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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

TOWNSHIP TRUSTEES OF SCHOOLS TOWNSHIP 38 NORTH, RANGE 12 EAST,	)	
Plaintiff and Counter-Defendant,	)	No. 13 CH 23386
v.	)	Hon. Thomas M. Mulroy
LYONS TOWNSHIP H.S. DISTRICT 204,	)	Calendar I
Defendant and Counter-Plaintiff.	)	(Transferred to Law)

LT'S TRIAL BRIEF & OPENING STATEMENT

I. INTRODUCTION

This is the trial brief and opening statement of Defendant and Counter-Plaintiff Lyons Township High School ("LT"). This trial brief outlines the legal and factual issues involved in the remaining claims of the TTO; LT's affirmative defenses; and LT's counterclaim. Here is the summary of the monetary claims at issue:

Summary of 'Out-of-Pocket' Damages Claims, According to LT:

TTO's Pro Rata Expenses Claim (to FY2012)	$686,251
TTO's Pro Rata Expenses Claim (FY2013-18)	$642,703
TTO's Audit Payment Claim	$123,326
TTO's Total Claims:	**$1,452,280**
LT's Counterclaim:	**$ 449,242**

In addition, both parties seek declaratory relief. The TTO's declaratory relief essentially asks this Court for the right to take money from LT's account to satisfy any judgment amount. LT's declaratory relief asks the Court to make determinations on the parties' rights and duties with

respect to the statutes that govern their principal-agent relationship, and the release of funds that are restricted and at risk of loss due to an illegal loan collateral deal.

II. THE TTO'S PRO RATA EXPENSES CLAIM (TO FY2012) & LT'S SETOFF COUNTERCLAIM (COUNT I)

The TTO's Second Amended Complaint ("the Complaint") presents a highly simplistic claim based on the annual pro rata invoices that the TTO sent to LT: the TTO sent invoices, LT did not pay them in full, and the money is due. However, as this Court now knows, the TTO's Pro Rata Claim really concerns two entirely different issues. First, for the fiscal years through 2012, the claim concerns the TTO's attempt to avoid the parties' setoff agreement that started in 2000, in which the TTO agreed to pay the costs of LT's business services by setting that amount off against the current pro rata invoice. Count I of LT's Counterclaim frames this dispute. Second, for the fiscal years 2013-18, the claim concerns LT's deductions from the annual pro rata expense invoices for non-operational costs – primarily, the attorneys' fees and costs that the TTO incurred in suing LT, and special software expenses beyond the Treasurer's authority to purchase.

We start with the Pro Rata Claim through FY2012. The parties' agreement provided that the TTO would pay for the costs of LT's business and accounting functions like payroll and accounts receivable, and computer recordkeeping. This agreement was based on the mutual recognition that the TTO performed these functions for all districts but LT, which performed these services for itself, and that the TTO would have to incur substantial costs if had to do that additional work in-house. The parties set off these costs against the TTO's pending pro rata expenses invoice. Through this arrangement, the TTO essentially outsourced LT's accounting work to LT, just as the TTO outsources its own accounting work to outside accountants and its investment services to outside money managers. This agreement addressed the inequity of the TTO charging LT over $200,000 a year for no services.

Also, the agreement was rooted in the TTO's desire to keep LT within what is an unnecessary organization that exists solely for political reasons. LT was and is the biggest member, by dollars and by students, of any district. LT is one of 14 districts and educational entities in the TTO, but it represented a 20-25% share of the TTO's revenues and expenses.

A. Section 8-4 of the School Code

The TTO's Pro Rata Expenses Claim is based on an alleged violation of Section 8-4 of the School Code, which requires each district to "pay a proportionate share of the compensation of the township treasurer … and a proportionate share of the expenses of the township treasurer's office." 105 ILCS 5/8-4. In the relevant years, the TTO sent LT letter invoices with a bottom-line number and no documentation. The TTO always lagged almost a full year behind in its billings.

However, the evidence will show that, the parties' agreement did not change or eliminate LT's obligations under Section 8-4. Indeed, the TTO expressly recognized in writing that the agreement did not involve a change in the pro rata expenses billing. Also, the TTO's 'rogue treasurer' argument, which contends that the TTO's long-serving Treasurer Robert Healy made this arrangement and kept the Trustees in the dark about it, is contrary to the evidence.

B. Negotiation of the TTO-LT Agreement

In July 1999, TTO Treasurer Healy wrote to and met with the TTO Trustees about LT's concerns over the TTO's excessive and inequitable costs. As Healy told the Trustees in writing, in a letter that set forth the institutional goals of the TTO:

> Recent meetings indicate an increasingly strained relationship between the administration of this office and the Board of Education of High School District #204. During the next year it will be necessary for this office to absorb costs related to the High School District 204 business function or face legislative action detrimental to the continued operation of the School Treasurer's office. A goal then for the upcoming year is to find an agreeable middle ground and keep the business relationship between the District Board and the Treasurer's office as mutually profitable and as equitable as possible.

At a subsequent TTO Board meeting, the Trustees and Treasurer discussed several options, one of which was to "fund certain business functions" of LT.

