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

TOWNSHIP TRUSTEES OF SCHOOLS TOWNSHIP 38 NORTH, RANGE 12 EAST,	)	
Plaintiff,	)	**No. 13 CH 23386**
vs.	)	**Judge Thomas R. Mulroy**
LYONS TOWNSHIP HIGH SCHOOL DISTRICT NO. 204	)	**Commercial Calendar I**
Defendants.	)	

PLAINTIFF'S TRIAL BRIEF
(for the December 16, 2019 trial date)

Plaintiff, Township Trustees of Schools Township 38 North, Range 12 East ("Trustees"), by its undersigned counsel, THE QUINLAN LAW FIRM, LLC, and MILLER, CANFIELD, PADDOCK & STONE, PLC, states as follows for their Trial Brief:

I. INTRODUCTION

A former Treasurer, Robert Healy, embezzled over $1 million in public funds, and granted unlawful, and unauthorized, financial benefits to Lyons Township High School District No. 204 ("District 204" or "LT") in violation of the School Code. Section 8-4 of the School Code mandates that LT "shall pay" its proportionate share of the Treasurer's expenses of office. **It is undisputed that LT did not pay its proportionate share of the Treasurer's expenses of office during Fiscal Years 2008 through 2018.**

LT argues that it and Mr. Healy reached an "agreement" in 2000 that excused LT from paying its proportionate share through Fiscal Year 2012. Even assuming this "agreement" was validly entered into by the Boards of both parties (it was not) and complied with the Intergovernmental Cooperation Act (it did not), it still violated Section 8-4 of the School Code

and is, therefore, unenforceable. Moreover, at the absolute most, it would have been effective for only a single fiscal year. **LT concedes that this "agreement" would not be applicable for Fiscal Year 2013 through Fiscal Year 2018 and LT offers no basis for not paying its proportionate share for those years (other than it just disagrees with how the Trustees spent funds).**

It is also undisputed that the Treasurer paid for LT's audit expenses during Fiscal Years 2008 through 2012; the Treasurer thus treated LT's expenses as though they were the Treasurer's expenses. This violated the School Code because each school district is required to pay for its own audit. Further, the cost of **LT's** audit is not an expense of the **Treasurer's** office. This means that every other school district not only paid for their own audit, but paid their proportionate share of LT's audit. – the tax dollars of other districts were used to subsidize LT.

The Trustees seek a declaratory judgment authorizing the Treasurer to remedy these violations of Illinois law by debiting the amounts LT failed to pay from the $51,000,000 in funds the Treasurer is currently holding for LT and by making the necessary bookkeeping entries. Failing this declaratory relief, the Trustees will need to address the deficit created by LT's failure to pay its proportionate share of the Treasurer's, and any decision they make will necessarily harm all of the other districts in Lyons Township.

II. FACTUAL BACKGROUND

A. <u>The Township Trustees</u>.

The Trustees are a body politic comprised of the three Township Trustees of Schools who are elected by voters within Lyons Township. 105 ILCS 5/5-2. The Illinois School Code mandates that "the school business of all school townships having school trustees shall be

transacted by three trustees….” 105 ILCS 5/5-2. The Trustees also appoint the Lyons Township School Treasurer (“Treasurer”). 105 ILCS 5/8-1.

B. The Treasurer.

The Treasurer is responsible for providing financial services for District 204, and 10 other school districts: District 101 through 109; and Argo Community High School District 217. The Treasurer also provides services for 2 other bodies: the LaGrange Area Department of Special Education (“LADSE”); and the West 40 Intermediate Service Center (“West 40”); each which provides specialty services to school districts.

The Treasurer has statutory duties, including to: (i) “[c]ollect from the township and county collectors the full amount of taxes levied by the school boards in his township;” (ii) “[b]e responsible for the receipts, disbursements and investments arising out of the operation of the school districts under his supervision; and (iii) “[p]ay all lawful orders issued by the school board of any district in his township.” 105 ILCS 5/8-17(a)(2); (a)(3); (a)(9). The Treasurer is the “only lawful custodian” of the funds belonging to each school district. 105 ILCS 5/8-7.

How this works in practice is that the Treasurer takes receipt of the property taxes levied by each districts and then pools and invests the funds. The Treasurer refers to this pooled fund as the “Agency Fund.” Each school district has its own percentage share of the Agency Fund. The Treasurer also pays each district’s bills as directed by those districts.

