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

TOWNSHIP TRUSTEES OF SCHOOLS TOWNSHIP 38 NORTH, RANGE 12 EAST,	)	
Plaintiff and Counter-Defendant,	)	No. 13 CH 23386
v.	)	Hon. Sophia H. Hall
LYONS TOWNSHIP HIGH SCHOOL DISTRICT 204,	)	Calendar 14
Defendant and Counter-Plaintiff.	)	

DEFENDANT LT'S RESPONSE TO THE TTO'S SUMMARY JUDGMENT MOTION

This is the response of Defendant Lyons Township High School District 204 ("LT/District 204") to the Second Revised Summary Judgment Motion ("the TTO Motion") of Plaintiff Township Trustees of Schools ("the TTO"). As LT will explain, this entire case should be resolved by a jury trial. First, LT asserted a Counterclaim that is not subject to the TTO Motion. Second, this Court ruled in February 2018 that the applicability of the statute of limitations to the TTO's Claims cannot be resolved on summary judgment and must be decided at trial. This ruling precludes the entry of summary judgment on any of the TTO's three Claims. Third, there are serious and real disputes of material fact on both liability and damages issues critical to the TTO's Claims that require the denial of the TTO Motion.

I. THE TTO MOTION DOES NOT ADDRESS LT'S COUNTERCLAIMS.

LT's Second Amended Counterclaim ("the Counterclaim") contains two counts. Count I for Setoff alleges that the TTO and LT knowingly agreed to outsource certain business functions to LT and to offset those costs against the TTO's annual expense invoices. Count I asserts that LT is entitled to a setoff in the amounts set forth in LT's annual cost statements. Count II for Breach of Fiduciary Duty alleges that the TTO's former Treasurer stole over $1 million from the districts' funds; that the TTO

recovered $1,040,000 in insurance proceeds from two fidelity bonds; but that the TTO failed to distributed these recoveries to the districts.

The TTO Motion, by its own terms, does not address either of the counts in the Counterclaim, and seeks summary judgment only on the TTO's Claims and LT's Affirmative Defenses. Because LT filed a jury demand, the parties will conduct a jury trial regardless of the outcome of the TTO Motion.

II. THE TTO CANNOT RE-LITIGATE THE STATUTE OF LIMITATIONS ISSUE.

In 2017, LT moved for partial summary judgment. LT asserted that a 5-year limitations period applies to the TTO's Claims, which would reduce the TTO's claimed damages by $3.3 million and would eliminate one Claim entirely. In response, the TTO asked this Court to rule that its Claims are exempt from limitations. In February 2018, this Court issued an order denying LT's motion without prejudice due to the existence of factual issues that must be resolved at trial.

Now, in the TTO Motion (at 23), the TTO asks for reconsideration of the February 2018 ruling, and again seeks a summary judgment ruling in its favor on the limitations issue. There is no proper basis for reconsideration. Because the upcoming trial will decide the limitations issue, the TTO cannot obtain summary judgment on any of its Claims, and the TTO Motion should be denied.

A. Material Facts – Statute of Limitations

In May 2017, LT filed its motion for partial summary judgment on the statute of limitations ("the LT Motion"). In July 2017, the TTO filed a response to the LT Motion. The TTO argued that summary judgment on the limitations issue was warranted, but that the Court should determine that its Claims were exempt. The same day, the TTO also filed its own motion for summary judgment ("the TTO 2017 Motion"). In that motion, under the heading "Second Affirmative Defense: Statute of Limitations," the TTO presented no argument, and instead cross-referenced its response to the LT Motion. The Court stayed the TTO 2017 Motion pending consideration of the LT Motion.

In February 2018, this Court issued an order on the LT Motion ruling that that the limitations issue could not be resolved on summary judgment: "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." (LT's SJ Ex. (Ex.) 1) In its oral ruling, the Court 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**." (Ex. 2 p.3.)

In particular, the Court stated that the TTO's argument that it was exempt because it held LT's funds in trust did not seem viable under the facts presented to that point (*id.* p.6-7):

> I don't see anything that indicates that the treasurer is holding -- at this point holding any money in trust subject to the treasurer's discretion as to how they might spend things. It just seems to me the treasurer is moving the district's monies according to the statutory requirements. So I'm not seeing that. So that means the issue of the Statute of Limitations, in my view, at this point is not going to be resolved by saying the Statute of Limitations doesn't apply because there is some trust account happening.

As for the TTO's argument that it was exempt based on a public interest exception, the Court stated that it did not have sufficient information about the accounts, the movement of funds, and the relationship of the Claims to the applicable legal precedent to resolve the issue before trial (*id.* p.7-8):

> The investment income is of interest, and that's a different kind of account. I don't know. More information has to be had about that. Then the operating expenses. How are the operating expenses paid? It would seem that the distribution of the operating expenses are connected to the whether or not the audit payments to -- let me back up. Moving to the audit expenses, the audit expenses seem -- of Lyons Township seem to come out of the operating income…. I know this sounds a little confusing as I'm expressing this, but that's because it is not totally clear how the monies are traveling.

Even though the TTO 2017 Motion acknowledged that the LT Motion would resolve the limitations issue, the current TTO Motion asks for a second bite at the apple. The TTO presents no new law or facts, and does not cite to the legal standard for reconsideration.

B. Argument – Statute of Limitations

"The purpose of a motion for reconsideration is to apprise the trial court of newly discovered evidence, a change in the law, or errors in the court's earlier application of the law." *Farley Metals v. Barber Colman Co*., 269 Ill.App.3d 104, 116 (1st Dist. 1994). The TTO fails to acknowledge that legal standard, let alone meet it. The TTO presently is asking for the same relief it sought in 2017 – a summary judgment ruling that its Claims are exempt from the statute of limitation. However, the TTO does not offer any newly found evidence or newly decided legal precedent to support its position.

The prior summary judgment proceeding lasted 8 months, and involved hundreds of pages of briefing (including supplemental briefs) and two hours of oral argument. The TTO's current attempt to cajole this Court into reversing its prior ruling – and preventing LT's defense from being heard at trial per the Court's order – is both contrary to the *Farley* standard and fundamentally unreasonable.

In asking the Court to reconsider the trust funds question, the TTO Motion does not cite to the transcript of the Court's statements, and only submits a short quote from one case: *Hackett v. Trustees of School*, 398 Ill. 27 (1947). The TTO chose not to cite that 71-year old decision in the two briefs it filed on the LT Motion.

In any event, the *Hackett* case does not provide a valid basis for reconsideration. In *Hackett*, private persons exercised their right under an option to buy land that contained a schoolhouse and other buildings. The options allowed the purchase once the school closed. The school trustees claimed that they could remove and sell the buildings before the land transfer, while the purchasers asserted their right to the buildings. 398 Ill. at 28-30. In ruling for the trustees, the Supreme Court cited with approval from an earlier case: "A municipal corporation holds its property in trust for public uses, and its funds can be used only for corporate purposes. They cannot be diverted to private use." *Id.* at 32. The Court further reasoned that giving the buildings to the private persons would be a "gift" that was not

contemplated at the time the deed was signed. *Id.* Thus, the dispute in the *Hackett* case concerned the use of public funds for public purposes, and not private gain. This case has nothing to do with whether LT's funds that the TTO manages – which the TTO's own Trustee characterized as an "agency account," and not a "trust account" – are held in trust as that term is defined under Illinois trust law.

On the public interest exception, the TTO merely quotes a part of the Court's February 2018 oral ruling from to imply that the Court previously ruled in its favor – which, as the order and transcript of the ruling show, was not the case. This Court denied the LT Motion without prejudice, and subject to proofs being presented at trial, because the Court was "not totally clear how the monies are traveling," and how those facts would impact each of the TTO's three Claims with respect to the public interest exception. Nothing about this issue has changed since February 2018.

In the unlikely event that this Court is inclined to re-litigate the limitations issue, LT respectfully requests leave to file a comprehensive brief on the applicable law and relevant facts. Otherwise, the Court's February 2018 ruling is a sufficient basis for denying the TTO Motion in its entirety. It is impossible to enter judgment in favor of any of the TTO's Claims without knowing whether a 5-year limitations period will lower the claimed damages by $3.3 million.

III. THE TTO'S FACTUAL STATEMENT ON BEING A "ZERO-SUM OFFICE" IS CONTRARY TO THE RECORD EVIDENCE.

The TTO Motion (at 3-4) contains a preliminary fact section in which the TTO claims it is a "zero-sum office." This factual contention is the TTO's theme of this case: namely, that any TTO transaction involving LT that is disproportionate to transactions involving other districts necessarily creates a larger liability for the other districts, and disrupts the statutory framework of the TTO system. The TTO makes the operation of the TTO seem simple: the TTO receives tax revenues, invests the districts' funds, pays investment income to the districts, and sends each district a pro rata expense invoice covering its office's expenditures. The implication is that the TTO zeros out its operation

annually, and that the TTO itself upset this balance from 1994-2012 by paying for LT's annual audits, allowing LT to setoff its business function costs against the expense invoices, and over-allocating investment income to LT. The TTO asks this Court, essentially, to save the TTO from its past decisions.

Later in this brief, LT will address the facts relevant to each of the TTO's three Claims. However, there is ample evidence in this case demonstrating that the TTO, as a matter of fact, did not operate as a "zero-sum office.". Because LT is opposing a motion for summary judgment, LT need not present all of the relevant facts in this response. The following evidence is sufficient to show why the TTO's "zero-sum office" contention is genuinely disputed, and should be resolved by a jury:

1. The TTO admitted that it operated with a "structural deficit" as far back as 2002. (Ex. 3 p.13) The TTO asserted a right to take money that it recovered and apply that money to its own structural deficit, "which would then cause each school district to then have lesser of a liability to the structural deficit." (*Id.*) Thus, the TTO office did not actually balance to zero.

2. The TTO covered for its structural deficits by borrowing millions of dollars from the districts' funds interest-free, without statutory authority or the districts' consent. The TTO's annual audit report for FY2013 showed "Advances to Township School Treasurer" from the Agency Fund in the amount of $3,267,267. (Ex. 4 p.10) This amount does not correlate to the $4,437,203.06 in damages that the TTO sought from LT in its 2013 complaint, filed only 3 months after the audit report.

