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

Township Trustees of Schools Township 38 North, Range 12 East, Plaintiff and Counter-Defendant, v. Lyons Township High School District No. 204, Defendant and Counter-Plaintiff.	No. 13 CH 23386 Calendar S Judge Jerry A. Esrig

ORDER

This cause coming to be heard for bench trial, the court having heard, considered and weighed the evidence, taking into account the credibility of the witnesses, and having considered the arguments and authority submitted by counsel, makes the following findings of fact and law.

I.
Background

Plaintiff and counter-defendant Township Trustees of Schools Township 38 North, Range 12 East ("TTO") is a governmental body, organized pursuant to the Illinois School Code, 105 ILCS 5/8-1, *et seq*. The TTO consists of a three-member elected Board of Trustees who supervise a Treasurer and the Treasurer's office, including staff.[1] The TTO's function is to receive, hold, manage, invest and account for tax funds collected on behalf of the TTO's member districts.

All tax monies collected for the member districts are held and invested by the TTO in a pooled account, but the moneys of each school district must "be accounted for separately in all respects, and the earnings from such investment shall be sepa-

[1] Unless otherwise indicated TTO refers to the Treasurer, the Treasurer's office and the Trustees.

rately and individually computed and recorded, and credited" to the school districts. 105 ILCS 5/8-7 The districts make their own budgeting decisions and determine what checks are to be written against their funds, but the checks are issued and signed by the Treasurer. The TTO has no input into an individual district's budgeting or spending decisions, and may not spend a district's funds without authorization from the district. 105 ILCS 5/8-16.

Each member district is required to pay a proportionate share of the TTO's expenses. 105 ILCS 5/8-4. Each district's proportionate share is determined by dividing the total amount of all school funds handled by the TTO by the amount of the funds belonging to that district. *Id*. The TTO does not receive tax revenue independently of the school districts; it has no independent source of funding and no funds of its own.

The Trustees have an affirmative legal duty to supervise the Treasurer and review his financial dealings. In this regard, section 5-20 of the School Code provides as follows:

> At each regular meeting, and at such other meetings as they may think proper, the trustees 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 or other township school officer, and shall make such order for their security, preservation, collection, correction of errors, if any, and for their proper disposition, as may be necessary.

105 ILCS 5/5-20.

Defendant Lyons Township High School District No. 204 ("LT") is a high school district and one of approximately twelve districts whose funds are managed by the TTO. LT is also governed by an elected board. During the relevant time period, it has had the largest fund balance of any of the member districts, usually owning approximately 25% of the total of the pooled funds.

From 1998 to 2012, the TTO Treasurer was Robert Healy. In 2012, it was discovered that Healy was embezzling school district funds. As a result, he was convicted and sentenced to prison. No comprehensive forensic audit was ever conducted, but it was estimated that Healy stole in excess of $1 million in school district funds.

A township trustee arrangement was once common in Illinois, but most treasurer's offices have been eliminated. LT has been an unhappy member of the TTO going back at least to the late 1980s. As a large high-school, LT had its own business office and believed it could perform its own accounting, money management and investment functions better than the TTO. As the district holding the largest fund balance, it also believed that it was paying a disproportionate share of TTO expenses while not receiving commensurate benefits.

II.
TTO Claims

A.
Agreement to Credit LT for Certain Accounting Expenses

1.
Pertinent Facts

Beginning at least as early as 1988, LT was unhappy as a member of the TTO. Because of LT's size and in-house requirements, LT had its own business office which performed many of the tasks which the TTO was otherwise required to perform for LT. In addition, LT was unhappy with the quality of work performed by the TTO and considered the reports and information received from the TTO inadequate. LT preferred to perform its own bookkeeping and accounting work in-house and believed that it could do so more efficiently and capably than could the TTO.

Correspondence and meeting minutes reflect LT's complaints that it was paying more than its fair share for TTO services and was performing services for itself that the TTO was performing for other districts resulting in inefficiencies and unnecessary expense. On the other hand, the TTO complained that LT was, by its own choice, duplicating services performed by the TTO and that any inefficiencies were caused by LT's deliberate decision not to rely on the TTO's services.

Over the years, LT let it be known that it was considering affiliating with another township treasurer's office or petitioning the state legislature to allow LT to hold, manage and invest its own funds. Given the size of LT, its fund balance, and LT's significant pro rata share of TTO expenses, the TTO knew that its own significance would be markedly reduced if LT left the group. To stave off attempts by LT to withdraw, in late 1999, the TTO began to formally negotiate with LT for an arrangement which would allow LT to perform accounting work which

the TTO would otherwise have to perform in exchange for a credit against LT's pro rata contributions to the TTO. This would dissuade LT from seeking withdraw from the TTO.

In May 1999, Todd Shapiro, Chairman of LT's Finance Committee and Vice President of LT's Board, directed Lisa Beckwith, LT's business manager, and Healy "to work together during the summer months to prepare options for the [LT] Board of Education to review that would provide more equity in the services provided [by the TTO to] the District." LT Ex. C-3. On July 15, 1999, Healy wrote to the TTO Trustees, as follows:

> Recent meetings indicate an increasingly strained relationship between the administration of this office and the Board of Education of High School District #204. During the next year it will be necessary for this office to absorb costs related to the High School District 204 business function or face legislative actions detrimental to the continued operation of the School Treasurer's office. A goal then for the upcoming year is to find an agreeable middle ground and keep the business relationship between the District Board and the Treasurer's office as amicable, as mutually profitable and as equitable as possible.

LT Ex. C-5. The July 27, 1999 minutes of the TTO Trustees contain the following entry:

> 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.

LT Ex. C-6.

On August 18, 1999, Healy wrote Beckwith a letter, in which he outlined five "proposed possible solutions" to "balance the efforts of our respective staffs." One of these proposals involved "a partial funding by the Treasurer's office to cover

[LT's] costs for the business functions [LT] now performs." LT Ex. C-7. Healy noted:

> If the responsibilities for the Accounts Payable and Payroll production were to be returned to the [TTO] it would mean higher costs for the [TTO] in the form of salaries and benefits for increased staff and higher related expenses to accommodate the work load.

Id. He predicted that the TTO Trustees, who were copied on the letter, "would logically conclude" that this was a "reasonable" proposal. *Id*.

On September 29, 1999, the LT Finance Committee met and "directed Dr. Beckwith to work with Mr. Healy to further define the costs of the Business Office that can be charged to the [TTO]." LT Ex. C-8. The minutes further state, as follows:

> These charges could include salaries for the accounts payable, payroll and computer services staff. Also an amount for computer processing was discussed. In addition to salaries, costs associated with reconciliation, printing of checks, audit, legal fees and office costs could also be transferred to the Treasurer's office. 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.

Id.

On February 29, 2000, Beckwith wrote a memo to Healy listing the following as the "responsibilities that [LT] proposes become the direct cost and responsibility of the [TTO]":

> Payroll and accounts payable bank reconciliation.
>
> Balance monthly totals between [TTO] and [LT].
>
> Provide printing costs for checks and envelopes for accounts payable, payroll, imprest and student activities.
>
> Annual salary and benefit cost for three employees listed below.

LT Ex. C-9. The memo listed three employee categories – Programmer Analyst, Accounts Payable Bookkeeper and Payroll Bookkeeper – and itemized the costs, including benefits, for each. The total was $106,403. The memo concluded as follows: "An invoice will be sent to the Township Treasurer in May with receipt of funds expected prior to close of the fiscal year." *Id.*

The TTO Trustees met on March 21, 2000. Trustees Russell Hartigan and Joseph Nekola were present. Nekola is now dead. Hartigan testified at trial, but his recollection of events which took place more than 20 years ago was understandably hazy. The meeting minutes state as follows:

> Healy submitted to the Trustees the proposal from [LT] stating this office absorb certain payroll, accounts payable and computer processing expenditures by [LT]. As these costs would be incurred by the [TTO] if [LT] were to totally utilize the facilities of the TTO. [sic] 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 [LT].
>
> A motion was made by Russell Hartigan seconded by Joseph Nekola to accept the proposal given to the [TTO] Trustees by [LT].
>
> ROLL CALL: Ayes – Joseph Nekola, Russell Hartigan
>
> Nays – None

LT Ex. C-10. A copy of Beckwith's February 29, 2000 memo is included in the Board Packet for the meeting. *Id.*

The LT Finance Committee met on March 22, 2000. The minutes state the following:

> The Committee reviewed the recommended changes in the Township Treasurer billing. The billing will include transferring the cost of 3 business office staff salaries and benefits to the Township Treasurer. The Treasurer will also offer additional services to include reconciliation of all funds and bank accounts as well as providing

> checks and envelopes to the district. This adjustment creates more parity between the services provided all member districts. This will be effective for the 1999-2000 school year. This change is subject to approval by the Township Treasurer Trustees.

LT Ex. C-11.

On June 14, 2000, Beckwith wrote a memo to the LT Board stating the following:

> Attached is a copy of the Lyons Township High School Treasurer's bill for the 1999-2000 school year. The District's share is $165,476, which is a 6% increase over the 1998-1999 school year. Also attached is a copy of the agreement that we made with the Treasurer, which pays the District $106,403 for comparable services provided to other township districts but not to Lyons Township High School. Board of Education action is to approve a payment in the net amount of $59,073.