In August 1999, Healy wrote LT a letter, copied to the TTO Trustees, which presented five proposals. The first proposal was "Deviation from Pro-Rata Billing," whereby the pro rata share allocations would change for all districts, and LT would pay less. Healy recommended against this option – which is what the TTO now claims the agreement was – because it would require all districts to sign an intergovernmental agreement, and Healy deemed this unlikely.

The second proposal was "Funding by Township School Treasurer of Some District Functions." This was the proposal that Healy recommended, and the basis for the eventual agreement. As Healy explained, "If the responsibilities for the Accounts Payable and Payroll production were returned to the School Treasurer's office it would mean higher operating costs for the Treasurer's office in the form of salaries and benefits for increased staff and higher related expenses to accommodate the increase in work load." Unlike the first proposal, Healy represented, the second proposal did not require an intergovernmental agreement, but only the approval of the TTO Trustees – which he represented as likely.

The TTO and LT moved forward with the second proposal. Healy and LT's Business Manager Lisa Beckwith fleshed out the details. This is the February 29, 2000 Memorandum that Beckwith sent to Healy ("the February 2000 Memo"). The February 2000 Memo detailed "a list of responsibilities that District 204 proposes become the direct cost and responsibility of the Township Treasurer's office." This is the writing that set forth the terms of the agreement. It stated:

> Following is a list of responsibilities that District 204 proposes become the direct cost and responsibility of the Township Treasurer's office:
>
> - Payroll and accounts payable bank reconciliation.
> - Balance monthly totals between Treasurer and LTHS.
> - Provide printing costs for checks and envelopes for accounts payable, payroll,

imprest and student activities.

- Annual salary and benefits costs for 3 employees as listed below:

[Three job positions listed, with salary and benefit costs specified for each, for a total cost for the 1999-2000 fiscal year of $106,403.]

The TTO is correct there is no writing that contains the physical signatures of the parties. However, the TTO's current Board President Michael Thiessen is incorrect in claiming that an agreement is invalid unless it has signatures. There is no Illinois law to support this position, and this Court will hear that the Boards of the two parties could and did confirm their assent to agreements through Board votes recorded in official minutes.

C. Board Approvals of the Agreement

There should be no dispute that both parties' Boards received the written proposal and voted to approve it. This made the agreement binding. In March 2000, the TTO Trustees held a meeting. The Trustees received the February 2000 Memo, and Healy presented LT's proposal – which he had previewed for the Trustees in 1999 –for formal approval. The TTO minutes state:

> Healy submitted to the Trustees the proposal from District 204 stating that this office absorb certain payroll, accounts payable and computer processing expenditures by District 204. As these costs would be incurred by the Treasurer's office if Lyons Township High School were to totally utilize the facilities of the Treasurer's office.
>
> A motion was made by Russell Hartigan seconded by Joseph Nekola to accept the proposal given to the Lyons Township Trustees of Schools by Cook County High School District #204.
> ROLL CALL: Ayes – Joseph Nekola, Russell Hartigan
> Nays – None

The TTO now makes the remarkable claim that the Trustees' vote was merely to a vote to "receive" LT's proposal, and not to vote in favor of it. This position on the meaning on the word "accept" in the minutes is contrary to the testimony of the only two living persons who attended the March 2000 meeting, Healy and Judge Russell Hartigan, and it defies logic and common sense. There was no reason to hold a vote to decide that the TTO had received LT's proposal – it plainly

was already received. Also, the TTO's position ignores the 13-year-long course of dealing that followed, in which the agreement was reaffirmed and followed in each successive year for over a decade.

While the TTO has offered an expert witness, Nancy Sullivan, to testify that the Board had a special meaning for the word "accept," she has no first-hand factual knowledge, no proper basis to offer an opinion, never spoke with any of the persons at the TTO who were present at the 2000 meeting, and wrote at least two books stating that the words "accept, approve, and adopt" all mean the same thing for purposes of parliamentary procedure. (LT will continue to ask that her testimony be barred in its entirety.)

In June 2000, the LT Board received the February 2000 Memo and approved the agreement with the TTO. It authorized the net payment due to the TTO after the setoff of LT's business function costs against the TTO's current invoice. Because the matter had been reviewed thoroughly in LT's Finance Committee, the LT Board voted their approval on the consent agenda. The TTO takes issue with LT's consent agenda vote, based on Sylvester's testimony that it was wrong to use the consent agenda to vote on a contract, but that opinion is improper and factually groundless, as well.

The agreement between TTO and LT was not hidden from the other districts. Elise Grimes, another district's superintendent, learned of the arrangement at superintendent meetings where the agreement was "openly discussed." The TTO received a legal opinion in May 2000 about the agreement from their attorney Michael Cainkar, even though the TTO now contends that it never had an agreement the TTO. LT notes that the TTO shielded the substance of the legal opinion it received based on a claim of attorney-client privilege, which Judge Hall upheld. (LT will continue to ask for production of a redacted version of that agreement to identify facts that the TTO provided

on the LT agreement.)

The TTO also contends that the agreement with LT, if it existed at all, was for only one year. This position is inconsistent with the record evidence. In September 2000, Healy wrote LT, "As was done last year the Trustees will continue funding certain business functions**.** Funding last year totaled $106,403.00 (which brought the district's net payment to $59,073.00)."

LT re-affirmed the parties' arrangement every year after 2000 when the LT business manager sent the TTO a memo with LT's costs to be set off, and LT's Board approved LT's budget with projected expenses and the net payment to the TTO.

