

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

2015 JUN -5 PM 2:15

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

Plaintiff,

vs.

LYONS TOWNSHIP HIGH SCHOOL
DISTRICT NO. 204

Defendants

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

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

PLEASE TAKE NOTICE that on June 5, 2015, I have filed with the Clerk of the Circuit Court of Cook County, Illinois, the following: **TOWNSHIP TRUSTEES' MOTION TO DISMISS FIRST AMENDED VERIFIED COUNTERCLAIM**, a copy of which is hereby attached and served on you.

Respectfully submitted,

TOWNSHIP TRUSTEES OF SCHOOLS
TOWNSHIP 38 NORTH, RANGE 12 EAST

By: 
One of its attorneys.

Gerald E. Kubasiak
Barry P. Kaltenbach
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PROOF OF SERVICE

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

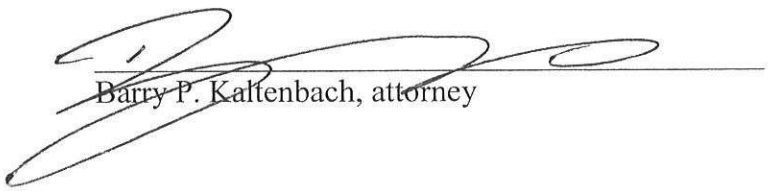
**TOWNSHIP TRUSTEES' MOTION TO DISMISS FIRST AMENDED
VERIFIED COUNTERCLAIM**

has been served upon:

Charles A. LeMoine
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as follows:

- ☐ by personal service on June 5, 2015 before 4:00 p.m.
- X by U.S. mail, by placing the same in an envelope addressed to them at the above address with proper postage prepaid and depositing the same in the U.S. Postal Service collection box at 20 S. Clark Street, Chicago, Illinois, on June 5, 2015 before 4:00 p.m.
- ☐ by facsimile transmission from 20 S. Clark Street, Suite 2900, Chicago, Illinois to the [above stated fax number/their respective fax numbers] from my facsimile number (312) 630-7939, consisting of ____ pages on June 5, 2015 before 4:00 p.m., the served [party/parties] having consented to such service.
- ☐ by Federal Express or other similar commercial carrier by depositing the same in the carrier's pick-up box or drop off with the carrier's designated contractor on June 5, 2015 before the pickup/drop-off deadline for next-day delivery, enclosed in a package, plainly addressed to the above identified individual[s] at [his/her/their] above-stated address[es], with the delivery charge fully prepaid.
- ☐ by _____, on June 5, 2015 before 4:00 p.m., the served [party/parties] having consented to such service.


Barry P. Kalttenbach, attorney

FILED - 1
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Plaintiff,

vs.

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

Defendants

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) **No. 13 CH 23386**
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**TOWNSHIP TRUSTEES' MOTION TO DISMISS
FIRST AMENDED VERIFIED COUNTERCLAIM**

Plaintiff, Township Trustees of Schools Township 38 North, Range 12 East ("Township Trustees"), for its Motion to Dismiss the First Amended Verified Counterclaim filed by defendant, Lyons Township High School District 204 ("District 204"), states as follows:

I. INTRODUCTION

District 204's First Amended Verified Counterclaim suffers from much of the same defects as did its original pleading. District 204 contends that it and Robert Healy, the former Treasurer appointed by Township Trustees, entered into two contracts which excused District 204 from fulfilling certain statutory obligations of the Illinois School Code. District 204 offers only conclusory allegations to support its contention, inappropriately relies upon the doctrine of apparent authority, and ignores that the School Code prohibits the validity of the contracts it now contends to have existed. For these reasons, and the additional reasons set forth herein, District 204's First Amended Verified Counterclaim should be dismissed.

