 n.30 (N.C. Super. Ct. Sep. 25, 2013) (unpublished) (App'x at A28). If nothing else, however, the propriety of an interlocutory appeal should be clear: the Cooperative faces torturously complex litigation, freighted with bet-the-

cooperative stakes, notwithstanding its absolute right not to be sued on such a claim. Only interlocutory appeal can vindicate the statutory right at stake.

What is more, the certification Order implicates other statutory protections applicable to the Cooperative. By statute, the Cooperative is expressly authorized to "engage in any activity in connection with the producing, marketing, [or] selling . . . of any agricultural products produced or delivered to it by its members and other farmers," and to "do each and everything necessary, suitable, or proper for the accomplishment of any one of the purposes or the attainment of any one or more of the objects herein." N.C. GEN. STAT. § 54-151(1)-(7). On the strength of this statute, this Court long ago foreclosed any such collateral attack against an agricultural cooperative. *See Pittman v. Tobacco Growers' Co-Op. Ass'n*, 187 N.C. 340, 340, 121 S.E. 634, 635 (1924) (holding that the validity of a cooperative organized under the North Carolina agricultural marketing association statute "cannot be assailed" via collateral attack). Members who may be aggrieved by the Cooperative's decision-making should be taking that up with the Board, following statutorily prescribed channels. *See* N.C. GEN. STAT. §§ 55-7-42, 55-7-44; *see also* N.C. GEN. STAT. § 54-150 (members may approve or reject agricultural cooperative's actions if "one third of the entire board of directors" refers the matter to the members); N.C. GEN. STAT. § 54-166 (providing mode of challenge by a

member ultimately aggrieved by agricultural cooperative's "merger, consolidation and other fundamental changes").

Such a catalogue of individual grievances never presented to the Board cannot be pursued as a class action, much less accepted as good grounds for class certification. *See Lay I*, 2007 WL 788316, at *3-4; *see also Woodford v. Ngo*, 548 U.S. 81, 85 (2006); *Thomas v. Union Carbide Ag. Prods. Co.*, 473 U.S. 568 (1985); *Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711, 722 (1945); *In re MyFord Touch Consumer Litig.*, No. C–13–3072, 2014 WL 2451291, at *35 (N.D. Cal. May 30, 2014) (unpublished) (App'x at A50); *Hoffman v. Colo. State Bd. of Assessment Appeals*, 683 P.2d 783, 786-87 (Colo. 1984); *Lilian v. Commonwealth*, 354 A.2d 250, 252-53 (Pa. 1976). In sum, against the backdrop of governing North Carolina statutes, grant of class certification in this case specially implicates the Cooperative's substantial rights so as to justify its interlocutory appeal.

STANDARD OF REVIEW

Grant of class certification is reviewed for abuse of discretion, *Beroth*, ___ N.C. at ___, 757 S.E.2d at 470, and reversed if "manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision." *Harrison v. Wal-Mart Stores, Inc.*, 170 N.C. App. 545, 547, 613 S.E.2d 322, 325 (2005) (citing *Nobles v. First Carolina Comms., Inc.*, 108 N.C. App. 127, 132, 423 S.E.2d 312, 315 (1992)). Underlying conclusions of law are reviewed *de novo*,

Beroth, ___ N.C. at ___, 757 S.E.2d at 471, and a court that misapprehends governing law necessarily abuses its discretion, *see, e.g.*, *Ruff v. Parex, Inc.*, 131 N.C. App. 534, 538, 508 S.E.2d 524, 527 (1998).

Factual findings must be "made with sufficient specificity to allow effective appellate review," *Nobles*, 108 N.C. App. at 133, 423 S.E.2d at 316, and "supported by competent evidence." *Beroth*, ___ N.C. at ___, 757 S.E.2d at 471 (quoting *Blitz v. Agean, Inc.*, 197 N.C. App. 296, 300-01, 677 S.E.2d 1, 4 (2009)). By design, the "competent evidence" standard demands more than the "clear error" standard that federal courts apply. *Beroth*, ___ N.C. at ___, 757 S.E.2d at 471 n.3.

