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DOROTHY BROWN
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2018CH08263

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION**

**LYONS TOWNSHIP TRUSTEES OF)
SCHOOLS, TOWNSHIP 38 NORTH,)
RANGE 12 EAST,)
)
) **No. 18 CH 8263**
) **Plaintiff,**)
) **Calendar 07**
) **vs.**) **Judge Eve M. Reilly**
)
)
) **LYONS TOWNSHIP HIGH SCHOOL**)
) **DISTRICT 204,**)
)
) **Defendant.**)**

**PLAINTIFF’S REPLY IN SUPPORT OF ITS
MOTION TO DISMISS DEFENDANT’S COUNTERCLAIM**

Plaintiff, Lyons Township Trustees of Schools, Township 38 North, Range 12 East (“Trustees”), by its undersigned counsel, THE QUINLAN LAW FIRM, LLC and MILLER, CANFIELD, PADDOCK AND STONE, P.L.C., for its Reply in Support of its Motion to Dismiss the Counterclaim filed by the Defendant, Lyons Township High School District 204 (“LT”), states as follows:

I. INTRODUCTION

Although LT slings some political mud that has no legal relevance to the issues before this Court,¹ LT fails to respond to one of the key arguments made against it. LT also fails to cite legal authority for other of its arguments, which would require this Court to rewrite the Illinois

¹ See, e.g., Response at 1 “TTO wants to avoid public scrutiny and accountability,” the TTO is “an outmoded form of government mostly eliminated state-wide decades ago,” the TTO is “retained in some townships in suburban Cook County for political reasons,” at 2 “lack of accounting controls and financial expertise at the TTO that enabled...criminal conduct, at 12 “efforts to avoid the bright lights of public accountability,” and at 16 “[i]t is important for the Courts in both cases to appreciate the history of mismanagement at the TTO and how it operates without real accountability....” None of this has any bearing on the legal issues facing this Court and they contribute nothing to the resolution of this matter.

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School Code. For these and the other reasons set forth in the Trustees' Motion and this Reply, the Motion should be granted.

II. LT'S ARGUMENTS DO NOT SAVE ITS COUNTERCLAIM

A. What the Plaintiff is Called is Not the Issue.

The named plaintiff in this case is a body politic consisting of three elected trustees. 105 ILCS 5/5-2. This is why the named plaintiff referred to itself as the "Trustees" in its Complaint. The Trustees appoint a Treasurer. 105 ILCS 5/8-1. The Treasurer has other employees who help the Treasurer do his or her job. Only the Trustees, and not the Treasurer, have the power to bring suit on behalf of the body politic. *See Lynn v. Trustees of Schools*, 271 Ill. App. 539, 543 (4th Dist. 1933) ("That a suit for recovery of such moneys should be initiated by and in the name of the trustees, appears to be settled..."). That is why the Trustees request in their Complaint a declaratory judgment that the Treasurer has authority to take certain actions – the Treasurer could not have filed this lawsuit.

In the first lawsuit, the Plaintiff actually referred to itself in its pleadings as the "Township Trustees." The "TTO" was an acronym for the "Township Treasurer's Office," a shorthand way of describing the Plaintiff's business office. As the parties were preparing to brief summary judgment motions in 2017, Judge Hall requested that the parties refer to the Plaintiff as the "TTO," and the defendant as "LT," for ease of reference. While the Plaintiff thinks it is best to refer to it as the "Trustees," Plaintiff will certainly defer to this Court's wishes on the matter.

The reason this issue is problematic is best illustrated in Count IV, which alleges a breach of fiduciary duty. Throughout the Counterclaim LT conflates the "TTO," the "Trustees," the "Treasurer" and the "other employees" and it is not clear at times to whom LT is referring. LT first alleges "the TTO – including its Treasurer and other employees" owes LT an unspecified

“duty to provide LT with truthful and complete information....” (Counterclaim, ¶ 6.) This signals that LT considers the TTO as including the Treasurer. LT incorporates this allegation, and actually its entire Counterclaim, into Count IV, thereby transforming its entire Counterclaim into one for breach of fiduciary duty. This alone produces a confusing pleading and is improper.