On the TTO side, the evidence will show that the TTO Trustees periodically reviewed and approved the accounts and expenses of the Treasurer, and the Trustees in fact were aware of the ongoing agreement with LT. The Trustees' examination and approval of the records of pro rata payments, and the setoff for LT's business costs, were mandated by the School Code: "At each regular meeting … the trustees of schools shall examine all books, notes, mortgages, securities, papers, moneys and effects of the corporation, and the accounts and vouchers of the township treasurer …." 105 ILCS 5/5-20. Also, the TTO's internal files for "Pro Rata" payments of the districts show that the TTO accepted LT's pro rata expense payments after setoff, and repeatedly and literally checked them in as satisfied.

In 2012, Healy resigned, and a new group took over the TTO. In April 2013, the TTO sent a letter to LT denying the existence of the agreement on LT's business function costs; accusing LT of violating Section 8-4; and demanding payment from LT of over $2 million. LT accepted this letter as notice the agreement would not be in place for FY2013.

D. An Intergovernmental Agreement Was Not Required.

In addition to its misplaced arguments that LT violated Section 8-4, and that only Healy

authorized the agreement, the TTO contends that the actions of the parties' Boards are invalid because they violated the Intergovernmental Cooperation Act ("the Act"), which the TTO claims required a formal intergovernmental agreement.

This argument is based on a fundamental misunderstanding of the purpose and scope of the Act, as well as the nature of the long-standing joint venture relationship between the TTO and its member districts. This argument also ignores the TTO's express representations in the August 1999 letter, shared to the TTO Trustees, that an intergovernmental agreement was not required for the 'second proposal' that formed the basis of the parties' agreement.

Initially, the Act does not require that every financial transaction between two government entities be memorialized in a signed agreement that conforms to the Act. An Illinois court construing the Act analyzed its purpose as follows: "Intergovernmental cooperation is the voluntary participation of units of local government in joint undertakings…. This section [of the Act] was intended to encourage rather than enforce cooperation and further remove the necessity under Dillon's Rule of obtaining statutory authorization for each cooperative venture by a unit of by a unit of local government or a school district." *Elmwood Park v. Forest Preserve Dist.*, 21 Ill.App.3d 597 (1st Dist. 1994) (emphasis added).

Thus, although joint venture "agreements are encouraged by the Intergovernmental Cooperation Act," *DOT v. Callender Constr.*, 305 Ill.App.3d 396, 404-05 (4th Dist. 1999), they are not required when the local governmental units already are part of a joint venture, and the transaction at issue is an expense already authorized by statute – as is the case here.

The limited scope of the Act is confirmed by the TTO's own practices with respect to intergovernmental agreements. There was no intergovernmental agreement between the TTO and its member districts, including LT, authorizing the TTO to borrow millions of dollars from the

districts (which the TTO calls "advances") to fund the TTO's operations, its legal costs, and the losses from Healy's thefts. Nor was there an intergovernmental agreement between the TTO and its member districts, including LT, authorizing the TTO to take $2.5 million from the districts to provide collateral for a loan to a single member entity known as West 40. Nor was there an intergovernmental agreement between the TTO and the other districts, including LT, authorizing the TTO to spend district money – which it did every year – on the outsourcing of its own business functions to various accounting firms and outside contractors.

Indeed, the TTO entered into very few agreements, and almost none of them truly are intergovernmental cooperation agreements. The only true intergovernmental cooperation agreement seems to be one involving the creation of a new "cooperative venture": the Intergovernmental Cooperative Agreement of the Lyons Township Elementary School Districts' Employee Benefit Cooperative. This cooperative is a newly created government entity that fits squarely within the intent of the Act. However, there was no such cooperative governmental venture created by the agreement to pay LT's business costs in our case.

Both LT Board Member Todd Shapiro and LT Business Manager Beckwith, who both had vast experience in school district management, will testify that no intergovernmental agreement was necessary for this arrangement. The TTO already had the statutory authority to perform business functions for LT and the other districts, and to pay both employees and non-employees of the TTO to perform those business functions.

Moreover, in 2000, the TTO and LT already had a joint governmental venture – the TTO system itself. Unlike, for example, a city that wants to take over or share a roadway with an adjacent city, the TTO and its member districts' financial functions already were tied together by membership in an organization and a set of governing statutes. Under Illinois law, the TTO by

statute served as the fiscal agent for LT: "trustees of schools are the fiscal agents for the business of their townships, of which the funds of the various school districts are a part, and, as such, have the management of such funds and financial affairs." *Lynn v. Trustees of Schools*, 271 Ill.App. 539, 547 (4th Dist. 1933) (persuasive authority).

E. The TTO's Damage Computations Violate the Statute of Limitations.

LT disputes the computation of the damages that the TTO seeks in the Pro Rata Expenses Claim because the TTO's misapplies the 10-17-2018 cutoff date for the statute of limitations.

On July 31, 2019, this Court entered an order granting LT's motion for reconsideration on the statute of limitations issue. The Court ruled "that the 5-year statute of limitations applies to the TTO's claims in this case per LT's motion." The TTO filed this case on 10-16-2013. Five years prior to that date is 10-17-2008. However, the TTO seeks damages for its Pro Rata Expenses Claim for many expenses incurred prior to the limitations cutoff date.