LT Ex. C-13. The LT Board met on June 19, 2000. Taken together the agenda, minutes and attachments reflect that payment of the TTO invoice after a credit for the services provided by LT as set forth in the Beckwith memos of February 29, 2000, and June 14, 2000, was considered and approved on the Board's Consent Agenda. LT Ex. C-14. There is no dispute that the TTO invoiced LT for $165,476.00 for its total pro rata share for the fiscal year ending June 30, 2000, and that LT authorized and the TTO accepted payment in the amount of $59,073, *i.e.*, the amount remaining after the crediting LT with $106,403 for services provided.

As mentioned above, Beckwith's February 29, 2000 memo contemplated that "[a]n invoice will be sent to the Township Treasurer in May with receipt of funds expected prior to close of the fiscal year." Subsequent annual memos sent by LT contained this same language. Nevertheless, in each year the transaction followed the pattern set for fiscal year 1999. There is no dispute that for each succeeding fiscal year up to and including fiscal year 2012, LT would send the TTO a memo outlining the costs associated with that fiscal year's agreed-upon accounting work. When LT received the TTO's invoice for LT's pro rata share of TTO expenses, LT would subtract its credit, as outlined in the annual memo, and authorize payment

to the TTO for the balance. The TTO would accept the net amount, deduct the net amount from LT's account and credit the net amount to the TTO. LT's associated expenses grew each year until these expenses exceeded LT's pro rata share of the TTO's expenses. At that point, LT stopped authorizing any payment to the TTO for pro-rata expenses; however, LT never requested and never received credit for the amount by which LT's in-house accounting fees exceeded its pro rata share.

By 2013, Healy's perfidy had been discovered, he had been fired and new TTO Trustees had been elected. In letters written in March and April 2013, Mark Thiessen, the new president of the TTO Board, advised LT that the TTO did not believe the School Code permitted LT to pay less than its pro rata share of TTO expenses; did not believe that the TTO Trustees had ever authorized an arrangement to credit LT for accounting services; would no longer allow LT a credit for accounting services LT performed; and was "exploring all . . . options for recovery associated with [LT's] lack of payment for legally obligated contributions to the TTO." TTO Ex. 62.

2.
Analysis

The TTO's accounting expense claim seeks a declaratory judgment that the Treasurer is authorized to debit all of the amounts taken by LT as a credit for accounting services from LT's balance held within the Agency Fund. The TTO argues that the TTO Trustees never agreed to credit LT for the accounting services; that there was no valid contract between the parties; and that allowing LT to pay less than its pro rata share violates Section 5/8-4 of the School Code.

As to the approval of the TTO Trustees, the TTO maintains that use of the word "accept" in the March 21, 2000 minutes does not reflect approval of the proposal, but only an acknowledgement that the Trustees had received the proposal for further consideration. The court finds that there is no credible evidence supporting the TTO's position. The testimony of the TTO's expert and other testimony that the vote reflected in the meeting minutes on March 21, 2000, was not a vote to accept the proposal but rather a vote to accept delivery of the proposal and a deferral of further action was not credible. That interpretation is inconsistent with the plain meaning of the word "accept"; the technical meaning of the word as defined by Robert's Rules of Order, as conceded by the TTO's expert; the use of the

word on occasions in minutes of Trustee meetings; and the conduct of the parties both before and after the vote. The court finds that the proposal to credit LT with the cost of performing certain accounting and bookkeeping tasks which the TTO would otherwise have had to perform was approved by the TTO Trustees knowingly, deliberately and with full disclosure.

The court also rejects the TTO's argument that the credits must be reversed because the parties had no valid, enforceable contract. Whether or not the proposal accepted by the TTO Board on March 21, 2000, was sufficiently concrete to establish a binding contract is immaterial to the issues before this court. The evidence of a 12 year course of conduct is undisputed. The TTO now seeks to unwind that conduct, even though it was a full and willing participant and beneficiary of the course of dealings.

As to the crediting of LT for accounting services, the parties engaged in a course of dealing over 12 years without ever once disagreeing about the arrangement or their respective responsibilities. The TTO never argued that LT did not perform in accordance with the parties' understanding. And even though the amount of the credit requested by LT rose annually, the TTO never formally questioned the amount or refused to issue the credit as requested by LT. Similarly, LT never argued that the TTO did not have the unilateral right to terminate the arrangement. In short, there has never been a dispute over the terms of the parties' arrangement. Instead, the TTO's arguments concern whether the course of conduct was properly authorized and permissible.

It is a well-established principle of contract law, that parol evidence, including evidence of a course of conduct, is admissible to supply missing terms of a contract. *Guel v. Bullock*, 127 Ill. App. 3d 36, 40 (1st Dist. 1984). "A course of dealing between the parties is admissible 'to explain, supplement, or add to the agreement (but not contradict it).'" *Midwest Builder Distrib. v. Lord & Essex*, 383 Ill. App. 3d 645, 673 (1st Dist. 2007) (quoting *Scott v. Assurance Co. of Am.,* 253 Ill. App. 3d 813, 818 (4th Dist. 1993). Even if no formal contract existed, the court cannot ignore the undisputed evidence of a course of conduct over many years.

Most importantly, this is not an action for breach of contract. Nor is it an action to compel future performance under the terms of a contract. Even if no binding agreement existed,

that alone, does not require or permit the court to reverse the parties voluntary conduct. In order to rescind a contract, the party seeking rescission must show that that the parties can be restored to the status *quo ante*. *Horwitz v. Sonnenschein Nath & Rosenthal LLP*, 399 Ill. App. 3d 965, 973 (1st Dist. 2010). Even assuming that the parties had no contract, the court finds that before the TTO can unwind the parties' 12 year course of dealings, the TTO must show not only a compelling reason to do so, but also that the status *quo ante* can be restored. Here, the evidence established that the TTO can make no such showing.

The TTO argues that even if the Trustees approved a credit for Fiscal Year 2000, they did not and could not bind future Boards. The court agrees, but, this case does not turn on this issue. The books and records of the TTO reflect that in each and every fiscal year at issue, LT requested, and the TTO agreed to, a credit for the accounting services provided by LT. TTO employees entered these credits on the books and records maintained by the TTO. In other words, the TTO's own books and records reflect that the TTO agreed to and issued the credit for each and every fiscal year at issue.

The TTO argues that in the fiscal years after 2000, the Board did not authorize and, in fact, had no knowledge of the arrangement. The facts and law do not support this argument. First, "[g]enerally, the knowledge and conduct of agents are imputed to their principals." *McRaith v. BDO Seidman, LLP*, 391 Ill. App. 3d 565, 589 (1st Dist. 2009). Here, there is no doubt that Healy and other TTO employees knew of the credits. Healy negotiated the arrangement, LT sent memos to Healy annually with a breakdown of the credit requested, and TTO staff, supervised by Healy. made general ledger entries reflecting all of the transactions based on the LT memos.

The TTO argues that Healy's knowledge should not be imputed to the Trustees because Healy was stealing from the TTO. It is true that there is an exception to the imputation rule where "the agent's interests are adverse to the principal." *Id.* "'[W]hen a corporate officer or agent engages in fraudulent conduct for the distinctly private purpose of lining his own pockets at his corporation's expense, it is unlawful, as well as illogical, to impute the agent's guilty knowledge or disloyal, predatory conduct to his corporate principal.'" *Id.* at 590 (quoting *Reider v. Arthur Andersen, LLP*, 47 Conn. Supp. 202, 211 (2001)). As to the arrangement with LT, however, there was no

fraud or concealment. Healy's interest and the Trustee's interests were aligned: both wanted to placate LT and keep it in the fold. The TTO's argument also ignores the knowledge of other TTO employees.

Second, as the facts recited above demonstrate, the TTO Trustees were fully informed of the negotiations leading up to the March 22, 2000 vote on the proposal. The Trustees wanted to placate LT to avoid its possible withdrawal from the TTO. They knew that the proposal was the product of a years' long dispute and that one year's credit was not going to bury the issue. Hartigan and Nekola, the two Trustees who voted to accept the proposal, served as Trustees until at least April 2005 and January 2007, respectively. There was evidence that in 2003 or 2004, Nekola complained of the increasingly large credit claimed by LT, but no evidence that he took any action. Unlike Healy's embezzlement, there is no evidence that Healy of the TTO staff concealed the arrangement or the credit.

Moreover, as mentioned above, section 5-20 of the School Code imposes upon the Trustees an affirmative legal duty to supervise the Treasurer and his staff and to perform a comprehensive review of the TTO's financial dealings. Each fiscal year, the credit given to LT against its pro rata bill had a significant impact on the TTO's budget. It would have been impossible for the Trustees to discharge their statutory duties without being informed, or informing themselves, of the credit. In fact, that statutory duty is the Trustees' *raison d'etre*. Minutes of TTO Trustee meetings reflect the Trustees reviewing the books, records and expenses of the TTO. The TTO offered no evidence that the arrangement or credits was concealed from the Trustee. Accepting the TTO's argument would not only require the court to ignore the evidence of actual knowledge, but also to assume that for 12 years, the Trustees utterly failed to perform their statutory duties. In the absence of any evidence to the contrary, the court finds that the Trustees performed the basic functions as prescribed by law and had actual knowledge of the credits issued each year.

