

Return Date: No return date scheduled  
Hearing Date: No hearing scheduled  
Courtroom Number: No hearing scheduled  
Location: No hearing scheduled

FILED  
4/1/2020 4:53 PM  
DOROTHY BROWN  
CIRCUIT CLERK  
COOK COUNTY, IL  
2013CH23386

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

**TOWNSHIP TRUSTEES OF SCHOOLS )  
TOWNSHIP 38 NORTH, RANGE 12 )  
EAST, )  
 )  
 ) **Plaintiff,** )  
 )  
 ) **vs.** )  
 )  
**LYONS TOWNSHIP HIGH SCHOOL )  
DISTRICT NO. 204, )  
 )  
 )  
 ) **Defendant.** )****

9003501

**No. 13 CH 23386  
Hon. Jerry A. Esrig  
Commercial Calendar S**

**PLAINTIFF’S ANSWER TO DEFENDANT’S “CONSOLIDATED COUNTERCLAIM”**

Plaintiff, Township Trustees of Schools Township 38 North, Range 12 East (the “Trustees”), by their undersigned counsel, THE QUINLAN LAW FIRM, LLC, and MILLER, CANFIELD, PADDOCK & STONE, PLC, for their Reply to the Fifth Consolidated Affirmative Defense asserted by Defendant, Lyons Township High School District No. 204 (“LT”), state as follows:`

**Common Allegations**

1. LT is a public school district organized under the laws of the State of Illinois with a principal office located in LaGrange, Cook County, Illinois. LT is sometimes is called “District 204” or “204.”

**Answer: The Trustees admit the allegations of Paragraph 1.**

2. The TTO is a local public entity organized under the law of the State of Illinois with a principal office located in LaGrange, Cook County, Illinois.

**Answer: The Trustees admit the allegations of Paragraphs 2.**

3. The TTO has three elected Trustees. The Trustees select a Treasurer.

FILED DATE: 4/1/2020 4:53 PM 2013CH23386

**Answer: The Trustees state that they “appoint” (not “select”) a Treasurer, but otherwise admit the allegations of Paragraph 3.**

4. The Treasurer manages the TTO’s operations on a daily basis, supervises the TTO’s employees and outside service providers, and interfaces with the school districts and educational entities that are members of the TTO.

**Answer: The Trustees deny the allegations of Paragraph 4.**

5. The Treasurer is an officer and employee of the TTO.

**Answer: The Trustees admit that the Treasurer is an employee of the Trustees and further state that the School Code provides only that the Treasurer is “ex-officio clerk of the board.” The Trustees deny the remaining allegations within Paragraph 5.**

6. LT is a member district of the TTO. LT’s membership in the TTO is mandated by state statute.

**Answer: The Trustees admit the allegations of Paragraph 6.**

7. The TTO holds the funds, received through tax revenues and other sources, belonging to LT as well as the other members school districts and educational entities associated with the TTO (“the Other Districts”). The TTO pools the funds of the member districts together and invests those funds on behalf of LT and the Other Districts.

**Answer: The Trustees state that the School Code provides that the Treasurer is the “only lawful custodian” of the funds, but otherwise admit the allegations of Paragraph 7.**

**Count I – Setoff**

The Court has dismissed Count I from the Consolidated Counterclaim and so the Trustees make no answer to the allegations of Count I.

**Count II – Fiduciary Duty**

41. LT incorporates by reference the allegations in paragraphs 1-7 above.

**Answer:** The Trustees incorporate their answers to Paragraphs 1-7 above.

42. As the fiscal agent of LT, the TTO owed and owes LT a fiduciary duty to handle and manage the funds and investments of LT, credit earnings to LT, distribute revenues to the member districts, and invoice LT for the salaries of expenses of the Treasurer’s office in a fair, responsible, even-handed, and open manner.

**Answer: The Trustees admit that have certain duties imposed upon them by operation of law. The Trustees deny that they are “the fiscal agent of LT” and deny the remaining allegations of Paragraph 42.**

43. The TTO has admitted repeatedly that it serves as a fiduciary for its member districts, including LT.

**Answer: The Trustees admit that they have described themselves as owing a fiduciary duty in certain contexts, but deny that they owe LT a fiduciary duty.**

**Insurance Recoveries**

44. By the time that Healy resigned from the TTO in 2012, the TTO had learned that Healy had stolen more than \$1 million through wrongful wire transfers of funds and through wrongful payment for sick and vacation days. The money that Healy stole belonged to LT and the Other Districts.

**Answer: The Trustees admit that in connection with Healy’s resignation in 2012 the Trustees learned that Healy had stolen in excess of \$1 million through wire transfers and wrongful payment for sick and vacation days. The Trustees admit that while the Treasurer is the only lawful custodian of the funds at issue, those funds are being held for the member districts. The Trustees deny any remaining allegations within Paragraph 44.**

45. The TTO made claims for Healy’s thefts to Liberty Mutual Insurance Company and The Hanover Insurance Company (a/k/a Massachusetts Bay Insurance Company), who had issued fidelity bonds for the Treasurer’s malfeasance (“the Bonds”).

