IN THE CIRCUIT COURT FOR THE SIXTEENTH JUDICIAL CIRCUIT
KANE COUNTY, ILLINOIS

MILL CREEK WATER RECLAMATION DISTRICT, et al	)	
Plaintiffs,	)	
vs.	)	14 MR 1234
KENT W. SHODEEN, as Trustee of the Kent W. Shodeen Trust Number 1, et al	)	
Defendants.	)	

ORDER

THIS CAUSE coming on for rendering of the verdict following a bench trial conducted from December 9 through December 12, 2019. In addition to the evidence presented at trial consisting of live testimony, evidence depositions, and volumes of documents entered as exhibits, the Court has reviewed and considered the pleadings of the parties as well as their extensive briefs, responses and replies filed post trial, in lieu of closing argument. The briefs present an excellent overview of the facts of the competing claims and the myriad of unique legal issues involved. Except where needed for clarity the facts will be not reiterated herein. For the sake of brevity, Mill Creek Water Reclamation District will be referred to as "the District" or "Plaintiff. Kent W. Shodeen, as Trustee of the Kent W. Shodeen Trust Number 1 will be referred to as "Trust"; Sho Deen, Inc. as "Sho Deen"; Mill Creek Land Company as "MCLC; Tanna Farms, LLC as "Tanna"; and Mill Creek Country Club, Inc. as "MCCC" and collectively as "Defendants".

FINDS:

MOTION FOR DIRECTED VERDICT

At the close of Plaintiff's case in 14 MR 1234, Defendants moved for a Directed Verdict as to Counts I and II. Defendants' Motion was made pursuant to 735 ILCS 5/2-1110, which provides in pertinent part:

> In all cases tried without a jury, defendant may, at the close of plaintiff's case, move for a finding or judgment in his or her favor. In ruling on the motion the court shall weigh the evidence, considering the credibility of the witnesses and the weight and quality of the evidence. If the ruling on the motion is favorable to the defendant, a judgment dismissing the action shall be entered. If the ruling on the motion is adverse to the defendant, the defendant may proceed to adduce evidence in support of his or her defense, in which event the motion is waived.

In *Orbeta v. Gomez*, 315 Ill. App. 3d 687 (2nd Dist. 2010) the Second District considered the differences in the standard for ruling on a direct verdict in a jury trial or a bench trial. The court stated, "[w]hen a defendant brings a motion for directed verdict during a jury trial, the court must determine whether the evidence, viewed in the light most favorable to the plaintiff, so overwhelmingly favors the defendant that no contrary verdict could ever stand". *Id.* at 689, citing *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 501 (1967). The court goes on to state that "in a bench trial, where the trial court is the fact finder, a motion for a 'directed verdict' is governed not by *Pedrick* but by section 2-1110." *Orbeta*, 315 Ill App. 3d at 689.
Under 735 ILCS 5/2-1110, the trial court must "weigh the evidence, considering the credibility of the witnesses and the weight and quality of the evidence." *Id.* at 690.

The court elaborated that, in considering this type of motion, the trial court 1) determines whether the plaintiff has made out a *prima facie* case, then 2) weighs out the evidence, including that which favors the defendant. *Id.* If, after weighing the evidence, the court decides that evidence necessary to make plaintiff's *prima facie* case has been negated, the court should grant the motion for a directed finding and enter judgment for the defendant. *Id.*

This language is mirrored in *Barnes v. Michalski*, 399 Ill. App. 3d 254 (4th Dist. 2010). The court in *Barnes* stated that in the first phase, the court does not yet weight the evidence, but merely considers whether the plaintiff

has presented some evidence of each element of their cause of action, thereby making a *prima facie* case. *Id.* at 263. If the plaintiff has not made a *prima facie* case, the court may make a finding for defendant. *Id.* If there is a *prima facie* case, then we move on to the second phase. *Id.* at 263-64. In the second phase, the court, as the fact finder, may not find the evidence as to one or more elements convincing enough to qualify as sufficient to meet the plaintiff's burden of proof. *Id.* at 264. The court states, "[i]f the court already knows, at the close of plaintiff's case, that it will not find in the plaintiff's favor on the basis of the evidence the plaintiff has presented, because the quality and credibility of the evidence, in the court's view, fail to satisfy the burden of proof, there is no point in going on." *Id.*