In Paragraph 27, LT alleges that the “TTO” must account to LT for LT’s investment earnings, but LT references Section 8-7 of the School Code, which imposes duties upon only the Treasurer. In Paragraph 44, LT alleges that the “TTO” (but not the “Treasurer”) incurred attorneys’ fees, signaling a difference between the two. In the main body of Count IV, LT alleges that it is owed a fiduciary duty and that the “TTO” breached that duty. (Counterclaim, ¶ 62.) Is the Treasurer part of the TTO for purpose this allegation? It certainly is not clear to the Plaintiff. As noted in the Motion, different Articles and Sections of the School Code impose different duties upon different persons and entities. The Plaintiff is the body politic, however, which means only the body politic can be the counter-defendant, *i.e.*, the person or entity against whom LT seeks judgment. Neither the trustees (individually), the Treasurer, nor the “other employees” are counter-defendants.

To state a claim for breach of fiduciary duty, LT must clearly allege the basis for the existence of the duty, that the particular counter-defendant breached that duty, and that LT suffered damage proximately caused by that breach. *Lutkauskas v. Ricker*, 2013 IL App (1st), ¶ 35; *In re Estate of Bontkowski*, 337 Ill. App. 3d 72, 78 (1st Dist. 2003). LT has failed to allege which individuals or entities owed them a fiduciary duty and on what basis, the scope of that duty, how it was breached, and how that breach actually caused damage to LT.

B. LT Does Not Have a Private Right of Action Under the School Code for Monetary Damages or Declaratory Relief.

As the Trustees argues in the Motion, relying upon In *Lewis E. v. Spagnolo*, 186 Ill. 2d 198, 227-32 (1999), LT does not have a private right of action under the School Code for money damages and declaratory relief. The Trustees brought this argument under Section 2-615 because the defect complained of is apparent from the face of the Counterclaim; there is nothing extrinsic that this Court must consider beyond the law itself. LT argues that this is improper and the Trustees should have made this argument under Section 2-619. LT's contention is wrong, and not relevant from a practical viewpoint.

In *Lewis E.*, a putative class of schoolchildren brought suit against state and local school boards and officials, seeking declaratory and other relief, alleging the defendant violated obligations imposed upon them under the School Code. *Id.* at 201. The Circuit Court dismissed the complaint pursuant to Section 2-615, finding that there was no private right of action under the School Code upon which the claims could be maintained. *Id.* at 204. The Supreme Court affirmed this dismissal. *Id.* at 230. The Trustees make the same argument here and submits that this Court may properly review that argument under Section 2-615, as the court did in *Lewis E.* Regardless, LT does not argue that reviewing the argument under Section 2-619 would materially alter the analysis. The Trustees do not rely upon anything extrinsic to the Counterclaim.

The cases that LT relies upon are ones discussing whether a party has "standing" to bring an action under statutory authority. (See Resp. at 8-9.) But the issue is not whether LT has standing, as opposed to some other person or entity; the issue is whether the Sections of the School Code at issue permit *anyone* to bring suit for money damages or declaratory relief for

alleged violations. Whether a particular party has standing is different from whether or not there is a private right of action under a statute. *See, e.g., Clarke v. Cmty. Unit Sch. Dist. 303*, 2012 IL App (2d) 1107053, ¶¶ 21-39 (analyzing whether a private right of action exists separate from whether a party has standing).

The mere fact that a statute has been (allegedly) violated does not mean that one can simply sue for money damages caused by that alleged violation. LT cites no cases to the contrary. As *Lewis E.* explains, in some instances a private right to sue *in tort* can be inferred, but LT is not alleging tort liability here.

LT attempts to distinguish *Lewis E.* by arguing that LT is not “an individual or a class of individuals, or a private entity of any kind [but] a public governmental entity.” (Resp. at 9-10) (emphasis in original). LT cites no authority for its proposition that a governmental body is incapable of acting for its private benefit. LT is not charged with enforcing Section 8-7 of the School Code (or the other Sections at issue); rather LT is just using Section 8-7 as a basis to sue for money damages for its own benefit.