3. According to the TTO's annual audit reports, the amount of investment income that the TTO received varied significantly from what it actually distributed to the districts. (Ex. 5 p.5-6) The TTO's audit reports for FY1995-2007 (the TTO stopped disclosing this data in 2008) show that the TTO earned more than $1 million in investment interest that it never allocates to the districts. (*Id.* p.5-6) In FY2003, for example, the TTO failed to distribute over $3.2 million in earnings. (*Id.* p.6; Ex. 6 p.4)

4. The TTO, in a verified pleading in this case, asserted that during the relevant years, there were

large differences between the expenses the TTO's office incurred and the amount of expenses actually billed to the districts. (Ex. 7 p.1-2) The TTO claimed that from FY1994-2012, the TTO under-billed the districts by $854,324.39. (*Id.*) According to the TTO, it billed the districts at or close to the amount of its incurred expenses in only 9 of the 19 years relevant to this case. (*Id.*)

5. In 2013, the TTO informed the districts that it had discovered a pool of undistributed investment income from prior years that belonged to the districts and was making a $500,000 distribution. (Ex. 8) But the TTO failed to tell the districts that the total pool was about $1.3 million, and that it still holds the balance of the discovered funds with no intent to distribute them. (Ex. 9 p. 41-43, 48-49)

6. To this day, the TTO still does not know much money Treasurer Healy stole from the districts. (*Id.* p.20-25, 33) The TTO recovered $1,040,000 on insurance claims for Healy's thefts (*id.* p.25-26), but still has not distributed theses recoveries to the districts. (Ex. 3 p.12-15)

7. In 2012, when Treasurer Healy resigned, the TTO had no records stating all of the investments that the TTO held for the districts. (Ex. 10 p.21-22) The TTO said that it created a listing of the investments, but lost the flash drive containing the listing. (*Id.* p.25-26)

8. From at least 2003 to the present, The TTO loaned money belonging to the districts to an entity called West 40. In July 2018, West 40's debt to the TTO stood at $2.4 million. This debt "is a combination of pro rata charges and monies provided by the TTO to assist West 40 with covering some expenses." (Ex. 11) There are no intergovernmental agreements covering the TTO's relationship with West 40 of their loans. (*Id.*)

Thus, the TTO's contention that is a "zero-sum office" – which is the factual predicate of all of its Claims – is contradicted by compelling record evidence. A reasonable jury could conclude that the TTO operated during the relevant years outside of its statutory authority and proper accounting standards, and in ways that disadvantaged LT and all of the other member districts.

IV. THE CLAIM FOR AUDIT COSTS SHOULD BE TRIED TO A JURY.

The TTO's first Claim seeks recovery of $511,068.60 in payments that the TTO made to Baker Tilly and its predecessor companies William F. Gurie and Virchow Krause (collectively, "Baker Tilly"). The TTO alleges that these costs were for LT's annual audits from 1994-2012. This Claim cannot be resolved on summary judgment for many reasons:

1. The statute on which the TTO bases its Claim did not require LT to pay for its annual audits, nor did it prevent the TTO for paying for them. The TTO admitted this under oath.

2. The TTO stated repeatedly in both letters and discussions with LT, and in sworn testimony, that the TTO paid for the audits of all districts. Even the TTO's current personnel now admit that the TTO paid for the audits of at least some other districts in some years.

3. The TTO's Claim is based on incomplete source records that prevent the TTO from meeting its burden of proof at trial, much less obtaining a summary judgment.

4. The TTO's Claim is based on a methodology that improperly includes costs for Baker Tilly work outside the scope of LT's annual audit – namely, for reconciliation/balancing work. The TTO admitted that reconciling the TTO's books with LT's books was the TTO's responsibility.

5. The TTO's damages computation is overstated by 25 percent because it seeks to recover costs that the TTO previously included in its pro rata expense invoices sent to LT.

6. If the LT prevails on the limitations issue at trial, most of the damages will be time-barred.

A. <u>Material Facts – The Applicable Statute</u>

The TTO bases its Claim on Section 3-7 of the School Code, which states, "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 an audit and charge the cost back to the district. *Id.*

TTO's representative deponent, Treasurer Susan Birkenmaier, admitted that the School Code does not require LT to pay for its own annual audit, nor does it prohibit the TTO from paying for LT's audit (Ex. 9 p.80-82):

Q: Is there any requirement in the School Code that requires District 204 to pay for its own audit?

A: I would say based on my knowledge of what's in there, it has no indication of who pays for an audit, just that one must be completed.

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Q: So you're not aware sitting here today of any part of the School Code or other law that would, as far as you know, prohibit the TTO from paying for District 204's audits, correct?

A: I don't believe it's referred to or discussed, so I will say no.

B. Material Facts – Baker Tilly's Audit, Reconciliation, and Extra Work

Well before the relevant time period in this case, the TTO selected Baker Tilly to perform annual audits for the TTO, LT, and all of the other districts. According to Treasurer Healy, "There was one audit, big audit, comprised of, shall we say for the sake of argument, 14 school districts. LT was one of them. They went in and performed audit functions." (Ex. 12 p.19)

Also, according to Healy, "there were subsequent services Baker Tilly performed for the individual school districts that were not part of the audit." (*Id.* p.21-22) These extra services involving special projects like the auditing of state grants, federal grants, interest funds, activity funds, and scholarship funds – "which were not part of the trustees' responsibilities." (*Id.* p.22)

LT was the only district in the TTO's jurisdiction that performed its own business/accounting functions internally. In an April 1999 letter to LT (Ex. 13), Healy noted that fact and stated that the TTO therefore 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. (*Id.* p. 5) Healy sent his letter to each of the TTO Trustees. (*Id.* p.9)

In keeping with this letter, Healy testified that Baker Tilly performed work for the TTO to

reconcile the TTO books with the LT books, and that this reconciliation work was separate from the work it performed for LT's annual audit because it benefitted both sides. (Ex. 12 p.15-17)

The TTO's representative deponent agreed: "The TTO has assumed that responsibility" to reconcile the two sets of books. (Ex. 9 p.52) In addition, the TTO acknowledged that it 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. (*Id.* p.53-54)

C. Material Facts – Who Paid for Baker Tilly's Work

Treasurer Healy repeatedly informed LT in writing and verbally that the TTO paid for the annual audits of all districts. In his April 1999 letter to LT (and copied to the Trustees), Healy wrote, "The trustees hire and pay for the audit of the school districts and the Treasurer's office in Lyons Township." (Ex 13 p.6) 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." (Ex. 14 p.5)

Healy testified that these statements contained in his letters were correct (Ex. 12 p.18-19):

Q: And so the Trustees paid for the audits for not just LT, but the other school districts?

A: Right.

Healy also noted that TTO's Trustees approved all of the office's expenditures on an annual basis. (*Id.* p.117) As for the extra work that Baker Tilly performed for the districts, "[i]t was the district's responsibility to pay for those individually." (*Id.* p.22)

Russell Hartigan was a Trustee of the TTO from 1998-2005. (Ex. 15 p.4, 13) He confirmed Healy's testimony. When shown Healy's April 1999 letter stating that the TTO paid for all of the district's audits, and asked if it is "consistent with your understanding of what the trustees did," he replied, "I believe so." (*Id.* p.25-26) When shown Healy's deposition testimony to the same effect, and asked if that was consistent with his understanding, Hartigan stated, "I think it is. I think we did pay for

the audits of others, as far as I recall." (*Id.* p.49)

The testimony of LT's witnesses is consistent with Treasurer Healy and Trustee Haritgan's recollections. Dr. Dennis Kelly was LT's Superintendent from 1992-2009. (Ex. 16 p.16) He testified that the TTO selected Baker Tilly as the auditor for the entire Township and paid for the audits of all districts. (*Id.* p.66-67) He received confirmation from the Superintendent of District 105, as well as from Healy himself. (*Id.* p.68-69, 73) This arrangement on audit costs already was in place when Kelly assumed his position back in 1992. (*Id.* p.70)

Dr. Lisa Beckwith was LT's Director of Business Services from 1996-2000. (Ex. 17 p.15-17) She said the TTO hired and paid Baker Tilly to perform audits for all districts. (*Id.* p.45-47) Healy told Beckwith that "he pays for all of the elementary districts and the high school, all of his districts, because it made more sense for one auditor to be auditing all of the books." (*Id.* p.47-48) David Sellers was LT's Director of Business Services from 2003-14. (Ex. 18 p.12) He testified that in 2012, Healy made the same representation: "The conversation I had with Bob Healy was to ask the question, Bob, you're paying for the audits of all of the school districts, correct? To which he responded yes." (*Id.* p.31)

The TTO's representative deponent admitted that "the TTO, during the time period relevant to this lawsuit, was knowingly and deliberately paying the audit costs for District 204." (Ex. 9 p.60) The TTO admitted to having "no idea why" the TTO paid these costs (*id.* p.61), and that the TTO made no effort to speak to its former employees or trustees to find out why this occurred. (*Id.* p.64-70) The TTO admitted it could not get information from Baker Tilly because the TTO had threatened to sue Baker Tilly, which led to the signing of a tolling agreement between them. (*Id.* p.206-07)

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 to perform its audit work. (Ex. 18 p.33-35)

D. Material Facts – Current TTO Testimony on Other Districts

In this case, the TTO's outside accounting contractor Kelly Bradshaw and Treasurer Birkenmaier both disagree with Trustee Hartigan and Treasurer Healy's testimony. However, even Birkenmaier and Bradshaw do not agree with each other, and Birkenmaier herself testified inconsistently under oath.

