

**United States Small Business Administration
Office of Hearings and Appeals**

SIZE APPEAL OF:

USA Jet Airlines, Inc.

Appellant

Appealed from
Size Determination Nos. 4-2006-114/117

SBA No. SIZ-4867

Decided: October 22, 2007

APPEARANCES

Stephen S. Kaye, Esq., Bryan Cave LLP, Washington, D.C., for Appellant.

Carolyn Callaway, Esq., Albuquerque, New Mexico, for Ross Aviation, Inc.

DECISION

PENDER, Administrative Judge:

I. Introduction and Jurisdiction

This appeal arises from a July 19, 2007 size determination (Case Nos. 4-2006-114 and 4-2006-117 (on remand)) (size determination) issued by the U.S. Small Business Administration (SBA), Office of Government Contracting, Area Office IV (Area Office) finding USA Jet Airlines, Inc. (Appellant) to be other than small for the applicable size standard of 1500 employees. The size determination stems from a Remand Order issued by SBA's Office of Hearings and Appeals (OHA) on December 21, 2006. *See Size Appeals of Ross Aviation, Inc. and Ryan International Airlines*, SBA No. SIZ-4829 (2006) (Remand Order).

Appellant filed its appeal of the size determination to SBA's OHA on August 7, 2007. OHA decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134.

II. Issue

Whether the size determination was based on clear error of fact or law. *See* 13 C.F.R. § 134.314.

III. Facts

1. On July 7, 2006, Appellant submitted an offer in response to Request for Proposals No. DE-RP52-06NA25694 (RFP), issued by the National Nuclear Security Administration of the U.S. Department of Energy. The RFP stated it is set-aside for small businesses and North American Industry Classification System (NAICS) code 481211, Nonscheduled Chartered Passenger Air Transportation, is applicable. NAICS code 481211 has a size standard of 1,500 employees.

2. Based upon Appellant's July 7, 2006, proposal submittal date, Appellant is deemed to have certified that it and all of its affiliates employed 1,500 or fewer employees as of July 7, 2006 (Admission). *See* 13 C.F.R. § 121.404(a).

3. Appellant is a wholly-owned subsidiary of Active Aero Group, Inc. (Active Aero). (Stipulations and SBA Form 355 in the Record).

4. Active Aero also owns Active Aero PTM, LLC, and Active Aero Charter, LLC. Appellant concedes it is affiliated with Active Aero and these other two concerns and that their total number of employees is 368. (Appeal Petition and SBA Form 355 in the Record).

5. The principal (greater than 10%) stockholders of Active Aero, along with their percentage of stock ownership, are:

- | | | |
|----|--|---------|
| a. | Berkshire (US) Fund V, LP (Berkshire US Fund V) | 37.29% |
| b. | GMAC Commercial Finance, LLC (GMAC CF) | 16.285% |
| c. | Greenbriar Equity (US) Fund, LP (Greenbriar US Fund) | 10.865% |

Berkshire (Foreign) Fund V, LP (Berkshire Foreign Fund V) and Greenbriar Equity (Foreign) Fund, LP (Greenbriar Foreign Fund) also own stock in Active Aero, but are not principal stockholders.

No other shareholder owns more than 5.4% of Active Aero (SBA Form 355 in the Record and Appeal Petition). Appellant concedes affiliation with Berkshire US Fund V, but contends that holdings beyond it are "remote and attenuated with no relevance to the operation" of Appellant. (September 13, 2006 letter to Area Office).

6. Berkshire Partners, LLC (Berkshire Partners) is an investment entity managed by 11 Managing Directors. Berkshire Partners' website states:

Berkshire Partners has invested in mid-size private companies for the past 20 years through seven funds with aggregate capital commitments of approximately \$6.5 billion.

The firm has invested in 90 operating companies with more than \$19 billion of

acquisition value and combined revenues in excess of \$21 billion.

We have compiled a strong track record of partnering with management teams working together to grow the companies in which we invest and have achieved superior investment returns.