The TTO argues that the credits given to LT must be reversed because they violate the requirement in School Code section 8-4 that each district pay its pro rata share of TTO expenses. The court disagrees.

The evidence is that the TTO routinely engaged independent contractors to perform services for it. For example, it hired

bookkeeping and accounting staff on an independent contractor basis and received investment advice from independent contractors. The parties agree that nothing prohibited the TTO from doing so.

The arrangement between LT and the TTO to credit LT for accounting services that the TTO would otherwise have had to perform is in the nature of an independent contractor agreement. No one would challenge the TTO's authority to have engaged or paid an independent contractor to perform the bookkeeping and accounting services that LT was performing for itself. The court sees no meaningful distinction between the TTO's engaging independent parties to perform those services and its engaging LT to perform those services. That the TTO paid, or credited, LT for performing services the TTO would otherwise have had to perform does not mean that LT did not pay its pre rata share of TTO expenses or otherwise violate section 8-4 of the School Code. LT simply received a credit against its pro rata share for services rendered to the TTO – services which the TTO would otherwise have had to perform. The court finds that the TTO had the authority to credit LT for accounting services performed for itself on behalf of the TTO. *See Ryan v. Warren Twp. High Sch. Dist.*, 155 Ill. App. 3d 203, 205 (2nd Dist. 1987) (authority to act may be implied from the statutory scheme).

Nor does the court believe that a formal written intergovernmental agreement was required. First, the parties themselves specifically considered the issue and concluded that no such agreement was necessary. Second, for accounting and investment functions, the parties were connected by a statutory structure. No additional inter-governmental agreement was necessary to further the ends of the statutory mandate. The TTO has not cited any case which requires a township treasurer, responsible for the accounting and investment functions for a school district, to sign an intergovernmental agreement for every delegation of task or other accommodation that might take place between these related entities. The TTO has never entered into an intergovernmental agreement when dealing with its own statutory members. As is discussed more fully below, the TTO acted to guarantee a loan of one of its members without signing a formal intergovernmental agreement.

Further, the TTO is in no position to complain about inadequate formalities when it performed its obligations and received the benefits of the arrangement. A party that accepts

the benefits of an agreement is estopped to deny its existence. *Grot v. First Bank*, 292 Ill. App. 3d 88, 93 (1st Dist. 1997); *In re Estate of Herwig*, 237 Ill. App. 3d 737, 744, (2nd Dist. 1992); *Wasserman v. Autohaus on Edens, Inc.,* 202 Ill. App. 3d 229, 238-39 (1st Dist. 1990).

While "Illinois courts have consistently held that the doctrine of equitable estoppel will not be applied to governmental entities absent extraordinary and compelling circumstances", *Matthews v. Chi. Transit Auth.*, 2016 IL 117638, ¶ 94, the court finds that application of the doctrine is justified in this case. The courts are reluctant to apply estoppel to governmental entities, because "[i]f the unauthorized acts of a governmental employee were allowed to bind a municipality through equitable estoppel, the municipality would remain helpless to remedy errors and forced to permit violations to remain in perpetuity." *Village of Wadsworth v. Kerton*, 311 Ill. App. 3d 829, 837 (2nd Dist. 2000). That policy concern is less compelling where the adverse parties are both governmental entities, a statutory scheme places them in relation to one another, and the dispute arises out of that inter-connectedness. Here, refusing to apply estoppel works adverse consequences upon another unit of local government. If the TTO were permitted to undo 12 years of practice between the parties, another governmental entity – LT – would be unable to rely on the conduct of its governmental partner, would and be helpless to budget and otherwise plan for the conduct of its fiscal affairs.

Second, the traditional prerequisites for application of estoppel to a governmental entity are present here. "To invoke estoppel against a municipality, two requisites must be met: (1) an affirmative act on the part of the municipality; and (2) the inducement of substantial reliance by the affirmative act." *Village of Wadsworth*, 311 Ill. App. 3dat 837. "The affirmative act that induces a party's reliance must be an act of the municipality itself, such as a legislative enactment, rather than the unauthorized acts of a ministerial officer. A municipality cannot be estopped by an act of its agent beyond the authority expressly conferred upon that official." *Id.*

Here, the court finds that the TTO Trustees were aware of and authorized Healy to negotiate with LT over the accounting expense issue. The Trustees then affirmatively voted to delegate the work to LT and credit LT for the cost of that work. Each subsequent year, as they were required to do by statute, the Trustees explicitly approved the continued arrangement by

approving the budget and reports of the TTO. As noted above, the court finds that the arrangement between LT and the TTO was not the result of secret, unilateral actions by Healy, but rather was fully disclosed and approved each year by the TTO Trustees. As such the requirement of affirmative action by the Trustees is satisfied.

The court also finds that in issuing LT a credit each year for the services performed, the TTO induced LT to rely on its acts and that LT's reliance was significant. First, LT incurred the expense of performing work which it otherwise could have passed on to the TTO. Second, LT refrained from taking steps to remove itself from the TTO. These actions or inactions were the direct result of the TTO willingness to issue the credits.

Finally, even if, in years after 2000, the Treasurer lacked authority to issue credits to LT, the Trustees ratified the Treasurer's actions. "[A] principal ratifies a contract made by an agent when, with knowledge of all material facts, it either expresses its assent to the contract or fails to disaffirm the contract within a reasonable time and accepts benefits under it." *Grot*, 292 Ill. App. 3dat 93 (citing *Old Sec. Life Ins. Co. v. Cont'l Ill. Nat'l Bank & Trust Co.,* 740 F.2d 1384, 1392 (7th Cir. 1984).

"[T]he doctrine of ratification fully applies to municipal and other public bodies." *Athanas v. City of Lake Forest*, 276 Ill. App. 3d 48, 56, (2nd Dist. 1995). "Where an agent has acted outside the scope of his or her authority, a principal may ratify the unauthorized act and the ratification is equivalent to original authority confirming that which was originally unauthorized." *Id.* "Ratification, which may be express or implied, occurs when the principal, with knowledge of the material facts of the unauthorized action, takes a position inconsistent with non-affirmation of the action." *Id.* at 55-56. "Stated another way, a principal (including a city) can ratify the actions of the agent by not repudiating the agent's actions once it has knowledge of the actions, or by accepting the benefits of the actions." *Id.* at 57. *See also Ryan*, 155 Ill. App. 3d at 207 ("although the contract was irregularly entered into, plaintiff is entitled to be reimbursed for his services where the school district ratified the contract by accepting the services and by making the partial payment"); *Bd. of Supervisors v. Lincoln*, 81 Ill. 156, 157 (1876) (estoppel is applicable to a municipal corporation where it fails to assert a right and acts so as to influence the actions of another.)

Therefore, the court denies the TTO's request for declaratory relief with respect to the accounting credits claim for Fiscal Years 2000 through 2012.

B.

LT's Refusal to Pay Pro Rata Share of Other TTO Expenses

As mentioned above, in the spring of 2013, the new president of the TTO Board advised LT that the TTO would no longer credit LT for accounting services and that the TTO would seek to recover for past credits. Shortly thereafter, LT began to challenge certain TTO expenses and to refuse to pay its pro rata share of those expenses. Beginning with Fiscal Year 2013, LT deducted from TTO invoices issued to it LT's pro rata share of certain financial software, certain other expenses including the fees of an outside public relations firm, and TTO legal expenses. Beginning with Fiscal Year 2013 and continuing through Fiscal Year 2019, LT has refused to pay $764,789.33 of the pro rata share invoiced by the TTO. The TTO seeks a declaration that it may deduct this amount and pre-judgment interest from LT's account balance. The court agrees.

1.

Infinite Visions Software

With respect to the TTO's purchase of the Infinite Visions software, LT argues that the expense is not authorized by the School Code. Section 5-17 authorizes the TTO to "incur the cost of a record book," which does not include, according to LT, accounting software licensing, programming, training and modules for human resources and attendance. LT also offered evidence that it objected to the Infinite Visions software because it was not compatible with and duplicated software already used by LT.

Nothing in the statute gives LT or this court the authority to second-guess TTO decisions or to substitute their business judgment for that of the TTO. LT cites no case that suggests otherwise. LT's sole cognizable argument is that the TTO exceeded its statutory authority when it purchased the accounting software.

LT acknowledges that the statute is more than 100 years old. The drafters could not have contemplated computer software of any kind. Nevertheless, LT implicitly concedes that the TTO is authorized to purchase computers and accounting

software. The TTO's accounting systems have been computerized for many years without objection from LT.

