

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

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

Plaintiff,

v.

Case No. 13 CH 23386

LYONS TOWNSHIP HIGH SCHOOL DISTRICT
NO. 204,

Defendants.

NOTICE OF FILING

To: Charles A. LeMoine, Rosa M. Tumialan, Stephen M. Mahieu, Dykema Gossett PLLC, 10
S. Wacker Drive, Suite 2300, Chicago, IL 60606

Please take notice that on July 24, 2015, we are filing with the Circuit Court of Cook
County, Illinois, **TOWNSHIP TRUSTEES' MOTION TO DISMISS FIRST AMENDED
VERIFIED COUNTERCLAIM**, a copy of which is hereby served on you.

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


Barry P. Kaltenbach

Gerald E. Kubasiak
Barry P. Kaltenbach
Gretchen M. Kubasiak
Miller, Canfield, Paddock & Stone, P.L.C.
225 West Washington, Suite 2600
Chicago, IL 60606
312-460-4200
Firm No. 44233

JOHN H. BROWN
CLERK

2015 JUL 24 PM 3:26

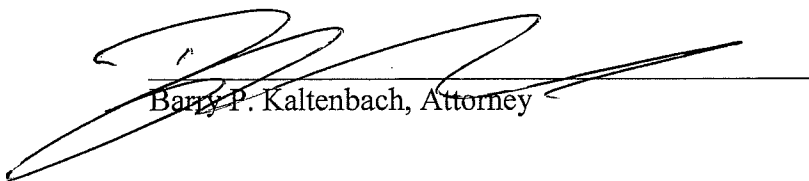
FILED

PROOF OF SERVICE

The undersigned, an attorney, certifies that copies of the following documents:

TOWNSHIP TRUSTEES' MOTION TO DISMISS FIRST AMENDED VERIFIED COUNTERCLAIM have been served upon Charles A. LeMoine, Rosa M. Tumialan, Stephen M. Mahieu, Dykema Gossett PLLC, 10 S. Wacker Drive, Suite 2300, Chicago, IL 60606 as follows:

- ☐ by personal service on July 24, 2015 before 4:00 p.m.
- ☐ by U.S. mail, by placing the same in [an] envelope[s] addressed to [him/her/them] at [the above address/their respective addresses] with proper postage prepaid and depositing the same in the U.S. Postal Service collection box at 20 S. Clark Street, Chicago, Illinois, on July 24, 2015 before 4:00 p.m.
- ☐ by facsimile transmission from 20 S. Clark Street, Suite 2900, Chicago, Illinois to the [above stated fax number/their respective fax numbers] from my facsimile number (312) 630-7939, consisting of ____ pages on July 24, 2015 before 4:00 p.m., the served [party/parties] having consented to such service.
- ☐ by Federal Express or other similar commercial carrier by depositing the same in the carrier's pick-up box or drop off with the carrier's designated contractor on July 24, 2015 before the pickup/drop-off deadline for next-day delivery, enclosed in a package, plainly addressed to the above identified individual[s] at [his/her/their] above-stated address[es], with the delivery charge fully prepaid.
- ☒ by Email, on July 24, 2015 before 4:00 p.m.


Barry P. Kaltenbach, Attorney

FILED
2015 JUL 24 PM 3:26
DOUGOTHY BROWN CLERK

No. 13 CH 23386

Judge Sophia H. Hall
Calendar 14

VS.

Calendar 14

Defendants

FILED
2015 JUL 24 PM 3:26
DOUGOTHY BROWN CLERK

INTRODUCTION

1

Township Trustees brings this Motion pursuant to Section 5/2-619.1 of the Code of Civil Procedure, which authorizes utilizing both Sections 5/2-615 and 5/2-619 in a single motion. *Patrick Eng'g, Inc. v. City of Naperville*, 2012 IL 113148, ¶31. Sections I, II and III of this Motion address insufficiencies appearing on the face of the First Amended Verified Counterclaim and, accordingly, are brought pursuant to Section 5/2-615. Section IV incorporates extrinsic facts not appearing on the face of the pleading and, accordingly, is brought under Section 5/2-619. Under either section, only well-pled facts are accepted as true. *Id.* This Court should not accept as true conclusions of fact unsupported by underlying allegations of specific fact, or conclusions of law. *Id.*

ARGUMENT

I. COUNT I IS PREMISED UPON ALLEGED CONTRACTS THAT WOULD BE UNENFORCEABLE UNDER THE SCHOOL CODE EVEN IF THEY HAD BEEN ADEQUATELY ALLEGED [SECTION 5/2-615]

In Count I, District 204 alleges the existence of two purported contracts that excused it from fulfilling its statutory obligations under the School Code. Through the first alleged contract, the Township Trustees purportedly agreed that it would pay for the cost of the annual audit which Section 5/3-7 of the School Code, 105 ILCS 5/3-7, obligates District 204 to undertake (the purported “audit agreement”). Through the second alleged contract, the Township Trustees purportedly agreed that District 204 did not have to pay its *pro rata* share of the Treasurer’s compensation and expenses of office, which Section 5/8-4 of the School Code, 105 ILCS 5/8-4, mandates (the purported “*pro rata* agreement”). District 204 further alleges that one of these purported agreements was breached (although it does not specify which one).

