IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

Case No.: 5D16-4049

DARDEN RESTAURANTS, INC., and GMRI, INC.,

Appellant,

v.

RICK SINGH, as Orange County Property Appraiser, and LEON BIEGALSKI, as Executive Director of the Florida Department of Revenue,

Appellees.

On appeal from the Ninth Judicial Circuit in and for Orange County, Florida

_____/

APPELLEE, RICK SINGH'S, ANSWER BRIEF

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Preliminary Statement

This brief refers to Defendants/Appellants, Darden Restaurants, Inc., and GMRI, Inc., collectively as "Darden"; Plaintiff/Appellee, Rick Singh, as Orange County Property Appraiser, as "OCPA"; and the tangible personal property at issue in the consolidated cases as "Darden's TPP" or the "Subject TPP." Record cites are designated with a parenthetical referencing "R." and the record page number(s) for the cited document, whether located in the original record, the first supplemental record, or the second supplemental record. Cites to Darden's Initial Brief and the Amici Curiae Briefs are in parentheticals with the following abbreviations: "I.B." = Initial Brief; "F.C.C." = Amicus Brief of Florida Chamber of Commerce; "U.S.C.C." = Amicus Brief of United States Chamber of Commerce.

Supplemental Statement of Case and Facts

Darden's Initial Brief inadequately describes and, in certain significant respects, mischaracterizes the trial evidence and the Final Judgment's rulings. Darden also omits any reference to the motion for involuntary judgment as a matter of law it made under section 194.301, Florida Statutes ("§ 194.301") at the close of OCPA's evidence, which Darden failed to renew at the end of its case in chief and trial. Since these deficiencies are material to the Court's resolution of this appeal, OCPA hereby provides its own supplemental Statement of the Case and Facts.

OCPA filed these consolidated actions pursuant to section 194.036, Florida Statutes ("§ 194.036"), after the Orange County Value Adjustment Board ("VAB") reduced OCPA's 2013 and 2014 just valuations of Darden's TPP from $29,033,332 to $20,503,172, and from $27,424,505 to $17,265,000, respectively. (R. 12 & 2924) Pursuant to § 194.036(2), OCPA bore the burden of proving its claims by a preponderance of the evidence. OCPA neither requested nor received a presumption of correctness for its valuations of Darden's TPP from the trial court.

This case's central dispute is the just valuation of Darden's TPP for ad valorem tax purposes -- an inherently factual issue. OCPA's lead trial witness was Brett Thayer, who over his 25+ years with OCPA has valued "tens of thousands" commercial TPP accounts. (R. 1147-54)

Mr. Thayer testified that OCPA used a mass appraisal cost approach to value Darden's TPP. (R. 1162, 1201) Under this methodology, OCPA calculates the TPP assets' "replacement cost new," and then depreciates the replacement cost down to the assets' fair market value based on their effective age (*i.e.*, the older the asset, the higher the depreciation, and the lower its value). (S.R. 1163) OCPA's mass appraisal cost approach is expressly authorized by Supreme Court precedent (*see infra* pp. 22-25) and the Florida Department of Revenue's "DOR") *Standard Measures of Value: Tangible Personal Property* (the "*Standard Measures*"), which

are promulgated pursuant to a legislative mandate and were admitted at trial. (R. 3202)

At trial, Mr. Thayer explained each step in OCPA's mass appraisal cost approach. (R. 1164-1209) In particular, Section VIII.F. of the *Standard Measures* guides property appraisers on how to account for functional and economic (a/k/a external) obsolescence in a mass appraisal cost approach by directing appraisers to "look to the market for any evidence of a change in value when formulating an estimate of the market value using the cost approach." (R. 3242) This provision further states that if the property appraiser identifies functional or economic obsolescence that he or she believes is impairing the value of TPP, the appraiser may further adjust its valuations downward to account for the obsolescence. (R. 3242) Mr. Thayer explained that OCPA's mass appraisal cost approach includes numerous steps to ensure compliance with these provisions. (R. 1182 – 96)

One of those very important steps is OCPA's constant evaluation of the life-years it has assigned to asset classes (*e.g.*, "computers" or "furniture & fixtures") in its "Life Assignment Guide," a central component of OCPA's mass appraisal cost approach. (R. 3317, 3328) As Mr. Thayer explained, OCPA annually assigns a useful life (*e.g.*, four, six, ten years and so on) to each TPP-asset class listed in its Life Assignment Guide. (R. 1182-83) OCPA also annually prepares its Present Worth Table, which lists "percent good" figures for each useful-life category,

which decline each year as the assets grow older and suffer more depreciation.[1] (R. 1172-90, 3316, 3326) Crucially, assets assigned a shorter useful life depreciate and, therefore, decline in value more rapidly, than assets assigned a longer useful life. (R. 1186-90, 3316, 3326)

Mr. Thayer testified that as a result of its continuous monitoring of the TPP market, OCPA "constantly" makes adjustments to its annual Life Assignment Guides. (R. 1186) Every such adjustment remembered by Mr. Thayer involved OCPA moving the asset class from a longer to a shorter useful life. (R. 1186 – 90) This results in a more rapid decrease in the assets' percent good, a more rapid increase in the assets' depreciation, and, concomitantly, a more rapid decrease in the assets' just value over time. (R. 1186 – 90)

Mr. Thayer's testimony proves that OCPA increased the depreciation for, thereby lowering the value of, the asset classes included in its 2013 and 2014 Life Assignment Guides used to value Darden's TPP when, in OCPA's judgment, it was necessary to account for functional or economic obsolescence observed in the TPP market. This is substantial, competent evidence of OCPA's consideration of, and accounting for, any such obsolescence impairing the value of Darden's TPP.

Ronny Cardell also testified in OCPA's case-in-chief. (R. 1463) Mr. Cardell

[1] "Percent good" is the inverse of depreciation. For example, an asset that is 70% "percent good" has depreciated by 30% from replacement cost new. (R. 1171)

worked in OCPA's TPP department for 30+ continuous years, serving as OCPA's field operations manager for the final ten, until his retirement shortly before trial. (R. 1463-66) He supervised appraisers in OCPA's "field department," who have year-round interaction with taxpayers regarding TPP-valuation issues and continually research the TPP market. (R. 1471-1477)

Mr. Cardell detailed numerous actions taken by OCPA's field department to examine the TPP market for indications of functional or economic obsolescence that may be impairing the value of TPP assets. These include, and are not limited to: a) talking to taxpayers who report their TPP is suffering from functional or economic obsolescence and reviewing related information provided by them; b) reviewing and researching evidence submitted by taxpayers in support of petitions filed with the VAB claiming value impairment due to obsolescence; c) performing year-round research on the internet and through interviews with manufacturers and used equipment dealers; d) attending onsite inspections of TPP; and e) preparing written studies of the TPP market referred to as "market studies." (R. 1474-86)

Like Mr. Thayer, Mr. Cardell also explained OCPA's movement of asset classes from longer to shorter useful lives in its Life Assignment Guide when OCPA determines the move is necessary to account for functional or economic obsolescence impairing the assets' value. (R. 1491 – 96) He described specific changes to OCPA's Life Assignment Guide and other adjustments OCPA has

made based on concerns raised, and information provided by, taxpayers regarding functional and economic obsolescence. (R. 1486-1496)

Darden's cross-examination of Mr. Cardell focused on OCPA's market studies. (R. 1621 - 68) Mr. Cardell addressed Darden's concerns and explained that when properly analyzed, the studies' data supports their conclusions, with which he agreed. (R. 1621 - 68) Mr. Cardell also estimated that OCPA's 2013 and 2014 market studies comprised a mere 10% of OCPA's research of the TPP market within its mass appraisal cost approach during those years.[2] (R. 1496-97)

Following OCPA's case-in-chief, Darden moved for involuntary dismissal based on the following arguments made by its counsel under § 194.301:

> [T]he Defendant moves for an involuntarily [sic] dismissal at this time, and the grounds are as follows. The burden of proof is set forth, as I've said, in section 194.301, Florida Statutes. The burden is to show that -- the burden is to establish that the assessments set by the Value Adjustment Board do not represent just value. And that must be done with evidence that cumulatively meets the requirements of the assessment statute and professionally accepted appraisal practices.
>
> Although, the Plaintiff did offer the opinion of Mr. Thayer that the just value is in excess of the Value Adjustment Board's assessments, there was no testimony or evidence that the Property Appraiser's original assessments comported to professionally

[2] The Florida Chamber falsely states that "OCPA's priority is unhampered reliance on [its] computer." (F.C.C., p. 19) This baseless, *ad hominem* attack is directly contrary to all of the above-described evidence of OCPA's human interaction with, and adjustments to, its mass appraisal cost approach.