The TTO's Pro Rata Expenses Claim is based on Section 8-4 of the School Code, 105 ILCS 5/8-4. Section 8-4 provides, in pertinent part:

> Each elementary school district, community high school district and township high school district … shall pay a proportionate share of the compensation of the township treasurer serving such district or districts and a proportionate share of the expenses of the township treasurer's office, which compensation and expenses shall be determined by dividing the total amount of all school funds handled by the township treasurer by such amount of the funds as belongs to each such elementary school district or high school district.

Section 8-4 is silent on when or how frequently a treasurer should or may bill the districts for compensation and expenses. However, Section 8-4 plainly provides that a district's financial obligation to the TTO arises when the expenses (and compensation) are incurred, and not at some future time.

Likewise, Illinois law applies the statute of limitations cutoff to expenses based on when those expenses were incurred – and not when they were paid, when they were assigned, or when

the payor sought to be compensated by another party for those expenses. The decision in *Reimers v. Honda Motor Co.*, 150 Ill. App. 3d 840, 843-44 (1st Dist. 1986), is instructive. While the *Reimers* case concerns medical expenses, the holding is equally applicable in the present case.

In *Reimers*, an accident victim sought to recover medical expenses incurred on the date of the accident. *Id.* The Court held that the claim was time-barred, because the limitations period ran from the date of the accident, when the medical expenses were incurred. *Id.* The Court rejected plaintiff's argument that the limitations period should be extended because plaintiff's parents – at a later date – assigned to him their derivative rights to recover medical expenses that they incurred on plaintiff's behalf (*id.*):

> In the instant case, the accident out of which the parents' derivative action arose occurred on June 26, 1982. Plaintiff's complaint was filed on July 5, 1984, 11 days after the expiration of the statute of limitations on the parents' derivative action. Plaintiff's derivative suit to recover for medical costs is thereby barred by the statute of limitations…. If the plaintiff here was allowed to proceed with the assigned cause of action, which would otherwise be time barred, the effect would be to allow assignment of any cause of action to a minor or to anyone under a legal disability, thereby circumventing the applicable statute of limitations. Accordingly, we hold that a derivative cause of action for recovery of medical expenses is barred by the statute of limitations if it is not filed within two years of the occurrence causing the injury.

At trial, the TTO will seek damages based on expenses the TTO incurred prior to 10-17-2018 in two separate ways. First, the TTO will seek damages based on expenses incurred in the TTO's FY2008, which ran from 7-1-2007 to 6-30-2008. The TTO's damages claim for LT's share of the TTO's FY2008 expenses is $245,177.

All of the expenses that the TTO incurred in FY2008 pre-date the statute of limitations cutoff date of 10-17-2008 by several months. However, the TTO contends that it may seek to recover LT's share of the FY2008 expenses because the TTO did not bill for those expenses until 6-9-2009. The long delay of almost a year in billing LT and the other school districts was not an

anomaly. For reasons that LT has never understood, the TTO always took (and still takes) almost a full year to add up its expenses and send an annual invoice to the districts.

Second, the TTO will seek damages for expenses incurred in the TTO's FY2009, which ran from 7-1-2008 to 6-30-2009. The TTO did not bill LT for those expenses until 5-20-2010. The expenses that the TTO incurred in FY2009 during the period 7-1-2008 to 10-16-2018 pre-date the statute of limitations cutoff date of 10-17-2008. LT does not know what portion of the FY2019 expenses were incurred from 7-1-2008 to 10-16-2008, because the TTO's claim for FY2009 is based solely on a letter with a bottom-line figure for LT's share ($289,560.14). The TTO has made no effort to break down the FY2009 expenses based on the limitations cutoff date, despite being on notice of this issue for at least several months.

Under Section 8-4 and the *Reimers* case, the TTO's rights under Section 8-4 to proportionate reimbursement from LT – if any – arose when the compensation and expenses were incurred, and not when the TTO got around, almost a year later, to billing the districts for those expenses. The TTO's theory that it can revive time-barred occurrences by sending out an invoice for them is not supported by Illinois law – and if true, it would allow any creditor to defeat the statute of limitations simply by sending out a new bill for expenses incurred years earlier, which is a manifestly unjust result.

Accordingly, the FY2009 expenses incurred from 7-1-2008 to 10-16-2018 pre-date the statute of limitations cutoff date. The TTO's claim for FY2009 expenses is based solely on a bottom-line figure for LT's share ($289,560.14). Unless the TTO can break down the FY2009 expenses by date, the most that the TTO can recover for the Pro Rata Expenses Claim (through FY2012) are LT's shares of the FY2010-12 expenses, which total $686,251.

In opposition to the Pro Rata Expenses Claim, LT also raises the affirmative defenses of laches and the voluntary payment doctrine, both addressed below.

II. THE TTO'S PRO RATA EXPENSES CLAIM (FY2013-18)

There are additional fiscal years, FY2013-18, that does not involve the setoff issue. In those years, LT's paid for a majority of the TTO's pro rata expense invoices, and explained to the TTO in writing each year why LT was not paying the invoices in full. Essentially, the TTO paid only for its share of the TTO's "operational costs," a term that the TTO itself uses to describe its expenses of office that does not include attorneys' fees and special software expenses. LT's position is that Section 8-4 only requires LT to pay a share of the Treasurer's compensation and "expenses of the Treasurer's office," which LT views as operational costs.