Kelly Bradshaw is an accountant and an independent contractor for the TTO from 2012 to the present. (Ex. 10 p.7-8) In October 2016, she testified she had analyzed the TTO's payments of Baker Tilly invoices and prepared a report detailing the TTO's payment of LT's audit costs. (*Id.* p.30-31.) She said that the TTO paid audit costs for only one other district, called LADSE, in 1999. (*Id.* p.35-36)

In February 2017, Birkenmaier testified for the TTO. She stated that in November 2016, she reviewed the TTO's records on payments for Baker Tilly's audits of other districts: "We found that the charges for annual audit fees for all of the other districts were charged against the district, the specific district funds, the respective district funds." (Ex. 9 p.63)

In July 2017, Treasurer Birkenmaier signed an affidavit for the TTO 2017 Motion. (TTO Motion Ex. 3) In the affidavit, Birkenmaier claimed that the TTO generally did not pay the audit expenses of districts other than LT, but that the TTO paid certain audit expenses for LADSE in 2008 and for District 999 in 2011 and 2012. (*Id.* ¶30) LT located one of the District 999 invoices, which shows that Baker Tilly invoiced the TTO directly while referencing District 999's audit in the bill. (Ex. 19) Birkenmaier did not explain why the TTO paid the audit invoices for LADSE and District 999, or whether the TTO asked these districts to make repayments to the TTO. (TTO Ex. 3 ¶30)

E. Material Facts – Missing Invoices and Records

The TTO's computation of audit payments (Ex. 20) is inherently unreliable, and the jury properly could reject it, due to the many missing records at the TTO. The TTO admits it is missing, for

multiple years, many of the Baker Tilly invoices that the TTO says were for LT's audit costs. (Ex. 10 p.31; Ex. 20-21) In 2013, the TTO tried to obtain the missing invoices from Baker Tilly, but could not get them because Baker Tilly's records only went back to about 2006. (Ex. 10 p.32-33)

Because the TTO is missing so many Baker Tilly invoices, many of the disputed payments for LT's audit statements are based solely on a vague one- or two-word description of a payment entered on the TTO's general ledger. (Ex. 20) Additionally, the TTO Motion admits that it is missing all records on audit payments for two entire years: "Audit expenses have not been identified with any specificity for FY 2004 and 2005." (TTO Ex. 3 ¶24 n.4, ¶41-42)

Like the TTO, LT lacks a complete set of the Baker Tilly invoices. Baker Tilly often sent its invoices directly to the TTO. (*E.g.*, Ex. 22) Also, LT sometimes forwarded Baker Tilly's invoices directly to the TTO for payment without retaining a copy. (Ex. 18 p.36)

F. Material Facts – Inclusion of Non-Audit Expenses

The TTO's damages computation for this Claim relied on a methodology that reviewed the TTO's general ledger for those TTO payments to Baker Tilly that said "LT" or "District 204." The jury should hear that this simplified methodology caused the TTO to include many non-audit related costs in its claimed damages. This is a summary judgment proceeding, and there are scores of disputed payments that comprise the claimed damages. Accordingly, LT will provide several examples to show that there is a genuine dispute over the TTO's methodology. LT is not inviting the TTO to deduct these examples from the amount of its Claim and assert that the remaining payments are undisputed, because that is not the case. Here are just some of the many improperly included payments in the TTO's Claim:

1. 5/13/1994 payment for "Dist 204 Balancing." (TTO Ex. 3, 1994 p.17) This payment is based solely on a general ledger entry, meaning the TTO lost the invoice. Healy and the TTO's representative agreed that balancing the TTO's books to LT's books was the TTO's responsibility, and was separate

from LT's audit work.

2. 2/7/1994 payment for "Prof Services # 204"; 4/15/1994 payment for "Dist 204". (*Id.*) These payments are based solely on general ledger entries. These payments simply refer to LT and make no mention of its audit. The work could be for reconciliation/balancing, or for the TTO's own audit insofar as the auditors needed or wanted to examine LT's records.

3. 8/31/1994 payment for "Dist 204 – Legal Serv"; 1/31/1995 payment for "Soc Sec #204 – Legal Serv." (TTO Ex. 3, 1995 p.22) 12/11/1995 payment for "Dist 205 -Legal Serv." (TTO Ex. 3, 1996 p.7) These payments are based solely on general ledger entries. The entries do not refer to audit work and are, due to their classification as legal services and social security-related, unexplainable.

4. 8/11/1995 payment for "Dist 204 – Form 5500-CR"; 8/11/1995 payment for "Dist 204 – School levy/tax cap." (TTO Ex. 3, 1996 p.5) These payments are based solely on general ledger entries. The entries do not refer to audit work, and it is unclear what the nature of this work was, or which entity should have paid for this work.

5. 5/15/2000 payment for "Dist 204." (TTO Ex. 3, 2000 p.5) The supporting invoice states that this work was for "Balancing School District 204's accounts with the Treasurer." (*Id.* p.30) This payment was not for LT's annual audit.

6. 8/30/2000 payment for "Audit 204." (TTO Ex. 3, 2001 p.5) Contrary to the general ledger entry, the supporting invoice states that this work was for "Balancing School District 204's accounts with the Treasurer." (*Id.* p.7)

7. 9/28/2001 payment for "Audit for Dist #204." (TTO Ex. 3, 2001 p.5) Contrary to the general ledger entry, the supporting invoice references the TTO's own audit. (*Id.* p.11) An unidentified person wrote by hand on the invoice that it was for LT's audit. (*Id.*)

These examples involve less than half of the 18 years that the TTO raises in this Claim. LT can,

and will, present to the jury additional examples that call the TTO's methodology into question. The jury also will hear that the TTO's representative deponent could not explain any of the unsupported and questionable general ledger entries shown to her. She admitted that she needed to see the "source documents" – which neither party has. (Ex. 6 p.104-15)

G. Material Facts – Damages Overstated by 25%

The jury also should hear that 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 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. (Ex. 7 p.2) The TTO also admitted that LT's annual share of these expenses was "roughly 25%." (*Id.* p.2) Accordingly, through the TTO's pro rata expense process, the TTO invoiced LT for a 25% share of LT's audit costs (and the other districts' audits, as well).

The TTO tried to work around these facts by arguing in a prior pleading (*id.*) that the TTO did not bill all of its expenses in all years, apparently under the theory that a double recovery in this case would allow the TTO to catch up for unbilled expenses as to LT (and LT only). The TTO admitted that "for fiscal years 1999 though 2003 and 2006 through 2008, LT was invoiced for its proportionate share of LT's own annual audit." (*Id.*) The TTO asserted that "for fiscal years 1994 through 1998 and fiscal years 2009 through 2012, LT was invoiced for only a portion of its proportionate share of LT's own annual audit." (*Id.*) The TTO Motion does not acknowledge these facts.

H. Argument – Audit Costs Claim

1. *Summary Judgment Is a "Drastic Means" of Resolving Cases.*

"The purpose of summary judgment is not to try an issue of fact but to determine whether one exists. A genuine issue of material fact precluding summary judgment exists where the material facts

are disputed, or, if the material facts are undisputed, reasonable persons might draw different inferences from the undisputed facts. Although summary judgment is encouraged in order to aid the expeditious disposition of a lawsuit, it is a drastic means of disposing of litigation. Consequently, a court must construe the evidence in the record strictly against the movant and should grant summary judgment only if the movant's right to a judgment is clear and free from doubt." *Monson v. City of Danville*, 2018 IL 122486 ¶12.

2. *The School Code Does Not Support the TTO's Claim.*

The TTO asserts that Section 3-7 of the School Code is the legal basis for its Claim. Yet its own representative deponent admitted that this provision did not require LT to pay for its own audit, and did not prohibit the TTO from paying for LT's audit. (See above p. 9)

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

The TTO's argument is 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 – on summary judgment – to rewrite Section 3-7 by adding a condition that simply does not exist, and thereby graft one sub-provision's requirement onto another.

In addition, the TTO cannot explain how a provision that grants authority to a regional superintendent of schools – in circumstances that are not present here – can be construed as also providing statutory authority to the TTO. As the TTO admitted under oath, no statute authorizes the TTO to charge LT for the cost of an annual audit. Nor does Section 3-7 of the School Code create any right of action for the TTO – which is governed by an entirely different statute – to sue LT for allegedly failing to comply with Section 3-7.

The TTO also argues, without citing to authority or record evidence, that because LT "engaged" Baker Tilly, it must pay for its costs. In fact, it was the TTO that selected Baker Tilly. (See above p. 9) The fact that LT signed formal 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.

The TTO is correct that the record does not contain a written contract between the TTO and LT governing the payment of audit costs. This arrangement pre-dated Superintendent Kelly's tenure at LT, which began in 1992. (Ex. 16 p.66-67) LT's business manager who served in the years before 1992, Leon Eich, is long dead. (*Id.* p.67) We will never know exactly how this arrangement began due to the TTO's long delay in filing suit.

However, the TTO misstates the record when it claims that the TTO's payment of audit costs was done solely on Treasurer Healy's authority. The record evidence shows that Healy copied the Trustees on a letter stating the TTO pays for all district audits, and that Trustee Hartigan admitted being aware that the TTO paid these audit costs. (See above p. 10-11) Also, the record shows that the disputed audit costs were included in the TTO's expenses, which the Trustees approved on an annual basis. (See above p. 10) The Trustee's approval was mandated by the statute setting forth the Trustees' responsibilities for oversight of the Treasurer's office (105 ILCS 5/5-20):

> Examination of books, securities and effects – Accounts and vouchers. **At each regular meeting … the trustees of schools 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** …, and shall make such order for their security, preservation, collection, correction of errors, if any, and for their proper disposition, as may be necessary.

3. *The TTO's Damages Computation is Flawed and Disputed.*

In addition, there is ample record evidence to support LT's position that the TTO's damages computation of audit costs is flawed and indefensible. The TTO is missing so many of its own records and Baker Tilly's records, and some of the TTO's records are so sketchy and vague, that a jury reasonably could choose to discredit the TTO's entire damages analysis. Furthermore, there are many real factual disputes over whether the TTO's computation includes invoices for reconciliation/balancing work, which was the TTO's responsibility, or for other non-audit work. Also, a jury should be allowed to consider that the TTO billed LT for a 25% share of the audits costs in the TTO's annual pro rata expense invoices, which the TTO Motion does not even acknowledge.

Moreover, there is a genuine dispute of fact as to whether the TTO paid for the regular audit costs of all of the districts in some or all years. Hartigan and Healy said so under oath and in contemporaneous writings. With so many missing records, it is impossible for the current TTO to know with any reasonable certainty that the payments that the other districts allegedly made to Baker Tilly were all for audit work, or were for extra work that each district had to pay on its own behalf.

In addition, the application of the 5-year statute of limitations at trial would reduce the TTO's Claim immediately from $511,068.60 to $164,435.35. (SJ Ex. 20)

V. THE CLAIM FOR PRO RATA EXPENSES SHOULD BE TRIED TO A JURY.

The TTO's second Claim is for payment of certain pro rata expense invoices sent to LT for 2000-13. This dispute primarily concerns an agreement to setoff LT's business function costs against the TTO's pro rata invoices from 2000-12. The factual circumstances of this agreement, and its annual reaffirmation, are genuinely disputed and should be resolved by a jury. Also, there additional factual

issues concerning whether portions of the FY2013 invoice that the TTO sent to LT are legitimate expenses of the Treasurer's office and were properly documented and charged to LT.

A. Material Facts: The TTO's Annual Invoice for Expenses

Section 8-4 of the School Code requires each district to "pay a proportionate share of the compensation of the township treasurer … and a proportionate share of the expenses of the township treasurer's office." 105 ILCS 5/8-4.