Counts I and II of the District's pleading pray for injunctive and declaratory relief, respectively, effectively voiding the 1995 agreements. These counts are rooted in alleged violations of the Public Officer Prohibited Activities Act, 50 ILCS 105/3(a). By this Court's orders of June 18, 2019 and November 7, 2019 the scope of these counts were limited to acts on the part of the three trustees authorizing the 1995 agreements as a part of an imaginative scheme or cabal between the trustees and Defendants as noted by the courts in *Kruse v. Streamwood Utilities Corp.*, 34 Ill.App. 2d 100 (1st Dist. 1962 and *People v. Simpkins*, 45 Ill.App. 3d 2022 (5th Dist. 1977). Based upon this Court's prior rulings, the District was no longer able to void the 1995 agreements solely due to the familial or work relationship of the trustees to Defendants. Pursuant to the limited avenue remaining, the District must prove that the trustees interest in the 1995 agreements which would disqualify them from executing the contracts "must be certain, definable, pecuniary, or proprietary." *Simpkins* at 208 citing *Panozzo v. City of Rockford*, 306 Ill.App. 443, 456(2d Dist. 1940). This Court found no credible direct evidence of any interest in the 1995 agreements on the part of the trustees.

What remains is a claim of indirect interest in the contracts. However, even that interest must be proved to be financial and specifically relate to the contract at issue. *Panozzo*, at 456. As noted in both *Kruse* and *Simpkins*; "We interpret "indirect interest" to refer to the interest of the official, such as ownership of stock or a beneficial interest in a trust, *not the individual interest of another to whom the official is related.* The language is intended to prevent imaginative schemes by which an official might veil his interest from public view." *Simpkins* at 208-209; *Kruse* at 115. (emphasis added). It is important to consider these evidentiary requirements in relation to the

purpose of POPPA and certain provisions of the SDA. It is a felony under POPPA for a public official to have a specified interest such as stock ownership, control or pecuniary interest in a company with whom the public entity contracts. Although the individual trustees were not made a party to this action, it is proof of their actions, their monetary remuneration (not their spouses', Kent Shodeen's, nor that of any other Shodeen entity) and their undertakings as a part of the "imaginative scheme" which must be proved.

Returning to the two-step process for considering the efficacy of the Motion for Directed Verdict in this bench trial setting, this Court took the motion under advisement as the seven discovery depositions admitted by agreement at the close of the District's case needed to be read. Similarly, a review of the admitted exhibits was necessary. The parties were afforded the opportunity to brief this issue subsequent to trial and as a result, the Court has had the benefit of six excellent dissertations (three from each side) on the issues and facts presented. As the District noted, at the close of their case nearly all of the testimony and exhibits relied upon in their argument on this issue was in evidence. The sole exception was one cited statement by Kent Shodeen which bore no specific relationship to the allegedly improper portions of the 1995 agreements. While the District may arguably have presented a *prima facie* case, this Court does not find, when considering the credibility of the witnesses and the weight and quality of the evidence that they have satisfied their burden of proof on this issue. The Court does not find sufficient evidence of a certain, definable pecuniary interest that these three trustees maintained separate from that of others to whom they were related.

The result would remain the same if viewed at the close of all the evidence.

DEFENDANT'S AFFIRMATIVE CLAIMS IN 15 L 293

Defendants' claims extant against the District are found in Counts I (breach of contract), IV (trespass) and VII (unjust enrichment). The latter two counts are in the alternative to the first. Most of the critical facts concerning the claim are uncontested. The water reclamation system designed and sold to the District by Defendants is a Schaefer land application system. Of integral importance to the system is an irrigation field available for depositing treated wastewater. Instead of providing the

District with deeded lands for this purpose (that fact creating the basis for the District's breach of contract claim), Defendants entered into what is entitled a "Lease Agreement" with the District as a part of the 1995 agreements. The sum and substance of the agreement was that the District could deposit their treated wastewater on the Defendant golf courses in exchange for a specified payment noted under paragraph 4, Rental.

The term of the "Lease Agreement" was 15 years. Significantly, twice the trustees extended the agreement. (These were trustees inarguably independent of Defendants.) The "rental" terms remained consistent. When the last extension expired on April 30, 2012, the District continued to use the golf courses as their irrigation field, but refused to pay further "rent". Up to the time of trial, Defendants made nearly annual requests for payment pursuant to the terms of the agreement. The District responded in writing to each refusing to pay. Defendants choose to allow continued deposition of treated wastewater on their property rather than try to stop it through injunctive proceedings, but advised the District they were not waiving payments. Stopping the dumping of effluent without an alternative irrigation site would ultimately create a disastrous situation for the subdivision as a whole.