"The cardinal rule in statutory construction is that the statute be construed so as to ascertain and give effect to the intention of the General Assembly as expressed in the statute." *Inskip v. Bd. of Trs.*, 26 Ill. 2d 501, 510 (1962). Section 1.01 of the Statute on Statutes provides: "All general provisions, terms, phrases and expressions shall be liberally construed in order that the true intent and meaning of the General Assembly may be fully carried out." A court "must consider the spirit of the enactment, and that spirit will control over the letter of the statute, where there is a conflict." *Inskip*, 26 Ill. 2d at 510. "The intent of the legislature in enacting a statute must be determined by examining the *entire* statute and by construing each material part of the legislation together." *Castaneda v. Ill. Human Rights Comm'n*, 132 Ill. 2d 304, 318 (1989) (emphasis in original).

Here, viewing the School Code as a whole, the legislative intent was to form a governmental unit which would create efficiencies for its member districts in connection with the accounting for and investing of the member district's funds, while maintaining the independence of those districts. The legislative intent was to permit the TTO to acquire those tools which would allow it to carry out its functions. Nothing suggests that the legislature intended to limit the TTO to the tools that existed at the time the statue was originally enacted. Nothing suggests that the TTO is required to integrate its systems with those of any or all of its member districts. And nothing in the statute expressly prohibits the TTO from acquiring management tools for the use and benefit of its member districts. Authority to act may be implied from the statutory scheme. *Ryan*, 155 Ill. App. 3d at 205.

As discussed above, the TTO has no funds of its own. Any TTO expenditure must be paid pro rata from funds of the districts. To the extent any district fails to pay its pro rata share, the burden of that district's non-participation falls on the other districts. None of the districts have any statutory ability to control TTO decision making. The TTO Trustees answer to their constituents, not the districts. While the School Code provides that the TTO cannot spend a district's funds without a district's approval, the statute also provides that a district cannot avoid paying its pro rata share of TTO expenses.

It may be that Infinite Visions includes certain software modules that have the capability to perform functions which are outside the strict limits of the TTO's statutory duties. LT does not complain, however, that it is being forced to use these modules, that the TTO has taken control of LT's human resource or attendance functions or that the TTO has otherwise acted outside of its statutory authority to control or perform district functions.

Further, there was no evidence that the Infinite Visions software was not used by the TTO to perform functions within its statutory authority. There was no evidence of cost attributable to the offending modules or that these modules increased the cost of the software or, if they did so, by how much. There was no evidence that other districts are using these modules, such that LT is indirectly subsidizing the other districts. Even assuming, however, that the TTO paid for software functions which go beyond the strict limits of the TTO's statutory duties; that other districts, but not LT, use this software; and that, therefore, LT is called upon to indirectly subsidize other districts, the court declines to intervene. First, much the same could be said about the 12 year arrangement by which LT received credits for accounting functions: that arrangement accommodated LT, not the other districts. Second, there is no evidence that the amount of subsidy, if any, is anything but *de minimus*. Third, the court will not interfere with the discretionary acts of public officials absent fraud, corruption, oppression or gross injustice. *Bd. of Educ. v. Bd. of Educ.*, 112 Ill. App. 3d 212, 218 (1st Dist. 1983). The court finds that the acquisition of the Infinite Visions software is not so far outside the statutory authority of the TTO or so favors one district over another that court intervention is required or advisable, especially in the absence evidence of quantifiable damages to LT.

2.
Other Expenses

To the extent that LT has refused to pay its pro rata share of other expenses, the court finds no legal justification for its failure to do so. As to the cost of a public relations consultant, the court finds that this is not a prohibited expense. *See Ryan*, 155 Ill. App. 3d 203, 205 (authority to hire public relations firm implied from school district's power to hold regular and special meetings open to the public).

3.
Legal Expenses

Beginning in Fiscal Year 2014, LT refused to pay its pro rata share of TTO legal fees, principally because those fees have been incurred in connection with this lawsuit. LT argues, that under the American Rule, each party is responsible for its own legal fees. Absent a statutory or contractual fee shifting provision, LT argues, it is impermissible and inequitable to require it to pay a pro rata share of the costs its adverse party's legal fees to prosecute this action. The TTO argues that it has the authority to engage lawyers and file suit; that in doing so it incurs an expense; and that, pursuant to statute, all TTO expenses, including legal fees must be paid pro rata, by the districts.[2] TTO argues that the School Code governs and that the American Rule has no applicability. Without denying the unfairness of the result, the court agrees with the TTO.

The American Rule provides that, absent a statutory or contractual provision to the contrary, the prevailing party in a lawsuit may not recover its attorneys' fees from its adversary. *Morris B. Chapman & Assocs. v. Kitzman*, 193 Ill 2d 560, 572 (2000) ("Illinois generally follows the 'American Rule': absent statutory authority or a contractual agreement between the parties, each party to litigation must bear its own attorney fees and costs, and may not recover those fees and costs from an adversary.") Here, however, the TTO does not seek to "recover" its legal fees in the sense contemplated by the American Rule. The TTO is not asking the court to award legal fees to the TTO as a prevailing party. Rather, the TTO assessed against LT its pro rata share or attorneys' fees in the same way the TTO has assessed against LT a pro rata share of all other TTO expenses.

The Trustees clearly have the authority to hire lawyers and file lawsuits. *See* 105 ILCS 5/5-2; *Lynn v. Trs. of Schs.*, 271 Ill. App. 539, 540 (4th Dist. 1933) (Township school trustees have authority to sue as trustees to recover moneys owing to the several school districts of their township.) As with any other TTO expense, legal fees must be paid pro rata by the member districts. There is no other source of funds and there is no other statutorily permissible method for allocating TTO expenses.

[2] To the extent LT argues that this suit is brought by the Trustees and that the Trustee's legal fees are not an expense of the Treasurer, the court disagrees. The court views the Treasurer, his office, and the Trustees as a single governmental entity.

Even if the American Rule applied, School Code section 5/8-4 would be a statutory provision within the exceptions contemplated by the Rule.

While this result may seem inequitable in this case, that inequity is the inevitable result of the statutory scheme. As the TTO notes, any taxpayer prosecuted criminally or sued civilly by a unit of government effectively pays a share of the government's costs to sue or prosecute her, without offending the American Rule. While the result is more drastic here, the principle is the same.

Therefore, the court grants the TTO's request for declaratory relief with respect to the pro rata expense claim covering Fiscal Years 2013 through 2019. The Treasurer is authorized to debit $764,789.33 from LT's fund balance. With regard to pre-judgment interest, the court finds that the TTO has not offered evidence of unreasonable and vexatious delay and that the sums due and owing do not otherwise qualify under the statute concerning pre-judgment interest.

C.
Audit Claim

1.
Additional Background

By statute, the TTO and each member district are required to perform audits annually. School Code section 105 ILCS 5/3-7 makes each district responsible for its own audit. Nevertheless, from at least Fiscal Year 1993 through Fiscal Year 2012, the TTO paid the costs of LT's audits. The TTO claims that Healy decided unilaterally to make these payments, that he had no authority to do so, and that the payments were prohibited by the statute. The TTO seeks a declaration that it be permitted to deduct those costs from LT's fund balance.

LT argues that the TTO agreed to pay these costs, that it did so to placate LT and keep it from leaving the TTO, and that the payments were authorized by the Trustees. LT argues that its audit costs were greater than the other districts because LT performed much of its accounting in-house. It also argues that the TTO also paid at least some, if not all, audit expenses for other districts.

There is conflicting evidence as to how the TTO handled the audits of the other districts. On August 27, 1992, Healy wrote a lengthy letter to LT's business manager Leon Eich, "as a fol-

low-up to our recent discussion regarding [LT's] possible return to using the [TTO] for various business services." TTO Ex. 5 p. 1. In the letter, Healy argues that the "first and foremost" reason why "such a change would be beneficial" to LT was "the bottom line: [LT] stands both to save money and to get a greater return on money it is already spending." *Id*. Later in the letter, Healy wrote:

> Another cost saving feature that results from this change is that this office would assume the cost of your audit, with the exception of your imprest and cafeteria accounts. The cost savings would be substantial.

Id. p.3. The TTO Trustees were blind copied on this letter.

On April 29, 1994, Healy wrote a letter to Beckwith, which stated as follows:

> Annual Audit. The trustees ***hire and pay for the audit of the school districts*** and the Treasurer's office in Lyons Township. This office has assumed the cost of [LT's] audit, ***even though*** the functions were in house.

The TTO Trustees were copied on the letter. In January 2001, Healy wrote Dennis Kelly, then LT's superintendent, as follows:

> Annual Audit. The trustees hire and pay for the audit of the school districts and the Treasurer's office in Lyons Township.

At trial, Healy and Hartigan recalled that the TTO paid for the audits of other districts.

On the other hand, the TTO introduced evidence that other districts paid their own auditing costs. This evidence was inconclusive, because, in part, back-up invoices were not available and the court could not determine whether audit costs billed and recorded as TTO expenses also included audit costs of the districts. The passage of time, the faded recollection of witnesses, and the incompleteness and unreliability of TTO records make it very difficult for the court to determine when and to what extent, the TTO paid for the audits of other districts. Nevertheless, the court's analysis does not turn on whether or not the TTO paid audit costs of other districts.

2.
Analysis

The court considers two differences between the facts underlying the audit claim and those underlying the accounting credit claim. First, while Healy's agreement to pay LT's audit expenses is documented and was offered as an incentive to reintegrate LT into the TTO's system, there is no evidence of a specific proposal or vote by the Trustees on the TTO's assumption of LT's audit fees. The court does not find this fact to be significant, however, because, as with the accounting credits, the Trustees were required to and did affirmatively approve each payment by the TTO of LT's audit expenses.

