

FILED-3
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

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) No. 13 CH 23386
)
) Judge Sophia H. Hall
) Calendar 14
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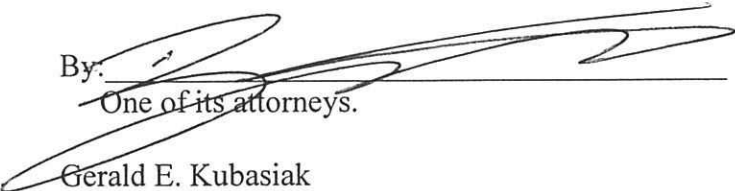
NOTICE OF FILING

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

PLEASE TAKE NOTICE that on March 12, 2015, I have filed with the Clerk of the Circuit Court of Cook County, Illinois, the following: **Plaintiff's Motion to Dismiss Counterclaim**, a copy of which is hereby attached and served on you.

Respectfully submitted,

TOWNSHIP TRUSTEES OF SCHOOLS
TOWNSHIP 38 NORTH, RANGE 12 EAST

By: 
One of its attorneys.

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PROOF OF SERVICE

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

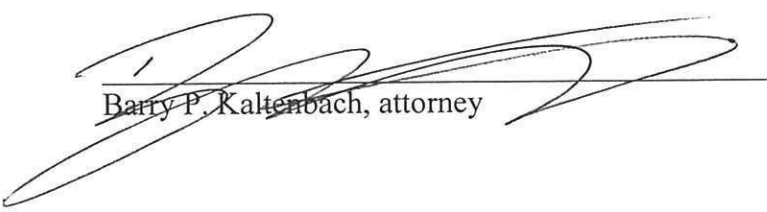
Plaintiff's Motion to Dismiss Counterclaim

has been served upon:

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as follows:

- ☐ by personal service on March 12, 2015 before 4:00 p.m.
- ☒ by U.S. mail, by placing the same in an envelope addressed to them at the above address with proper postage prepaid and depositing the same in the U.S. Postal Service collection box at 20 S. Clark Street, Chicago, Illinois, on March 12, 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 March 12, 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 March 12, 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 _____, on March 12, 2015 before 4:00 p.m., the served [party/parties] having consented to such service.


Barry P. Kaltenbach, attorney

COOK COUNTY, ILL.
CHANCERY DIVISION

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Judge Sophia H. Hall
Calendar 14

PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIM

Plaintiff, Township Trustees of Schools Township 38 North, Range 12 East (“Township Trustees”), for its Motion to Dismiss the Verified Counterclaim for Declaratory, Injunctive, and Other Relief (“Counterclaim”), filed by defendant, Lyons Township High School District No. 204’s (“District 204”), states as follows:

I. INTRODUCTION

Count I of District 204's Counterclaim should be dismissed because it fails to properly allege the pre-requisites to an action for an accounting and because an accounting is unnecessary. Count II should be dismissed because the declaratory relief District 204 seeks amounts to press releases, not findings that would terminate any controversy between the parties. The injunctive relief District 204 seeks in Count II is over broad and vague. Further, District 204 fails to adequately allege the purported 1993 and 1999 Agreements upon which much of its Counterclaim is based; in addition these alleged Agreements are unenforceable as a matter of law.

II. DISMISSAL IS WARRANTED UNDER SECTIONS 2-615 AND 2-619 OF THE CODE OF CIVIL PROCEDURE

Township Trustees brings this Motion pursuant to Section 5/2-619.1 of the Code of Civil Procedure, which authorizes combining Sections 5/2-615 and 5/2-619 into a single motion. *Patrick Eng'g, Inc. v. City of Naperville*, 2012 IL 113148, ¶31. The majority of this Motion is pursuant to Section 2-615, which tests the legal sufficiency of the Counterclaim. *Id.* In some instances, Township Trustees relies upon additional facts not set forth in the Counterclaim. Such arguments are noted as being brought under Section 5/2-619. Under either section, only well-pled facts are accepted as true. *Id.* The law does not accept as true conclusions of fact unsupported by underlying allegations of specific fact, or conclusions of law. *Id.*

III. AN ACCOUNTING IS NOT ADEQUATELY ALLEGED, OR NECESSARY

District 204 has not adequately alleged that it is entitled to an accounting, particularly under the circumstances of this case. Moreover, District 204 has no need for an accounting because it has been offered, and is obtaining through discovery, all the documents it seeks. Imposing the procedural sideshow of an accounting upon the parties and this Court is unnecessary, and will only result in greater delay and expense.