> accepted appraisal practices. As I said earlier this morning, this part of the statute is akin to the standard of care expert in a negligence case.
>
> To meet this standard, it was incumbent on the Plaintiff to offer competent testimony from an expert witness to establish just what the professionally accepted appraisal practices are for valuing tangible personal property. Mr. Thayer never spoke to that point, neither did Mr. Cardell. There is zero evidence in the record on that issue by the Plaintiff.
>
> So without that evidence in the record, the plaintiff has not put on a prima facie case for relief and we would ask that the Court grant the Motion for Involuntary Dismissal.

(R. 1742-43; emphasis supplied) These arguments should look familiar as they are the same ones Darden is making in this appeal. The court denied Darden's motion. (R. 1763) Critically, Darden failed to renew its motion following the close of its own case-in-chief or at the end of trial.

Based on the above-described evidence, the trial court entered the Final Judgment for OCPA. (R. 859-877) Section II. of the judgment discusses the legal standards governing the court's adjudication of the case and ends by clearly stating: "As the Plaintiff and party initiating these actions, OCPA bears the burden of proof." (R. 863)

Section III.A. of the judgment then details OCPA's evidence in support of its just valuations of Darden's TPP. (R. 863-66) This section discusses the above-described testimony of Messrs. Thayer and Cardell and ends with the following summary:

> 21. In sum, OCPA calculated its 2013 and 2014 fair-market valuations of Darden's TPP by using a Mass Appraisal Cost Approach that complies with the DOR's *Standard Measures* and § 193.011, and which the Florida Supreme Court has approved for valuing property like Darden's TPP for ad valorem tax purposes. After considering all of the evidence, the Court finds that OCPA's $29,033,332 and $27,424,505 fair market valuations of Darden's TPP for 2013 and 2014, respectively, <u>are very reliable and credible.</u> (R. 866; emphasis supplied)

Certain subject matters <u>not</u> included in the Final Judgment's discussion of OCPA's evidence are also important for this appeal. In particular, Section III.A. is devoid of any reference to a supposed "value in use" valuation methodology. (R. 863-66) Moreover, Section III.A.'s only reference to the judgment in *Wal-Mart Stores, Inc. v. Crapo*, 97-CA-4728 (Fla. 8th Cir Ct. 2001) ("*Crapo*") is a "*Cf.*" cite in a footnote, which supports the trial court's factual finding that "any real or perceived problems with OCPA's 2013 and 2014 market studies are not material to OCPA's 2013 and 2014 valuations of Darden's TPP." (R. 865-66)

Section III.B. of the Final Judgment next discusses Darden's competing evidence in support of its proposed valuations of the Subject TPP. (R. 863-73) As stated therein, Lazaro Seijo of Landmapp was Darden's only trial witness to offer an opinion of value. (R. 866) The judgment also explains that he used a sales comparison approach to value the vast majority of Darden's TPP. (R. 866-67).

The judgment then details a litany of problems with Mr. Seijo's testimony, which cast tremendous doubt on the credibility and reliability of his valuation

opinions. (R. 867-873) Indeed, the trial court explained that Mr. Seijo violated perhaps the most fundamental tenet of the sales-comparison approach -- failing to ensure that the comparable sales (actually internet sales listings) he used to value Darden's TPP were "arms-length transactions," as defined in Florida Administrative Code Rule 12D-1.002(2) and Florida common law. (R. 867-69)

Other significant problems with Mr. Seijo's methodology and opinions detailed in the judgment include: a) his use of only one or two sales listings (*i.e.*, "comps") to value the majority of Darden's TPP, which violated professionally accepted appraisal practices according to Darden's own expert, Tammy Blackburn; b) his failure to adjust his comps to account for differences in quality and condition between them and Darden's TPP; c) his valuation of Darden's computer assets by simply lifting estimated values from the Web site usedprice.com, instead of performing his own value analysis on them; d) his failure to provide any comps or methodology to support his values of Darden's alarm system, artwork and decor, window treatments, and signage; e) obvious problems with his valuation of Darden's solar-power system; and f) his repeated impeachment with his prior inconsistent statements. (R. 869-873)

The trial court also identified one more problem with Mr. Seijo's value opinions. It noted his testimony "that Darden's use of the Subject TPP to operate its business on the Valuation Dates was irrelevant to his valuation methodology."

(R. 869) With reference thereto, the court explained Mr. Seijo's methodology violated 193.011(2), which "lists 'the present use of the property' as a relevant consideration for valuing TPP for ad valorem tax purposes." (R. 869) In support of this conclusion, the court quoted the ruling in *Crapo* that is the focus of Darden's argument in Section I.B. of its Initial Brief. (R. 869) (I.B., pp. 22-29) Thus, the court relied on that ruling when assessing Mr. Seijo's valuation methodology, not when analyzing, or even discussing, OCPA's valuation methodology or evidence.

The trial court set forth its "Findings of Ultimate Fact" in Section IV. of the Final Judgment. (R. 874-75) There, the court made the purely factual finding that OCPA's proved, "by at least a preponderance of the evidence," that its "$29,033,332 and $27,424,505 valuations of Darden's TPP represent its just and fair market value for 2013 and 2014, respectively, pursuant to Article VII, § 4." (R. 875) This finding establishes that: a) OCPA bore the burden of proving its case by a preponderance of the evidence; and b) after considering and weighing the parties' competing evidence, the court found that OCPA met that burden and was entitled to a judgment reinstating its 2013 and 2014 just valuations of Darden's TPP.

Summary of Argument

The Final Judgment must be affirmed because substantial, competent evidence supports the trial court's factual findings that OCPA's valuations of Darden's TPP represent its just value and are more "reliable and credible" than

Darden's proposed valuations. Darden's entire brief is a futile exercise in trying to escape this inescapable conclusion.

Darden repeatedly argues that the trial court violated § 194.301. Darden, however, unequivocally waived all of its arguments under this statute by failing to renew its motion for involuntary dismissal at the close of its evidence and the end of trial. Recognizing this fact, Darden has based nearly all of its arguments on rulings that the trial court literally did not make, and which are not, therefore, in the record.

First, Darden claims that the trial court violated § 194.301 by approving OCPA's utilization of a so called "value in use" methodology to value Darden's TPP. The trial court made no such ruling in the Final Judgment or otherwise.

Second, Darden argues that § 194.301 required OCPA to call an expert witness from the "private sector" to opine that OCPA used "professionally accepted appraisal practices" to value Darden's TPP. Any such testimony would, however, constitute improper bolstering of an expert in clear violation of section 90.706, Florida Statutes ("§ 90.706"). OCPA's proved its use of professionally accepted appraisal practices to value Darden's TPP with detailed evidence describing its mass appraisal cost approach, which has been long approved for valuing TPP by the Florida Supreme Court and fully complied with the professionally accepted appraisal practices set forth in the *Standard Measures*.