LT always objected to being charged for a share of the TTO's costs of suing LT. These legal costs are not expenses of the Treasurer's office under the provisions of Section 8-4 of the School Code because the Trustees incurred them, and they are not office expenses.

Nor are they expenses based the American Rule on recovery of attorneys' fees. Illinois law does not a party to recover its fees from an opponent without express statutory authority: "Generally, Illinois courts follow the 'American Rule,' which provides that each party must bear its own attorney fees and costs, absent statutory authority or a contractual agreement…. [A] statute or contract must allow for attorney fees by specific language, such that the provision at issue must specifically state that 'attorney fees' are recoverable." *Bank of Am. v. WS Mgmt.*, 2015 IL App (1st) 132551, ¶119-20. While this Court recently held that the American Rule was not an affirmative defense, the Court allowed LT to raise this principle in opposition to the TTO's claim.

Moreover, although Illinois law allows the TTO to hire private attorneys to pursue legal claims on behalf of all the member school districts as against third parties, *Lynn*, 271 Ill.App. at

547, no statute allows the TTO to bill LT for the costs of being sued by its own fiscal agent.

LT's deductions from the pro rata invoices for FY2013-18 for non-operational costs total $642,703. These deductions were spelled out in letters that LT provide the TTO. The deductions were based on both the non-operational nature of the expenses and the failure of the TTO to justify and document the contested expenses – and not on second-guessing of the TTO's business judgments, as the TTO now claims.

Of the $642,703 that LT contested and deducted from its payments, about $400,000 was for LT's share of the costs of being sued (the TTO's attorneys' fees and costs in this case), and about $170,000 was for the purchase and use of financial software that LT cannot and does not use, and that was beyond the TTO's statutory authority to purchase. See section 5-17 of the School Code, 105 ILCS 5/5-17, which only authorizes the TTO to pay for "the cost of a record book," not hundreds of thousands of dollars in software licensing, training, and programming costs that LT cannot even use.

LT notes that the TTO has tried repeatedly to distinguish the TTO's Trustees from its Treasurer, and has claimed that they operate separately under different governing statutes. That is why the TTO now calls itself the generic term "Plaintiff." By the TTO's own admission, the litigation costs of the three different law firms and its many litigation experts and consultant (like the Legacy accountants, Kelly Bradshaw, and the Jascula PR firm) are expenses of the Trustees, and not the Treasurer. Nor are they "office expenses" within the meaning of Section 8-4; by the TOT's own admission, they are not "operational costs." It would be grossly inequitable for LT to prevail mostly or entirely in this case, only to be required to pay 25% of the TTO's attorneys' fees and costs.

The TTO already spent over $2 million in fees and expenses on this case, and its maximum

recovery is much less than that amount. LT's deductions from the FY2013-18 invoices were legal and proper.

III. THE TTO'S AUDIT PAYMENTS CLAIM

The TTO's Audit Payments Claim seeks recovery from LT of payment that the TTO made to the audit firm Baker Tilly for LT's annual audits, based on invoices that LT provided to the TTO for payment. Since at least the early 1990s, and through 2012, the TTO made these payments to Baker Tilly knowingly and deliberately, and the TTO's Trustees and the Treasurer were fully aware they were for LT's audits. Now, the new leadership at the TTO is unhappy with that arrangement and wants LT to repay these amounts.

The evidence will show that the TTO hired an accounting firm now known as Baker Tilly, and formerly known as William F. Gurie and Virchow Krause (collectively, "Baker Tilly"), to perform one big audit for the TTO and all the member school districts. This made sense because the books for all of the districts other than LT (which did its own accounting work) were maintained at TTO. This giant audit essentially was a two-stop-shopping process.

LT disputes the TTO's legal right to seek recovery of these audit payments; disputes certain of the factual bases for the TTO's claim; disputes the TTO's view on the application of the statute of the statute of limitations to this claim; and disputes the TTO's calculation of damages.

A. The Legal Basis for the Audit Payments Claim: Section 3-7

Throughout this case, the TTO's legal justification for the Audit Payments Claim was Section 3-7 of the Illinois School Code, 105 ILCS 5/3-7. Section 3-7 states, "Each school district shall, as of June 30 of each year, cause an audit of its accounts to be made…." This provision empowers the regional superintendent, in a district does not submit an audit, to pay for one and charge the cost back to the district. *Id.*

Illinois law prohibits courts from construing statutes to add conditions not expressly stated. "We cannot rewrite a statute under the guise of statutory construction or depart from the plain language of a statute by reading into it exceptions, limitations, or conditions not expressed by the legislature." *People v. Michelle J.*, 209 Ill.2d 428, 437 (2004).

Section 3-7 provides no support for the TTO's Audit Payments Claim. Nothing in Section 3-7 required LT to pay for its own annual audit. Nothing in Section 3-7 prohibited the TTO from paying for LT's audit. TTO's representative witness admitted this in her deposition and will admit these truths at trial.

The TTO's contends that because Section 3-7 authorizes the regional superintendent, when a district does not submit an audit, to order an audit and charge the district for it, that authorization implies that a district always must pay for its own audit. This argument violates the principles of statutory construction in *Michelle J.* Also, this argument ignores the fact that the office of the regional superintendent was abolished in 2010. Whatever grant of rights Section 3-7 might contain, it does not provide any statutory authority to the TTO.