The business backgrounds of the Managing Directors and investment team are diverse and include general management, consulting, turnaround management, and commercial and investment banking. This diversity has been further strengthened by the knowledge gained through investing together over several business cycles.

The original team, which came together in the early 1980's, has expanded significantly as our capital base and investment scope have grown. *Except for retirement no partner has left the firm.*

Managing Directors

Mike Ascione
 Brad Bloom
 Jane Brock-Wilson
 Kevin Callaghan
 Chris Clifford
 Carl Ferenbach
 Chris Hadley
 Larry Hamelsky
 Ross Jones
 Richard Lubin
 Randy Peeler
 Rob Small

(<http://www.berkshirepartners.com>) (emphasis added).

Berkshire Partners' website also provides biographies of its Managing Directors and lists directorships and primary Berkshire involvement. The website lists primary Berkshire involvement for Active Aero as being Robert J. Small.

Among the "Berkshire" entities are:

- Berkshire US Fund V;
- Berkshire Foreign Fund V;
- Berkshire Fund V, LP (Berkshire Fund V);
- Berkshire Fund V, Co-Investment Fund, LP (Berkshire Fund V Co-Investment);
- Berkshire Fund VI, LP (Berkshire Fund VI or Fund VI);
- Fifth Berkshire Associates, LLC (Fifth Berkshire); and
- Sixth Berkshire Associates, LLC (Sixth Berkshire).

Other "Berkshire" entities include: Berkshire Fund III, LP (Berkshire Fund III);

Berkshire Fund IV, LP (Berkshire Fund IV); Third Berkshire Managers, LLC (Third Berkshire Managers); Third Berkshire Associates, LLC (Third Berkshire); Fourth Berkshire Associates, LLC (Fourth Berkshire); Berkshire Investors, LLC (Investors); Berkshire Investors II, LLC (Investors II); Berkshire Investors III, LLC (Investors III); and Berkshire Star Investors III, LLC (Star Investors).

None of the “Berkshire” entities, except for Berkshire Partners itself, has any employees; however, each Berkshire fund invests in various portfolio companies and these companies do have employees. (Appellant’s SBA Form 355 and responses to the protest and to Area Office queries before and after remand).

7. Appellant provided a copy of Berkshire US Fund V’s Agreement of Limited Partnership to the Area Office with its SBA Form 355. Based upon the text of the agreement, Berkshire US Fund V is a limited partnership comprised of various investing limited partners and one general partner. In addition, the agreement provides:

Section 6.1 Description of General Partner.

Fifth Berkshire Associates, a limited liability company comprised of Bradley M. Bloom, Jane Brock-Wilson, Kevin T. Callaghan, J. Christopher Clifford, Russell L. Epker, Carl Ferenbach, Garth H. Greimann, Richard K. Lubin, Ross M. Jones, Robert J. Small, David R. Peeler and certain associates of *Berkshire Partners* as its members, is the General Partner of the Partnership.

Section 6.2 Management by the General Partner.

The management, policy and operation of the Partnership shall be vested exclusively in the General Partner who shall perform all acts and enter into and perform all contracts and other undertakings which it deems necessary or advisable to carry out any and all of the purposes of the Partnership. . . .

A. To become a party to the Management Contract¹ between Fund V and *Berkshire Partners*.

. . .

Section 6.6 Payment of Fees and Expenses.

Fees and expenses incurred with respect to the business of the Partnership shall be payable as follows:

A. Subject to the provisions of section 6.6.D, the Partnership shall be responsible for and shall pay all fees and reasonable expenses not specified in subparagraph B as being the responsibility of Berkshire Partners.

¹ The Management Contract, identified as Exhibit B to the Berkshire US Fund V’s Agreement of Limited Partnership, is not in the Record.

...

B. *Berkshire Partners*, so long as the Management Contract is in effect, shall be responsible for and shall pay all of its out-of-pocket expenses and those of the General Partner, including expenses which relate to office space, supplies and other facilities of their businesses, and fees and expenses of consultants, outside counsel and accountants and similar outside

C. *Berkshire Partners* shall serve as the management company of the Partnership in accordance with the terms of the Management Contract, and shall be entitled to receive a Management Fee in the amount and payable in the manner provided in such Management Contract.