C. How the Expenses of the Treasurer’s Office Are Paid.

The Treasurer is compensated and the Treasurer has expenses of office. Neither the Trustees nor the Treasurer, however, have a tax base, or any other source of revenue, to pay for these things. Accordingly, during the fiscal year (which begins on July 1 and runs through June

30),[1] the Treasurer advances unallocated monies from the Agency Fund to an operating account to pay its bills. This operating account is referred to as the "Government Fund."

In the short term, this creates a structural deficit within the Agency Fund, because the Treasurer has advanced monies owned by the school districts to pay his bills. At the conclusion of each fiscal year, however, the Treasurer sends each district a bill for that district's pro-rata share of the Treasurer's expenses. When these bills are paid, the districts' accounts are debited and the unallocated deficit is reduced by the amount of the payments. To the extent a district does not pay, the unallocated deficit remains in the Agency Fund. So long as the Treasurer bills the amount he spends, and so long as the districts pay, however, the fiscal year balances.

The School Code states that each district "**shall pay** a proportionate share" of the Treasurer's compensation and expenses of office. 105 ILCS 5/8-4 (emphasis added). This share "shall be determined by dividing the total amount of all school funds handled by the township treasurer by such amount of funds as belong to each such…district." *Id*. LT admits that its obligation to pay its proportionate share is mandatory and not optional. (LT Answer, ¶ 28.) This means the wealthiest districts are billed for a higher share of the Treasurer's expenses, and the poorest districts are billed for the least share. LT is, by far, the wealthiest district.

The critical fact is that if a district does not pay its pro-rata bill, then the unallocated deficit in the Agency Fund will not balance, **because the Treasurer has already spent the money shown on the pro-rata bill**. Because the Trustees and Treasurer do not have their own source of funds, they cannot "make up" the shortfall.

This produces one of two eventualities. Either LT makes up the shortfall that was created by its failure to pay its share of the Treasurer's expenses, or the other districts have to absorb at least their proportionate share of that shortfall. Every single theory that LT advances overlooks

[1] For example, Fiscal Year 2008 is the year beginning on July 1, 2007, and ending on June 30, 2008.

this inevitable conclusion: if LT does not pay, all of the other districts will eventually absorb that cost.

D. Robert Healy's Misconduct.

Robert Healy was the Treasurer from July 1988 through August 2012. Towards the end of his tenure, Healy redeemed a significant amount of unused vacation days. The Trustees engaged counsel to investigate whether this was appropriate. This led to the discovery that Healy had embezzled over $1 million. Ultimately, the Trustees turned their findings over to the Cook County State's Attorney, who successful prosecuted Healy.

The Trustees also investigated whether Baker Tilly, who audited the Treasurer's office, was negligent in failing to discover the embezzlement. This, in turn, lead to the discovery that Healy had conferred unlawful, and unauthorized, financial benefits upon LT. The Trustees found that: (i) Healy paid for LT's annual audit and forced that expense upon each of the other school districts; (ii) Healy permitted LT to avoid paying its pro-rata share of the Treasurer's expenses; and (iii) Healy over-allocated income from the pooled investments to LT. The third claim has been removed from this lawsuit by application of the limitations period. In October 2013, just over one year after Healy resigned, the Trustees filed this action against LT.

III. CLAIM 1 – LT'S FAILURE TO PAY ITS ANNUAL PRO-RATA BILLS

Section 8-4 of the School Code mandates that each district "**shall pay**" its pro-rata share of the Treasurer's expenses. 105 ILCS 5/8-4. After the close of each fiscal year, the Treasurer totals the amount he spent and sends a pro-rata bill to each district. **It is undisputed that LT did not pay its pro-rata share for Fiscal Years 2008 through 2018** (the years at issue currently in this lawsuit)**.** LT offers excuses for why it did not pay, but none of these excuses change the fact that Healy permitted LT to violate Section 8-4.

A. LT's Non-Payment Violates Section 8-4.

Section 8-4 requires LT to pay its annual invoice, and LT did not pay. The issue is as simple as that; LT's non-payment violated Section 8-4. Any agreement that resulted in LT not "paying" its proportionate share violates Section 8-4.