In 2000-12, the TTO sent LT invoices in the form of a letter with a bottom line number and no detail information or documentation. (*E.g.*, TTO Ex. 3(c) 1995 p.25) The TTO cannot find the invoice for $200,680 that it says it sent to LT for FY2006. (Ex. 23; Ex. 9 p.161) The TTO records submitted on summary judgment also are missing the invoice sent to LT for FY1999. (TTO Ex. 3(c) 1999 p.1-32)

Also, the TTO did not invoice the districts "[a]t the close of each fiscal year," as the TTO Motion (at 7) states. Instead, the TTO lagged a year behind in its billings. This is why the TTO invoice sent in 2002 was for FY2001 expenses incurred in 2000-01, etc. (TTO Ex. 3(c) 2001 p.21)

B. Material Facts: Negotiation of the TTO-LT Agreement

In 1999, LT was "exploring the possibility of removing ourselves" from the TTO because LT was "receiving little or no services" in return for paying the TTO's invoices. (Ex. 17 p.54) The TTO, on the other hand, wanted to "keep LT in the fold." (Ex. 12 p.13)

In May 1999, Healy attended the meeting of the Finance Committee of the LT Board of Education ("the Board"). The Finance Committee "directed Mr. Healy and Dr. Beckwith to work during the summer months to prepare options for the Board of Education to review that would provide more equity in the services provided the District." (Ex. 24)

In July 1999, Treasurer Healy discussed these negotiations at a meeting of the TTO Trustees: "There was a discussion regarding Lyons Township High School and the problems the district has with

the Pro Rata billing system. The Trustees discussed with Treasurer Healy several options to improve relations with the high school. Some of the items discussed are for the Treasurer's office to assume more duties, possibly fund certain business functions, computer sharing and legislation." (Ex. 25)

On August 18, 1999, Treasurer Healy wrote LT Business Manager Beckwith a letter ("the August 1999 Letter") "[i]n response to our most recent discussion regarding the possibility of instituting certain measures to balance the efforts of our respective staffs." (Ex. 26 p.1) Healy presented "proposed possible solutions" in the form of **five different proposals**. (*Id.*) Healy copied this letter to the Trustees. (*Id.* p.3)

The **first proposal** in the August 1999 Letter was "Deviation from Pro-Rata Billing." Healy said this would involve LT not paying its pro rata share of the TTO's expenses, and having the other member districts absorb LT's share. Healy represented that this proposal would require all twelve member districts to sign an intergovernmental agreement, which was "highly unlikely." (*Id.* p.1)

The **second proposal** was "Funding by Township School Treasurer of Some District Functions." This was the proposal that Healy recommended. Healy explained, "If the responsibilities for the Accounts Payable and Payroll production were returned to the School Treasurer's office it would mean higher operating costs for the Treasurer's office in the form of salaries and benefits for increased staff and higher related expenses to accommodate the increase in work load." Unlike the first proposal, the second proposal did not require an intergovernmental agreement or the other districts' consents. (*Id.* p.2)

In the August 1999 Letter, Healy explained why the TTO Trustees were likely to approve the second proposal (*id.* p. 2):

> I would expect that when the Trustees of Schools takes into consideration these necessary increases, they would logically conclude that a partial funding by the Treasurer's office to cover District 204's costs for the business functions District 204 now performs would be reasonable. Especially in light of the fact that the Treasurer's office is currently performing the same

business functions for the eleven other districts.

Healy consulted with the TTO Trustees about this situation by "talking to the trustees individually." (Ex. 12 p.35-36, p.30)

On September 29, 1999, the LT Finance Committee met with Healy and considered his proposals. The Finance Committee decided to proceed with the second proposal, and asked Beckwith and Healy to work out the details (Ex. 27):

> The committee directed Dr. Beckwith to work with Mr. Healy to further define the costs of the business office that can be charged to the Treasurer's office. These charges could include salaries for the accounts payable, payroll and computer services staff…. These costs would be included in the Treasurer's pro rata billing. Mr. Healy indicated the Township Board of Trustees is supportive of this method.

Healy and Beckwith negotiated the terms of a written agreement that fleshed out Healy's second proposal. In the February 29, 2000 Memorandum that Beckwith sent to Healy ("the February 2000 Memo", Ex. 28 p.1), LT provided the TTO with the specific expenses that the TTO would assume:

> 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.]

C. Material Facts: TTO Trustee Approval of Agreement

On March 21, 2000, the TTO Trustees held a meeting. The agenda included the LT proposal: "8. District 204 Business Office." (Ex. 29 p.1) The meeting packet shows that the Trustees received the February 2000 Memo. (*Id.* p.2) Healy signed the meeting minutes as clerk. (Ex. 12 p.38) According to the minutes, Healy presented the February 2000 Memo to the Trustees for their approval (Ex. 30

p.1):

> 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.

The Trustees voted unanimously to approve the agreement between LT and the TTO (*id.* p.2):

> 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 Motion (at 14) asserts that the Trustee vote in 2000 was merely to "receive" LT's proposal, and not to approve 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, Treasurer Healy and Trustee Hartigan.

Healy testified that if the TTO had performed LT's business functions, "I would have had to hire a few more people." (Ex. 12 p.33) The TTO had only 2 high schools, LT and Argo, and Argo was a third the size of LT. (*Id.* p.11) Healy also confirmed that the minutes mean that "the **trustees would pay the cost** of the business functions of LT" set forth in the February 2000 Memo. (*Id.* p.39)

Likewise, Hartigan testified that the Trustees agreed to "pay for business functions" of LT, and that this was done by setoff to the pro rata expenses (Ex. 15 p.40-41):

Q: Based on the minutes, you believe that the trustees voted to accept the proposal of District 204, whereby the TTO would pay for business functions at District 204, correct?

A: Appears that way.

***

Q: Sir, do you recall that what would happen in practice was that the TTO would bill District 204 for its share of pro rata expenses and District 204 would deduct the cost of the business functions at District 204 that the TTO was paying for and then District 204 would pay the balance?

A: I don't recall the financial interworkings, but it sounds somewhat accurate.

Neither Healy nor Hartigan testified that the Trustees voted only to "receive" LT's proposal and

consider it at some later date.

D. Material Facts: LT Board Approval of Agreement

In March 2000, the LT Finance Committee met and discussed the February 2000 Memo: "The Committee reviewed the recommended changes in the Township Treasurer billing." (Ex. 31) On June 14, 2000, Business Manager Beckwith wrote a memo to the Board. Beckwith explained the details of the agreement, and attached the TTO's current expense invoice and the February 2000 Memo. Beckwith explained that the invoice was for $165,476, and that the TTO would pay $106,403 for LT's business functions. Beckwith asked the Board to approve the agreement by authorizing the net payment to the TTO. (Ex. 32; Ex. 17 p.139-40)

On June 19, 2000, the LT Board held a meeting. By this time, Healy had told Beckwith that the TTO Trustees approved the agreement. (Ex. 17 p.148-50) The agenda for the June 2000 LT meeting includes a line item for "P. Township Treasurer's Invoice." (Ex. 33 p.2) The minutes state that the Board received a handout that included Beckwith's June 2000 and its attachments. (Ex. 34 p.10; Ex. 35 p.91)

The LT Board approved the agreement, with its net payment, by a unanimous vote of the Board on the consent agenda. (Ex. 34 p.10; Ex. 35 p.81) The Board can and did approve some contracts on the consent agenda. The Board often used the consent agenda for contracts that were not new items based on earlier Finance Committee meetings, or based on prior discussions between the Superintendent and the Board. (Ex. 36 p.49-50; Ex. 17 p.136)

Todd Shapiro was on LT's Board in 2000 and chaired the Finance Committee. (Ex. 35 p.16, 26) He confirmed that the Committee recommended the approval of the TTO's agreement to essentially "outsource" LT's business functions to LT, and that the Board voted to approve that recommendation. (*Id.* p.49) Shapiro testified that no intergovernmental agreement was needed because the TTO's

payment for LT's business functions was "nothing more than an increased expense." And the TTO "didn't have to go out and get an intergovernmental agreement for all their expenses." (*Id.* p.59)

The agreement between TTO and LT was not hidden from other districts. Elise Grimes, Superintendent of District 106, learned of the arrangement at superintendent meetings where the agreement was "openly discussed." (Ex. 37 p.19) The TTO even received a legal opinion in 2000 on the agreement (*see* Ex. 38), although the TTO refused to disclose the substance of the legal opinion.

E. Material Facts: Annual Re-Affirmation of Agreement

On September 7, 2000, Healy wrote LT and stated that the TTO, for FY2001, would re-affirm the parties' agreement: "**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)." (Ex. 39)

LT Board Member Shapiro testified that LT re-affirmed the parties' arrangement every year after 2000 when the Board approved LT's budget with projected expenses. LT considered the agreement would continue "until one of the parties informed the other party that there was no longer an agreement in place." (Ex. 35 p.56) According to LT Superintendent Kelly, "every year there was an additional agreement for the year going through." (Ex. 16 p.46)

Harold Huang was LT Business Manager from 2000-03. (Ex. 40 p.12) In May 2001, Huang prepared a memo to Healy that mirrored the format of Beckwith's February 2000 Memo by listing the costs of LT's business functions that the TTO would assume. (*Id.* p.24; Ex. 28 p.6-14) In June 2001, Huang and Healy discussed his memo. Healy said that "once I received whatever it is that our portion was, I took this off and paid the balance difference." (Ex. 40 p.25-26) Huang sent similar memos to Healy in 2002-03, and never heard any concerns from Healy. (*Id.* p.27-28)

In 2003, Sellers succeed Huang at LT. (Ex. 18 p.12) From 2004-12, Sellers sent Healy the same

type of memo sent in prior years. (*Id.* p.45-77; Ex. 28 p.15-56) Sellers never heard any concerns from Healy, either. (Ex. 18 p.55) In 2009, the incoming LT Superintendent, Dr. Timothy Kilrea, met with Healy and discussed the setoff agreement with him (Ex. 36 p.80):

> First thing Mr. Healy said to me was, after, hey, welcome aboard and congratulations was You are aware of our agreement, correct? … And he explained to me as I explained it to you. We will send you a bill. Our agreement is we will send charges for the personnel we use, and we will continue to move in this direction.

On the TTO side, Trustee Hartigan admitted that the **Trustees were aware that agreement continued annually after the initial 2000 approvals** (Ex. 15 p.42-43):

Q: And you were aware, sir, that from the year 2000 through the remainder of your term as trustee, that the TTO was paying for certain business functions performed at District 204, correct?

