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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,	)	No. 13 CH 23386
Plaintiff and Counter-Defendant,	)	
v.	)	Hon. Jerry A. Esrig
LYONS TOWNSHIP H.S. DISTRICT 204,	)	Commercial Calendar S
Defendant and Counter-Plaintiff.	)	(Transferred to Law)

LT'S TRIAL BRIEF

This is the trial brief of Defendant and Counter-Plaintiff Lyons Township High School District 204 ("LT"). This trial brief outlines the legal and factual issues involved in the claims of Plaintiff and Counter-Defendant Township Trustees of Schools ("the TTO"); LT's affirmative defenses to the TTO's claims; and LT's counterclaim. LT begins with an overview of the parties and their claims, followed by a more detailed review of the contested issues involved.

I. INTRODUCTION: THE PARTIES INVOLVED IN THIS CASE.

The TTO represents an obscure and mostly eliminated layer of government. By statute, the TTO hold the funds and handles the investments of school districts and other educational entities in its jurisdiction. This office was necessary 100 years ago, when accounting was more difficult to manage for school districts. In 1962, Illinois eliminated all of the school treasurer organizations statewide, except for those in suburban Cook County – which were kept for their political power. Even within suburban Cook County, most townships – like New Trier Township – long ago eliminated their school treasurer's organizations by statutory amendment.

LT operates a large public high school in LaGrange. LT is the largest school within the TTO and one of two high schools. LT owns about 25 percent of the assets at the TTO, making it

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the largest member by assets. LT has been an involuntary and unsatisfied member of the TTO for many decades. LT long has had concerns about the competence and capabilities of the TTO and its staff. LT decided decades ago to perform its own accounting services and still does.

In 2012, LT's worst fears were realized when the long-serving TTO Treasurer, Robert Healy, was caught stealing over $1 million in funds belonging to LT and the other districts within the TTO. We will never know how much Healy stole, as the TTO refused the requests of LT and other districts in 2012 and 2013 to perform a comprehensive forensic audit of the TTO's finances. Healy went to prison for his crimes. The Chicago Tribune, the local LaGrange newspaper, and the LaGrange League of Women Voters all have called for the abolition of the TTO and the return of school funds to the school districts.

In late 2012 and 2013, a new group took over the TTO's operations, led by TTO Board of Trustees President Michael Thiessen. Thiessen and the new leadership became convinced that Healy had gone behind the backs of the TTO Trustees to reach illegal financial arrangements with LT. They reached these conclusions without speaking with any of the former TTO Trustees, with Healy, or with any of the LT personnel who worked with Healy and the TTO on these arrangements. At trial, LT will present documents and testimony showing that Healy informed the TTO Board of his actions in person, in meeting minutes, and in letters; that the TTO Board regularly reviewed and approved the organization's finances; and that the TTO Board voted unanimously to confirm the major agreement with LT that is involved in this case.

Prior to filing the lawsuit in 2013, Thiessen demanded money from LT and threatened to hold LT hostage in a lawsuit. The TTO succeeded in that goal, and this case has dragged for over seven years, with multiple delays in discovery, motion practice, and trial dates. The TTO, through the summer, has spent over $3.3 million in legal costs in this case, about a quarter of which the

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TTO has sought to recoup from LT through expense invoicing. Every year, the TTO sends LT an annual bill that exceeds $300,000 for services that LT does not want and does not use.

In 2018**,** the State legislature passed a law allowing LT to leave the TTO – but only after this litigation is over. This is why LT has been so eager to complete the trial of this case, and why the TTO kept delaying the case. Not surprisingly, LT wants to resolve the pending claims expeditiously; depart the TTO as soon as possible; stop paying hundreds of thousands of dollars to the TTO annually; and start managing its own funds like almost every other high school in Illinois does. Resolving the TTO's claims is the first step toward LT achieving financial independence and protecting its public funds from any future malfeasance.

II. INTRODUCTION: THE TTO'S CLAIMS IN THIS CASE.

The TTO has three main claims in this case: the Audit Payments Claim; the Investment Earnings Claim; and the Pro Rata Expense Claim (which has two parts). The TTO asserts these claims as a single count for Declaratory Judgment. The TTO asks for a declaration that the Treasurer can deduct, from LT's agency account held at the TTO, the damages associated with these claims. LT provides a brief outline each of the TTO's claims and LT's defenses as follows:

A. Introduction to the Audit Payments Claim

There is no dispute that from at least 1993 through 2012, the TTO paid for the costs of LT's annual audit. The TTO admits that it made these payments knowingly and deliberately, and that it responded to its receipt of the invoices of the auditor Baker Tilly with checks for payment.

The TTO asserts in this case that its own payments to Baker Tilly violated Section 3-7 of the Illinois School Code. Section 3-7 states, in pertinent part, "Each school district shall, as of June 30 of each year, cause an audit of its accounts to be made …." 105 ILCS 5/3-7. This provision also empowers the regional superintendent, in the event a district does not submit an audit, to pay for

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an audit and charge the cost back to the district. *Id.* However, the regional superintendent's office was eliminated years ago.

The TTO contends that it is bringing this claim under Section 3-7 on behalf of the other school districts, and that this Court should award the TTO over $500,000 in damages. LT's response to this claim includes (but is not limited to) the following legal, factual, and affirmative defenses:

<u>Legal and Factual Defenses</u>

- Section 3-7 does not require LT to pay for its own audit, nor does it prohibit the TTO from paying for LT's audit
- No other provision of the School Code requires LT to pay for its own audit or prohibits the TTO from paying for LT's audit
- Section 8-4 of the School Code does not provide any legal support for this claim
- The TTO's representative deponent admitted that the TTO is unaware of any provision in the School Code requiring LT to pay for its own audit
- The TTO conducted multiple analyses of the amounts it paid for LT's audits and reached a variety of different results, making its damages claim unreliable
- The TTO's latest analysis of the audit payments was disclosed in October 2020 (upon the exchange of trial exhibits), which comes too late in the case to be accepted into evidence
- The TTO analyses include many years in which the TTO has no records of invoices or payments other than cryptic and incomplete ledger entries
- The TTO analyses include auditor charges for reconciliation and balancing work (to match the TTO's books with LT's), which work was the TTO's responsibility to have done and to pay for
- The TTO repeatedly represented to LT that the TTO was paying for the audits of all of the school districts – essentially, performing one big audit by one audit firm
- The TTO's claim that all of the other districts paid for their own audits is both irrelevant and at least partially disproven by the documentary evidence
- The TTO's claim that the other districts will receive any of the funds recovered on

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this claim is contrary to the TTO's past treatment of the districts and unlikely

- The TTO Board was aware of the TTO's payments of LT's audit costs, and the Board routinely examined the Treasurer's books and approved the Treasurer's expenditures at regular Board meetings

- The TTO's damages claim is overstated by 25%, given that the TTO included its audit payments in the pro rata expenses billed to LT and other districts (and LT had about a 25% share)

- The Audit Payments Claim has no viable basis, and LT intends to ask this Court to enter a finding against this claim at the close of the TTO's evidence pursuant to 735 ILCS 5/2-1110

Affirmative Defenses

- The TTO's claim is barred by the doctrine of laches due to the TTO's lack of diligence in objecting its own payments to Baker Tilly and the real prejudice to LT resulting from this late claim

- The TTO's claim is barred by the voluntary payment doctrine, as it involves money voluntarily paid under a claim of right, and with the TTO's knowledge of the facts of the payments

- A 5-year statute of limitations applies, and it reduces the maximum damages for this claim to less than $165,000 (before reduction for the 25% overstatement)

B. Introduction to the Investment Earnings Claim

The TTO pools the monies of LT and the other school districts into a pooled agency investment fund. Section 8-7 of the School Code provides that when Treasurers create a pooled investment fund, "the earnings from such investment shall be separately and individually computed and recorded, and credited to the fund or school district …." 105 ILCS 5/8-7.

There is no dispute in this case that for the relevant period from 1994-2012, the TTO has no idea (a) how much money the TTO actually earned on its pooled investment fund each year, or (b) how much of those earnings should have been separately computed, recorded, and credited to LT's agency account each year. The TTO's expert admits that the TTO's financial records are too

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incomplete to determine the TTO's actual investment earnings.

The TTO claims that its own credits to LT for investment earnings violated Section 8-7. The TTO contends that LT allegedly received too large a share, relative to the other districts, of the investment earnings that the TTO claims were distributed. The TTO says it seeks to recover funds under Section 8-7 for the benefit of the other districts, and it asks this Court to award damages in excess of $1.5 million. LT's response to this claim includes (but is not limited to) the following legal, factual, and affirmative defenses:

Legal and Factual Defenses

- Section 8-7 required the TTO to compute, record, and credit the school districts, separately and individually, with their full investment earnings that the TTO received on the pooled funds
- Section 8-7 required the TTO to compute, record, and credit LT – fully and individually – with its share of investment earnings
- Section 8-7 does not authorize the TTO to sue LT for allegedly receiving a disproportionate amount of credited income when that the credited income is not based on actual earnings
- The TTO's staff and its expert admit they have no idea how much money the TTO actually earned in investments on the pooled agency fund
- The TTO's staff and its expert admit they have no idea how much money LT actually was entitled to be credited for in investment earnings
- The TTO's crediting of investment income during these years was arbitrary and was not supported by source documentation of earnings
- The TTO's expert witness analysis, which is based on an internal TTO analysis, is improper, unreasonable, and based on faulty assumptions and incomplete reviews
- The TTO's analysis is not based on source documents like bank and investment statements and therefore is unsound
- The TTO's analysis is based on unreliable internal documentation, including handwritten estimates that were subject to revision and were replete with errors and inconsistencies

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- The TTO's analysis ignores the TTO Financial Statements, which show the haphazard nature of the TTO's crediting of investment income and that the TTO's allocated earnings to the districts were much less than actual earnings

- The Investment Earnings Claim has no viable basis, and LT intends to ask this Court to enter a finding against this claim at the close of the TTO's evidence pursuant to 735 ILCS 5/2-1110

Affirmative Defenses

- The TTO's claim is barred by the doctrine of laches due to the TTO's lack of diligence in objecting to these investment earning credits dating back 15 years and the real prejudice to LT resulting from this late claim

- The TTO's claim is barred by the voluntary payment doctrine, as the claim involves money voluntarily credited under a claim of right and with the TTO's knowledge of the facts

- The application of the applicable 5-year statute of limitations reduces the TTO's damages claim to zero

C. Introduction to the Pro Rata Expense Claim (FY2000-12)

The TTO claims that LT failed to make payments to the TTO for its pro rata share of the expenses of the Treasurer's office. 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."

The Pro Rata Expense Claim has two parts. First, the Pro Rata Expense Claim (FY2000-12) is based on the parties' agreement that LT would pay for the costs of LT's business services – which was work that LT did for itself, unlike the other districts. The TTO and LT handled the payment for these services as a setoff against the pending annual pro rata expense invoice that the TTO sent to LT. In the negotiations, the TTO specifically represented to LT in writing – with copies to the TTO Trustees – that this arrangement would not involve any deviation from Section 8-4 and would not require an intergovernmental cooperation agreement.

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This agreement, which both Boards approved and which was reaffirmed annually, ended in 2013 after the new leadership of the TTO took charge. The internal records of the TTO confirm that the TTO incorporated the agreed setoff into its pro rata expense accounting for 13 years. LT's Fifth Affirmative Defense of Setoff (originally pled as Count I of the Consolidated Counterclaim) frames this dispute. The TTO claims a right to damages for the Pro Rata Expenses Claim (FY2000-12) of just over $2.5 million.

Second, the Pro Rata Expense Claim (FY2013-19) is based on LT refusal to pay for certain expenses that it contends are unauthorized by statute and law. These deductions from the pro rata expense invoices are not based on the setoff issue. We address this second claim part later on.

