In the Supreme Court of Ohio

Buckeye Terminals, LLC,	:	
	:	Case No. 2016-0495
Appellant,	:	
	:	Appeal from the Ohio
v.	:	Board of Tax Appeals
	:	
	:	BTA Case No. 2014-4958
Franklin County Board of Revision, Franklin County Auditor, the Board of Education of South-Western City School District, and the Tax Commissioner of Ohio,	:	
Appellees.	:	

REPLY BRIEF OF APPELLANT, BUCKEYE TERMINALS, LLC

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INTRODUCTION

This is a case about what happens when a purchaser of property mistakenly completes a conveyance fee statement and how to correct such an error. However, it is clear from the South-Western City School District Board of Education's ("South-Western's") brief that it has no intention to argue the case that exists before this Court. Rather, South-Western attempts to argue the case it wishes existed. South-Western has attempted to rewrite Buckeye Terminals' ("Buckeye's) brief to fit South-Western's scheme. The reason? If South-Western had to admit that this is anything other than a valuation case involving the sale of the subject property for approximately $8.4 million, it would be unable to adequately address all of the evidence amassed by Buckeye. This evidence supports an allocated sale price for the subject real estate of approximately $1.9 million. Having nothing to support its position, South-Western tries to belittle Buckeye's evidence. So, South-Western has misstated and misrepresented Buckeye's case, selected snippets of evidence, and slanted case law – all to avoid addressing the issues now before the Court.

South-Western continues to argue that value should be based upon a single piece of paper shown to have been completed in error. South-Western mistakenly asserts that Buckeye paid $8,493,000 exclusively for real estate. ***This is a factually indefensible position.*** The only way South-Western can be correct is if Buckeye paid absolutely nothing for the tangible personal property located on the subject. In other words, the tangible personal property would have a value of $00.00!

On the other hand, Buckeye has 1) established that a mistake occurred when filing the original conveyance fee statement, 2) shown the nature of that error and its correction, and 3) provided additional corroborating evidence of the proper allocation and value of the real estate portion of the subject property. Based on the corrected conveyance fee statement, Buckeye has established that, ***for Ohio* ad valorem *tax purposes***, it actually paid $1,921,084 for the real estate and $6,571,916 for the tangible personal property. The personal property includes: fourteen above-ground storage tanks with a storage capacity of nearly 13 million gallons of fuel, six horizontal tanks, two underground tanks, a vast network of pipelines and related equipment used to bring in product from other locations and to pump product into customer's trucks, and a load rack consisting of seven bays with a total of seventeen load arms.

The evidence supporting $1,921,084 as the correct value of the real estate includes:

1. Evidence that the original conveyance fee statement contained errors.
2. The corrected conveyance fee statement and deed reflecting the accurate value of the real property as allocated at the time of the sale, $1,921,084.
3. The treatment of the subject's value in succeeding years.
4. The expert testimony and report of the accounting firm charged with making the allocation of the purchase price for tax purposes.
5. Expert appraisal testimony that valued the subject real property at $1,445,000 as of the January 1, 2011, tax lien date.
6. Expert testimony to 1) identify the tangible personal property at the subject, 2) confirm the proper classification of the tangible personal property by Buckeye, and 3) review and confirm the proper allocation of the value of that tangible personal property by Buckeye**.**

Unbelievably, both the BTA and South-Western dismissed every piece of evidence as hearsay, even to the point of reinterpreting Ohio's business records rule and the

state's treatment of expert testimony. South-Western continues this trend by further contorting Buckeye's evidence and claiming that only a very narrow kind of evidence can be reviewed (conveniently, the only kind of evidence unavailable to Buckeye). South-Western further insists upon a burden of proof so high that it could never be met by a property owner, even if that owner had the specific kind of evidence South-Western claims is the only relevant kind of evidence permitted. At the same time, South-Western insists that its burden is nowhere near as high. It can rely upon a single piece of unauthenticated hearsay.

Taken in its entirety, South-Western lays nothing before this Court that can be considered rational.

LAW AND ARGUMENT

A. South-Western continues to rely upon the wrong standard of proof.

Mirroring the BTA's incorrect ruling, South-Western argues that the original conveyance fee statement controls unless Buckeye can establish - through fact testimony only - that the sale was not recent or arm's length in nature. ***Again, this is not a valuation case***. Even so, the burden of proof asserted by South-Western far exceeds the standard "burden of persuasion" applied before the BTA. See, *e.g.*, *Westhaven, Inc. v. Wood Cty. Bd. of Revision*, 81 Ohio St.3d 67 (1998). And, such a burden is inconsistent with this Court's established law in allocation cases.

1. The proper standard of review was to make a determination of whether there was some corroborating evidence to support the allocated price.

This Court has held that "[a]n owner who favors the use of an allocated bulk-sale price to reduce the value assigned to real property must bear the burden of proving the

propriety of the allocation." *RNG Properties, Ltd. v. Summit Cty. Bd. of Revision*, 140 Ohio St.3d 455, 2010-Ohio-4036, at ¶36. ***Contrary to the BTA's treatment of Buckeye in this case***, the burden is not a heavy one. *Bedford Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 132 Ohio St.3d 371, 2010-Ohio-2844. In *Bedford*, this Court stated, "all that is required is ***some additional increment of corroborating evidence*** beyond the bare fact of the allocation in the conveyance-fee statement." *Id*. at ¶36 (citing *St. Bernard Self-Storage, LLC v. Hamilton Cty. Bd. of Revision*, 115 Ohio St.3d 365, 2007-Ohio-5249). (Emphasis added.)