In order specifically to justify class certification pursuant to N.C. Rule of Procedure 23, N.C. GEN. STAT. § 1A-1-23, plaintiffs must "establish the existence of a class" by showing that "each of the members has an interest in either the same issue of law or fact," and that those "common issues of fact or of law" "predominate[] over issues affecting only individual class members." *Beroth*, ___ N.C. at ___, 757 S.E.2d at 470, 476 (citing *Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 277, 282, 354 S.E.2d 459, 462, 465 (1987)). From there, plaintiffs also bear the burden of showing, among other things, "that named representatives will fairly and adequately represent the interests of all members of the class" and that there is "no conflict of interest between the named representatives and members of

the class." *Id*. (citations omitted). At that point, a trial court's discretionary decision to certify should turn upon "whether a class action is superior to other available methods for the adjudication of th[e] controversy," as informed by, *e.g.*, balancing the "usefulness of the class action . . . against inefficiency or other drawbacks." *Id*. (citing *Crow*, 319 N.C. at 284, 354 S.E.2d at 466).

ARGUMENT

Once this Court reaches the merits of the class certification order, we respectfully submit that the legal errors the Order reflects, the practical problems it poses, and the abuse of discretion it perpetrates are clear. After serving growers for nearly 70 years, the Cooperative faces an existential threat from this litigation. Although a request for dissolution has technically been dismissed from this case, the class's persisting claims continue to strike, *en masse*, at the heart of this Cooperative. They seek, among other things, to deplete the Cooperative's reserve in the name of hundreds of thousands of individuals who ceased many years ago to have any interest or involvement (if ever they had it) in farming flue-cured tobacco, and to call into question business judgments, particularly the Board's decision to retain a reserve, dating back to the 1960s. Even worse, the interests of former members (or, in many cases, their heirs and assigns) in making a one-time money grab from the Cooperative's reserve have been lumped together with those of current members who continue to rely upon the Cooperative for their livelihood.

As already noted *supra* at 20-23, the trial court has identified one theory that supposedly unifies these plaintiffs and supports class treatment—and it is one of derivative liability that is altogether foreclosed, especially as against this agricultural Cooperative. For each of the reasons (incorporated by reference as stated *supra*) that the Order deprives the Cooperative of substantial rights, it should be reversed to vindicate those rights. Nor does the class certification withstand review under Rule 23 itself.

Indeed, the need for reversal in this case follows *a fortiori* from this Court's recent decision in *Beroth*. There, the putative class was pursuing takings claims on the common theory that the N.C. Department of Transportation had harmed their properties by including them in a transportation corridor. ___ N.C. at ___, 757 S.E.2d at 469-70. Even though the class was complaining of the same basic action (identification of transportation corridors), this Court held that class certification was foreclosed and that the takings claim could not be adjudicated on a class-wide basis because it required a property-by-property analysis. "While [the defendant's] generalized actions may be common to all, the Court of Appeals correctly determined that 'liability can be established only after extensive examination of the circumstances surrounding each of the affected properties.'" *Id.* at 474. The claims were too variable because "[n]ot all of these 800 property owners have the

same property interests and expectations": for instance, the affected properties included improved and unimproved properties, as well as residential and commercial properties. *Id.* Nor was it appropriate "for this Court to narrow plaintiffs' allegations to conform to the requisites of a proper class. Here plaintiffs' proposed class is of such breadth that, despite some overlapping issues, a trial on the merits would require far too many individualized, fact-intensive determinations for class certification to be proper." *Id.* at 476; *see also EQT Prod.*, 764 F.3d at 367-69 (reversing lower court for abusing its discretion by certifying a class whose claims required individualized determinations based on individualized evidence, and faulting lower court for emphasizing sheer number of common practices without evaluating the extent to which those practices would ultimately bear on liability); *Neil*, slip op. at 16, 17 (endorsing the trial court's consideration of "evidentiary facts" in denying class certification where "the claims of individual tenants would necessarily require a series of separate trials").

Simply stated, there is no way the instant class might be certified consistent with established precedent and principle. Accordingly, this Court should reverse and hold that class certification is foreclosed in this case. Alternatively, at the very least, it should remand with detailed instruction regarding what proper analysis of class certification entails.

A. The Trial Court Erred By Ignoring Conflicts Of Interest That Preclude Adequate Representation

The trial court erred as a matter of law by disregarding fundamental conflicts that divide the class. As a result, the class definition combines under a single heading, unattended by any sub-class or separate representation, different sets of Plaintiffs who have opposing interests—and even goes so far as pitting a named representative who remains on the Cooperative's Board against the class as a whole. *See also* NCCC Am. Br. at 3, 17-19. To understand the dimensions of this problem, it is important to keep in mind what the trial court elides: The operative claims of this class span *nearly 70 years* and further call out some *30 different crop years*, most of which saw the Cooperative selling at a *loss* and *only a few* of which yielded returns arguably contributing to the current reserve. In addition, the class definition draws no distinction whatsoever between ex-members of the Cooperative (who typically have nothing to do with tobacco farming) and active members (even *Board* members) of the Cooperative.