LT's response to first part of the Pro Rata Expense Claim (FY2000-12) includes the following legal, factual, and affirmative defenses:

Legal and Factual Defenses

- The TTO and LT never rejected, changed, or adjusted the statutory obligations of LT under Section 8-4 of the School Code, as the TTO now claims
- In 1999 and 2000, Healy informed the TTO Board that he was negotiating with LT on the TTO's payment for the costs of LT's business and accounting functions like payroll, accounts receivable, and computer recordkeeping
- In 2000, LT provided the TTO with a memorandum detailing the types and amounts of LT's costs that the TTO would pay under the parties' arrangement
- In March 2000, the TTO Board unanimously confirmed LT's proposal in an unambiguous vote recorded in written minutes
- The TTO's current position, that the TTO Board vote to "accept" the proposal of LT is unclear, and that the vote just acknowledged physical receipt of LT's proposal, is belied by the record evidence and is irrational
- In June 2000, the LT Board voted unanimously to confirm the parties' arrangement
- The parliamentarian witness that the TTO presents as an expert cannot offer valid expert testimony on the meaning of the disputed minutes or the votes taken

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- The parliamentarian's opinions are not supported by her own publications or by the other minutes of the TTO

- In 2001, the TTO expressly acknowledged to LT in writing the continuing nature of the parties' arrangement

- The TTO Trustees were aware of this continuing arrangement

- The TTO Board had a statutory duty to review the records of the Treasurer, and it voted regularly to approve the Treasurer's finances – which included the agreed setoffs to the pro rata expense invoices

- The LT Board annually approved the setoffs to the TTO invoices

- The internal records of the TTO confirm that the TTO incorporated the agreed setoff into its pro rata expense accounting for 13 years

- The TTO's position that the parties' agreement required a formal intergovernmental agreement is not correct and is not consistent with the TTO's practices

- The TTO's position that any agreement between the TTO and LT must be based on a signed document is contrary to Illinois contract law

Affirmative Defenses

- Based on the parties' conduct, LT is entitled to a setoff against the entire amount of the TTO's Pro Rata Expenses Claim (FY2000-12)

- The TTO's claim is barred by the doctrine of laches due to the TTO's lack of diligence in objecting to the setoffs for LT's business costs for 13 years and the real prejudice to LT resulting from this late claim

- The TTO's claim is barred by the voluntary payment doctrine, as the claim involves money voluntarily credited to LT for its business costs under a claim of right and with the TTO's knowledge of the facts

- The application of the applicable 5-year statute of limitations limits the TTO's maximum recovery to the invoices issued for FY2010-12, which are $686,626

D. Introduction to the Pro Rata Expense Claim (FY2013-19)

The TTO's Pro Rata Expense Claim (FY2013-19) is based on LT's refusal to pay for certain expenses that it contends are unauthorized by statute and law. The TTO acknowledges that

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the TTO ended the parties' setoff arrangement for the pro rata expenses invoice for purposes of FY2013, which invoice the TTO sent out in 2014. Each year in this later period, LT deducted from the TTO invoices the pro rata costs of the TTO's legal fees (for a total of about $467,000); the costs of the TTO's financial software (about $218,000); and a few other expenses (about $79,000). All of LT's deductions total to about $765,000.

LT's response to Pro Rata Expense Claim (FY2013-19) includes (but is not limited to) the following legal and factual defenses:

- The legal costs that the TTO incurred in this case are not expenses of the treasurer's office and thus cannot be invoiced under Section 8-4
- The American Rule on the recovery of attorney's fees prohibits the TTO from charging LT, its opponent in litigation, with the TTO's legal costs because Section 8-4 does not specifically authorize the charging of attorney's fees
- Section 5-17 of the School Code, which authorizes the Treasurer to incur "the cost of a record book," is over 100 years old and does not authorize the spending of money with district approval on accounting software licensing, programming, and training
- The TTO failed to justify the other expenditures of the TTO that LT deducted, despite LT's requests for documentation and information

III. INTRODUCTION: LT'S COUNTERCLAIM IN THIS CASE.

LT's counterclaim accuses the TTO of committing several breaches of the TTO's fiduciary duties to LT. Remarkably, despite holding tens of millions of dollars for LT and serving as LT's fiscal agent, the TTO contends that it owes no fiduciary duties to LT and the other districts. Instead, the TTO contends that it somehow owes fiduciary duties to the taxpayer base for their school districts. This current position is contrary to the TTO's own documentation and was contrived solely to avoid liability in this case.

LT asserts that the TTO breached its fiduciary duties to LT through the following conduct:

1. The TTO failed to credit LT with its share of insurance recoveries that the TTO received

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from fidelity bonds. The TTO insurance claims asserted that Healy stole money belonging to LT and the other districts. The TTO never distributed a dollar of these recoveries. The TTO contends that it spent or allocated this money for the benefit of the districts, but these contentions are contrary to the statutory requirements of the School Code and are internally inconsistent. LT seeks damages of $225,341 for this breach.

2. Since 2013, the TTO has failed to credit LT with its full investment earnings. Instead, the TTO credits LT for only most of its earnings, and claims that it retains the rest in some unassigned portion of the investment pool. In reality, the TTO keeps the extra earnings and uses them however it pleases. The TTO's conduct violates Section 8-7 of the School Code. LT seeks damages of $253,855.95 for this breach.

3. The TTO pledged $2.5 million in school district funds as collateral for a loan to an educational entity known as West 40. The TTO thereby exceeded its authority under the School Code. After LT sued the TTO on this loan deal, the TTO and West 40 got this loan paid off and the collateral released. While LT seeks damages of $4,590.12 for lost investment earnings resulting from this deal, LT really is trying to stop the TTO from organizing another illegal loan deal that puts LT's principal at risk. LT will be satisfied with a favorable finding and a nominal damages award.

4. In this case, the TTO has incurred a highly excessive amount of legal costs. Through the summer of 2020, those costs exceed $3.3 million. The TTO has hired four lawyers at two law firms to drag this case out for seven years. The TTO has done so because it does not have to pay its own legal costs, and simply bills them through to the districts. The unreasonable nature of these costs constitutes a breach of fiduciary duty that should relieve LT of any responsibility for paying a quarter share of them.

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IV. THE TTO'S AUDIT PAYMENTS CLAIM

With those introductions, LT provides this Court with the legal authorities governing the many claims at issue and the facts that LT expects to be presented at trial. LT begins with the TTO's Audit Payments Claim. LT realizes that this trial brief is very long, but the claims go back 27 years from today and involve both multiple claims, millions of dollars, and several unique questions of law. LT appreciates the Court's patience and understanding.

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.

The parties' arrangement on the TTO's payment for LT's audit costs extended for 13 years, during which time the TTO never voiced a single word of complaint or concern. The TTO always treated these costs as a TTO expense. After Healy left in 2012, a new group took over the TTO. Prior the FY2013 annual audit, the TTO informed LT that it would no longer pay for LT's annual audit. LT immediately ended its relationship with Baker Tilly and hired a new accounting firm.

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

Since the start of this case, the TTO's legal basis for the Audit Payments Claim has been 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:

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"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). "It is a basic rule of statutory construction that, "by employing certain language in one instance and wholly different language in another, the legislature indicates that different results were intended." *People v. Mary Ann P.*, 202 Ill.2d 393, 409 (2002).

Section 3-7 is not a valid basis for the 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 deponent, Dr. Susan Birkenmaier, admitted on behalf of the TTO that the TTO is unaware of any School Code provision requiring LT to pay for its own audit.

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 Supreme Court's principles of statutory construction stated in *Michelle J.* and *Mary Ann P.* because it invites this Court to rewrite Section 3-7 by adding a condition that simply does not exist, and thereby graft one sub-provision's requirement onto another.

Also, this argument ignores the fact that the office of the regional superintendent was abolished long ago, and that this sub provision is obsolete. The TTO cannot explain how a provision that grants authority to a regional superintendent of schools – in circumstances not present here – can be construed as providing statutory authority to the TTO.

B. The Other Legal Argument: Section 8-4

Perhaps realizing that Section 3-7 does not support its claim, in September 2019 the TTO

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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. Section 8-4 concerns the districts' obligations to pay for certain TTO expenses.

The evidence 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 actually accuses itself violating Section 8-4. The TTO does not, and cannot, claim that there was any fraud, duress, or mistake in making these audit payments. And this is not a claim that the Trustees are brining against its Treasurer for acting improperly under Section 8-4 – indeed, the TTO complaint says that "the Treasurer brings this action" to recover the audit fee 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." This argument would not provide any additional rights to the TTO under Section 8-4. Moreover, 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.

Indeed, the Trustees' examination and approval of the Treasurer's expenses – including 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.

D. The TTO's Representations on Paying for All District Audits

The evidence at trial will show that the TTO repeatedly told LT – in letters and in oral

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conversations – that the TTO paid for the audits of all the districts. For example, an April 1999 letter that Healy sent to LT, with a copy to the TTO Trustees, stated, "The trustees hire and pay for the audit of the school districts and the Treasurer's office in Lyons Township." In January 2001, Healy again wrote LT and stated, "Annual Audit. The trustees hire and pay for the audit of the school districts and the Treasurer's office in Lyons Township."

LT expects that Healy will testify at trial consistently with his deposition testimony, in which he explained that the TTO hired Baker Tilly to perform one big audit for the TTO and all the districts and "paid for the audits for not just LT, but the other school districts." Healy also noted that TTO Trustees approved all of the office's expenditures on an annual basis.

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 at least some audit costs, but this evidence is inconclusive and incomplete. Several months after her deposition in this case, former TTO Treasurer Birkenmaier conducted a review of the payment history by the other districts. However, the TTO will not call Birkenmaier as a witness in this case, so it remains to be seen what evidence the TTO will be able to produce at trial on this issue.

Even so, payments for audits of the other districts are irrelevant to whether the TTO may sue LT for the TTO's own supposed violations of the School Code.

E. The TTO's Damages Analyses are Flawed and Unreliable.

It appears that the TTO conducted five separate reviews of the TTO's records in an effort to determine what payments the TTO made to Baker Tilly for the annual audits of LT and the other districts. As stated in a March 8, 2013 letter from TTO Trustee Thiessen, the TTO claimed that it made $285,900.01 in payments for LT's audits. In an undated spreadsheet produced early in this case, the TTO revised its estimate to $473,174.85. In another undated spreadsheet produced later

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in this case, the TTO further revised its estimate to $511,068.60. In a July 17, 2017 affidavit of Birkenmaier (provided several months after her deposition), the TTO described another review of records that arrived at the same $511,068.60 figure for alleged payments for LT but included different figures for payments that the TTO admitted it made – and never sought to recoup – for the audits of other districts.

Then, on October 7, 2020 – one month before trial – the TTO produced for the first time the results of a new analysis that claimed payments for LT's audit costs of $550,566.62. LT objects to this last analysis being introduced into evidence at trial, as it comes far too late and violates the TTO's obligations to supplement its prior discovery responses. LT has had no opportunity to depose the TTO and ask questions about this new analysis.

What is especially concerning about all of these analyses is that an organization like the TTO that exists solely to perform financial and accounting services has reviewed its records over and over, at great expense to LT and the other districts, in order to arrive at different and ever increasing claims for damages.

Among the most significant flaws in the TTO's analyses is that while the TTO's claims date back to 1993, it is missing source records of invoices and payments for the earlier years (including FY1994, FY1995, and FY1996), and for some years in between (including FY2004 and FY2005). The sketchy nature of the TTO's records is a recurring theme in this case, and one of the many reasons why the application of the 5-year statute of limitations is just and necessary. The Court will hear that Baker Tilly's records only went back as far as 2006.

In addition, the TTO analyses include Baker Tilly's charges for balancing and reconciliation work. Essentially, this work involved squaring the TTO's books with LT's, and it had to be done because LT – unlike the other districts – did its own accounting. This work was

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separate from the work on LT's audit, and the TTO repeatedly has admitted in contemporaneous letters and sworn testimony that the TTO was responsible for completing and paying for the balancing and reconciliation work.