Other facts found relevant to the legal issues in Defendants' claims include the finding that while often a collaborative effort between the District and Defendants, the ultimate determination as to when and how much effluent could be pumped onto the courses at times resided with the courses. It was also quite clear that the dumping of effluent on the courses was not without harm to the courses themselves. It is against these factors that the legal issues must be examined.

While Defendants contend this to be a very straight forward breach of contract claim, the District argues that the "lease" is, in fact, a license. They then proffer that said status eliminates all claims for damage other than a "nominal" award. What remains clear from weighing the evidence and the credibility of the witnesses is that for 17 years the District payed Defendants substantial amounts of money pursuant to an agreed upon formula for the right to use Defendants' property as its irrigation field and then continued said practice while refusing payment. These facts are not contested in the District's argument.

The District initially posits that the subject agreement cannot be a lease because the District did not have exclusive possession and control over the property. Respectfully, Plaintiffs overread what is meant by the courts in regards to "exclusive possession". Exclusivity must be contemplated in regards to the nature of what it being leased. Herein, Plaintiffs have "leased" the right to use Defendants' property as an irrigation field. No one else can use that property as an irrigation field. This right cannot be taken away as long as the District upholds its portion of the contract. This does not prevent someone from leasing the same property to use as a golf course, a mine, or a gravel pit as examples. The fact that occasionally, in the past, the courses attempted to exert control over the timing and amount of irrigation may have, arguably, provided the basis for a breach of contract claim (which was never made), those conflicts did not provide a right to use the property without payment. It is those sporadic losses of control which must be weighed against the intent of the parties and terms of the agreement to ultimately determine whether this is a lease or license.

In *Dargis v. Paradise Park, Inc.*, 354 Ill.App. 3d 171, 180-181 (2d Dist. 2004) the Court explained:

" A license grants the licensee the right to enter upon the licensor's land and use it for a specific purpose, without giving up the licensor's legal possession and control over the property. *North Avenue Properties, L.L.C. v. Zoning Board of Appeals*, 312 Ill. App. 3d 182, 189, 726 N.E.2d 65, 244 Ill. Dec. 469 (2000). The appearance of the term "license" in an instrument, however, does not necessarily make it so. See *Universal Vending Service Co. v. DeMeo*, 231 Ill. App. 30 (1923). Whether a contract is a license or a lease is determined, not from the language used, but rather from the legal effect of its provisions. *Jackson Park Yacht Club v. Department of Local Government Affairs,* 93 Ill. App. 3d 542, 546, 417 N.E.2d 1039, 49 Ill. Dec. 212 (1981).

The existence of a lease depends upon the intention of the parties. *Jackson Park Yacht Club*, 93 Ill. App. 3d at 546. Essential requirements of a lease include the following: (1) a definite agreement as to the extent and bounds of the property; (2) a definite and agreed term; and (3) a definite and agreed rental price and manner of payment. *Jackson Park Yacht Club*, 93 Ill. App. 3d at 546-47....

...Finally, the fact that the agreement was for a specific purpose does not transform the contract into a license. An agreement does not fail as a lease simply because the premises may be used only for certain purposes.

People v. Chicago Metro Car Rentals, Inc., 72 Ill. App. 3d 626, 630, 391 N.E.2d 42, 28 Ill. Dec. 843 (1979). For example, in *Gustin v. Barney*, 250 Ill. App. 209 (1928), the court upheld the existence of a lease even though the lessee was given the right only to hunt upon the premises and the lessor reserved all other uses. "

Ultimately, "it is the degree of possession and control that must be considered to determine whether a lease rather than a license has been granted." *Millennium Park Joint Venture, LLC v. Houlihan*, 241 Ill.2d 281, 309 (2010). In *Millennium Park*, the Supreme Court provided several factors to consider in determining whether an agreement is a lease or license: Licenses are usually revocable at will by the grantor; leases are not. Leases must contain certain "essential elements" not required in a license such as a defined extent and boundary of the property; a defined lease term; a defined amount for payment or rent; and the time and manner of payment. *Millennium Park* at 309. Each of the *Millennium Park* factors exists in the present case including the preeminent reason, irrevocability. Colloquially, attorneys (and this judge) may consider a license a granted use upon property and a lease a granting of possession of the property. However, the caselaw reveals this to be, at best, a generalization. Applying the factors to the present case and weighing the credibility and strength of the evidence, this Court finds the "Lease Agreement" to be appropriately named.