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

Township Trustees brings this Motion pursuant to Section 5/2-619.1 of the Code of Civil Procedure, which authorizes utilizing both Sections 5/2-615 and 5/2-619 in a single motion. *Patrick Eng'g, Inc. v. City of Naperville*, 2012 IL 113148, ¶31. The First Amended Verified Counterclaim fails because it purports to assert the existence of a contract that, even if properly alleged, could not exist under the School Code. The pleading thus lacks legal sufficiency, warranting dismissal under Section 2-615. In support of a few arguments, Township Trustees relies upon additional facts set forth in the attached Affidavit of Dr. Susan Birkenmaier, the current Treasurer. Arguments reliant upon these facts are specifically noted as being brought under Section 2-619. Regardless of the relevant Section, however, only well-pled facts are accepted as true. *Id.* The law does not accept as true conclusions of fact unsupported by underlying allegations of specific fact, or conclusions of law. *Id.*

III. COUNT I SUFFERS FROM NUMEROUS PLEADING DEFECTS AND THE 1999 AGREEMENT IT SEEMINGLY IS PREMISED UPON WOULD BE UNENFORCEABLE UNDER ILLINOIS LAW

In its original Verified Counterclaim, District 204 alleged the existence of two contracts through which the Treasurer purportedly discharged District 204's statutory obligations. District 204 referred to the first of these as the "1993 Agreement." In this alleged contract, the Township Trustees purportedly agreed that it would pay for the cost of the annual audit which Section 5/3-7 of the School Code, 105 ILCS 5/3-7, obligates District 204 to undertake. District 204 referred to the second contract as the "1999 Agreement." In this alleged contract, the Township Trustees

purportedly agreed that District 204 did not have to pay its *pro rata* share of the expenses of the Treasurer's office, which Section 5/8-4 of the School Code, 105 ILCS 5/8-4, mandates.¹

A. The Factual Allegations Within Count I.

1. The Allegations Regarding the 1993 Agreement.

The allegations regarding the 1993 Agreement are located at paragraphs 20 through 24 of the First Amended Verified Counterclaim. District 204 alleges this purported contract in only the most conclusory of fashion: "The [Township Trustees], through its Treasurer, agreed it was appropriate to pay District 204's audit expenses" (§21.) There are no specific allegations of how this contract was formed, including allegations of offer and acceptance. *How* did the Township Trustees agree to this contract? Who at District 204 accepted this offer? These allegations of contract formation are not well-pled and are not sufficient. *See Denkewalter v. Wolberg*, 82 Ill. App. 3d 569, 572-73 (1st Dist. 1980) (explaining that alleging two parties agreed to a contract are conclusory and are not accepted as true).²

2. The Allegations Regarding the 1999 Agreement.

The allegations concerning the 1999 Agreement are located within paragraphs 26 through 57. The majority of the allegations recite the apparent back-and-forth between Mr. Healy and Lisa Beckwith, District 204's treasurer. District 204 then concludes that "[Township Trustees], through its authorized agent, Healy, adopted and accepted the [1999 Agreement] on or around March 22, 2000" (§41.) Of course, District 204 does not allege *how* Township Trustees accepted the 1999 Agreement.

¹ District 204 continues to assert the existence of each Agreement in its First Amended Verified Counterclaim, but for some reason has stopped using the terminology "1993 Agreement" and "1999 Agreement." Oddly, it has not chosen another name for either. This is unfortunate and makes District 204's later allegations confusing. For ease of reference, Township Trustees will continue to refer to the purported agreement regarding audit expenses as the 1993 Agreement, and the purported agreement regarding District 204's *pro rata* share as the 1999 Agreement.

² Township Trustees does not dispute that Robert Healy, the former Treasurer and convicted felon whose conduct is at issue, was in fact paying for District 204's audit out of non-District 204 funds. Township Trustees initiated this litigation to remediate this very wrongdoing.