B. No "Agreement" Can Override Section 8-4.

For Fiscal Years 2008 through 2012, LT argues that it was duplicating the Treasurer's services with its own employees, and so Healy agreed that the Treasurer's office would pay for those employees. The **result**, whatever might have been intended, was that Healy sent the annual pro-rata bills to LT, and LT did not pay. Nor did Healy make any payment to LT to pay for any employees, as LT argues was agreed upon. Healy just sat by and watched the deficit continue to grow for years. LT concedes this alleged "agreement" would not possibly apply for the period Fiscal Year 2013 through Fiscal Year 2018 – for those years, LT just decided it would not pay the pro-rata bill in full, and instead made *ad hoc* partial payments.

LT cannot pick-and-choose what it is willing to pay for, or reject the expenses imposed upon it by the School Code; LT "**shall pay**" its pro-rata share. Any agreement that excused LT from doing so violated Section 8-4, and is therefore void, because a public body cannot enter into a contract that "is *ultra vires*, contrary to statutes, or contrary to public policy." *Matthews v. CTA*, 2016 IL 117638, ¶ 98. The "agreement" LT reached with Healy functionally excused LT from paying its pro-rata share of the Treasurer's expenses and, therefore, was contrary to the School Code.

C. Any "Agreement" Required a Formal Intergovernmental Agreement.

LT's witnesses have described their agreement with Healy as that of the Treasurer "outsourcing" services to LT, or the two parties "sharing" services. This attempt at justifying the

"agreement" leads to a violation of the Intergovernmental Cooperation Act. First, if LT were truly a vendor, selling its services to the Treasurer, then the Treasurer should have included the cost of those services **when calculating his expenses of office**. But this did not happen. Rather, Healy just permitted LT to pay its bill less the amount of LT's own employees.

Section 3 of the Intergovernmental Cooperation Act provides that one public body may "exercise[], combine[], transfer[], and enjoy[]" its powers with another public body. 5 ILCS 220/3. Under LT's theory, that is what happened, *i.e.*, one public body performed work for another public body. But Section 5 of the Act imposes certain requirements upon such contracts.

Section 5 approves intergovernmental agreements, "provided that such contract shall be approved by the governing bodies of each party to the contract…." 5 ILCS 220/5. As discussed below, the governing bodies of each party did not approve the "contract." Moreover, since the "contract" created a deficit impacting the other school districts, they should have been a party to the agreement, too – but they were not.

Section 5 also provides that "[s]uch contract shall set forth fully the purposes, powers, rights, objectives and responsibilities of the contracting parties." 5 ILCS 220/5. The purported "contract," however, does not state the purpose or objectives of the agreement, nor the rights, powers or other responsibilities of the parties.

The existence of a formal intergovernmental agreement is not mere pomp. In *Village of Montgomery v. Aurora Township*, 387 Ill. App. 3d 353, 354 (2nd Dist. 2008), Montgomery brought suit seeking a declaratory judgment respecting which public body had the obligation to maintain a bridge. Aurora Township argued that either Montgomery or the City of Aurora had informally agreed to assume the obligation. The Appellate Court explained that:

> [a]lthough the record contains intergovernmental agreements reflecting that during certain years, [the City of] Aurora agreed to plow and salt the bridge on

> behalf of the Township, neither Aurora nor Montgomery ever executed a formal agreement to take over maintenance responsibility for the bridge.

Id. at 358. Accordingly, lacking a proper intergovernmental agreement to transfer maintenance, the Township retained the obligation for maintenance of the bridge. *Id*.

Similarly, in *Connelly v. Clark County*, 16 Ill. App. 3d 947 (4th Dist. 1973), decided even before the Intergovernmental Cooperation Act became law, the Appellate Court addressed whether Clark County was permitted to operate a gravel pit and sell gravel to other public bodies. The court concluded that although Clark County *could* have entered into an agreement with other public bodies, no such intergovernmental agreement existed. *Id*. at 951. Accordingly, while Clark County could operate the gravel pit for its own needs, it *could not sell excess gravel to other public bodies*, absent a formal intergovernmental agreement. *Id*. at 952.