The failure of the District to vacate its use of Defendants' property as its irrigation field affords Defendants the right to treat the District either as a tenant at sufferance or as a holdover tenant. *Bransky v. Schmidt Motor Sales, Inc.*, 222 Ill. App. 3d 1056 (2d Dist. 1991); *Roth v. Dillavou*, 359 Ill. App. 3d 1023, 1027 (2d Dist. 2005). Defendants have chosen the latter by allowing the continued use of the land. The Court finds the appropriate measure of damages to be the rent amounts as historically agreed to and extended by different groups of trustees over the course of more than 17 years. To assert a different measure of damages would not only seem illogical and speculative, but would require one to completely ignore the value both sides placed on the land's use as an irrigation field.

In regards to the amount of those lease payments, Defendants rely primarily on the testimony of David Patzelt and the District upon their engineer, Jason Fowler. The Court found certain aspects of the testimony of each very credible and weighing the evidence finds the Defendants' damages on this claim to total $2,616,079.38. The Court does not find that

an award of prejudgment interest should be made for the reasons cited in the District's brief.

It is noted that these findings would be no different if the "Lease Agreement" were found to be a license and the District considered a holdover (such as in *Pleasure Driveway & Park District of Peoria*, 51 Ill. App. 3d 182 (3d Dist. 1977) or a trespasser. The District's primary argument is that Defendants are entitled to nominal damages at best if this agreement is a license because there was no proof of the fair market value of the license. To the contrary, we have 17 years of proofs as to the fair market value of the property as an irrigation field from the value the parties hereto placed on it. That value is $2,616,079.38.

As the Court finds for Defendants on Count I, there is no reason to consider Counts IV and VII.

THE DISTRICT'S AFFIRMATIVE CLAIMS IN 14 MR 1234

THE DISTRICT'S CLAIMS FOR DECLARATORY RELIF DUE TO UNCONSCIONABILITY AND/OR PUBLIC POLICY VIOLATIONS

In Counts V, VIII and X of its current pleading the District asks the Court to void two of the three interrelated agreements referred to as the 1995 Agreements. Although explicitly interwoven, they do have a severability clause allowing any unconscionable or public policy offending provision to be parsed from the herd. Specifically, it wants the Lease Agreement and the Excess Capacity Agreement voided, and most of the Purchase Agreement upheld. A determination of the validity of these counts requires consideration of the expert testimony at trial, the paucity of case law on the subject and, perhaps most importantly, the legislation concerning the creation and powers of sanitary districts. Ultimately, this trier of fact must ascertain whether the agreements improperly constrict the District from performing its legislated function.

Initially it is very important to consider the role of the developer vis a vis the sanitary facility. This is not a situation wherein the developer is desirous of being annexed into an existing sanitary/water district. That scenario presents a multitude of different concerns including the rights of the district's existing clientele. In the present case, Defendant developer either

owned or controlled nearly all the vacant land presented to the Kane County Board to be considered within the boundaries of the Mill Creek Planned Unit Development. At the time of Board approval and creation of the District the boundaries of the PUD and the location and nature of uses (i.e. residential, single family, multi-family, commercial, etc.) was sufficiently known to determine the capacity needed to service the PUD and the approximate number and price of tap-on fees within the District's boundaries. The great unknown was whether Defendants would sell 20 houses or 2000. The outcome was dependent upon the quality of the product being sold, its price, and marketing, but primarily upon the economy. The District's facilities had to be designed and built to accommodate the planned development whether Defendants were successful or failed miserably.

Much of the District's evidence and argument on this issue focused on an alleged disparity between the costs of the water reclamation facilities borne by Defendants and the monies earned pursuant to the agreements. (The District focused on their costs of the systems, approximately $8,755,000, versus the income derived from tap-on fees while Defendants presented very competent evidence that they have expended nearly four times that amount on the systems over the years.) While it is true that "significant cost-price disparity" (*Kinkel v. Singular Wireless LLC*, 223 Ill.2d 1, 28 (2006)) can support a finding of unconscionability, the Court does not find that this occurred in this case regarding the profits made within the boundaries of the PUD. There is no rule that it is unconscionable or against public policy for a developer to make a profit when contracting with a water/sewer district to build its facilities. DiSanto v. City of Warrenville, 59 Ill.App.3d 931(2d Dist. 1978). As noted above, the profitability of the subject agreements for Defendants was not etched in stone. It depended upon the success or failure of their development. Further, the upside potential of that profitability within the development was easily estimated at the time of contracting. Here, whether portions of the agreements violated public policy or were unconscionable is more dependent upon the usurping of the District's responsibilities and decision making abilities beyond the known confines of the development and for an unlimited amount of time.

