

IN THE SUPREME COURT OF OHIO

UTSI FINANCE, INC. (CROWN)	CASE NO. 2015-1861
ENTERPRISES CONSTRUCTION)	
SERVICES, INC.) (CROWN)	
ENTERPRISES, INC.),)	Appeal from the Ohio Board of Tax Appeals
)	
Appellant,)	
)	Board of Tax Appeals Case No.
-vs-)	2014-3748 and 2014-3749
)	
FRANKLIN COUNTY BOARD OF)	
REVISION, THE FRANKLIN COUNTY)	
AUDITOR, BOARD OF EDUCATION OF)	
THE HILLIARD CITY SCHOOLS AND)	
TAX COMMISSIONER OF OHIO)	
)	
Appellees.)	

UTSI FINANCE, INC.'S REPLY BRIEF

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SUMMARY OF ISSUES

This case hinges on certain discrete factual and legal determinations. First, there is a question whether the sale at issue occurred in September 2002, as indicated on the face of the deed, or on March 5, 2009, which is when the deed was eventually recorded. Second, if the BTA determined that the sale occurred on March 5, 2009, there is a question whether the BTA acted unlawfully and unreasonably when it failed to acknowledge that Ms. Fried's appraisal report and testimony established that there were significant changes in the market place from March 2009 to January 1, 2011. There is competent and probative evidence which established that a March 5, 2009 sale would be too remote to be reliable evidence of value. Finally, there is a question as to whether there was a valid, arm's-length sale. The BTA unreasonably and unlawfully excluded Ms. Fried's testimony that the sale was between related entities and, was not a valid, arm's-length sale. The Property Owner set forth that Ms. Fried's testimony was independently corroborated by documents contained in the public record that must be given judicial notice. Finally, the School Board has argued in its brief that the Property Owner should be collaterally estopped from challenging the arm's-length nature of the sale. However, collateral estoppel cannot be applied in this case.

The Court must vacate the BTA's decision since the BTA (1) unreasonably and unlawfully determined the date of sale by ignoring Ohio case law and misapplying *HIN, L.L.C. v. Cuyahoga Cty. Bd. of Revision*, 124 Ohio St.3d 481, 2010-Ohio-687, syllabus, 923 N.E.2d 1144; (2) unreasonably and unlawfully determined that Ms. Fried's testimony and report was not competent and probative evidence that established changes in the market conditions which rendered the sale too remote; and (3) unreasonably and unlawfully excluded Ms. Fried's testimony that the sale was not a valid, arm's-length sale. If the Court should find in favor of the Property Owner on any of

these three issues, then the Court must vacate the BTA's decision and adopt the competent and probative appraisal evidence valuing the subject property at \$1,470,000 as of January 1, 2011.

ARGUMENT

I. THE LAKESHORE DEED ESTABLISHED THAT THE SALE OCCURRED IN 2002

The School Board has argued that the Property Owner failed to present competent and probative evidence that the sale at issue was not "recent" to the tax lien date. In order for the Court to affirm the BTA's decision that the sale was recent, the Court must ignore the dates of execution and notarization that are shown on the face of the deed in question, which was recorded with the county on March 5, 2009.

The following timeline sets forth the important dates:

1. On September 20, 2002, Matthew T. Moroun as a member of Lakeshore Ventures, LLC signed a deed transferring ownership of the subject property from Lakeshore Ventures, LLC to Universal Truckload Services, Inc. (hereinafter, the "Lakeshore deed"). School Board Supp. p. 2;
2. On September 23, 2002, a notary public acknowledged Matthew T. Moroun's signature. School Board Supp. p. 2;
3. On February 12, 2009, Robert Sigler signed a deed, as the Chief Financial Officer of Universal Truckload Services, Inc., transferring ownership of the subject property from Universal Truckload Services, Inc. to UTSI Finance, Inc. (hereinafter, the "Universal Truckload" deed). Statutory Transcript ("S.T.");
4. On February 16, 2009, after the Universal Truckload deed is signed, Robert Sigler signed the Real Property Conveyance Fee Statement for the subject property as the Chief Financial Officer of Universal Truckload Services, Inc.;
5. On March 5, 2009, Universal Truckload Services, Inc. filed the Lakeshore deed, almost 7 years after it was executed and notarized on September 20, 2002; School Board Supp. p. 2;
6. On March 5, 2009, Universal Truckload Services, Inc. filed the Conveyance Fee Statement; School Board Supp. p. 1;

7. On April 9, 2009, the Universal Truckload deed is recorded. S.T.

The Lakeshore deed is competent and probative evidence that the sale occurred in September 2002 not on March 5, 2009. The fact the Universal Truckload deed was signed by the grantor before the Lakeshore deed was recorded is crucial. The timing established that the parties were interrelated. If the parties were not related, the Lakeshore deed would have been recorded before the Universal Truckload deed was executed. The timing establishes that the interrelated corporate entities were in no rush to file deeds since title and ownership was not questioned or a concern. The only reasonable inference that can be drawn is that the buyers and sellers were related corporate entities who were not motivated to record deeds to put the world on notice of ownership. Thus, the only reasonable inference to draw from the record (notwithstanding Ms. Fried's testimony) is that the sale relied upon by the School Board occurred in September 2002 and delivery occurred in September 2002. If the sale occurred in September 2002, then the sale cannot be presumed to be recent. *Akron City School Dist. Bd. of Edn. v. Summit Cty. Bd. of Revision*, 139 Ohio St.3d 92, 2014-Ohio-1588.