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). A demand for copies of books and records is insufficient. *Id.* Yet District 204 does little more than allege that on unspecified occasions it

asked for financial records and Township Trustees failed to provide them. Even accepting these allegations as true,¹ they are not sufficient to support District 204's claim for an accounting.

It is not until paragraph 48 of its Counterclaim that District 204 alleges that it requested a "full accounting for the period of January 1, 1993 through the present, but, *to date*, the TTO has failed to provide the requested accounting." (Emphasis added.) District 204 does not allege *when* it made this request, but District 204 is apparently referring to a letter it sent on January 27, 2015, less than 2 weeks before it filed its 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, it provided a link to audited financial statements for the fiscal years going back 15 years. Township Trustees also offered to look for older financial statements. District 204 did not respond to this offer.² District 204's last-minute request for an accounting leaves it unable to plead that it has both demanded and been refused an accounting. For this reason, Count I of its Counterclaim should be dismissed.

B. District 204 has not Alleged an Accounting Would Reveal Township Trustees Owes District 204 any Sums.

District 204 has not alleged an accounting would reveal that Township Trustees owes it money, nor has District 204 alleged how much it believes is at issue.³ Both are necessary allegations for a party seeking an accounting. *American Sanitary*, 346 Ill. App. at 463; *Gutsch Brewing Co. v. Fischbeck*, 41 Ill. App. 400, 402 (1st Dist. 1891). District 204's failure in this regard warrants dismissal of Count I of its Counterclaim. District 204 might argue it needs an

¹ Because District 204 does not allege anything specific (*e.g.*, what was requested, or when), these allegations are not well-pled. They are also inaccurate. For example, in December 2013, the current Treasurer, Dr. Susan Birkenmaier, invited District 204 to send a representative to her office to inspect financial records. District 204 declined this invitation. (See Affidavit of Dr. Birkenmaier, Exhibit 1 hereto, ¶4.)

² District 204's failure to allege it has been refused an accounting can be evaluated under the governance of Section 2-615. To the extent the Court wishes to consider Exhibit 2, then Section 2-619 governs.

³ District 204 does allege that in recent years it has received less interest income (Counterclaim ¶22), but this does not satisfy pleading requirements. It also overlooks the nation-wide drop in interest rates. The Treasurer cannot invest however she wishes; she is limited to conservative investments that provide minimal return. 105 ILCS 5/8-8.

accounting because it does not know precisely how much is at issue, but as discussed below, this does not mean that an accounting is necessary.

C. An Accounting is not Necessary.

Even if District 204 pled the elements for an accounting, it would be within this Court's discretion whether to proceed. *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, interest income and audit fees) are already at issue via the Amended Complaint. District 204 may undertake any discovery it wishes. As of the writing of this Motion, Township Trustees is responding to written discovery that District 204 has already served. Conducting an accounting will just add another layer of expense and delay.

IV. DISTRICT 204'S REQUESTED DECLARATORY RELIEF IS IMPROPERLY PLEAD AND TOO VAGUE TO RESOLVE THE PARTIES' DISPUTES

Varied problems exist with the declaratory relief District 204 seeks in paragraphs (a) through (g) of its prayer for relief in Count II. Paragraphs (a) through (c) fail to state a cause of action because they are premised upon the validity of the purported "1993 Agreement" and "1999 Agreement." But District 204 has not adequately alleged the existence of either Agreement. In any event, the alleged Agreements would be unenforceable. The declaratory relief prayed for in paragraphs, (d) through (g) would not resolve the parties' disputes.

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 score political points, 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 there is an actual controversy and the requested relief would terminate at least part of the controversy. *Illinois Press Ass'n v. Ryan*, 195 Ill. 2d 63, 66-67 (2001).

A. District 204 Does not Adequately Allege the Existence of the 1993 and 1999 Agreements, nor Would They be Enforceable in any Event.

The cardinal problem declaratory relief sought in paragraphs (a) through (c) is that District 204 fails to adequately allege the existence of either the 1993 or 1999 Agreement. Further, even if adequately alleged, neither Agreement would be enforceable as a matter of law.

i. District 204 alleges the Agreements only in conclusory fashion.