A: I think so.

Q: And this is an expenditure that you and the other trustees approved on a regular basis when you approved the expenditures of the TTO?

A: Again, you know, if it was brought before us and we had an auditor and an attorney present, we would generally approve those.

Q: Am I also correct that there was never any issue during the time you were a trustee with District 204 not paying its pro rata share of the treasurer's expenses?

A: I don't think so.

Healy confirmed Hartigan's testimony that the Trustees knew that the TTO was paying for some LT business functions after 2000. (Ex. 12 p.45) Healy testified that the series of memos that LT sent the TTO from 2000-12 (Ex. 28) "correctly sets out the trustees' responsibilities for paying the LT business function costs." (*Id.* p.50) Healy recalled that from 2000-12, the TTO Trustees sometimes complained to him that LT's business functions costs "seemed high." (*Id.* p.117) Nevertheless, the Trustees annually approved the TTO's payment of these costs (*Id.* p.117-18):

Q: Is it true, despite voicing those complaints, the trustees were aware of and approved the expenditures that the trustees made to LT for LT's business functions?

A: They approved the expenditures of the treasurer's office as a whole.

Q: Those would have <u>included the LT business functions?</u>

A: LT business functions would have been included as a whole.

Q: It wasn't like it was hidden in there and they didn't know what was going on? They knew, yes?

A: <u>They knew some – we were picking up some of the costs for LT</u>.

Also, Healy admitted that because LT was offsetting costs against the TTO's pro rata expense invoices, **<u>LT in fact "was complying" with Section 8-4 of the School Code</u>**. (*Id.* p.44)

The TTO's internal records for "Pro Rata" payments of the districts show that the TTO accepted LT's pro rata expense payments after setoff and literally checked them in as fully paid. These are the entries for the first several years (all from TTO Ex. 3(c)):

FY1999	204	J.E.	6/2000	165,176.00	100✓
FY2000	204	CK214346	6/2001	$39,742.75	100
FY2001	204	CK223736	6/02	$40,489.00	100✓
FY2002	204	CK230705	6/18/03	$17,948.00	✓100

In 2012, Healy resigned, and a new group took over the TTO. In April 2013, the TTO sent a letter to LT denying the existence of the agreement on LT's business function costs; accusing LT of violating Section 8-4; and demanding payment from LT of over $2 million. (Ex. 41) LT accepted this letter as notice the agreement would not be re-affirmed for FY2013. (Ex. 36 p.54-55)

F. <u>Material Facts: Problems with the TTO's FY2013 Invoice</u>

The TTO's pro rata expenses Claim includes one fiscal year after the TTO ceased its consent to LT's setoffs, which is FY2013. As LT Board Member Shapiro testified, LT agreed to pay the TTO's pro rata expense invoices until FY2013, when the TTO started billing LT for "the cost to sue ourselves." (Ex. 35 p.63) The Board also requested information from the TTO about many items in the invoice's detail (*Id.* p.63; Ex. 42), which the TTO did not provide.

For example, the TTO billed LT for certain costs of (a) Legacy Professionals (Ex. 43 p.17-19),

which did forensic accounting work on the Claims against LT (Ex. 44 p.2-3); (b) payments that the TTO made to Accountants Bradshaw and Mark Dudzik (Ex. 43 p.15), who also worked on the Claims against LT; and (c) the Kubasiak law firm (*id.* p.18-19), which filed this case against LT and still represents the TTO (the firm is now know as Miller Canfield).

G. Argument – Pro Rata Expenses Claim

1. The TTO-LT Arrangement Did Not Violate Section 8-4.

The TTO's principal argument on the pro rata expenses Claim is that the TTO-LT agreement violated School Code Section 8-4, which required LT to pay its proportionate share of the TTO's office expenses. First, this argument only applies to the 2000-12 period when this agreement was in effect. FY2013 presents additional factual issues.

Second, the TTO Motion ignores that in August 1999 Letter, its own Treasurer – with the express knowledge of the Trustees – assured LT that this agreement would not change LT's obligations under Section 8-4, and instead would simply act as an expense setoff against that amount. Both the TTO and LT considered, but decided not to pursue, the first option in Healy's August 1999 Letter, which option was to reduce LT's pro rata share under Section 8-4 (*i.e.*, the argument that the TTO makes now).

Third, the evidence in this case contradicts the TTO's fallback to its "zero-sum office" position. The TTO never balanced its books; annually borrowed money from the districts, without statutory authority; rarely billed the right amount for its expenses, according to the current TTO; never credited the districts with their full investment earnings; and refused to pay undistributed interest and insurance recoveries to the districts. Moreover, Healy admitted that but for the offsets, the TTO would have had to hire several additional employees to handle the heavy work load of LT (a huge school relative to the others) – meaning that a recovery of the offset amounts would constitute a windfall for the TTO.

Fourth, the TTO ignores the admission of Treasurer Healy that from 2000-12, LT fully complied with Section 8-4. (See above p.26) The jury is entitled to hear that the person who ran the TTO on a daily basis, and had statutory authority for enforcing Section 8-4, believed that LT had no violated its duties under that statutory provision.

What is apparent from the TTO Motion is that the current TTO feels that this agreement was unfair to the TTO. Even if true, this is not a summary judgment argument. The TTO should be required to present its 'buyer's remorse' argument to the jury.

2. An Intergovernmental Agreement Was Not Required.

The TTO also argues that the Intergovernmental Cooperation Act ("the Act") serves to prohibit the payments that the TTO made, by way of setoff, to LT from 2000-12. This argument is based on a fundamental misunderstanding of the purpose and scope of the Act, as well as the nature of the long-standing joint venture relationship between the TTO and its member districts.

First, there is no requirement in the Act or elsewhere that every financial transaction between two government entities be memorialized in a signed agreement that conforms to the Act. The record evidence show that the TTO, of all entities, should appreciate this, given the many TTO transactions described above that occurred without any intergovernmental agreement:

1. There was no intergovernmental agreement between the TTO and its member districts, including LT, authorizing the TTO to borrow millions of dollars from the districts (which the TTO called "advances") to fund the TTO's operations, its legal costs, and the losses from Healy's thefts.

2. There was no intergovernmental agreement between the TTO and its member districts, including LT, authorizing the TTO to loan millions of dollar from the districts to West 40. Nor was there any intergovernmental agreement between the TTO and West 40 governing their relationship.

3. There was no intergovernmental agreement between the TTO and its member districts

authorizing the TTO to withhold investment earnings from the districts.

4. There was no intergovernmental agreement between the TTO and its member districts, including LT, governing the TTO's payment of annual audit expenses – an absence that the TTO does not raise as an argument in support of its separate audit expenses Claim.

5. There was no intergovernmental agreement between the TTO and the other districts, including LT, authorizing the TTO to spend district money – which it did every year – on the outsourcing of its own business functions to various accounting firms and outside contractors like Cheryl Sudd, Bradshaw, Legacy Professionals, Mark Dudzik, and so on.

The TTO did not obtain intergovernmental agreements for any of those major transactions with LT and the other districts. In part, this is because of the limited purpose of the Act. An Illinois court construing the Act reviewed the legislative history on the purpose of the Act: "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).

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), there 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. That is the situation in the present case.

The limitation of the Act to new joint undertakings is illustrated by the TTO's own admissions in Healy's August 1999 Letter. This letter, copied to the Trustees, presented LT with these two options: (1) agree on a reduction of LT's pro rata expenses required by statute, which would have required an

intergovernmental agreement with all of the other member districts, or (2) have the TTO treat the cost of LT's business functions as an outsourced expense, which would not require an intergovernmental agreement or the other districts' consent. Both parties chose and approved the second option.

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

Moreover, in 2000, the TTO and LT already had a joint governmental venture – that is, the TTO system created by statute. Unlike, for example, a city that wants to take over or share a roadway with an adjacent city, the TTO and its member districts' financial functions already were tied together. Under Illinois law, the TTO by statute served as the fiscal agent for LT: "trustees of schools are the fiscal agents for the business of their townships, of which the funds of the various school districts are a part, and, as such, have the management of such funds and financial affairs." *Lynn v. Trustees of Schools*, 271 Ill.App. 539, 547 (4th Dist. 1933). There was no need to use an intergovernmental agreement to create a joint venture between the TTO and LT, as one already existed.

Thus, the TTO agreement with LT on business function costs did not create a new joint cooperative venture or "combine, transfer, or exercise" the statutory powers of the contracting parties within the meaning of the Act's Section 5. 5 ILCS 220/5. The TTO and LT already were married, even though the marriage was shaky, and they did not need an intergovernmental agreement to memorialize their cooperative relationship and joint undertakings.

The case of *Village of Montgomery v. Aurora Township,* 387 Ill.App.3d 353 (2d Dist. 2008), which the TTO cites, does not support the TTO's argument. That case is a lot like our case. The Aurora

Township constructed a bridge and maintained it for 37 years. Then, like the TTO in our case, the Township changed its mind and decided that the Village had to maintain the bridge, even though the it never agreed to do so – by an intergovernmental agreement or otherwise. 387 Ill.App.3d at 354-55.

As in our case, where the TTO's Healy and Hartigan fully support LT's position, the retired Township highway commissioner in *Village of Montgomery* testified that the Village had no obligation to maintain the bridge. Also, the Township had affixed signs to the bridge years earlier declaring its ownership. In the face of this overwhelming evidence, the Court decided that the Township had to maintain the bridge. *Id.* at 357-59.

Contrary to the TTO's representations about the decision, the *Village of Montgomery* Court based its decision primarily on the applicable ordinances and the affidavits of the key witnesses. *Id.* at 361-62. As secondary evidence, the Court noted that while there were intergovernmental agreements between the parties concerning plowing and salting the bridge, there was none stating the Village's willingness to take over all maintenance of the bridge. *Id.* at 362.

The moral of the *Village of Montgomery* case is that a governmental entity cannot act in a certain manner for decades, and then change its mind in complete disregard of all relevant evidence (which, in that case, included the lack of an intergovernmental agreement by which the Village assumed maintenance responsibility). The *Village of Montgomery* case does not provide support for the TTO to assume certain expenses that occurred within the parties' existing joint venture, and then – 13 years later – deny its existence and demand millions of dollars back based on the lack of a signed contract.