If the sale occurred in September 2002, then the School Board had the burden to produce evidence that the character of the property or market conditions had not changed between the sale date and the January 1, 2011 tax lien date as a matter of law. *Id.* at syllabus. The School Board has relied entirely on the deed and conveyance fee statement and presented no evidence relating to the character of the property or market conditions. If the sale is not recent, the Court must remand the matter back to the BTA to look to the record to determine the subject property's fair market value.

On page 13 of its brief, the School Board argued that the date the deed and the conveyance fee statement were recorded established the date of the sale. In reaching this conclusion, the School

Board (and the BTA) relied entirely on *HIN, L.L.C., supra*. As more fully set forth in the merit brief, *HIN, L.L.C.* resolved an issue as to how a fact finder should determine the operative dates for *two sales* that took place in close temporal proximity to each other. *HIN, L.L.C.* states:

Two specific issues are presented in this case: *first*, when a property has been the subject of two transfers within a few months of the tax lien date [one before the tax lien date and one after], which of the two sales should be used by the auditor to establish the property's true value, and *second*, whether the auditor should consider the date on the purchase agreement, the date the deed was signed, the date of the closing, the date the real property conveyance fee statement is filed in the auditor's office, or the date of recording the transfer of the property as the date of sale for taxation purposes.

Id. at ¶2. (Emphasis added.)

In *HIN, L.L.C.*, the rule set forth in the second issue referenced above that the School Board relies upon in the UTSI case only comes into play “when a property has been the subject of two transfers within a few months of the tax lien date.” *Id.* at ¶30. When there is only one sale, there is no reason to resort to the rule set forth as the second issue in *HIN, L.L.C.* When there is only one sale, settled Ohio law as to when title to real estate transfers should control.

Even if the Court clarifies that *HIN, L.L.C.*'s date-of-the-conveyance-fee rule controls, the Property Owner should be permitted to rebut *HIN, L.L.C.*'s bright-line rule with evidence that the sale occurred on a different date. *Id.* at ¶33 (concurring opinion holding “This language may be interpreted to permit the parties to submit evidence of a different date of sale to rebut the conveyance date”).

In the above-captioned case, nearly seven years elapsed between the date the Lakeshore deed was executed and the date the deed was recorded. The confusion surrounding the sale dates in *HIN, L.L.C.* is not an issue here since there is only one sale. Accordingly, the rule coming out of *HIN, L.L.C.* does not apply to the facts before this Court.

The School Board and the BTA failed to acknowledge that, in Ohio, title to real estate is perfected when the deed is transferred. *Turney, L.L.C. v. Cuyahoga Cty. Bd. of Revision*, 2015-Ohio-4086, ¶12, 43 N.E.3d 868 (8th Dist.). A deed passes title upon its proper execution and delivery. *Id.* While recording a deed perfects delivery, recording is not an absolute requirement. *Id.*

As will be explained in more detail below, on September 20, 2002 Matthew T. Moroun signed Lakeshore Ventures, LLC's deed to Universal Truckload Services, Inc. See below:



LAKESHORE VENTURES, LLC.
Matthew T. Moroun
Matthew T. Moroun
ITS: Member

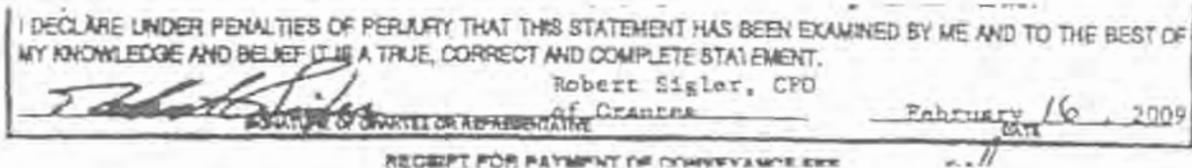
UTSI Supp. p. 1.

Subsequently, on February 12, 2009, Robert Sigler signed the Universal Truckload deed transferring ownership of the subject property to UTSI Finance, Inc. However, the Universal Truckload deed was not recorded until April 9, 2009. See below:



SIGNED AND SEALED:
UNIVERSAL TRUCKLOAD
SERVICES, INC., a Michigan corporation
By: *Robert Sigler*
Robert Sigler
Its: Chief Financial Officer

Statutory Transcript from Board of Revision to the Board of Tax Appeals (“S.T.”). Four days after he signed the Universal Truckload deed, Robert Sigler signed the Real Property Conveyance Fee Statement for the Lakeshore deed on February 16, 2009. See below:



School Board's Supp., p. 1.