Regardless, this is the gist of District 204’s position – that Robert Healy had authority to enter into the 1999 Agreement on behalf of the Township Trustees. (See paragraph 42 – “Healy had actual authority, either express or implied . . . to enter the [1999 Agreement].”) (§42.) But upon closer examination, the allegations run contrary to District 204’s position. They establish that Mr. Healy initially told District 204 he did *not* have authority to enter into the 1999 Agreement. In paragraph 32, District 204 quotes from correspondence Mr. Healy sent to Ms. Beckwith wherein he stated, “I would expect that *when the [Township Trustees] takes into consideration . . .*” (§32.) In paragraph 37, District 204 alleges that “Healy represented to District 204’s Finance Committee . . . that the [Township Trustees] had knowledge and were supportive of the proposal.” (§37.) In both instances, District 204’s well-pled allegations establish that Mr. Healy informed District 204 and/or its Finance Committee that the Township Trustees, rather than himself, needed to approve the purported agreement.³

District 204 apparently seeks to address this flaw by later alleging that Mr. Healy switched positions and subsequently represented that he *did* have authority to enter into the 1999 Agreement. In paragraph 47, District 204 alleges that it “reasonably relied on Healy’s representations, as agent of the [Township Trustees], regarding the [1999 Agreement]” (§47.) Notably, District 204 does not allege it relied upon a representation from one of the Township Trustees. Likewise, in paragraph 42, District 204 alleges that “District 204 inquired about Healy’s authority, and was repeatedly informed that . . . [Township Trustees] supported and approved [the 1999 Agreement].” (§42.) District 204’s use of the passive voice makes this allegation insufficient. To whom did District 204 inquire? From whom did District 204 receive

³ District 204 also does not assert that the Finance Committee had statutory authority to contract on District 204’s behalf. Any purported contract entered into by the Finance Committee would be invalid on this additional basis.

the information that Township Trustees wished to enter into the 1999 Agreement? It seems that the answer is likely Mr. Healy himself. But this answer is problematic under Illinois law.

B. Count I Does not State a Cause of Action for Breach of Contract.

In Count I, District 204 does not specify whether it is suing for breach of the 1993 Agreement or the 1999 Agreement. For example, in paragraph 96, District 204 alleges it “has suffered damages as a result of [Township Trustees] breach of the parties’ agreement” (¶96.) But it is not clear which Agreement it has alleged has been breached. In paragraph 97, District 204 alleges that it would be harmed if it were required to pay its “*pro rata* share or audit expenses.” (¶97.) Here, District 204 seems to allege both Agreements have been breached.

In paragraph 95, District 204’s allegations are even more problematic. District 204 begins this paragraph by again alleging that the Township Trustees “breached the terms of the parties’ agreement,” without specifying which Agreement. Then in paragraph 95(a), District 204 alleges that Township Trustees breached one of the Agreements by failing “to provide District 204 with timely notice of any termination of the agreement” (¶95(a)). But nowhere within the First Amended Verified Counterclaim does District 204 allege an obligation to give notice of termination. Given this, paragraph 95(a) cannot possibly state a claim for breach of contract. This is also true with respect to paragraph 95(c), wherein District 204 alleges vaguely that Township Trustees “otherwise failed to perform its obligations” (¶95(c)). Alleging a party breached an unknown and unspecified contract provision does not state a cause of action.

In paragraph 95(b), District 204 alleges that Township Trustees failed to “provide District 204 with offsets towards its annual *pro rata* share of expenses” (¶95(b)). This concerns the 1999 Agreement, but it does not state a cause of action for breach of contract. District 204’s theory is that it was entitled to offset its cost of performing certain services against its *pro rata*

share of the Treasurer's expenses. In those years when the value of its own services less than its *pro rata* share, District 204 paid the difference to Township Trustees. (§54.) For those years where the value of its services was *greater* than its *pro rata* share, "District 204 would not owe the [Township Trustees] any additional payment for *pro rata* expenses that year." (§55.) There is no allegation that Township Trustees ever had an obligation to pay District 204.