**Answer: The Trustees admit that they made claims upon fidelity bonds issued by Liberty Mutual and Hanover with respect to Healy. The Trustees deny any remaining allegations within Paragraph 45.**

46. Among the purposes of the Bonds was to protect LT and the Other Districts from losing money as a result of thefts by the Treasurer.

**Answer: The Trustees affirmatively aver that the named payees of the bonds were the Trustees, as set forth in the School Code. The Trustees deny the remaining allegations of Paragraph 46.**

47. Through their payments of TTO’s pro rata expenses invoices, LT and the Other Districts paid the premiums on the Bonds.

**Answer: The Trustees affirmatively aver that LT did not pay the pro rata bills issued to LT by the Treasurer during the years in question. The Trustees also affirmatively aver that Healy under billed expenses in certain years. The Trustees admit that the premiums for the bonds should have been included on annual pro**

**rata expense bills that the other member districts paid. The Trustees otherwise deny any remaining allegations in Paragraph 47.**

48. In 2013, the State of Illinois charged Healy with the crime of Theft in Excess of \$1 million, a Class X felony. Healy pled guilty and received a sentence of nine years in prison.

**Answer: The Trustees admit the allegations of Paragraph 48.**

49. The TTO recovered \$1,040,000 on its two claims on the Bonds, with the second and final recovery occurring in June 2014 (“the Recoveries”).

**Answer: The Trustees admit the allegations of Paragraph 48, assuming that by the “TTO” LT refers to the Trustees.**

50. In an affidavit filed in this case and dated June 5, 2015, the Treasurer of the TTO asserted that \$1,040,000 in recoveries on the Bonds “has been set aside while Township Trustees continue their efforts to recover additional sums”; that the TTO can apply the \$1,040,000 recovery “to pay unrelated expenses of the Treasurer’s office”; that the TTO can “otherwise” use the money in an unspecified manner “in accordance with Illinois law”; and that the TTO had no obligation to distribute the Recoveries to the member districts.

**Answer: The Trustees admit that Dr. Birkenmaier, the Treasurer in June 2015, executed an affidavit asserting that the Trustees understood they had the right to use the bond proceeds in accordance with Illinois law, and that one such use was to apply the proceeds to reduce the expenses of the Treasurer’s office, thereby reducing the total amount being billed to member districts on a pro rata basis. The Trustees affirmatively aver that Dr. Birkenmaier’s reference to “unrelated expenses” was a reference to those expenses not directly related to the recovery of the bond proceeds. The Trustees affirmatively aver that they applied the bond**

**proceeds to reduce the expenses of the Treasurer's office, which reduced the amount being billed to each district on a pro rata basis, and that all member districts were advised of this fact and the reductions were documented in papers sent to each district. The Trustees deny any remaining allegations within Paragraph 50.**

51. The Recoveries consist of money that rightly belongs to LT and the Other Districts, and that must be used to compensate LT and the Other Districts for Healy's theft of their funds.

**Answer: The Trustees state that the proceeds were properly paid to the Trustees as they were the payees on the bonds, as set forth in the School Code. The Trustees further state that the member districts (including LT) received the full benefit of the recoveries because the amounts they were billed for their pro rata share of the costs of the Treasurer's office were reduced by the amounts recovered, as was communicated to all member districts (including LT) and documented in papers sent to all member districts (including LT). The Trustees deny any remaining allegations in Paragraph 51.**

52. Despite LT's repeated demands to the TTO for payment of LT's share of the Recoveries, the TTO refused to make payment. The TTO failed to distribute a single dollar of the Recoveries to its member districts.

**Answer: The Trustees state that the member districts (including LT) received the full benefit of the recoveries because the amounts they were billed for their pro rata share of the costs of the Treasurer's office was reduced by the amounts recovered, as was communicated to all member districts (including LT) and**

**documented in papers set to all member districts (including LT). The Trustees deny any remaining allegations within Paragraph 52.**

53. The TTO claimed, through its counsel in this case, that it spent the entire amount of the Recoveries on claimed expenses of the TTO, including alleged underbillings of expenses in several years earlier. The TTO had no statutory authority to take the Recoveries and spend them without authorization from LT and the Other Districts. The TTO thereby breached its fiduciary duty to LT.

**Answer: The Trustees admit that the amount recovered was used to reduce the expenses of the Treasurer's office that was being billed to each district on a pro rata basis, including to reduce the amounts that Healy had under billed while he was serving as Treasurer. The Trustees deny the remaining allegations within Paragraph 53.**

54. In June 2014, LT's proportionate share of revenues for FY 2014 was 21.6674%. Accordingly, LT was and is entitled to have its agency account credited with \$21.6674% of the \$1,040,000 in Recoveries – which is \$225,341 – to compensate LT for the TTO's breach of fiduciary duty.