Second, unlike the issuance of credits for accounting work, the TTO lacked statutory authority to pay LT's, or any other district's audit expenses. As discussed above, the court finds that the TTO had the authority to engage contractors to help perform its statutory duties, and that when the TTO issued credits to LT in exchange for accounting services, it was acting within that authority. No such authority exists, however, for the payment of district audit fees. The statute makes each district responsible for its own audit. When the TTO paid district audit fees, the TTO was not paying for a service the TTO was otherwise obligated to perform.

An *ultra vires* act of a governmental entity is void *ab initio*. *Matthews*, 2016 IL 117638 at ¶ 98 ("a municipal corporation cannot be obligated under a contract implied in fact that is *ultra vires*, contrary to statutes, or contrary to public policy"). Nevertheless, a governmental entity may be estopped to deny an *ultra vires* act, "when [the opposing party's] action was induced by the conduct of municipal officers, and where in the absence of such relief he would suffer a substantial loss and the municipality would be permitted to stultify itself by retracting what its agents had done." *Chi. Food Mgmt., Inc. v. City of Chicago*, 163 Ill. App. 3d 638, 645-46 (1st Dist. 1987) (quoting *Cities Serv. Oil Co. v. City of Des Plaines*, 21 Ill. 2d 157, 160-161 (1961)).

As with the accounting credits claim, the court finds that the TTO is estopped to reverse its prior action. First, as discussed above, the usual policy concerns relating to the use of estoppel against a governmental body are not as compelling where both parties are governmental entities adverse to one another. Second, the traditional prerequisites for application of

estoppel to a governmental entity are present here. In the ordinary discharge of the Trustees explicit statutory duties, they were aware of and did authorize payments to the auditors for LT and other districts. LT relied on the TTO's audit payments: first, it acceded to the TTO's choice of auditors, even though these auditors were more expensive than others LT might, and, later did, choose. Second, the TTO's payment of LT's audit expenses were an additional incentive for LT to remain within the TTO system. In fact, when the TTO stopped crediting LT for accounting services and stopped paying for LT's audit, LT hired new, less expensive, auditors, and took steps to obtain legislative authority to leave the TTO.

Therefore, and based on the same analysis as the court articulated with respect to the accounting credits claim, the court denies the TTO's request for declaratory relief as to the audit claim.

D.
Investment Earnings Claim

1.
Background

As discussed above, the statutory scheme requires the TTO to collect, hold, pool for investment purposes and invest the money of the member school districts; however the TTO is required to separately account for the funds of each member district. Like expenses, investment income must be allocated to the member districts based on the ratio of the district's funds to total funds held by the TTO at the time of allocation. The TTO must keep separate books of account for the member districts reflecting all receipts, expenses, allocated investment income and fund balances. The TTO must maintain an account balance for each member district, including the district's balance in the pooled funds. Again, the TTO is not permitted to make any payments or issue any such checks for the expenditure of district funds without express authority from the issuing district.

The TTO claims that in the period running from Fiscal Years 1995 through 2012, LT was allocated more income from the pooled investments than its proportionate share of distributions actually made. The TTO asks the court for permission to reverse quarterly or annual interest allocation to LT that exceeded LT's proportionate share during the respective quarter or year.

LT argues that, because of an absence of records, the TTO has no evidence of actual investment earnings in any particular quarter or year and, in general. Therefore, LT argues, the TTO cannot and does not know how much investment income was earned by and should have been credited to LT in any particular quarter or year. Absent such knowledge, LT argues, there is no evidence to support an over-allocation claim. LT also argues that the TTO's method of computing the over-allocation is flawed, and therefore unreliable, for a number of reasons, including mathematical errors by Healy and the TTO's expert and the failure to examine and account for over-allocations to other districts. LT argues that when Healy's defalcation was uncovered, LT requested that the TTO conduct a complete forensic audit to determine the amount of money stolen and examine the allocation of investment earnings, but the TTO declined to do so. Instead, for purposes of this lawsuit, the TTO hired an expert to examine allocations to LT only during a limited period of time.

At trial, LT moved for a direct verdict on this claim. The court denied the motion but expressed reservations about the TTO's methodology for computing the claim. Subsequently the TTO moved to voluntarily dismiss the claim. The court denied this motion, believing it was inadvisable to allow a party to voluntarily dismiss a claim after closing its case hearing the court's reservations about the merits of the claim. At closing argument, the TTO abandoned its claim, essentially conceding that its method of computing over-allocations was flawed.

Nevertheless, the court is faced with a live claim which the parties litigated at great expense for approximately eight years. Therefore, the court offers the following analysis and ruling.

2.
Analysis

It cannot be disputed that analysis of the TTO's claim is hampered by an absence of source documents. The TTO concedes that there is no way to know precisely how much investment income was earned in any year during the Healey era and therefore precisely how much income should have been allocated to each member district. Therefore, the TTO relied on certain handwritten notes created by Healy and on its general ledger, which reflects amounts actually credited to the member

districts, even though these amounts cannot be tied to actual investment income.

Healy's notes appear to be prepared on a quarterly basis. They appear to reflect his estimates of investment income for the respective quarter, his estimate of each district's then-current pro rata share of the fund, and his estimate of the proper allocation based on those numbers. These notes also reflect additional allocations to LT and other districts which are seemingly random and are unrelated to the computation of the pro rata share of investment income, even according to Healy's numbers. The notes also contain other entries which are often incomprehensible. The notes are not tied to any underlying documents and the TTO did not connect them with brokerage statements. Healy recognized his notes and testified generally as to how he used them, but could not recall or explain individual entries.

The TTO's analysis compared Healy's estimate of LT's pro rata investment earnings for each quarter against the amount actually credited to LT per the general ledger. To the extent the general ledger reflected an amount which exceeded or fell short of Healy's estimate, the TTO allocated a debit or credit to LT. The TTO did not do this analysis for the other districts; its expert testified he spot checked other districts and concluded that over and under payments for other districts would be *de minimus*. Further, the TTO's analysis began in fiscal year 1995 and ended in fiscal year 2012. It did not consider allocations or adjustments which may have been made after 2012.

The TTO's analysis was fatally flawed. First, leaving aside the absence of any documentation establishing actual investment earnings for each quarter and year, the TTO's general ledger reflects investment income actually allocated to the districts. Therefore, in each quarter and for each year, the general ledger would also reflect the amount of investment income ***actually*** allocated to each other district and to the districts as a whole. Therefore, there is no reason to compare the general ledger allocation for LT to Healy's notes. The better and only comparison that matters is the general ledger allocation for LT versus the entire amount of investment income allocated to all of the districts.

Because the TTO is audited annually, the general ledger should tie to actual fund balances. Of course, that assumption is undercut by the fact that the auditors failed to catch Healy's

embezzlement. Nevertheless, the evidence was that Healy embezzled funds before they hit the TTO's books, so the allocations, account balances and total fund balance shown on the TTO's book reflect reliable actual balances even if those balances are significantly lower than they should have been due to the embezzlement. In any event, comparing general ledger allocations to Healy's notes is neither appropriate nor reliable and proves nothing.

Second, the failure to examine all of the allocations to all of the districts is fatal. The allocation of investment income is completely dependent on (a) total income and (b) pro rata share. Because each district receives a pro rata share of investment income, any analysis of under or over allocation for a particular district must consider what the other districts received. The testimony of the TTO's expert that he could compute over allocations to LT without reference to the allocations to other districts not credible. His testimony that minimal random spot checks were sufficient to verify that reference to the allocations to the other districts would not change the result was not credible.

Third, the TTO's analysis failed to reflect the impact each fund balance adjustment would have on future allocations. If a particular district's fund balance changes at a point in time, then the pro rata share of that district and every other district at that point in time also changes. That change then affects future income allocations. Failing to account for the impact each fund balance adjustment would have on future allocations means the TTO's analysis is inherently inaccurate.

Fourth, the TTO's analysis ended in 2012 even though the investment pool continues to this day and investment earning allocations continued. There was no reliable evidence that income was properly allocated after 2012. There was no testimony as to how adjusting fund balances before 2013 would have affected subsequent allocations.

Further, the court notes that despite LT's request, the TTO unilaterally chose not to perform a forensic audit after Healy's embezzlement was discovered. The inadequacy of the evidence is directly related to the TTO's failure to maintain appropriate records and its failure to engage a forensic auditor to examine its books. No doubt such an examination would have been expensive, but not in comparison with the amounts spent on this litigation.

Finally, the TTO has a fiduciary duty to all of its member districts, including LT. That duty requires the TTO to treat all of its member districts even-handedly. That the TTO has an unrelated dispute with LT is not an excuse to audit the investment earnings allocated to LT without performing a similar examination of the other member districts. There was no evidence to suggest Healy deliberately treated LT differently than other districts.

For all these reasons, the court concludes that the TTO has not proved any particular amount of investment earnings was over-allocated to LT and therefore denies the TTO's request for declaratory relief as to this claim.