On February 12, 2009, Robert Sigler signed the Universal Truckload deed in his capacity as CFO of Universal Truckload Services, Inc. See the statutory transcript produced by the BOR and supplied to the BTA. On February 16, 2009, Robert Sigler signed the conveyance fee statement in his capacity as CFO of Universal Truckload Services, Inc. *Id.*

Documents contained in the public record and filed with the United States Securities and Exchange Commission¹ establish that, as of March 30, 2005, Matthew T. Moroun served as Universal Truckload Services, Inc.'s Chairman of the Board of Directors. *See* footnote 1. The very same document shows that Robert Sigler served as Universal Truckload Services, Inc.'s Vice President, Chief Financial Officer, Secretary and Treasurer. *Id.* The Lakeshore deed indicates that Lakeshore Ventures, LLC (i.e., the seller) was owned, at least in part, by Matthew T. Moroun. The SEC filings also indicate that Matthew T. Moroun was an officer of and board member of Universal Truckload Services, Inc. (i.e., the buyer). Thus, the buyer and seller must be deemed to be related business entities.

A presumption of transfer is created if the grantee possesses the deed. *Id.* Further, delivery may be perfected by actual manual delivery, "it may be made by words and acts, or either, if

¹ U.S. SEC Information 2004 Annual Report on Form 10-K, <http://www.sec.gov/Archives/edgar/data/1308208/000095012405002037/k93655e10vk.htm> (accessed on May 24, 2016); and U.S. SEC Information 2009 Annual Report on Form 10-K, <http://www.sec.gov/Archives/edgar/data/1308208/000119312510057003/d10k.htm> (accessed on May 24, 2016).

accompanied with intention that they have that effect, it may be made by the grantor personally, or through his agent, to the grantee, either personally or through his agent; and it may be made in escrow, or to take effect immediately.” *Turney, L.L.C., supra* at ¶18 (citing *Williams v. Schatz*, 42 Ohio St. 47, 50 (1884)).

Since the SEC filings indicate that the buyer and seller are related business entities, delivery and/or knowledge of the sale and deed should be presumed to have been established as of the date the deed was executed in September 2002. As related business entities the grantor and the grantee share common ownership. If there is common ownership between the entities then knowledge of and/or possession of the deed should give rise to a presumption of delivery. *Cf. Kniebbe v. Wade* (1954), 161 Ohio St. 294, 297, 118 N.E.2d 833. No other reasonable inference can be made. Accordingly, the Property Owner requests the Court to take judicial notice of Universal Truckload Services, Inc.’s filings with the United States Securities and Exchange Commission.

Universal Truckload Services, Inc.’s 2004 ANNUAL REPORT ON FORM 10-K, states:

Our predecessor began operations in 1981 when Universal Am-Can Ltd. was formed as an owner-operator and agent based truckload carrier hauling general commodities over irregular routes in North America. Prior to December 31, 2001, we conducted our operations through several independent operating subsidiaries, all of which were owned by CenTra, Inc., a Delaware corporation (or CenTra), which is a private company wholly owned by Matthew T. Moroun and a trust controlled by Manuel J. Moroun. ***On December 31, 2001, CenTra completed a corporate reorganization pursuant to which all of our operating subsidiaries became wholly owned subsidiaries of Universal Truckload Services, Inc., a newly formed Michigan corporation and wholly owned subsidiary of CenTra. On December 31, 2004, CenTra distributed all of our shares held by it to its shareholders, Matthew T. Moroun and a trust controlled by Manuel J. Moroun.***

<http://www.sec.gov/Archives/edgar/data/1308208/000095012405002037/k93655e10vk.htm>

(page 4) last accessed on May 24, 2016. Accordingly, Matthew T. Moroun had an ownership

interest in both the grantor and grantee entities. The deed shows he was member of the selling entity. The SEC documents show that Moroun was a shareholder of the buyer.

Universal Truckload Services, Inc.'s 2009 ANNUAL REPORT ON FORM 10-K states: "Subsequent to the initial public offering in 2005, the Morouns retained and continue to hold a controlling interest in UTSP" (i.e., Universal Truckload Services, Inc.).

<http://www.sec.gov/Archives/edgar/data/1308208/000119312510057003/d10k.htm> (page 52) last accessed on May 24, 2016.

Various federal courts have taken judicial notice of a company's filings with the Securities and Exchange Commission. Evid.R. 201(B) and (C) (authorizing a court to take discretionary judicial notice of a fact that is not subject to reasonable dispute in that it is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"); *S.E.C. v. Goldstone*, 952 F.Supp.2d 1060 (D.N.M. 2013) (holding "although the Defendants' attorneys prepared the 10-K Compilation, the Court determines that the accuracy of its contents may be readily determined by sources whose accuracy is not reasonably questioned, as the Defendants have provided the Court with links to world wide web sites that verify the date and time at which the various companies filed their 2007 Form 10-Ks. Accordingly, the Court will take judicial notice of the 10-K Compilation."); *Oran v. Stafford*, 226 F.3d 275, 289 (3d Cir. 2000).