For example, in an April 1999 letter to LT, Healy noted that the TTO had to reconcile its books with LT's books to make sure they balanced. Healy described this as "an extremely complicated and time-consuming endeavor" and an "added responsibility" for the TTO. Healy sent his letter to the TTO Trustees. In sworn testimony in this case, the TTO's representative Birkenmaier acknowledged that the TTO used Baker Tilly for reconciliation and balancing work in conjunction with the TTO's audit, and that it was the TTO's responsibility to pay for that work.

Nevertheless, the TTO's analyses include the costs of the balancing and reconciliation work that Baker Tilly performed. Because the TTO is missing so many source records, it is impossible to know how much of the TTO's damages claim is comprised of balancing and reconciliation costs. This makes the TTO's entire analysis defective and unreliable.

F. Claimed Damages Overstated by 25%

In addition, the TTO inflated its damages computation for this claim by 25 percent. The TTO did so by not recognizing that the TTO billed LT for a pro rata share (of about 25%) of its office's expenses, and that those bills included the now-disputed audit costs.

The TTO admitted under oath that its payments for LT's audit costs were included in the office's expenses billed to the districts. The TTO also admitted that LT's annual share of these expenses was "roughly 25%." Accordingly, through the TTO's pro rata expense process, the TTO invoiced LT for a 25% share of LT's audit costs.

The TTO tried to work around these facts by arguing in a prior pleading that the TTO did not bill all of its expenses in all of these years. The TTO's theory apparently was that a double

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recovery from LT in this case would allow the TTO to catch up for allegedly unbilled expenses. It is unclear whether the TTO will make this argument at trial.

G. LT's Engagement Letters with Baker Tilly

The TTO also has argued because LT signed engagement letters with Baker Tilly, it must pay for its costs. As this Court will hear, while LT did sign these letters, it was the TTO that selected Baker Tilly to perform the audits for the entire TTO system. The fact that LT signed engagement letters with Baker Tilly does not mean that those engagement letters conferred any legal rights on the TTO, which did not sign the letters.

H. The TTO's Other Arguments

The TTO has other arguments that are not legal arguments and seem intended to be generalized fairness arguments. These arguments must have a recognized legal basis in order to be actionable, but LT will address them in any event.

The TTO argues that for this claim, as well as its other two claims, the TTO's books will not balance unless this Court rights a historical wrong and allows the TTO to recoup money from LT. The argument is belied by the evidence that this Court will hear at trial. In 2012, following the departure of Healy, the TTO refused the requests of LT and other districts to conduct a forensic audit. The TTO resisted these requests out of self-preservation: an audit only would reveal the disarray and debt of the TTO and lead to the dissolution of the TTO – along with the clout that comes with money management and jobs.

This Court also will hear that the TTO continues to borrow millions of dollars from the schools' funds to support its operations; that it now claims it underbilled for expenses for many years, but never informed the school districts or sought to true up these figures; that the TTO credits the districts with only most of their investment earnings, and retains the rest; that the TTO

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blames LT for an operational deficit but never has sought to true up this deficit; and on and on. The reality is that the TTO never truly balances and never will balance. The TTO is anything but the "zero-sum" office that it claims to be in this case.

In addition, the TTO contends that it brought the Audit Payments Claim (and the Investment Earnings Claim) on behalf of the other districts. The TTO claims that the other districts were shortchanged by the TTO's own prior conduct, and that these districts will benefit from a judgment in favor of the TTO. When the TTO recovered a little over $1 million insurance proceeds from Healy's thefts of school district funds, the TTO booked the recoveries as TTO assets and credited the districts' accounts with zero dollars. Given that the TTO has denied in this case that it owes any fiduciary duties to these other districts, and has spent over $3.3 million in legal costs already, the odds that these districts will see any direct and real benefit from a recovery by the TTO in this case are very slim.

V. THE TTO'S INVESTMENT EARNINGS CLAIM

The TTO contends that in the period running from 1995 through 2012, "LT was allocated more income from the pooled investments than its proportionate share of distributions actually made." The TTO bases its Investment Earnings Claim on Section 8-7 of the School Code.

A. The Legal Basis for the Investment Earnings Claim: Section 8-7

Section 8-7 provides that Treasurers must separately account for all investment earnings and must credit those earnings to the accounts of the districts:

> 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 moneys of other school districts, community college districts or educational service regions, <u>the moneys combined for such purposes shall be accounted for separately in all respects, and the earnings from such investment shall be separately and individually computed and recorded, and credited to the fund or school district</u>, community college district or educational service region, as the case may be, for which the investment was acquired.

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105 ILCS 5/8-7.

Section 8-7 does not allow a Treasurer to fail to account for investment earnings, or to credit a school district with less than full amount of its investment earnings. Neither Section 8-7 nor any other provision in the School Code authorized the Treasurer to make interest payments at his or her own discretion, without regard to the actual earnings of the districts. In addition, Section 8-5 and 8-6 required the Treasurer to maintain detail records of all receipts and disbursements for school district accounts.

B. The TTO Claim is Not Based on Actual Earnings

The major problem with the Investment Earnings Claim is that the TTO admits that for the 15 years at issue, it has no idea of how much the TTO actually earned on the pooled investments – or how much money LT actually was entitled to be credited with under Section 8-7.

The TTO's analysis was performed mostly by its contract accountant Kelly Bradshaw, who will testify at trial. Bradshaw admitted that the TTO's analysis did not take into account the actual investment earnings of the TTO, or what share of those earnings LT was entitled to receive. Bradshaw also admitted that the source of information she used for credits of investment income – Healy handwritten notes – were unrelated to the amount of income actually due LT.

Likewise, the TTO's expert James Martin admitted that he tried to determine how much money the TTO earned in investment income, but he had to abandon that effort because the TTO's records were seriously incomplete. Martin estimated that the TTO's records in the early years were only 40-50% complete, and even the later years' records were incomplete. Martin did not consider the TTO's financial statements, which "didn't seem relevant" to him.

Ultimately, Martin performed the same analysis as Bradshaw, although he made a few changes. Like Bradshaw, Martin conceded that he could not tell whether Treasurer Healy's figures

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stated the TTO's actual investment earnings.

In other words, the TTO's argument is this: LT may have been under credited with investment income during these years (and the TTO financial statements suggest so), but LT was less under credited than the other districts and therefore must pay $1.5 million back to the TTO. This, despite the uncontested fact that LT had no way of knowing how much in investment earnings it should have gotten.

LT notes that it did not assert a counterclaim against the TTO for underpaying interest to LT, even though the TTO's own analysis contends that the TTO under credited LT in the five years before this case was filed. The reason is that the TTO's records are so incomplete that it is impossible for anyone to know how much investment earnings the TTO should have credited.

C. The TTO's Analysis is Unreasonable and Erroneous.

In addition to bearing no relationship to the investment earnings actually due LT, the TTO analysis of the Investment Earnings Claim suffers from numerous other deficiencies. Should this Court deny LT's motion for a directed finding on this claim at the close of the TTO's case, this Court will hear LT's expert Martin Terpstra express the following opinions based on his broad expertise and thorough review of this matter:

1. "The TTO and Martin are unable to determine with certainty actual investment earnings. We would have expected that the TTO determined investment earnings on pooled investments for the Districts using source documentation such as bank and investment statements. Based on that information, we would anticipate the TTO to have calculated each District's allocation of the investment interest…. Based on the documents produced in this matter, it is not possible to determine investment interest with reasonable certainty due to the lack of available source documents."

2. "The audited financial statements demonstrate that there were additional funds that were available for distribution to the Districts …. [I]t appears that the TTO earned in excess of $1 million of investment income that had not been allocated to the Districts."

3. "Healy's handwritten notes were estimates and subject to revision. Based on Healy's testimony …, it is not reasonable for Martin to rely on Healy's handwritten notes as a guide for

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what the TTO intended to distribute."

4. "Martin did not test Healy's handwritten notes for mathematical accuracy…. Our analysis of Healy's notes, which Martin accepted at face value, disclosed several quarters where his calculations for other Districts were not based on the method of applying each District's proportionate share of the fund balance to the allocable quarterly interest."

5. "Martin did not use a consistent approach to general ledger entries to determine the amount of investment income allocated to LT."

6. "Martin ignored "apparent additional investment interest allocations made on Healy's handwritten sheets, even though he reviewed and relied on them…. Martin's analysis is inconsistent with the facts that are known in this matter and, as such, is unreasonable."

7. "Other districts also may have been over-allocated and under-allocated investment income under the TTO's methodology…. [T]he TTO's position that over-allocations to LT necessarily resulted in corresponding under-allocations to all of the other Districts is erroneous."

8. "The TTO made a $1.5 million reduction to LT's allocable investment interest…. Martin's review of the general ledgers LT maintained at the TTO was incomplete because he did not locate and include this journal entry in his analysis."

The record contains compelling evidence that the TTO and its Treasurer made arbitrary determinations on interest payments, and never paid LT and the other districts their fair shares of investment earnings. Terpstra will testify that the TTO financial statements show an under-allocation to the districts of more than $1 million.

VI. THE TTO'S PRO RATA EXPENSES CLAIM (FY2000-12) & LT'S FIFTH AFFIRMATIVE DEFENSE FOR SETOFF

The TTO's complaint presents a simplistic claim based on the annual pro rata expense invoices that the TTO sent to LT. According to this pleading, the TTO sent invoices, LT did not pay them in full, and the money is due. However, the TTO's Pro Rata Claim really involves two separate, and less cut-and-dried, issues to be resolved at trial.

First, for fiscal years 2000 through 2012, the claim concerns the TTO's attempt to avoid the parties' setoff agreement that they negotiated in 1999-2000 and got Board approval for in mid-2000. In this arrangement, the TTO agreed to pay the costs of LT's business services to set off

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those costs against the current pro rata invoice. This agreement was based on the mutual recognition that the TTO performed business functions for all districts but LT, and that the TTO would have to incur substantial costs if did the LT work in-house. Accordingly, the TTO outsourced these tasks to LT and paid LT to do them.

The parties reaffirmed this agreement each year through 2013, when the TTO's new leadership ended it. LT's Fifth Affirmative Defense for Setoff (originally pled as Count I of LT's Consolidated Counterclaim) frames this dispute.

Second, for TTO claim for fiscal years 2013-19, the claim concerns LT's deductions from the annual pro rata expense invoices for non-operational costs. This brief will start with the Pro Rata Claim (FY2000-12).

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. Section 8-4 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 billing.

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 deviation from Section 8-4. Also, the TTO's "rogue treasurer" argument, which contends that Treasurer Healy made this arrangement and kept the Trustees in the dark about it, is contrary to the documents and testimony that the Court will hear at trial.

B. Negotiation of the TTO-LT Agreement

In July 1999, TTO Treasurer Healy wrote to and met with the TTO Trustees about LT's

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

In August 1999, Healy wrote a letter to LT, which he copied to the Trustees, presenting five possible proposals. The first proposal was called "Deviation from Pro-Rata Billing," whereby the pro rata share allocations under Section 8-4 would change for all districts, and LT would pay a lesser share. Healy recommended against this 'deviation from Section 8-4' option – which is what the TTO now claims the parties' agreement represented – because it would require all districts to sign an intergovernmental agreement, and Healy deemed this unlikely to happen.

The second proposal was "Funding by Township School Treasurer of Some District Functions." This was the proposal that Healy recommended, and it was the basis for the parties' eventual agreement. As Healy explained to LT and the Trustees, "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, which needed intergovernmental agreement, Healy represented that the second proposal only required the approval of the TTO Trustees – which he said was likely.

The TTO and LT moved forward with the second proposal. Healy and LT's Business Manager Lisa Beckwith fleshed out the details. LT's proposal is set forth in the February 29, 2000 Memorandum that Beckwith sent to Healy ("the February 2000 Memo").