D. <u>If There Was an "Agreement," It Was Effective Only For FY 2000</u>.

LT was the wealthiest district, and so LT's pro-rata bill was the largest – LT did not like the fact that its wealth meant it had to pay more, and so its business manager (Lisa Beckwith) sought to alleviate LT's unhappiness.[2] The end-result was a February 29, 2000 memorandum Beckwith sent to Healy. In the memorandum, Beckwith states the relevant "proposal:"

[2] LT was akin to parents who send their children to private schools being unhappy paying that portion of their taxes supporting public schools. The monies are owed whether they used the services or not.

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 benefit costs for 3 employees as listed below:

	Salary 99-00	OASDI Medicare	IMRF	Insurance Medical	Insurance Life	Total
Programmer Analyst	$41,205	$3,152	$3,045		$48	$47,450
Accounts Payable Bkkeeper	$23,192	$1.774	$1,714	$7,028	$48	$33,756
Payroll Bookkeeper	$21,861	$1,672	$1,616		$48	$25,197
Total	$86,258	$6,598	$6,375	$7,028	$144	$106,403

An invoice will be sent to the Township Treasurer in May with receipt of funds expected prior to the close of the fiscal year.

(Plaintiff's Trial Exhibit 10.)

LT argues that the Trustees voted to "accept" this proposal during a March 21, 2000 Board meeting, thereby forming a contract with LT. Even if this were true, on its face, the proposal was for "99-00." Nothing in the memorandum suggests it was to be applicable on a perpetual basis. **And neither this proposal, nor any other similar proposal, was ever again voted upon by the Trustees.**

Moreover, Illinois law states that a public board cannot enter into contracts for employment or services lasting longer than the period for which the board making the decision has left to serve. *Cannizzo v. Berwyn Twp. 708 Cmty. Mental Health Bd.*, 318 Ill. App. 3d 478, 482-87 (1st Dist. 2000). Such contracts are "*ultra vires* and void *ab initio*." *Id*. at 487.

Here, the governing body of the Plaintiff consists of 3 elected Trustees. 105 ILCS 5/5-2. One trustee is elected every 2 years to serve a 6-year term, with elections occurring in odd-

numbered years. 105 ILCS 5/5-4; 5-13; 5-14. LT's theory is that the contract was agreed to by the Trustees in March 2000 and by LT in June 2000. A new Board of Trustees would then be created in 2001 with the next election. A "perpetual" agreement would have been unlawful.

E. <u>The Trustees Did Not Vote to Approve an Agreement With LT</u>.

The Trustees' minutes for the March 21, 2000 meeting reflect the following:

> Healy submitted to the Trustees the proposal from District 204 stating 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. These costs would certainly be incurred. A point to be clarified is to make sure that workman's compensation is covered. A further recommendation by Trustee Hartigan is that the trustees be given an evaluation of the employee's performance for those aforementioned personnel employed at the high school.

(Plaintiff's Trial Exhibit 14, p. 2.)

The Minutes then reflect the following action:

> 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

(Plaintiff's Trial Exhibit 14, p. 3.) (The third Trustee was absent.)

LT argues that by voting to "accept" the proposal, the Trustees formally agreed to enter into a contract with LT. This is wrong. The Board was acknowledging their receipt of the proposal. Russell Hartigan will testify that his vote was not to officially enter into a contract with LT, suggested by his comments that additional points remained to be clarified. A review of other of the Trustees' minutes reveals that the Trustees "accepted" documents when receiving them into the record; and always "approved" contracts.

LT argues that Healy **told them** that the Trustees approved the agreement; but Healy did not have actual authority to bind the Trustees. The School Code mandates that all township

business be conducted by the Trustees. 105 ILCS 5/5-2, and while Section 8-7 of the School Code authorizes the Treasurer to enter into certain types of contracts, none of them are applicable here. 105 ILCS 5/8-7. In short, under the School Code, only the Trustees could approve an agreement with LT. *See also Matthews v. CTA*, 2016 IL 117638, ¶99 (a public body may only be contractually bound by official action taken by its governing Board).

Nor did Healy have apparent authority. The doctrine of apparent authority is not applicable against public officials. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶36. This is because: (a) it would leave a public body "helpless to correct errors" and "escape the financial effects of frauds and thefts by unscrupulous public servants;" and (b) persons acting with a public official are charged with knowing the bounds of his or her authority, even if the official is himself unsure. *Id*. Moreover, LT employees will testify that they knew that Healy was not authorized to enter into the purported contract.