Given this, it is evident that even paragraph 95(b) does not state a cause of action for breach of contract. Assuming that the 1999 Agreement existed and was enforceable, District 204 does not allege that its terms would have required Township Trustees to pay money to District 204. Accepting this as true, Township Trustees' purported breach could not have caused money damages to District 204. Paragraph 95(b) is perhaps more akin to an affirmative defense to Township Trustees' Amended Complaint, but it is not an actionable cause for breach of contract.

C. The Illinois School Code did not Authorize Healy to Enter into Either Agreement.

District 204's allegations – summarized above – are premised upon the purported authority of the former Treasurer, Robert Healy, to have entered into the 1993 and 1999 Agreements. (See §89.) But Healy did not have actual or apparent authority to enter into either Agreement, both of which purport to excuse District 204 from statutorily-imposed obligations.

1. Healy did not have actual authority to enter into either Agreement.

Section 5/5-2 of the School Code provides that "the school business of all school townships having school trustees shall be transacted by three trustees" 105 ILCS 5/5-2. The authority to conduct school business is not given to the Treasurer. Section 5/8-17 sets forth the duties of the Treasurer, but it does not recite that one of the Treasurer's duties is to enter into contracts with other school districts. 105 ILCS 5/8-17. Section 5/8-7 does authorize the Treasurer to enter into contracts, but only contracts:

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

105 ILCS 5/8-7. Section 5/8-7 does not authorize the Treasurer to enter into a contract excusing District 204's statutory obligation to pay for its audit expenses or its *pro rata* share of the Treasurer's expenses of office.

2. Healy did not have apparent authority to enter into either Agreement.

The doctrine of apparent authority is not applicable against a public body; else a public body "would remain helpless to correct errors or, worse, to escape the financial effects of frauds and thefts by unscrupulous public servants." *Patrick Eng'g, Inc. v. City of Naperville*, 2012 IL 113148, ¶¶35-36.⁴ Even if this were not true, a well-recognized tenet of agency law is that an agent cannot create his own apparent authority. *Cove Mgmt. v. AFLAC, Inc.*, 2013 IL App (1st) 120884, ¶24. District 204 alleges that it relied upon Healy's representations of his authority, but District 204 does not allege that it relied upon representations from Township Trustees. District 204 could not have been justified, as a matter of law, relying upon Healy's own representations.

D. Even if Township Trustees Authorized Either Agreement, the Agreements are Unenforceable Because They Would Violate the School Code.

Even if Healy did have authority, actual or apparent, to enter into the 1993 and 1999 Agreements, they still would not have been enforceable. The Township Trustees and District 204 do not have the legal ability to contract to excuse District 204 from the requirements of the School Code. The 1993 Agreement purportedly excused District 204 from paying for its own annual audit. Section 5/3-7 of the School Code, however, provides that each school district is to pay for its own audit. 105 ILCS 5/3-7. Likewise, the 1999 Agreement purportedly excused

⁴ It seems apparent that the Supreme Court's holding, that the doctrine of apparent authority is not applicable to a municipality, would apply to other public bodies such as Township Trustees.

District 204 from paying for its *pro rata* share of the Treasurer's expenses of office. But Section 5/8-4 of the School Code mandates that each school district pay its *pro rata* share of such expenses according to a statutory formula described therein. 105 ILCS 5/8-4. Each purported Agreement, therefore, would have necessarily served to excuse District 204 from statutory obligations. A contract contrary to statutory obligations is not enforceable. *South Suburban Safeway Lines, Inc. v. Regional Transp. Auth.*, 166 Ill. App. 3d. 361, 366 (1st Dist. 1988).⁵

IV. THE DECLARATORY RELIEF SOUGHT IN COUNT II IS INADEQUATELY ALLEGED AND WOULD NOT RESOLVE THE PARTIES' DISPUTE

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

A. The Declarations Sought in the Paragraphs 2(a) Through 2(c) are Premised Upon the Enforceability of the Alleged 1993 and 1999 Agreements.