A. Either of the Purported Agreements Would Violate the School Code.

The Township Trustees and District 204 do not have the legal right to contract between themselves to excuse District 204 from the requirements of the School Code. The purported audit agreement allegedly excused District 204 from paying for its own annual audit. Section 5/3-7 of the School Code, however, provides that each school district is to cause an audit to be performed. 105 ILCS 5/3-7. It further provides that if any school district does not cause an audit to be performed, an audit shall be performed on its behalf and billed to the school district. The only logical reading of Section 5/3-7 as a whole is that each school district is supposed to pay for its own, statutorily-required audit. A contract contrary to statutory obligations, such as the purported audit agreement, is not enforceable. *South Suburban Safeway Lines, Inc. v. Regional Transp. Auth.*, 166 Ill. App. 3d. 361, 366 (1st Dist. 1988).

Likewise, the purported *pro rata* agreement allegedly excused District 204 from paying for its *pro rata* share of the Treasurer's expenses of office. But Section 5/8-4 of the School Code mandates that each school district pay its *pro rata* share of such expenses according to a statutory formula described therein. 105 ILCS 5/8-4. Any contract that purports to excuse this statutory obligation is not enforceable. *South Suburban*, 166 Ill. App. 3d at 366.

B. Even if the Purported Agreements did not Violate the School Code, Healy Lacked Actual or Apparent Authority to Enter into Such Contracts.

District 204's allegations respecting the two purported agreements are premised upon the alleged apparent or actual authority of Robert Healy, the former Treasurer and a convicted felon. But the doctrine of apparent authority is inapplicable against a public entity and it is evident that Healy did not have actual authority to contract away statutory obligations.

1. The doctrine of apparent authority is inapplicable.

The doctrine of apparent authority is not applicable against a public body. *Patrick Eng’g*, 2012 IL 113148 at ¶¶35-36. As the Supreme Court has explained, this rule of law is designed to prevent the public from harm, because otherwise a public body “would remain helpless to correct errors or, worse, to escape the financial effects of frauds and thefts by unscrupulous public servants.” *Id.* As a matter of law, Healy does not have apparent authority to contract on behalf of Township Trustees. He is the very type of employee the Supreme Court had in mind when it authored *Patrick Engineering*.

Even if this were not true, District 204 still has not properly alleged Healy’s apparent authority. An equally well-recognized rule of law is that an agent cannot create his own apparent authority. *Cove Mgmt. v. AFLAC, Inc.*, 2013 IL App (1st) 120884, ¶24. District 204, however, alleges that it relied upon *Healy’s* representations that he had authority to enter into the two purported agreements (see paragraph 47: District 204 “reasonably relied on Healy’s representations . . .”).

Elsewhere, District 204 alleges that it inquired about Healy’s authority, but the allegations rely upon the passive voice (see paragraph 42: “District 204 inquired about Healy’s authority, and was repeatedly informed that . . .”). This latter allegation is not well-pled because it does not allege to whom District 204 inquired, nor the identity of the speaker in response. District 204 could not have been justified, as a matter of law, relying upon Healy’s own representations of authority to contract.

2. The School Code does not provide Healy with actual authority to enter into either of the two purported agreements.

Section 5/5-2 of the School Code provides that “the school business of all school townships having school trustees shall be transacted by three trustees . . .” 105 ILCS 5/5-2.

The authority to conduct school business is not given to the Treasurer. Section 5/8-17 sets forth the duties of the Treasurer, but none of the duties listed include the duty to enter into contracts. 105 ILCS 5/8-17. Section 5/8-7 *does* authorize the Treasurer to enter into contracts, but only contracts:

[r]egarding the deposit, redeposit, investment, reinvestment or withdrawal of school funds, including, without limitation, agreements with other township and school treasurers, agreements with community college districts . . . and agreements with educational service regions

105 ILCS 5/8-7. The purported audit agreement and *pro rata* agreement have nothing to do with the deposit or investment of school funds. It is evident that Healy was not charged with the actual authority to enter into either purported agreement. District 204's conclusory allegations to the contrary are not well-pled and fail to overcome the School Code's limitation on Healy's actual authority.