B. The New Legal Argument: Section 8-4

Perhaps realizing that Section 3-7 does not support its claim, the TTO in September 2019 offered a new argument: that the payments to Baker Tilly were not an expense of the Treasurer's office under Section 8-4 because they were an expense of LT. The record will show that the TTO's Treasurer at the time treated the Baker Tilly payments as expenses of the treasurer's office; that the Trustees reviewed and approved those expenses on a regular basis; and that the TTO billed out these charges in its pro rata expenses invoices. LT cannot be accused of violating Section 8-4, given that the TTO's claim accuses itself violating Section 8-4. The TTO does not and cannot claim any fraud, duress, or mistake in making these payments.

C. The TTO's "Rogue Treasurer" Argument

While not a legal argument, the TTO contends that it can recover the disputed payments because the arrangement with LT was the work of a 'rogue treasurer.' The evidence at trial will show that the TTO's payment of audit costs was not done solely on Treasurer Healy's authority, and the Trustees were aware of and regularly approved these payments. The Trustees' examination and approval of the Treasurer's expenses – including the disputed audit fee payments – were mandated by the School Code: "At each regular meeting … the trustees of schools shall examine all books, notes, mortgages, securities, papers, moneys and effects of the corporation, and the accounts and vouchers of the township treasurer …." 105 ILCS 5/5-20.

Also, the TTO Trustees received communications specifically stating that the TTO paid for the audits of all the districts. An April 1999 letter that Healy sent to LT, with a copy sent to the Trustees, stated, "The trustees hire and pay for the audit of the school districts and the Treasurer's office in Lyons Township."

D. The TTO's Representations Concerning Payments for All Districts' Audits

The evidence at trial will show that the TTO repeatedly told LT – in letters and in oral conversations – that the TTO paid for the audits of all the districts. These representations are consistent with the understandings that both the TTO's Trustees and its Treasurer at the time.

Whether the TTO regularly paid for the audits of the districts other than LT is an open question. There certainly is evidence to suggest that some or most of the other districts paid for their annual audit costs, but it seems inconclusive and incomplete. Yet, this fact is irrelevant to whether the TTO may sue LT for the TTO's supposed violations of the School Code.

E. The TTO's Claimed Damages are Overstated.

LT disputes, on two grounds, the amount of damages that the TTO seeks for the Audit Payments Claim, which is $249,008.

Initially, the TTO's claim violates the statute of limitations. The TTO is trying to recover audit payments that it made to Baker Tilly prior to the statute of limitations cutoff date of 10-16-2018, under the theory that it did not bill the districts for those payments until the following year. This argument is contrary to the legal principle, set forth in the *Reimers* case discussed above, that the statute of limitations begins to accrue when an expense is incurred. The TTO's subsequent pro rata billing of the audit payments is not even what the TTO is complaining about in this claim.

The correct application of the statute of limitations limits the TTO's recovery to audit payments made before the cutoff date, which total $164,435.

Furthermore, because the TTO billed the districts for its payments to Baker Tilly in the annual pro rata invoices, the TTO already charged LT for its approximately 25 percent share of the disputed costs. This undisputed fact reduces the maximum amount of the TTO's damages on the Audit Payment Claim to $123,326.

IV. LT'S AFFIRMATIVE DEFENSES

LT's affirmative defenses are critical to a just resolution of this case. LT's Second Affirmative Defense: Statute of Limitations already prevailed, and its impact will be further refined through trial in this case.

Even if the TTO is able to prove one of its claims as set forth above, the application of LT's other affirmative defenses should bar the TTO from recovering under its Pro Rata Expenses Claim (to FY2012) or its Audit Payments Claim. These affirmative defenses do not apply to the TTO's Pro Rata Expenses Claim (FY2013-18).

A. First Affirmative Defense: Laches

Under Illinois law, "laches are applied when a party's failure to timely assert a right has caused prejudice to the adverse party. The two fundamental elements of laches are lack of due diligence by the party asserting the claim and prejudice to the opposing party. *Van Milligan v. Board of Fire & Police Comm'rs*, 158 Ill.2d 85, 89 (1994). "The applicability of *laches* to a given case lies within the discretion of the circuit court." *Richter v. Prairie Farms Dairy, Inc.*, 2016 IL 119518, ¶51. The evidence supporting a laches defense against a public entity must present "unusual or extraordinary circumstances," *Van Milligan*, 158 Ill.2d at 90. "[T]he existence of prejudice is so critical that in some instances, a court may impose *laches* on a claim brought before the statute of limitations has expired." *Renth v. Krausz*, 219 Ill. App. 3d 120, 122 (5th Dist. 1991).

This case does present unusual and extraordinary circumstances. LT's laches defense asserts that the TTO lacked diligence in pursuing its claims, given that the TTO – including its Treasurer and Trustees – knew the operative facts but chose not to file suit for over a decade.

On the Pro Rata Expenses Claim (to FY2012), but for the TTO's lack of diligence in filing suit, LT could have chosen to shift its business functions over to the TTO, as unpalatable as that might have been. Also, absent the setoff arrangement, LT could have sought legislative action to remove LT from the TTO's operation (which it did as soon as this arrangement ended).