**Answer: The Trustees admit that LT's pro rata share for fiscal year 2014 was 21.6674%. The Trustees deny the remaining allegations of Paragraph 54 and affirmatively aver that the remedy LT requests make no sense.**

*Investment Earnings from FY2014 to the Present*

55. Section 8-7 of the School Code, 105 ILCS 5/8-7, provides in part as follows:

When moneys of more than one fund of a single school district are combined for investment purposes or when moneys of a school district are combined with money of other school districts, community college districts or educational

service regions, the money combined for such purposes shall be accounted for separately in all respects, and the earnings from such investment will be separately and individually computed and recorded, and credited to the fund or school district, community college district or educational service region, as the case may be, for which the investment was acquired.

**Answer: The Trustees admit that the quoted language appears within Section 8-7 of the School Code, but denies that LT has quoted the entirety of the Section.**

56. Section 8-7 set forth the responsibility of the TTO Treasurer. In practice, the TTO Trustees determine the amounts of investment income to be paid to its member districts, and they direct the Treasurer to credit the member districts' accounts accordingly. Thus, the TTO – including its Trustees and Treasurer – have a fiduciary duty to LT to honor the requirements of Section 8-7 governing the payment of investment income to LT.

**Answer: The Trustees admit that Section 8-7, along with other provisions of the School Code, sets forth the duties of the Treasurer. The Trustees admit that member districts are allocated investment income in proportion to their share of the pooled investment totals. The Trustees deny the remaining allegations of Paragraph 56.**

57. Since at least FY2014, the TTO has failed to credit LT with the full amount of its investment earnings on its share of the districts' pooled investment fund. Instead, the TTO has failed to credit the member districts, including LT, with about 6-10 percent of the investment earnings in each fiscal year.

**Answer: The Trustees deny the allegations of Paragraph 57.**

58. The TTO claims that it withholds investment earnings from the districts, and fails to credit their account with, about 6-10 percent of the investment earnings as a supposedly



prudent business practice that protects the parties against fluctuations in the investment values. However, this is a pretense for the TTO taking money from the member districts. The TTO is not delaying the payment of the withheld earnings to ward against market fluctuations. On the contrary, the TTO fails to credit the member during the following fiscal year with investment income that the TTO retained in the prior fiscal year.

**Answer: The Trustees deny the allegations of Paragraph 58.**

59. The TTO's practices violate the requirements of Section 8-7 and the TTO's fiduciary duty owed to LT in at least the following respects: (a) the TTO fails to "account[] for separately in all respects" the monies combined for investment purposes – and instead pretends that the investment pool is a fund that has its own existence and in which each district has some vague, fractional interest (*i.e.*, a 'one big pot' approach); (b) the TTO does not "separately and individually compute[] and record[]" LT's earnings on the investment pool – and instead treats the investment pool as one pot of funds while refusing to provide full information to LT on its investments; and (c) the TTO does not ensure that "the earnings from such investment...[are] credited to the fund or school district" for LT – and instead credits LT with only a portion of its earning .

**Answer: The Trustees deny the allegations of Paragraph 59.**

60. In addition, during the relevant time period, the TTO took investment earnings of the districts and used it to pay claimed investment-related expenses such as custodial fees, investment advisory fees, and bank fees. The TTO diverted these investment earnings without the authorization of the member districts.

**Answer: The Trustees admit that, like any entity managing a significant portfolio of investment assets, it incurs banking, custodial and investment fees. The**

**Trustees deny that it is unlawful to incur such fees and deny the remaining allegations of Paragraph 60.**

61. The TTO had no statutory authority under Section 8-7, or any other provision of the School Code, to use investment earnings belonging to the member districts to pay alleged expenses.

**Answer: The Trustees deny the allegations of Paragraph 61.**

62. Both in response to requests from LT's school personnel to the TTO's officers, and in formal discovery requests in the LT Litigation, the TTO thus far has refused to provide LT with clear and candid information on the investment earnings not credit to LT, as well as the claimed investment expenses that the TTO diverted from the investment earnings.

**Answer: The Trustees deny the allegations of Paragraph 62. The Trustees affirmatively aver that they have provided all information that LT has requested, and that if LT believed it does not have any documents or information it finds necessary, LT had the ability to seek relief from the Court.**

63. The TTO's refusal to account for LT's investments separately and individually, its refusal to credit LT with the full amount of its investment earnings, its diverting of investment earnings to pay alleged investment-related expenses, and its refusal to provide clear and timely information to LT as requested constitute breaches of the TTO's fiduciary duty to LT that have caused LT to lose hundreds of thousands of dollars in investment earnings.