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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. Under Illinois law, a contract can be formed when "the circumstances and behaviors of the parties demonstrated a general course of dealing and a mutual intent to contract. *Trapani Construction Co. v. Elliot Group, Inc.*, 2016 IL App (1st) 143734, ¶ 56. As the Court held in *Lynge v. Kunstmann*, 94 Ill. App. 3d 689, 694 (2d Dist. 1981), "[A] signature is not always essential to the binding force of an agreement. Whether a writing constitutes a binding contract, even though it is not signed, or whether the signing of the instrument is a condition precedent to its becoming a binding contract usually depends upon the intention of the parties. The object of a signature is to show mutuality or assent, but these facts may be shown in other ways, as, for example, by acts or conduct of the parties." *Id.* at 694.

In this case, the formal, recorded votes of two duly authorized Boards and the conduct of the parties consistent with the written details of their arrangements evidence the parties' continuing agreement. The TTO's argument are those of a party unhappy with a long-standing agreement and

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now willing to rewrite history, and try to seize on any minor inconsistencies, in an effort to avoid the consequences of its own prior decisions and conduct.

C. Board Approvals of the Agreement

There should be no dispute that both parties' Boards received the written proposal and voted to approve it. In March 2000, the TTO Trustees held a meeting. The Trustees received a copy of the February 2000 Memo in their board packet. 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 bold claim that the Trustees' vote was unclear, and that it believes the vote was merely to "acknowledge receipt of" LT's proposal – not a 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 TTO Trustee 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 received already. 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 TTO Board has a special meaning for the word "accept" – i.e., to acknowledge receipt of and not act on – Sullivan has no first-hand factual knowledge; has no proper basis to offer an opinion; never spoke

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with any of the persons at the TTO who were present at the 2000 meeting; never spoke with any TTO people with knowledge; wrote two books stating that the words "accept, approve, and adopt" all mean the same thing for purposes of parliamentary procedure; and, in any event, is factually wrong about her conclusion. Her testimony is improper and should not be credited.

Of course, for this Court and the other lawyers involved in this case, the irony of the TTO's position is that the first lesson a first-year law student learns in contracts class is that a contract consists of an offer and an acceptance. *See Geary v. Great Atlantic & Pacific Tea Co.*, 366 Ill. 625, 628 (1937) ("The rule of law, accepted by counsel on both sides of this lawsuit, is that a contract is ordinarily effected by offer and acceptance.").

After the TTO Board vote, Healy informed LT that the TTO Board had approved the agreement. That left LT to secure Board approval. In June 2000, the LT Board of Education received a copy of the February 2000 Memo and a memo explaining the parties' arrangement in its Board packet. The LT Board approved the agreement with the TTO and authorized the net payment due to the TTO after the setoff.

Because LT's arrangement with the TTO was reviewed thoroughly in LT's Finance Committee, the LT Board voted their approval in June 2000 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. However, that opinion is both improper and factually groundless. The LT witnesses will testify that LT regularly and properly used the consent agenda for matters like this one.

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

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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 a prior Judge upheld. (To preserve its position on this issue, LT will ask this Court to order production of a redacted version of that agreement in order to identify facts that the TTO provided to its counsel about the 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 a letter to LT stating, “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 detailed memo with LT’s costs to be set off, and LT’s Board approved LT’s budget with projected expenses and any net payment to the TTO. It is telling that the TTO’s pro rata expense files contains these setoff memos.

On the TTO side, the evidence will show that the TTO Trustees periodically reviewed and approved the accounts and expenses of the Treasurer, and that the Trustees in fact were aware of the ongoing arrangement with LT. The Trustees’ examination and approval of the records of pro rata expense invoicing and payments, and the setoff for LT’s business costs, were mandated by Section 5-20 of the School Code. As this Court will see, the TTO had no problem with the parties agreement; reaffirmed it each year for over a decade; and in its files, literally checked off the TTO’s pro rata expense obligation as having been satisfied through the setoff and any partial payment required.

In 2012, Healy resigned in disgrace, 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;

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accusing LT of violating Section 8-4; and demanding payment from LT of over $2 million. LT accepted this letter as notice that the agreement would not be in place for FY2013.

D. An Intergovernmental Agreement Was Not Required.

In addition to its contentions that LT violated Section 8-4 and that only Healy authorized the agreement, the TTO argues that the actions of the parties' Boards are illegal because they violated the Intergovernmental Cooperation Act ("the Act"). The TTO contends that the Act required a formal intergovernmental agreement to memorialize the parties' ongoing arrangement.

This argument is based on a misunderstanding of the purpose and scope of the Act, as well as the nature of the existing joint venture relationship among the TTO and its member districts. This argument also overlooks the TTO's representation in August 1999, which Healy shared with the Trustees, that an intergovernmental agreement was not required.

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.

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The limited scope of the Act is confirmed by the TTO's own practices on 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 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. 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 the TTO's own accounting functions to various accounting firms and outside contractors.

Indeed, the TTO entered into very few intergovernmental cooperation agreements, and these involved different relationships than the one between the TTO and LT. The TTO entered into intergovernmental cooperation agreements to perform accounting services for a school district outside of its jurisdiction and authority (Puffer); for a property sale with the Village of Stickney; and to set up a new joint venture entity that functioned as an employee benefit cooperative. These agreements either created a new entity or established an agreement between the TTO and units of government outside of the TTO's system.

As the LT witnesses with experience in intergovernmental cooperation agreements will testify, the TTO already had statutory authority to perform business functions for LT and the other districts and to pay employees and non-employees of the TTO to perform those functions.

In other words, in 2000, the TTO and LT already were part of a joint governmental venture – the TTO system itself. 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

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financial affairs." *Lynn v. Trustees of Schools*, 271 Ill.App. 539, 547 (4th Dist. 1933) (persuasive authority). The TTO's payment of certain expenses of its principal LT did not require an agreement created under the terms of the Act.

VII. THE TTO'S PRO RATA EXPENSES CLAIM (FY2013-19)

There are additional fiscal years, FY2013-19, that do 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. For FY2013-19, LT has deducted from the TTO's pro rata expenses invoices (a) the legal costs of the TTO in this case, totaling $4677,322.42; (b) the costs of the TTO's financial software, totaling $218,475.06; and (c) other deductions that the TTO failed to document and justify, totaling $78,991.85.

A. The TTO Charges for Attorney's Fees and Costs

By the TTO's own admission, the litigation costs of three law firms and several litigation experts and consultants are expenses of the Trustees and not the Treasurer for purposes of Section 8-4. Nor are they "office expenses" within the meaning of Section 8-4. By the TTO's own admission, they are not part of what it calls the TTO's "operational costs." It would be deeply inequitable for LT to prevail mostly or entirely in this case, only to be required to pay about 25% of the TTO's attorney's fees.

Furthermore, these charges violate the American Rule on recovery of attorneys' fees. A prior Judge in this case ruled this was an actionable defense, but not technically an affirmative defense. The Court's 11-21-2019 Order states, the TTO's motion to dismiss "is granted as to affirmative defense #4, but LT is permitted to argue in response to the complaint that plaintiff's litigation fees are not expenses recoverable from LT under 105 ILCS 5/8-4 based on the American Rule on attorney's fees recovery."

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According to long-standing precedent of the Supreme Court of Illinois, "Illinois generally follows the 'American Rule': absent statutory authority or a contractual agreement between the parties, each party to litigation must bear its own attorney fees and costs, and may not recover those fees and costs from an adversary." *Morris B. Chapman & Assoc. v. Kitzman*, 193 Ill.2d 560, 572 (2000) (citing cases); *see also Negro Nest, LLC v. Mid-Northern Mgt.*, 362 Ill.App.3d 640, 641-42 (4th Dist. 2005); *Village of Glenview v. Zwick*, 356 Ill.App.3d 630, 632 (1st Dist. 2005).

For a party to avoid the American Rule, "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 America v. WS Mgt.*, 2015 IL App (1st) 132551 ¶ 120 (citing *Negro Nest*, 362 Ill.App.3d at 640). For example, a Court held that a party could not recover attorneys' fees based on a contract provision allowing for recovery of "all costs of collection," because that term did not explicitly include the words "attorneys' fees." *Negro Nest*, 362 Ill.App.3d at 651. Likewise, even a statute that allows for the recovery of punitive damages in fraudulent transfer situations cannot support a recovery of attorneys' fees, absent an express reference in the statute to "attorneys' fees." *Bank of America*, 2015 IL App (1st) 132551 ¶ 121.

In addition, governmental entities cannot create ordinances that permit recovery of attorneys' fees from adversaries. In *Village of Glenview*, Glenview passed an ordinance allowing it to recover attorneys' fees from its opponents in litigation if Glenview won. 356 Ill.App.3d at 632. The Court struck down the ordinance as contrary to the American Rule. The Court held, "Glenview did not have the authority to create a fee-shifting ordinance," and that the Constitution barred "a local entity's imposition of a burden on our state's judicial system." *Id.* at 637.

The *Village of Glenview* case shows that a governmental entity cannot legally attempt to recover its attorneys' fees, and thereby "balance its books," by sending a bill for its attorneys' fees

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to a Glenview resident and litigation opponent. This "recovery process" by Glenview, the Court held, would have placed an unconstitutional "burden on our state's judicial system." Just as the Glenview ordinance was struck down, the TTO's interpretation of Section 8-4 to provide a "recovery process" for its attorneys' fees from LT should be rejected.

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. What the *Lynn* case did not involve is a situation like the present case in which school trustees claimed to be suing one school district on behalf of one or more other school districts. There was no issue in *Lynn* as to how the attorneys' fees were to be allocated, given the Court's finding that the Trustees sued outside individuals on behalf of all the township's school districts. The *Lynn* case therefore does not support the TTO's position.

Also, there is no merit to the TTO's contention that it has no other way to charge for the legal costs. The TTO could have, but did not, seek the approval of the other districts to file this suit and ask their Boards to agree to pay proportionate shares of the legal costs. This case is, and always has been, the TTO's undertaking. The record also demonstrates that the TTO has employed great creativity in recouping expenses outside of Section 8-4, including taking expenses directly from the pooled investment fund and allegedly applying insurance recoveries to expenses. It could and should have found another way to bill these expenses.

B. The TTO Charges for Software

The second major item that LT has deducted from the TTO's pro rata expense invoices for FY2013-19 are the costs of the TTO's Infinite Visions software. In 2014, LT informed the TTO that it would not participate in these costs, especially as that LT previously had purchased different

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software that was incompatible. LT said it disagreed with the TTO's position that Section 5-17 authorized the TTO to incur software licensing, training, and programming costs in 2013 and subsequent years.

Section 5-17 of the School Code authorizes the TTO Trustees to pay for "the cost of a record book, if any." Section 5-17 has been part of the School Code for over 100 years. This provision became law at a time when school business operations, finance, and governance were very different than they are today. While the legislature could have updated this archaic and outdated provision to authorize the purchase of modern conveniences, it never did.

A "record book" is a type of book, not a complex software system with training and programming costs. There is no dispute in this case that the Infinite Visions software goes well beyond accounting and financial issues and includes modules for budgeting, employee management, employee web access, applicant tracking, employee evaluations, and salary negotiations. The costs of training employees on a computer system that tracks salary negotiations is not analogous to the expense of "a record book" and thus is not a proper expense. The TTO could have overcome the limited and archaic nature of Section 5-17 by asking the school districts to participate in and consent to their plan, but it chose to forge its own path.

C. The Other Expenses

As this Court will hear at trial, there are other, more minor costs that LT deducted from its pro rata expense invoices. These average out to about $10,000 per year. While they involve several different types of expenses, the common thread is the unwillingness of the TTO to document and justify these costs. Under the circumstances, these deductions were proper.

VIII. LT'S FIRST AFFIRMATIVE DEFENSE: THE LACHES DOCTRINE

This case presents a very strong argument for the application of the doctrine of laches to

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all of the TTO's claims dating back to the 1990s: the Audit Payments Claim, the Investment Earnings Claim, and the Pro Rata Expense Claim (FY2000-12).

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 Commissioners*, 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).