III.
LT's Affirmative Defenses

Although unnecessary to a resolution of the TTO's claims, in the interests of judicial economy, the court considers LT's affirmative defenses.

A.
Statute of Limitations

"As a general rule, the statute of limitations will not apply to bar a claim by a governmental entity acting in a public capacity. However, where the entity is acting in a private capacity, its claim may be subject to a limitations defense." *Champaign Cnty. Forest Pres. Dist. v. King*, 291 Ill. App. 3d 197, 200 (4th Dist. 1997) (citing *Bd. of Educ. v. A, C & S, Inc.*, 131 Ill. 2d 428, 472-76 (1989) and *Shelbyville v. Shelbyville Restorium, Inc.,* 96 Ill. 2d 457, 464-66 (1983)). *Champaign County* articulates the following test to determine whether, in any given case, the statute of limitations defense applies to a governmental entity:

> In order to determine if a governmental activity is public or private, courts should consider who would benefit by the government's action and who would lose by its inaction. Three factors must be addressed: (1) the effect of the interest on the public, (2) the obligation of the governmental unit to act on behalf of the public, and (3) the extent to which the expenditure of public revenues is necessitated.

291 Ill. App. 3d at 200 (citing *A, C & S*, 131 Ill. 2d at 476 and *Shelbyville,* 96 Ill. 2d at 464-65). This test is based on "the

policy judgment that the public should not suffer as a result of the negligence of its officers and agents in failing to promptly assert causes of action which belong to the public." *A, C & S*, 131 Ill. 2d at 472.

In *Champaign County*, a forest preserve district filed an action for breach of fiduciary duty and breach of agency against its insurer. The district complained that the insurer overcharged for premiums and failed to disclose that comparable coverage was available at a lower cost. The trial court denied the insurer's motion to dismiss on statute of limitations grounds but certified the following two questions under Supreme Court rule 308:

> 1. Did the Plaintiff act in its public capacity by purchasing liability insurance?
>
> 2. Is the Plaintiff asserting a public right in claiming excessive billing in the approximate amount of $20,000 per year for insurance thus enjoying immunization from limitation defenses?

Champaign Cnty., 291 Ill. App. 3d.at 199. The court answered both questions in the negative, and stated:

> Unlike the governmental activities in *Shelbyville* and *A, C & S*, plaintiff's purchase of liability insurance in this case had no effect on the public at large. It did not make the public safer, nor did it reduce the likelihood of injury on plaintiff's property. The insurance was acquired solely for the benefit of plaintiff, not the general public.

Id. at 201.

In *Shelbyville*, a municipality filed suit against a builder to recover money spent to complete and repair streets that the builder failed to construct, although required to do so under an annexation agreement. The Illinois Supreme Court found that construction and maintenance of city streets directly affected the safety of the general public and, hence, the city was acting in its public capacity. As a result, the municipality was immune from the builder's statute of limitations defense. The court stated:

> We disagree with the position advanced by the defendant. It is apparent that the safety of all persons who have occasion to use the streets at issue

> here will depend on the workmanlike construction and maintenance of these streets. Insofar as it is the continuing responsibility of cities to ensure such construction and maintenance for the use of the public, the inability of the city of Shelbyville to enforce its annexation agreement or compel payment by the defendant will affect the city's finances and may impair its ability to build or oversee the construction or maintenance of streets within its jurisdiction in the future.

Shelbyville, 96 Ill. 2d at 464.

In *A, C & S*, a board of education sued suppliers of asbestos seeking to recover cleanup costs. The trial court dismissed the board's claims as time-barred, but the appeals court held that plaintiffs were immune from various limitations periods while asserting a public right. The Illinois Supreme Court affirmed the appellate court, holding that viable claims were not time-barred. The court focused on the health and safety concerns which would arise in the absence of abatement:

> Though property damage is alleged, for the purposes of this issue, we cannot ignore the resulting health concerns involved, and at trial the plaintiffs will have an opportunity to establish that the levels of asbestos in the buildings can cause personal injury. The complaint also alleges a costly program is underway to repair, replace and maintain the ACMs. This complaint has alleged, therefore, an interest in the safety of these public buildings and in the safety of a large segment of this State's population which attends the public schools and for the children who will in the future attend these schools. There is also the interest of the parents, faculty, staff and other people who use or will use our public school system. Moreover, unlike "any other property owner," these buildings are owned by the government, maintained with tax revenue, and used for mandatory classroom attendance as well as for other public functions.

A, C & S, 131 Ill. 2d 428, 473-74.

Closer to this case is *Sch. Dirs. of Dist. No. 5 v. Sch. Dirs. of Dist. No. 1*, 105 Ill. 653 (1883). There a school district alleged

that a township treasurer had mistakenly diverted the taxes paid in the plaintiff district to the second district for four consecutive years. The first district argued that the second district had not made any tax levy on any property in its district and that it carried on its schools out of the funds collected from taxes levied by the first district. The court found the dispute did not affect the public interest and that the statute of limitations barred the action.

People v. Oran, 121 Ill. 650 (1887) is similar. There, one town sued another seeking a contribution towards bond indebtedness. Ten years before suit was filed, county officials ordered six sections of land detached from the plaintiff town and attached to the defendant town. At the time the county issued this order, the plaintiff town had a bond indebtedness, which the people of the six detached sections had participated in making. As a result, the plaintiff detaching town claimed it was entitled to a contribution toward the bond indebtedness from the attaching town. The trial court dismissed based on the statute of limitations and the Illinois Supreme Court affirmed. The Court stated:

> No public rights are involved in this case, – the controversy relates solely to two townships. The real question is, [sic] whether the town of Atlanta shall recover money from the town of Oran. This matter does not concern the State or the people of the State. We fail to see how the public can be interested in this transaction to any greater extent than they would be in an action which one citizen might bring against another to recover money claimed to be due on a contract. The public will neither money claimed to be due on a contract [sic]. The public will neither lose nor gain if the town of Atlanta is required to pay all of its. [sic] indebtedness, nor will it affect the public if the town of Oran is required to contribute. No public interest being involved, the Statute of Limitations might properly be pleaded.

Id. at 655-56.

As in *Sch. Dirs. of Dist. No. 5* and *Oran*, the dispute here involves the correct allocation of funds between governmental entities. Unlike *Shelbyville* and *A, C & S*, here "[p]laintiff's suit will have no effect on the general public, as it will neither

'make the public safer, nor [will] it reduce the likelihood of injury on plaintiffs property.'" *Village of DePue v. Viacom Int'l, Inc.*, 713 F. Supp. 2d 774, 782 (C.D. Ill. 2010) (citing *Champaign Cnty.*, 291 Ill. App. 3d at 201). "[L]ost potential tax and business revenues, in and of themselves, are not damages that are part of a 'public' cause of action, as they do not implicate the public's interest in health and safety, and merely affect the economic interests of the residents of the Village." *Id.* "The fact that the residents of a particular municipality would benefit from the action is not alone sufficient to render it 'public' in nature; the right must belong 'to the general public,' rather than 'only to the government or some small, distinct subsection of the public at large.'" *Id.* at 781 (quoting *Champaign Cnty.*, 291 Ill. App. 3d at 203). "[P]ublic rights or uses are those in which the public has an interest in common with the people of such municipality, whereas private rights or uses are those which the inhabitants of a local district enjoy exclusively, and the public has no interest therein." *Savoie v. Bourbonnais*, 339 Ill. App. 551, 558 (2nd Dist. 1950).

To the extent plaintiff argues that its claim effects education and education is in the public interest, that argument also fails. Here, the TTO is not engaged in educating students, only in collecting, holding, investing and accounting for money. *See, DePue*, 713 F. Supp. 2d at 782 ("recovery by Plaintiff of the 'cost of remediating Lake DePue of its heavy metal contaminants' will not improve public health and safety, as Plaintiff has not, and cannot, undertake this task itself.") Here the controversy is simply how funds will be allocated among several governmental entities. Finally, looking to the policy behind excepting certain governmental lawsuits from the statutes of limitations defense, there is no danger here that the public will "suffer as a result of the negligence of its officers and agents in failing to promptly assert causes of action which belong to the public." *A, C & S*, 131 Ill. 2d at 472. What happens in this case will advantage the students and taxpayers in certain school districts over others. There is no general public interest in which of those groups prevails.

Finally, the TTO argues that the funds at issue were trust funds and therefore the statute of limitations does not apply. LT argues that the districts' funds are held in agency accounts, not trust accounts; that the Treasurer is an agent or custodian for the funds, not a Trustee; and therefore the trust exception to the statute of limitations does not apply.

The court agrees with LT; the funds at issue are not trust funds. All tax revenues for the participating districts are deposited with the TTO. By statute, the TTO must distribute those funds to the districts as determined by the taxing authorities and strictly account for each district's fund balance. 105 ILCS 5/8-7. While the TTO is permitted to, and does, pool funds for investment purposes, each district has a specific fund balance and operating funds for each are held in a separate agency account or accounts. The TTO is not entrusted with the use of those funds; to the contrary, the TTO may not use or spend a district's funds without express authorization of that district.