**Answer: The Trustees deny the allegations of Paragraph 63.**

*Investment Earnings Distributed in Nov. 2013*

64. In November 2013, the TTO informed LT and the Other Districts that it was holding investment earnings that the districts earned prior to July 1, 2013, but that the TTO had

failed to credit to member districts. The TTO further informed that it would distribute these earnings, and that it was making a distribution of \$500,000.

**Answer: The Trustees admit that, based upon information and advice provided to it by its auditors at that time, it notified the member districts that there appeared to be undistributed income and that \$500,000 was being distributed. The Trustees deny any remaining allegations within Paragraph 64.**

65. However, in violation of the TTO's fiduciary duty to LT to provide truthful, complete, and candid information to LT, the TTO failed to disclose to the districts that it was not crediting the districts with the full amount of the undistributed earnings that the TTO was holding from those earlier years.

**Answer: The Trustees deny the allegations of Paragraph 65.**

66. Both in response to requests from LT's school personnel to the TTO, and in formal discovery in the LT litigation, the TTO thus far refuses to provide LT with clear and candid information on the total amount of investment earnings from prior years that the TTO chose not to distribute to LT.

**Answer: The Trustees deny the allegations of Paragraph 66. The Trustees affirmatively aver that they have provided all information that LT has requested, and that if LT believed it does not have any documents or information it finds necessary, LT had the ability to seek relief from the Court.**

67. In 2017, LT learned that the TTO was still holding on to the balance of the undistributed earnings the TTO located in 2013.

**Answer: The Trustees deny that the funds at issue have not been fully distributed and on that basis deny the allegations of Paragraph 67.**

68. LT believes that the earnings from those prior years that the TTO failed to distribute in November 2013 are at least \$283,968.

**Answer: The Trustees deny that the funds at issue have not been fully distributed and on that basis deny the allegations of Paragraph, except to state that the Trustees lack knowledge as to LT's subjective belief.**

69. By withholding pre-July 1, 2013 investment earnings from LT, and failing to be candid with LT and the Other Districts about making a partial distribution only, the TTO breached its fiduciary duty to LT, violated the clear requirements of Section 8-7 of the School Code to credit LT with all of its investment earnings, and caused LT to suffer a monetary loss.

**Answer: The Trustees deny the allegations of Paragraph 69.**

*The Loan Deal with West 40*

70. West 40 Intermediate Service Center #2 ("West 40") is a regional education agency operating in the Western Cook County suburbs.

**Answer: The Trustees admit the allegations of Paragraph 70.**

71. West 40's geographic area is both within and outside of Lyons Township. Accordingly, West 40's geographic area includes school districts that are both within and outside of the jurisdictional boundaries of the TTO.

**Answer: The Trustees admit that West 40 provides services both within and outside of the boundaries of Lyons Township. The Trustees state that they do not have "jurisdiction" over any particular entity or geographic locale although they admit that they are charged with providing services to those member districts located within Lyons Township. The Trustees deny any remaining allegations within Paragraph 71.**

72. For years, West 40 has had financial difficulties. Due to these financial difficulties, West 40 was unable to pay its share of the TTO's pro rata expenses, and therefore had an account at the TTO that ran a large deficit.

**Answer: Because the phrase "financial difficulties" is ambiguous, the Trustees lack knowledge to either admit or deny the allegations of Paragraph 72. The Trustees aver that West 40 does not have a tax base and is dependent upon State funding for its operations, and that at times West 40 has not received timely State funding, leading to West 40 operating in deficit.**

73. The TTO allowed West 40 to run a deficit account at the TTO. As a result, LT and the Other Districts earned less money on their invested funds, given that the TTO effectively used their money to make a loan to West 40. The TTO failed to seek authorization for this use of the member districts' funds from LT and the Other Districts.

**Answer: The Trustees admit that due to issues related to State funding for its operations, West 40 at times operated in deficit. The Trustees affirmatively aver that it worked with West 40 in an effort to enable West 40 to keep its doors open, which provided a social and economic benefit to all the citizens, teachers, and other member districts within Lyons Township, because West 40 was thereby permitted to keep providing services. The Trustees deny that these actions caused economic harm to any member district and deny that the Trustees were required to seek formal authorization for this arrangement, although the Trustees aver that its actions were conducted in open, public meetings.**

74. In 2018, the TTO participated in a loan deal for West 40. In this loan deal, the Community Bank of Oak Park River Forest ("the Bank") agreed to make a multi-million dollar

loan to West 40, while the TTO provided \$2.5 million in collateral for the loan in the form of CDs (“the Collateral”).

**Answer: The Trustees admit that West 40 sought and obtained such a loan from the Bank due to a State oversight in funding West 40. The Trustees admit that CDs, which provided market interest rates, were provided as collateral for the loan. The Trustees deny that the Trustees “participated” in the loan as either lender or borrower and deny any remaining allegations within Paragraph 74. The Trustees affirmatively aver that West 40 paid off the subject loan in full and ahead of scheduled and that the “Collateral” is no longer serving as collateral for the loan.**

75. The Collateral consisted of money that the TTO took from the funds of the member districts without their authorizations.