...

F. The General Partner, *Berkshire Partners* and their respective Affiliates shall be entitled to receive management, directors', consulting and other similar fees and compensation from Portfolio Companies; provided that the amount of such fees and other compensation is reasonable

G. The General Partner, *Berkshire Partners* and their respective Affiliates shall be entitled to receive from a Portfolio Company a transaction fee for arranging financing

Section 7.1 Commitment of General Partner.

The General Partner hereby agrees to use its best efforts in furtherance of the purposes and objectives of the Partnership and to devote to such purposes and objectives such of its time as shall be necessary for the management of the affairs of the Partnership. The General Partner hereby further agrees that, during the term of the Partnership, it will not dissolve, liquidate or otherwise wind-up its affairs. During the Commitment Period, (i) each of the members of Fifth Berkshire Associates will devote substantially all of his business time to the affairs of the Partnership and to the affairs of the Prior Funds² and *Berkshire Partners* and (ii) each such member shall present to the Partnership any investment opportunity presented to or generated by such member. . .

(Berkshire US Fund V's Agreement of Limited Partnership) (emphases added)

Section 7.1 goes on to provide that after the Commitment Period, the General Partner need spend only such time as will be reasonably necessary to manage the assets of the Partnership for the benefit of the investors.

² The First Berkshire Fund, the Berkshire Fund, Berkshire Fund III, and Berkshire Fund IV.

The Agreement of Limited Partnership for Berkshire US Fund V was signed for the General Partner, Fifth Berkshire, by Richard K. Lubin as Managing Director (Mr. Lubin is a Managing Director and Founder of Berkshire Partners). In addition, Berkshire Partners is also listed as a Limited Partner. Berkshire US Fund V owns 37.29% of Active Aero, Appellant's parent, and has no other holdings.

8. The Agreement of Limited Partnership for Berkshire Fund V is not in the Record. Information submitted with Appellant's Form 355 shows that Berkshire Fund V has interests in nine companies and is a principal shareholder in five of the nine. These five concerns are: AAH Holdings, Corp. (Amscan); Advanced Drainage Systems, Inc.; Bare Escentuals, Inc.; Bartlett Holdings, Inc.; and Casella Waste Systems, Inc. Except for Bare Escentuals, Inc., each of these five concerns, by itself, exceeds the size standard.

9. The Agreement of Limited Partnership for Berkshire Fund VI is not in the Record. Appellant and Berkshire Partners' submissions to the Area Office show that Fund VI has interests in the following concerns: AAH Holdings Corp. (Amscan); Advanced Drainage Systems, Inc.; American Tire Distributors; Aritzia; Bare Escentuals, Inc.; Bartlett Holdings, Inc.; Citizens of Humanity; Electro-Motive Diesel, Inc. (EMD); National Vision, Inc.; Tinnerman Palnut Engineered Products, Inc.; Vi-Jon; and Waterworks, Inc. These submissions show that Fund VI has a controlling interest in several of these concerns, including EMD.

10. The Record after remand contains the Operating Agreements of Fifth Berkshire (the General Partner of Berkshire US Fund V and Berkshire Fund V) and Sixth Berkshire (the General Partner of Berkshire Fund VI), except for their Schedules.

11. Berkshire Partners has entered into Management Contracts with the Berkshire Funds (including Berkshire US Fund V and Fund VI) and receives a Management Fee for those services. These contracts themselves are not in the Record; however, in response to the Area Office's May 23, 2007 query about the management services provided by Berkshire Partners to other Berkshire entities, Appellant informed the Area Office that the Management Contract provides:

Services to be Rendered by the Company to the Partnership. The Company (Berkshire Partners) will use its best efforts to provide the Partnership with investment opportunities in Portfolio Securities meeting the requirements of the Agreement including the Amended Investment Guidelines and Restrictions. The Company shall provide such assistance as the Partnership may reasonably request in identifying, evaluating, structuring, consummating, monitoring and disposing of potential investments by the Partnership. All investment decisions shall be made by the general partner of the Partnership on behalf of the Partnership, and nothing in this contract shall be construed to constitute the Company an agent of the Partnership.