There is direct precedent for applying laches in the context of a dispute involving the governmental unit involved in our case. In *Trustees of Schools v. American Surety*, 307 Ill.App. 398 (1940), the Court held that the "trustees [of schools] failed to exercise the diligence imposed on them by express statutory command," and thereby failed to uncover their treasurer's misdeeds. The Court sustained the defendants' laches defense. *Id.* at 408.

In our case, there are "unusual and extraordinary circumstances" that require the application of the laches defense. As in *American Surety*, LT's defense asserts that the TTO lacked diligence in pursuing its claims, given that the Treasurer and Trustees knew the operative facts of its claims but chose not to file suit for 20, 19, and 13 years, respectively, resulting in deep prejudice to LT. LT will address the application of the doctrine of laches to each of the three claims.

A. The Audit Payments Claim

On the Audit Payments Claim, the TTO admits that it made the payments to Baker Tilly

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for LT's audit knowingly and deliberately from 1994 through 2012. The TTO waited 19 years to try to reverse the payments it made by suing LT. The evidence shows that Healy informed the Trustees in writing that the TTO was making these payments, and the Trustees regularly examined and approved the books and records of the Treasurer. There can be no clearer lack of due diligence.

As for prejudice, 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. When the TTO's new leadership stopped paying for LT's audit, LT hired a new auditor that did the same work for less (and was not beholden to the TTO). LT's new auditors, had they been hired earlier, could have uncovered Healy's corruption and done a better job than Baker Tilly did of protecting LT's funds. Indeed, the TTO admits that Baker Tilly was derelict in its duties, given the TTO's threat to sue Baker Tilly and the still-pending tolling agreement with Baker Tilly.

In addition, the TTO's long delay in filing suit prevented LT from being able to access critical records. The TTO admits it is missing lots of records, while Baker Tilly's records only go back to 2006. In addition, by the time the TTO filed this case, key witnesses like former TTO Trustee Joseph Nekola and former LT Business Manager Leon Eich were long dead. The absence of critical documentation and witnesses handcuffs LT's ability to present its defense.

B. The Investment Earnings Claim

On the Investment Earnings Claim, the record evidence shows that the TTO made decisions to credit the district with certain levels of investment earnings; the Trustees reviewed and approved the Treasurer's books and records; and the information on the distributions was made available to Baker Tilly. In all of the audit reports from FY1995-2008, the investment earnings and the distributions to the school districts are presented as either separate numbers or as a net number.

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These figures were known and available to everyone the TTO. Again, there was a clear lack of due diligence on the part of the TTO in waiting 19 years to seek to recoup parts of credits made to LT.

Moreover, the 19-year delay in seeking to recoup these credits caused real prejudice to LT. If the TTO had brought this claim in 1998 – four years after the disputed credits at issue began – LT probably could have obtained all of the source records of the TTO and Baker Tilly showing actual investment earnings. LT could have determined how much money it should have received and compared that to the distributions. Because the TTO waited so long to sue, those critical records are lost.

Furthermore, if LT knew a decade ago that the TTO contested the investment earning credits that the TTO alone calculated – and explained to LT or the districts – LT certainly would have made a greater effort to force an end to its membership in the TTO. LT would have advocated sooner for the separation legislation that LT finally secured in 2018. Essentially, had the TTO sued to recoup investment earnings in 1998 or 2002 or 2005, it would have made a bad situation absolutely intolerable for LT.

Also, had the TTO lawsuit come earlier, Healy's thefts of school funds probably would have been uncovered much sooner than 2012. Healy and all of the other districts suffered tremendous financial losses from Healy's malfeasance and the Trustees' poor performance in part because the TTO sat on its alleged rights for so long.

C. The Pro Rata Expenses Claim (FY2000-12)

On the Pro Rata Expenses Claim (FY2000-12), the TTO's lack of diligence is apparent from the TTO's own minutes, correspondence, financial records, and the involvement of the TTO's attorney Cainkar showing full knowledge of the setoff agreement with LT by 2000.

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As for prejudice, but for the TTO's lack of diligence in filing suit for 13 years, LT could have chosen to shift its business functions over to the TTO, as unpalatable as that might have been. In addition, as with the other TTO claims, the TTO's long delay in presenting this claim prevented LT from conducting its defense before persons like TTO Trustee Nekola died, and TTO Trustee Donna Milich retired to Arizona, taking their recollections with them.

Furthermore, there is no question that the recollections of the persons involved in the parties' negotiations and agreement in 1999-2000, and their course of dealing and reaffirmations of their agreement in 2000-12, have dimmed with the passage of time. LT has done its best to reach out to the TTO officials involved in these events, like TTO Trustee Russell Hartigan and TTO Treasurer Robert Healy – which is more than the TTO did either before or after it filed this case. The lack of clearer recollections, and the incomplete nature of the TTO's remaining records, significantly prejudices LT's ability to prove its case at trial.

D. Prejudice Resulting from LT's 20 Years of Budgeting and Resource Allocation

As a final element of prejudice that applies to all three claims, LT notes that in 1993, and in subsequent each year through 2012, The LT Board made financial decisions, allocated resources, paid employees, negotiated contracts, and budgeted for future spending based on the state of its finances in each of those years. LT's annual finances in each year depended, in significant part, on the investment income that the TTO credited to LT; the outside expenses that LT did or did not incur, including the costs of LT's annual audit; and the internal expenses that the TTO's did or did not cover, including the costs of LT's business functions. For the LT Board to make decisions based on these financial arrangements – only to have the TTO's new leadership attempt to pull the rug out from under LT 13 to 20 years later – is manifestly unjust.

LT also notes that the TTO's filings in this case repeatedly reference the tens of millions

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of dollars currently in LT's agency account. The implication of these references is that LT has lots of money, and that the TTO taking $5 million from LT's funds will not put a dent in LT's wealth. The TTO's argument belies not only a disregard for the well-being of LT and the community it serves, but a complete lack of understanding as to the need for a very large public high school to maintain a sizeable reserve. The TTO's sole focus on its own interests does not allow it to consider, for example, the enormous costs of constructing the new facilities that LT will need in the future. It is a matter of public record that LT's fund levels are lower than comparable high schools in suburban Cook County, which is due in part to the TTO's lack of accountability and its poor performance as LT's fiscal agent.

IX. LT'S SECOND AFFIRMATIVE DEFENSE: STATUTE OF LIMITATIONS

LT's second affirmative defense asserts that the TTO's claims are subject to a 5-year statute of limitations. It falls on this Court to decide, based on the applicable law and the evidence presented a trial, whether the TTO's claims are subject to a 5-year limit or – as the TTO argues – no limitations period at all. This defense involves the TTO's three historical claims: the Audit Payments Claim, the Investment Earnings Claim; and the Pro Rata Expenses Claim (FY2020-12). For ease of reference, we will refer here to the three historical claims as "the TTO Claims."

This is a complicated issue, and LT will do its best to provide the Court with a thorough discussion of the many relevant precedents in this trial brief. Here is a brief summary of the limitations issue and its procedural path in this case.

A. Summary of Argument

Both the TTO and LT asked our two prior Judges to resolve the limitations issue on summary judgment. Judge Hall ruled that the issue had to be tried. Judge Mulroy ruled in favor of LT and imposed a 5-year limitations period, but later reversed that decision and ordered this issue

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to be resolved at trial. As the TTO's claims in this case go back to 1993, and the case was filed in 2013, the financial impact of this issue is enormous – about $3 million.

The TTO Claims all involve financial and accounting issues. As discussed above, all are based on alleged violations of the School Code. The 5-year catch-all limitations period is applicable. The Supreme Court of Illinois has recognized that statutes of limitation are critical to afford a fair process to litigants.

The TTO has raised two exceptions to the general rule that causes of action are limited in time. The first is the "held in trust" exception. The held in trust exception requires that a specific pool of dispute funds be held in an expressly created trust account. This exception does not apply to the general funds of a defendant held in its agency account, also called a custodial account, which Illinois law distinguishes from an account held in trust. LT's account at the TTO is an agency account for which LT has sole spending authority. This exception is not applicable.

The second exception that the TTO raises is the "public rights" exception, which is a form of sovereign immunity. The TTO has sought to portray this exception as applying to cases involving "public funds," in which there is always a "public interest." That is not what "public rights" means, and Illinois courts have repeatedly applied statutes of limitations to claims involving public funds and government entities.

As a recent federal court decision makes clear, the public rights exception is meant for cases in which the claims are analogous to causes of action that the general public could assert – meaning cases in which a compelling general interest like public safety or health is at stake. When a government entity sues to recover public funds based on financial, accounting, or contractual claims, however – as in this case – those claims are viewed as analogous to the rights of private

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companies, and therefore are limited in time. Courts in those "private rights" cases applied limitations periods even though public money was involved and taxpayers were impacted.

B. The Procedural History of This Issue

In May 2017, LT filed a partial summary judgment motion on the limitations issue. The TTO filed a response asking the Court to exempt its claims from the statute of limitations.

In February 2018, Judge Hall ruled that that she could not resolve the limitations issue on summary judgment. The 2-20-2018 Order states, "Defendant LT's Motion for Partial Summary Judgment, for the reasons stated in its oral ruling issued today in open Court, is denied without prejudice to proofs to be presented at trial." In an oral ruling, she explained, "I'm going to deny the motion for Statute of Limitations without prejudice because I think there is some factual matters that may have a bearing on whether or not a Statute of Limitations will apply."

In 2019, Judge Hall transferred this case to the Law Division. At the time, the TTO's motion for complete summary judgment was pending. Both parties asked Judge Mulroy to reconsider the limitations issue. In a 7-31-2019 Order, the Judge granted LT's motion for reconsideration; "the Court rules that the 5-year statute of limitations applies to the TTO's claims in this case per LT's motion." He denied the TTO's summary judgment motion in its entirety.

The case was set for trial in September 2019 and again in December 2019. Both trial dates were continued at the TTO's request. The TTO then filed a motion for reconsideration on the limitations ruling. Judge Mulroy agreed to reconsider the ruling and decided – as Judge Hall did – that the issue had to be tried. The 1-31-2020 Order states, "The Court vacates the 7/31/2019 Order granting LT's motion for reconsideration and denying the TTO's motion for reconsideration on the limitations issue and will decide the applicability of the 5-year statute of limitations to the TTO's claims based on the proofs to be presented at trial."

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There is no reason for LT to try to explain why the prior Courts ruled as they did. The 1-31-2020 Order makes it clear that this Court will have to tackle the limitations issue at trial with an open mind and a clean slate.

C. The 5-Year Statute of Limitations

In this case, the TTO bases all three of its claims on provisions in the School Code. 734 ILCS 5/13-205 governs "all civil actions not otherwise provided for", and it applies because there is no specific limitations period for claims under the School Code.

The Supreme Court of Illinois has emphasized that statutes of limitations are favored because they are necessary to prevent injustices to litigants. "A statute of limitations is by definition an arbitrary period after which all claims will be cut off. However, the need to encourage claimants to investigate and pursue causes of action in order to discourage delay, in time, outweighs the right to litigate a claim." *Langendorf v. City of Urbana*, 197 Ill. 2d 100, 110 (2001). "Delayed claims will almost certainly prejudice defendants, who must defend against claims arising out of traumatic events long after witnesses' memories have faded and evidence has become unavailable for testing and inspection." *Golla v. Gen. Motors Corp*., 167 Ill. 2d 353, 370 (1995). These fairness considerations are critical in our case, where the TTO waited up to 20 years to assert a legal claim against LT, and did so only due to a change in leadership at the TTO.

D. The Held in Trust Exception to Limitations

Once LT has established the applicability of a statute of limitations to the TTO's claims, the burden shifts to the TTO to prove that an exception to that limitations period applies. *Ocasek v. City of Chicago*, 275 Ill.App.3d 628, 632 (1st Dist. 1995). The TTO's argument for the held in trust exception is based on the Supreme Court's decision in *School Directors of District No. 5 v. School Directors of District No. 1*, 105 Ill. 653 (1883).