**Answer: The Trustees state that they regularly use CDs as one investment vehicle for the pooled funds, and that the CDs pledged as collateral for the loan were likewise purchased using pooled investment funds. The Trustees deny that authorization from the member districts was necessary to purchase the CDs or to engage in the West 40 transaction.**

76. In connection with the loan deal, the TTO executed a document entitled Commercial Pledge Agreement, in which the TTO represented and warranted that the TTO was “the lawful owner of the Collateral free and clear of all security interests, liens, encumbrances and claims of others except as disclosed to and accepted by Lender in writing prior to execution of this Agreement.”

**Answer: The Trustees admit that the Trustees executed the Commercial Pledge Agreement and that the quoted language appears in the referenced document. The Trustees deny any implicit allegations within Paragraph 76.**

77. This representation and warranty of the TTO is inaccurate because the Collateral belongs to LT and the Other Districts, and not to the TTO.

**Answer: The Trustees deny the allegations of Paragraph 77. The Trustees affirmatively aver that the statement in the Commercial Pledge Agreement was truthful and accurate. The Trustees are the “owners” of CDs that are purchased, even if purchased using pooled investment funds being held by Treasurer as the only lawful custodian of those funds for the member districts, and no other party has “security interests, liens, encumbrances [or] claims” in or on the CDs. Moreover, the Bank does not claim to have been misled by any aspect of the transaction.**

78. In placing the Collateral with the Bank to guarantee West 40’s payment of the loan, the TTO unreasonably placed the funds of LT and the Other Districts at a risk of loss from a default on the loan.

**Answer: The Trustees deny the allegations of Paragraph 78. The Trustees affirmatively aver that the State represented to West 40 that funding was forthcoming and that, in fact, West 40 repaid the loan in full and ahead of schedule.**

79. The TTO’s unauthorized use of the Collateral, the risk of loss that it created for those funds, and the inaccurate representations and warranties that the TTO made concerning the ownership of the Collateral breached the TTO’s fiduciary duty to LT.

**Answer: The Trustees deny the allegations of Paragraph 79. The Trustees affirmatively aver that the statements in the Commercial Pledge Agreement were truthful and accurate (and were not made to LT), what the State represented to West 40 that funding was forthcoming, and that, in fact, West 40 repaid the loan in full and ahead of schedule.**

80. These breaches of fiduciary duty damaged LT in that it was unable to earn normal investment income on its share of the Collateral while held at the Bank, its funds continue to be at an unreasonable risk of loss from a loan default, and its funds are tied up in a loan deal that LT never authorized.

**Answer: The Trustees deny the allegations of Paragraph 80. The Trustees affirmatively aver that the interest produced by the CDs was market-rate interest, that this income was allocated to all the member districts as with any other CD purchased by the Trustees, and that West 40 repaid the loan in full and ahead of schedule. The Trustees further aver that LT suffered no loss whatsoever because of the pledge of CDs as collateral, and that by working with West 40, the Trustees and West 40 were able to permit West 40 to keep its doors open, pay its staff, and continue providing services to the citizens, teachers and other member districts within Lyons Township.**

81. As compensatory damages for these breaches of the TTO's fiduciary duty, LT is entitled to have its agency fund credited with its full share of the Collateral being held at the Bank, in addition to being reimbursed for lost investment earnings.

**Answer: The Trustees deny that LT has suffered any damages whatsoever and deny the allegations of Paragraph 81. The Trustees aver that the CDs that**



**compromised the Collateral were credited, fully, to the member districts at all times.**

**The Trustees further state that the remedies that LT requests make no sense.**

**The TTO's "Excessive and Unreasonable" Attorneys' Fees**

82. In the pro rata expense invoices that the TTO sent LT for fiscal years 2013 through the present, the TTO has included the attorneys' fees and litigation costs associated with the cases that the TTO filed against LT ("the TTO Attorneys' Fees" for "the LT Litigation"). Thus, the TTO attempted to charge LT for about 20-25 percent of the TTO Attorneys' fees.

**Answer: The Trustees admit that all legal fees and costs incurred, whether related to the litigation against LT or otherwise, are billed to all member districts in their pro rata amount as required by the School Code. The Trustees admit that this means that LT is billed for its pro rata share of those attorneys' fees that have been incurred in prosecuting this litigation against LT, and defending from LT's counterclaims. The Trustees deny remaining allegations within Paragraph 82.**

83. It is the position of LT that the TTO's Attorneys' Fees are not expenses of the Treasurer's office, and therefore are not proper expenses under Section 8-4.