12. The individuals who serve as managers of the general partner LLCs, *e.g.*, Fifth Berkshire and Sixth Berkshire, also are managers of and have all the ownership interest in Berkshire Partners, LLC. However, the general partner LLCs of the various Berkshire Funds are

responsible for all investment and management decisions for the Berkshire Funds they manage (Declaration of Robert J. Small, Managing Director, Berkshire Partners).

13. GMAC CF is wholly owned by General Motors Acceptance Corporation (GMAC). GMAC was established as a wholly-owned subsidiary by General Motors Corporation (GM) in 1919. In November 2006, GM sold a 51% controlling interest in GMAC to a consortium of investors led by Cerberus Capital Management, L.P. GMAC also employs over 30,000 individuals worldwide. (Judicial Notice, Rule 201 Fed. R. Evid.).

14. Greenbriar Equity Group, LLC (Greenbriar) is an investment entity. Greenbriar has three managing partners: Reginald L. Jones, Gerald Greenwald, and Joel S. Beckman. According to Greenbriar's website³, Greenbriar's managing partners have extensive and complementary backgrounds in the transportation industry. They have over eight decades of industry experience in principal investing, senior management, operations, finance, mergers and acquisitions, public equity offerings and leveraged finance. Greenbriar's managing partners have played leading roles across a broad range of transportation industry activities, built successful business and created sustainable long-term value for shareholders, managements, customers and employees.

15. Greenbriar Holdings, LLC (Greenbriar Holdings) is the general partner of Greenbriar Equity Capital, LP (Greenbriar Capital) and Greenbriar Co-investment Partners, LP (Appellant's SBA Form 355 and responses to the protest and to Area Office queries before and after remand).

16. Greenbriar Capital is the general partner of:

(1) Greenbriar US Fund (which, along with Berkshire US Fund V and GMAC CF, is a principal shareholder of Active Aero);

(2) Greenbriar Equity (Foreign) Fund, LP (Greenbriar Foreign Fund) (which owns a small stake in Active Aero); and

(3) Greenbriar Equity Fund, LP (Greenbriar Fund) (which, along with Berkshire Fund VI, is a principal shareholder of EMD).

None of the "Greenbriar" entities, except for Greenbriar itself, have any employees; however, each Greenbriar fund is invested in various portfolio companies and these companies do have employees. (Appellant's SBA Form 355 and responses to the protest and to Area Office queries before and after remand).

17. The Greenbriar US Fund Agreement of Limited Partnership (Article VI) provides that Greenbriar Capital is Greenbriar US Fund's general partner and that management and operation of the partnership is vested exclusively in the general partner.

³ See <http://www.greenbriarequity.com>.

18. Greenbriar portfolio companies (including holdings with entities other than Berkshire) include: Western Peterbilt, Inc., Argo-Tech Corporation, and Stag-Parkway, Inc. (<http://www.greenbriarequity.com>).

19. Berkshire Partners and Greenbriar entered into a Coinvestment Agreement in November 1999 and modified it in 2004. Immediately after the first recitation, the Agreement states that Greenbriar established Greenbriar Fund to make equity investments in transportation and related companies. Among the recitals, the Agreement, in relevant part, states:

a. [P]ursuant to that certain Coinvestment Agreement dated as of November 1, 1999 (the “Initial Agreement”), the parties entered into a strategic relationship to pursue jointly investment opportunities in the transportation industry with the belief that pooling their efforts in a joint venture for the purpose of investing in transportation and related investments is mutually beneficial;

b. (i) Greenbriar and Berkshire each desire to allocate their respective transportation-related investment opportunities to the joint venture; (ii) Berkshire desires to support the activities of the Greenbriar Fund by (x) causing the Berkshire Funds (as hereinafter defined) to co-invest in certain portfolio investments of the Greenbriar Fund and (y) serving on the Greenbriar Investment Committee (as defined herein);