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In *District 5*, the plaintiff was a school district called District 5. It claimed that the township treasurer collected tax revenue for District 5 but mistakenly credited this revenue to the account of the defendant, District 1. *Id.* at 655. The Court held that District 5's claim was time-barred, even though a public school's public money was directly impacted.

The Court reasoned that because the treasurer already credited the disputed funds to District 1's account, the treasurer no longer held them in trust: "The trustee in this case was the township treasurer, and as long as he held the money it was a trust fund in his hands, but when [the treasurer] paid it out to [District 1], or on [District 1's] orders, it was not a trust fund in [District 1's] hands which would exclude the operation of the Statute of Limitations." *Id.* at 655-56. The Court reached this conclusion even though the treasurer managed the account of District 1, which was clear from the decision because the treasurer had "paid out" disputed funds on the "orders" of District 1.

District 5's holding is consistent with Illinois law distinguishing "agency accounts" – also known as "custodial accounts" – from "trust accounts." In *Tucker v. Soy Capital Bank & Tr. Co.*, 2012 IL App (1st) 103303, the Court explained that a "'custody' or 'custodial' account is a type of agency account in which the custodian has the obligation to preserve and safekeep the property entrusted to him for his principal." *Id.* ¶ 32. The Court held that agency accounts are distinct from trust accounts, and that trust accounts must be expressly established. *Id.* ¶ 32-34. The Court ruled that the IRA accounts in dispute were alleged to be agency/custodial accounts and therefore were not subject to the legal protections afforded to a trust account. *Id.* ¶ 34.

The counterpoint to the *District 5* case is the Supreme Court's decision in *Bd. of Sup'rs of Logan County. v. City of Lincoln*, 81 Ill. 156 (1876). The *City of Lincoln* case explains when a pool of disputed public funds is considered to be held in trust, and therefore not subject to a statute of limitations. In *City of Lincoln*, the city claimed ownership of a pool of disputed funds that the

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county received and held in the county treasury. *Id.* at 157. The Court decided that because the disputed funds belonged to the city, but were held in the county treasury, the county was holding those funds in trust for the city: "The funds involved in this controversy are in the nature of trust funds, held by the county for a specific object, defined by a public law, and hence the Statute of Limitations is not available …." *Id.* at 158-59.

Applying this case law to the facts of the present case requires an analysis of the TTO's claims and the accounts at issue. TTO Trustee Thiessen has testified that the TTO has its own operational account as well as separate accounts for LT and the other districts. He has stated that the accounts of LT and the other districts contain "agency funds which we manage on their behalf."

The TTO's complaint repeatedly states that the TTO manages an "Agency Account" for LT. The TTO's demand for relief asks this Court for authority to take money from LT's "Agency Account." The TTO's complaint admits that the TTO is the "custodian" of LT's funds. The TTO's admissions on the nature of LT's account are consistent with the School Code. 105 ILCS 5/8-6 provides that the "school treasurer shall have custody of the school funds" – and says nothing about holding those funds in trust.

Also, in contrast to a trust account, there is no dispute that for LT's account, only LT can authorize disbursements. The complaint admits the Treasurer can make payments from a district's agency account only upon receiving the district's "lawful instruction to the Treasurer to issue payment." Accordingly, LT's account, like District 5's account, is an agency account containing funds credited to LT; LT has sole spending discretion; there was no express creation of a trust for LT's account; and LT's account does not contain funds held in trust.

Moreover, unlike in the *City of Lincoln*, the TTO is not fighting over a pool of money that the TTO received and still is holding in trust pending crediting or spending. The TTO's claims all

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concern monies that the TTO credited to LT's agency account long ago; paid to outside parties, on LT's orders, from LT's account; or simply did not receive from LT's account. The TTO's sole claim involving disputed funds paid into LT's account is the Investment Earnings Claim, and the last alleged overpayment of interest (according to the TTO's analysis) was for FY2009.

E. The Public Rights Exception to Limitations

This sovereign immunity doctrine was most recently analyzed in a federal court decision that includes an overview of the key Illinois cases. As a high school, LT is in favor of any case that functions as a teacher's manual. Of course, LT well recognizes that the Supreme Court of Illinois cases are controlling, and we address those cases shortly.

In *Village of DePue v. Viacom Int'l, Inc.*, 713 F.Supp.2d 774, 778 (N.D. Ill. 2010), the Village of DePue sued defendants whose predecessors long ago had operated a zinc smelting facility. *Id.* at 776. The Village sued defendants for trespass and both public and private nuisance based on the flow of contaminants onto the Village's public land. *Id.* at 778. Defendants raised the 5-year statute of limitations for nuisance and trespass claims as a defense. *Id.* at 778.

In applying the 5-year statute of limitations to the Village's claims, the federal court made it clear that the Illinois public rights exception to the statute of limitations is for those exceptional cases in which the general public is directly impacted, as when the public's health or safety is put at risk. The court began its analysis by recognizing that the public rights exception is based on sovereign immunity: "Governmental entities are immune from statutes of limitation when they act in their public capacity, but are not immune if they act in their private capacity." *Id.* at 781.

The federal court then quoted the Supreme Court's three-part test:

> In order to determine if a governmental activity is public or private, courts should consider who would benefit by the government's action and who would lose by its inaction. Three factors must be addressed: (1) the effect of the interest on the public, (2) the obligation of

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> the governmental unit to act on behalf of the public, and (3) the extent to which the expenditure of public revenues is necessitated.

Id., citing *City of Shelbyville v. Shelbyville Restorium, Inc.*, 96 Ill. 2d 457 (Ill. 1983); *Board of Education v. A, C & S, Inc.*, 131 Ill. 2d 428 (Ill. 1989).

In examining the first factor, the Court found that "lost potential tax and business revenues, in and of themselves, are not damages that are part of a 'public' cause of action, as they do not implicate the public's interest in health and safety, and merely affect the economic interests of the residents of the Village." *Id.* at 782. The Court also noted that Village could not directly perform any site cleanup if it won the case, and thus the case simply was about money. *Id.*

On the second factor, the court held that "this factor turns on whether there is an obligation in law for the governmental entity to undertake the action for which it seeks to recoup its costs." The Court determined that "[t]hough the Village might wish, as a landowner, to undertake such efforts, it is not legally obligated to do so and therefore is not asserting a right of the general public." *Id.* at 783-84.

On the third factor, the court found that "the public interest at stake must necessitate an expenditure of public revenues, though the fact that public funds have been used is not dispositive of whether the activity is public." *Id.* The court found that this factor was not present, in contrast to those Illinois cases in which the government entity had spent large amounts of money on remediation work.

The federal court concluded its analysis by quoting the Supreme Court's statement of the purpose of the limitations exception: "The purpose of sovereign immunity from statutes of limitations for public actions is to protect the public from 'the negligence of its officers and agents in failing to promptly assert causes of action which belong to the public,' thereby leaving the public

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without a remedy." *Id.* at 784, quoting *A, C & S*, 131 Ill. 2d at 472. Based on the absence of this overriding purpose, the federal court held the Village was subject to the statute of limitations.

The *Village of DePue* case is so instructive because it makes clear that government entities are not generally immune from statutes of limitation, and that even cases that involve public land, public money, and public interests do not necessarily involve "public rights." To be immune from the statute of limitations, government entities must assert actions "which belong to the public."

With that primer, we move on to Illinois precedent. The standards for applying the public rights exception were established in the Supreme Court's decisions in *A, C & S*, and *Shelbyville*. In *Shelbyville*, the city sued a home builder for failing to construct streets in a subdivision in accordance with the requirements of a city ordinance. *Id.* at 459. Many years later, the city "eventually constructed or repaired the streets at great expense to itself." *Id.* at 459-60. The Court held that the city's claim was exempt from the statute of limitations because "the safety of all persons who have occasion to use the streets at issue here will depend on the workmanlike construction and maintenance of the streets." *Id.* at 464. The Court further reasoned that the action was public in nature because the city had to spend public money for road work that the builder should have done under the ordinance, and the city had a responsibility under state statutes to maintain the roads. *Id.* at 464-65.

In the *A, C & S* case, 34 school districts sued 78 defendants involved in the manufacturing and distribution of asbestos-containing material. 131 Ill.2d at 436. The school districts were required by a state statute to remove or contain asbestos materials in public schools, and they expected to spend large amounts of money on the remedial work. *Id.* at 437. The Court held that the application of the statute of limitations depended on whether "the right that the government unit seeks to assert is in fact a right belonging to the general public, or whether it belongs only to

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the government or some small distinct subsection of the public at large." *Id.* at 472. More specifically, the Court had to consider the three-part test referenced above: "the effects of the interest on the public, the governmental entities obligation to act on behalf of the public and the extent to which public funds must be expended." *Id.* at 476.

The Court concluded that the districts' claims were in the general public's interest because of the "interest in the safety of these public buildings and in the safety of a large segment of this State's population which attends the public schools." *Id.* at 473-74. The Court noted the "property damage that will be costly to repair" and the "health concern involved." *Id.* at 474-75. The Court also relied on the state statute that required the schools to correct the asbestos problems and the state administrative oversight authority and grants set up for this effort. *Id.* at 474. The Court found that the asbestos projects "will run into the millions." *Id.* at 476. Accordingly, the Court held that the districts were not barred by the statute of limitations. *Id.*

The next Illinois decision on this exception is *Champaign County Forest Preserve Dist. v. King*, 291 Ill.App.3d 197 (4th Dist. 1997). In *Champaign County*, a forest preserve district claimed it was overcharged for liability insurance purchased over 6 years earlier. *Id.* at 199. Defendant raised the 5-year catch-all limitations period. *Id.*

The Court applied the Supreme Court's three-factor test. On the effect of Champaign County's interests on the general public, the Court distinguished the liability insurance involved from the health and safety interests in the prior cases: "Unlike the governmental activities in *Shelbyville* and *A, C & S*, plaintiff's purchase of liability insurance in this case had no effect on the public at large. It did not make the public safer, nor did it reduce the likelihood of injury on plaintiff's property." *Id.* at 201.

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For the second factor, the obligation to act, the Court determined that "although plaintiff was authorized to purchase insurance, it was not required to do so." *Id.* Nor was there a reference to a statute requiring the county to recoup alleged overcharges. *Id.* For the third factor, the necessity of spending public money, the Court noted that "the fact that public funds were used to purchase insurance does not necessarily render it a public act. Otherwise, any use of public funds would always be considered a public act." *Id.* at 202. The Court therefore concluded that the district's purchase of insurance was a private act subject to a limitations defense. *Id.*

There are two older Illinois cases, as well, that are instructive. In *People v. Oran*, 121 Ill. 650 (1887), the town of Oran waited 10 years to sue the town of Atlanta for money due on a land transfer. The Court decided that the 5-year statute of limitations barred the claim. *Id.* at 652-54. The Court held, "No public rights are involved in this case. The controversy relates solely to two townships…. The public will neither lose nor gain if the town of Atlanta is required to pay all of its indebtedness; nor will it affect the public if the town of Oran is required to contribute." *Id.* at 655-56. This type of dispute between two government entities over money that could shift between them is exactly what the present case between the TTO and LT represents.

The other older case is *People v. Knox*, 157 Ill.App. 438 (2nd Dist. 1910) (pre-1935 persuasive authority). In *Knox*, a county sought to recover allegedly excessive and wrongful funds paid to the sheriff. *Id.* at 438-39. The Court decided that the statute of limitations applied, and held that claims of municipalities are exempt from statutes of limitation only where the claims involve "governmental affairs affecting the general public." *Id.* at 439. The Court concluded that the alleged overpayments to the sheriff concerned "only private rights" because the general public "are not interested in the amount allowed for these county expenses." *Id.* at 440. Thus, the County's recouping of money that a public official allegedly misappropriated was not the type of claim that

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the general public could bring. This finding speaks to the similar contentions of the TTO about the alleged misdeeds of Treasurer Healy in this case.