A cause of action for declaratory judgment respecting a contract must first allege the existence of the contract. *Denkewalter v. Wolberg*, 82 Ill. App. 3d 569, 572-73 (1st Dist. 1980). This requires pleading “sufficient allegations of specific facts” establishing offer, acceptance and consideration. *Id.* An allegation that two parties entered into a contract is conclusory and not taken as true. *Id.* Paragraphs (a) and (b) pray for declarations that the alleged 1999 and 1993 Agreements are valid and enforceable, respectively. District 204 does not, however, allege specific facts establishing that it and Township Trustees entered into either Agreement.

In paragraph 8, District 204 offers only the conclusory allegation that the parties “entered into” the 1999 Agreement. Likewise, in paragraph 12, District 204 offers only the conclusory allegation that an “agreement was reached” between it and Township Trustees to enter into the 1993 Agreement. District 204 does not offer any allegations of specific fact regarding offer, acceptance or consideration. Because Count II fails to allege sufficient specific facts showing the formation of either Agreement, prayers for relief (a) through (c) must be dismissed.⁴

⁴ District 204 oddly alleges that under the 1999 Agreement it performed services that otherwise would have been performed by Township Trustees. (¶¶7-8.) District 204 later alleges that because of agreement, Township Trustees agreed to pay for District 204’s audit expenses, leading to the 1993 Agreement. (¶12.) This is a temporal paradox.

ii. Robert Healy did not have actual or apparent authority.

In an attempt to allege contract formation, District 204 alleges that it “relied on the authority of Robert Healy, the [former] Treasurer who negotiated, confirmed, and administered the 1999 Agreement.” (Counterclaim ¶9.) District 204 also alleges that Healy had “actual or apparent authority” to enter into the 1993 Agreement. Healy purported authority is not well-pled, and it is wrong as a matter of law.

The School Code did not give Healy express authority to enter into the alleged Agreements, which purport to excuse District 204 from statutory obligations to pay its own audit fees and *pro rata* share of the Treasurer’s expenses. 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. This power to conduct school business is not entrusted to the Treasurer.

Section 5/8-17 sets forth the duties of the Treasurer, but it does not provide that the Treasurer has the duty to enter into contracts. *See* 105 ILCS 5/8-17. Section 5/8-7 *does* authorize the Treasurer to enter into contracts – but only very specific types:

agreements . . . regarding 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 authorized by Section 3-47 of the Public Community College Act and agreements with educational service regions authorized by Section 3-9.1.

This section limits the Treasurer’s authority to enter into agreements relating to the investment of school funds. It does not authorize the Treasurer to enter into agreements with other school districts that excuse statutory obligations. District 204’s allegation that Healy had actual authority to enter into either Agreement is not well-pled and fails as a matter of law.

Equally failing is District 204’s conclusory allegation that Healy had apparent authority. The doctrine of apparent authority is not applicable against a public body, otherwise the public

body “would remain helpless to correct errors or, worse, to escape the financial effects of frauds and thefts by unscrupulous public servants.” *Patrick Eng’g*, 2012 IL 113148 at ¶¶35-36.⁵ Even if the doctrine was applicable, District 204 alleges no facts establishing apparent authority. District 204 offers only the single, conclusory sentence at the end of paragraph 12 of its Counterclaim. This is not sufficient under Illinois law. *Id.* at ¶31.

iii. The Agreements would be unenforceable even if Healy had authority.

Even if Healy had authority to enter into either Agreement, they *still* would not be enforceable. The Township Trustees and District 204 do not have the legal power to contract away obligations imposed by the School Code. Purportedly, the 1993 Agreement provided District 204’s annual audit expenses would be borne not by District 204, but by Township Trustees.⁶ But Section 5/3-7 of the School Code, 105 ILCS 5/3-7, provides that audit expenses are to be borne by the school district being audited. A contract contrary to statutory requirements is not enforceable. *South Suburban Safeway Lines, Inc. v. Regional Transp. Auth.*, 166 Ill. App. 3d 361, 366 (1st Dist. 1988).

Likewise, the 1999 Agreement purportedly excused District 204 from paying its *pro rata* share of the Treasurer’s expenses. But Section 5/8-4 of the School Code, 105 ILCS 5/8-4, mandates that each school district pay its *pro rata* share of such expenses. Township Trustees does not have the legal power to contractually excuse District 204’s statutorily-imposed obligations. For this additional reason, prayers for relief (a) through (c) must be dismissed.

B. In Paragraphs (d) and (e), District 204 Does not Seek Declaratory Relief That Would Terminate any Controversy.

In paragraphs (d) and (e) of its prayer for relief, District 204 seeks declarations that the Township Trustees improperly withheld interest payments and insurance proceeds from District

⁵ There is no reason why the Supreme Court’s ruling in *Patrick Engineering* would be limited to municipalities.