C. Neither Purported Agreement is Well-Pled, Regardless.

Even *if* the School Code did not forbid both purported agreements, and even *if* Healy had apparent or actual authority to enter into either purported agreement, District 204 does not offer well-pled allegations respecting offer and acceptance. Rather, District 204 offers only conclusory allegations that the parties entered into a contract and Count I does not state a cause of action for breach of either purported agreement.

The allegations regarding the purported audit agreement are located at paragraphs 20 through 24 of the First Amended Verified Counterclaim. District 204 alleges this purported agreement in only the most conclusory of fashion: "The [Township Trustees], through its Treasurer, agreed it was appropriate to pay District 204's audit expenses" (¶21.) There are no well-pled allegations of how this contract was formed. *How* did the Township Trustees agree to this purported deal? When was the deal reached? Who from District 204 accepted it? Did

that person have authority to contract on behalf of District 204? The existing allegations of contract formation are not sufficient. See *Denkewalter v. Wolberg*, 82 Ill. App. 3d 569, 572-73 (1st Dist. 1980) (alleging two parties agreed to a contract is conclusory and not accepted as true for purposes of a motion to dismiss).

The allegations regarding the purported *pro rata* agreement are confusing and equally insufficient. The majority of the allegations recite the apparent back-and-forth between Healy and Lisa Beckwith, District 204's treasurer. District 204 then concludes that "[Township Trustees], through its authorized agent, Healy, adopted and accepted the [*pro rata* agreement] on or around March 22, 2000" (§41.) District 204 does not allege *how* Township Trustees accepted this agreement or that Ms. Beckwith had authority to contract on behalf of District 204.

Regardless, the gist of District 204's position is that Healy had authority to enter into the *pro rata* agreement. But District 204's other allegations contradict this. In paragraph 32, District 204 quotes from correspondence Healy sent to Ms. Beckwith wherein he stated, "I would expect that *when the [Township Trustees] takes into consideration . . .*" (§32.) In paragraph 37, District 204 alleges that "Healy represented to District 204's Finance Committee . . . that the [Township Trustees] had knowledge and were supportive of the proposal." (§37.) In both instances, District 204's well-pled allegations are that Mr. Healy informed District 204 that the Township Trustees, rather than he, needed to approve the purported agreement.

District 204 apparently seeks to address this flaw by later alleging that Mr. Healy switched positions and subsequently represented that he *did* have authority to enter into the *pro rata* agreement. In paragraph 47, District 204 alleges that it "reasonably relied on Healy's representations, as agent of the [Township Trustees], regarding the [*pro rata* agreement]." (§47.) Likewise, in paragraph 42, District 204 alleges that it "inquired about Healy's authority, and was

repeatedly informed that . . . [Township Trustees] supported and approved [the *pro rata* agreement].” (§42.) As explained above, these allegations run contrary to the rule that an agent cannot establish his own authority and they are not well-pled.

The final flaw in Count I is that District 204 does not specify which purported agreement it contends Township Trustees breached. For example, in paragraph 96, District 204 alleges it “has suffered damages as a result of [Township Trustees] breach of the parties’ agreement” (§96.) But it is not clear which Agreement it has alleged has been breached. In paragraph 97, District 204 alleges that it would be harmed if it were required to pay its “*pro rata* share or audit expenses.” (§97.) Here, District 204 seems to allege both Agreements have been breached.

In paragraph 95, District 204’s allegations are even more problematic. In paragraph 95(a), District 204 alleges that Township Trustees breached an unidentified agreement by failing “to provide District 204 with timely notice of any termination of the agreement” (§95(a)). But nowhere within the First Amended Verified Counterclaim does District 204 allege an obligation to give notice of termination for either purported agreement.

In paragraph 95(b), District 204 alleges that Township Trustees failed to “provide District 204 with offsets towards its annual *pro rata* share of expenses” (§95(b)). District 204’s theory is that it was entitled to offset its cost of performing certain services against its *pro rata* share of the Treasurer’s expenses. In those years when the value of its own services was less than its *pro rata* share, District 204 paid the difference to Township Trustees. (§54.) For those years where the value of its services was *greater* than its *pro rata* share, “District 204 would not owe the [Township Trustees] any additional payment for *pro rata* expenses that year.” (§55.) There is no allegation, however, that Township Trustees had an obligation to pay District 204.

Given this, paragraph 95(b) does not state a cause of action for breach of contract. Assuming that the *pro rata* agreement existed and was enforceable, District 204 does not allege that its terms would have required Township Trustees to pay money to District 204. Accepting this as true, Township Trustees' purported breach could not have caused money damages to District 204. Paragraph 95(b) is perhaps akin to an affirmative defense to Township Trustees' Amended Complaint, but it is not an actionable cause for breach of contract.