It seems impossible for a single set of plaintiffs' counsel to provide zealous or even coherent representation to all of these class members. In multiple respects, the claims of these legions of plaintiffs are certain to diverge and conflict with one another, with counsel necessarily neglecting some to advance others.

First, there is an obvious conflict between a named representative, Richard Renegar, a Director who sits on the Cooperative's Board and has consistently voted in favor of its decisions (RE. 2318-2320; RE. 2563-2704), and other Plaintiffs who want to argue there is unreasonableness and even impropriety reflected in the Board's recent and current actions. Such a conflict—in the form of a named representative effectively inculpating, if not suing, himself—precludes class certification. *See Radell v. Towers Perrin*, 172 F.R.D. 317, 320-21 (N.D. Ill. 1997) (named plaintiff's interests, as former board member, were necessarily antagonistic to class's interest in proving that board breached its fiduciary duty and therefore precluded class certification). Because the certification Order now obligates Mr. Renegar to conduct this action on behalf of the class as its named representative, the trial court's suggestion that he and others might simply bail on it by "opt[ing] out" (R. 278) affords no comfort.

Second, there is a marked conflict between those class members who no longer grow or sell tobacco, and therefore are glad to deplete the Cooperative's reserve, and those current members who still rely on the Cooperative to buy their tobacco and help drive a fair price, and therefore want the Cooperative to retain its reserve for the sake of sustaining its operations. *See* R. 272 (Judge Jolly acknowledging that the Cooperative is serving the "interests of a select group of

surviving members/shareholders," while lumping those individuals into the class without any distinction). Notably, around a quarter of U.S. flue-cured tobacco farmers are members of the Cooperative. (RE. 908.) Former members extracting damages "have every right to act in accordance with their own interests, but not at the expense of other [members] who do not share their vision." *Audio-Video World of Wilmington, Inc. v. MHI Hotels Two, Inc.*, No. 7:09–CV–39, 2011 WL 1059169, at *4 (E.D.N.C. Mar. 18, 2011) (citation omitted) (unpublished) (App'x at A1).

Such pronounced conflict between identified, rival factions of a class who "have opposing interests," particularly such that certain "members . . . benefit from the same acts alleged to be harmful to other members of the class," precludes certification. *Pickett v. Iowa Beef Processors*, 209 F.3d 1276, 1280 (11th Cir. 2000) (reversing certification of class of farmers who entered forward contracts because it "includes those who claim harm from the very same acts from which other members of the class have benefitted"); *see Aamco Automatic Transmissions, Inc. v. Tayloe*, 67 F.R.D. 440, 446-47 (E.D. Pa. 1975) (following line of authority that forecloses certification of class inclusive of (i) members "currently maintaining a franchise relationship with Aamco," for whom "the continued economic viability and public goodwill of Aamco is a legitimate and real concern,"

alongside (ii) "former franchisees" "who have severed their business relationship with Aamco," who "do not share in this interest," and who are concerned only with "recovery of maximum monetary damages without regard to the possible adverse impact of this lawsuit on the present Aamco franchise system"); *see also* Opinion and Order at 10-11, *Congleton v. Burley Tobacco Growers Coop. Ass'n*, No. 06-CI-00069 (Ky. Cir. Ct. Feb. 13, 2007) (vacating and denying class certifications based, in part, on the "definite antagonism" between named plaintiffs and "certain class members who desire to continue to being involved in tobacco production") (unpublished) (App'x at A7).

Third, there is a marked conflict between the named representatives and class members who are on record as taking issue with conduct of this class action. Most prominently, eleven North Carolina farmers in 2012 filed *their own* putative class action in federal court in North Carolina. In that parallel case, captioned *Speaks v. United States Tobacco Cooperative Inc.*, the plaintiffs detail why their interests and those of other former members of the Cooperative are not adequately represented by these named Plaintiffs and their counsel. (R. 219-223.)