Third, Darden falsely asserts that the trial court accorded a presumption of correctness to OCPA's valuations in violation of § 194.301. This assertion is quite remarkable since: a) OCPA never requested a presumption of correctness for its valuations; b) the trial court never accorded them a presumption of correctness; and c) the Final Judgment clearly states that OCPA was required to prove, and did prove, its case by a preponderance of the evidence.

Fourth, Darden claims OCPA took the position at trial that Darden's property does not suffer from any functional or economic obsolescence. This claim is utterly false. OCPA's position at trial was that its mass appraisal cost approach accounted for any functional or economic obsolescence that impaired the value of Darden's TPP, not that it was unimpaired by any such obsolescence. The Final Judgment makes this exact ruling.

Fifth, Darden rehashes an argument it first raised weeks after the trial. Even though Darden reported its alarm system, window treatments, music system, and solar power system as TPP assets in its TPP tax returns, Darden argued in a post-trial motion for rehearing that those assets were really not TPP and were instead part of the real property. The trial court summarily rejected Darden's prejudicially tardy and meritless arguments. This Court should do the same.

Finally, Darden incorrectly asserts that OCPA's valuations of Darden's TPP are based on its market studies, and the trial court erred by approving them.

Contrary to this assertion, OCPA's market studies were only a minor component of the mass appraisal cost approach it used to value Darden's TPP, and the trial court ruled they were not material to OCPA's ultimate valuations of Darden's TPP.

Standard of Review

This case was tried before the trial court, which after hearing, considering, and weighing the evidence made the factual finding, *inter alia*, that "OCPA's $29,033,332 and $27,424,505 valuations of Darden's TPP represent its just and fair market value for 2013 and 2014, respectively." This factual finding, and those related to it, come to the Court clothed with a presumption of correctness, and they must be affirmed if there is any substantial, competent evidence supporting them. *RH Resorts, Ltd. v. Donegan*, 881 So. 2d 1152, 1154 (Fla. 5th DCA 2004); *see also Love PGI Partners, LP v. Schultz*, 706 So. 2d 887, 890 (Fla. 5th DCA 1998)("The findings of the trial court as to disputed facts cannot be overturned by this court.")

Darden knows it cannot possibly prevail under this standard of review. Accordingly, Darden strives to convince this Court that this appeal really concerns legal errors subject to a *de novo* review. Indeed, the first sentence of Darden's "Legal Argument" proclaims -- with more than a hint of desperation -- "[t]his is not an appeal about the weighing of evidence." (I.B., p. 21) Since we are quoting

Shakespeare,[3] Darden "doth protest too much, methinks." William Shakespeare, *Hamlet*, act 3, sc. 2.

Darden cites *Rippy v. Shepard*, 80 So. 3d 305 (Fla. 2012) in support of its proffered *de novo* standard of review. (I.B., pp. 21, 37) *Rippy* involved an order granting a motion to dismiss the plaintiff's complaint. We are not here on a motion to dismiss. As was the case in *RH Resorts* and *Love PGI*, we are here following the trial of a factual dispute in the field of ad valorem taxation. In addition to citing clearly distinguishable case law, Darden's Initial Brief repeatedly proffers literally non-existent rulings as the foundation for its arguments in a futile attempt to convert this case into legal dispute. These instances are detailed below.

[3] While fun, Darden's analogy to King Richard, III, is also seriously flawed. (I.B., p. 26) The king seeks to acquire a horse and would, therefore, be the buyer in the proposed sale transaction. On the other hand, Darden owns its TPP and would be the seller in its hypothetical sale. Moreover, since the king so desperately needs a horse he would give up his entire kingdom for one, the horse vendor can clearly take advantage of the exigencies of the king's situation. By definition, therefore, the horse sale (like Mr. Seijo's comps) is not an arms-length transaction appropriate for valuing property under Florida law, including F.A.C. Rule 12D-1.002(2). Darden, on the other hand, is under no duress to sell its TPP.

Argument

I. THE TRIAL COURT'S FACTUAL FINDINGS THAT OCPA'S VALUATIONS OF DARDEN'S TPP REPRESENT ITS JUST VALUE AND ARE MORE RELIABLE AND CREDIBLE THAN MR. SEIJO'S OPPOSING VALUATIONS ARE SUPPORTED BY SUBSTANTIAL, COMPETENT EVIDENCE.

Regardless of Darden's various arguments on (real or fabricated) sub-issues in this case, it cannot be disputed that following the parties' admission of competing trial evidence, the trial court made the following "Findings of Ultimate Fact":

> 30. After considering and weighing all of the evidence the parties admitted at trial including, but not limited to, the evidence described herein, the Court finds that OCPA proved by at least a preponderance of the evidence that:
>
> a) The Mass Appraisal Cost Approach used by OCPA to value Darden's TPP promotes "equity within and between all classes of property among the taxing jurisdictions in Florida," as well as between Orange County's taxpayers, as set forth in the Introduction to the DOR's *Standard Measures*.
>
> b) The Mass Appraisal Cost Approach used by OCPA to value Darden's TPP is considerably more reliable and credible than Landmapp and Mr. Seijo's sales-comparison approach and market derived cost approach valuation methodologies.
>
> c) OCPA's $29,033,332 and $27,424,505 valuations of Darden's TPP represent its just and fair market value for 2013 and 2014, respectively, pursuant to Article VII, § 4.

(R. 874-75; emphasis supplied) Nothing argued by Darden or otherwise can alter

the irrefutable conclusion that these dispositive factual findings are supported by substantial, competent evidence. Thus, the Final Judgment for OCPA based on them must be affirmed. *See supra RH Resorts* and *Love PGI*.

II. DARDEN WAIVED ITS ARGUMENTS UNDER § 194.301 BY FAILING TO RENEW ITS MOTION FOR INVOLUNTARY DISMISSAL AT TRIAL, AND, THEREFORE, DARDEN HAS ATTEMPTED TO BASE ITS ARGUMENTS UNDER THIS STATUTE ON NON-EXISTENT RULINGS.

By Darden's own admission, all of its arguments are grounded in its assertion that the trial court violated § 194.301. (I.B., p. 21) Darden, however, failed to preserve its arguments under § 194.301 for review. As such, Darden has attempted to base those arguments on non-existent trial court rulings.

A. Darden waived its arguments under § 194.301 by failing to renew its motion for involuntary dismissal at the close of Darden's case-in-chief and the end of trial.

Despite basing its entire appeal on the argument that the trial court erred in its application of § 194.301, Darden does not identify a single reference to this statute in the Final Judgment, much less any ruling therein based on it. This is because the Final Judgment contains no such ruling.

As quoted above, Darden moved for an involuntary dismissal at the close of OCPA's case-in-chief based on the same arguments under § 194.301 Darden is now making in this appeal. For example, Darden's trial counsel argued that "there

was no testimony or evidence that the Property Appraiser's original assessments comported to professionally accepted appraisal practices." *See supra* pp. 6 - 7. Darden's Initial Brief likewise proposes the following language for a hypothetical appellate opinion: "The Property Appraiser, while recognizing that its burden in this case was altered by amendments to the law [*i.e.*, § 194.301] in 2009, presented no evidence to permit the trial court to conclude Property Appraiser's assessment was based on professionally accepted appraisal practices." (I.B., p. 18)

The trial court's denial of Darden's motion for involuntary dismissal perfectly "tees up" Darden's appellate arguments under § 194.301. Yet, Darden's Initial Brief does not even mention that motion, much less argue for a reversal based on the trial court's denial of it. Why is this? Darden has waived its arguments under § 194.301 by failing to renew its motion for involuntary dismissal at the close of its own case-in-chief or the end of trial. *Plaza Builders, Inc. v. Regis*, 502 So. 2d 918, 922 (Fla. 2d DCA 1986); *see also Honda Motor Co., Ltd. v. Marcus*, 440 So. 2d 373, 375 (Fla. 4th DCA 1983)(explaining that a defendant's failure to renew a motion for directed verdict at the close of all evidence results in a failure to preserve the arguments made therein for appeal).