LT also argues that since the Trustees have brought their suit, LT must be allowed to do so – but LT did not move to dismiss the Complaint. LT argues that it must be allowed to maintain its action, because otherwise it would be “powerless” to do anything about what it perceives as a violation of the School Code. (Resp. at 11.) But it is not the job of the undersigned counsel – or this Court – to undertake the legal research to determine if there are other theories or remedies LT can pursue. The point is that LT does not have the right to sue for money damages under the School Code, nor does LT have a right to maintain its action for declaratory relief in Counts II and III for the reasons articulated by the Supreme Court in *Lewis E.* The Motion should be granted.

C. LT Concedes the Insufficiency of Counts II and III.

The declaratory relief LT seeks in Counts II and III of its Counterclaim is so vague that it would not “settle and fix the rights of the parties” and “represent the ultimate and precise determination” of the issues presented. (See Motion at 8-11, citing *Kaybill Corp. v. Cherne*, 24 Ill. App. 3d 309, 315 (1st Dist. 1974).) For example, a declaratory judgment in Count II that the Treasurer must “maintain detailed records” would not terminate the controversy, because it begs the question of what is a “detailed record.” Likewise, a declaratory judgment in Count III that the Treasurer must provide “sufficient documentation” to support its annual invoices would not terminate the controversy, because this begs the question of what constitutes “sufficient” documentation. (The Trustees actually offer detailed documentation for public consumption, including budgets, investment policies, total compensation reports, audit reports, and quarterly investment review, see <http://www.lyonstto.net/agendas---minutes.html>.)

LT fails to respond to the Trustees’ argument on this issue and makes no attempt to explain why the declaratory relief for which it prays would terminate the controversy. As this Court has noted in its Standing Order, “[i]f a party fails to respond to an argument, the court may deem the argument conceded.” Accordingly, Counts II and II should be dismissed for the further reason that a declaratory judgment is not adequately pleaded, as LT has conceded.

D. LT’s Requested Relief On Counts I and IV Would Require This Court to Rewrite Section 8-4 of the School Code.

LT makes various arguments under the heading “LT’s Requests for Declaratory Relief are Appropriate,” but those argument do not relate to Counts II or III (which seek declaratory relief), but rather relate to issues affecting Counts I and IV (which seek money damages). LT

argues that the Trustees' description of the Treasurer as a "zero sum office" cannot be accepted as true for purposes of the Motion – but LT admits all of the key facts.

What the Trustees means by "zero sum" – as alleged in the Complaint – is that there is no tax base or any source of revenue other than the payments required by Section 8-4 of the School Code, 105 ILCS 5/8-4. This is something that LT flatly admits: "LT admits that the TTO does not have a tax base, and that it does not have any legitimate source of revenue other than payments received from the school districts." (Answer, ¶ 15.)

Section 8-4 is actually simple. It requires that the Treasurer add together his or her expenses, and then allocate the total expenses amongst the different school districts according to a formula set forth in Section 8-4. Section 8-4 does not provide an option of allocating expenses to only some of the districts. Yet this is precisely the remedy for which LT prays. (See Counterclaim at ¶ 62(d), alleging the "TTO" is breaching a fiduciary duty by not "charging those [legal] fees solely to the Other Districts.")

LT argues, without citation, that this Court can order this to be done regardless because it can "fashion a remedy that is just and fair." (Resp. at 12)² But "fashioning a remedy" that instructs the Treasurer to not include a judgment as an expense of office on the next annual invoice sounds more like injunctive relief, for which LT has not prayed. Moreover, "fashioning a remedy" that instructs the Treasurer to not allocate a portion of this judgment to LT, but instead directs that it apportioned solely among the other districts, has further problems.