In general, Article II, Section 2.1 discusses the mechanics and limits of the investment agreement between Greenbriar and Berkshire Partners. Section 3.1 provides that if the Greenbriar Investment Committee (GIC) determines that an investment should occur, then Berkshire Partners and Greenbriar will make their investments in their respective ratios. Per Section 3.1, the GIC is comprised of “representatives” from Greenbriar and one Berkshire Partners representative and may act only by unanimous vote. Thus, either Berkshire Partners or Greenbriar may veto any proposed investments. If the GIC does not recommend an investment, then either Berkshire Partners or Greenbriar may invest in a concern.

Article V contains Berkshire Partners’ representations, including the statement that the Agreement will be legally binding upon Berkshire Partners (and not its funds).

20. Berkshire Partners and Greenbriar obtained a controlling interest in EMD in April of 2005. The primary Berkshire Partners involvement for EMD is Richard K. Lubin, a founding partner of Berkshire Partners and Lawrence S. Hamelsky (Judicial Notice, Rule 201, Fed. R. Evid. and Berkshire Partners website).

21. EMD is one of the two principal manufacturers of diesel electric railroad locomotives in the United States and employs over 2,800 employees. (Judicial Notice, Rule 201, Fed. R. Evid.).

22. Since 1999, Berkshire Partners and Greenbriar have partnered to pursue equity investments in transportation and transportation-related companies. Berkshire Partners and Greenbriar seek to invest in a broad range of opportunities, including: traditional sectors such as airlines, air freight, autos, railroads, shipping and trucking; closely-related sectors including

manufacturing, logistics, distribution, and various service sectors supplying the transportation industry; and natural extensions of transportation activity supporting or facilitating e-commerce, energy, financial services, infrastructure, retail, and technology. Berkshire Partners and Greenbriar (through affiliated investment funds) have jointly made substantial investments in:

- a. Active Aero;
- b. EMD;
- c. American Tire Distributors, Inc. (\$65 million);
- d. Hexcel Corporation (\$78 million); and
- e. Tinnerman Palnut Engineered Products, Inc. (\$25 million).

(Berkshire Partners and Greenbriar websites, excerpts in the Record).

A. The Size Determination

The Area Office first summarized the procedural history of the case, the Ross Aviation, Inc. (Ross) allegations, and the affiliation regulations applicable to stock ownership.

The Area Office elected to ask a broad question in analyzing the facts before it. Specifically, it identified the sole issue as being whether Appellant is affiliated with any other companies. More specifically, given the employee-based size standard applicable to this procurement (NAICS code 481211), the Area Office narrowed the question to whether the number of Appellant's employees when added to those of Appellant's affiliates caused it to exceed the size standard.

The Area Office first discussed 13 C.F.R. § 121.103(a), General Principles of Affiliation, which emphasizes that the power to control is the paramount consideration. The Area Office noted that § 121.103(a)(2) also states SBA will consider factors such as ownership, management, previous relationships between concerns, and contractual relationships to determine whether affiliation exists. Following that, the Area Office noted that § 121.103(a)(4) provides that affiliation could be found where an individual or concern exercises control directly or through a third party.

The Area Office discussed indicia of control emphasizing 13 C.F.R. § 121.103(c), which involves stock ownership. The Area Office noted that ownership of more than 50% of a firm's voting stock could give control as could a block of stock which is large compared to other outstanding blocks of voting stock. The Area Office followed this discussion with a conclusion that several companies are affiliated with Appellant because of stock ownership.

The Area Office began its discussion of affiliation through stock ownership by explaining that Active Aero owns a majority of Appellant's shares, as well as two other entities, Active Aero PTM, LLC and Active Aero Charter, LLC. Therefore, Appellant is affiliated with Active

Aero, Active Aero PTM, and Active Aero Charter.