Yet, South-Western continues to rely upon case law that is not reflective of the issues before this Court. As to the application of this Court's decision in *Sapina v. Cuyahoga Cty. Bd. of Revision*, 136 Ohio St. 3d 188, 2013-Ohio-3028, Buckeye believes that South-Western's reading of the case goes far beyond this Court's intent. Buckeye invites the Court to review Buckeye's Merit Brief at 12-14 for a more accurate depiction of the *Sapina* line of decisions.

Buckeye met its burden of furnishing corroboration for an allocation to realty that is plausible and entirely supportable ***within the entire context of the bulk sale***. *Sapina, surpa*, at ¶41. South-Western presented not a shred of evidence beyond the erroneous, unauthenticated conveyance fee statement. As such, the BTA's failure to undertake the proper analysis and to apply the law resulted in an erroneous finding of value. ***South-Western cannot wish that away.***

B. The corrected conveyance fee statement and deed superseded the erroneous documents and are controlling.

South-Western continues to misapply the cases of *Union Oil of California v. Gahanna-Jefferson Bd. of Edn., et al*., 38 Ohio App.3d 66 (1987), and *Cumberland Farms, Inc. v.*

Franklin County Bd. of Revision, 10th Dist. Court of Appeals No. 91AP-349 (Oct. 1, 1991). Buckeye has addressed these cases in its Merit Brief at pages 16-18. South-Western now attempts to reimagine those cases by taking snippets of those cases out of context. Buckeye believes the Court's reading of those cases will bear out Buckeye's position.

The reality is that the corrected conveyance fee statement and deed control. Ohio statutes provide that the statement and deed are controlling upon acceptance by the auditor and recorder, respectively. See R.C. 317.08, 317.22 and 319.20. See, also, Buckeye's Merit Brief at 18. In short, under the corrected filing ***superseded*** the original, erroneous filing ***upon acceptance***. In this matter, the auditor not only endorsed the corrected conveyance fee statement but also reflected the $1,921,084 price paid on his records. See BOR Exhibit C; Supp. at 184-185, and BOR Audio Hearing Record. South-Western has failed to refute this authority.

C. South-Western continues to mischaracterize Buckeye's behavior about the timing of the filing of the corrected conveyance fee statement and deed.

South-Western makes much of the fact that Buckeye did not correct the conveyance fee statement and deed immediately after the sale, but, instead, waited some months after South-Western's complaint was filed to make the corrections. The implication is that Buckeye must not be acting with clean hands. Such implications are unjustified.

South-Western ignores the fact that the county's original value for the subject was $1,825,700 for tax year 2011. The county did not alter the value after Buckeye filed the erroneous conveyance fee statement; the county continued to value the subject at $1,825,700. This $1,825,700 was the value used by the county treasurer to determine Buckeye's tax liability.

Because Buckeye continued to receive tax bills not materially inconsistent with the value it placed on the real estate portion of its purchase ($1,921,084), Buckeye had no reason to suspect that it had filed a conveyance fee statement erroneously listing the value of personal property as part of the value of the real property. As Ms. Davis testified, Buckeye did not become aware that there was a potential problem until the BOR case. S.T. at Audio Hearing Record.

One can imagine the shock Buckeye had when South-Western finally filed a complaint seeking an increase in value to $8,493,000. At most, Buckeye may have expected an increase request of $95,384 – the difference between the allocated price of the real estate ($1,921,084) and the county's current value ($1,825,700). South-Western's complaint was something different. This increase complaint included the $6,571,916 paid for the substantial personal property located on the subject. What happened? Why was South-Western seeking to include the value of personal property in its increase complaint?

Upon receipt of the complaint, Buckeye had to determine if it made a mistake in applying Ohio law *(i.e.*, whether it properly classified real and personal property). Buckeye then had to review its records, only to discover that it had erroneously included the value of personal property on the conveyance fee statement. Buckeye cannot be faulted for taking time to determine the nature of the error, and soliciting the assistance of counsel to determine the best corrective action. Buckeye cannot be faulted for then waiting until the BOR hearing was scheduled to actually file the corrected conveyance fee statement and deed. Buckeye was

being careful after being blindsided by an unexpected increase complaint. South-Western's comments are specious at best - a classic red herring.

D. South-Western mischaracterizes Buckeye's inability to use certain fact witnesses.

At footnote 2 on page 3, South-Western has the audacity to claim that Buckeye committed a falsehood in claiming that fact witnesses with knowledge were unavailable to testify. Yet, it is Buckeye alone, not South-Western, that knows about the knowledge and availability of potential witnesses.

Not every person involved in the sale is the right witness. The question is: who had the requisite knowledge to testify about the issue in this case – the nature of the allocation error and how it was corrected? Those witnesses with the requisite knowledge were not available for hearing. Moreover, South-Western well knows that Buckeye could not seek a subpoena for out-of-state witnesses to appear before either the BOR or the BTA, as the BTA has ruled that boards of revision and the BTA lack the power to enforce subpoenas directed to out-of-state persons. *Zanesville City Schools Bd. of Edn. v. Muskingum Cty. Bd. of Revision* (Nov. 26, 2003), BTA No. 2003-T-51; *Pepper Pike Assoc., LLC v. Cuyahoga Cty. Bd. of Revision* (Sept. 26, 2003), BTA No. 2003-A-709.