The declarations sought in paragraphs 2(a) through 2(c) of the prayer for relief are premised upon the enforceability of the 1993 Agreement and the 1999 Agreement. As explained above, however, the Agreements are inadequately alleged and not the proper subject of a

⁵ Subsequent to Township Trustees initiating this litigation, District 204 has pursued legislation that would allow it to withdraw from the oversight of the Township Trustees and eliminate District 204's obligation to pay it *pro rata* share of the Treasurer's expenses. This is the only proper way for District 204 to achieve its goals.

declaratory judgment action. *Denkewalter*, 82 Ill. App. 3d at 572-73. They are also unenforceable under the School Code.

In paragraph 2(a), District 204 prays for a declaration that the “parties’ contractual agreement” are “valid and enforceable.” Because neither Agreement is adequately alleged nor valid and enforceable, this declaration fails as a matter of law. In paragraph 2(b), District 204 prays for a declaration that if value of the services it purportedly provided to District 204 exceeds its *pro rata* share of the Treasurer’s expenses, then the Township Trustees owe District 204 the difference. This argument is entirely dependent upon the 1999 Agreement, by which the Treasurer purportedly excused District 204 from paying its *pro rata* share and agreed to such an offset. The 1999 Agreement is not adequately alleged, and the 1999 Agreement is not valid and enforceable. Accordingly, this declaration also necessarily fails as a matter of law.

In paragraph 2(c), District 204 seeks a declaration that that it is not obligated to reimburse the Township Trustees for the costs of District 204’s statutorily-required audit. This argument is entirely dependent upon the 1993 Agreement, by which the Treasurer purportedly agreed that District 204 did not have to pay for its own audit expenses. As above, because the 1993 Agreement is neither adequately alleged nor valid and enforceable, this declaration fails.

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

In paragraph (d) of its prayer for relief, District 204 seeks a declaration that the Township Trustees “has underpaid District 204 its investment interest currently due and owing” Assuming, for purposes of this Motion, that Township Trustees has failed to properly allocate interest income such that District 204’s allocation was a shortfall, this declaration would not terminate the controversy. District 204 would have nothing more than a declaration that

Township Trustees under-allocated interest income. This might provide District 204 with a nice press release, but providing press releases is not the province of the judiciary.

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

Robert Healy embezzled in excess of \$1 million in public money from his office. Township Trustees thereafter successfully recovered \$1,040,000 on Mr. Healy's applicable fidelity bonds. Township Trustees has set this money aside and continues its efforts to recover additional sums. Once Township Trustees has exhausted its efforts, it will be able to determine a net recovery (total amount recovered less expenses). This can then be allocated either to the member districts or used to pay unrelated expenses of office (which would benefit on the member districts because they would not be charged with payment of those unrelated expenses). (See Affidavit of Dr. Susan Birkenmaier, attached as Exhibit 1 hereto, ¶¶7-8.)⁶

Paragraph 2(e) seeks a declaration relating to this issue. District 204 seeks a declaration that Township Trustees "must pay District 204 its proportionate share of fidelity bond and insurance proceeds received in relation to Healy's purported misconduct" District 204, however, has alleged no authority under which Township Trustees is required to immediately allocate the gross recovery as opposed to waiting to determine its net recovery. Regardless, this declaration would not resolve the dispute. District 204 seeks merely a declaration that Township Trustees is not doing something that District 204 feels it should be doing.

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

In paragraph (f) of its prayer for relief, District 204 seeks a declaration that the Treasurer "must reimburse District 204 for improper expenditures, including but not limited to public

⁶ These additional facts are provided as background information only and their inclusion does not require that this Court analyze this argument under the standard governing a Section 2-319 motion to dismiss.

relations firm and duplicative investment advisor services” This relates to paragraphs 82 and 83 of the “Background” section of the First Amended Verified Counterclaim. In those paragraphs, District 204 alleges that Treasure incurred expenses of office, including retaining a public relations firm and investment advisors, which “were not authorized under Illinois law.”