In *Sch. Dirs. of Dist. No. 5*, the court stated as follows:

> Money belonging to a school district while in the hands of the township treasurer is a trust fund, but when he pays it out to the directors of another district, on their orders, by mistake, without fraud or collusion, or notice to the recipients that it belonged to another district, it cannot be held to be a trust fund in their hands which will exclude the operation of the Statute of Limitations.

105 Ill. at 655. Once the TTO allocates funds to a district, it has effectively paid those funds to the district within the meaning of *Sch. Dirs. of Dist. No. 5.* At that point, by statute, the Treasurer has no authority to disburse funds for the benefit of the district, as a trustee would do. *See* 105 ILCS 5/8-16. Instead, the Treasurer simply holds the funds as an agent or custodian and disburses them only in accordance with the specific direction of the district. *Id.* Simply by filing this lawsuit, the TTO concedes this point. The TTO seeks declaratory relief from the court because it recognizes that it cannot debit LT's fund balance without LT's permission.

The court finds that, with respect to allocated funds, section 5/8-16 of the School Code is fundamentally inconsistent with a trustee-beneficiary relationship. School district funds are held in agency accounts, which are custodial accounts, not trust accounts. The distinction between trust accounts and custodial accounts is well-established. *See Tucker v. Soy Capital Bank & Trust Co.*, 2012 IL App (1st) 103303 and *Waller v. Davis (In re Estate of Davis)*, 225 Ill. App. 3d 998 (2nd Dist. 1992).

The court finds that none of the TTO's claims fall within the public rights or trust fund exceptions to the statute of limitations. The TTO brings its claims under the School Code. The statute of limitations applicable to the TTO's claims is five years pursuant to 735 ILCS 5/13-205 which governs "all civil actions not otherwise provided for". *See Keller v. Boatman's Bank*, 186 Ill. App. 3d 448, 452 (4th Dist. 1989) (quoting *Lyon v. Morgan Cnty.*, 313 Ill. App. 296, 298 (3rd Dist. 1942). (where liability results from a statute, an action to enforce such liability is a 'civil action not otherwise provided for' within the meaning of section 15 of the Limitations Act, and is therefore governed by the five year statute of limitations"); *Gibraltar Ins. Co. v. Varkalis*, 115 Ill. App. 2d 130, 137 (1st Dist. 1969) (declaratory judgment action was a statutory action within the meaning of the phrase "civil action not otherwise provided for" in limitations provision).

The TTO filed this lawsuit on October 16, 2013. Therefore, as to any payment made on LT's behalf for audit expenses, any credit issued to LT for accounting related services, and any credit issued to LT for investment earnings on or before October 16, 2008, the TTO's claim, even if otherwise viable, is barred by the statute of limitations. With respect to credits, reimbursements and allocations, the key date is the date of the general ledger entry.

To the extent LT cites *Reimers v. Honda Motor Co.*, 150 Ill. App. 3d 840, 843-44 (1st Dist. 1986) for the proposition that, as to the audit claim, the statute should run from the date the expense was incurred, the court disagrees. *Reimers* involved parents' derivative claim for medical expenses arising out of an auto accident involving their child. The court held that the two-year statute of limitations applicable to the child's injury claim was also applicable to the parents Family Expense Act claim. In a personal injury action, the two-year statute of limitations begins to run from the date of injury, regardless of when medical expenses are incurred. A new cause of action does not arise each time new medical expenses are incurred.

In this case, however, the injury does not occur when the auditor preforms services or issues a bill for services truly rendered. No harm arises from the service or the bill. Instead, the injury arises when the TTO pays an expense that should have been paid by LT. Therefore, with respect to the audit claim, for each allegedly wrongful payment, the statute of limitations runs from the date the TTO paid the disputed bill.

See Feltmeier v. Feltmeier, 207 Ill. 2d 263, 279 (2003) (the statute begins to run on the date the defendant invaded the plaintiff's interest and inflicted injury, and this is so despite the continuing nature of the injury).

B.
Laches

LT also asserts *laches* as an affirmative defense. With limited exceptions, *laches* is an equitable defense which does not apply to actions at law. *Gen. Auto Serv. Station, LLC v. Garrett*, 2016 IL App (1st) 151924, ¶¶17-18. Ordinarily, *laches* is inapplicable where a statute of limitations applies. Here, the court has already determined that five-year limitations period set forth in Limitations Act section 13-205 applies, and LT does not argue that *laches* should be applied to shorten that period. Therefore, the only possible application of the doctrine in this case is if the court had held that the public rights or trust fund doctrine barred application of the statute of limitations. Because the court applied the statute of limitations, it need not consider *laches*.

Nevertheless, again, in the interests of judicial economy, the court considers whether *laches* would bar any of the TTO's claims, if the statute of limitations did not apply. In analyzing this question, the threshold issue is whether *laches* may be applied where an otherwise applicable statute of limitations defense is barred because the plaintiff is a public entity or the funds involved are trust funds. Neither party addresses this question. The court finds, however, that it would be appropriate for the court to consider a *laches* defense under those circumstances. *See Tolbert v. Godinez,* 2020 IL App (4th) 180587, ¶24 (laches may apply where the statute of limitations is equitably tolled). The court does not believe that the public interest or trust fund exceptions to the statute of limitations mean that a governmental entity could bring an action regardless of the length of delay or the prejudice to the adverse party resulting from the delay. In the absence of a statute of limitations, the court must still consider equitable and due process principles in determining whether the claim is timely made.

"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. Bd. of Fire & Police Comm'rs*, 158 Ill. 2d 85, 89 (1994) (citing *Tully v. State of Illinois*, 143 Ill. 2d 425, 432 (1991)). "There is considerable reluctance to impose

the doctrine of *laches* to the actions of public entities unless unusual or extraordinary circumstances are shown." *Id.* at 90. "This is so because *laches* 'may impair the functioning of the [governmental body] in the discharge of its government functions, and * * * valuable public interests may be jeopardized or lost by the negligence, mistakes, or inattention of public officials.'" *Id.* at 90-91 (quoting *Hickey v. Ill. Cent. R.R. Co.*, 35 Ill. 2d 427, 447-48 (1966)). "Although 'the reluctance to apply equitable principles * * * does not amount to absolute immunity * * * from *laches* and estoppel under all circumstances,' it has been recognized that *laches* does not apply to the exercise of governmental powers except under 'compelling circumstances.'" *Id.* (quoting *Hickey*, 35 Ill. 2d at 448).

The court finds that those compelling circumstances exist with respect the TTO's claims. First, some of the TTO's claims are more than twenty years old. The TTO's audit claim dates back to 1993, its investment earnings claim dates back to 1995, and it's accounting credits claim dates back to 2000. Relevant events began more than 30 years ago. As to all of the claims, there is concrete evidence of missing documents, dead witnesses and faded and untrustworthy memories. Key factual issues relating to all three claims are obscured by time. LT has demonstrated actual prejudice in defending all three claims due to the absence of evidence.

Second, LT demonstrated that the TTO did not act with diligence. As the court has repeatedly discussed, the TTO Trustees had an affirmative duty to inform themselves about and approve all of the reports and expenses of the Treasurer's office. It is inconceivable that the TTO Trustees were unaware of the credits to LT for accounting services and the payment of LT audits. The evidence strongly suggests and the court finds that the Trustees had actual knowledge in real time. But, in view of their statutory duties, if the Trustees did not have actual knowledge, then, as a matter of law, they were not diligent. *See Trs. of Schs. v. Am. Sur. Co.*, 307 Ill. App. 398, 408 (2nd Dist. 1940) (lack of knowledge of the true state of treasurer's is due to trustees' failure to exercise the degree of diligence imposed on them by law).

That new Trustees may have acted with reasonable alacrity when they learned about the actions or inactions of previous Trustees does not excuse former Trustees. The court looks not to the actions of individual Trustees, but to the actions of the TTO and Trustees as a continuing entity. As to the investment

earnings credits, the court finds that the Trustees lacked diligence when they failed to conduct a forensic audit after learning of Healy's defalcation and the possibility of over-allocations.

"Although statutes of limitation, applicable in legal actions, are not directly controlling in suits seeking equitable relief, courts ordinarily follow statutes of limitation as convenient measures for determining the length of time that ought to operate as a bar to an equitable cause of action." *Sundance Homes v. County of Du Page*, 195 Ill. 2d 257, 270 (2001); *see also Am. Sur. Co.*, 307 Ill. App. at 406 ("as a general rule, equity follows the law and will adopt by analogy the same period of time fixed by the statute."). Here, the court would look to the applicable statute of limitations to fix the length of time that would bar these claims. If that statute were not applicable, the court finds that *laches* would bar the TTO's claims, even if otherwise viable, as to any payment made on LT's behalf for audit expenses, any credit issued to LT for accounting related services, and any credit issued to LT for investment earnings on or before October 16, 2008.

C.