1. The BTA made clear its intent to reject any fact witness evidence.

Buckeye's BOR counsel[1] did allude to affidavits from two individuals involved in either the sale or the preparation of the erroneous conveyance fee statement. However,

[1] Buckeye had different counsel before the Board of Revision than it had before the Board of Tax Appeals.

Buckeye could neither submit to nor rely upon those affidavits at the BTA, as the BTA has consistently ruled such documents inadmissible. *See, e.g., Bernie's Music Building, Inc. v. Montgomery Cty. Bd. of Revision* (Jan. 5, 2014), BTA No. 2013-5472. In fact, the BTA made doubly sure that Buckeye could not utilize affidavits where it could not compel the attendance of witnesses by finding that "even if the affidavits were before us, we would have found them to be unreliable hearsay." BTA Decision at 5.

2. South-Western's claim that only live testimony from certain fact witnesses can meet Buckeye's burden is absurd.

South-Western clings to its unfounded belief that the burden placed upon the property owner in valuation cases must be set unbelievingly high. While South-Western insists that it can rely upon uncertified documents (themselves hearsay), the property owner is limited to a very narrow scope of what kind of evidence it can use. In fact, South-Western and the BTA both insist that only one kind of evidence can be considered – the live testimony of those with firsthand knowledge of not only the sale but also the error. Where such testimony is unavailable, the property owner must fail. According to South-Western and the BTA, the property owner cannot rely upon any other time-honored methods of establishing its case.

Of course, South-Western must take this position. To do otherwise would mean that it must address the evidence and arguments that Buckeye has presented. By maintaining that anything other than direct testimony is inadmissible hearsay, South-Western (just like the BTA) avoids having to address the merits of the evidence in this case, and further avoids having to admit that this case is anything but a straight-forward sale case. It can rely upon its slim claims while asking everyone to sidestep the mountain of evidence against it.

E. Buckeye may certainly rely upon any of the recognized forms of evidence available to meet its burden of persuasion. This includes the use of the Business Records Rule and the reliance upon expert testimony.

1. The Business Records Rule is a recognized and accepted form of evidence.

With regard to the Business Records Rule, South-Western simply does not want Buckeye to have it. Therefore, South-Western has twisted both the rule and Buckeye's initial position into something else. According to South-Western and the BTA, Buckeye's reliance on its business records constitutes inadmissible hearsay. But the Business Records Rule ***is an exception*** to the hearsay rule. "The rule allows the admission of records kept in the ordinary course of business 'if it was the regular practice of that business to make such records and those records were made by or from information transmitted by a person with knowledge.'" *States Resources Corp. v. Hendy*, 2011-Ohio-1900, at ¶21, quoting *Charter One Mtge. Corp. v. Keselica,* 2004-Ohio-4333, at ¶19. ***The Business Records Rule allows you to rely upon your business records because they are what they are – evidence of documentation at the time.*** There is no question that the records qualified under the rule, as Ms. Davis, the custodian of those records, authenticated them. Those records showed that a mistake had occurred resulting in an erroneous conveyance fee statement, and further showed an allocation inconsistent with that erroneous statement. The BTA wrongly excluded this evidence, as well as Ms. Davis' testimony as the custodian of the records. South-Western, however, wants to distract the parties and this Court from those simple facts because (in light is its lack of evidence to the contrary) it has no real answer for them.

2. Mr. Spisak's expert opinion is entitled to weight. He is permitted to rely upon source material prepared by other experts, even if not in the record. South-Western's objections to Mr. Spisak's expert testimony are not supported by Ohio law.

South-Western attempts to reclassify Appellant's Exhibit 5, the E&Y allocation report, reviewed as one of the source materials for Mr. Spisak's expert opinion, as merely hearsay. Clearly, South-Western misinterprets how such source materials are treated when used by an expert witness. As Buckeye has demonstrated in its merit brief, an expert may rely on many types of outside information provided by others. Such reliance is deemed to be an exception to the general hearsay rules. See Appellant's Merit Brief at pages 20-22. See, also, R.C. 2317.36; *Shesler v. Consol. Rail Corp.,* 151 Ohio App.3d 462, 2003-Ohio-320 ("experts ***have always been permitted to testify*** regarding information which forms the basis of their opinions. This has never been limited to 'hands-on' experience."); *Progressive Realty Assoc., L.P. v. Franklin Cty. Bd. of Revision* (June 30, 1997), BTA No. 1995-N-473 (holding that experts often rely upon information and documents "upon which they have no personal knowledge"); *Arrowhead Apartments, Ltd., at al., v. Clermont Cty. Bd. of Revision* (May 13, 2005), BTA Nos. 2003-A-116, 1148, 1149, 1150 (holding that experts may "rely upon many types of outside information * * * provided by others"); *Armco, Inc. v. Richland Cty. Bd. of Revision* (Nov. 19, 2004), BTA No. 2003-A-1058 (expert "is not required to provide an authenticating witness for every piece of information he utilizes").

i. South-Western's reliance on *Almondtree Apts. of Columbus, Ltd. v. Franklin Cty. Bd. of Revision* (June 28, 1988), Franklin Cty. App. No. 90-2469, is misplaced.

Almondtree Apts. involved the owner's claim that a sale was not at arm's length. The owner relied on out-of-court statements. The ***owner did not offer*** the testimony of the witnesses who had talked to the appraiser ***or the documents upon which the appraiser had relied***, but merely offered its appraiser's testimony setting forth his opinion based on that underlying evidence. The instant matter is a far stronger case for the acceptance of the expert's opinion:

- First, the source material that Mr. Spisak reviewed was provided to South-Western. South-Western had a full opportunity prior to hearing to request a deposition or a subpoena for hearing to inquire into Mr. Spisak's source materials. South-Western, once again, did nothing. See *Edbow, Inc. v. Franklin Cty. Bd. of Revision*, 85 Ohio St.3d 656 (1999).