F. Not Even LT's Board Voted to Approve the "Agreement".

The LT Board of Education met on June 19, 2000. Its Agenda, Minutes and relevant attachments are Plaintiff's Trial Exhibit 16. The Minutes reveal the Board voted to "approve the Consent Agenda…." (Plaintiff's Trial Ex. 16, p. 13.) The Consent Agenda identifies "Exhibit T" as the "Township Treasurer's Invoice." (*Id*.) Consent Agenda Exhibit T includes a memorandum from Beckwith to the Board, stating that the "Board of Education action is to approve a payment…." (Plaintiffs' Trial Ex. 16, p. 21.) That is precisely what the Board did.

LT's position is that the Board's vote approving payment of the invoice and the vote approving the "contract" are one and the same vote. In other words, by voting to approve a payment, the Board was also voting to approve a contract. But that is not what the actual vote was. LT's Board never voted to approve a contract with the Trustees.

G. The Pro-Rata Bill for Fiscal Year 2013 Through Fiscal Year 2018.

LT's failure to pay its pro-rata bills for Fiscal Year 2013 through Fiscal Year 2018 is problematic for a different reason. LT concedes that the purported "agreement" would not have been in effect beginning in Fiscal Year 2013. Despite this, LT still failed to pay its bill in full, because LT disagrees with the Trustees' discretionary decisions to pay for things like drinking water, attorneys, financial software, and a public relations firm.

Most respectfully, neither this Court nor LT has authority to second-guess the discretionary business decisions of the Trustees or the Treasurer. While this Court has the authority to issue relief to control "the discretionary actions of public officials," this is only where "fraud, corruption, oppression or gross injustice is shown…." *Board of Educ. v. Board of Educ.*, 112 Ill. App. 3d 212, 219 (1st Dist. 1983). LT has never alleged that such facts are present and it is not appropriate for this Court to substitute its own business judgment for the discretionary judgment of a public body.

Moreover, the public relations firm was hired to help with the media attention generated as a result of Healy's wrongdoing. This engagement is within the business judgment of the Trustees. In *Ryan v. Warren Township High School Dist.*, 155 Ill. App. 3d 203 (2d Dist. 1987), the court held that a school district had implicit authority to employ a public relations firm during a period when the school board was under scrutiny. This was authorized as a result of the district's obligation to hold public meetings because the firm might "enhance the school district's communications with the public…." *Id*. at 205. The Trustees are similarly required to disseminate information to the community and to hold public meetings. 5 ILCS 120/1.

The total amount that LT failed to pay for the period Fiscal Year 2008 through Fiscal Year 2018 is $1,863,691.20.

IV. CLAIM 2 – HEALY WRONGLY PAID FOR LT'S ANNUAL AUDITS

The School Code mandates that "[e]ach school district shall, as of June 30 of each year, cause an audit of its accounts to be made…." 105 ILCS 5/3-7. Thereafter, they "shall…submit an original and one copy of such audit to the regional superintendent of schools…." *Id*. If they do not, the superintendent "shall…cause such audit to be made by employing an accountant…to conduct such audit and shall bill the district for such services…." *Id*.

Courts should interpret statutory provisions as a whole and not focus on phrases in isolation. *People v. Glisson*, 202 Ill. 2d 499, 505 (2002). This Court may also assume that the legislature did not intend an absurd result. *Id*. Section 3-7 of the School Code requires that each district "shall cause" an annual audit to be made. While not expressly identifying who should pay, the logical reading is that each district pays for its own audit, because that district is the party "causing" the audit to be undertaken.

If a school district does not cause an audit to be undertaken, the regional superintendent "shall cause" the audit to be done, and then "shall bill" the district for the cost. This reinforces the conclusion that the cost of the audit is for the school district to bear. Any other conclusion would create the absurd result wherein the district is **not** responsible for the cost of its audit if the district causes it, but **is** responsible for the cost if the regional superintendent causes it.

Yet it is undisputed that during Fiscal Years 2008-2012, Healy paid for LT's audit and treated it as an expense of the Treasurer's office. This means that: (a) LT did not pay for its own audit because LT's audit costs were included on the pro-rata bill that LT did not pay; and (b) every other district paid for its own audit **and** its pro-rata share of LT's audit – the other districts were forced to subsidize LT.