It is axiomatic that an appellant cannot obtain a reversal of a non-existent ruling. *French v. Department of Children and Families*, 920 So. 2d 671, 676-77 (Fla. 5th DCA 2006); *Fleming v. Peoples First Financial Sav. and Loan Ass'n*, 667

So. 2d 273, 274 (Fla. 1st DCA 1995)(citing P. Padovano, *Florida Appellate Practice* § 5.2 at 70 (West 1988)). The only ruling that could have supported Darden's current arguments under § 194.301 is the trial court's denial of its motion for involuntary dismissal at trial. Darden, however, failed to preserve that ruling for review, and the Initial Brief does not raise it as grounds for a reversal. All of Darden's arguments under § 194.301 should, therefore, be facially rejected because there is no preserved ruling in the Final Judgment or otherwise to support them.

B. Contrary to Darden's arguments, the Final Judgment does not rule that OCPA utilized a "value in use" standard to value Darden's TPP, and the judgment quotes the ruling in *Crapo* challenged by Darden when analyzing Mr. Seijo's valuation methodology, not any evidence presented by OCPA in its case-in-chief.

Section I.B. of the Initial Brief claims that the Final Judgment violated § 194.301 by approving OCPA's utilization of a so-called "value in use" methodology to value Darden's TPP, as do Darden's amici curiae. (I.B., pp. 22-29, F.C.C., pp. 13-20, U.S.C.C., 14-19) This is a prime example of a non-existent, "phantom" ruling. The Final Judgment's discussion of OCPA's evidence in its case-in-chief, including its description of OCPA's valuation methodology, is devoid of any reference to OCPA's utilization of a "value in use" standard. (R. 863-66) As explained above, Darden cannot obtain a reversal based on a non-existent ruling. *See supra French* and *Fleming*, p. 17.

Furthermore, Darden attempted to admit evidence vaguely (and incorrectly) suggesting that OCPA had used a so-called "value in use" methodology to value the Subject TPP through one of its experts, Tammy Blackburn. (R. 2131-33) On cross examination, however, Ms. Blackburn was forced to admit that: a) she was asserting OCPA had used a particular "value in use" methodology called "fair market value in continued use with assumed earnings"; and b) this particular methodology examines the taxpayer's business earnings as a relevant consideration in the TPP's valuation. (R. 2358-62) OCPA presented no evidence in its case-in-chief suggesting that OCPA used any such methodology to value Darden's TPP. On rebuttal, Mr. Thayer unequivocally testified that OCPA did not do so. (R. 2730-32) These are additional reasons why the Final Judgment is devoid of any finding that OCPA valued Darden's TPP with a so-called "value in use" methodology.

Section I.B. of the Initial Brief does identify and challenge one ruling that actually exists in the Final Judgment, which is the following language from *Crapo*:

> Quite obviously, there would be no willing seller that would sell relatively new property for ten cents on the dollar, especially when it had recently been installed in an ongoing business. The fact that there is a "market" in used equipment totally fails to take into consideration the reality of the way businesses are run. Ongoing operations such as Wal-Mart simply do not sell equipment that has a remaining useful life to the owner.

(R. 869 quoting *Crapo*, 97-CA-4728 at * 4.) While somewhat unclear, Darden

appears to assert that the judgment's adoption of this ruling somehow suggests that OCPA utilized a "value in use" methodology to value Darden's TPP. Darden's amici curiae also take issue this ruling. (F.C.C., pp. 14-17, U.S.C.C., p. 13)

Contrary to their arguments, the Final Judgment's discussion of *Crapo*'s above-quoted ruling applies exclusively to Mr. Seijo's valuation methodology, not any of OCPA's evidence regarding its own valuation methodology or otherwise. The Florida Chamber correctly recognizes this fact by quoting the Final Judgment's introductory paragraph to the *Crapo* ruling, which begins by stating "Mr. Seijo also testified that. . . ." (F.C.C., p. 14) The trial court's application of *Crapo* to Mr. Seijo's valuation methodology does not somehow demonstrate that OCPA utilized a supposed "value in use" valuation methodology to value Darden's TPP.

Mr. Seijo's violation of *Crapo* is just one of many material problems with his valuation opinions identified by the trial court. *See supra* pp. 8 - 10. The court was authorized to reject Mr. Seijo's opinions based on any of one of those problems, including his repeated impeachment, or simply because the court found them not to be credible. *Corbett v. Wilson*, 48 So. 3d 131, 134 (Fla. 5th DCA 2010)(holding that the fact finder at trial "is free to weigh the credibility of an expert witness, just as any other witness, and to reject such testimony, even if uncontradicted.").

It is worth noting that both *Crapo*'s above-quoted ruling, and the trial court's application of it to Mr. Seijo's grossly defective valuation methodology, are imminently correct. Indeed, the Florida Supreme Court has expressly adopted a portion of *Crapo* and praised its "comprehensive analysis" of TPP-valuation issues. *Mazourek v. Wal-Mart Stores, Inc.*, 831 So. 2d 85, 91 (Fla. 2002).

Section 193.011(2) compels consideration of "the present use of the property" when valuing TPP for ad valorem tax purposes. § 193.011(2), Fla. Stat. (2016). The Florida Supreme Court has also instructed property appraisers "to consider all of the factors [the seller and buyer] would regard as important in fixing the price of the property" when valuing it for ad valorem tax purposes. *Southern Bell Tel. & Tel. Co. v. Dade County*, 275 So. 2d 4, 8 (Fla. 1973). As explained in *Crapo*, a company that is using an asset to operate its business is obviously going to consider its present use and need for the asset when fixing its selling price.

Darden is presently using the Subject TPP to operate it business and, as stated in *Crapo*, is clearly not prepared to sell it at fire-sale prices. *See supra* p. 19. This stands in stark contrast to the assets Mr. Seijo used in his appraisals, which were being liquidated on the internet. Those sales listings involving an "element of liquidation" are not appropriate for valuing TPP for ad valorem tax purposes. *See Hillsborough County v. Knight & Wall Co.*, 14 So. 2d 703, 705 (Fla. 1943); *see also Southern Bell*, 275 So. 2d at 6 (disqualifying "sheriff's sales, sales by

fiduciaries and the like" as non-arm's length transactions in the plaintiff's TPP valuation model); *Florida East Coast Ry. Co. v. Department of Revenue*, 620 So. 2d 1051, 1058-59 (Fla. 1st DCA 1993)("[T]he threshold requirement of comparability [is] the presence of a willing purchaser and a willing seller, in an arm's length transaction."). Thus, the trial court correctly ruled that Mr. Seijo's valuation methodology violates both § 193.011(2) and *Crapo*.

Additional language in *Hillsborough* further establishes this fact. With reference to its earlier decision in *City of Tampa v. Colgan*, 163 So. 577 (Fla. 1935), the Court explained the proper methodology for valuing the assets of an operating hardware store:

> Turning to that opinion we find the statement that the "value for purposes of taxation, is to be determined by taking into account not one, but all, favorable and unfavorable circumstances that would control the admeasurement of its present value were it placed upon the market to be sold by the owner." There is in the opinion also this language: 'If similar property is commonly bought and sold, the price which it brings is the best test of the value. But where an established market is nonexistent the process of valuation must comprehend not only one but all of the influencing factors going to make up intrinsic value.'
>
> * * *
>
> Recurring to *City of Tampa v. Colgan*, it seems to us illogical here to apply, in their entirety, the rules there announced, mainly because of the inherent difference between real and personal property. It was written there, to repeat, that when there was an established market where property of the kind then under consideration was 'commonly

> bought and sold * * * the assessors need look no further.' Even though hardware is 'commonly' dealt in it appears impractical to judge the worth of appellee's stock by what it could be sold for in bulk, or for that matter, article by article, to one purchaser.
>
> Obviously there is a market for the merchandise; a market where there may be purchased goods to replenish the stock; a market where appellee sells to the customers whom it has served for more than fifty years. . . . Because the market price cannot be relied upon, therefore, as a definite measure of value, the assessor should weight all the circumstances detailed by us. He allowed a deduction of 20% for depreciation and this, under the facts, seems reasonable and not ungenerous.