Several paragraphs of the Sanitary District Act of 1936 merit consideration to determine a district's statutory powers and responsibilities. Section 4 states in pertinent part: "The board of trustees has full power to pass all necessary ordinances, rules and regulations for the proper management and conduct of the business of the board and the sanitary district, and for carrying into effect the collection and disposal of sewage

and the purposes for which the sanitary district was formed." Section 4.3 provides: "... A sanitary district operating a combined waterworks and sewerage system may: (i) improve and extend the system..." Section 8 provides: "Every such sanitary district shall proceed as rapidly as is reasonably possible, by construction, purchase, lease or otherwise, to provide sewers and a plant or plants for the treatment and purification of its sewage,..." Section 10 provides: "The sanitary district may acquire by purchase, condemnation or otherwise all real and personal property, right of way and privilege, either within or without its corporate limits that may be required for its corporate purposes...." Section 12(b), while specifically directed to a district's power to "lease or contract" with another governmental entity "with reference to any real or personal property for use for any sanitary district purpose", is interesting as it prohibits contracts exceeding 50 years. Section 32 provides the authority and sets forth the procedure for a district to annex private land into the district.

"Procedural unconscionability consists of some impropriety during the process of forming the contract depriving the individual of meaningful choice. Factors to be considered are the circumstances surrounding the transaction, including the manner in which the contract was entered into." Kinkel v. Cingular Wireless LLC, 223 Ill.2d 1, 23 (2006). Based upon the evidence and credibility of the witnesses and for the reasons noted relative to the Motion for Directed Verdict, this Court does not find procedural unconscionability.

Substantive unconscionability requires consideration of the "relative fairness of the obligations" undertaken because of the contract. *Phoenix Ins. Co. v. Rosen,* 242 Ill.2d 48, 75 (2011). Factors supporting a finding of substantive unconscionability include "contract terms so one-sided as to oppress or unfairly surprise an innocent party, an overall imbalance in the obligations and rights imposed by the bargain, and significant cost price disparity." *Rosen* at 75, citing *Kinkel* at 28. The Court in *Rosen* also considered whether the terms were inordinately one-sided, hidden or unclear so to unfairly surprise a party. *Rosen* at 75-76. It is relevant to note that neither *Kinkel* nor *Rosen* involved a public governmental body.

Illinois Courts will not enforce private agreements which contravene public policy. *O'Hara v. Ahlgren, Blumfield & Kempster*, 172 Ill.2d 333, 341 (1989). As the Court noted in *O'Hara* at 341; "[t]he public policy of this State is reflected in its constitution, its statutes and its judicial decisions." This Court's public policy analysis must consider whether the

contract provisions at issue "threaten[s] harm to the public as a whole" including by contravening the SDA and the constitution. *Rosen* at 60. It is with a view to these legal tenets that this Court must weigh the evidence and credibility of the witnesses in resolving these two distinct, but interrelated claims.

The evidence revealed that the three trustees engaged in whatever negotiation and consideration occurred concerning the 1995 Agreements were unsophisticated in the creation of a sanitary district and lacked an understanding of the ramifications of dealing away future tap-on fees and excess capacity beyond the scope of the district extant. This lack of sophistication (which may not be uncommon) was further exacerbated by the absence of any limitation by way of timeframe, geographic boundary or other restriction that would allow unsophisticated trustees to calculate the value of what the District was giving as consideration. On the other hand, the Defendant developer is extremely experienced and sophisticated in the creation of such districts with an excellent grasp of the possibilities and probabilities of extra-PUD development.

Ultimately, based upon the weight of the evidence, credibility of the witnesses and consideration of the factors necessary for a finding of unconscionability and/or a violation of public policy agreements this Court finds that certain portions of the agreements which are not limited as to time and geographic scope are not reliably calculable as to value. Consequently, these agreements may lead to gross value disparity and violate the SDA. The Court will examine each allegedly improper provision separately.