In *Oran*, the U.S. Court of Appeals for the 3rd Circuit reasoned that official notice "properly-authenticated public disclosure documents filed with the SEC" is permissible because such documents are "required by law to be filed with the SEC and no serious questions as to their authenticity can exist." *Oran*, 226 F.3d at 289 (citing *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1276 (11th Cir. 1999)); *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1018 (5th Cir. 1996); *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 774 (2d Cir. 1991); *In re Global Crossing, Ltd.*

Securities Litigation, 322 F.Supp.2d 319 (S.D.N.Y. 2004) (“the Court may take judicial notice of public disclosure documents filed with the SEC.”).

The SEC filings establish the common corporate officers of the buyer and seller, which not only corroborates testimony given by Ms. Kelly Fried, but also independently establishes that the sale at issue was not an arm’s-length transfer. BOR H.T. 11:29-11:40 and 28:30-29:12. Given the intertwined relationship of the buying and selling corporate entities, it must be presumed that the title in the September 2002 sale transferred to Universal Truckload Services, Inc. *prior to* March 5, 2009.

The near simultaneous filings of the Lakeshore deed (i.e., executed in September 2002 and recorded March 5, 2009) and the Universal Truckload Services deed (executed February 12, 2009 and recorded April 9, 2009) further evidences that Universal Truckload Services had been in possession of the deed for a period of time but only recorded the Lakeshore deed in March 2009 to effectuate the transfer of the subject property from Universal Truckload Services, Inc. to UTSI Finance, Inc.

Since there is no evidence in the record to rebut these circumstances, the presumption or inference that title transferred *prior to* March 5, 2009 must stand. Accordingly, the BTA unlawfully and unreasonably determined that title transferred on March 5, 2009. When the BOR considered the issue on the very same set of facts and evidence, the BOR determined that the sale was not the best evidence of value. If the Court finds that the BTA unlawfully and unreasonably determined that title transferred on March 5, 2009, then it must vacate the BTA’s decision and order.

Alternatively, the Court should take judicial notice that the buyer and seller were related corporate entities. Having taken notice of this fact, the Court must either conclude that the sale

was not an arm's-length transaction or remand the matter to the BTA to hear additional evidence on the issue. Regardless, the Court must vacate the BTA's decision.

II. MS. FRIED'S TESTIMONY AND REPORT ESTABLISHED THAT MARKET CONDITIONS CHANGED ENOUGH TO RENDER THE SALE TOO REMOTE TO BE RELIED UPON

Assuming, in arguendo, that the Court finds that the BTA correctly determined that the sale occurred in March 2009 and not September 2002, the Court must find that Ms. Fried's appraisal report and testimony contained sufficient evidence to establish there were changes in the market place between March 2009 and January 1, 2012. These market changes rendered a March 5, 2009 "sale" date too remote to be the best evidence of value. As set forth in the Property Owner's merit brief, Ms. Fried's report contained ample evidence that the national and local real estate market changed dramatically between March 2009 and January 1, 2012.

Under *Columbus City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 2016-Ohio-757, ¶19, 2014-0883 (hereinafter, "*Buckeye Hospitality*"), the Property Owner can meet its burden of proof regarding market changes through the testimony and report of an expert appraisal witness. It is worth noting that in both the subject case and *Buckeye Hospitality* that the Franklin County Board of Revision set aside a sale due to changes in market conditions and, instead relied upon an expert appraiser's testimony regarding value. Both in *Buckeye Hospitality* and this appeal that the appraiser decided not to use the sale. *Id.* at ¶5. In both the present case and the *Buckeye Hospitality* case, the sales occurred just under two years from the tax lien date at issue. In both cases, the appraisers testified that they believed the market conditions changed too much between the date of sale to the tax lien date to place much reliance on the sale.

Ms. Fried's testified at the BOR regarding market condition changes. BOR H.T. 15:39:05 through 15:39:30, 15:40:17 through 15:40:51 and 15:45:05 through 15:45:09. Further, Ms. Fried's

report contains ample evidence that the market changed from March 5, 2009 to January 1, 2011. For instance, on pages 28-30 of her report, Ms. Fried stated that the different comparable sales she relied upon either occurred in inferior (i.e., Sale Comparable 1) or superior market conditions (i.e., Sale Comparables 2, 3 and 4). UTSI Supp. p. 28-30. Ms. Fried also stated capitalization rate trends showed changing market conditions. UTSI Supp. p. 30. In addition, Ms. Fried analyzed changes in market rent and vacancies to form the basis for the market condition adjustments made to the comparable sales. UTSI Supp. p. 35.