1. *The Audit Payments Claim Involves Private Rights*

The TTO's three claims are based on three different statutes, involve different facts, raise different considerations, and must be considered separately for purposes of the exemption. The TTO cannot aggregate them into one big claim for limitations purposes.

For the Audit Payments Claim, the general public has no direct interest in which government unit, the TTO or LT, paid about $500,000 to Baker Tilly over 20 years for audit costs. The TTO admits that these payments were knowing and intentional. This claim does not involve any compelling general interests like public health or safety as in *Shelbyville* and *A,C&S*, and instead only implicates the types of "inside baseball" expense-related issues and inter-government financial dealings held to be private in nature in *Village of DePue*, *Knox*, and *Oran*.

On the obligation of the TTO to act on behalf of the public, the TTO contends that LT had an obligation to pay for its own audits under the School Code, and that the TTO must protect the interests of the other districts by enforcing this provision. However, Section 3-7 contains no requirement that LT pay for its own audit, and it cannot be construed to require the TTO to sue LT for not paying for its audits. There is no statute requiring the TTO to bring this claim, in contrast the state law requiring asbestos remediation in the *A, C & S* case.

As for the expenditure of public funds, the TTO already paid Baker Tilly years ago. There are no further funds that will be spent in connection with the Audit Payments Claim, which is the same as in *Champaign County* and different than the situations in *A,C&S* and *Shelbyville*. The TTO claims that it is acting on behalf of the other school districts, and implies that it might share any recoveries with them, but that would not be an expenditure of public funds – just a shifting of

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funds. In any event, the TTO has not shared its recoveries with the school districts in the past, as with the $1 million insurance recoveries. Its claim that the Audit Payments Claim will benefit the other districts is speculative and unpersuasive.

2. *The Investment Earnings Claim Involves Private Rights*

In the Investment Earnings Claim, the TTO contends that the TTO overallocated to LT about $1.5 million in income over 17 years (about $88,000/year). There is no dispute that the TTO made these allocations and presented the end result to LT. As the TTO explains, this is a financial accounting issue among the school districts within the TTO's jurisdiction.

Although the TTO alleges that Healy overpaid LT relative to the other districts (which LT disputes), that still does not identify an issue impacting the general public. This claim is an intergovernmental dispute held to be a private right in *Oran*. It is not an overstatement to say that unless they read the Chicago Tribune or the local Landmark paper's editorials calling for the TTO's abolition, most of the general public is not even aware of the existence of the TTO or any of the functions that it performs. The possibilities that a school district might get some additional money someday, and might spend that money on its educational mission, are not sufficient to create a public right for purposes of this exception.

As for the obligation of the TTO to act on behalf of the public, the TTO's claim relies on Section 8-7 of the School Code, which requires the Treasurer to credit each district with the amount of its investment earnings from the pooled investment fund. However, the TTO has no idea how much investment income it earned on the districts' pooled investments or the earnings due LT, and based this claim solely on its view of relative distributions. Section 8-7 does not state any obligation of the TTO to act on the alleged relative overallocations.

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As for the expenditure of public revenues, there are none involved in this claim. The last claimed overallocations were in 2009. The TTO does not allege that it will have to spend any new funds to remediate these earnings credits to LT. Essentially, there are no asbestos materials to remove, and no roads to build – just accounting distributions and internal ledger entries to contest.

3. *The Pro Rata Claim Involves Private Rights*

The Pro Rata Claim asserts that LT underpaid or failed to pay annual bills the TTO sent LT for FY2000-12. Again, the TTO attributes this long course of dealing to unauthorized decisions of Healy that must be reversed. However, the record evidence shows otherwise. While it is apparent that the new leadership of the TTO is unhappy with the TTO's past arrangement with LT, the TTO cannot identify any interest of the general public in a contractual/billing dispute between government units, which at most would involve some shifting of funds amongst them.

As to any obligation of the TTO to act, there is no statute that has a direct impact on this dispute over charged expenses, in contrast to the statutes requiring action in *A,C&S* and *Shelbyville*. While the TTO relies on general provisions in the School Code charging it with safeguarding the school districts' funds, those provisions are not specific to the present claim. If these general statutes are sufficient in this case, then every claim that the TTO could ever bring would be exempt from all statutes of limitations because they could have some remote impact on the school districts. This is not sufficient to create an obligation to act. It also is fair to ask why, if the TTO has a legal duty to sue on behalf of the other school districts, the TTO never sued Baker Tilly for the negligent conduct that the TTO claimed to have uncovered.

As for the expenditure of public funds, the TTO will not have to spend any funds in connection with the Pro Rata Claim. The Pro Rata Claim is a collection claim. There is no dispute that from 2000-12, the TTO was aware of the partial payments and offsets and considered the bills

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satisfied. If the TTO really had to charge the other districts for an alleged shortfall, and make the other districts pay in more funds to cover a real loss, the TTO would have done so years ago.

Thus, for each of the TTO's three claims in this case, the TTO cannot use the public rights exception to avoid the applicable statute of limitations.

F. Applying the 5-Year Period to the Audit Payments Claim

The application of the 5-year statute of limitations to the Audit Payments Claim would significantly reduce the claimed damages. Under Illinois law, the cutoff for a statute of limitations is based on when claimed expenses were incurred – not when they were paid, when they were assigned, or when the payor sought compensation 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 this 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 – *i.e.*, 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 rights to recover medical expenses." *Id.*

The TTO filed this case on 10-16-2013. Five years prior to that date is 10-17-2008. As this Court will hear at trial, the payments that the TTO made to Baker Tilly that allegedly were for LT's annual audit from on or after 10-17-20187 total $164,435.35.

The TTO has contended that it can recover audit payments that it made to Baker Tilly prior to the statute of limitations cutoff date of 10-16-2018 – i.e., starting on 6-29-2007 – under the theory that it did not bill the districts for those payments until the following year, in 2008. This argument is contrary to the holding in *Reimers* that the statute of limitations begins to run when an

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expense is incurred. The TTO's subsequent pro rata billing of the audit costs payments to LT and the other districts simply is not what the TTO is complaining about in this claim.

G. Applying the 5-Year Period to the Investment Earnings Claim

There is no dispute that the application of the 5-year limitations period entirely eliminates the Investment Earnings Claim. The TTO's analysis actually states that it shorted LT on investment earnings by hundreds of thousands of dollars during this 5-year period.

H. Applying the 5-Year Period to the Pro Rata Expenses Claim (FY2000-12)

As discussed above, Section 8-4 obligated LT to pay a proportionate share of incurred compensation and office expenses of the Treasurer. Section 8-4 is silent on when or how frequently a Treasurer should or may bill the districts for those expenses. Section 8-4 provides that a district's financial obligation to the TTO arises when the expenses are incurred and not later on.

This means that the TTO cannot recover any damages from FY2008, even though the TTO waited almost a full year to bill those expenses. FY2008 ran from 7-1-2007 to 6-30-2008. Thus, all expenses in FY2008 were incurred on or before 6-30-2008. On June 9, 2009 – over 11 months after the close of FY2008 – the TTO sent LT an invoice for FY2008 in the amount of $245,176.53. Under *Reimers*, the date of the expense is determinative.

FY2009 presents an interesting issue. FY2009 ran from 7-1-2008 to 6-30-2009. FY2009 includes the time period from 7-1-2008 through the limitations cutoff date of 10-17-2008, a period of 3.5 months. Despite being aware of the statute of limitations issue, the TTO has not broken down its FY2009 expenses into periods before and after the limitations cutoff date. Instead, the TTO provided only a cumulative, year-end statement of expenses for FY2009. On May 20, 2010 – over 10 months after the close of FY2009 – the TTO sent LT an invoice for FY2009 in the amount of $289,560.14. Because the TTO failed to break down its FY2009 expenses before and

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after the cutoff date, and simply rested on a bottom-line figure for its FY2009 expenses claim, the FY2009 claim should barred in its entirety.

The application of the applicable 5-year statute of limitations limits the TTO's maximum recovery for the Pro Rata Expenses Claim (FY2000-12) to the sum of the invoices issued for FY2010-12, which is $686,626.

X. LT'S THIRD AFFIRMATIVE DEFENSE: VOLUNTARY PAYMENT DOCTRINE

LT's third affirmative defense, the voluntary payment doctrine, is a compelling legal principle that applies to all three of the TTO's historical claims in this case: the Audit Payments Claim, the Investment Earnings Claim, and the Pro Rata Expense Claim (FY 2000-12). Like the laches doctrine, the voluntary payment doctrine is just and necessary to redress the 13 to 20 year time periods in which the TTO – with the participation of its Board of Trustees – make financial arrangements and decisions. These involved voluntary and knowing payments and credits of funds that the TTO now contends were illegal under the School Code.

The Illinois voluntary payment doctrine provides as follows: "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 Accept. Corp.*, 345 Ill.App.3d 669, 674-75 (1st Dist. 2003).

In the past, the TTO argued that no Illinois court has ever applied this doctrine against a public body. This is another way of saying that no Illinois court has ever approved an exemption for public entities. The facts of this case are very unusual and unique. It is not surprising that there

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is no body of cases in Illinois involving a public body seeking to undo decades of financial arrangements that it had with a school that it is supposed to represent as a fiscal agent and fiduciary, based on claims that its own prior conduct was illegal. If this case is appealed and becomes the first reported appellate decision in Illinois in which a public entity made claims barred by the voluntary payment doctrine, it will be a result that is warranted and just.

A. The Audit Payments Claim

On the Audit Payments Claim, there is no dispute that the TTO voluntarily made payments to Baker Tilly from 1993 to 2012 for the costs of LT's annual audits. There also is no dispute that the TTO had full knowledge of the facts of these payments. The TTO makes no claim of fraud, misrepresentation, or mistake of fact. The record reflects that sometimes these Baker Tilly bills went directly to the TTO, with the understanding that the TTO was paying them, and sometimes LT forwarded these Baker Tilly bills to the TTO for payment. It does not matter who initially received the bills under the voluntary payment doctrine. The critical factor is that LT claimed a right to have the TTO make these payments.

It also does not matter that the TTO's payments went to Baker Tilly and not to LT. As the *Jenkins* case shows, there is no additional legal requirement that the plaintiff made payments *directly to* the defendant as opposed to *on behalf of and at the demand of* the defendant. In other words, LT saying "you pay these bills for us" is no different, under the legal standard for this affirmative defense, than saying "you pay us money so we can pay these bills."

The TTO now contends that its payments were illegal under Sections 3-7 and 8-4 of the School Code, and that the TTO should be relieved of the consequences of its own voluntary and knowing conduct. This is precisely the type of argument that the voluntary payment doctrine was designed to overcome.

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B. The Investment Earnings Claim

On the Investment Earnings Claim, there is no dispute that the TTO knowingly and voluntarily made investment credits to the districts, including LT, from 1995-2012. Nor is there any dispute that the TTO made these payments as a bottom line credit to the districts' agency accounts. These credits of earnings to the account balances certainly constituted payments for purposes of the voluntary payment doctrine.

Furthermore, the TTO made these credits for investment earnings under a claim of right from LT. The evidence at trial will reflect that LT – for decades that continue through today – has tried repeatedly to get the TTO to be transparent and accurate with respect to its investment earnings. The record also will show that LT regularly pushed the TTO to provide investment returns consistent with market conditions, instead of the arbitrary and deficient returns that the TTO offered without any or much explanation to its fiduciaries. The quarterly credits were not gifts or mistakes – they were statutorily mandated payments under Section 8-7. LT consistently has demanded that the TTO comply with its obligations under that statute.

C. The Pro Rata Expenses Claim (FY2000-12)

With respect to the Pro Rata Expenses Claim (FY2000-12), the record shows that LT annually submitted to the TTO a written claim in memo form 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 offsetting the costs of LT's business functions against LT's annual pro rata expense invoices. These facts demonstrate both the voluntary and knowing nature of the TTO's absorption of these now-disputed costs, and well as the clear demand for payment as of right from LT.