Id. at 350 and 352-353 (emphasis supplied).

The silence of Darden and its amici curiae regarding *Hillsborough*'s binding authority is deafening. Even though there was "obviously" a "market" for the hardware at issue in *Hillsborough*, the Court held that marketplace sales prices could not be relied upon to value the hardware for ad valorem tax purposes. The internet liquidation "market" that Mr. Seijo used to value Darden's TPP suffers from this same defect. Like *Crapo*, the above-quoted holdings in *Hillsborough* confirm that when an asset's owner is using it to operate a business (*i.e.*, the property's "present use"), the price the asset would bring in a liquidation or fire sale is not indicative of its just value for ad valorem tax purposes.

Darden also appears to suggest that one of OCPA's interrogatory answers shows that it improperly considered Darden's present use of the Subject TPP as a

component of its "intrinsic value." (I.B., p. 11) Contrary to Darden's argument, the interrogatory answer is entirely consistent with *Hillsborough*'s holding that "the process of valuation must comprehend not only one, but all of the influencing factors going to make up intrinsic value." (emphasis supplied)

Moreover, the interrogatory answer is merely one piece of evidence that the trial court was authorized to accept or reject in its entirety. *See, e.g.*, *Durousseau v. State*, 55 So. 3d 543, 556 (Fla. 2010). The Final Judgment contains no ruling that OCPA utilized a "value in use" methodology to value Darden's TPP based on the interrogatory answer or otherwise. Darden's arguments based on an imaginary "value in use" standard and *Crapo* cannot alter the inescapable fact that OCPA admitted substantial, competent evidence supporting the trial court's factual finding that OCPA's valuations of Darden's TPP represent its just value.

III. DARDEN'S ARGUMENTS UNDER § 194.301 ARE CONTRARY TO FLORIDA LAW, AND DARDEN AND ITS AMICI CURIAE HAVE FALSELY ASSERTED THAT THE TRIAL COURT ACCORDED A PRESUMPTION OF CORRECTNESS TO OCPA'S VALUATIONS.

Assuming *arguendo* Darden had preserved its arguments under § 194.301 (it did not), they are without merit. Messrs. Thayer and Cardell gave detailed expert testimony and presented documentary evidence explaining that OCPA valued Darden's TPP with a mass appraisal cost approach that is fully compliant with, and long accepted by, Florida law. The evidence also proved that most, if not all, of

Florida's county property appraisers use a mass appraisal cost approach to value TPP, while none use a sales-comparison approach like the one employed by Mr. Seijo. (R. 1444 & 1449) Despite this substantial, competent evidence, Darden argues that § 194.301 required OCPA to bring in an "independent" expert witness with "private sector experience" to utter the magic words that OCPA complied with "professionally accepted appraisal practices." (I.B., p. 11)

In other words, Darden advocates for a rule that would require the bolstering of an expert as strictly prohibited under § 90.706. Darden asserts that property appraisers must support their valuation opinions either by appraisal treatises admitted directly into evidence, or through the testimony of an expert witness from the "private sector." Either way, such evidence would constitute improper bolstering of the property appraiser's valuation opinions that is "fundamental" and "clear" error. *See, e.g.*, *Phillip Morris, Inc. v. Janoff*, 901 So. 2d 141, 144 (Fla. 3rd DCA 2004); *Carver v. Orange County*, 444 So. 2d 452, 454 (Fla. 5th DCA 1983).

A. <u>OCPA's mass appraisal cost approach has been expressly approved by the Florida Supreme Court and fully complies with Florida law.</u>

Contrary to Darden's arguments, OCPA presented prima facie evidence of its use of "professionally accepted appraisal practices" to value Darden's TPP for purposes of § 194.301 or otherwise by admitting evidence of OCPA's mass appraisal cost approach -- a valuation methodology long accepted under, and in full

compliance with, Florida law.

Twenty years ago, the Florida Supreme Court held that the cost approach is "one of three well-recognized approaches to determining the value of tangible personal property" for ad valorem tax purposes. *Havill v. Scripps Howard Cable Co.*, 742 So. 2d 210, 212 (Fla. 1998). In so doing, the Court explained that "[t]he cost approach simply values the original, reproduction or replacement cost of the property, less an allowance for depreciation." *Id.* at 213.

Four years later, the Supreme Court considered county property appraisers' use of a mass appraisal cost approach to value Wal-Mart's TPP, which would include furniture, fixtures, equipment, and computers like those owned by Darden. *Mazourek v. Wal-Mart Stores, Inc.*, 831 So. 2d 85 (Fla. 2002). The Court described the trial court proceedings, which included a non-jury trial, as follows:

> The tangible personal property supervisor in Mazourek's office used a mass appraisal cost approach to determine the assessment amount. . . .
>
> The trial court concluded that Mazourek properly considered all factors enumerated in section 193.011 and that the mass appraisal cost approach method was appropriate in this case.

Id. at 87. In the course of quashing this court's intervening decision and affirming the trial court's entry of judgment for the property appraisers, *Mazourek* expressly approved their use of the mass appraisal cost approach to value Wal-Mart's TPP. *Id.* at 87 & 91-92. The Court explained the steps in this approach and then held:

> The cost approach can be applied to almost all types of personal property. Its application is especially well suited to the valuation of machinery and equipment, for which it is possible to identify make and model (model number) of the item, year acquired, and total acquisition costs including freight, installation, taxes, and fees.

Id. at 89 - 90 (quoting International Ass'n of Assessing Officers, *Property Assessment Valuation* 360 (2d ed.1996) (emphasis removed)). Thus, *Mazourek* expressly approved property appraisers' use of a mass appraisal cost approach to value basic TPP like Darden's for ad valorem tax purposes.

Like the property appraisers in *Mazourek*, OCPA used a mass appraisal cost approach to value Darden's TPP. Like the trial court in *Mazourek*, the court below heard, considered, and weighed the parties' competing trial evidence regarding the appropriate appraisal practices for valuing Darden's TPP, and then ruled in OCPA's favor. In so doing, the trial court made the purely factual findings that: a) "OCPA's $29,033,332 and $27,424,505 fair market valuations of Darden's TPP for 2013 and 2014, respectively, are very reliable and credible"; and b) "the Mass Appraisal Cost Approach used by OCPA to value Darden's TPP is considerably more reliable and credible than" Mr. Seijo's valuation methodologies. (R. 874-75) Under *Mazourek*, the trial court was unquestionably authorized to make these findings, and the mass appraisal cost approach OCPA used to value Darden's TPP is clearly a "professionally accepted appraisal practice" for purposes of § 194.301.