**Answer: The Trustees lack knowledge as to LT's subjective position. The Trustees state that Illinois law required the Trustees to be the plaintiff in this lawsuit, and forbid the Treasurer from being the plaintiff in this lawsuit, and so expenses incurred to obtain authorization for the Treasurer to make the bookkeeping entries being requested are necessarily expenses of the Treasurer's office because they are necessary for the Treasurer to perform the duties of his office. The Trustees deny any remaining allegations in Paragraph 83.**

84. Alternatively, it is the position of LT that the American Rule on the recovery of attorneys' fees from opponent in litigation, which Illinois has adopted, prohibits the TTO from recovering the TTO Attorneys' Fees from LT because Section 8-4 does not specifically mention or authorize the recovery of attorneys' fees, and because there is no contract between the parties that authorizes such recovery.

**Answer: The Trustees lack knowledge as to LT's subject position. The Trustees maintain that the common law "American Rule" on attorneys' fees has nothing to do with the issues in this lawsuit, and that the Trustees would be violating the School Code if they did not apportion the legal fees equally among all of the member districts in their pro rata share. The Trustees deny any remaining allegations in Paragraph 84.**

85. Nevertheless, in the alternative to LT's positions, should this Court determine that Illinois law allows the TTO to charge LT with 20-25 percent of the TTO's Attorneys' Fees, the TTO breached its fiduciary duty to the member districts, including LT, by incurring excessive and unreasonable attorneys' fees and litigation expenses and thereby misusing LT's money.

**Answer: The Trustees deny the allegations of Paragraph 85.**

86. The TTO Attorneys' Fees are grossly excessive and unreasonable because, among other things, the TTO spent far more in attorneys' fees and expenses that it can recover in damages at the trial in this case; the TTO hired an excessive number of attorneys and law firms to pursue the LT Litigation; and the TTO allowed its attorneys to incur excessive fees and expenses by routinely overstaffing case events, duplicating efforts, delaying the LT Litigation, and pursuing meritless claims and arguments.

**Answer: The Trustees deny the allegations of Paragraph 86.**

87. Both in response to requests from LT's school personnel to the TTO's officers, and in formal discovery requests in the LT Litigation, the TTO thus far has refused to provide LT with clear and candid information on the amount and components of, and backup document for, the TTO Attorneys' Fees.

**Answer: The Trustees deny the allegations of Paragraph 87. The Trustees affirmatively aver that LT has received documents showing the amount and components of all legal fees related to this lawsuit, and backup documents, with the exception of individualized time entries. With respect to individualized time entries, the Court sustained the Trustees' objection that such entries are protected by the attorney-client privilege and denied LT's motion to compel on that issue.**

88. The TTO's breach of its fiduciary duty by incurring excessive and unreasonable attorneys' fees and litigation expenses cause damage to LT, in the event that LT must pay for a share of these fees and expenses.

**Answer: The Trustees deny the allegations of Paragraph 88.**

### **Count III – Declaratory Judgment**

The Court has dismissed Count III from the Consolidated Counterclaim and so the Trustees make no answer to the allegations of Count III.

### **Affirmative or Other Defenses**

Pursuant to 735 ILCS 5/2-613(d) the Trustees assert the following grounds or defenses, whether affirmative or not, which if not expressly stated might take LT by surprise:

### **Common Allegations**

1. The Trustees deny that any duties LT alleges are owed are properly categorized as fiduciary. The School Code imposes certain ministerial duties upon the Trustees, but LT does not

allege a violation of any ministerial duty. With respect to implementing non-ministerial duties, the Trustees are afforded discretion to make business decisions, and this discretionary decisions-making is subject to challenge only for fraud, corruption, oppression or gross injustice, none of which LT alleges.

2. If this Court determines that the Trustees owe a fiduciary duty to LT, then the Trustees would owe that same fiduciary duty to all the member districts they service. When making business decisions, the Trustees have considered what is in the best interests of the citizens of Lyons Township who elected them, and all of the member districts they serve, as a whole.

3. Currently, LT is but one of eleven public school districts within Lyons Township for which the Trustees are responsible. The Trustees are also responsible for the LaGrange Area Department of Special Education, and West 40, which provides services to other students, teachers and the other member districts.

4. Although LT is the largest single member district, LT accounts for only a modest percentage of the services performed by the Trustees and the Treasurer. For example, during Fiscal Year 2019, the Treasurer processed about 23,000 accounts payable transactions, and 18,000 of those were for member districts other than LT. Likewise, the Treasurer processed about 106,000 payroll transactions, and 90,000 of those were for member districts other than LT.

5. The Trustees' business is conducted at both regular and special meetings and those meetings are open to the public. Advance notice of these meetings is published online (<http://www.lyonstto.net/agendas---minutes.html>) (the "website") and members of the public, including LT, are welcome to appear and contribute. LT has never appeared at a public meeting of the Trustees and requested that the Trustees change any of the policies or decisions at issue.