- Second, unlike the lack of documentation in *Almondtree*, the source material, the E&Y report, was provided by Mr. Spisak at hearing.

- Third – and this is a significant fact that South-Western badly wants to hide from the Court – ***Mr. Spisak did not use the E&Y cost allocation report as the basis for his opinion***, *i.e*., he was not using the report to assert the truth of the matter. Rather, ***Mr. Spisak developed his own, independent classification of the property (real vs. personal) located at the subject. Mr. Spisak <u>then</u> developed his own, independent allocated*** value for each item of property (both personal and real) located on the subject site. He even prepared his own report! Appellant's Exhibit 4; Supp. at 126. He then went one-step further, ***opining that the E&Y report was consistent with his own classification and valuation.***

- Fourth, Mr. Spisak ***based his opinions upon his personal inspection of the property***, which included a verification of what was located on the property as of the time of the sale as well as his determination of what was real estate and what was personal property. While South-Western makes vague references to taking an "inventory," the tangible personal property in issue does not consist of small boxes tucked away in a shed somewhere***. The property involved includes tanks the size of office buildings.*** Mr. Spisak viewed everything necessary to make his determinations.

Because the BTA and South-Western continuously interrupted and cut short Mr. Spisak's testimony, it is unknown what further details and clarification Mr. Spisak could have provided if he had been permitted to testify like any other expert before an Ohio tribunal. Mr. Spisak is an expert, was recognized as such in this case, and performed his duties as any other expert would.

3. South-Western's position creates new law regarding experts.

As Buckeye has previously pointed out, the real issue is whether the BTA should be permitted to ***alter the legal standard*** by requiring expert witnesses to be fact witnesses. Real property appraisers rely upon information 1) supplied by the property owner, 2) received from the buyers and sellers of properties used for the sales comparison approach, and 3) a plethora of other data prepared by other laypersons and experts. Taken to its logical conclusion, the ***BTA's ruling would prohibit any expert appraiser from testifying about the facts and data perceived in preparing the appraiser's opinion***.

F. South-Western's allegation that the purchase agreement provides evidence supporting its claimed allocation is not only mere supposition but also incorrect.

South-Western refers to the purchase agreement to raise an unsubstantiated argument that Buckeye intended to allocate a $13,981,000 purchase price for the subject property between business fixtures and real property, with $8,493,000 for real property and $5,488,000 to personal property. ***South-Western offers nothing to support this conclusion***. Supposition is not evidence. See *Lakota Local School Dist. Bd. of Edn. v. Butler Cty. Bd. of Revision*, 108 Ohio St.3d 310, 2006-Ohio-1059.

It is true that the parties to the sale allocated $13,981,000 of the $166 million purchase price to all aspects of the subject facility. See Stipulated Exhibit 8 at BTL000374. However, it does not follow that this price in any way reflects value for Ohio real property tax purposes.

1. **The price listed in the purchase contract does not list value for Ohio tax purposes.**

The price referred to in the purchase agreement was ***not an allocation*** between real estate and personality ***for Ohio tax purposes***. Not all sale contracts value property based upon how a particular state may define real property, especially where, as here, the property is spread across multiple states. Contracts often include value based upon a general understanding of property. Once done, the parties had to consider the value of the subject real property and personal property for purposes of *ad valorem* taxation in Ohio. Ohio has an unusual definition of business fixtures, which classifies such fixtures as tangible personal property. See R.C. 5701.03. See, also, *Metamora Elevator Co. v. Fulton Cty. Bd. of Revision*, 143 Ohio St.3d 359, 2015-Ohio-2807. The values cited in the agreement did not contemplate this uncommon Ohio definition, and therefore cannot (and were not) used to allocate the sale for purposes of Ohio's *ad valorem* tax.

The $13,981,000 does not reflect value for Ohio tax purposes for other reasons:

- The $13,981,000 contains more than real property and business fixtures (tanks equipment, pipelines, etc.). Also included in the price paid were inventory, fuel, and intangibles, such as contracts; license agreements; permits; leases; books and records; assets and liabilities; easements, and more. See, Stipulated Exhibit 8, at BTL000115-BTL000123; BTL000287; BTL000291; BTL000299; BTL000300;

BTL000304; BTL000308; BTL000319; BTL000327; BTL000344; BTL000348; BTL000377; BTL000381; BTL000428.

- For Ohio tax purposes, the parties engaged Ernst & Young to review the sale and make an allocation between the subject's real estate and tangible personal property. At the BOR, Buckeye presented the testimony of Robert Stall and Mark Molepske, principals with Ernst & Young LPP ("E&Y"), the accounting firm charged with making the allocation of the purchase price. Mr. Molepkse is an M.A.I. appraiser, while Mr. Stall holds a certification as an assessor. S.T. at Audio Hearing Record. Both gentlemen testified that they undertook a contemporaneous review of the sale price. For each of the 33 sites purchased, they used accepted appraisal methodology to determine a value for the land, tangible personal property, site improvements, and buildings. S.T. at Audio Hearing Record. They both testified that, for the subject property, they determined a combined value of the site improvements, buildings, and land of $1,921,084. Id. See, also Appellant's Exhibit 5. ***This was the amount paid for the real property portion of the subject property based on Ohio's definitions of real and personal property, and it was the amount that should have been reflected on the conveyance fee statement.***

G. The parties contemplated E&Y's review to refine the values for Ohio tax purposes. The E&Y evidence provided <u>timely</u> corroborating indicia and other evidence concerning the error made and the proper allocation of the purchase price for *ad valorem* tax purposes.