Fourth, there is a conflict between those class members who sold tobacco to the Cooperative during the years 1982-1984 and 2001-2004, and those who sold in 1985-2000: The reserves the Cooperative accumulated between 1982 and 2004 are

attributable *only* to the 1982-1984 and 2001-2004 bands within those *23* crop years.[5] Assuming *arguendo* that any of these plaintiffs might have claim to any portion of the Cooperative's reserve, that claim would track the claims of what the trial court described as "the 1967-1973 certificate group"—namely, "each would receive only that portion of the net gains for each year that is attributable to the tobacco they delivered that year." (R. 276.) It follows that the Plaintiffs who sold tobacco to the Cooperative during the relevant sliver of years (crediting Plaintiffs' theory *arguendo*) may have claims that their fellow class members lack. Yet their distinct claims are being buried in an effort to contrive an all-encompassing theory that supposedly unifies this disparate class.[6]

This fourth conflict may be subtle by comparison to the other three but it is no less problematic: The trial court certified the class only by crediting class counsel's submission that class members would be recovering "based on the ratio that the pounds/assessments/year have to the total pounds/assessments/year from

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[5] In the early 1990s, USDA returned to the Cooperative unsold tobacco from the 1982-1984 crops, yielding approximately $110 million as sold by the Cooperative. (RE. 2311.) Later, when Congress ended the federal Tobacco Program in 2004, USDA ceded approximately 83 million pounds of tobacco from the 2001-2004 crops for the Cooperative to use "in any manner it desires," yielding approximately $81 million as sold by the Cooperative. (RE. 2313-2314.)

[6] Notwithstanding that unifying façade, ultimate trial and adjudication of damages would hinge on individualized proof of how much tobacco a particular grower sold, when, at what price, and how the Cooperative's ultimate proceeds on the tobacco compares for that crop year.

1982 through 2004," without further distinction. (R. 274.) Making things so simple, however, requires disregarding the obvious arguments of a *sub*set of class members (those selling from 1982-1984 and/or 2001-2004) to the effect that *their* specific tobacco sales, and *only* their specific tobacco sales, contributed to the Cooperative's current reserve.

Not only is the class too large, too unwieldy, too disparate, therefore, but it is forcing the court as well as class counsel to sacrifice the interests of certain class members for those of others in a concerted effort to achieve facile, artificial equivalency amongst all. This is contrary to basic tenets governing class actions. *See, e.g.*, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 858 (1999) (vacating class settlement due to concerns about "inequity" and "fairness"); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 (1997) ("In significant respects, the interests of those within the single class [were] not aligned.").

The trial court did nothing to address these conflicts beyond noting individuals may "opt out of the Class." (R. 278.) That was legal error. Identified conflicts cannot be ignored when analyzing whether an opt-out class is or is not adequately represented; otherwise, the requirement of adequacy would be drained of meaning, because the ability of any and all *in*adequately represented class members to "opt out," which is common across class actions, would always be a

complete answer. The necessary premise of class certification is that the class as defined is—at least absent a sub-class—similarly interested in pressing a common question, as to which the same counsel can adequately represent all. Here, that premise does not hold; the identified conflicts are such that portions of the class are *inherently adverse* to one another.

The prospect of individuals opting out is no solution to fundamental conflicts dividing the class, especially for a class that includes countless unidentified heirs and assigns who will likely go unaware that they are class members—and therefore remain out of the loop and in the dark. Indeed, to the extent a trial court would count on an *entire set* of class members to opt out, it should ensure that result by *excluding* the set from its class definition—or at least differentiating the set as a distinct, separately represented sub-class.[7] Similarly, to the extent that a named representative is compromised by interests on the opposite side of the caption, the solution is to have him replaced with a *non*-conflicted representative—not to count on absent class members to protect themselves by opting out.

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[7] Any anticipation of wide swathes of the class opting out also undermines the trial court's determination that a class action is a superior method of adjudication—for it follows that waves of separate litigation should be expected regardless.

As best we can tell, no court agrees that ability to opt out, by itself, cures fundamental conflicts that otherwise compromise adequacy. To the contrary, the Fourth Circuit has affirmed a trial court's denial of class certification when faced with one such conflict. *See Lukenas v. Bryce's Mountain Resort, Inc.*, 66 F.R.D. 69, 72 (W.D. Va. 1975), *aff'd*, 538 F.2d 594 (4th Cir. 1976) ("[T]he opt-out provisions of Rule 23(c)(2) may not be used to achieve compliance with the [adequacy] prerequisites of 23(a) . . . . "). Dozens of other trial courts have likewise rejected any notion that mere ability to "opt out" is the panacea the court below took it to be. Indeed, the United States District Court of the Eastern District of Pennsylvania, in *Aamco Automatic Transmissions, Inc.*, 67 F.R.D. 440, pinpointed the problem in refusing to certify a strikingly analogous putative class. There, franchisees brought a putative class action against their franchisor for breaching a franchise agreement. *Id.* at 443. First, the court noted the obvious conflict between former franchisees (wanting to maximum their damages) and current franchisees (wanting to minimize them):