Finally, Paragraph 95(c) alleges only that Township Trustees "otherwise failed to perform its obligations" (§95(c)). Alleging a party breached an unspecified obligation does not state a cause of action. In sum, Count I suffers from numerous defects and should be dismissed pursuant to Section 5/2-615 of the Code of Civil Procedure.

II. THE DECLARATORY RELIEF REQUESTED IN COUNT II IS IMPROPER AND WOULD NOT RESOLVE THE PARTIES' DISPUTE [SECTION 2-615]

In Count II, District 204 seeks a series of declaratory judgments that, if granted, would not resolve the parties' dispute. A declaratory judgment is intended to settle and fix the parties' rights. *Illinois Emcasco Ins. Co. v. Waukegan Steel Sales Inc.*, 2013 IL App (1st) 120735, ¶15. It is not intended to provide a press release supporting one side or the other in a political contest; nor does it authorize a court to issue generalized declarations involving abstract propositions. *Beck v. Binks*, 19 Ill. 2d 72, 74 (1960). Declaratory relief is appropriate only when the requested relief would terminate at least part of the parties' controversy. *Illinois Press Ass'n v. Ryan*, 195 Ill. 2d 63, 66-67 (2001). The declaratory relief, which District 204 prays for in paragraphs 2(a) through 2(f) of its *ad damnum* clause, is improper.

A. The Declarations Sought in the Paragraphs 2(a) Through 2(c) are Premised Upon the Enforceability of the Purported Agreements.

The declarations sought in paragraphs 2(a) through 2(c) of the prayer for relief are premised upon the enforceability of the purported audit and *pro rata* agreements. As explained above, these purported agreements are unenforceable and inadequately alleged and, therefore, not the proper subject of a declaratory action. *Denkewalter*, 82 Ill. App. 3d at 572-73.

B. The Declaration Sought in Paragraph 2(d) Would not Terminate the Parties' Dispute Over Allocation of Investment Income.

In paragraph 2(d) of its prayer for relief, District 204 seeks a declaration that the Township Trustees “has underpaid District 204 its investment interest currently due and owing” Assuming, for purposes of this Motion, that Township Trustees has failed to properly allocate interest income such that District 204’s allocation was a shortfall, this declaration would not terminate the controversy. It would just provide District 204 with a press release that Township Trustees miscalculated something.

C. The Declaration Sought in Paragraph 2(e) Would not Terminate the Parties' Dispute Regarding Distribution of Fidelity Bond Proceeds.

In paragraph 2(d) District 204 seeks a declaration that Township Trustees “must pay District 204 its proportionate share of fidelity bond and insurance proceeds received in relation to Healy’s purported misconduct” (Township Trustees have been able to recover roughly \$1 million from Healy’s fidelity bonds.) Even assuming the School Code required Township Trustees to immediately release to each school district its share of these funds – something that Township Trustees does not concede – the requested declaration would not terminate the controversy. District 204 would just have a declaration that Township Trustees should do something it wants done.

D. The Declaration Sought in Paragraph 2(f) is not Premised Upon Statutory Authority and Would not Terminate the Parties' Dispute.

In paragraph (f) of its prayer for relief, District 204 seeks a declaration that the Treasurer “must reimburse District 204 for improper expenditures, including but not limited to public relations firm and duplicative investment advisor services” This relates to paragraphs 82 and 83 of the “Background” section of the First Amended Verified Counterclaim. In those paragraphs, District 204 alleges that Treasure incurred expenses of office, including retaining a public relations firm and investment advisors, which “were not authorized under Illinois law.”

There are two problems with this prayer for relief. First, similar to the above declarations, it would not terminate the parties' controversy. District 204 would just have a public scolding of Township Trustees for incurring a past expense it does not believe Township Trustees should have incurred. Second, and more importantly, District 204 makes no well-pled allegation that either expense was not authorized under Illinois law. Indeed, District 204 does not identify *any* portion of the School Code in support of its conclusory allegations.

The relevant statutory authority governing the Treasurer's expenses of office is Section 5/8-4 of the School Code. This Section, entitled “High school districts to pay share of compensation and expenses,” provides that each member district:

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

105 ILCS 5/8-4 (emphasis added). Section 5/8-4 of the School Code does not itemize permissible expenses of the Treasurer's office. In fact, nowhere in the School Code are such expenses itemized. Given this, what is District 204 relying upon to supports its position that the retention of a public relations firm or an investment advisory firm is unauthorized?