There are two problems with this prayer for relief. First, similar to the above declarations, it would not terminate the parties’ controversy. It just provides a public scolding. Second, and more importantly, District 204 makes no allegations supporting its assertion that either expense was not authorized under Illinois law. Indeed, District 204 does not identify *any* portion of the School Code to support its conclusory allegation.

The relevant statutory authority governing the Treasurer’s expenses of office is Section 5/8-4 of the School Code. This section provides that each member district:

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

105 ILCS 5/8-4 (emphasis added). Section 5/8-4 of the School Code does not itemize permissible expenses of the Treasurer’s office. In fact, nowhere in the School Code are such expenses itemized. Given this, what is District 204 relying upon to supports its position that they were unauthorized?

This also raises the question of the standard under which this Court might review expenses that the Township Trustees and Treasure determine to be appropriate in the exercise of their business judgment. Are the Township Trustees and the Treasurer authorized to buy accounting software? Can they pick between a Dell or a Mac? Is it appropriate for this Court to substitute its own judgment for that of Township Trustees and the Treasurer?

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

V. COUNT III DOES NOT ADEQUATELY ALLEGE THE RIGHT TO AN ACCOUNTING AND ONE IS NOT NECESSARY

District 204 has not adequately alleged in Count III of the First Amended Verified Counterclaim that it is entitled to an accounting, particularly under the circumstances of this case. More importantly, District 204 has no need for an accounting because is obtaining through discovery all the documents it seeks.

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

District 204 must allege both that it has demanded and been denied an accounting. *American Sanitary Rag Co. v. Dry*, 346 Ill. App. 459, 463 (1st Dist. 1952); *Patterson v. Northern Trust Co.*, 170 Ill. App. 501, 516 (1st Dist. 1912). An allegation that a party has demanded books and records is insufficient. *Id.* Yet District 204 does little more than allege that it asked for financial records and Township Trustees did not provide them (see, *e.g.*, ¶120). Even accepting these allegations as true,⁷ they are insufficient.

⁷ Because District 204 does not allege anything specific (*e.g.*, what was requested, or when), these allegations are not well-pled. They are also inaccurate. For example, in December 2013, the current Treasurer, Dr. Susan Birkenmaier, invited District 204 to send a representative to her office to inspect financial records. District 204 declined this invitation. (See Affidavit of Dr. Birkenmaier, Exhibit 1 hereto, ¶4.)

It is only in paragraph 121 of its First Amended Verified Counterclaim that District 204 actually alleges that it requested a “full accounting for the period of January 1, 1993 through the present, but, to date, the TTO has failed to provide the requested accounting.” District 204 does not allege *when* it made this request, but District 204 is apparently referring to a letter it sent on January 27, 2015, less than 2 weeks before it filed its original Verified Counterclaim. Township Trustees responded to this letter on February 3, 2015, just 7 days later. (Copies of both letters are attached as Exhibit 2.) Township Trustees did not refuse an accounting. To the contrary, it provided a link to audited financial statements for the previous *fifteen years*. District 204 did not respond, beyond filing its original Verified Counterclaim.⁸

B. An Accounting is not Necessary nor Appropriate.

District 204 does not need an accounting given the pending litigation between the parties. Whether to proceed with an accounting is within this Court’s discretion. *Newton v. Aitken*, 260 Ill. App. 3d 717, 756 (2nd Dist. 1994). “[T]he right to an accounting is not absolute.” *Id.* In exercising its discretion, this Court may consider the circumstances of this litigation, and may decline an accounting “if the circumstances are such as to make an accounting unnecessary or improper.” *Patterson*, 170 Ill. App. at 516’.