Also, the other case that the TTO relies on, *Connelly v. Clark County*, 16 Ill.App.3d 947 (4th Dist. 1973), was overruled as superseded by the 1970 Constitution in *Marshall Field & Co. v. South Barrington*, 92 Ill.App.3d 360, 362 (1st Dist. 1981). In any event, the *Connelly* case only stood for the proposition that a city could not enter the gravel selling business because it had no statutory authority

to make these sales, and had no existing relationships with other cities by way of intergovernmental agreements ("we find no such joint venture here"). 16 Ill.App.3d at 951. In contrast, the TTO had statutory authority to pay the costs of its statutorily authorized business functions, and – as LT's fiscal agent – already was engaged in a statutorily authorized joint venture with LT.

3. <u>There is Ample Evidence of Board and Trustee Knowledge and Approval.</u>

The TTO further argues that the TTO Trustees and the LT Board did not properly authorize the parties' agreement in 2000. In light of the record evidence discussed above, these arguments merit scant consideration on summary judgment. Both Treasurer Hartigan and Trustee Healy testified that – in accordance with the plain language of the meeting minutes – the Trustees were aware of and voted to pay for the now-disputed expenses of LT. The TTO's argument that the Trustees voted only to "receive" the proposal, and then never voted on it, is contrary to the testimony of its own witnesses and is an argument for the TTO to offer at trial.

Likewise, all of LT's witnesses testified that the LT Board voted in favor of the agreement set forth in the February 2000 Memo, and that the consent agenda was a proper mechanism given the Finance Committee's prior consideration. No witness testified to the contrary. The TTO's argument that the agreement's placement on the consent agenda was procedurally improper, and served to invalidate the vote of the Board, is factually unsupported and certainly cannot be resolved on summary judgment.

The same is true for the TTO's 'only-one-year' alternative argument. Both Healy and Hartigan testified that the TTO was aware it was paying for certain LT expenses from 2001 on, and that the Trustees approved the office's expenditures annually in accordance with their statutory oversight responsibilities. The TTO cannot dispute that it accepted LT's net payments in the years starting 2001; received yearly memos outlining LT's costs; and never once rejected any of those annual statements.

The jury should hear from Healy, Hartigan, and the LT witnesses who will testify that this agreement was re-affirmed annually for 12 years until 2013.

4. There are Valid Factual Disputes Over the FY2013 Invoice.

There are the further and separate issues involving the FY2013 invoice, which the TTO Motion does not acknowledge. LT's position is that these charges, and certain other expenses that the TTO refused to explain, are not "expenses of the township treasurer's office" within the meaning of 105 ILCS 5/105. Most of the disputed charges are litigation costs adverse to LT, which the TTO claimed in this case that it incurred on behalf of the other districts. (TTO Ex. 1, Complaint ¶37, 47, 60) There are other disputed charges for FY2013 that the TTO refused to explain and document to LT.

The School Code nowhere authorizes the TTO to recover its attorneys' fees in a suit against LT. Illinois law does not allow for shifting of attorneys' fees without express statutory authority: "Generally, Illinois courts follow the 'American Rule,' which provides that each party must bear its own attorney fees and costs, absent statutory authority or a contractual agreement…. [A] statute or contract must allow for attorney fees by specific language, such that the provision at issue must specifically state that 'attorney fees' are recoverable." *Bank of Am. v. WS Mgmt.*, 2015 ILApp (1st) 132551, ¶119-20. Although Illinois allows the TTO to hire private attorneys to pursue legal claims, *Lynn*, 271 Ill.App. at 547, no statute allows the TTO to bill LT for the costs of being sued.

It would be a grossly inequitable result for LT to prevail in this case, only to be required to pay 25% of the TTO's litigation expenses that it claims it incurred for the benefit of the other school districts but not LT. (LT notes that it denies that the TTO is acting on behalf of the other districts, and will show at trial that the TTO is acting out of its own self-interest and without authority from the districts.)

In addition, LT notes that the application of the 5-year statute of limitations at trial would reduce the TTO's Claim immediately from $2,628,807 to $1,080,160. (Ex. 22)

VI. THE CLAIM FOR INCOME PAYMENTS SHOULD BE TRIED TO A JURY.

For its third Claim, the TTO Motion (at 17) contends that "LT was allocated more income from the pooled investments than its proportionate share of distributions actually made." The TTO bases its Claim on Section 8-7 of the School Code.

The TTO's Claim stands in direct violation of Section 8-7, as well as Sections 8-5 and 8-6. Those provisions required Treasurer Healy to maintain cash books containing all investment related receipts and distributions to the districts; allow the districts to inspect those books; and disburse to the districts all money that the TTO earned on the pooled investments. But, as LT will explain, the record evidence shows that the TTO's records of its investment receipts and distributions are seriously incomplete; that the TTO withheld information from the districts; and that the TTO did not credit the districts with their actual investment earnings.

Moreover, the TTO admitted in this case that it does not know how much investment income it earned on the districts' pooled investments, or the amount of earnings due to LT. Accordingly, the basis for the TTO's Claim is that the TTO allegedly overpaid LT relative to the payments made to other districts. The TTO bases this claim entirely on a comparison of Healy's handwritten notes on income allocation with general ledger entries at the TTO of interest allocations made to LT. Neither Section 8-7 nor any other provision in the School Code authorized the Treasurer to make interest payments at his own discretion, and without regard to the actual earnings of the districts. No statute authorizes the TTO to maintain an action against LT under the theory that the TTO over-allocated interest to LT only relative to amounts allegedly credited to other districts.

In addition, LT will explain below that the TTO's analysis of interest allocations to LT does not satisfy reasonable accounting standards; improperly relies on internal records of the TTO that are incomplete and contain only estimated values; shows that the TTO's own analysis indicates over-

allocations to districts other than LT; and contains numerous errors in judgment and computation. These are fact-intensive issues that cannot be resolved on summary judgment.

A. Material Facts – The School Code's Requirements

Section 8-5 requires Treasurers to maintain a "cash book" in which "he shall enter in separate accounts all moneys received and paid out, with the amount, date, from whom, to whom and on what account received or paid out …." 105 ILCS 5/8-5(a). Section 8-5(a) also requires Treasurers to maintain a "district account book" in which "he shall post from the cash book all receipts and expenditures on account of any district, with the amount, date, from or to whom, and from what sources and for what purposes." *Id.* Section 8-5(a) gives school districts the right to inspect the Treasurer's books. *Id.*

Similarly, for the funds of the individual schools, Section 8-6 requires Treasurers to maintain a "cash book" with "separate balances" in which "he shall enter in separate accounts the balance, total of all moneys received in each fund, and the total of the orders countersigned or checks signed with respect to each fund and extend the balances and the aggregate cash balance for all funds balance at least monthly." 105 ILCS 5/8-6.

The next relevant provision – and the one the TTO Motion relies on – is 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, 105 ILCS 5/8-7:

> 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, 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**, community college district or educational service region, as the case may be, for which the investment was acquired.

Thus, 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.

In the TTO Motion (at 17), the "School Code Requirements" section contains this statement: "If one district receives an over allocation, then the other districts receive less money. Ex. 4 at 114:20-115:11.)" This statement appears nowhere in the School Code, and actually comes from the testimony of current TTO Trustee Michael Thiessen. Thiessen became a Trustee a few weeks before Treasurer Healy resigned in 2012 (Ex. 3 p.6), and therefore has no first-hand knowledge of how the TTO paid interest earnings. Theissen admitted it was possible that there was "no real rhyme or reason" as to how Healy actually distributed interest. (*Id.* p.114)

B. Material Facts – The TTO's Allocation of Investment Income

At his deposition, Healy described how the TTO allocated interest income to LT and the other districts. His account differs significantly from the account in the TTO Motion.

Healy pooled the districts' money in an "investment pool." (Ex. 12 p.51-52) Each district "would own a certain percentage of that combined assets." (*Id.* p.52) Healy paid interest quarterly: "I often estimated the value, estimated the income, because the actual numbers weren't readily available…. I could pretty much judge what was made in my head. And then I would make a conservative estimate for the first three periods of the fiscal year; and then at the end, the fourth was usually a large payment … [w]here I would get as close to actual as possible. " (*Id.*)

Healy testified that in all four quarters, he would create a handwritten sheet with interest income earnings that always were round numbers. (*Id.* p.57) Each figure on his handwritten sheets was "a conservative number. The money on these books were left in there was much more than this." (*Id.* p.58) Healy provided his sheets to Cheryl Sudd, an accountant who worked as a contractor for the TTO. Sudd created the precise amounts to be credited to the districts, and she entered those numbers into the computerized general ledger. (*Id.* p.54-58) The general ledger was the "Final draft of all our official numbers." (*Id.* p.55) According to Healy, as between his handwritten sheets and the general ledger, the

general ledger contained the actual numbers intended to be distributed to the districts (*id.* p.60):

Q: So … if anybody wanted to figure out how much actually should have been paid or credited to each district, they would look at the general ledger and not at your files, correct?

A: You would have to use Cheryl's exact numbers. I think that my numbers were a reasonable estimate of what was made.

Healy specifically denied allocating too much interest to LT or any other district. (*Id.* p.64) Healy testified that if he made an allocation error in one year, it would have been across the board for all districts, and he "would have to have made up for it in the future." (*Id.*)

Interestingly enough, TTO's Treasurer Birkenmaier was a business manager for a member district while Healy was Treasurer. She said she never received information sufficient to determine if her district received the right amount of investment income from the TTO (Ex. 9 p.68):

Q: Did the interest income journal entry provide enough documentation for you to be able to determine whether the amount of money that was paid to your district in interest income was, in fact, the amount you should have received?

A: No…. Well, we didn't have access to the financial records or the amount of interest that was earned, market conditions. There was no documentation.

All of the witnesses who worked at LT agreed with Birkenmaier's assessment. Business Manager Seller's testimony is representative of what the jury will hear at trial: "I considered Mr. Healy's calculations to be arbitrary and a black hole in terms of what went on behind them." (Ex. 18 p.115)

The TTO Motion does not address most of this record evidence. In addition, the facts that the TTO Motion does contain are not fully supported by the record. Besides lacking citations for many factual statements, the TTO Motion (at 17-18) makes statements that are not supported by the cited testimony. For example:

1. The TTO Motion asserts, without citation (at 17), that "Healy also maintained a general ledger for each district." As cited above, Accountant Sudd maintained the general ledger, and Healy created

handwritten sheets with estimated figures.

2. The TTO Motion asserts (at 17), "Each month, Healy received a computer report of the separate 'fund' balances for each district, which he then added together. Dep. of K. Bradshaw, Exhibit 17, at 92:24-93:8.)" Actually, Accountant Bradshaw started at the TTO in early 2012; overlapped with Healy for only a few months; and had no involvement in interest income allocations. (Ex. 10 p.8-10) The Bradshaw testimony that the TTO cites does not say what Healy received, and instead discusses a report that the TTO's system can generate.