LT has two counter-arguments, but neither of them changes the fact that LT's non-payment violated Section 3-7. First, LT argues that Healy paid for every school district's annual audits. This is a pointless argument, because it still would not excuse LT's own violation. Regardless, the business records establish that with a few exceptions, Healy paid the annual audits of **only** LT, and not the other districts; and that each of the other districts paid for their own annual audit **plus** their pro-rata share of LT' audit.

Second, LT argues that because it was the biggest (and wealthiest) district, it performed many of its own business services and its audit was more complex, and so it was proper for Healy to force the other districts to subsidize LT. This is nonsensical. If LT's audit was more complex all the more reason for **LT** to bear that cost, rather than forcing it on the school districts.

As a result of this Court's imposition of a five-year limitations period, the amount presently at controversy is $249,008.21.

V. LT's AFFIRMATIVE DEFENSES

A. First Affirmative Defense: *Laches*.

"There is considerable reluctance to impose the doctrine of *laches* to actions of public entities unless unusual or extraordinary circumstances are shown." *Van Milligan v. Board of Fire & Police Comm'rs*, 158 Ill. 2d 85, 90 (1994). This is because "*laches* may impair the functioning of the [public body] in the discharge of its government functions, and valuable public interests may be jeopardized or lost by negligence, mistakes, or inattention of public officials. *Id*.; *accord Wabash County v. IMRF*, 408 Ill. App. 3d 924, 936 (2d Dist. 2011) ("the doctrine should not be imposed on a government entity absent extraordinary circumstances, because the public would be adversely affected."). This is precisely what happened in this case, Healy's misconduct adversely affected the other school districts within Lyons Township; they should not have to bear

the financial burden of Healy's malfeasance. Moreover, once the extent of Healy's malfeasance came to the attention of the Trustees, they promptly investigated and filed suit within about one year.

B. Second Affirmative Defense: Statute of Limitations.

This Court ruled previously that the Trustees' claims are subject to a five-year limitations period, meaning that causes of action accruing more than five years prior to the Trustees' filing suit are no longer viable. The Trustees have taken this Court's ruling into account when calculating their claims and damages for purposes of this trial.

Section 5/8-4 of the School Code requires each district to pay its pro-rata share of the Treasurer's compensation and expenses. Once each fiscal year closes, the Treasurer totals his compensation and expenses, calculates each district's pro-rata share, and then issues a pro-rata bill. LT refused to pay those bills. Each refusal to pay amounts legally due triggers a new cause of action, regardless of when the Treasurer incurred the underlying expenses on the bill, because until LT refused to pay the bill no cause of action had arisen.

C. Third Affirmative Defense: Voluntary Payment Doctrine.

A basic principle of law is that where a person receives funds to which he had no legal right, equity and good conscience dictates that the funds must be returned. *Bd. of Ed. of City of Chicago v. Holt*, 41 Ill. App. 3d 625, 626 (1st Dist. 1976). The "voluntary payment doctrine" has developed as an exception to this principle, permitting a party to keep monies paid to them under a claim of right, even where no legal right to the funds existed, excepting where a mistake of fact, fraud, or duress is involved.

The doctrine is little more than a form of estoppel, and the Illinois Supreme Court has explained that estoppel "will not be applied to governmental entities absent extraordinary and

compelling circumstances." *Matthews*, 2016 IL 117638 at ¶ 94. Further, estoppel may not be applied against a public body through the unauthorized acts of a public official. *Patrick Eng'g*, 2012 IL 113148 at ¶ 39. Perhaps for these reasons, courts in Illinois have a history of permitting public bodies to recover public funds to which the recipient did not have a legal right. *See*, *e.g.*, *City of Chicago v. McKechney*, 205 Ill. 375, 434-35 (1903) (City could recover overpayment under construction contract); *City of Chicago v. Weir*, 165 Ill. 582, 590-91 (1897) (same); *Deford-Goff v. Dept. of Pub. Aid*, 281 Ill. App. 3d 888, 892 (4th Dist. 1996) (Department could pursue claim to recover overpayment); *Holt*, 41 Ill. App. 3d at 627 (Board could recover salary paid to retired teacher even though Board should have known that teacher resigned); *see also Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 482, 493 (1994) (commenting without concern on the holding of *Holt*).