An accounting here is unnecessary, and would be substantially duplicative, given that the relevant issues (*pro rata* expenses of the Treasurer’s office, allocation of interest income, and the payment of District 204’s statutorily-required audit) are already at issue via Township Trustees’ Amended Complaint. District 204 has already served discovery in this case seeking the very documents it alleges it needs to undertake its own accounting.

⁸ District 204’s failure to allege it has been refused an accounting can be evaluated under the governance of Section 2-615. To the extent the Court wishes to consider Exhibits 1 and 2, then Section 2-619 governs.

For example, in paragraph 119 of its First Amended Verified Counterclaim, District 204 alleges that “the financial data in the [Township Trustees’] possession is cryptically stored on a database the TTO created The [Township Trustees] is the only party with knowledge of, and access to, the vast financial contents of this database.” As an initial matter, there is nothing “cryptic” about the information – as with virtually any entity, the Treasurer has computerized financial records. True, the database is antiquated, which is probably not a surprise given the Township Trustees and Treasurer are a public body. More importantly, Township Trustees has already generated and produced over 1,500 financial reports to District 204. District 204 has not had to make a motion to compel the production of any documents or information and there is no reason to believe the parties will not be able to manage discovery in this case.

VI. COUNT IV AND COUNT V ARE LEGALLY INSUFFICIENT

In Count IV and Count V, District 204 seeks a monetary recovery from Township Trustees under quasi-contract. In Count IV, District 204 relies on a theory of *quantum meruit*, whereas in Count V District 204 relies on a theory of unjust enrichment. While there is some difference between the two under Illinois law, they both are theories of quasi-contract and can be analyzed similarly. *Hayes Mech., Inc. v. First Indus., L.P.*, 351 Ill. App. 3d 1, 9 (1st Dist. 2004).

As discussed above, Illinois law provides that contracts entered into by a public body, which are prohibited by law or which under no circumstances could legally be entered into, are *ultra vires* and void. *Evans v. Benjamin School Dist. No. 25*, 134 Ill. App. 3d 875, 882 (2nd Dist. 1985). There is no exception to this, as “the law cannot at the same time prohibit a contract and enforce it [and] the prohibition of the legislature cannot be disregarded by the courts.” *DeKam v. Streator*, 316 Ill. 123, 129 (1925). Under the School Code, the Township Trustees did not have

the authority to enter into the Agreements District 204 alleges – implied or otherwise. Only the legislature can change the obligations it deems to impose statutorily.

This is true regardless of whether District 204 argues the existence of an express contract or the existence of quasi-contract. Implied contracts with public entities that are contrary to statutes are equally unenforceable. *McMahon v. City of Chicago*, 339 Ill. App. 3d 41, 48 (1st Dist. 2003). If the Township Trustees could be found liable under quasi-contract for services furnished by District 204, then the statutory provisions of the School Code governing audit fees and District 204's *pro rata* share of the Treasurer's expenses are meaningless. *Gregg v. Bourbonnais*, 327 Ill. App. 253, 267 (2d Dist. 1945).

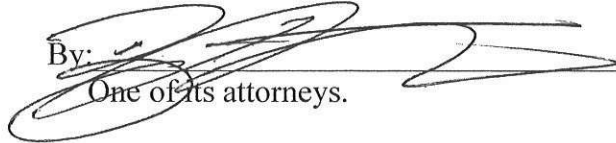
A further flaw in Counts IV and V is that District 204 is under the misbelief that it conveyed a benefit upon Township Trustees by performing certain services that the Treasurer otherwise would have performed. The Township Trustees, by statutory formula, does not save money when another entity performs services on the Treasurer's behalf. The Township Trustees and the Treasurer are a "zero-sum" public entity. If the cost of the Treasurer's services are lessened, it does not save the Township Trustees a penny because Township Trustees does not pay for those services. Rather, the member school districts pay for those services through the *pro rata* formula. Township Trustees were not enriched, unjustly or otherwise.