> For those members of the proposed class who are currently maintaining a franchise relationship with Aamco, the continued economic viability and public goodwill of Aamco is a legitimate and real concern. Those who have severed their business relationship with Aamco do not share in this interest. On the contrary, of principal concern to the class of former franchisees is the recovery of maximum monetary damages without regard to the possible adverse impact of this lawsuit on the present Aamco franchise system. This particular

> conflict between present and former franchisees has been recognized and cited by other courts in refusing certification of an all-inclusive class.

Id. at 446-47 (citations omitted). Considering whether "opt out" sufficed to counterbalance this conflict, the court said it did *not*, deeming it "inappropriate" to try to solve the conflict simply "by allowing those present franchisees who are opposed to this lawsuit to exercise their 'opt-out' privilege":

> It is no answer to say that those franchise dealers who do not desire to be represented by plaintiff may opt out under the provisions of Rule 23(c)(2). The machinery of the Rule, with its attendant expense, should not be brought into play unless initially plaintiff, who has the burden of proof, justifies its application.

Id. at 447 (citing *Free World Foreign Cars, Inc. v. Alfa Romeo*, 55 F.R.D. 26, 29 (S.D.N.Y. 1972)).

The same result should obtain here, just as it has in case, after case, after case. *See, e.g., S. Snack Foods, Inc. v. J&J Snack Foods Corp.*, 79 F.R.D. 678, 681 (D.N.J. 1978); *Thompson v. T.F.I. Cos., Inc.*, 64 F.R.D. 140, 148-49 (N.D. Ill. 1974); *Matarazzo v. Friendly Ice Cream Corp.*, 62 F.R.D. 65, 68 (E.D.N.Y. 1974); *see also Morris v. Wachovia Sec., Inc.*, 223 F.R.D. 284, 296-97 (E.D. Va. 2004); *In re Jackson Nat'l Life Ins. Co. Premium Litig.*, 209 F.R.D. 134, 142 (W.D. Mich. 2002) (opt out cannot cure conflict because "the legal enforceability of policies purchased by [class members] who opted out would nonetheless unavoidably be

impugned," posing "antagonism of interests"); 1 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 3:58 (5th ed. 2014) ("[C]onflicts that are fundamental to the suit and that go to the heart of the litigation prevent a plaintiff from meeting the . . . adequacy requirement.").

Notably, insistence upon a class representative's "undivided loyalties to absent class members" is essential to "basic due process." *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 338 (4th Cir. 1998); *see Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998); *Audio-Video World*, 2011 WL 1059169, at *4-5. And ability to opt out does not assuage "an overriding conflict between the named plaintiffs and more than a few potential class members, not only in remedial preferences, but far more significantly, in the decision to take up the sword in the first place." *Audio-Video World*, 2011 WL 1059169, at *4.

Tellingly, the one case the trial judge cited in support of his view that opt out inoculates against all these conflicts—*see* R. 278 (citing *Srail v. Vill. of Lisle*, 249 F.R.D. 544, 553 (N.D. Ill. 2008))—indicates just the opposite. In *Srail*, the court analyzed conflict posed by a class comprised of residents from neighboring towns, Oak View and Meadows. *Id.* at 554-55. It recognized conflict between the named plaintiffs, Oak View residents who sought to connect Oak View to the municipal water system, and the unnamed plaintiffs, including Meadows residents who

opposed such change for fear of resulting costs. *Id.* at 553. Given this "inherent" conflict, "the named plaintiffs [did] not show[] that they [we]re adequate representatives of a class including Meadows residents." *Id*. at 554. The court held, accordingly, that the named plaintiffs could represent *only* a *subclass* from *Oak View*, still leaving individual Oak View residents to opt out. *Id.* at 553-54. Thus, the *Srail* court accounted for categorical conflict by categorically tailoring its class definition. The court below, in contrast, did nothing of the sort. Its reliance on opt out alone was legal error; it abused its discretion by certifying the class without regard for conflicts.[8]