On the Audit Payments Claim, the evidence will show that LT used Baker Tilly as its auditor only because the TTO selected that firm and paid for its audit work. Had the TTO filed suit earlier, LT could have competitively bid its audit work to save money. Also, the TTO's long delay in filing suit prevented LT from conducting its defense before critical witnesses like TTO Trustee Joseph Nekola and LT Business Manager Leon Eich died.

D. Third Affirmative Defense: Voluntary Payment Doctrine

"Under the voluntary payment doctrine, money voluntarily paid under a claim of right to the payment, and with knowledge of the facts by the person making the payment, cannot be recovered by the payor solely because the claim was illegal. Absent fraud, misrepresentation, or mistake of fact, money voluntarily paid under a claim of right to the payment, with full knowledge of the facts by the person making the payment, cannot be recovered unless the payment was made under circumstances amounting to compulsion." *Jenkins v. Concorde Acceptance Corp.*, 345 Ill.App.3d 669, 674-75 (1st Dist. 2003).

With respect to the Pro Rata Expenses Claim (to FY2012), the record shows that LT annually submitted to the TTO a claim for reimbursement for the costs of LT's business functions. Those annual claims included a detailed description of the employees who performed the business functions, their salaries and benefits, and any ancillary expenses. With full knowledge of the relevant facts, the TTO each year during that period made payment on LT's claims by agreeing to offset the costs of LT's business functions against LT's annual pro rata expense invoices.

With respect to the Audit Payments Claim, LT plainly expected the TTO to pay for LT's audit expenses, and so did Baker Tilly, as shown by the submission of invoices to the TTO for payment. Those invoices described the work that Baker Tilly did for LT. With full knowledge of the facts, the TTO issued payment.

The TTO did not make these payments or setoffs due to any fraud, coercion, or mistake of fact. Furthermore, as this Court recognized in denying the TTO's last-minute motion to dismiss this affirmative defense, the TTO Trustees either knew or should have known about these setoffs and payments based on their statutory duty, cited above, to examine and approve the records and expenses of the Treasurer – which they did regularly at TTO Board meetings.

V. LT'S FIDUCIARY DUTY COUNTERCLAIM (COUNT II)

Count II of LT's Counterclaim charges LT with several breaches of fiduciary duty. "To state a claim for breach of fiduciary duty, a plaintiff must allege the existence of a fiduciary duty, the breach of that duty, and damages proximately caused therefrom." *Duffy v. Orlan Brook Condominium Owners' Ass'n*, 2012 IL App (1st) 113577, ¶17. In this case, the TTO is charged with acting as the fiscal agent of LT. The TTO holds and manages over $40 million of LT's funds in an agency account. In addition, the TTO incurs expenses as LT's fiscal agent that it charges to LT and the other districts in annual billings. The relationship between the TTO and LT therefore is fiduciary in nature, and the TTO has admitted this fiduciary relationship in writing. As LT explained in its response to the TTO's recent motion to dismiss Count II, there is no basis in Illinois law for the TTO's claim that it is exempt from fiduciary duty actions.

LT's fiduciary duty count has four parts. First, LT seeks to recover its share of insurance proceeds totaling $1,040,000 that the TTO recovered on fidelity bond claims. The TTO made these claims based on Healy's theft of money belonging to the school districts, including LT. The TTO failed to distribute any of these proceeds to the districts. LT will show that this failure constituted a breach of the TTO's fiduciary duties to LT, and that the TTO's positions on how it claims to have spent the proceeds are legally invalid.

In June 2014, LT's proportionate share of revenues for FY2014 was 21.6674%. Accordingly, LT was and is entitled to have its agency account credited with a 21.6674% of the $1,040,000 recovery, which is $225,341.

Second, LT seeks to force the TTO to credit LT's account with LT's full investment earnings. Section 8-7 of the School Code required that for the TTO's investment of the school districts' funds, "the earnings from such investment shall be separately and individually computed

and recorded, and credited to the fund or school district …" This statute does not allow the TTO to credit LT with 'most' of its investment earnings, which is what the TTO plainly has done. The TTO owes LT $223,901 in uncredited net investment earnings (which are net of the TTO's investment-related expenses).

Third, LT seeks to have its agency account credited with an unrestricted share of the approximately $1.5 million that the TTO illegally pledged as collateral for the West 40 loan. The collateral, as yet, has not been collected due to any default. The loan was made to an educational entity called West 40, and the TTO provided the collateral without LT's authorization and based on the TTO's false representation that it owned the collateral.

Fourth, LT asserts that the TTO incurred excessive and unreasonable attorneys' fees and expenses in this litigation, and to the extent that these fees can be considered Section 8-4 expenses, the TTO's breach of fiduciary duty in incurring these fees should absolve LT of having to pay a share of them (which amounts LT already deducted from its pro rata expense invoices for FY2013-18, as discussed above).

The TTO spent over $2 million in attorneys' fees in a case in which its maximum recovery in under $2 million. The TTO's President, in 2013, threatened to hold LT hostage in a lawsuit, and the TTO has done so for over 6 years. While the TTO contends that LT has an obligation to identify every instance in which the TTO incurred excessive fees, that information could be had only from an analysis of the TTO's invoices for legal work, which the TTO refuses to produce. The TTO represented to this Court that it produced its records of legal costs for this case, but in fact the TTO provided only cover sheets for its legal bills through July 2018 – a year and a half ago.