The Lease Agreement is certainly limited in time and scope. It had an initial 15 year term and was extended two more years by an undeniably impartial set of trustees. The value of the agreement was easily calculable and tied to a percentage of fees billed. The statute specifically authorizes the leasing of property to allow the District to achieve its responsibility of creating its plant and sewer system "as rapidly as is reasonably possible." The creation of a lease of property to assist in the payment for the facility is allowed. However, finding that the Lease Agreement was not unconscionable and did not violate public policy does not resolve the issue of whether Defendants breached the Purchase Agreement.

The Purchase Agreement and the Assignment of Excess Capacity are completely interrelated reiterating numerous provisions. They will be reviewed in concert focusing on the three areas of contention; tap-on fees,

control of annexation and excess capacity. Tap-on or connection fees are moneys received for an individual connection to the District's system. It can be residential, multi-family or commercial. The amount of the fees are defined in the Purchase Agreement. Initially the tap-on fees were to be used relative to the bonds and special assessment. Once the bonds were redeemed Defendant Developer was no longer required to pay tap-on fees to the District for hookups within the development. Defendant Developer could then keep all tap-on fees for all further construction within the PUD. This amount is calculable as to the amount of the fees and the number of tap-ons and limited to a known geographic territory. It is allowed under the SDA and is not unconscionable.

A second category of tap-on fee, which the two agreements convey to Defendants, are fees related to "Additional Land". Both agreements require the District to provide "water, wastewater treatment and storm water drainage service, to the extent of [its] "Excess Capacity"" to real estate "designated" by Defendants. Defendants are also granted the right to force the annexation of this "Additional Land" into the District as long as it is contiguous to the District and not otherwise prohibited by law. The owners of these "Additional Lands" are not required to pay tap-on fees as long as the bonds have been paid and the right to charge tap-on fees is reserved to Defendants. The agreements regarding Excess Capacity give exclusive rights to the Excess Capacity to Defendants. The agreements are not limited in any way as to time or geographic size or location (in the case of Additional Lands). The agreements acknowledge that the Excess Capacity of the District can increase over time. There is no prohibition in the agreement from Defendants owning Excess Capacity created in the future solely through the actions of the District. In other words, if 25 years after the agreements the District annexed another large development into its boundaries and constructed another system or added to the existing system, on its own, Defendants would arguably own that Excess Capacity as well.

The SDA provides the District with certain governmental powers, rights and obligations including the power to determine its boundaries through annexation. Additional governmental powers include the ability to create funding through the issuance of bonds. These governmental powers, rights and obligations are not "assets" which a District can sell to satisfy its responsibilities under Section 8 of the SDA. A governmental body cannot sell its legislative power. Consequently, this Court holds that any provision contained in the Purchase Agreement or Assignment of Excess Capacity

requiring the District to annex property or use it bonding power at the petition of Defendants is void as it violates of public policy.

The sale of tap-on fees for future properties as requested by Defendants does not have a value that is calculable. It is unlimited as to time and geographic territory. There is no specific number of connections granted. It could be none. It could be 1000. They could occur 100 years from now. No one knows. The Court finds the provisions of the Purchase Agreement granting Defendants tap-on fees for connections on properties annexed in the future into the District or considered "Additional Lands" void as being unconscionable and violating public policy.

The Assignment of Excess Capacity as described in that agreement as well as the Purchase Agreement provides similar difficulties. The assignment is not limited as to time. The amount of excess capacity is only calculable based upon the system as designed and the development as planned. Future expansion of the District is not definable. No one knows if through the District's efforts its capacity will double, triple or quadruple over the next 100 years or remain static. The Court finds those provisions of the Purchase Agreement and Assignment of Excess Capacity conveying increases in excess capacity to Defendants as being unconscionable and violating public policy.

The conveyance of excess capacity as designed does not suffer the same problems. The Court does not find that sale of a defined amount of excess capacity is unconscionable or violative of public policy. It is clearly an asset of the District which may be utilized under Section 8 of the Act. In the Purchase Agreement the parties designate Sheaffer & Roland, Inc., an engineering firm, as the party to determine the amount of excess capacity in existence. Defendants are entitled to excess capacity, if any, of the system, as designed after accounting for the estimated usage of the PUD as designed.