Ms. Fried's income capitalization approach analysis included a chart from the Korpacz Real Estate Investor Survey as published by PriceWaterhouseCoopers and Real Capital Analytics to show changes in market conditions. The chart shows the national mean capitalization rate rose **from a low** of 7.5% in the first quarter of 2009 **to a high** of 8.75% in the fourth quarter of 2009 before **dropping back down** to 7.75% in the first quarter of 2011. UTSI Supp. p. 42. The Korpacz chart is an authoritative reference in the real estate industry and must be considered competent and probative evidence that established there the market changed between March 2009 and the January 1, 2011 tax-lien date.

In *Health Care REIT*, this Court found evidence of "general market changes" to be sufficient to rebut recency. *Health Care REIT, Inc. v. Cuyahoga Cty. Bd. of Revision*, 140 Ohio St.3d 30, 2014-Ohio-2574. More to the point, Ms. Fried testified at the BOR regarding why she did not use the \$2,300,000 transfer in determining the value of the subject property as of January 1, 2009. BOR H.T. 15:39:05 through 15:39:30, 15:40:17 through 15:40:51 and 15:45:05 through 15:45:09. Specifically, Ms. Fried testified that there were declining market values, increasing capitalization rates and increasing vacancy rates in the market place beginning in 2008 and continuing through the end of 2011 and the beginning of 2012. BOR H.T. 26:59-27:33.

Ms. Fried's testimony and appraisal report contained competent and probative evidence that the market condition changes rendered the March 2009 "sale" too remote to be considered the best evidence of value as of the tax lien date. Accordingly, the BTA unreasonably and unlawfully determined that the March 5, 2009 "sale" price was the best evidence of value. If the Court finds that there was competent and credible evidence of changes in the market place, then it must vacate the BTA's decision and order.

III. THE BTA IMPROPERLY EXCLUDED EVIDENCE THAT THE SALE WAS BETWEEN TWO RELATED ENTITIES

If the Court finds that the sale was recent to the tax lien date, the BTA unlawfully and unreasonably excluded Ms. Fried's testimony that the sale relied upon was not good evidence of value because it was bought and sold between related corporate entities. UTSI Supp. p. 22; BOR Audio 27:00-27:32, 31:12.

The School Board's brief at page 20 cites to case law that states: "Hearsay *may be considered* by an administrative agency." *Felice's Main St., Inc. v. Ohio Liquor Control Comm.*, 10th Dist. No. 01AP-1405, 2002-Ohio-5962. (Emphasis added.) Additionally, the School Board's brief states: "*the hearsay rule is relaxed* in administrative proceedings," and the hearsay rule should not be exercised in an arbitrary manner. *Hong Kong Trading Ctr. v. Ohio Liquor Control Comm.*, 10th Dist. No. 09AP-293, 2010-Ohio-913. (Emphasis added.) The 10th Appellate District has stated "hearsay evidence is not precluded in administrative hearings." *Black v. State Bd. of Psychology*, 160 Ohio App.3d 91, 2005-Ohio-1449, ¶17, 825 N.E.2d 1192 (10 Dist.).

While there is a long line of cases where the BTA has excluded appraisal reports, those cases involved the failure of an appraiser to appear. In those circumstances, the BTA excluded the appraisal reports because the opposing party had been denied the opportunity to cross-examine the appraiser on his or her findings and analysis. *Bd. of Edn. of the Northridge Local Schools v.*

Montgomery Cty. Bd. of Revision (Jan. 28, 2005), BTA No. 2004-B-35, unreported, 2005-Ohio-4216; *Fisher v. Morrow Cty. Bd. of Revision* (Feb. 15, 2008), BTA No. 2006-V-717, unreported; *Giallombardo v. Montgomery Cty. Bd. of Revision* (May 7, 2004), BTA No. 2003-V-875, unreported; *Shanker v. Franklin Cty. Bd. of Revision* (July 19, 2002), BTA No. 2002-J-82, unreported.

Ms. Fried appeared and testified to her appraisal report and analysis at the BOR and the School Board cross-examined Ms. Fried. In its decision, the BTA itself acknowledged that “Ms. Fried also testified regarding her investigations into the March 2009 sale of the subject property.” UTSI Appx. p. 7; BOR H.T. 11:29-11:40 and 28:30-29:12. Thus, the BTA’s own usual rationale for excluding appraisal testimony is not present. Further, Ms. Fried’s report is not only reliable and probative, but contains a signed certification that “The statements of fact contained in this report are true and accurate.” UTSI Supp. p. 49. Taken together, the BTA’s decision to strike Ms. Fried’s testimony as to the arm’s-length nature of the sale (i.e., a critical issue in this matter) was an abuse of discretion.