3. The TTO Motion states (at 18) that Healy made the calculations of interest to be paid, which is contrary to his testimony concerning Sudd's role. Also, the TTO contends that Healy wrote his detailed calculations on "ledger sheets," which confuses the handwritten sheets with the general ledger. The same is true for the TTO Motion's statement (at 18) that "When Healy made an allocation, the Treasurer's office made a bookkeeping entry in the general ledger for each district…." This statement is not consistent with Healy's testimony and has no other evidentiary support.

C. Material Facts – The TTO's Damages Computation

Accountant Bradshaw prepared the first version of the TTO's analysis of interest income allocations to LT. In 2013, Trustee Theissen asked Bradshaw to "compare the interest earnings that were received by District 204 in comparison to Mr. Healy's calculations and what was actually recorded in the general ledger." (Ex. 10 p.64-65) Thiessen chose the time frame of FY1995-2012. (*Id.* p.74)

Bradshaw's analysis had two steps. First, she compared Healy's handwritten sheets to the general ledger entries. She used Healy's handwritten sheets "assuming that's what he intended to distribute." (*Id.* p.105) She determined that the general ledger contained allocations to LT that were $1,477,566.65 in excess of the figures she gleaned from Healy's sheets. (Ex. 45) Second, she used system reports on investment pool balances to correct "errors" in the allocation percentages that Healy

used. (Ex. 10 p.98-99) This step added another $97,070.12, resulting in a total damages figure of $1,574,636.77. (Ex. 45)

Bradshaw admitted that her analysis did not take into account the actual interest earnings of the TTO, or what share of those earnings LT was entitled to receive (Ex. 8 p.88-89):

Q: In order to figure out how much should have been paid to District 204 is a given fiscal year, you'd have to know how much money the TTO made in income and then how much of that income was – belonged on a percentage basis to District 204, right?

A: I wasn't asked to look at the actual interest income. I was asked to compare what Mr. Healy said was income versus what was distributed.

***

Q: So you have no idea and it is not part of your analysis to determine how much money the TTO actually earned in interest income for each fiscal year?

A: Yeah. I don't know that.

Likewise, Bradshaw admitted that she does not know whether the figures Treasurer Healy wrote on his handwritten sheets contain correct statements of interest earnings (*id.* p.134):

Q: But how do you know that what Healy intended to pay based on his handwritten reports was actually the amount of interest that should have been paid to District 204 in each year?

A: Again I wasn't asked to assert whether that number was correct. I was asked to take the number that he was intending to distribute and see if that's what District 204 received.

Bradshaw admitted that some of Healy's handwritten sheets on allocation were missing from the TTO's files (*id.* p.86), and that her analysis had blank sections because the TTO's records were incomplete. (*Id.* p.131-32) She also admitted that no one at the TTO had any actual knowledge about the apparent discrepancies in the records she compared. (*Id.* p.85)

D. Material Facts – The TTO's Audit Reports

Accountant Bradshaw's analysis did not take into account the TTO's annual audit reports. The audit reports show that the TTO did not distribute to the districts the actual amount of interest that it earned in a given year. As two of many examples, in FY2002, the TTO allocated to the districts

$1,946,645 more than its earnings, and ran a general fund deficit of $3,524,267. (Ex. 46 p.4) In FY2003, the TTO allocated to the districts $3,256,195 less than actual earnings, and thereby lowered its deficit to $94,449. (Ex. 6 p.4)

E. Material Facts – LT's Estimate of Interest Allocations

After the filing of this case, LT's Business Manager Sellers conducted a rough analysis of the interest allocation issue. He used "a readily available downloading of annual financial reports for all of the member districts and ran an analysis" on expected interest earnings. (Ex. 18 p.117) Sellers admitted that his "methodology is not that precise" due to data limitations. (*Id.* p.118) Nevertheless, **Sellers concluded that LT was under-allocated investment interest** from FY2008-12 in amounts of about $4000,000 to $500,000. (*Id.* p.131-32; Ex. 47 p.1)

LT did not pursue a counterclaim for under-allocated interest income in the Healy years because the TTO's records are too incomplete to produce a reliable calculation. (Ex. 36 p.125)

F. Material Facts – The TTO's Expert Opinions

In July 2016, the TTO retained James Martin as its accounting expert. (Ex. 48 p.8-10) Martin tried to determine how much interest the TTO actually earned in investment income during the relevant years, and tried to calculate a "total fund balance" for each year, but his efforts failed due to the many missing records at the TTO. (*Id.* p.12, 18-19) Martin estimated that the TTO's records in the early years were only 40-50% complete, and even the later years' records were incomplete. (*Id.* p.14-15) Martin did not consider the TTO's annual audit reports, which "didn't seem relevant" to him. (*Id.* p.22)

Ultimately, Martin performed the same analysis as Bradshaw, although he made a few changes. Martin eliminated Bradshaw's $97,000 addition for errors in Healy's sheets on allocation percentages. (*Id.* p.111) Martin opined that even if Healy's sheets had the wrong percentages, "it would be an error applied evenly to all districts." (*Id.* p.113) He also made three adjustments to Bradshaw's classification

of interest allocations, and arrived at a damages figure of $1,427,442.04. (*Id.* p.37, 65-66)

Like Bradshaw, Martin conceded that he could not tell whether Treasurer Healy's figures stated the TTO's actual investment earnings (*Id.* p.42):

Q: Isn't it true that you have no way to know whether the numbers in Healy's notes as to investment interest to be distributed have any relationship to the amount of money that the TTO actually earned?

A: That's true, yes, I agree with that.

Moreover, no one at the TTO asked Martin to consider the impact of a TTO document that refers to a one-sided reduction to LT's fund balance in June 2011 for "audit adjustment – interest" in the amount of $1,512,451.00. (*Id.* p.50; Ex. 5's Ex. S) According to Martin, he had "no idea" what this entry meant. (Ex. 48 p.55)

Martin also admitted that he found entries in the TTO's ledger for interest allocations to District 109 marked as "extra." (*Id.* p.75-77) In one quarter, the extra payment to District 109 was $57,000. (*Id.* p.78) Martin chose not to follow up with the TTO on the District 109 issues, and said, "At some point we'll report that to the trustee's office." (*Id.* p.77) He found anomalies in the reported allocations for other school districts, as well. (*Id.* p.79-82, 85-91)

G. Material Facts – LT's Expert Opinions

In response to the opinions of Martin, LT retained Martin Terpstra as its expert. Terpstra was highly critical of Martin's analysis and the TTO's investment income Claim. Unlike Martin, Terpstra issued a detailed written report that explained his opinions and findings. (Ex. 48) Terpstra's expert opinions include the following points (*id.* p.4-13):

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. The, 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 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."

Terpstra confirmed these opinions in his deposition testimony. As Terpstra stated, "Trying to calculate the earnings on the investments, both at the aggregate and at the individual district level … cannot be done with a reasonable degree of certainty based upon the documents available." (Ex. 49 p.27-28) He further opined that "any undistributed amounts should be allocated to the districts on a timely basis at the end of each fiscal year end." (*Id.* p.39) Terpstra also explained his criticism of Martin for basing his analysis on Healy's handwritten sheets (*id.* p.59-60):

A: What I'm offering as an opinion is that the handwritten sheets contain many discrepancies, and that the handwritten sheets, due to these many discrepancies, really shouldn't be relied upon …. Mr. Healy's handwritten sheets are wildly inconsistent from what they should have been.

In the face of Terpstra's clear repudiation of the TTO's position and Martin's analysis, the TTO

Motion pretends that Terpstra and Martin essentially agree. After citing to pages 9-10 of Terpstra's report, the TTO Motion (at 21) states, "Terpstra opines that Martin should not have ignored 3 entries, which is how Terpstra arrived at his figure $1,386,267.03, which the TTO will accept."

Nowhere on pages 9-10 of Terpstra's report does Terpstra state a figure of $1,386,267.03. Nowhere in his report or testimony does Terpstra state or imply that Martin's analysis would be a correct statement of interest income allocated to LT if the figure was lower by about $100,000. Nowhere in Terpstra's report does he state or imply that Martin's methodology is reasonable, professionally sound, or defensible – and indeed, Terpstra states just the opposite.

H. Argument – The Investment Income Claim

The TTO is not entitled to summary judgment on the investment income Claim. There is ample record evidence that the Claim stands in direct violation of Sections 8-5, 8-6, and 8-7 of the School Code. As detailed above, these statutory provisions required the Treasurer to maintain a cash book with records of all of receipts of income, which he did not do; allow the districts to inspect his books, which he did not do; and required him to pay districts the income they earned on investments, which he did not do. There is no language in Section 8-7 that allowed Healy to make arbitrary determinations on the allocation of investment earnings to the districts. Nothing in Section 8-7, or any other statute, authorized the TTO to sue LT in order to recover interest income that the TTO allocated to LT under the theory that the TTO overpaid LT relative to the allocations made to the other districts.

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 income. Some of the TTO's audit reports show multi-million dollar variances between the income the TTO made, and the income that the TTO paid out to the districts. LT's expert Terpstra determined that the audit reports showed an under-allocation to the districts of more than $1 million.

LT's argument that any under-allocations to the districts will all wash out in the end, and that the districts own a proportionate share of the TTO various accounts, is belied by the facts of the TTO's conduct since 2013: namely, that it discovered a pool of unallocated interest income, distributed only a part of the pool, and still has not distributed the rest four years later. Whatever the TTO is, the evidence shows that it does not operate as a "zero-sum office." The TTO is not entitled to summary judgment under its "relative allocation" theory.

In addition, LT expert Terpstra's very powerful and well supported opinions cannot just be brushed aside. Terpstra explained in a detailed report explaining why the TTO's analysis is flawed and should be rejected in its entirety; why Martin's methodology is unreasonable for relying on Healy's handwritten sheets, and replete with errors; and why the TTO's argument that any over-allocation of income to LT caused under-allocations to the other districts is factually and conceptually incorrect. Terpstra never opined that LT was over-allocated interest by a figure of $1,386,267.03, or any other amount. This clear and fundamental disagreement between the parties' experts over applied accounting principles, appropriate documentation, and reasonable methodology should be resolved by the jury.