⁶ In actuality, this would mean the expenses would be borne by the other districts the Township Trustees serve.

204. Assuming, for purposes of this Motion, that Township Trustees has failed to properly allocate interest income, or failed to distribute insurance proceeds, neither declaration would terminate the controversy. District 204 would have nothing more than a declaration that Township Trustees did something wrong. It might score District 204 political points, but it is not the province of the judiciary to involve itself in such matters. District 204 does not pray for any substantive relief; it just wants this Court to reprimand Township Trustees.

C. The Declaratory Relief Sought in Paragraph (f) Would not Terminate any Controversy and is Premised Upon the Wrong Section of the School Code.

In paragraph (f) of its prayer for relief, District 204 seeks a declaration that the Treasurer invoiced school districts for expenses of office not permitted by Section 5/5-17 of the School Code. There are two problems with this request for relief. First, such a declaration would not terminate any controversy; it would just function as a nice press release for District 204.

Second, District 204 misreads the School Code. District 204 alleges that Section 5/5-17 sets forth categories of permissible expenses, and to the extent an expense does not fall within one of these categories, it is impermissible and cannot be billed as an expense of the Treasurer's office. (Counterclaim ¶¶30-38.) Section 5/5-17 does not do this. Section 5/5-17 merely lists four specific items and describes how Township Trustees is to pay them.⁷ First, they are to be paid out of the income from the permanent township fund. Then, if there is not sufficient income, Section 5/5-17 provides they are to be paid by each school district on a *pro rata* basis.

Section 5/5-17 does not categorize permissible expenses of the Treasurer's office. This is evident by examining the four items that are listed. For example, the last item, "[t]he cost of dividing school lands and making plats," is not a function the Treasurer performs. If Section 5/5-17 were intended to itemize the Treasurer's expenses of office, this item would be misplaced.

⁷ They four items are: (a) compensation of the Treasurer; (b) cost of publishing the annual statement; (c) cost of a record book, if any; and (d) cost of dividing the school lands and making plats.

Equally important to examine is what is *not* listed. If Section 5/5-17 were the exclusive list of “expenses,” the Treasurer would be unable to purchase, for example, office supplies, or pay the electric bill, as they are not listed therein.

The relevant statutory authority governing the Treasurer’s expenses is Section 5/8-4 of the School Code. This section 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).

Notably, Section 5/8-4 of the School Code does not itself itemize permissible expenses of the Treasurer’s office. Nowhere in the School Code are such expenses itemized. This raises the question of this Court’s standard of review for expenses that the Township Trustees and Treasurer determine to be appropriate. Such determinations are necessarily discretionary. While this Court has the authority to issue relief to control “the discretionary actions of public officials,” this is permissible only where “fraud, corruption, oppression or gross injustice is shown” *Board of Education v. Board of Education*, 112 Ill. App. 3d 212, 219 (1st Dist. 1983).

District 204 does not allege that the engagement of either was the result of fraud, corruption, oppression or gross injustice. Absent such, it is not appropriate for this Court to substitute its own business judgment for that of an elected public body.

D. The Declaratory Relief Sought in Paragraph (g) is Also not Well-Pled and Would not Terminate the Controversy.

In paragraph (g) of its prayer for relief, District 204 seeks a declaration that the Township Trustees and the Treasurer “failed to comply with the financial and oversight requirements, including but not limited to those set forth in 105 ILCS 5/5-17 and 105 ILCS 5/5-20.” Such a

declaration would not terminate any controversy. District 204 would, again, have nothing more than a press release. This fails to state a cause of action for declaratory judgment.

District 204 also fails to allege *how* the Township Trustees failed to comply with financial and oversight requirements. In paragraphs 24 and 25, for example, District 204 recites the requirements of Section 5/5-20, which includes, *inter alia*, examining the paperwork of the Treasurer. District 204 then alleges, in paragraph 26, that Township Trustees must have failed in their duties, because Healy has been criminally indicted and sued. No other casual connection is alleged. One cannot draw the connection that, just because one public official embezzles money, other public officials violated their statutory duties. There is no allegation that Township Trustees failed to meet regularly, or failed to examine the books of Healy, or failed to retain a qualified accounting firm to audit Healy's paperwork. District 204 has failed to set forth well-pled allegations sufficient to establish any right to declaratory relief.