While this Court has the authority to issue relief to control “the discretionary actions of public officials,” this is only where “fraud, corruption, oppression or gross injustice is shown” *Board of Educ. v. Board of Educ.*, 112 Ill. App. 3d 212, 219 (1st Dist. 1983). District 204 does not allege that the engagement of a public relations firm or an investment advisor was the result of fraud, corruption, oppression or gross injustice. Absent such allegations, it is not appropriate for this Court to substitute its own business judgment for the discretionary spending of a public body.

III. COUNT IV AND COUNT V ARE LEGALLY INSUFFICIENT [SECTION 2-615]

District 204 asserts Counts IV and V as alternative relief in the event this Court finds that the alleged agreements are not enforceable under the School Code. While there is some difference between *quantum meruit* (Count IV) and unjust enrichment (Count V), they both are theories of quasi-contract and can be analyzed similarly. *Hayes Mech., Inc. v. First Indus., L.P.*, 351 Ill. App. 3d 1, 9 (1st Dist. 2004).

While it is common for a party to seek alternative recovery under quasi-contract in the event a court finds an express contract does not exist, this is not permissible where the express contract would be prohibited by law or could not have been legally entered into in the first instance. Such contracts are *ultra vires* and void. *Evans v. Benjamin School Dist. No. 25*, 134 Ill. App. 3d 875, 882 (2nd Dist. 1985). There are no exceptions, as “the law cannot at the same time prohibit a contract and enforce it [and] the prohibition of the legislature cannot be disregarded by the courts.” *DeKam v. Streator*, 316 Ill. 123, 129 (1925).

Implied contracts with public entities that are contrary to statutes are equally unenforceable. *McMahon v. City of Chicago*, 339 Ill. App. 3d 41, 48 (1st Dist. 2003). If the Township Trustees could be found liable under *quantum meruit* or unjust enrichment, then the

School Code's statutory provisions governing audit expenses and District 204's *pro rata* share would be rendered meaningless. *Gregg v. Bourbonnais*, 327 Ill. App. 253, 267 (2d Dist. 1945). When an agreement is contrary to statute or made without legal authority, then *quantum meruit* or unjust enrichment may not be utilized to enforce it. *Board of Educ. v. Murphy*, 56 Ill. App. 3d 981, 985 (4th Dist. 1978). Accordingly, District 204's theory that it can recover sums from Township Trustees pursuant to an quasi-contract that would violate the School Code were it an express contract must be rejected and Counts IV and V should also be dismissed.

IV. COUNT III DOES NOT ADEQUATELY ALLEGE THE RIGHT TO AN ACCOUNTING AND ONE IS NOT NECESSARY [SECTION 2-619]

District 204 has not adequately alleged in Count III of the First Amended Verified Counterclaim that it is entitled to an accounting, particularly when considering certain additional facts that provide context to its sparse allegations. More importantly, District 204 has no need for an accounting because it is entitled to – and has—issued issue discovery in this case.

A. District 204 has not Demanded and Been Denied an Accounting.

District 204 must allege both that it has demanded and been denied an accounting. *American Sanitary Rag Co. v. Dry*, 346 Ill. App. 459, 463 (1st Dist. 1952); *Patterson v. Northern Trust Co.*, 170 Ill. App. 501, 516 (1st Dist. 1912). An allegation that a party has demanded books and records is insufficient. *Id.* Yet the bulk of District 204's allegations are little more than a recitation that it asked for financial records and Township Trustees did not provide them (see, e.g., ¶120).

These allegations are insufficient, but they are also inaccurate. For example, in November 2013, Dr. Susan Birkenmaier, the current Treasurer, notified certain school district personnel that she was in the process of gathering various information they had requested. (See Affidavit of Dr. Birkenmaier, Exhibit 1 hereto, at ¶4 and attached exhibit thereto.) Dr.

Birkemaier explained that the process took time, because it involved “analysis, retrieval of archived material, [and] attorney review” *Id.* She recognized that “the request for itemized billings will generate a significant amount of information.” *Id.* Accordingly, she invited the school districts to “come in and look at our bills payable for this year and past years if that is useful.” *Id.* District 204 flatly rejected this invitation to examine the bills payable, stating “I do not intend to come to your office to review the materials” *Id.*

It is only in paragraph 121 of its First Amended Verified Counterclaim that District 204 finally alleges that it requested a “full accounting for the period of January 1, 1993 through the present, but, to date, the [Township Trustees] has failed to provide the requested accounting.” (¶121.) District 204 does not allege *when* it made this request, but District 204 is referring to a letter it sent on January 27, 2015, less than 2 *weeks* before it filed its original Verified Counterclaim. Township Trustees responded to this letter on February 3, 2015, just 7 days later. (Copies of both letters are attached as Exhibit 2.) Township Trustees did not refuse an accounting. To the contrary, its counsel provided a link to *15 years of audited financial statements*, which is the logical starting point of any financial accounting. District 204’s only response was to immediately file its counterclaim. District 204’s position that it requested, but was denied, an accounting is contrary to the actual history of the parties’ communications.