VI. CONCLUSION

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

Respectfully submitted,

TOWNSHIP TRUSTEES OF SCHOOLS
TOWNSHIP 38 NORTH, RANGE 12 EAST

By: 
One of its attorneys.

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**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
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AFFIDAVIT OF DR. SUSAN BIRKENMAIER

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

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

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



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

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

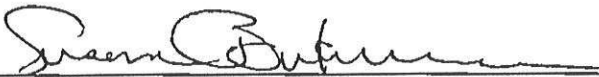
5. I also understand that District 204 has asserted that the Treasurer's office made use of a public relations firm. The firm of Jascula Terman & Associates, which provides public relations amongst other services, was engaged to deal with the media fallout cause by the well-publicized criminal investigation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

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

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

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

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



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

[REDACTED]

[REDACTED]

[REDACTED]

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

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

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

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

Subject: RE: Request for additional information

Susan,

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

Thank you.

Sincerely,

Tim Kilrea

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

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

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

Cc: thiessen@lyonstto.k12.il.us

Subject: RE: Request for additional information

Good morning all,

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

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

Thanks for your patience,
Susan

From: Kevin O'Mara [<mailto:komara@argohs.net>]
Sent: Wednesday, November 27, 2013 8:12 AM
To: Susan Birkenmaier; Joe Murphy; Warren Shillingburg; Lauri Calabrese; Tim Kilrea; David Sellers
Cc: Joe Murphy
Subject: Re: Request for additional information

Thank you Susan. I appreciate the response.

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

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

Take care,
Kevin

Dr. Kevin J. O'Mara
Superintendent
Argo Community High School
www.argohs.net
President
Illinois High School District Organization
www.ihsdo.org

From: Susan Birkenmaier <susan@lyonstto.k12.il.us>
Date: Tuesday, November 26, 2013 at 10:58 AM
To: Kevin O'Mara <komara@argohs.net>, Joseph Murphy <jmurphy@argohs.net>, Warren Shillingburg <shillingburgwa@dist102.k12.il.us>, Lauri Calabrese <calabresela@dist102.k12.il.us>, Timothy Kilrea <tkilrea@lths.net>, David Sellers <dsellers@lths.net>
Subject: Request for additional information

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

Please contact me if you have any questions.

Best wishes for a Happy Thanksgiving,
Susan

Susan Birkenmaier, Ed.D.
Lyons Township School Treasurer
930 Barnsdale Rd
La Grange Park, IL 60526
708-352-1178 Ext. 106
susan@lyonstto.k12.il.us

Please save trees. Print only when necessary.

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Fax: (312) 876-1155

Charles A. LeMoine

Direct Dial: 312-627-2163

Direct Fax: 866-546-2547

Email: CLeMoine@dykema.com

January 27, 2015

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

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

Dear Mr. Kaltenbach:

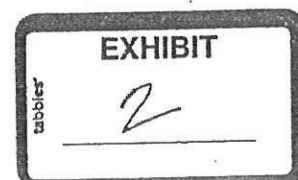
On behalf of our client, Lyons Township High School District 204 ("District 204"), we hereby reiterate our demand that Township Trustees of Schools, Township 38 North, Range 12 East ("Township Trustees"), immediately conduct and provide District 204 with a full accounting of all of Township Trustees'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

Sincerely,

DYKEMA GOSSETT PLLC

Charles A. LeMoine

cc: Superintendent Timothy Kilrea



KFT&R

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

ATTORNEYS AT LAW

Barry P. Kaltenbach
bkaltenbach@kftrlaw.com

312.630.9600 [voice]
312.630.7939 [fax]



FILE COPY

February 3, 2015

Via E-Mail (clemoine@dykema.com)

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

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

Dear Charles:

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

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

Very truly yours,

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



Barry P. Kaltenbach