V. DISTRICT 204 SEEKS VAGUE INJUNCTIVE RELIEF THAT WOULD REQUIRE THIS COURT TO PERMANENTLY MONITOR PUBLIC SPENDING

District 204 also prays for *permanent* injunctive relief in paragraphs (h) through (j) of its prayer for relief in Count II of its Counterclaim. District 204, however, does not approach the level of pleading necessary to warrant this extraordinary relief. The permanent injunctions it requests are too vague to be enforced and would saddle this Court with never-ending oversight of the governing functions and discretionary actions of an elected public body.

A. District 204 Does not Allege an Underlying Cause of Action to Support Its Request for Permanent Injunctive Relief.

A plaintiff must plead and prove the "clear right" to permanent injunctive relief, irreparable harm absent an injunction, and that it has no adequate remedy at law. *Kaplan v.*

Kaplan, 98 Ill. App. 3d 136, 142 (1st Dist. 1981). An injunction is an “extraordinary remedy,” only to be issued in exigent circumstances. *Crowley v. Bauchens*, 57 Ill. 2d 360, 366 (1974).

The first problem with District 204’s prayer for permanent injunctive relief is that an injunction is a remedy – not a cause of action. *Town of Cicero v. Metropolitan Water Reclamation Dist.*, 2012 IL App. (1st) 112164, ¶¶40-74. To be entitled to injunctive relief, District 204 must allege more than that it is being harmed. District 204 fails to allege a cause of action, the remedy for which is injunctive relief.

B. District 204’s Requested Injunctions are Too Vague to be Enforced.

District 204 prays that this Court issue permanent injunctions that will commit this Court to oversee of the governance and discretionary actions of an elected public body. *Forever*. Equally problematic is that District 204 seeks what is known as an “obey the law” injunction. An injunction must be specific in terms and must describe in reasonable detail, without reference to other sources, the conduct to be enjoined. *Paschen Contractors, Inc. v. Burrell*, 14 Ill. App. 3d 748, 753-53 (1st Dist. 1973). Because an injunction is punishable by contempt, a party is entitled to fair notice of what conduct it is enjoined from undertaking. *Id.* at 752. The injunctive language must be “as definite, clear and precise in its terms as possible so that there may be no excuse or reason for failing to comprehend or obey its prohibitions.” *Streif v. Bovinette*, 88 Ill. App. 3d 1079, 1085 (5th Dist. 1980) (citing what is now 735 ILCS 5/11-101). “The act enjoined or directions given must be delineated with the particularity requisite to command obedience, enable enforcement, and allow an understanding of exactly what is forbidden.” *Id.*

“Illinois courts have disapproved injunctions which inadequately define the specific rights to be protected or merely allude to general principles of conduct to be followed.” *Gilberts v. Holiday Park Corp.*, 150 Ill. App. 3d 932, 937 (2d Dist. 1986). To borrow the verbiage from

federal jurisprudence, courts should not enjoin a party to “obey the law.” *Swift & Co. v. United States*, 196 U.S. 375, 501 (1905); *United States v. P.H. Glatfelter Co.*, 768 F.3d 662, 685 (7th Cir. 2014). This is, however, what District 204 asks this Court to do.

In paragraph (h) of its prayer for relief, District 204 requests that this Court enjoin Township Trustees from spending “funds paid by member school districts on expenses not permitted by law[.]” Paragraph (i) of District 204’s prayer for relief similarly seeks an injunction against Township Trustees “invoicing member school districts for *pro rata* share expenses not permitted by law[.]” Both of these requests are impermissibly vague and over broad, and enjoin Township Trustees to obey the law. Township Trustees already has a pre-existing legal duty to obey the law (as does District 204). District 204 does not seek an injunction against particular expenses being incurred, nor against particular expenses being invoiced. District 204’s allegations focus on the expense of a public relations firm and a financial advisor, but District 204 does not purport to limit the scope of its injunction. District 204’s request in paragraph (j) of its prayer for relief seeks an injunction requiring Township Trustees to “comply with all requirements set forth in the Illinois School Code” Here, District 204 literally seeks an injunction to obey the law.

The injunctive language District 204 seeks is impermissible. Such injunctions would commit this Court to the permanent micro-management of each particular expense and invoice submitted by Township Trustees, without any meaningful guidance on what conduct might place Township Trustees in contempt of Court. Each of District 204’s requested injunctions fail to comply with Illinois law and District 204’s prayer for injunction relief should be dismissed.