Voluntary Payment Doctrine

"Under the voluntary payment doctrine, money voluntarily paid under a claim of right to the payment, and with knowledge of the facts by the person making the payment, cannot be recovered by the payor solely because the claim was illegal. Absent fraud, misrepresentation, or mistake of fact, money voluntarily paid under a claim of right to the payment, with full knowledge of the facts by the person making the payment, cannot be recovered unless the payment was made under circumstances amounting to compulsion." *Jenkins v Concorde Acceptance Corp.*, 345 Ill. App. 3d 669, 674-675 (1st Dist. 2003) (internal citations omitted). LT argues that the voluntary payment doctrine bars the TTO's attempts to reverse the accounting credits issued to LT, to debit LT for payments made to the auditors and to reverse investment income credits given to LT.

The TTO first argues that the voluntary payment doctrine is a form of estoppel and that estoppel "will not be applied to governmental entities absent extraordinary and compelling circumstances." *Matthews*, 2016 IL 117638, ¶ 94. For the reasons stated above, the court finds no bar to the application of estoppel principles in this case. To the extent that the TTO

argues that estoppel may not be applied against the unauthorized acts of a public official, the court finds that none of the claims asserted here involve unauthorized activity by Healy or the TTO.

The TTO next argues that the doctrine is inapplicable here because LT did not receive any "payment" under a "claim of right." The court disagrees. In the context of the statutory relationship between these parties, the issuance of credits to the LT, as memorialized in the general ledger, are "payments" within the meaning of the voluntary payment doctrine. As is discussed above, the fund balances held by the TTO belong to the districts and may not be spent without approval of the district. A credit against LT's pro rata expense payment is equivalent to a payment by the TTO in the amount of the credit. A payment to the auditor by the TTO on behalf of LT is a payment. In other contexts, courts have held that the voluntary payment "rule is applicable to payments made to an intermediary." *Freund v. Avis Rent-A-Car Sys., Inc.*, 114 Ill. 2d 73, 79 (1986).

Further, the payments were made under "claim of right" by LT. LT claimed it had an arrangement with the TTO that afforded LT the right to the credits for the accounting services and audit payments. LT claimed a right to an allocation of investment earnings. Whether these rights were enforceable is not determinative. In every case in which a party seeks to invoke the voluntary payment doctrine, the opposing party claims that there was no actual right to the payments.

Finally, the TTO argues that the Trustees, had, at best, incomplete knowledge of the payments at issue. Application of the voluntary payment doctrine requires "full knowledge of the underlying facts." *Ill. Graphics Co. v. Nickum*, 159 Ill. 2d 469, 491 (1994). "A recognized exception to this long-standing rule provides that where money is paid under a mistake of fact, which would not have been paid had the facts been known to the payor, such money may be recovered." *Id.*

As to the accounting credits and payments to auditors, for the reasons discussed above, the court finds that the TTO, including the Trustees, had full knowledge of the relevant facts and circumstances when the credits were issued and payments made. Therefore, if those claims were otherwise viable, and not barred by the statute of limitations or laches, they would be barred by the voluntary payment doctrine.

As to the investment earnings claim, LT did not meet its burden of proving complete knowledge. While the TTO and Trustees knew of the allocations to LT, there is no evidence that anyone knew that investment earnings were over allocated or by how much. Therefore, if the investment earnings claim were viable and not otherwise barred, it would not be barred by the voluntary payment doctrine.

IV.
LT's Counterclaim

LT asserts a counterclaim asserting that the TTO owes LT a fiduciary duty which the TTO breached in the following four instances:

1. Failing to credit LT and the other districts for insurance proceeds recovered on Healy's fidelity bonds;
2. Failing to credit LT and the other districts with the full amount of investment earnings;
3. Permitting West 40 Intermediate Service Center #2 (West 40) to operate at a deficit and then guaranteeing a bank loan to it;
4. Incurring legal fees in this case that are so large and excessive that they constitute a breach of the TTO's fiduciary duties.

As a preliminary matter, the TTO owes statutory duties and a fiduciary duty to all of the districts. In general, the court finds that the TTO's fiduciary duty requires that, in exercising its statutory duties, the TTO must treat the member districts even-handedly and may not further its own interests at the expense of the districts' interests.

A.
Background as to Insurance Proceeds and Investment Earnings Counterclaims

As is discussed above, for cash flow purposes, the TTO maintains operating accounts for the member district against which, at the direction of and with the approval of the respective district, checks are written for the payment of bills. The remainder of the districts' funds are pooled in an investment account, which is made up of sub-accounts for the various investments. As to the pooled funds, each district has a precise account balance. Quarterly, each district is credited for its share of pro rata earnings. Annually, final adjustments to

account balances are made based on the audit. As necessary, a district's pooled money is transferred to an operating account to meet cash flow needs. The TTO maintains its own account to pay its own expenses. That account is funded through the pro rata payments of the member districts for TTO expenses.

Not all investment income is allocated quarterly to the districts. "Best practices" requires the TTO to hold a balance of unallocated income to account for market fluctuations and errors in allocation. These unallocated balances belong to the districts in amounts equal to their respective pro rata shares, but have not been formally credited to the districts on the TTO's books and records. The unallocated fund balance is invested and earns interest for the districts. The amount of unallocated funds balance fluctuates, but it does not grow over time.

B.
LT's Claims

1.
Healy Insurance Proceeds

There is no evidence that the TTO made any inappropriate use of the Healy insurance proceeds. The proceeds were deposited into bank accounts associated with the TTO. To the extent that the insurance proceeds were not immediately credited to the districts but deposited into the TTO's operating account and used for TTO expenses, these funds would have belonged to the districts in proportion to their pro rata share and therefore would have been applied to TTO expenses in accordance with each district's pro rata share. There is no evidence that the TTO made any undisclosed use of the Healy insurance proceeds. Other than the expenses about which LT complains and are addressed in connection with the TTO's claims for post-2012 expenses, there was no suggestion of inappropriate or unauthorized expenses by the TTO. LT made no closing argument in support of this counterclaim. The court finds no evidence that the TTO's handling of the insurance proceeds was inappropriate or caused LT any damage.

2.
Failure to Credit All Investment Earnings

Again, LT made no closing argument with respect to this claim. The court finds that the TTO's practice of maintaining an unallocated investment earnings balance – which balance is

reflected on its books and records – does not violate any statutory or fiduciary duty and does not cause any damage to LT.

3.

Providing Collateral for West 40's Loan

West 40 is a governmental agency that provides certain services to TTO member school districts. Among the services provided, West 40 runs a safe school, which provides a learning environment for certain at-risk students. West 40 is funded by government grants, not tax dollars. Through no fault of West 40 and as a result of funding delays at the state level, West 40 had significant financial problems and ran a significant deficit in its TTO account. In 2018, the TTO organized and participated in arranging a bank loan for West 40. A local bank agreed to make a $2.5 million dollar loan to West 40. A condition of the loan was that the TTO would post collateral consisting of $2.5 million in certificates of deposit. The CDs were funded using money from the pooled investments held by the TTO.

There was nothing corrupt about the transaction. To the contrary, the loan benefited West 40, which, in turn, benefited all of the other school districts. For example, the loan allowed West 40 to continue to operate the safe school for the benefit of the districts' students, including LT's students. Since the State owed West 40 money sufficient to cover the loan and interest, the risk of default was miniscule. While posted, the CD's earned interest for the fund balance. Nevertheless, citing School Code provisions 5/8-1 through 8/20, LT argues that the TTO exceeded its authority in posting the collateral.

The court agrees. Nothing in the School Code authorizes the TTO to use the funds of the districts to collateralize a loan to any of the member districts or anyone else. In its pre-trial brief, LT argued that it is entitled to recover the difference between what its funds earned while pledged as collateral for the loan and what those funds would have been expected to earn as an average part of the TTO's investment portfolio. LT also indicated that it "will be satisfied with a nominal damages award." LT's Trial Brief p.65. At trial, there was no evidence that, but for the loan, the CD funds would have been allocated to a different, more productive, investment as part of the investment strategy for the entire portfolio. There was no evidence that the CDs earned less interest than the pooled investment fund as a whole. There was no evidence from which the court could conclude that LT suffered any concrete damage,

let alone that would permit the court to calculate that damage. Absent proof of actual damages, the court cannot award actual damages.

Nominal damages may be awarded when a party proves that it has suffered actual damages, but fails to produce proper evidence as to the amount. *Brewer v. Custom Builders Corp*. 42 Ill. App. 3d 658, 678 (5th Dist. 1976). Here, there is no evidence of actual damages. In any event, an award of nominal damages is within the court's discretion. *See Chi. Title Land Trust Co. v. JS II, LLC*, 2012 IL App (1st) 063420, ¶ 75. This court declines to award nominal damages.

* * * *

Based on the foregoing,

(1) The TTO's request for declaratory relief is granted, in part, and denied in part. The Treasurer is authorized to debit $764,789.33 from LT's Agency Fund balance for pro rata payments withheld by LT for Fiscal Years 2013 through 2019;

(2) In all other respects, the TTO's requests for declaratory relief are denied;

(3) The case management set for June 21, 2021 at 9:00 a.m. is stricken;

(4) This is a final order disposing of all matters pending before the court.

ENTERED:

Jerry A. Esrig

Honorable Jerry A. Esrig
Circuit Judge, Law Division

Circuit Judge
Jerry A. Esrig

May 21, 2021

Circuit Court - 2101

Dated: May 21, 2021