In addition, the application of the 5-year statute of limitations at trial would reduce this Claim from $1,386,267.03 to zero, as the TTO's own analysis states that LT was under-allocated interest during the 5-year limitations period. (Ex. 50)

VII. LT'S AFFIRMATIVE DEFENSES SHOULD BE TRIED TO A JURY.

LT asserted a series of affirmative defenses in this case. LT already discussed its limitations defense. In some cases, parties raise affirmative defenses as an afterthought, and end up discarding these defenses prior to trial. However, in this case, LT's affirmative defenses are critical to a just resolution of this case and are supported by compelling evidence.

The TTO – which was charged with serving LT as its fiscal agent – repeatedly and over the

course of decades made promises and representations to LT about how their financial dealings would be handled. The TTO acted on its own, without providing meaningful information to LT. Then, when LT's many concerns and warnings about the TTO's operations under Healy proved valid, and the TTO's corrupt Treasurer and negligent Trustees departed, a new group took over the TTO and decided to blame LT for the consequences of the TTO's own past decisions made over the prior 20 years. The affirmative defenses will prevent the unjust results that the TTO seeks to achieve in this case, and a jury should be allowed the weigh the relevant evidence.

A. First Affirmative Defense: Laches

The TTO does not contend that it is immune from a laches defense. Although the TTO argues that the First Affirmative Defense's allegations concerning prejudice are not compelling enough, the TTO fails to cite any authority for the proposition that this determination can or should be made in a summary judgment proceeding.

Under Illinois law, "laches are applied when a party's failure to timely assert a right has caused prejudice to the adverse party. The two fundamental elements of laches are lack of due diligence by the party asserting the claim and prejudice to the opposing party. *Van Milligan v. Board of Fire & Police Comm'rs*, 158 Ill. 2d 85, 89 (1994). And, as the TTO notes, the evidence supporting a laches defense against a public entity must present "unusual or extraordinary circumstances." *Id.* at 90.

LT is aware of and is comfortable with this standard. LT's laches defense expressly alleges the presence of "extraordinary circumstances." (TTO Ex. 21 ¶53-54) There is direct precedent for applying laches in the context of a trustee of schools dispute. 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.

As in *American Surety*, LT's laches defense asserts that the TTO lacked diligence in pursuing its claims, given that the Treasurer and Trustees knew the operative facts but chose not to file suit for over a decade. The TTO does not contest these allegations, and only claims that LT's allegations of prejudice are insufficient. The TTO Motion (at 23) argues that LT's prejudice argument is limited to "generalized prejudice, alleging that it relied on the purported contract in formulating its budget. (Ex. 21 at ¶55.)" In fact, Paragraph 55 of the Counterclaim provides a more expansive allegation: "During the relevant time period, LT relied on its financial arrangements with the TTO in formulating budgets, allocating resources, and managing its public funds."

Furthermore, because the TTO Motion is for summary judgment and not dismissal, the TTO may not disregard the record evidence. As to all of the TTO's Claims, absent the financial arrangements between LT and the TTO, LT could and would have made aggressive efforts to seek legislative action to remove LT from the TTO's operation. (Ex. 36 p.121) Also, the TTO's long delay in filing suit prevented LT from conducting its defense before persons like TTO Trustee Joseph Nekola and LT Business Manager Leon Eich died, and TTO Trustee Donna Milich retired to Arizona, taking their recollections with them. (Ex. 16 p.67; Ex. 15 p.18, 21) Moreover, but for the TTO's long delay, LT could have obtained documentation from the TTO to use in its defense before those records were lost, presumably due to mismanagement, corruption, and a flood. (Ex. 9 p.101-02)

On the audit costs Claim, the record shows that LT used Baker Tilly as its auditor only because the TTO selected that firm and paid for its audit work. (Ex. 36 p.103) Had the TTO filed suit earlier, LT would have stopped using Baker Tilly, and instead competitively bid its audit work in order to save money. (*Id.* p.122) Also, LT's new auditors might have uncovered Healy's corruption, or at least done a better job than Baker Tilly did of protecting LT's funds. The TTO admits that Baker Tilly was derelict in its duties, given the TTO's threat to sue Baker Tilly. Also, a timely lawsuit would have meant that

all of Baker Tilly's invoices would have been available for LT's defense. (Ex. 8 p.31-33)

On the expense invoices Claim, the TTO's long delay in filing suit led to even more incomplete recordkeeping. (Ex. 9 p.161) Also, but for the TTO's lack of diligence, LT could have chosen to shift its business functions over to the TTO, as unpalatable as that might have been to LT's Board at the time. On the interest allocation Claim, had the TTO filed a timely Claim, LT could have gotten relevant data and documentation about the TTO's interest income earnings from the TTO and Baker Tilly.

B. Third and Fourth Affirmative Defenses: Promissory and Equitable Estoppel

The TTO asks this Court to enter summary judgment against the promissory and equitable estoppel defenses. As with the laches defense, LT has no quarrel with its need to present the jury with evidence of extraordinary circumstances. LT will do so at trial. The TTO argues that it cannot be subject to estoppel defenses because (a) the TTO is only "adhering to the School Code," and (b) Healy did everything complained of, and he had no authority to bind the TTO. Both of these arguments are contrary to the applicable statutes and substantial record evidence.

First, on the audit costs Claim, the Claim is not consistent with the School Code. Nothing in Section 3-7 required LT to pay for its own audit, and no statute prevented the TTO from paying for LT's audit. Also, the record evidence shows that the TTO Trustees were aware of the payments made for the audits of LT and the other member districts. The TTO Trustees approved the expenditures of the TTO's office on an annual basis, and those expenditures included LT's audit costs.

Second, on the pro rata expense claim, as Treasurer Healy admitted, LT complied with Section 8-4 in 2000-12 because it paid the pro rata invoices, and simply made setoffs to them. The TTO's FY2013 invoice does not comply with Section 8-4 because it includes special litigation costs that are not "office expenses" that can be foisted on LT. Also, based on the testimony of the TTO's own witnesses and documentary evidence, the Trustees were aware of, and re-affirmed annually, the TTO's

expenses for LT's business function costs.

Third, on the interest income Claim, this Claim does not conform to the School Code. Sections, 8-5 through 8-7 required the Treasurer to maintain records of investment income receipts and distributions, and to credit LT with all earned income. Also, the TTO Trustees were charged with the responsibility of reviewing the Treasurer's books and records, 105 ILCS 5/5-20, which includes the investment records. If LT proves its estoppel defenses at trial, and shows that the TTO concealed its failure to pay investment income to LT and made incorrect and arbitrary allocations, the fault will be attributable to both the Trustees and the Treasurer.

C. Fifth Affirmative Defense: Waiver

In its request for summary judgment, the TTO cites to three cases but makes no specific argument on LT's waiver defense. The TTO seems to be making another 'fault Healy but not the Trustees' contention, which under the record in this case is a jury argument. LT's waiver defense concerns the TTO's intentional relinquishment of its right to receive pro rata expense payments without a setoff for LT's business expenses. As explained in detail above, ample record evidence shows that the TTO Trustees voted to approve the agreement with LT; knew that the TTO was paying certain business costs of LT; and authorized those expenditures annually.

D. Sixth Affirmative Defense: Unclean Hands

The TTO's summary judgment arguments on the unclean hands defense (at 24) are (a) the defense is "disfavored"; and (b) LT's specific assertions of the TTO's bad faith conduct – which the TTO waters down in its argument, and mistakenly calls "bad conduct" – do not allege either "fraudulent or unlawful" conduct.

The first argument is not a basis for seeking summary judgment. On the second argument, the TTO fails to cite any authority for its assertion that "fraudulent or unlawful" conduct is required. Indeed,

Illinois law has long provided that the unclean hands doctrine covers "misconduct, fraud, or bad faith toward the defendant." *Mascenic v. Anderson*, 53 Ill.App.3d 971, 972 (1st Dist. 1977).

E. Seventh and Eighth Defenses: Unjust Enrichment and *Quantum Meruit*

The TTO contends that unjust enrichment and *quantum meruit* can never be raised as affirmative defenses. The TTO cites to two cases that do not support this argument.

In *Partipilo v. Hoffman*, 156 Ill.App.3d 806, 809-10 (1st Dist. 1987), the plaintiff asserted an affirmative unjust enrichment claim, and the Court made no mention of this legal theory as an affirmative defense. 156 Ill.App.3d at 808-14. In *Storino, Ramello & Durkin v. Rackow*, 2015 IL App (1st) 142961, the Court held that "the theory of unjust enrichment is not a defense to a breach of contract action." *Id.* ¶36. LT asserted its unjust enrichment and *quantum meruit* defenses in relation to the TTO's pro rata expense Claim, which is not a breach of contract claim.

F. Ninth Affirmative Defense: Voluntary Payment Doctrine

The TTO asks this Court to enter summary judgment on LT's voluntary payment defense. The TTO Motion argues (at 25) 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 from the voluntary payment doctrine. The TTO also cites to five cases from other states that are 75-120 years old. The TTO likens this doctrine to estoppel, but public entities are not exempt from estoppel claims in Illinois. Any Court inclined to create new law in Illinois by establish a new legal exemption should do so only after a full record is created at trial.

The TTO also contends (at 25-26) that LT's voluntary payment doctrine "fails under the facts presented," based on a few factual assertions with no record citations. The evidence in this case support the defense. On the investment income Claim, the record shows that LT repeatedly made claims for payment of interest on LT's investments in the form of discussions with the TTO concerning the nature

and sufficiency of the investments, and requests for more investment information. For example, Superintendent Kelly testified, "we used to complaint all the time about not receiving information." (Ex. 16 p.63) Business Manager Sellers pressed Healy to provide a higher rate of return in order to fulfill the TTO's statutory duties to LT. (Ex. 18 p.110-15)

On the audit costs Claim, the record shows that LT forwarded certain Baker Tilly invoices to the TTO for the TTO to pay. (*Id.* p.19) The TTO presents no legal authority stating that the voluntary payment doctrine cannot cover payments that the TTO made to Baker Tilly at LT's request, especially where the TTO is seeking to recover those payments from LT.

On the pro rata expense Claim, the TTO contends (at 26) that the setoffs of LT's business function costs against the pro rata expenses did not constitute "payments." This hyper-technical argument is unsupported by any legal authority, and it is contrary to the record evidence concerning LT's annual memos making demand and the parties' course of dealing from 2000-12. (Ex. 28)

VIII. CONCLUSION

For all of the reasons set forth in this response, the TTO Motion should be denied in its entirety, and this case should proceed to a jury trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Jay R. Hoffman, an attorney, certifies that on August 17, 2018, he caused the foregoing pleading to be served by email on the following attorneys:

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