B. The Trial Court Erred By Ignoring The Merits As Relevant To Analyzing Class Certification

The trial court further erred as a matter of law in looking past the merits it must ultimately adjudicate in order to resolve liability and damages on each claim brought by the class. To be sure, the trial court was correct that it "should not

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[8] The putative class that brought a similar suit in Tennessee against the Burley Stabilization Corporation (BSC) also affords a telling point of comparison. That class was much smaller (consisting of roughly 140,000 people), yet it was parsed into *sub-classes* based on years in which members sold tobacco to the cooperative. It also *categorically excluded* all officers, directors, and employees of the BSC and their immediate families. Fifth Amended Complaint at 29-30, *Lay v. Burley Stabilization Corp.*, No. 06-CV-111 (E.D. Tenn. Mar. 27, 2006), ECF No. 1; Complaint at 22-25, *Lay v. Burley Stabilization Corp.*, No. 07-CV-259 (E.D. Tenn. June 29, 2007), ECF No. 2. In contrast, the trial court in this case made no such attempt to address conflicts that divide and infect the class as defined.

prematurely *determine* the merits" in deciding class certification. (R. 271 (citing *Maffei v. Alert Cable TV of N.C. Inc*., 316 N.C 615, 617-18, 342 S.E.2d 867, 870 (1986) (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974))).) But it by no means follows that a trial court should *ignore* the merits arguments, as the court below did, when deciding whether class treatment is manageable and superior so as to commend certification.

As the U.S. Supreme Court recognizes, it is often "necessary for the court to probe behind the pleadings before coming to rest on the certification question." *General Telephone Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982); *see also Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (explaining that the "rigorous analysis" required for class certification "will entail some overlap with the merits of the plaintiff's underlying claim"). Likewise, the Fourth Circuit recently observed that, "[p]rior to certifying a class, a district court must definitively determine that the requirements of Rule 23 have been satisfied, even if that determination requires the court to resolve an important merits issue." *EQT Prod.*, 764 F.3d at 361 (citation omitted). And only days ago, the North Carolina Court of Appeals emphasized the importance of such inquiry into the merits, writing "*certainly*, the trial court considered evidentiary facts" en route to upholding the denial class certification. *Neil*, slip op. at 17 (emphasis added). Any

trial court that looks past the merits will predictably miss the rubber-meets-road problem that this Court considered dispositive in *Beroth*—namely, that the "proposed class is of such breadth that, despite some overlapping issues, a trial on the merits would require far too many individualized, fact-intensive determinations for class certification to be proper." ___ N.C. at ___, 757 S.E.2d. at 476; *see Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432-33 (2013); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 367 (4th Cir. 2004).

In a case like this, a court cannot conclude in a vacuum that there are "common" issues, or that named representatives are "adequate" to advance them, or that a class mechanism is "superior" to others. Rather, it must apply its discretion in full view of whatever merits questions await adjudication on a class-wide basis. "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart Stores*, 131 S. Ct. at 2551 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)); *see Ealy v. Pinkerton Gov't Servs., Inc.*, 514 F. App'x 299, 305-08 (4th Cir. 2013); *Beroth*, ___ N.C. at ___, 757 S.E.2d. at 474-76.

Here, the court's stated justifications for certifying are belied by variation among Plaintiffs' nine different merits claims, as well as the facts implicated by different class members' different relationships with the Cooperative over different time periods. Not only do the operative theories require consideration of different legal elements but they also require consideration of countless different facts (*e.g.*, if, when, and at what price a grower sold tobacco to the Cooperative; what communications and understandings surrounded that exchange; what relationship, if any, a potential class member has with an actual grower who previously sold tobacco to the Cooperative; whether a Certificate of Interest was obtained, and, if so, has been redeemed; what business calculus surrounded the Cooperative's retention of its reserve at a given time; when the statute of limitations began to run on a particular plaintiff's grievance).

Because it makes no sense to subject such differing legal theories and factual proof to uniform treatment across this vast class, the trial court fixated on *one* theory: according to the certification Order, the merits boil down to "whether [plaintiffs] are entitled to share in the accumulated assets held by Defendant, which Defendant contends is held as reasonable reserve." (R. 272.) But that contemplates a derivative claim that is statutorily foreclosed, *supra* at 20-23. And, even if that merits theory were otherwise viable, treatment of it on a class-wide

basis would not be, as explained *infra* at 44-49. Most important, in focusing on *that* theory, the trial court turned a blind eye to the litany of *other* merits issues that are baked into the claims of this enormous class, thereby doing what this Court has condemned as "imprudent"—namely, trying to "narrow plaintiffs' allegations to conform to the requisites of a proper class." *Beroth*, ___ N.C. at ___, 757 S.E.2d at 476.