South-Western argues that the E&Y allocation cannot be relied upon because it was not made prior to the closing of the purchase. Buckeye understands that the allocation was not completed at the time of the closing***, as an allocation for tax purposes was not contemplated at that time***. However, the allocation was indeed made as part of the sale, *i.e.,* contemporaneous with the sale. E&Y's review took place between closing and the filing of the original (erroneous) conveyance fee statement. E&Y's report was not only a common element of a complex sale like the one in issue, but also, the parties contemplated the valuation for tax purposes as an integral part of the transaction. See Section 9.4 of the sale contract (providing

for the engagement of appraisers ***after closing*** for the purposes of determining the ***"final" fair market value*** of property). Stipulated BTA Exhibit 8, at page BTL000147.

H. Variances in the values expressed by the various experts are not evidence that Buckeye paid $8,493,000 for the subject real property. Neither is this evidence that Buckeye's evidence is either inconsistent or unreliable.

South-Western maintains that there are some inconsistencies in the values expressed by the various expert reports. First, ***all opinions place the value of the subject real property near the $1.9 million Buckeye reported on the corrected conveyance fee statement. No one comes anywhere near the $8.4 million claimed by South-Western***. The BTA's reliance on these small differences was wrong, and used by it simply to justify its predetermination that the erroneous conveyance fee statement need not be looked past. Certainly these variances do not prove the opposite, *i.e.*, that Buckeye paid $8.4 million for all of the real property. Buckeye would be more concerned if all of its sources matched identically, as this would suggest that the opinions of values offered by multiple sources were somehow managed to get to a preset value.

1. The variances were fully explained and supported in the record. Both the BTA and South-Western chose to ignore this crucial information.

Moreover, as ignored by both South-Western and the BTA, Ms. Davis testified that some of the records erroneously showed a value for a parcel identified as parcel number 272-00337-00. This parcel was not part of the subject property, was not located near or adjacent to the subject property, and was not purchased by Buckeye. S.T. at Audio Hearing Record and S.T. Ex. D. Ms. Davis testified that the inclusion of the unrelated parcel was a part of the error. In short, some of the reports not only improperly included non-real property items

but also a non-related parcel of real estate. S.T. at Audio Hearing Record and S.T. Ex. D. The corrected conveyance fee statement listed the proper amount paid for the real property portion of the subject property. *i.e.,* $1,921,084. S.T. at Audio Hearing Record and S.T. Ex. B. This was explained at the BOR hearing and well known to both South-Western and the BTA. However, rather than taking this into account, the BTA chose to ignore it in order to justify tossing Buckeye's evidence. South-Western now wants to ignore these facts in order to create inconsistency where there is none.

I. Buckeye's references to tax year 2014 are not an attempt to prove value through another year's value. Buckeye's purpose is to expose the absurdity and inconsistency of South-Western's (and the BTA's) position.

In what is perhaps the most egregious example of South-Western's complete rewrite of Buckeye's merit brief, South-Western states that Buckeye has taken the position that the BOR's unchallenged $1,825,790 value for tax year 2014 is evidence of the value for tax year 2011. Buckeye fully understands that each tax year is a new year. Buckeye's point, now distorted by the board of education, ***is that nothing at the property changed between 2011 and 2014.*** Thus, the increase for tax year 2011 does not fit, and South-Western's acceptance of the lower value in 2014 is inconsistent with its claim that the real property is worth more than $8.4 million.

This begs the question as to why South-Western did not appeal the 2014 determination to the BTA. The reason is simple. South-Western could no longer rely upon the erroneous sale documents for the tax year 2014 value. The sale was too remote for this purpose. See *Akron City School Dist. Bd. of Edn. v. Summit Cty. Bd. of Revision*, 139 Ohio St.3d

92, 2014-Ohio-1588. Unable to rely upon the sale, South-Western would have a tighter burden of proof. It would have to supply appraisal evidence to support an increase of over $6 million in value. South-Western could not do this. It could not do it because no appraiser would be able to justify such an increase in the value of the real estate.

Seeking an appraisal also would backfire on South-Western,[2] as it would expose the truth: Buckeye has considerable value in the personal property located at the subject site. Any appraisal would have laid bare South-Western's unrealistic position that Buckeye paid nothing for the substantial personal property (*i.e.*, the $8.4 million was for real estate alone). As seen by Mr. Eberly's report, an appraiser would not have supported a value for 2014 anywhere near the so-called $8.4 million sale price erroneously relied upon by South-Western.

This exposes the farce happening in this case. South-Western wants to rely upon a mistake. It desperately wants the Court to ignore that mistake. It wants to secure a three-year windfall in revenue from that mistake, a windfall that comes at the expense of a taxpayer. South-Western fully understands that it cannot maintain a higher value for the subject property once that mistake becomes too old. The point of Buckeye's reference to the 2014 tax year decision is not to use the lower value as evidence of value in 2011. It is to expose the fact that the increase in the 2011 is built upon an irrationality, a calculated attempt to use Ohio tribunals to tax property at something other than its true value.

[2] This is true for tax year 2011 as well as tax year 2014.