B. An Accounting is not Necessary or Appropriate in This Litigation.

District 204 does not need an accounting given the pending litigation. Whether to proceed with an accounting is within this Court’s discretion. *Newton v. Aitken*, 260 Ill. App. 3d 717, 756 (2nd Dist. 1994). “[T]he right to an accounting is not absolute.” *Id.* In exercising its discretion, this Court may consider the circumstances of this litigation, and may decline an

accounting “if the circumstances are such as to make an accounting unnecessary or improper.” *Patterson*, 170 Ill. App. at 516’.

An accounting here is unnecessary, and would be substantially duplicative, given that the relevant issues (*pro rata* expenses of the Treasurer’s office, allocation of interest income, and the payment of District 204’s statutorily-required audit) are already at issue via Township Trustees’ Amended Complaint. District 204 has the ability to – and already has – served written discovery seeking the very documents it contends are necessary for an accounting.

For example, in paragraph 119 of its First Amended Verified Counterclaim, District 204 alleges that “the financial data in the [Township Trustees’] possession is cryptically stored on a database the [Township Trusees] created The [Township Trustees] is the only party with knowledge of, and access to, the vast financial contents of this database.” (§119.) Presumably, District 204 suggests an accounting is necessary because it does not have access to the information on this database. But this is wrong.

As an initial matter, there is nothing “cryptic” about the information – as with virtually any entity, the Treasurer has computerized financial records that are stored securely. More importantly, Township Trustees has already generated and produced nearly 2,000 *financial reports*, most of which come from this database, to District 204. District 204 has not had to make a motion to compel the production of any documents or information and there is no reason to believe the parties will not be able to continue to manage discovery in this case. There is no need for this Court to invest itself to personally supervise an accounting.

CONCLUSION

WHEREFORE, for the reasons stated herein, plaintiff, Township Trustees of Schools Township 38 North, Ranger 12 East, respectfully requests that this Court enter an Order dismissing the First Amended Verified Counterclaim filed by Lyons Township High School District No. 204, along with providing such other relief as may be appropriate.

Respectfully submitted,

TOWNSHIP TRUSTEES OF SCHOOLS
TOWNSHIP 38 NORTH, RANGE 12 EAST

By: 

One of its attorneys.

Gerald E. Kubasiak
Barry P. Kaltenbach
Gretchen M. Kubasiak
Miller, Canfield, Paddock & Stone, P.L.C.
225 West Washington, Suite 2600
Chicago, Illinois 60606
(312) 460-4200
Firm No. 44233

24926109.1\154483-00001

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

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

Plaintiff,

vs.

**LYONS TOWNSHIP HIGH SCHOOL
DISTRICT NO. 204**

Defendants

No. 13 CH 23386

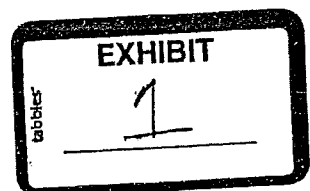
**Judge Sophia H. Hall
Calendar 14**

AFFIDAVIT OF DR. SUSAN BIRKENMAIER

The undersigned, under penalties provided by law pursuant to Section 1-109 of the Code of Civil Procedure, certifies that the statements set forth in this Affidavit are true and correct, except as to such matters herein stated to be on information and belief, and as to such matters the undersigned certifies as aforesaid that she verily believes them to be true.

1. My name is Susan Birkenmajer, Ed.D. I am presently the Lyon's Township School Treasurer ("Treasurer"). I was appointed to my position by the Township Trustees of Schools, Township 38 North, Range 12 East, the plaintiff in this case. I have served as Treasurer since October 2013. Before that, I served as Superintendent of Lemont-Bromberek School District 113a, and as the Director of Operations for LaGrange Highlands School District 106.

2. I have a Bachelor of Arts in Political Science from Northern Illinois University. I also have a Masters of Arts in Public Affairs from Northern Illinois University, and a Doctor of Education in Educational Leadership and Administration, General, from Indiana University. I hold a State of Illinois license as a Chief School Business Official (CSBO).



3. I am submitting this Affidavit in support of a Motion to Dismiss that the plaintiff has filed in this case. I have personal knowledge of the facts set forth herein, unless I state otherwise, and am competent to testify thereto.