Additionally, section 195.032, Florida Statutes ("§ 195.032"), mandates that

the DOR "shall establish and promulgate" the *Standard Measures*, which must not be "inconsistent with those standards provided by law, to be used by property appraisers in all counties. . . ." § 195.032, Fla. Stat. (2012). This statute further commands that the *Standard Measures* "shall assist the property appraiser in the valuation of property and be deemed prima facie correct . . . ." *Id.* Their introduction explains that the *Standard Measures* "help achieve equity in the mass appraisal of tangible personal property through uniform application of valuation guidelines," and further the "Florida Constitution's mandate[] that general law regulations be prescribed to secure a just valuation of all property for ad valorem taxation." (R. 3204)

Both *Scripts Howard* and *Mazourek* quoted and relied upon the *Standard Measures* in reaching their decisions. *Scripps Howard*, 742 So. 2d at 213-14; *Mazourek*, 831 So. 2d at 89. In *Scripps Howard*, the Court explained that the *Standard Measures* "strongly discourage[d]" the property appraiser's income approach and concluded, therefore, that this methodology was invalid. 742 So. 2d at 214. Conversely, the *Mazourek* Court found that the property appraisers' mass appraisal cost approach complied with the *Standard Measures* and was, therefore, an appropriate appraisal practice for valuing Wal-Mart's TPP. 831 So. 2d at 88-90.

As detailed above, OCPA's trial evidence proves that the mass appraisal cost approach OCPA used to value Darden's TPP is authorized by, and fully complied

with, the *Standard Measures*. *See supra* pp. 2 – 6. Pursuant to § 195.032's mandate that the appraisal practices set forth in the *Standard Measures* shall be deemed "prima facie correct," and the Supreme Court's adoption of the *Standard Measures* in *Scripps-Howard* and *Mazourek*, this substantial, competent evidence further establishes OCPA's use of "professionally accepted appraisal practices" to value Darden's TPP for purposes of § 194.301 or otherwise.

Darden's argument to the contrary is belied by the admissions of its own amicus curiae, the Florida Chamber. Its brief expressly concedes that under the 2009 amendment to § 194.301, OCPA's valuations of Darden's TPP "would not be reduced" if they are based on a "sound methodology." (F.C.C., p. 10, n. 4) Pursuant to *Scripps Howard*, *Mazourek*, the *Standard Measures*, and § 195.032, OCPA's mass appraisal cost approach is a "sound methodology." The Florida Chamber also states that OCPA must "adhere to the standards of [its] profession . . . in the daily discharge of [its] duties; it does not spring to life only when an assessment is challenged." (F.C.C., p. 11). Exactly. OCPA does not have, nor does it need, an expert witness from the "private sector" standing over its representatives' shoulders to ensure they use professionally accepted appraisal practices when valuing the thousands of TPP accounts in Orange County.

Darden had every opportunity to prove that OCPA did not use professionally accepted appraisal practices when valuing the Subject TPP. The testimony of

Darden's expert witnesses, Jerome Weinert and Tammy Blackburn, was entirely devoted to that failed endeavor. (R. 1848-1948, 2114-2266, 2302-74) After considering and weighing all of the evidence, the trial court rejected Darden's position and found that OCPA's valuations are "considerably more reliable and credible" than Mr. Seijo's, and represent the just value of Darden's TPP. Those factual findings cannot be disturbed in this appeal.

B. The trial court did not accord a presumption of correctness to OCPA's valuations of Darden's TPP, which renders Darden's additional arguments under § 194.301 factually baseless and irrelevant.

Section III.B. of Darden's Initial Brief raises a different line of argument under § 194.301. (I.B., pp. 37-41) There, Darden incorrectly asserts that the trial court accorded OCPA's valuation of Darden's TPP a presumption of correctness in violation of § 194.301. Darden's amici curiae make the same incorrect assertion. The U.S. Chamber goes so far as to state that it is "simply absurd" to "return to the good old days" of when a taxpayer had to prove the "imperial" property appraiser's valuations were not supported by "any reasonable hypothesis." (U.S.C.C., pp. 10-11) What is "simply absurd" is Darden's and its amici curiae's grossly incorrect suggestion that the trial court applied the "no reasonable hypothesis" burden of proof in this case, or otherwise accorded a presumption of correctness to OCPA's valuations of Darden's TPP.

This is yet another example of their attempt to impermissibly obtain a reversal based on a non-existent ruling. *See supra French* and *Fleming*, p. 17. The Final Judgment does not state that OCPA's valuations are presumed correct. OCPA never asked the trial court to make that ruling, and the court did not do so.

Indeed, Darden initiates its argument by stating that the Final Judgment "fails to recite . . . [that] the Property Appraiser was not entitled to a presumption of correctness." (I.B., p. 38-39; emphasis supplied) Darden, therefore, argues that the absence of language in the Final Judgment expressly stating that the trial court did not accord a presumption of correctness to OCPA's valuations, necessarily means the trial court did so. In addition to being utterly devoid of logic, this argument directly conflicts with the Final Judgment's express rulings that OCPA bore the burden of proof on its claims, and proved the trial court's factual findings by a preponderance of evidence. (R. 863, 874)

Darden attempts to support its "ruling-by-omission" argument by noting that the Final Judgment is "replete" with language describing the significant problems with Mr. Seijo's testimony. (I.B, p. 38) This makes no sense. The trial court's listing of the myriad problems with Mr. Seijo's valuations of Darden's TPP does not even arguably suggest that it somehow accorded a presumption of correctness to OCPA's opposing and independent valuations.

Darden eventually identifies two actual rulings in the Final Judgment it

claims demonstrate the trial court's according of a presumption of correctness to OCPA's valuations. These are the judgment's restatement of the following general principles of ad valorem tax law: a) "'The property appraiser's determination of assessment value is an exercise of administrative discretion within the officer's field of expertise.'" (R. 862 quoting *Mazourek*, 831 So. 2d at 89); and b) "'The particular method of valuation, and weight to be given to each factor in § 193.011, is left to the discretion of the' property appraiser." (R. 863 quoting *Valencia Center, Inc. v. Bystrom*, 543 So. 2d 214, 216 (Fla. 1989)) (I.B. p. 39) The Florida Chamber also claims these holdings are "no longer correct" under the 2009 amendment to § 194.301. (F.C.C., p. 11)

Preliminarily, their argument once again suffers from a fatal defect in logic. The trial court's recognition of property appraisers' general discretion and expertise in valuing property for ad valorem purposes does not equate to a ruling that OCPA's specific valuations of Darden's TPP are presumed correct.

More importantly, Darden and its amici curiae urge this Court to adopt a clearly unconstitutional interpretation of § 194.301 by arguing that its 2009 amendment abrogated the above-quoted holdings from *Mazourek* and *Bystrom*. As explained by the Florida Supreme Court when discussing these same holdings:

> Under Florida's Constitution and this Court's case law the particular method of valuation and the weight to be given the factors set out in section 193.011 are left to the discretion of the appraiser.

> *See Bystrom*, 543 So. 2d at 216–17. The "[d]etermination of just value inherently and necessarily requires the exercise of appraisal judgment and broad discretion by Florida property appraisers." *Dep't of Revenue v. Ford*, 438 So. 2d 798, 802 (Fla.1983) (quoting trial court's judgment). Thus, "[t]he property appraiser's determination of assessment value [is] an exercise of administrative discretion within the officer's field of expertise." *Mazourek v. Wal–Mart Stores, Inc.*, 831 So. 2d 85, 89 (Fla. 2002) (quoting *Blake v. Xerox Corp.*, 447 So. 2d 1348, 1350 (Fla.1984)).

Florida Dept. of Revenue v. Howard, 916 So. 2d 640, 643 (Fla. 2005)(emphasis supplied). *Howard* later reiterates that property appraisers have "broad discretion to determine just value in accord with article VII, section 4" of the Constitution. *Id.*

As explained in *Howard*, the Florida Constitution grants property appraisers the broad discretion they enjoy in valuing property for ad valorem tax purposes. The Legislature cannot abrogate that constitutionally derived discretion by amending § 194.301 or otherwise. Thus, the above-quoted holdings of *Mazourek* and *Bystrom* remain good law. Regardless, the Final Judgment's restatement of those general principles does not even arguably demonstrate that the trial court accorded OCPA's valuations a presumption of correctness.