The Area Office explained the majority of Active Aero's shares are held by three principal (greater than 10%) shareholders: Berkshire US Fund V, GMAC CF, and Greenbriar US Fund. The Area Office stated that under 13 C.F.R. § 121.103(c)(1), Berkshire US Fund V has the power to control Active Aero since its ownership stake is the largest and more than twice as large as the next largest block. Thus, it found Berkshire US Fund V has the power to control Active Aero and, thus, Appellant.

Since the Area Office found Berkshire US Fund V is affiliated with Appellant, it concluded that any entity affiliated with Berkshire US Fund V is affiliated with Appellant. The Area Office noted that Berkshire US Fund V is one of seven investment funds organized as limited partnerships and bearing the Berkshire name. Each of the seven limited partnerships has a general partner, which in the case of Berkshire US Fund V is Fifth Berkshire. The Area Office noted Fifth Berkshire is also the general partner in three other limited partnerships, Berkshire Fund V, Berkshire Foreign Fund V, and Berkshire Fund V Co-Investment. The Area Office noted this is typical of other Berkshire Partners-organized funds, *e.g.*, Third, Fourth, and Sixth Berkshire Associates, LLC, serve as general partners respectively, for Berkshire Fund III, Berkshire Fund IV, and Berkshire Fund VI. Further, because the general partners are held to control limited partnerships, the Area Office concluded that there is also "vertical affiliation" between each fund and its general partner. Nevertheless, the Area Office stated that there could be affiliation between the funds and their general partners with Active Aero, only if they also are affiliated "horizontally," *i.e.*, the funds or their general partners must be affiliated with Berkshire US Fund V or its general partner, Fifth Berkshire, in order for them to be affiliated with Active Aero.

The Area Office then examined the status of the general partners to the Berkshire investment funds. It found they are all organized as limited liability companies (LLCs) under the laws of Massachusetts, which provides that the manager of an LLC manages and controls the LLC, unless provided otherwise. Consistent with Massachusetts law, the operating agreements of Third Berkshire Managers and Fourth, Fifth, and Sixth Berkshire Associates all grant their managers exclusive managerial authority.

The Area Office found Fourth and Fifth Berkshire are managed by nine individuals serving as managers or managing members. (All nine of these individuals are also Managing Directors of Berkshire Partners.) Third Berkshire is managed by eight of these nine and Sixth Berkshire is managed by these nine, plus two others. The Area Office found that the same nine individuals (less one in a single instance and plus two in four instances) are managers/managing members of ten limited liability companies. Accordingly, it found these ten entities to be affiliated under 13 C.F.R. § 121.103(e). Thus, the Area Office found that each Berkshire investment fund is affiliated "vertically" with its general partner and that the general partners are all affiliated with each other "horizontally" by virtue of common management.

The Area Office also considered Appellant's arguments in its analysis and rejected them. Specifically, Appellant had alleged Fifth and Sixth Berkshire are "completely independent of and unaffiliated with each other" because the four managing members who comprise a majority of

voting rights in Fifth Berkshire do not represent a majority of shares or decision-making authority of Sixth Berkshire. The Area Office rejected this argument because it did not deal with the issue of common management under 13 C.F.R. § 121.103(e) or the fact that the same core group of eight individuals serves as managers or managing members of nine entities and that number in every case was sufficient to control every entity.

Continuing its analysis of Berkshire, the Area Office considered the portfolios of the seven Berkshire investment funds. It determined that Fund VI, by itself, has majority ownership (and thus control) of five companies. These are: Aritzia; Citizens of Humanity; National Vision, Inc; Vi-Jon; and Waterworks, Inc. The Area Office then determined that the aggregated shareholdings of Fund V and Fund VI confer control of four additional companies. These additional companies are: Amscan Holdings, Inc., AAH Holdings Corporation (Amscan) (by majority ownership); Bare Escentuals (by ownership of the largest single block of stock); and Bartlett Holdings, Inc. (by ownership of one of the two controlling blocks of stock). Thus, these nine portfolio companies are also affiliated with Active Aero.

After examining the submissions concerning the portfolios of the other Berkshire investment funds, the Area Office found no additional affiliates through stock ownership.