4. I am aware that the defendant in this case, Lyons Township High School District No. 204 ("District 204") is alleging that it has requested various books and records from the Treasurer, although it is not clear to me whether District 204 is referring to me or my predecessors. I do know that on a prior occasion I invited District 204 to come to my office to inspect certain documents, but District 204 declined my invitation. Attached to this Affidavit is a true and correct copy of an e-mail exchange between I had with Timothy Kilrea, who is affiliated with District 204. As is evident from the exchange, District 204 declined my invitation in December 2013 to come to my office and conduct an inspection.


5. I also understand that District 204 has asserted that the Treasurer's office made use of a public relations firm. The firm of Jascula Terman & Associates, which provides public relations amongst other services, was engaged to deal with the media fallout cause by the well-publicized criminal investigation of Robert Healy, a prior Treasurer. Jascula Terman is no longer being utilized.

6. I also understand that District 204 asserts that my office utilized the service of a unspecified financial advisor. The Treasurer's office has worked with various financial advisors over the years to help the Treasurer's office fulfill its statutory duty to invest the public funds over which it has custody. Based on various communications outside of this lawsuit, I believe that District 204 might be referring to William Blair & Company. William Blair's services have been utilized in the past, but are not currently being utilized. To my knowledge, William Blair's

fees were not included in the any *pro-rata* bills. Rather, like many financial professionals, its fees were earned from the income its investments produced.

7. Township Trustees have undertaken actions to recover the funds that Robert Healy, a former Treasurer, embezzled. Township Trustees have, to date, successfully recovered \$1,040,000 from applicable fidelity bonds.

8. This money has been set aside while Township Trustees continue their efforts to recover additional sums. Once Township Trustees have exhausted its efforts, it will be able to determine the net recovery (the total amount recovered less the expense engaged in recovery). This net recovery can then either be allocated amongst member districts, used to pay unrelated expenses of the Treasurer's office, or otherwise used in accordance with Illinois law.



Susan Birkenmaier, Ed.D. 6/5/15
DATE

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

From: Kilrea, Timothy [mailto:tkilrea@LTHS.NET]

Sent: Wednesday, December 04, 2013 1:56 PM

To: 'Susan Birkenmaier'; 'Kevin O'Mara'; 'Joe Murphy'; 'Warren Shillingburg'; 'Lauri Calabrese'; Sellers, David

Cc: thiessen@lyonstto.k12.il.us; Mark Pera

Subject: RE: Request for additional information

Susan,

Please forward all materials that we originally requested in June, 2013 to LT at the end of December, which is within the timeline that you have provided. I do not intend to come to your office to view the materials and will await to receive this information in its entirety.

Thank you.

Sincerely,

Tim Kilrea

From: Susan Birkenmaier [mailto:susan@lyonstto.k12.il.us]

Sent: Wednesday, December 04, 2013 11:48 AM

To: 'Kevin O'Mara'; 'Joe Murphy'; 'Warren Shillingburg'; 'Lauri Calabrese'; Kilrea, Timothy; Sellers, David

Cc: thiessen@lyonstto.k12.il.us

Subject: RE: Request for additional information

Good morning all,

My goal is to have this project completed by the end of December. Some of the information is easier to collect than other information. I was expecting to create a complete response before sending you any information. I can break it down into smaller pieces if that is helpful to you. Further I can offer that the request for itemized billings will generate a significant amount of information. You are welcome to come in and look at our bills payable for this and past years if that is useful.

Please understand that any privileged correspondence/billing will be removed from the file. We cannot provide you any documents related to lawsuits that are pending. For District 102 and District 217 the signing of a Joint Defense Agreement will provide access to more, privileged information. If you are interest in pursuing such an agreement, please let me know and I will have our attorney speak with your district representation to work through the details of the agreement.

Thanks for your patience,
Susan

From: Kevin O'Mara [<mailto:komara@argohs.net>]

Sent: Wednesday, November 27, 2013 8:12 AM

To: Susan Birkenmaier; Joe Murphy; Warren Shillingburg; Lauri Calabrese; Tim Kilrea; David Sellers

Cc: Joe Murphy

Subject: Re: Request for additional information

Thank you Susan. I appreciate the response.

What is a reasonable deadline that you can meet to answer the questions District 217 posed?

Also, since Susan has decided to share the fact that I asked some questions, if anyone included on this email would like to get a copy of what I wrote to the TTO, please let me know.