“[I]f the only evidence before the BTA is the statutory transcript from the board of revision, the BTA must make its own independent judgment based on its weighing *of the evidence contained in that transcript*.” Ms. Fried’s testimony at the BOR that Property Owner told her that the property was transferred between related corporate entities is contained in the statutory transcript. BOR H.T. 11:29-11:40 and 28:30-29:12. Counsel for the School Board made an objection at that time, but it was not sustained. *Id.*

Later in the BOR hearing, counsel for the School Board asserted a modified objection. BOR H.T. 27:59-28:30. In addition, the School Board also recognized that appraisers rely on hearsay-type statements in preparing a report or opinion of value. *Id.* In its modified objection,

the School Board did not object to Ms. Fried testifying as to what she was told, but wanted to continue its objection to the extent the testimony disproved the arm's-length nature of the sale. *Id.* By confusing and/or qualifying the basis and extent of its objection, the School Board effectively waived its objection to testimony that Ms. Fried said the property owner told her that the sale recorded by deed on March 5, 2009 was between two, related business entities.

Additionally, the Franklin County Treasurer's representative on the BOR expressly stated in the BOR's deliberations that he did not believe that the sale at issue was a valid arm's-length sale and that items other than real estate were transferred. BOR Deliberation H.T. 2:44-3:39. The BOR voted 3-0 that the Ms. Fried's opinion of value should be adopted. *Id.* at 3:40-3:44.

Ms. Fried's testimony that the sale was not an arm's-length sale is contained in the statutory transcript. Accordingly, the BTA had an affirmative duty to review and consider that BOR testimony. *Simon v. Lake Geauga Printing Co.*, 69 Ohio St.2d 41, 45-46, 430 N.E.2d 468 (1982) ("Assuming the claimant could have effectively objected to certain evidence presented by the employer at some earlier point, the time for such objection has long since passed.").

It would be improper for the BTA to ignore evidence contained in the statutory transcript. The BTA has a duty to independently weigh and evaluate all the evidence before it and make a thorough and comprehensive review of the evidence. *Columbus Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 76 Ohio St.3d 13, 15, 665 N.E.2d 1098 (1996).

The BTA hears and considers thousands of cases a year. It is well settled that, in the absence of a recent, arm's-length sale, an appraisal report is the best evidence of value. Real estate appraisers must rely on "hearsay" statements made by third parties when they investigate a variety of factors in reaching an expert opinion of value for a property. Expert witness are permitted to testify as to "The *facts* or *data* in the particular case upon which an expert bases an opinion or

inference may be those *perceived by the expert or admitted in evidence at the hearing.*” Evid.R. 703. (Emphasis added.)

The School Board cites to *Almondree Apartments of Columbus, Ltd. v. Bd. of Revision of Franklin Cty.*, 88-LW-2217, 87AP-1216 (holding “The *opinions* of the appraiser about the identity of the parties to the sale or the nature of the transaction is not sufficient to carry the taxpayer’s burden absent production of the underlying data that provides support for the *naked opinions* of the appraiser, partly, at least, of which are outside his areas of expertise.”) (Emphasis added.) *Almondree* was decided years prior to this Court’s recent *Buckeye Hospitality* decision.

Ms. Fried testified as to *factual statements* the property owner made to her while she conducted her appraisal analysis. Thus, Ms. Fried was not offering her opinion on the matter. The factual statements that the School Board argued are hearsay are the same types of statements that an appraiser must solicit from real estate brokers, buyers, sellers, other market participants, or anyone else who might possess information or knowledge deemed important by the appraiser or information necessary to verify data related to the three approaches to value an appraiser utilizes when developing an opinion of value. For instance, appraisers routinely talk with market participants about whether a certain sale in the market place might have been an arm’s-length sale, bank sale, distressed sale, or whether a sale included more than just real estate, whether a sale included favorable financing, whether comparable lease rates include any special concessions to the tenant, etc. The type of facts Ms. Fried testified to, and which the BTA excluded as hearsay, fall within the exception to the hearsay rule for experts. If the BTA’s decision is allowed to stand, an expert appraiser’s ability to testify regarding their data and methodology in any meaningful way would be eliminated.

Ms. Fried stated succinctly: “The property transferred in March 3, 2009 from Lakeshore Ventures LLC to Universal Truckload for \$2.3 million in a sale that the owner reported to be between related entities.” UTSI Supp. p. 22; BOR H.T. 11:29-11:40 and 28:30-29:12. Ms. Fried was subject to cross examination on this issue. UTSI Appx. p. 7. Additionally, in light of *Buckeye Hospitality*’s holding that a testifying appraiser and a certified appraisal report can be used to meet the proponent’s burden of proof, as a result *Almondtree Apartments* is no longer applicable. *Buckeye Hospitality*, 2016-Ohio-757, ¶19, 2014-0883.