The trial court compounded error upon error by disregarding the actual merits issues pending before it and positing a singular theory to unify them. Its approach licenses class counsel to contrive a supposed justification for class certification divorced from the merits actually to be tried—to, in essence, advance a "bait and switch" strategy specially formulated to obtain class certification, only later to dredge up the litany of actual merits issues that must be tried. The trial court's failure to address the specific merits issues that are pending amounts to a separate legal error necessitating reversal.

C. The Trial Court's Analysis Of Commonality And Superiority Is Flawed

Finally, once the actual merits issues in this case are properly accounted for, class certification becomes an impossibility. By no fair account might this class satisfy the requirements of commonality and superiority.

The trial court's listing of twelve ("a" through "l") factual issues and seven ("a" through "g") legal issues supposedly "common" to the class should be telling in this regard. (R. 273-274.) Those issues, with all due respect, are *not* in fact common across the class of 800,000 as certified; they have different application to different class members, resulting in a dizzying number of permutations for how the claims of any given class member must actually be adjudicated. To take a few examples from what the Order spotlights as "common" issues, the Certificates of Interest at issue are limited to growers who sold to the Cooperative from 1967-73; the gains and losses varied across crop years, as did the statutory framework surrounding federal price stabilization; and the Cooperative's business judgments and reserves that are being called into question have themselves varied across years and even decades. (RE. 2306-2316; R. 273-274.)

What the trial court's listing actually reflects are issues that are shared by *certain fragments* of the class, in varying combinations, iterations, and degrees. When it comes time for actual merits adjudication, however, none of these issues will be "common" in any meaningful sense. Rather, all will vary according to, for example,

- whether a Plaintiff ever sold crops as an actual patronizing member or qualifies as an heir, successor, or assign thereof,
- what crop years a Plaintiff's claimed interest arises from,

- whether the Plaintiff remains a member of the Cooperative actively engaged in tobacco farming and selling to the Cooperative,

- whether and to what extent the Plaintiff has obtained and already redeemed Certificates of Interest,

- what exact communications the individual grower received and reviewed from the Cooperative,

- what annual meetings the individual grower attended or was otherwise privy to, and what was taken up at the relevant meeting,

- what views and understandings the individual grower previously expressed about the Cooperative's retention of a reserve at a particular point in time,

- whether and to what extent a Plaintiff has already received payment from the Cooperative after the price-stabilization program ended in 2004,

- when the Plaintiff's issue(s) arose, *etc*.

Far more so than held true for the 800 property owners who were before the North Carolina Supreme Court in *Beroth*, therefore, the "proposed class is of such breadth that, despite some overlapping issues, a trial on the merits would require far too many individualized, fact-intensive determinations for class certification to be proper." ___ N.C. at ___, 757 S.E.2d at 476.

Because Judge Jolly did not identify specific facts and law bearing on the class's various theories, he overlooked just how disparate they are. Whatever

concerns he may have about individual adjudication,[9] he has certified an oceanic class without accounting for the full array of disparate theories of liability, disparate methods of calculating damages, and disparate proof that swirl through it. Nor has he begun to explain how he envisions trying this case en route to deciding, *e.g.*,

- what "reasonable expectations" each grower had when joining the Cooperative for purposes of the declaratory judgment Plaintiffs seek (R. 138);
- what each grower did and did not allegedly authorize the Cooperative to do with their tobacco at each relevant time for purposes of Plaintiffs' conversion claim (R. 134), *see The N.C. State Bar v. Gilbert*, 189 N.C. App. 320, 324, 663 S.E.2d 1, 4 (2008);
- what "special relationship"[10] each grower had with the Cooperative for purposes of the alleged breach of "fiduciary duty" (R. 274), *see Dalton v. Camp*, 353 N.C. 647, 650-51, 548 S.E.2d 704, 707-08 (2001); *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 658, 488 S.E.2d 215, 219 (1997);

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[9] Although Judge Jolly emphasized the impracticality of each class member pursuing "individual litigation" (R. 280), the premise that there should be *any* litigation of these issues seems misconceived. Such reasoning suggests that the more strained (even frivolous) the claims underlying a class action are, the more deserving of aggregation they are because no one would otherwise see value in bringing individual suit. In no event should class treatment be ordered absent a sensible account of how class adjudication will proceed and prove superior in practice.