Courts in other jurisdictions have likewise permitted a public body to recover public funds that were illegally paid to a recipient, even if a private plaintiff might be unable to recover those same funds. *See*, *e.g.*, *U.S. v. Wurts*, 303 U.S. 414, 415 (1938) (permitting recovery where a public official "wrongfully, erroneously, or illegally" paid public monies); *U.S. v. Lahey Clinic Hosp., Inc.*, 399 F.3d 1, 15 (1st Cir. 2005) ("government has broad power to recover monies wrongfully paid"); *Harrold v. Glickman*, 206 F.3d 783, 789 (8th Cir. 2000) ("common law permits the government to recover funds that its agents wrongfully or erroneously paid"); *Old. Rep. Ins. Co. v. Fed. Crop. Ins. Corp.*, 947 F.2d 269, 275 (7th Cir. 1991) (government has "common law right to recover improperly paid funds"); *U.S. v. Dekalb Cnty.*, 729 F.2d 738, 741 n.4 (11th Cir. 1984) ("voluntary payment of public money made my public officers under no mistake of fact is not the equivalent in law of such payment by an individual"); *DiSilvestro v. U.S.*, 405 F.2d 150, 155 (2d Cir. 1968) ("It is, of course, well established that parties receiving

monies from the Government under a mistake of fact or law are liable *ex aequo et bono* to refund them…."); *Heidt v. U.S.*, 56 F.2d 559, 560 (5th Cir. 1932) (doctrine not applicable even where the unlawful payments continue for an extended period of time); *State ex rel. Zoeller v. Aisin USA Mfg., Inc.*, 946 N.E.2d 1148, 1157 (Ind. 2011) (recouping public funds is handled differently than recouping private funds); *State ex rel. Callaway v. Axtell*, 393 P.2d 451, 454 (N.M. 1964) (doctrine "is subject to an exception where public monies are involved"); *Arkansas Real Estate Co. v. Arkansas State Hwy. Comm'n*, 371 S.W.2d 1, 3 (Ark. 1963) ("that rule – of inability to recover a voluntary payment – does not apply to the State and its agencies."); *State ex rel. Jarrell v. Walker*, 117 S.E.2d 509, 512 (W. Va. 1960) ("there is a generally recognized exception to the [doctrine] where payment is made by a public officer"); *City of St. Louis v. Whitley*, 283 S.W.2d 490, 492 (Mo. 1955) ("case is not governed by the general rules applicable to the conduct and transactions of private individuals" as it involves "public officials entrusted with the expenditure of public funds"); *Township of Normania v. Yellow Medicine Cnty.*, 286 N.W. 881, 883 (Minn. 1939) (doctrine "has no application to unauthorized payment of public funds"); *Village of Ft. Edwards v. Fish*, 50 N.E. 973 (N.Y. 1898) (declining to apply doctrine).

Even if his Court were to apply the doctrine, however, such application would fail under the facts presented. First, Healy was not authorized to pay LT's annual audits, and the Trustees certainly did not have accurate or complete information even if they were aware generally that he was making the payments. Second, with respect to LT's failure to pay its pro-rata invoices, while Beckwith proposed that the Treasurer would actually "pay" LT the sums set forth in her memorandum; a payment was never actually made. Rather Healy just permitted LT to deduct certain expenses, thereby creating the ever-growing deficit. No payment was ever reflected on the Trustees books.

VI. LT'S "CONSOLIDATED" COUNTERCLAIM

A. Count I – Setoff.

As explained in the Trustees' pending Motion to Dismiss Count I of LT's Consolidated Counterclaim, LT's claim for setoff is just another attempt to enforce the "deal" it asserts it reached with Healy. For all the reasons discussed above that "deal" is unenforceable and void under Illinois law. Moreover, a setoff asserts a cause of action that is "based upon a transaction extrinsic to that which is the basis of plaintiff's cause of action." *Lake County Grading Co. of Libertyville v. Advance Mech. Contractors, Inc.*, 275 Ill. App. 3d 452, 461-62 (2nd Dist. 1995). Count I does not state any particular cause of action, but is really just an argument why LT believes it does not owe any monies for the period Fiscal Year 2008 through Fiscal Year 2012. (LT does not allege that its setoff applies for the period Fiscal Year 2013 through Fiscal Year 2018.)