J. Buckeye's appraisal evidence is properly before the Board for consideration. Not only does the appraisal support the proper allocation of the purchase price but also it meets the exceptions by which it may be considered as direct evidence of the value of the real property in issue.

South-Western has taken the position that Buckeye's appraisal evidence should not be used to value the subject property. Of course South-Western wants the Court to ignore the expert appraisal evidence. It not only busts South-Western's claim of value, but also, it fully supports the fact that the original conveyance fee statement included an erroneous value for the real property.

Obviously, the ***expert opinion of value provides additional "corroborating indicia"*** under *Sapina* that clearly supports Buckeye's allocation of the price. Messrs. Pickering and Eberly found the value of the real estate to be $1,445,000. This contradicts South-Western's claimed allocation and supports Buckeye's. In addition, the use of appraisal evidence is not completely prohibited, and the complexities of the bulk sale in issue make reliance upon the appraisal evidence appropriate. See Appellant's Merit Brief at 8 and at 14-16 for a detailed discussion of this topic. *See, also, Sapina, supra*; *Colsol. Aluminum v. Monroe Cty. Bd. of Revision*, 66 Ohio St.2d 410 (1981); and *Hilliard City Schools Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 128 Ohio St.3d 565, 2011-Ohio-2258.

K. Buckeye is not barred from challenging South-Western's use of uncertified documents.

The copies of the erroneous conveyance fee statement and deed presented by South-Western ***were not certified as true and accurate copies of the documents in the custody of the county*** auditor and county recorder, nor did South-Western offer authenticating testimony. Under Ohio law, proof of a writing's authenticity is required before the writing can

be admitted into evidence. *Steinle v. Cincinnati*, 142 Ohio St. 550 (1944). Evid.R. 902(1)-(3) and Evid.R. 1005.

While South-Western takes the position that Buckeye has waived the error because property owner's counsel did not object at the BOR hearing, Buckeye disagrees. This is not a situation where Buckeye's objections were advanced for the first time on appeal to this Court. The proceedings before the Board of Tax Appeals are *de novo* in nature. The BTA is charged with reviewing all evidence afresh, and the parties may advance new arguments about that evidence before the BTA. R.C. 5717.01. Certainly, South-Western was not shy about raising new issues concerning the evidence when before the BTA.

In addition, it must not be forgotten that the uncertified conveyance fee statement and deed ***were not part of the record before the BTA*** until South-Western moved to supplement the record. At that time, Buckeye objected to South-Western's motion to supplement the record on, *inter alia*, the grounds that the deed and conveyance fee statement attached to South-Western's motion were not properly authenticated. See Appellant's Memorandum Contra Appellee's Motion to Supplement the Record, at pp 4-7; Appendix at 4-7. Buckeye should be permitted to raise objections to unauthenticated evidence introduced to the BTA record after both the close of hearing and the filing of Buckeye's BTA merit brief.

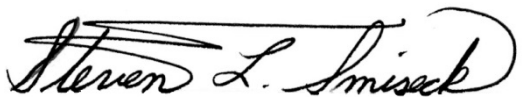
CONCLUSION

As demonstrated by considerable evidence from multiple sources, the original conveyance fee statement does not reflect the $1,921,084 Buckeye paid for the subject real property and the $6,571,916 Buckeye paid for personal property. Rather, the conveyance fee statement erroneously shows $8,493,000 paid for real property and $00.00 paid for personality.

South-Western does not want this mistake corrected, and the BTA limited its decision to one piece of true hearsay, an uncertified conveyance fee statement that does not reflect either the price paid or the value of the real estate purchased in a bulk transaction. The totality of the BTA's decision evidences a denial of Buckeye's legal rights under the law. South-Western now furthers these errors by taking positions that are contrary to law, that misstate Buckeye's arguments, and that misrepresent the issues in this case. South-Western has no evidence of value beyond the erroneous conveyance fee statement. Buckeye does have evidence proving 1) the existence of the error, 2) the proper correction of the error, 3) corroborating evidence of the proper allocation of the sale price, and 4) corroborating evidence showing the proper valuation of the subject real property.

For the reasons set forth in its merit brief and this reply, Buckeye requests the Ohio Supreme Court to reverse and vacate the BTA's unlawful and unreasonable decision. Buckeye requests the Court to give effect to the corrected conveyance fee statement and find a value of $1,921,090[3] for tax years 2011, 2012, and 2013.

Respectfully Submitted,



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[3] For valuation purposes, the allocated sale price has been rounded to the nearest ten-dollar figure, as specified by R.C. 5715.26(A)(1).

CERTIFICATE OF SERVICE

This is to certify that on this 14th day of October 2016 a true copy of this Reply Brief and Appendix was sent by REGULAR U.S. MAIL to each of the following:

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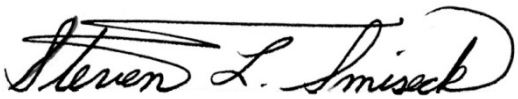
William J. Stehle, Assistant Prosecuting Attorney, 373 South High Street, 20th Floor, Columbus, Ohio 43215, counsel for appellees Franklin County Board of Revision and Franklin County Auditor;

Michael DeWine, Attorney General of Ohio, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215, counsel for appellee Joseph Testa, Tax Commissioner of Ohio;



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IN THE OHIO BOARD OF TAX APPEALS

Buckeye Terminals, LLC, Appellant, vs. Franklin County Board of Revision, et al., Appellees.	)	CASE NO. 2014-4958 (REAL PROPERTY TAX)

Memorandum Contra Appellee's Motion to Supplement the Record

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INTRODUCTION

On November 23, 2015, counsel for appellee, South-Western City Schools Board of Education ("South-Western"), filed with this Board a motion to supplement the record. This motion asserts that the record in this matter is deficient of certain documents that South-Western claims were attached to its original complaint and thereby submitted as evidence to the Franklin County Board of Revision ("BOR"). Attached to the motion are uncertified copies of a conveyance fee statement and a deed. Appellant, Buckeye Terminals, LLC, ("Buckeye") hereby objects to the motion to supplement. The alleged evidence was provided after the close of the record in this matter and is otherwise not properly admissible.