[10] Any notion that hundreds of thousands of members *all* enjoyed *precisely the same* "special" relationship with the Cooperative just by virtue of being members distorts beyond recognition the legal concept of a special relationship in North Carolina. Therefore, affording Plaintiffs' operative theory of fiduciary duty every benefit of the doubt, the relevant inquiry would need to be individualized rather than common to the class.

- when each Plaintiff's claim to the reserve retained by the Cooperative first accrued for purposes of the operative statute of limitations, *see* N.C. GEN. STAT. § 1-52.

Contrary to this Court's approach in *Beroth*, the Order blends these and other individualized liability questions together without indicating how it expects to decide each across the entire class.[11]

In a similar vein, the court obscures variations in damages by focusing on a single theory—according to which "a reasonable damages determination could be made through the application of cooperative patronage concepts[12] to determine recovery based on that patronage."[13] (R. 276.) This takes no account of how the

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[11] The trial court took comfort in manageability given "the past eight years of litigation leading up to this motion" for class certification. (R. 280.) But it has yet to make any inroads into the merits, which hardly inspires confidence in manageability of the merits moving forward.

[12] "Cooperative patronage concepts" by no means support Plaintiffs' recovery. First, whereas only a fraction of the class still patronizes the Cooperative, such patronage is essential for any continuing claim under "cooperative patronage concepts." What is more, growers obtained, upon sale to the Cooperative, the maximum upside any "cooperative patron" might expect (namely, payment of a fair, agreed price, typically better than what they could have obtained on the market), without any prospect of incurring the downside a "cooperative patron" would expect (namely, an ensuing bill to help cover recurring losses).

[13] Assuming *arguendo* such a *pro rata* measure might be used to divide settlement proceeds, it does not itself fix the aggregate damages the Cooperative allegedly owes Plaintiffs after paying a *premium* for the relevant tobacco relative to the open market. Such measure of damages seems especially inappropriate because the Cooperative is committed to contesting liability and damages, including through final judgment and all appeals.

damages calculation must vary according to, say, Plaintiffs' nine different liability theories, the years in which they sold crops, whether the Cooperative sold for a profit or a loss, and the extent to which Certificates of Interest were issued and whether they have already been redeemed by certain class members (or their relations). Had the trial court drilled down on these issues, it would have identified the problems that this Court has held are preclusive of class certification. *See Beroth*, ___ N.C. at ___, 757 S.E.2d at 475-76.

Even if liability were straightforward (which it is not), and even if damages were straightforward (which they are not), administration of this case as a class presents insuperable problems. Although the trial court found that "[m]ultiple numbers for a member's interests create no management issue that is not solved by the method used to track patronage interests" (R. 279-80), the record does not support that view: In fact, over 800,000 membership numbers were assigned (RE. 2302), and those numbers do not begin to answer the ultimate question which *persons* have a claim. Multiple numbers were assigned to the same individual, depending on whether the Cooperative bought from a person or a business, and multiple persons may now claim interest in the same membership number. (RE. 2303.) Indeed, simply *identifying* class members will be a monumental challenge, considering the need to trace lines of "heirs, representatives, executors or assign"

from hundreds of thousands of membership numbers. *See* NCCC Am. Br. at 20-24. Thus, even after attributing the right growers to the right 800,000 membership numbers, the trial court's work will be just beginning—it will then need to inquire into decades of successive interests (potentially unspecified or even disputed) for each grower in order to ascertain who is now a class member and what claim he or she holds. (R. 282.) That obviously poses difficulties all its own. *See, e.g.*, *Simer v. Rios*, 661 F.2d 655, 678 (7th Cir. 1981) (holding that the "cost of notifying the class members . . . was a proper factor to consider in denying class certification"); *Mowry v. JP Morgan Chase Bank, N.A.*, No. 06-C-4312, 2007 WL 1772142, at *6 (N.D. Ill. June 19, 2007) (finding class unmanageable given difficulty in identifying and notifying putative class members) (unpublished) (App'x at A45).

This class is unmanageable in every sense.

CONCLUSION

For the foregoing reasons, the Court should reverse the 24 February 2014 Order certifying the class and remand with instructions that the class cannot be certified.

Respectfully submitted this the 14th day of November, 2014.

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