THE DISTRICT'S CLAIM FOR BREACH OF CONTRACT

Count XI of the District's operative complaint asserts a claim for breach of contract. The theory is surprisingly simple. The District argues that the Purchase Agreement and Bill of Sale evidence it was to receive a complete land application system and it did not. The hub of their position is the alleged failure to receive title to an irrigation field.

Paragraph E.3. of the Purchase Agreement indicates the District is purchasing;

"a *complete wastewater management system* consisting of but not limited to the following: collection, transmission, treatment, *disposal* and monitoring system including:... all other related appurtenances necessary or useful and convenient for the collection, treatment and *disposal*, in a sanitary manner, of sewage and wastes, and *lands and easements necessary therefore*."(emphasis added)

The Bill of Sale contains identical language and specifically tenders ownership of the property necessary to fulfill the Purchase Agreement.

A great deal of testimony was adduced at trial concerning the workings of a Shaefer land application system. Civil engineer Jason Fowler of Shaefer & Roland was found by the Court to be extremely credible in this regard. Fowler testified that the subject land application system was not "complete" because it lacked an irrigation field. Defendant's witnesses testified and Defendant argues that the Lease Agreement provides the necessary irrigation field. However, a lease of land is not a sale of the "lands or easements necessary" under the Purchase Agreement and Bill of Sale. As noted above, this Court does not find the lease of an irrigation field to be unconscionable or contrary to public policy. The SDA specifically allows districts to lease property and facilities in order to commence services as soon as possible. However, the agreement herein to lease Defendants' property for 15 years, with extensions at the District's request does not obviate Defendants' contractual duty to give the District title or an easement to their own irrigation field. Several of the Defendants' witnesses testified that at the end of the 15 year lease agreement the District was "free" to go out and purchase its own irrigation field. They should not have to. They bought one in the Purchase Agreement as supported by the Bill of Sale.

At trial, James Dougherty, the current President of the District's Board of Trustees testified that the District was attempting to obtain land for an irrigation field through an active condemnation suit pending in Kane County. He stated that the current demand for the land was $3.36 million dollars. Subsequent to trial Plaintiff moved and was granted leave to amend Count XI. The Third Amendment to Second Amended and Consolidated Complaint (Count XI) is verified and alleges the District paid $2,678,798.25 to purchase its own irrigation field.

Defendants posit several affirmative defenses to Count XI. Plaintiff has moved to strike and dismiss Affirmative Defenses 11 and 13 (Election of Remedies and Statute of Limitations). However, the Court denies the motions relative to the legal sufficiency of the Defenses. As to their applicability to the subject proofs, based upon the evidence, the credibility of the witnesses and for the legal reasons set forth by Plaintiff, the Court finds for the Plaintiff on each of the Affirmative Defenses to Count XI.

Accordingly, the Court finds for the District and against Defendants as to Count XI assessing damages in the amount of $2,678,798.25. The Court finds for Defendants as to the other items of damage alleged.

CONCLUSION

Wherefore the Court having heard all of the testimony and examined all of the evidence admitted; having determined the credibility of the witnesses; having applied the evidence and the law to all of the pleadings and affirmative defenses and considered all of the argument of counsel;

IT IS HEREBY ORDERED:

1) That in 15 L 293 judgment is entered in favor of Kent W. Shodeen as Trustee of the Kent W. Shodeen Trust Number 1, Tanna Farms, LLC and Mill Creek Country Club, Inc. and against Mill Creek Water Reclamation District in the amount of $2,616,079.36 on Count I of the Complaint;

2) That in 14 MR 1234:

   (a) Judgment is entered in favor of Mill Creek Water Reclamation District and against Kent W. Shodeen as Trustee of the Kent W. Shodeen Trust Number 1 and the Mill Creek Land Company in the amount of $2,678,798.25 on Count XI of the Complaint;
   (b) Defendants' Motion for a Directed Verdict as to Counts I and II of Plaintiff's Second Amended and Consolidated Complaint is granted and judgment is entered in favor of all Defendants and

against Plaintiff Mill Creek Water Reclamation District as to Counts I and II;

(c) The Court's declaratory rulings as to the requests made in Counts V, VIII and X are set forth in detail above. Any declaratory or injunctive requests not specifically granted above are denied;

(d) Plaintiff's motion to strike and dismiss Defendant's Affirmative Defenses 11 and 13 is denied;

3) All parties to bear their own costs.

Enter: September 16, 2020

Judge