6. In compliance with the School Code, the Treasurer is audited at the conclusion of each fiscal year. The audited financial statements, beginning with those statements for Fiscal Year 2000, are available for public inspection and downloading on the website. Agenda and minutes for past regular and special meetings are also available on the website for meetings from 2007 onward. Beginning with Fiscal Year 2015, the Trustees have also posted on the website quarterly summaries of all of their investments, both short-term and long-term.

7. If this Court determines the Trustees owe to LT the fiduciary duties alleged, then with respect to LT's five assertions of fiduciary obligations, the Trustees deny each of the remaining elements of a claim for breach of fiduciary duty: (a) that the Trustees breached any fiduciary duty; and (b) that any breach proximately caused damages to LT.

#### **Recovery of Healy Fidelity Bond Proceeds**

8. The Trustees recovered \$1,040,000 from insurance companies that had issued fidelity bonds to the Trustees, in accordance with the School Code, with respect to Robert Healy's misconduct.

9. The Trustees applied the bond proceeds towards each member district's pro rata bills, reducing the amount of those bills, thereby reducing the amount due from each member district. The Trustees advised each member district, multiple times and in writing, that they were applying the bond proceeds in this manner. Only LT has complained about the Trustees' application of the bond proceeds.

10. The manner in which the Trustees applied the bond proceeds did not breach any fiduciary obligation, and LT did not suffer any damages, because LT received the same net benefit from the proceeds recovered.

### **Fiscal Year 2013 Allocation of Investment Income**

11. In Fiscal Year 2013, the Trustees were advised by their new auditors that the auditors believed that several hundred thousand dollars in investment income had not been allocated. The Trustees decided to promptly allocate \$500,000 of this income while the auditors continued investigating the matter.

12. To the extent there was any investment income that was not allocated at that time, such income remained in the pooled investment fund, where it was have been part of future quarterly allocations. The income did not “go” anywhere. The Trustees have not held back any unallocated amounts from Fiscal Year 2013.

13. The Trustees treatment of this matter in Fiscal Year 2013 did not breach any fiduciary obligation to LT, and did not cause any damage to LT.

### **Investment Income Allocated Beginning in Fiscal Year 2014**

14. The Trustees allocate (*i.e.*, make a bookkeeping entry) income generated from pooled investments on a quarterly basis. As of the last day of each quarter, the exact amount of income generated in that quarter is not known. The exact amount is not known until the next quarter begins and the Treasurer receives statements from the banks and financial advisors reflecting the exact amount of income that had been generated in the prior quarter.

15. For this reason, the allocation of investment income for the first three quarters occurs in the next-following quarter. For example, investment income generated during the first quarter is not allocated until the second quarter, when the Treasurer knows how much investment income was actually generated during the first quarter.

16. The actual allocation typically occurs at the end of the first month after the quarter ends. For example, the first quarter begins on July 1 and ends on September 30, and so the allocation of investment income earned during the first quarter typically occurs on October 31.

17. After being earned, but prior to being allocated, the income remains as part of the pooled investment funds, which is allocated to each member district in their pro rata share. The earned but unallocated income does not “go” anywhere.

18. When allocating investment income earned during the fourth quarter, however, the Treasurer does not wait until he knows the exact amount of income that had been generated during that quarter. The primary reason for this is that the fiscal year is ending and the member districts want to close their books on June 30 based on the numbers that exist at that time.

19. The Treasurer, therefore, estimates how much income will be generated during the fourth quarter and allocates this estimated income on or before June 30. The amount allocated is slightly less than the amount estimated. This is to avoid over-allocating investment income, *i.e.*, allocating more than what is actually earned. The Trustees believe that this procedure is preferable when compared to the risk of over-allocating funds because it ensures member districts will not make budgetary or planning decisions based upon funds they do not actually have.

20. The allocation, and the fact that the allocation is based on an estimate, is communicated to each member district in June.

21. As with the first three quarters, to the extent there is any investment income actually earned that was not actually allocated as of June 30, the income remains part of the pooled investment funds, with each member district continuing to maintain its pro rata share of that fund. The income, again, does not “go” anywhere.

22. After the end of each fiscal year, the Treasurer fully reconciles its cash and investments for that fiscal year, including all income that was actually earned during the year (not just the estimate). This reconciliation is audited by a public accounting firm (presently, Miller Cooper). These audited cash and investment figures are provided in writing to each member district as the Treasurer's official end-of-year cash position. Each member district's auditor also reviews these figures and includes them in each member district's own audit. The audit certifies that the Treasurer has accounted for all cash and investments.

23. Thereafter, the audited annual financial statements are released (and posted on the website). These audited financial statements include all investment income earned during the fiscal year.

24. Other than as described above, the Trustees are not withholding any investment income from any member district, including LT. The cash and investments are fully allocated to each district, along with the investment income.

25. The Trustees treatment of investment income as described above is not a breach of any fiduciary obligation to LT and has not caused any damage to LT. LT has always been credited fully with the cash, investments, and investment income in the custody of the Treasurer. This is confirmed by the independently audited financial statements.