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In 1999, the TTO specifically informed LT in writing that the TTO could pay for the costs of LT's business functions without altering the expense formula under Section 8-4 and without the need for an intergovernmental agreement. The voluntary payment doctrine prevents the TTO from coming to this Court over a decade later and claiming that the setoffs it knowingly and voluntarily made were illegal and should be unwound.

In the past, the TTO contended that the disputed setoffs did not constitute "payments." There is no legal authority that supports this argument. Under the *Jenkins* case, there is no additional legal requirement under the voluntary payment doctrine that a payment be made *directly in cash to* the defendant, as opposed to being made *in the form of a setoff or credit against other charges to* the defendant. In other words, "you pay these costs by giving us a check" is no different, under the legal standard for this affirmative defense, than saying "you pay these costs by setting them off against your pending invoice to us."

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

Count II of LT's Counterclaim charges the TTO with several breaches of fiduciary duties. "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.

A. The Existence of the TTO's Fiduciary Duties

Illinois law charges the TTO with serving as the "fiscal agent" of LT. *Lynn v. Trustees of Schools*, 271 Ill.App. 539, 547 (1933) (persuasive authority). The Supreme Court long has held that "the fiscal agent, whether of a government, a corporation, or an individual, should be held to the strictest accountability," and that the fiscal agent must "faithful[ly] discharge [] the duties devolving on him in his fiduciary capacity." *Hamilton v. Cty. of Cook*, 5 Ill. 519, 525 (1843).

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At trial, the Court will hear that the TTO has admitted that it serves as a fiduciary for the districts. The Court also will hear LT's current take on its responsibilities – that it owes no fiduciary duty to the districts, and somehow owes a fiduciary duty only to the taxpayers of Lyons Township. This Court can decide which view is consistent with Illinois law and the facts of this case.

Also, the Court will hear the TTO attempt to distinguish the TTO Trustees from the TTO Treasurer. As this Court will hear, there actually is an organization called the TTO which refers to itself in this case and with the general public as the TTO, the Lyons TTO, or the LTTO. The TTO consists of the Trustees, the Treasurer, and employees – just as LT consists of a Board of Education, a Superintendent, Principals, educators, and other employees. Each of these groups is governed by separate provisions of the School Code, but all are part of the organization. It is not by accident that the pending complaint of the TTO refers to the Trustees as the formal plaintiff and further asserts that it is the Treasurer who is bringing the claims in this case against LT.

The TTO holds and manages tens of millions 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 both the Trustees and the Treasurer of the TTO owe fiduciary responsibilities to LT.

B. The Insurance Recoveries

The first part of LT's breach of fiduciary duties claim is the failure of the TTO to credit LT's agency account with its share of $1,040,000 in insurance recoveries that the TTO received.

At trial, this Court will hear that the TTO made three claims on fidelity bonds for Healy's thefts of funds belong to the districts. Of these three claims, two were compromised through settlement, and one failed due to an insurer's insolvency. Through these settlements, the TTO

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recovered $1,040,000. As with most other TTO financial issues, the TTO made no effort to true up the difference between the amount of the claims and the amount of the recoveries.

The TTO's lack of accounting diligence was consistent with the TTO's refusal to conduct a forensic audit. Indeed, as this Court will hear, after Healy's departure the TTO's staff literally sat and waited for bank and investment statements to arrive in the mail so they could try to figure out what assets the TTO held for the districts. There is no dispute that the TTO failed to credit any portion of the insurance recoveries to LT's agency account. There also is no dispute that the TTO booked the insurance proceeds as revenues of the TTO.

Early in this case, the TTO took the position that it had not yet decided what to do with the insurance recoveries. Later in the case, the TTO offered several inconsistent explanations for how it supposedly applied the insurance proceeds to incurred expenses (and thus, did not bill for them through Section 8-4) and to claimed deficiencies in past expense invoicing. None of these alleged expenditures were approved by the districts, and the School Code does not permit the sorts of self-help in which the TTO apparently engaged. As a fiduciary, the TTO must conduct its financial affairs in good faith and for the benefit of LT and the other districts. As a government entity whose sole purpose is to handle accounting and investment issues, the TTO owed LT and the other districts a clear and timely explanation of its handling of over $1,040,000 in funds. As the new leaders of an organization that failed LT through the malfeasance of its long-time Treasurer, the TTO had an obligation to try and right that wrong.

In other words, the TTO should and could have credited LT and the other districts with their shares of the insurance recoveries instead of shrouding this large asset in mystery and then providing a sketchy explanation 3 years later – from its attorney in this case – as to why the TTO regarded this money as already dissipated.

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In response to this accusation, and indeed to all of the alleged breaches of fiduciary duties, the TTO responds with what essentially is a "one big stomach" argument. This argument goes as follows: the TTO holds the districts' funds and does not have any money of its own. Therefore, any money not credited to a particular member's agency fund stays in the TTO's system – the "big stomach" – as an asset, and each district owns an incremental portion of whatever the TTO owns.

This argument is of little solace to a public entity like LT with duties to its constituents. LT needs to know how much money it has, which should be the amount of the accounts held in its name. The TTO's accounting is too opaque, and the TTO is too adversarial, for LT to casually rely on someday being credited with some share of something. This concern is heightened by the state law that allows LT to leave the TTO once this case is over. When LT leaves, it is more likely that the TTO will present LT with a bill for undisclosed losses or deficits than give LT a credit for some ethereal ownership in non-allocated assets.

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

C. The Uncredited Investment Earnings Due LT

Earlier in this brief, we examined Section 8-7 of the School Code in the context of LT's Investment Earnings Claim. This same provision is the legal basis for the second part of LT's breach of fiduciary duties claim – the uncredited earnings due LT.

Section 8-7 of the School Code requires that for the TTO's investment of the pooled school district 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, but not all, which is what the TTO has done.

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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.

This Court will hear that in November 2013, the TTO informed the districts that it held investment earnings that the districts earned prior to July 1, 2013, but that the TTO had failed to credit to the districts. The TTO further informed that it would distribute these earnings, and that it was making a distribution of $500,000. However, in violation of the TTO's fiduciary duty to provide truthful, complete, and candid information to LT, the TTO failed to disclose that it was not crediting the districts with the full amount of the undistributed earnings from those earlier years. The earnings that the TTO failed to distribute in November 2013 were $283,968. LT is entitled to its proportionate share, which is $70,566.05.

In addition, in each fiscal year from 2014 through 2020, the TTO has paid LT most but not all of LT's share of the TTO's annual investment earnings. As this Court will hear at trial, the TTO consistently refuses to provide the districts with full and candid information on investment earnings. The TTO stopped providing the amounts of its investment earnings and distributions in its financial statements in 2008, and this fundamental information about the TTO's operations continues to be missing from the financial statements to this day. In addition, LT has repeatedly asked the TTO to provide complete information on its investment earnings and distributions but has received little cooperation in return.

As this Court also will hear, the TTO refused to provide responsive figures to LT in the context of this case. Instead, the TTO provided documents to LT and said, essentially, "you figure out how much we made and what you earned." LT has done its best to do so, but this response speak volumes about the TTO's real intentions in handling LT's money.

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It is important to understand that in any given year, the TTO credits only most of the net investment earnings to the districts, and it does not credit the remainder in the following year. The TTO admits this in writing, and claims that it is a “best practice” created by former Treasurer Birkenmaier. The remainder goes into the TTO’s “one big stomach” – and once there, available to be spent, accounted for, recategorized, or otherwise not credited to LT’s agency account.

The TTO’s improper practice for handling investment earnings violates Section 8-7. “Most” is not “all,” and LT has no obligation to wait until the day when the TTO might fully credit LT’s agency account. LT is entitled to be credited with its full investment earnings for this period, which total $253,855.95.

D. The West 40 Loan Deal

The third part of the fiduciary duties count arises from the TTO’s West 40 loan deal. West 40 Intermediate Service Center #2 (“West 40”) is a regional education agency operating in the Western Cook County suburbs.

For years, West 40 has had financial difficulties and was unable to pay its share of the TTO’s pro rata expenses. Its agency account at the TTO ran a large deficit. The TTO allowed West 40 to run this deficit. 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. These facts serve as background information for the resulting loan deal.

In 2018, the TTO organized and participated in a loan deal for West 40. 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”). The Collateral consisted of money that the TTO took from the funds of the districts without their authorizations. About $500,000 came from LT’s funds.

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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." This was inaccurate because the Collateral belongs to the districts and not the TTO. In placing the Collateral with the Bank, the TTO unreasonably put the funds at risk of default.

In this loan deal, the TTO exceeded its authority under the School Code. There are several provisions from the Illinois School Code that required the TTO to seek and receive LT's authorization before using LT's money in this manner. Article 5 of the Illinois School Code, 105 ILCS 5/5-1 to 5-37, specifies and limits the authority of township trustees of schools. Nowhere does Article 5 authorize the TTO to participate in a loan transaction to bail out a financially troubled regional educational agency using school district funds.

Also, Article 8 of the School Code, 105 ILCS 5/8-1 to 8-20, specifies and limits the authority of school treasurers. Section 8-7 requires treasurers to serve as the "custodian" of and "safely keep" all school district funds. Section 8-7 authorizes treasurers to enter into agreements to invest school district funds, and to pool the funds of several school districts for investment purposes. Section 8-8 authorizes the Treasurer to make loans, but only if the interest rate exceeds four percent and the loans are secured by mortgage on unencumbered Illinois real estate worth at least half of the loan. These conditions were not met for the West 40 deal. Section 8-8 specifies other, limited types of investments that a treasurer may make with school district funds. Section 8-16 provides that the "treasurer shall pay out funds of the school district only upon an order of the school board …." Sections 8-7 and 8-8 do not authorize a treasurer to use school district funds to provide a bank with collateral as security for a loan.

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Moreover, Section 8-16 required the TTO to seek approval of LT's school board to authorize the TTO to spend LT's money in a manner not authorized by the School Code, which is what the TTO did. Although the Collateral involved the purchase of CDs, the West 40 loan deal cannot be characterized fairly as an investment in CDs.

Fortunately, once LT added the West 40 loan deal to its counterclaim, West 40 and the TTO got to work getting this loan paid off. As a result, the collateral was released in January 2020, and LT's money no longer is at risk. While this is a victory of sorts, LT wants to ensure that the TTO does not exceed its authority and misuse LT's funds in this matter again. Accordingly, the TTO asks this Court to determine that the TTO's conduct in connection with the West 40 loan deal violated its statutory and fiduciary duties to LT.

As damages, LT seeks the difference between what its funds earned while pledged as collateral for the loan deal, and what it could have been expected to earn as an average part of the TTO's investment portfolio. LT acknowledges that this calculation is imprecise, but it is imprecise because the TTO refuses to provide its districts with typical measures of investment performance like annual rates of return. LT did the best it could with the limited information that the TTO provided. The damages that LT seeks for this issue is $4,590.12, although LT will be satisfied with a nominal damages award.

E. The TTO's Excessive Legal Costs

In the fourth and final part of the TTO's claim for breaches of fiduciary duties, LT contends if LT can be required to pay a large share of the costs of being sued, the amounts that the TTO incurred are so large and excessive that they constitute a breach of the TTO's fiduciary duties. The TTO's legal costs in this case, through the summer of 2020, exceed $3.3 million. That figure will rise dramatically after the trial, and may well top $4 million.

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To the extent that the TTO's legal costs in this case can be charged to LT under Section 8-4, the TTO's breach of fiduciary duty in incurring excessive costs should absolve LT of having to pay any share of them.

Conclusion

LT appreciates this Court's consideration of the arguments in this trial brief and the evidence that it will present at trial. LT respectfully asks this Court to enter judgment in favor of LT on the TTO's claims and LT's counterclaims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Jay R. Hoffman, an attorney, certifies that on October 16, 2020, he caused the foregoing pleading to be served by email and eService on the following attorneys:

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