The Area Office also found common management affiliation with four additional Berkshire entities: Investors, Investors II, Investors III, and Star Investors. Of these, only Investors and Investors III also invest in other companies; however, neither has control over any of those companies.

The Area Office next examined the “Greenbriar” entities. It noted first that Greenbriar US Fund is a principal shareholder of Active Aero but does not thereby have the power to control Active Aero. Next, the Area Office explained that the “Greenbriar” entities are affiliated with each other through common management. Because Greenbriar US Fund shares a common general partner, Greenbriar Capital, with two other limited partnerships, Greenbriar Fund and Greenbriar Foreign Fund, these four “Greenbriar” entities are affiliates. Greenbriar Capital, itself a limited partnership, is in turn controlled by its general partner, Greenbriar Holdings, an LLC whose three individual managers (along with a trust) are also the managers of Greenbriar Group. Thus, these last two “Greenbriar” entities are affiliates of the other four.

The Area Office found Greenbriar Fund is a principal shareholder in six portfolio companies.⁴ Of these, it controls Stag-Parkway and Western Peterbilt (by majority stock); Argo-Tech (by the largest minority block of stock); and EMD (significant ownership interest, as detailed below).

The Area Office next addressed EMD. If EMD were ultimately affiliated with Appellant, EMD’s employee count would mean Appellant would be affiliated with a concern larger than the size standard applicable to the procurement. (The acquisition of EMD by Berkshire and Greenbriar is particularly well-documented in the public domain.)

⁴ The Area Office noted that, among the other Greenbriar entities, only Greenbriar US Fund (which invests solely in Active Aero), is a principal shareholder in any company.

The Area Office explained that Ross had alleged Berkshire Partners and Greenbriar were affiliated through a “strategic joint venture” where they made joint investment decisions. Ross was referring directly to EMD, which Greenbriar Fund and Fund VI jointly purchased in 2005. Both, along with GM, own approximately equal shares of EMD. Accordingly, pursuant to 13 C.F.R. § 121.103(c)(2), the Area Office found each of these three entities is presumed to have the power to control EMD unless rebutted by a showing that power to control does not exist.

The Area Office rejected Appellant’s contention that EMD and Appellant are not affiliated. More specifically, even though Appellant contends Berkshire Partners and Greenbriar do not “exercise any form of coordination control” and owe a duty to their respective investment funds, the Area Office found that argument ignored the fact that EMD directors from both entities share a fiduciary duty to EMD. Ultimately, the Area Office pointed out that the composition of EMD’s Board of Directors is irrelevant unless EMD is widely held (13 C.F.R. § 121.103(c)(3)), which it clearly is not, for the three principal shareholders own nearly equal blocks of stock and any two of those blocks, taken together, control over 51% of EMD’s shares. Accordingly, the Area Office found “Under the express terms of § 121.103(c)(2), each of the three principal shareholders controls or has the power to control EMD.”

Since Greenbriar Fund can control EMD and all of the Greenbriar entities are affiliated with one another, the Area Office found the Greenbriar entities are all affiliated with EMD. Thus, because Fund VI is a controlling shareholder of EMD, all of the Greenbriar entities are also affiliated with the Berkshire entities found to be affiliated with one another; *i.e.*, because Berkshire US Fund V and Fund VI are affiliated, EMD is an affiliate of Appellant.⁵

The Area Office’s final affiliation finding relates to GMAC. As of July 7, 2006 (the date of Appellant’s self-certification as small with the instant proposal), GMAC was wholly owned by GM. At that time, GM was also a controlling shareholder of EMD and, through GMAC, a principal shareholder in Active Aero. Thus, although GM does not control Active Aero, it shared a critical identity of interest with Berkshire US Fund V and Greenbriar Fund through Active Aero and thus Appellant. Therefore, the Area Office found GM, through GMAC, to be affiliated with the Berkshire and Greenbriar entities through the identity of interest rule at 13 C.F.R. § 121.103(f).