C. District 204 Does not Allege a Threat of Irreparable or Continuing Harm.

District 204 does not set forth well-pled allegations of irreparable harm or the threat that such harm would continue into the future. Although the injunctive language District 204 requests is impermissibly vague, District 204 alleges issues relating to an unspecified “public relations firm” and “financial advisor.” (Counterclaim ¶¶31-36.) Forced to read District 204’s mind on this issue, Township Trustees believes that the public relations firm is Jascula Terman & Associates. (See Affidavit of Dr. Birkenmaier attached as Exhibit 1, ¶5.) According to its website, Jascula Terman works with a variety of clientele, including educational bodies such as the University of Illinois at Chicago and Oswego Community Unit School District 208.⁸ Jascula Terman was hired to provide assistance with the media fallout caused by the well-publicized criminal investigation into Healy. (Exhibit 1 ¶5.) Its services are no longer being utilized.

It is unclear what “financial advisor” District 204 refers to, but it seems to be William Blair & Company, whose services the Treasurer utilized for a limited period of time. (Exhibit 1 ¶6.) In order to fulfill its statutory obligations to invest school funds, the Treasurer needs to utilize the services of a qualified broker. This is not duplicative of other services. While the Treasurer is required to be a “certified public accountant or a certified chief school business official” (105 ILCS 5/8-1), the Treasurer is not a licensed broker-dealer or financial advisor. The Treasurer cannot buy or sell the bonds and similar securities to which its investments are limited. *See* 105 ILCS 5/8-8. The School Code anticipates the Treasurer’s need to engage outside financial services by authorizing the Treasurer to enter into agreements for the investment of school funds. *See* 105 ILCS 5/8-7. Additionally, William Blair’s fees for such services were not included in the any *pro-rata* bills and neither are the fees of any other such person or entity.

⁸ See www.jtpr.com.

With this additional factual context in mind,⁹ District 204 does not allege either irreparable harm or the threat of future harm such as to warrant an injunction. If Township Trustees no longer utilize Jascula Terman or William Blair, there is no threat of future harm. Even if Township Trustees *did* continue to use their services, such harm would not be irreparable. District 204 would not suffer irreparable harm by receiving an invoice.

District 204's final prayer for injunctive relief, in paragraph (j), could perhaps allege irreparable harm, if it were not so vague. District 204 cannot truthfully assert that every potential violation of the School Code would force it to endure irreparable harm. District 204's prayer for injunctive relief should be dismissed.

VI. 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 Verified Counterclaim for Declaratory, Injunctive, and Other Relief filed by Lyons Township High School District No. 204, along with providing such other relief as may be appropriate.

⁹ District 204's allegations are insufficient even without this additional factual context, making the relevant standard that of a Section 2-615 motion to dismiss. In the event that this Court wishes to consider the additional facts set forth in Dr. Birkenmaier's Affidavit, the proper standard would be that of a Section 2-619 motion to dismiss.

Respectfully submitted,

TOWNSHIP TRUSTEES OF SCHOOLS
TOWNSHIP 38 NORTH, RANGE 12 EAST

By: 

One of its attorneys.

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Firm No. 48237

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

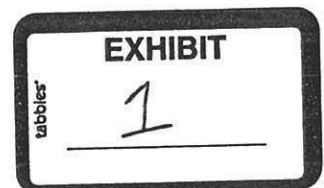
TOWNSHIP TRUSTEES OF SCHOOLS)	
TOWNSHIP 38 NORTH, RANGE 12)	
EAST,)	
)	No. 13 CH 23386
Plaintiff,)	
)	Judge Sophia H. Hall
vs.)	Calendar 14
)	
LYONS TOWNSHIP HIGH SCHOOL)	
DISTRICT NO. 204)	
)	
Defendants)	

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 Birkenmaier, 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 113, 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.




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 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 respond to the media fallout caused 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 an 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.



Susan Birkenmaier, Ed.D. 3/11/15
DATE

[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

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Charles A. LeMoine

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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:

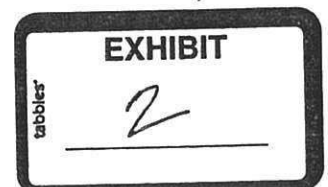
On behalf of our client, Lyons Township High School District 204 ("District 204"), we hereby reiterate our demand that Township Trustees of Schools, Township 38 North, Range 12 East ("Township Trustees"), immediately conduct and provide District 204 with a full accounting of all of Township Trustees' 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