² LT somehow links this argument to an argument that the Trustees have "refused to produce much of the documentation that LT requested in document requests," without any explanation of the linkage. Regardless, as of March 15 2019, the Trustees have produced over 2,200 documents totaling over 26,000 pages, and are working in good faith as quickly as resources allow to produce files that are labeled to respond to each individual document request. Further, LT does not argue that it somehow could not respond to the Motion due to "missing" discovery.

First, it would require rewriting Section 8-4 of the School Code. Ordering that the Treasurer not invoice LT for its share of any judgment would necessarily mean that the other districts would be invoiced more than their statutory share – they would have to collectively absorb LT’s roughly 25% share of the Treasurer’s expenses. Respectfully, altering the statutory formula is beyond the authority of the courts. *See Prazen v. Shoop*, 2013 IL 115035, ¶ 38 (“It is the dominion of the legislature to enact laws and the courts to construe them, and we can neither restrict nor enlarge the meaning of an unambiguous statute.”). An appeal to general equitable powers cannot overcome this point.

Second, because this would require the other districts to pay expenses beyond their statutory share, they will be affected by any resulting judgment. The fact that LT has “no complaint with the Other Districts” misses the point – those districts would likely have quite a complaint if they were told they had to pay not just their own share, but also LT’s share, of any resulting judgment. If they are going to be exposed to greater liability, then LT needs to join them as parties to its Counterclaim. Even then, altering the School Code would be beyond general equitable powers, but at least the parties who will be actually affected can be heard if they wish.

E. LT’s Counterclaim Have More Than Just Some Facts In Common With the First Lawsuit.

LT is wrong that there is just an overlap of “some common facts” between its counterclaim in the First Lawsuit and its Counterclaim in this lawsuit. (See Resp. at 16) (emphasis in original). Again, underlining does not make it so. This description also ignores that in previous argument to this Court, LT has represented that its two counterclaims are “similar.” (See “LT’s Response to the TTO’s Motion to Stay Discovery” at pp. 1-2.)

It also ignores the allegations themselves. In paragraph 62(f) of Count IV, LT alleges that the “TTO” breached its fiduciary duty by misapplying “insurance recoveries....” In the breach of fiduciary duty counterclaim in the First Lawsuit, LT also alleges that these same funds were misapplied (referred to as the “\$1,040,000 recoveries on the Bonds,” see Ex. 4 to Motion at ¶ 29). LT argues that it does not seek the same monetary recovery – apparently LT wants multiple recoveries – but the *issue* is the same, *i.e.*, whether Plaintiff misapplied the proceeds recovered from former-Treasurer Robert Healy’s official bond. The focus of Section 2-619(a)(3) is not whether the same *remedy* is being sought in two different pleadings, but whether there is a “substantial similarity of issues” in two different lawsuits. *Schacht v. Lome*, 2016 IL App (1st) 141931, ¶ 38.

In its Response, LT includes a chart comparing its two counterclaims, but that is the fundamental flaw with this chart – it only compares the two *counterclaims*. The proper analysis is whether the new Counterclaim has substantial similarity to issues raised in the first *lawsuit*; not just the first counterclaim.

The following chart actually compares the issues raised in the new Counterclaim (on the left) and the pleadings filed in the first lawsuit (on the right):