Given the nature of expert appraisal reports and exceptions to the hearsay rule for expert opinion witnesses, the fact the BTA can relax evidentiary rules and admit hearsay testimony, the BTA’s typical, well-established rationale for excluding appraisal evidence (when the appraiser does not testify), the BTA’s decision to exclude Ms. Fried’s competent, probative, reliable and critical evidence on a central issue was arbitrary, unreasonable and unconscionable. Thus, the BTA unlawfully and unreasonably excluded Ms. Fried’s testimony that the sale was between two related entities. For this reason, the Court should vacate the BTA’s decision.

IV. COLLATERAL ESTOPPEL CANNOT BE APPLIED SINCE THE PROPERTY OWNER DID NOT LITIGATE THE VALIDITY OF THE SALE

On page 5 of its brief, the School Board argued that the Property Owner should be collaterally estopped from arguing that the sale at issue was not an arm’s-length transfer. However, collateral estoppel cannot be applied here for multiple reasons.

First, as a matter of equity, it would be unjust to impose the doctrine when the face of the deed shows that the deed was executed and notarized eight (8) years before the January 1, 2011 tax lien date and the appraiser testified that she confirmed that the sale was between related entities.

Second, collateral estoppel cannot be used as the “sword” the School Board seeks. *First Federal Sav. & Loan Ass’n of Toledo v. Perry’s Landing, Inc.*, 11 Ohio App.3d 135, 463 N.E.2d 636 (6th Dist. 1983). This Court has stated that the doctrine of collateral estoppel is not mandatory. *Superior’s Brand Meats, Inc. v. Lindley*, 62 Ohio St.2d 133, 403 N.E.2d 996 (1980) (citing *U.S. v. Utah Construction & Mining Co.* (1966), 384 U.S. 394, 86 S.Ct. 1545, 16 L.Ed.2d 642 and Davis, *Administrative Law Text* (3 Ed. 1972), Section 18.01 et seq.). *Superior’s Brand Meats* also stated that the doctrine of collateral estoppel must be applied with “flexibility.” *Id.*

Third, and most importantly, the School Board has not presented any evidence that the issue of the arm’s-length nature of the sale was **actually litigated by the parties** in the 2009-tax-year case. In fact, the School Board’s brief admits at page 5 that the property owner did not participate in the 2009 tax year case. The only documents in the record related to the 2009-tax-year case are two decision letters from the Franklin County Board of Revision. The decision letters contain no discussion of the facts or evidence, the record, the BOR’s analysis, or the BOR’s findings. BOE Appx. p. 1 & 2.

The Sixth District Court of Appeals in Lucas County discussed the doctrine of collateral estoppel in *Frank v. Simon*, 2007-Ohio-1324, 6th Dist. No. L-06-1185. Citing to the Supreme Court of Ohio, *Frank v. Simon* held that a party seeking to assert collateral estoppel “must prove that the identical issue was **actually litigated**, directly determined, and essential to the judgment in the prior action.” *Frank v. Simon, supra* (citing *Goodson v. McDonough Power Equipment, Inc.* (1983), 2 Ohio St.3d 193, 201) (Emphasis added). “[I]ssue preclusion precludes relitigation of an issue that has been **actually and necessarily litigated and determined** in a prior action.” *Fort Frye Teachers Assn. v. State Emp. Relations Bd.* (1998), 81 Ohio St.3d 392, 395, 692 N.E.2d 140.

(Emphasis added.) The School Board cannot show that the arm's-length nature of the sale was *actually and necessarily litigated and determined* in the 2009-tax-year case.

Additionally, while the BOR adopted the sale price as the fair market value in the 2009-tax-year case, given the lack of testimony, the BOR must have relied entirely upon the evidentiary presumption created by the School Board's presentation. However, there is no way to know for certain as the School Board has not presented any evidence or documents regarding the substance of the 2009 proceedings or a transcript of the hearing. Thus, there is no evidence in the record showing that BOR actually weighed or considered whether the transfer was an arm's-length sale in the 2009-tax-year case.

In support of its collateral estoppel argument the School Board cites *New Winchester Gardens, Ltd. v. Franklin Cty. Bd. of Revision*, 80 Ohio St.3d 36, 1997-Ohio-360, 684 N.E.2d 312 and *Olmsted Falls Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 122 Ohio St.3d 134, 2009-Ohio-2461, 909 N.E.2d 597 (hereinafter, "*M&B Olmsted*"). However, both *New Winchester Gardens* and *M&B Olmsted* are readily distinguishable.

In *New Winchester Gardens*, the Court found that in a previous tax year case, the property owner participated and litigated the issue whether the sale at issue was an arm's-length transaction. *New Winchester Gardens, supra* at 42. As the School Board admits, UTSI did not participate in the 2009 proceedings.

The portion of *M&B Olmsted* cited by the School Board undercuts *M&B Olmsted's* application to the facts in the above-captioned matter. *M&B Olmsted* cited to *Columbus Bd. of Edn. v. Franklin Cty. Bd. of Revision* (Dec. 28, 1993), Franklin App. 92AP-1715, 1993 WL 540285. In the parenthetical description of the *Columbus* case, the 8th Appellate District states that the: "owner could not relitigate the issue of the arm's-length character of a particular sale of the

property when the owner had *litigated and lost* that issue on a valuation complaint pertaining to a prior year.” (Emphasis added.)