VI. LT'S DECLARATORY RELIEF COUNTERCLAIM (COUNT III)

In Count III, LT asks this Court to make declaratory determinations on the parties' rights and duties with respect to several provisions of the School Code that govern their relationship. Actual controversies exist between the TTO and LT concerning their respective rights, powers, and obligations under the School Code and the transactions addressed in this Count III. Section 2-701 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-701, authorizes this Court to make binding declarations of the parties' respective rights and obligations, having the force of final judgments, and to grant such further relief as this Court deems just and proper.

First, Section 8-7 of the School Code, as quoted above, requires the TTO to account separately for LT's funds and to credit LT with the full amount of its investment earnings. The TTO must comply with the statute on a forward-going basis and stop retaining net investment earnings for its own use. This is not a 'political' question, as the TTO claims, but simply a matter of the TTO complying with the School Code and no longer skimming from LT's investment earnings.

Second, no provision of the School Code authorizes the TTO to divert investment earnings belonging to the member districts to pay alleged investment-related expenses. As LT has long requested, the TTO must include its hefty investment-related expenses in its pro rata expenses invoices in order comply with Section 8-4 of the School Code (discussed above) and to stop artificially deflating the true costs of the TTO's operations in reporting to the districts that the TTO is intended to serve.

Third, for many years, the TTO has operated at a deficit. No provision of the School Code authorizes the TTO to operate with a deficit. The TTO finances its deficit by borrowing money from the member districts without their authorization. This borrowing is called Advances to

Township Treasurer in the TTO's audited financial statements. No provision of the School Code authorizes the TTO to borrow money from LT and the Other Districts. Furthermore, the TTO has threatened to charge LT for the TTO's claimed structural deficit. No provision of the School Code authorizes the TTO to charge LT for any amount related to a claimed structural deficit. The TTO should be barred from following through on its credible threats, made directly to this Court, to take money from LT's agency account to pay for all or part of the TTO's claimed deficit.

Fourth, the TTO has threatened to unilaterally, and without authority from this Court, take money from LT's account at the TTO to satisfy monetary claims that the TTO has asserted against LT. Section 8-16 of the School Code, 105 ILCS 5/8-16, provides as follows:

> The school treasurer shall pay out funds of the school district only upon an order of the school board signed by the president and clerk or secretary or by a majority of the board, except payment of the obligations for Social Security taxes as required by the Social Security Enabling Act and payment of recurring bills, such as utility bills, may be made upon a certification by the clerk or secretary of the board of the amount of the obligation only.

In addition, 105 ILCS 5/8-17, which sets forth the duties of the Treasurer, limits the Treasurer's spending power as follows: "Pay all lawful orders issued by the school board of any district in his township." 105 ILCS 5/5-17 limits the spending power of the Trustees as follows: "1. The compensation of the treasurer. 2. The cost of publishing the annual statement. 3. The cost of a record book, if any. 4. The cost of dividing school lands and making plats." Likewise, Section 5-25 of the School Code requires that the Trustees "shall cause all moneys for the use of the school districts to be paid to the proper treasurer thereof." 105 ILCS 5/5-25.

No provision of the School Code authorizes the TTO to make unilateral withdrawals, adjustments, ledger entries, disbursements, or other reductions to the amounts of LT's funds held at the TTO. The TTO must be barred from carrying forward with its credible threats, made in front of this Court, to take money from LT without authorization. Again, this is not an effort to question the

TTO's 'business judgment'; this is an effort to prevent the TTO from misappropriating LT's money. When the TTO talks about making some innocuous-sounding 'bookkeeping adjustments' to LT's account (which the TTO apparently thinks is too rich), this is just a nice way of describing an illegal taking of funds that should be prevented before it occurs.

Fifth, the TTO had no legal right under the School Code to use LT's funds, without authorization, as part of the collateral for the West 40 loan. The TTO must correct its illegal risk that it caused to LT's funds by placing them at risk of principal loss in a deal in which the TTO claimed ownership of LT's funds in sworn loan documentation.

Sixth, Section 8-4 of the School Code requires each district to "pay a proportionate share of the compensation of the township treasurer … and a proportionate share of the expenses of the township treasurer's office." 105 ILCS 5/8-4. In the pro rata expense invoices that the TTO sent LT for fiscal years 2013 through the present, the TTO has included the attorney's fees and litigation costs associated with the cases that the TTO filed against LT. The TTO has charged LT for about 20-25 percent of the TTO's attorneys' fees. As explained above, The TTO's attorneys' fees are not operational costs of the Treasurer's office, and therefore are not proper expenses under Section 8-4.

Also, the American Rule on the recovery of attorneys' fees from opponents in litigation, which Illinois has adopted, prohibits the TTO from recovering its fees from LT because Section 8-4 does not specifically mention or authorize the recovery of attorneys' fees, and because no contract authorizes such recovery. The TTO must be barred, on a forward-going basis, from charging LT for a portion of the TTO's attorneys' fees and expenses incurred in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Jay R. Hoffman, an attorney, certifies that on December 8, 2019, he caused the foregoing pleading to be served by email and eService on the following attorneys:

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