#### **West 40's Loan**

26. West 40 provides services to members of the public, school teachers, and the educational bodies within Lyons Township (and to some bodies outside of Lyons Township). West 40 does not have a tax base and is dependent upon State funding.

27. As part of well-publicized problems with State funding, West 40 did not have sufficient income to keep its doors open and pay its staff. If West 40 had been forced to close, it



would have caused harm to the public, school teachers and other educational bodies that depend upon West 40. West 40's need for a loan was not due to financial mismanagement.

28. West 40 sought a loan from a local bank while West 40 was waiting on State funding. West 40 provided a letter from the State assuring that the funding was forthcoming, but the bank required that collateral be posted to secure the loan to West 40.

29. As part of the short-term investment portfolio, the Trustees regularly purchase CDs at market interest rates. The Trustees used certain CDs it purchased, at market interest rates, to secure the loan to West 40. When those CDs expired and new CDs were purchased, those purchases were also at market interest rates.

30. The CD's remained part of the pooled investment portfolio, and each member district was allocated its pro rata share of the pooled investment portfolio, and of the investment income generated by the CDs.

31. West 40 paid off the loan in full and ahead of schedule.

32. The Trustees' agreement to provide collateral was not a breach of any fiduciary duty because it benefitted Lyons Township as a whole by permitting West 40 to remain open. The CDs were not at meaningful risk and as of the date of the filing of this pleading are not at any risk.

33. The transaction also did not cause any harm to LT or any other member district. Each member district was allocated its share of the combined investment portfolio which included the CDs at issue, and the income generated by those CDs.

### **The Trustees' Legal Fees**

34. The Trustees incur fees for legal services from multiple law firms, both for this lawsuit (because individual lawyers have changed firms) as well as for matters unrelated to this lawsuit. Since Fiscal Year 2013, LT has paid through its pro rata payments the legal expenses of the firms not engaged in this lawsuit without any complaint or assertion that those legal fees incurred by the Trustees were not expenses of the Treasurer's office. However, LT has failed to pay through its pro rata payments their share of the legal fees for the law firms engaged in this matter – even for services unrelated to this lawsuit – without any explanation.

35. Since Fiscal Year 2013 (and during the entire time period at issue in this lawsuit), all of the member districts other than LT have paid their pro rata bill in full.

36. The legal fees the Trustees have incurred prosecuting this lawsuit and defending from LT's counterclaims, and in investigating the misconduct of Healy, are likewise expenses of the Treasurer's office. The Trustees have brought this lawsuit seeking declaratory relief to enable the Treasurer to make certain necessary bookkeeping entries to unwind the unlawful financial benefits afforded LT at the expense of the other member districts. The Treasurer was not lawfully permitted to be the plaintiff in this lawsuit; rather only the Trustees were authorized to bring suit under the School Code and Illinois common law.

37. The School Code does not permit the Treasurer to allocate certain expenses among only some of the member districts. The School Code requires that the Treasurer allocate expenses among all member districts according to their pro rata share.

38. The Trustees' legal fees in this case are not excessive or unreasonable. LT's allegations in this regard overlook the significant delays caused by LT during discovery years ago, other delays not within the control of the Trustees, and LT's excessive discovery requests

which have often resulted in the Trustees being forced to provide the same documents and information to LT on multiple occasions.

**Further Allegations Regarding LT's Claim for Damages**

39. Because the Trustees do not have a tax base or any source of revenue, other than the funds received by member districts in response to the Treasurer's annual pro rata billing, any money judgment entered against the Trustees could only be paid if the Trustees treated the payment of such judgment as an expense of the Treasurer's office and then invoiced each member district (including LT) for that member district's pro rata share of the judgment. Each member district (including LT) would ultimately be paying LT.

Respectfully submitted,

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

By: /s/ Barry P. Kaltenbach  
One of its attorneys.

William J. Quinlan  
wjq@quinlanfirm.com  
Gerald E. Kubasiak  
gekubasiak@quinlanfirm.com  
Gretchen M. Kubasiak  
gmkubasiak@quinlanfirm.com  
The Quinlan Law Firm, LLC  
231 S. Wacker Drive, Suite 6142  
Chicago, Illinois 60606  
(312) 212-8204  
Firm No. 43429

Barry P. Kaltenbach  
kaltenschach@milleranfield.com  
Miller, Canfield, Paddock & Stone, P.L.C.  
225 West Washington, Suite 2600  
Chicago, Illinois 60606  
(312) 460-4200  
Firm No. 44233

**CERTIFICATE OF SERVICE**

I hereby certify that on April 1, 2020, I electronically filed **ANSWER TO DEFENDANT'S CONSOLIDATED 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

**VERIFICATION**

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in the forgoing pleading are true and correct except as to matters stated to be on information and belief and as to such matters, the undersigned certifies as aforesaid that verily believes the same to be true.



Michael Thiessen

4-1-2020

DATE