LAW AND ARGUMENT

1. **South-Western's motion is untimely. South-Western may not supplement the record after the record has been closed following the hearing before this Board.**

This Board held an evidentiary hearing in this matter on September 22, 2015. Although South-Western claims that the record in this matter supports a sale price of over $8 million, it went to the hearing without any evidence in the BOR record to support the sale and without offering any evidence at this Board's hearing. More than sixty days after the close of the record – and one week after Buckeye filed its brief pointing out the lack of evidence in the record - South-Western has submitted its motion, seeking to have unauthenticated documents admitted.

Although South-Western asserts that the evidence was before the BOR by way of its complaint, and although such evidence would appear to be fundamental to South-Western's assertions of value, South-Western failed to confirm that the record contains the very evidence it seeks to rely upon. South-Western attended this Board's hearing. It had a full opportunity to

review the record before that hearing and to supplement and/or present additional evidence to this Board on September 22. Once the hearing was concluded, both parties were bound by the record as it then existed.

The fact that South-Western asserts that this evidence was before the BOR does not otherwise excuse the failure to review the record and supplement prior to the close of this Board's hearing. In *Bd. of Edn. of the Columbus City Schools v. Franklin Cty. Bd. of Revision*, 90 Ohio St.3d 564 (2001), the Ohio Supreme Court held that "[n]either party can now be heard to complain that the record is incomplete" when a party failed to supplement the BOR record after the close of the BTA's hearing:

> When the record from the board of revision is filed at the BTA, it is open for the parties to review and verify that all the evidence offered to the board of revision is included. If any evidence is missing from the record and it cannot be supplied by the board of revision, any party can request the BTA to hold a hearing where the missing evidence can be introduced, as well as other additional evidence, within the limits of R.C. 5715.19(G).
>
> Here, both parties waived the opportunity for an evidentiary hearing before the BTA. By agreeing to waive an evidentiary hearing before the BTA, both parties agreed to have the case decided based on the record as it then existed. Neither party can now be heard to complain that the record is incomplete.

While the parties in *Columbus* waived hearing, the effect is the same in this matter. Both here and in Columbus, an attempt was made to supplement the BOR record after the BTA record was closed, albeit by different means. *Cf. AP Hotels of Illinois, Inc. v. Franklin Cty. Bd. of Revision*, 118 Ohio St.3d 343, 2008-Ohio-2565, at fn. 1.

This Board similarly has held that a party cannot supplement any of the record on appeal after the close of this Board's hearing. *See, e.g., Stevenson v. Ottawa Cty. Bd. of Revision*

(Mar. 5, 2015), BTA No. 2014-2857 ("The Supreme Court has noted that '[f]ailure to certify the entire evidentiary record may prejudice the interest of the proponents of the omitted items, and therefore, boards of revision should take care to comply with the statutory duty to certify the entire record.' However, it is the parties' duty to assure that the statutory transcript contains the evidence presented to the BOR."). See *Columbus City School Dist. Bd. of Edn. v. Franklin Cty. Bd of Revision* (2001), 90 Ohio St.3d 564."); and, *Margaret Realty Company v. Cuyahoga Cty. Bd. of Revision* (Apr. 28, 2015), BTA No. 2014-1251("It is clear that these documents, which were offered for their evidentiary value, have been submitted well after the conclusion of this board's hearing. Thus, we deny appellant's motion to supplement the record, and do not consider them in our value determination.").

Accordingly, South-Western's motion to supplement the record must be denied as being untimely. This Board should not allow a party to add to the record once it is closed, especially where the documents should have been confirmed prior to hearing and where there was an opportunity to present the documents during the BTA's hearing, *i.e.*, when the record was still open. This is more than inadvertence.

2. The documents are not admissible.

Neither of the documents attached to South-Western's motion are admissible because they are not properly authenticated. Under Ohio law, proof of a writing's authenticity is required before the writing can be admitted into evidence. *Steinle v. Cincinnati*, 142 Ohio St. 550 (1944). Pursuant to Evid.R. 902(4), copies of public documents, which would include conveyance fee statements and deeds, are self-authenticating if "certified as correct by the custodian or other person authorized to make the certification." Certification may be

accomplished by affixing the appropriate signature and/or seal. See Evid.R. 902(1)-(3). Because South-Western failed to meet the self-authentication rules of Evid. R. 902, the documents are not admissible and cannot be relied upon by South-Western as evidence of value. *Sertingetti Constr. Co. v. Cincinnati*, 51 Ohio App.3d 1 (1988).