B. Count II – Breach of Fiduciary Duty.

As an elected body politic, the discretionary decisions of the Trustees are reviewable only for "fraud, corruption, oppression or gross injustice…." *Board of Educ. v. Board of Educ.*, 112 Ill. App. 3d 212, 219 (1st Dist. 1983). LT has not alleged any of these sins are present in this case and so the minutiae of the Trustees discretionary decisions are properly part of this lawsuit.

Moreover, even if the Trustees did owe a fiduciary duty to LT, they would necessarily owe that duty not *only* to LT, but also to each of the other school districts within Lyons Township. LT complains that the Trustees decisions are not good for LT, but this misses the point, as the Trustees have to make decisions about what is best for everyone even if that decision disadvantages LT. Accepting LT's view of the world – and only LT's view of the world – by finding the Trustees breached a fiduciary duty would imperil the services the Trustees

provide to all of the other districts, and so those other districts are necessary parties whom LT has failed to join. *See Lah v. Chicago Title Land Tr. Co.*, 379 Ill. App. 3d 933, 940 (1st Dist. 2008) (a necessary party is one whose interests may be materially affected by any resulting judgment).

To state a claim for breach of fiduciary duty, LT must prove that the Trustees breached a fiduciary duty owed to LT and damage proximately caused by that breach. *Lutkauskas v. Ricker*, 2013 IL App (1st), ¶ 35; *In re Estate of Bontkowski*, 337 Ill. App. 3d 72, 78 (1st Dist. 2003). LT additionally fails to establish its right to recover for any purported breach of a fiduciary duty because LT concedes it does not have damages with respect to some of its alleged breaches. As set forth in the Trustees' pending Motion to Strike, LT concedes that it has no damages with respect to the transaction involving West 40. The evidence will also show that LT has not suffered any damages with respect to its other claims. For the additional reasons set forth in LT's Motion to Strike, LT cannot prevail on its fiduciary claim relating to the Trustees' attorneys' fees, since LT has refused and is unable to respond to discovery aimed at identifying the basis of LT's claim.

C. Count III – Declaratory Judgment.

LT's proposed declaratory relief would not "settle and fix the rights of the parties," as is required to state a claim for declaratory relief. *Kaybill Corp. v. Cherne*, 24 Ill. App. 3d 309, 315 (1st Dist. 1974). LT's declaration would accomplish nothing put public relations victories, such as this Court declaring that certain conduct is "improper."

Moreover, LT seeks declarations that undeniably would affect the other districts, such as how the Treasurer's office is funded, whether West 40 can maintain a commercial loan agreement and amongst how many districts the public deficit should be allocated. The other

districts are necessary parties to Count III and LT has failed to join them. *See Lah*, 379 Ill. App. 3d at 940 (a necessary party is one whose interests may be materially affected by any resulting judgment). As set forth more fully in the Trustees' pending Motion to Dismiss, the declaratory relief at issue involves governance under the School Code and decisions involving the operation of the body politic should be left to the General Assembly that created the body politic.

Even if this Court ultimately denies the pending Motion to Dismiss with respect to Count III of LT's Consolidated Counterclaim, this Court should exercise its discretion and decline to enter the vague, yet politically sweeping, declaratory relief LT seeks. *See Marlow v. American Suzuki Motor Corp.*, 222 Ill. App. 3d 722, 728 (1st Dist. 1991) (holding trial court has discretion whether to afford declaratory relief).

VII. CONCLUSION

For these reasons, the Trustees request this Court enter a declaratory judgment authorizing the Treasurer to make a bookkeeping entry debiting those funds allocated to LT and held by the Treasurer, in the amount of $1,863,691.20 (LT's unpaid pro-rata bills) and $249,008.21 (LT's audit expenses), and authorizing the Treasurer to credit the unallocated deficit by this same amount. The Trustees will submit a post-trial memorandum setting forth a credit to which LT will be entitled should the Trustees prevail on both of their claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2019, I electronically filed **PLAINTIFF'S TRIAL BRIEF** with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt.

/s/Barry P. Kaltenbach