Even assuming *arguendo* the above-quoted holdings in *Mazourek* and *Bystrom* have been legislatively abrogated (they have not), this would not alter the instant case's outcome. The trial court's specific factual findings that OCPA's valuations are "considerably more reliable and credible" than Darden's proffered appraisals and represent the just value of Darden's TPP, are supported by

substantial, competent evidence. An incorrect statement of a general principle of law cannot, and would not, alter this inescapable conclusion.

At any rate, the trial court did not accord OCPA's valuations of Darden's TPP a presumption of correctness in the Final Judgment or otherwise. As such, Darden's and its amici curiae's entire discussion of the presumption of correctness, including its (actual or purported) treatment under the 2009 amendment to § 194.301, is contrary to the record, factually incorrect, and irrelevant to this appeal.

IV. OCPA'S MASS APPRAISAL COST APPROACH ACCOUNTED FOR ANY FUNCTIONAL OR ECONOMIC OBSOLESCENCE IMPAIRING THE VALUE OF DARDEN'S TPP.

Darden's argument in Section II.B. of the Initial Brief likewise conflicts with the trial-court record and suffers from fatal gaps in logic. (I.B., pp. 30-36) Without any record cite, Darden incorrectly asserts that OCPA took the position at trial that "Darden's property does not suffer from functional or economic obsolescence." (I.B., p. 31) Based on that assertion, Darden argues that OCPA was required to prove the absence of functional and economic obsolescence and failed to do so. (I.B., p. 30) Once again, Darden's argument has foundation in the record.

The argument is wholly dependent on three indispensable prerequisites. First, OCPA must have claimed that "Darden's property does not suffer from functional or economic obsolescence." Second, OCPA must have failed to admit

any evidence that the methodology it used to value Darden's TPP accounted for functional or economic obsolescence impairing the value of Darden's TPP. Third, the trial court must have ruled that the value of Darden's TPP was not impaired by any functional or economic obsolescence. None of these events occurred below.

First, OCPA did not assert that "Darden's property does not suffer from functional or economic obsolescence." Instead, OCPA asserted that its Mass appraisal cost approach, and its resulting valuations, accounted for any functional or economic obsolescence that was impairing the value of Darden's TPP.

Second, OCPA admitted plenty of substantial, competent, evidence to support this position, including the testimony of Messrs. Thayer and Cardell explaining: a) OCPA's continuous research and examination of the TPP market in search of functional or economic obsolescence that may be impairing assets values; and b) OCPA's movement of asset categories from longer to shorter lives in its Life Assignment Guide when, in OCPA's judgment, the change is necessary to capture functional or economic obsolescence impairing those assets' value.

Mr. Thayer also testified that OCPA valued Darden's computer assets (the largest category of Darden's TPP) using a negatively trended four-year useful life. (R. 1179-80) Trending, sometimes called indexing, is used to calculate the assets' replacement cost new by accounting for inflation or, in the case of negative trending, deflation in the price of new assets. (R. 1166-67) By negatively trending

the replacement cost new of Darden's computer assets, OCPA accounted for the functional obsolescence suffered by them as better technologies are brought to market and prices go down. (R. 1179-80) This testimony is more substantial, competent evidence proving that OCPA's valuation methodology and resulting valuations accounted for any functional or economic obsolescence impairing the value of Darden's TPP.

Third, the trial court did not rule that the value of Darden's TPP was unimpaired by functional or economic obsolescence. The absence of any such ruling is, of course, consistent with the fact that OCPA never asked for one. There can be no doubt as to the court's actual ruling on this issue as the Final Judgment clearly states: "Irrespective of the testimony of Darden's experts regarding the DOR's depreciation table, there is no or, at best, clearly insufficient evidence for this Court to conclude that Darden's TPP was impaired by any functional or economic obsolescence that is not already accounted for in OCPA's 2013 and 2014 valuations of Darden's TPP. (R. 873-74; emphasis supplied) Darden is once again trying to impermissibly obtain a reversal based on a non-existent ruling.

Darden asserted at trial that the difference between OCPA's (higher) and Mr. Seijo's (lower) valuations of Darden's TPP equals, *ipso facto*, functional or economic obsolescence not captured by OCPA's valuations. OCPA's opposing position was that the difference between OCPA's and Mr. Seijo's valuations was

caused by significant defects in Mr. Seijo's valuation methodology, which caused him to tremendously undervalue Darden's TPP. After hearing, considering, and weighing the parties' competing evidence, the trial court resolved this factual dispute in OCPA's favor. That factual finding cannot be disturbed on appeal.

V. THE TRIAL COURT ACTED WELL WITHIN ITS DISCRETION IN SUMMARILY DENYING DARDEN'S POST-TRIAL MOTION FOR REHEARING, WHICH ARGUED FOR THE FIRST TIME THAT ASSETS DARDEN REPORTED IN ITS TPP TAX RETURNS ARE NOT REALLY TPP.

Fifteen days after the trial court rendered its Final Judgment, Darden filed a Motion for Rehearing raising, for the first time, the arguments Darden now makes in Section III.C. of its Initial Brief. (I.B., pp. 41-45) Darden argued that its alarm system, window treatments, music system, and solar power system are really not TPP and are instead part of the real property. (R. 891 - 93) Up until this post-trial point in time, Darden had always taken the opposite position.

This dates back to Darden's filing of its 2013 and 2014 TPP tax returns, which list the alarm system, window treatments, music system, and solar power system as TPP assets. (R. 3005, 3010, 3014, 3019-20, 3026, 3032, 3043, 3055, 3096-97, 3104, 3110, 3114, 3117, 3122, 3124-25, 3128, 3137-38, 3141, 3144, 3147-48, 3150-51, 3155, 3160, 3163, 3171, 3187) Since Darden reported those assets as TPP (and had Mr. Seijo value them as such), OCPA did not consider them

when valuing the real property improved with Darden's Restaurant Support Center. Thus, Darden ultimately seeks to have its alarm system, window treatments, music system, and solar power system escape taxation altogether as either TPP or real property.

Darden reasserted its position in an Amended Motion for Rehearing and a supporting affidavit of its representative, Warren Lombardy. (R. 908 - 15) Since OCPA did not receive his affidavit until after trial, OCPA could not perform discovery, or cross-examine Mr. Lombardy, on his testimony therein. The trial court denied Darden's Amended Motion for Rehearing with an order finding that a hearing was unnecessary. (R. 995-96) This Court should impose the fate on Darden's current arguments.

A. The trial court clearly had discretion to summarily deny Darden's Amended Motion for Rehearing, and, therefore, that ruling should be summarily affirmed.

"Rehearing is not intended as a device to present additional evidence that was available, although not presented, at the original trial." *Allard v. Al-Nayem Intern., Inc.*, 59 So. 3d 198, 202 (Fla. 2d DCA 2011). As such, the trial court had broad discretion to summarily deny Darden's Amended Motion for Rehearing and reject Mr. Lombardy's affidavit, which raised untimely post-trial arguments. *See, e.g., Coffman Realty, Inc. v. Tosohatchee Game Preserve, Inc.*, 381 So. 2d 1164

(Fla. 5th DCA 1980), *affd. Coffman Realty, Inc. v. Tosohatchee Game Preserve, Inc.*, 413 So. 2d 1 (Fla. 1982); *Lennertz v. Dorsey*, 421 So. 2d 820, 821 (Fla. 4th DCA 1982). Moreover, Darden's motion and affidavit materially prejudiced OCPA by denying it discovery and cross examination on the issues raised therein. Under these circumstances, this Court should affirm the trial court's summary denial of Darden's Amended Motion for Rehearing without reaching the merits of Darden's related appellate arguments. *See, e.g., Coffman*, 381 So. 2d at 1167.