“The essential test in determining whether the doctrine of collateral estoppel is to be applied is whether the party against whom the prior judgment is being asserted had *full representation* and a ‘full and fair opportunity to litigate that issue in the first action.’” *Cashelmarra Villas Ltd. P’ship v. DiBenedetto* (1993), 87 Ohio App.3d 809, 813, 623 N.E.2d 213. (Emphasis added.) “The benefits garnered from applying collateral estoppel in any cause must be balanced against the costs associated with its application. *The major risk linked to such an application is that of an erroneous determination in the first case.*” *Goodson v. McDonough Power Equipment, Inc.* (1983), 2 Ohio St.3d 193, 201-202, 443 N.E.2d 978. (Emphasis added.)

The concerns referenced by the *Goodson* court are present here and are set forth below:

The dangers of issue preclusion are as apparent as its virtues. The central danger lies in the simple but devastating fact that the first litigated determination of an issue may be wrong. The risk of error runs far beyond the proposition that most matters in civil litigation are determined according to the preponderance of the evidence. The decisional process itself is not fully rational, at least if rationality is defined in terms of the formally stated substantive rules. Considerations of sympathy, prejudice, distaste for the substantive rules, and even ignorance or incapacity may control the outcome. Trial tactics are consciously adapted to these concerns, but efforts to reduce the irrationality may fail or backfire and efforts to exploit it may succeed.

Id. fn 14 (citing 18 Wright, Miller & Cooper, Federal Practice & Procedure 142, Section 4416).

As argued in the merit brief and in more detail above, there is very real and credible evidence to believe that the BOR, in the 2009-tax-year case, unlawfully and unreasonably determined that the sale occurred in March 2009 and not September 2002. This matter is discussed by the BOR during its deliberations in the 2011-tax-year case. BOR Deliberation H.T. 2:44-3:44. In the 2011-tax-year case, the BOR had the benefit of Ms. Fried’s testimony as well as the

argument of counsel that raised the point that the deed was signed in September 2002. Thus, the BOR in the 2011 hearing had a more complete record than what was available to the BOR in the 2009-tax-year case.

As the School Board admitted and the BOR acknowledged, the Property Owner did not participate in the 2009 proceedings. Thus, Property Owner could not have litigated the issue in the 2009 proceedings. Further, there is no evidence that the BOR made an affirmative determination that the sale at issue was an arm's-length sale. The School Board admitted at page 1 that no witness with personal knowledge of the sale testified at the 2009 BOR hearing. Accordingly, it must be presumed that the BOR found in favor of the School Board in the 2009 proceeding based on an evidentiary presumption created in the School Board's favor. An un rebutted presumption cannot be considered to be a litigated issue. As such, the interests of justice, fairness, and due process dictate that collaterally estoppel cannot be applied to prevent UTSI from challenging the validity of the sale in this 2011-tax-year-case.

CONCLUSION

In conclusion, the Property Owner requests the Court find that the BTA unlawfully and unreasonably determined that the sale of the subject property was recent to the tax lien date and that the changes in market conditions did not render the sale too remote regardless of the sale date used. If the Court does not find sufficient evidence in the record to establish that the sale occurred in 2002 or that was competent and probative evidence of market condition changes, then, in the interests of justice, a remand to the BTA to hear additional evidence on the date delivery was perfected on the Lakeshore deed is appropriate.

Alternatively, the Court must find that the BTA unlawfully and unreasonably excluded Ms. Fried's testimony that the March 9, 2009 sale was between related parties—i.e., Universal

Truckload Services, Inc. and UTSI Finance, Inc. If the BTA had properly considered Ms. Fried's testimony that she found that the sale was between related entities, then, under *Buckeye Hospitality*, the BTA could not have found that the sale was a valid, arm's-length transaction. Moreover, publically available and judicially noticeable federal administrative agency filings demonstrate that the buyer and seller were related corporate entities.

If the sale was either too remote from the tax lien date or not a valid, arm's-length transaction, then the sale price cannot be considered the best evidence of the value. Thus, the Court should value the subject property in accordance with the only competent and probative evidence of value in the record—i.e., the expert appraisal witness' testimony and report. Accordingly, the Court should vacate the BTA's decision and order and find that the subject property's true value in money as of January 1, 2011 was \$1,470,000.

For all these reasons, the Court should reverse the BTA's decision and reinstate the BOR's determination of value.

Respectfully submitted,



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I hereby certify that a copy of this *Reply Brief* was emailed on May 31, 2016 to the following persons:

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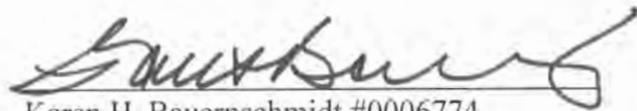
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