2018 CH 08263 LT's Counterclaim	Overlap With 2013 CH 23386
<p><i>Count I: Violation of 105 ILCS 5/8-7</i></p> <ul style="list-style-type: none"> • Interest prior to July 1, 2013 <ul style="list-style-type: none"> ○ ¶19(a) 	<ul style="list-style-type: none"> • Interest FYs 1995 – 2012 <ul style="list-style-type: none"> ○ Trustees Verified Amended Complaint ¶¶38-47, ¶¶61(D) and (E)
<p><i>Count II: Declaratory Judgement as to 105 ILCS 5/8-5 through –7</i></p> <ul style="list-style-type: none"> • Interest prior to July 1, 2013 <ul style="list-style-type: none"> ○ ¶21 incorporates Count I ¶19(a) 	<ul style="list-style-type: none"> • Interest FYs 1995 – 2012 <ul style="list-style-type: none"> ○ Trustees Verified Amended Complaint ¶¶38-47, ¶¶61(D) and (E)
<p><i>Count III: Declaratory Judgment as to 105 ILCS 5/8-4</i></p> <ul style="list-style-type: none"> • Interest prior to July 1, 2013 <ul style="list-style-type: none"> ○ ¶33 incorporates Count I ¶19(a) ○ ¶50(a) 	<ul style="list-style-type: none"> • Interest FYs 1995 – 2012 <ul style="list-style-type: none"> ○ Trustees Verified Amended Complaint ¶¶38-47, ¶¶61(D) and (E)
<ul style="list-style-type: none"> • ProRata Bills prior to FY 2013 <ul style="list-style-type: none"> ○ ¶41, ¶50(a) 	<ul style="list-style-type: none"> • ProRata Bills FYs 2000 – 2012 <ul style="list-style-type: none"> ○ LT's Second Amended Counterclaim – Count I: Setoff • ProRata Bills FYs 2000 – 2013 <ul style="list-style-type: none"> ○ Trustees Verified Amended Complaint ¶¶24-37, ¶¶61(A) - (C)
<ul style="list-style-type: none"> • Healy Bond Recoveries <ul style="list-style-type: none"> ○ ¶41, ¶50(a) 	<ul style="list-style-type: none"> • Healy Bond Recoveries <ul style="list-style-type: none"> ○ LT's Second Amended Counterclaim – Count II: Breach of Fiduciary Duty
<p><i>Count IV: Breach of Fiduciary Duty</i></p> <ul style="list-style-type: none"> • Interest prior to July 1, 2013 <ul style="list-style-type: none"> ○ ¶51 incorporates Count I ¶19(a) ○ ¶51 incorporates Count III ¶50(a) ○ ¶62(a) 	<ul style="list-style-type: none"> • Interest FYs 1995 – 2012 <ul style="list-style-type: none"> ○ Trustees Verified Amended Complaint ¶¶38-47, ¶¶61(D) and (E)
<ul style="list-style-type: none"> • ProRata Bills prior to FY 2013 <ul style="list-style-type: none"> ○ ¶51 incorporates Count III ¶41, ¶50(a) ○ ¶62(f) 	<ul style="list-style-type: none"> • ProRata Bills FYs 2000 – 2012 <ul style="list-style-type: none"> ○ LT's Second Amended Counterclaim – Count I: Setoff • ProRata Bills FYs 2000 – 2013 <ul style="list-style-type: none"> ○ Trustees Verified Amended Complaint ¶¶24-37, ¶¶61(A) - (C)
<ul style="list-style-type: none"> • Healy Bond Recoveries <ul style="list-style-type: none"> ○ ¶51 incorporates Count III ¶41, ¶50(a) ○ ¶62(f) 	<ul style="list-style-type: none"> • Healy Bond Recoveries <ul style="list-style-type: none"> ○ LT's Second Amended Counterclaim – Count II: Breach of Fiduciary Duty

It is evident that LT's description of the similarity of issues is understated to say the least, because LT only looked at the overlap between its two counterclaims. There is substantial

overlap between the issues being litigated and that presents an entirely independent reason for dismissing the Counterclaim, under Section 2-619(a)(3).

III. CONCLUSION

For these reasons, the Plaintiff, Lyons Township Trustees of Schools, Township 38 North, Range 12 East, requests that this Court grant this Motion and dismiss the Counterclaim filed by the Defendant, Lyons Township High School District 204, pursuant to 735 ILCS 5/2-619.1, along with providing such other relief as may be appropriate.

Respectfully submitted,

LYONS TOWNSHIP TRUSTEES OF SCHOOLS
TOWNSHIP 38 NORTH, RANGE 12 EAST

By: /s/ Barry P. Kaltenbach
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CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2019, I electronically filed **PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS DEFENDANT'S COUNTERCLAIM** with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt.

/s/Barry P. Kaltenbach

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