Take care,

Kevin

Dr. Kevin J. O'Mara

Superintendent

Argo Community High School

www.argohs.net

President

Illinois High School District Organization

www.ihsdo.org

From: Susan Birkenmaier <susan@lyonstto.k12.il.us>

Date: Tuesday, November 26, 2013 at 10:58 AM

To: Kevin O'Mara <komara@argohs.net>, Joseph Murphy <jmurphy@argohs.net>, Warren Shillingburg <shillingburgwa@dist102.k12.il.us>, Lauri Calabrese <calabresela@dist102.k12.il.us>, Timothy Kilrea <tkilrea@lths.net>, David Sellers <dsellers@lths.net>

Subject: Request for additional information

Just a quick note to let you know I am working on collecting the TTO background data you have requested. As some of this information requires analysis, retrieval of archived materials, or attorney review it is taking a bit of time to comply with your requests. I will not be able to meet the December 1st deadline imposed by District 217 and 102. I will continue to work on this project as time allows.

Please contact me if you have any questions.

Best wishes for a Happy Thanksgiving,
Susan

Susan Birkenmaier, Ed.D.

Lyons Township School Treasurer

930 Barnsdale Rd

La Grange Park, IL 60526

708-352-1178 Ext. 106

susan@lyonstto.k12.il.us

Please save trees. Print only when necessary.

E-MAIL CONFIDENTIALITY NOTICE: This email communication is considered a public record and is subject to public disclosure. However, this message and any attachments may contain information protected by state and/or federal law for the sole use

of the intended recipient. If you are not the intended recipient, please note that any unauthorized review, disclosure, distribution, use or copying of this communication is strictly prohibited. If you are not the intended recipient, please notify the sender immediately and destroy all copies of the message.

E-MAIL ABUSE REPORTING: If you would like to report an inappropriate message that was sent to you, or if you do not wish to receive additional messages from this sender, please send your report / request to [spam-report at lths.net](mailto:spam-report@lths.net)



Dykema Gossett PLLC
10 S. Wacker Drive
Suite 2300
Chicago, IL 60606
WWW.DYKEMA.COM
Tel: (312) 876-1700
Fax: (312) 876-1155
Charles A. LeMoine

Direct Dial: 312-627-2163
Direct Fax: 866-546-2547
Email: CLeMoine@dykema.com

January 27, 2015

Barry P. Kaltenbach
Kubasiak Fylstra Thorpe & Rotunno, PC
Two First National Plaza, 29th Floor
20 South Clark Street
Chicago, IL 60603

Re: Lyons Township High School District 204's Demand for an Accounting

Dear Mr. Kaltenbach:

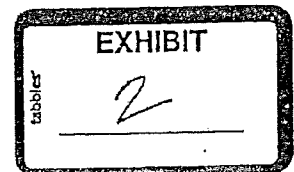
On behalf of our client, Lyons Township High School District 204 ("District 204"), we hereby reiterate our demand that Township Trustees of Schools, Township 38 North, Range 12 East ("Township Trustees"), immediately conduct and provide District 204 with a full accounting of all of Township Trustees' financial books and records for the period of January 1, 1993 through the present. District 204 previously requested such financial information, in addition to access to relevant books and records, but Township Trustees has not agreed to those requests.

Sincerely,

DYKEMA GOSSETT PLLC

Charles A. LeMoine

cc: Superintendent Timothy Kilrea



KFT&R

KUBASIAK, FYLSTRA, THORPE & ROTUNNO, P.C.

ATTORNEYS AT LAW

Barry P. Kaltenbach
bkaltenbach@kftrlaw.com

312.630.9600 [voice]
312.630.7939 [fax]



FILE COPY

February 3, 2015

Via E-Mail (clemoine@dykema.com)

Charles A. LeMoine
Dykema Gossett PLLC
10 S. Wacker Drive, Suite 2300
Chicago, Illinois 60606

Re: Township Trustees v. District 204
Circuit Court of Cook County, Illinois, Case No. 13 CH 23386

Dear Charles:

In your correspondence of January 27, 2015, you state that you are "reiterat[ing]" District 204's demand that the Township Trustees of Schools Township 38 North, Range 12 East ("Township Trustees") provide District 204 with a "full accounting of all of Township Trustees' financial books and records for the period of January 1, 1993 through the present." To my knowledge, this is the first such time that this demand has been made. Township Trustees has never refused to provide District 204 with any reasonable request for information.

With respect to your request, please be advised that the Township Trustees posts on its website copies of all of its audited financial statements for the fiscal years ending June 30, 2000 through June 30, 2014. Please see <http://www.lyonstts.org/meetings.html>. We can certainly check to see if audited financial statements are available dating back to the fiscal year ending June 30, 1993. If there is additional, specific information that District 204 is requesting be made available to it, and that is not contained in the audited financial statements, please let us know and we can discuss that with our client.

Very truly yours,

KUBASIAK, FYLSTRA, THORPE & ROTUNNO, P.C.



Barry P. Kaltenbach