B. Darden's arguments are meritless.

Should the Court examine the merits of Darden's arguments, it will find there are none. The alarm system, window treatments, music system, and solar power system all fall squarely within the definition of "tangible personal property" set forth in section 192.011(11)(d), Florida Statutes ("§ 192.011(11)(d)"): "all goods, chattels, and other articles of value . . . capable of manual possession and whose chief value is intrinsic to the article itself." One court has concluded that electricity -- far less a "good," "chattle," or "article" "capable of manual possession" than Darden's window treatments and alarm, music, and solar systems -- is tangible personal property under § 192.011(11)(d). *Davis v. Gulf Power Corp.*, 799 So. 2d 298, 300 (Fla. 1st DCA 2001).

Darden argues that the definition of a real estate "fixture" set forth in the

Appraisal Institute's *Dictionary of Real Estate Appraisal* "begins and ends" the analysis. (I.B., p. 42) On the contrary, that definition is hearsay from a treatise that would have never been admitted into evidence at trial. *E.g.*, *Duss v. Garcia*, 80 So. 3d 358, 364 (Fla. 1st DCA 2012). Regardless, the definition is meaningless because it defines "fixtures" as former articles of personal property that are "regarded in law as part of the real estate." (I.B., p. 42; emphasis supplied) In other words, Darden's alarm system, window treatments, music system, and solar power system are exactly what Florida law says they are -- tangible personal property pursuant to the statutory definition set forth in § 192.011(11)(d).

Darden next offers *Houdaille Industries, Inc. v. Markham*, 440 So. 2d 59 (Fla. 4th DCA 1983), which does not even reference § 192.011(11)(d). (I.B., pp. 42-43) Moreover, the assets at issue in *Houdaille* were "interior walls, marble flooring, carpeting, pipes, ducts, electrical wiring, central air conditioning, ceilings, and an internal stairway." *Id.* at 60, n. 1. These are obviously very different from Darden's alarm system, window treatments, and music, alarm, and solar power systems. For these reasons, *Houdaille* is irrelevant.

So are Darden's last two authorities, *Rally's Hamburgers, Inc. v. State, Dept. of Transp.*, 697 So. 2d 535 (Fla. 1st DCA 1997) and *Sweeting v. Hammons*, 521 So. 2d 226 (Fla. 3d DCA 1988), neither of which involve ad valorem taxation. They are eminent-domain cases addressing the issue of whether certain equipment

constituted "trade fixtures," for which the owners could receive compensation in the takings. *Rally's*, 697 So. 2d at 537; *Sweeting*, 521 So. 2d at 228-29. Those issues have nothing to do with this case, which rendering *Rally's* and *Sweeting* wholly inapposite.

The Legislature clearly considers solar-power systems like Darden's to be TPP. We know this because in 2016 the Legislature placed a proposed amendment to Florida's Constitution on the ballot, which would authorize the exemption of the "assessed value of solar devices or renewable energy source devices subject to tangible personal property tax from ad valorem taxation." (R. 985; emphasis supplied)

Darden's arguments in opposition to the findings in Paragraph 27(e) of the Final Judgment regarding Mr. Seijo's valuations of the Restaurant Support Center's music system are grossly incorrect. (I.B., pp. 44-45) First, Darden again claims that the trial court's identification of problems with Mr. Seijo's valuation of the music system somehow means that the trial court accepted OCPA's independent and competing valuations "without any requirements of proof" from OCPA. The trial court's finding that Mr. Seijo's valuations of the music system lack credibility does not somehow suggest that OCPA failed to present evidence in support of its own independent and competing valuation.

Without any record cite, Darden argues that the trial court committed "clear"

error by "transforming $1,600 worth of unaffixed musical equipment into over $1 million of TPP." (I.B., pp. 44-45) The obvious defect in Darden's reasoning is that it assumes -- with zero evidentiary support -- that Mr. Seijo correctly identified all of the TPP comprising the music system when he listed merely a few pieces of audio equipment that he valued at $1,600. Darden's 2013 TPP Tax Return reports the music system's original installed cost as $1,066,055. (R. 3020) To accept Darden's argument, therefore, one must unfathomably conclude that of the $1,066,055 that Darden paid for its music system, a mere $1,600, or 0.15 percent of the total, was spent on audio equipment.

It is far more likely that in his carelessness, Mr. Seijo failed to identify the vast majority of the TPP comprising the music system. After considering the testimony and related evidence, the trial court made this exact finding. (R. 872)

VI. OCPA'S VALUATIONS OF DARDEN'S TPP ARE NOT BASED ON ITS MARKET STUDIES.

Darden's final argument is, once again, based on non-existent facts and rulings. Section III.D. of the Initial Brief asserts that OCPA used its market studies as the sole basis for valuing Darden's TPP, and the trial court approved that valuation methodology. (I.B, pp. 45-47) Neither of these assertions is correct.

OCPA valued Darden's TPP with a mass appraisal cost approach that complies with Florida law. There is not a scintilla of evidence to support Darden's

incorrect assertion that OCPA based its valuation of the Subject TPP on the market studies. On the contrary, Mr. Cardell testified that the studies comprised only 10% of OCPA's overall research of the TPP market. The entire body of that research is, in turn, just one component of OCPA's mass appraisal cost approach. Thus, Darden's assertion that OCPA's valuations are "premised" or otherwise based on the market studies is contrary to the uncontradicted trial evidence.

Consistent with this fact, the trial court did not rule that OCPA based its valuation of Darden's TPP on the market studies, much less that doing so was proper. In fact, the Final Judgment makes the opposite rulings:

> While Darden and its experts focused substantial attention on alleged problems with OCPA's 2013 and 2014 market studies, Mr. Cardell testified that they only constituted approximately 10% of OCPA's overall efforts to look to, and analyze, the market during those years. Mr. Cardell's testimony on all of the above issues was uncontradicted. As such, the Court finds that: a) any real or perceived problems with OCPA's 2013 and 2014 market studies were not material to OCPA's 2013 and 2014 valuations of Darden's TPP; and b) Mr. Cardell's testimony is additional competent evidence of OCPA's actions in looking to the market in the methodology OCPA used to value Darden's TPP for the 2013 and 2014 tax years in compliance with the *Standard Measures*.

(R. 865-66; emphasis supplied; footnote omitted) This ruling proves the inaccuracy of Darden's assertion that the trial court accepted OCPA's market studies as an appropriate methodology for valuing the Subject TPP.

Another portion of Darden's arguments regarding OCPA's market studies is

truly extraordinary. Darden claims that the studies cannot be used to value Darden's TPP (they were not) because: a) the studies were based on "listing prices only [and OCPA] did nothing to confirm that any actual sales occurred or that any purchasers agreed to pay the itemized listing price"; b) OCPA "made no effort to contact either the listing party or the prospective purchaser"; c) OCPA "never requested any purchase and sale agreement"; and d) OCPA did not "confirm an arms-length transaction or a qualified sale." (I.B., p. 46)

These arguments are extraordinary because the Final Judgment finds that the sales-comparison approach Mr. Seijo used to value Darden's TPP suffers from these same problems. (R. 866 - 71) OCPA's market studies were a very small part of its methodology and, as the trial court found, were not material to its valuations of the Subject TPP. On the other hand, Mr. Seijo's sales-comparison approach was the exclusive and entire basis for Darden's proffered valuations. Darden has now conceded that the trial court correctly found that his valuation methodology is materially defective. This concession further confirms the need to affirm the trial court's reinstatement of OCPA's 2013 and 2014 just valuations of Darden's TPP based on its factual finding that they are "considerably more reliable and credible" than Darden and Mr. Seijo's opposing valuations.

Conclusion

For all of the foregoing reasons, OCPA respectfully requests the Court to affirm the Final Judgment.

Certificate of Service

I HEREBY CERTIFY that a copy of this brief was furnished by e-mail on this 6th day of April, 2018, to all persons listed on the Service List.

Certificate of Compliance with Font Requirements

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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