This Board has been consistent in its treatment of unauthenticated documents like those attached to South-Western's motion to supplement. In *Wyandot Ltd., Inc. v. Franklin Cty. Bd. of Revision* (Feb. 4, 2000), BTA No. 1999-K-531, the BTA held that a property owner could not submit as evidence an uncertified copy of a property record card. The BTA specifically ruled that the property record card was not admissible because the owner failed to comply with the self-authentication rules of Evid.R. 902. Similarly, in *Lancaster City Schools Bd. of Edn. v. Fairfield Cty. Bd. of Revision* (June 30, 1997), 1993-R-662, the BTA refused to admit documents purportedly from the Delaware Secretary of State's office because the documents were not certified. Then, in *Donta v. Jackson Cty. Bd. of Revision* (Sept. 19, 1997), BTA No. 1996-M-01068, the appellant had attempted to submit documents filed with the Jackson County Probate Court as part of a guardianship proceeding. The Board held the documents inadmissible because they "have not been certified by the custodian of the record as required by the rule [i.e., Evid.R. 902]." *See, also, Williams v. Cuyahoga Cty. Bd. of Revision* (Jan. 25, 1991), BTA No. 1989-D-766, *Ohio Art. Co. v. Williams Cty. Bd. of Revision* (Dec. 21, 1990), BTA No. 1988-H-390, and *Blackwood v. Lindley* (Jan. 31, 1986), BTA No. 1982-D-1331, for other cases finding that public documents must be identified and authenticated to be admissible.

Further, specifically with regard to the contents of the documents in issue, Evid.R. 1005 provides that, where a copy of an official record or recorded document is to be relied upon, the content of that document must meet certain standards before being admitted into evidence.

Evid.R. 1005 provides that the "contents of an official record, or of a document authorized to be recorded or filed and actually filed or recorded or filed *** may be proved by copy, certified as correct in accordance with Rule 902, Civ.R. 44, Crim.R. 27, or testified to be correct by a witness who has compared it with the original."

The documents in issue, not being certified, cannot meet the requirements of Evid.R. 902. Civ.R. 44 requires the certification by the seal of the proper public officer having custody. Again, no such certification or seal is provided with regard to either document. Finally, South-Western has offered no authenticating testimony from a witness who has seen the original and compared it to the copy. *See State v. Skimmerhorn*, 162 Ohio App.3d 762 (2005). Consequently, this Board must conclude that the documents and their content are inadmissible both through a motion to supplement the record and in this appeal.

3. The documents are unauthenticated hearsay, which can be afforded no probative value and do not meet the threshold requirements to establish a *prima facia* presumption of value.

Regardless of the whether the Board grants South-Western's motion, the statement and deed remain subject to the same defects in materiality and authentication raised both in the foregoing paragraphs and in Buckeye's briefs.[1] Ohio has consistently ruled that the BTA may not rely upon uncertified conveyance fee statements and deeds as evidence of value, nor can such unauthenticated evidence create a *prima facia* presumption in favor of any price contained in such documents. *Ross v. Levin*, 2010-Ohio-4009 (the BTA acted arbitrarily when it explicitly relied on evidence without requiring the authentication of the documents or the testimony of the persons who prepared them); *Almondtree Apartments of Columbus, Ltd. v. Bd. of Revision of Franklin Cty.* (June 28, 1988), Franklin App. No. 87AP-1216; and, *Cleveland*

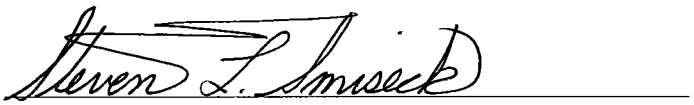
[1] This theme runs throughout Buckeye's two briefs. But see, more specifically, Buckeye's Merit Brief at 14-17.

Municipal Schl. Dist. Bd., of Edn. v. Cuyahoga Cty. Bd. of Revision (Apr. 19, 2002), BTA No. 2000-V-342, 349 ("we are unwilling to consider the ***uncertified*** conveyance fee statement as being competent, probative evidence of value."). Here, the issue of authentication is particularly relevant, given that Buckeye has presented certified copies of a conveyance fee statement and deed evidencing a sale at $1,921,084. The accuracy of the content of the unauthenticated documents cannot be overlooked, especially when Buckeye has established that the content of the documents at issue is erroneous. In short, no weight can be afforded to the documents South-Western now attempts to present. Certainly, the "corroborating indicia" and "other independent evidence" of value submitted by Buckeye would overcome any other evidence on the record.

CONCLUSION

Based upon the foregoing, Buckeye requests that this Board deny South-Western's motion to supplement the record in that it is both untimely and seeks to introduce inadmissible, unauthenticated evidence. Alternatively, to the extent the BTA may grant such a motion, this Board must afford the documents no weight, as they are unauthenticated, have been shown to contain errors, and have been rebutted by other evidence.

Respectfully Submitted,



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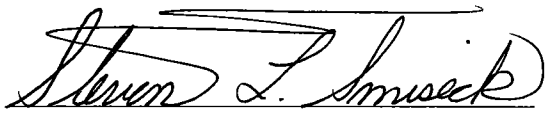
CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2015 a true and correct copy of Appellant's Memorandum Contra has been sent via e-mail to Kimberly G. Allison, [Kallison@richgillislawgroup.com] Rich & Gillis Law Group, LLC, 6400 Riverside Drive, Suite D, Dublin, Ohio 43017, as Legal Counsel for the Appellee Board of Education, and to William Stehle [wjstehle@franklincountyohio.gov], Assistant Prosecuting Attorney, 373 South High Street, 20th Floor, Columbus, Ohio 43215, as Legal Counsel for, Appellees, Franklin County Board of Revision and Franklin County Auditor.



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