Beyond the affiliations discussed above, the Area Office declined to find Appellant affiliated with any additional entities or individuals. Specifically, after analysis, the Area Office rejected Ross’ assertion that Appellant was affiliated with concerns through two of Active Aero’s managers (Martin Goldman and Brian Hermelin), who also manage other concerns.

⁵ Although the Area Office did not find an identity of interest between Berkshire and Greenbriar based upon common investments as it had found among GM, Berkshire and Greenbriar, an identity of interest between Berkshire and Greenbriar under 13 C.F.R. § 121.103(f) surely must exist if there is an identity of interest among GM and Berkshire and Greenbriar. While Berkshire and Greenbriar cannot be affiliated under common management or ownership theories, there is evidence they are affiliated because they have common investments, through the funds each controls, or contractual interests, *e.g.*, EMD, Active Aero, etc.

The Area Office's final substantive analysis involved Ross' allegation that L-3 Communications (L-3) was affiliated with Appellant as an ostensible subcontractor pursuant to 13 C.F.R. § 121.103(h)(4). The Area Office found that Appellant's proposal contains no indication that L-3 would have any role in Appellant's performance of the contract. Hence the Area Office determined L-3 could not possibly be an ostensible subcontractor and thus cannot be affiliated with Appellant as an ostensible subcontractor.

The Area Office concluded the size determination with a list of 41 concerns it found to be affiliated with Appellant. These include:

- | | |
|--|--|
| 1. Active Aero Group, Inc. | 22. Waterworks, Inc. |
| 2. Active Aero PTM, LLC | 23. Vi-Jon |
| 3. Active Aero Charter, LLC | 24. Citizens of Humanity |
| 4. Berkshire Partners, LLC | 25. Aritzia |
| 5. Berkshire Fund III, LP | 26. Amscan Holdings, Inc. |
| 6. Berkshire Fund IV, LP | 27. AAH Holdings Corporation |
| 7. Berkshire Fund V, LP | 28. Bare Escentuals |
| 8. Berkshire (US) Fund V, LP | 29. Bartlett Holdings, Inc. |
| 9. Berkshire (Foreign) Fund V, LP | 30. Electro-Motive Diesel |
| 10. Berkshire Fund V Coinvestment Fund, LP | 31. General Motors Corporation |
| 11. Berkshire Fund VI, LP | 32. GMAC Commercial Finance, LLC |
| 12. Third Berkshire Associates, LLC | 33. Greenbriar Equity Group, LLC |
| 13. Third Berkshire Managers, LLC | 34. Greenbriar Holdings, LLC |
| 14. Fourth Berkshire Associates, LLC | 35. Greenbriar Equity Capital, LP |
| 15. Fifth Berkshire Associates, LLC | 36. Greenbriar Equity Fund LP |
| 16. Sixth Berkshire Associates, LLC | 37. Greenbriar Equity (US) Fund, LP |
| 17. Berkshire Investors, LLC | 38. Greenbriar Equity (Foreign) Fund, LP |
| 18. Berkshire Investors II, LLC | 39. Greenbriar Coinvestment Partners, LP |
| 19. Berkshire Investors III, LLC | 40. Stag Parkway |
| 20. Berkshire Star Investors III, LLC | 41. Western Peterbilt |
| 21. National Vision, Inc. | |

Based upon the 41 concerns the Area Office found to be affiliated with Appellant, it found that Appellant was other than small under 13 C.F.R. § 121.106 because when its employees were aggregated with those of all its affiliates, Appellant exceeds the size standard of 1500 employees for NAICS code 481211.

B. The Appeal

Appellant contends it is a small concern under NAICS Code 481211. Appellant avers it has not even heard of some of the entities that are its alleged affiliates and it never considered itself to be affiliated with others. Appellant alleges it was found to be affiliated with the various 41 concerns through a strained application of SBA's affiliation rules. Appellant also claims it is not linked with the other concerns controlled by different individuals who owe their allegiance to different owners. What is more, Appellant asserts that if the Area Office's strained application

of the regulations stands on appeal, small businesses will not be able to use venture capital.

While admitting that it is a wholly-owned subsidiary of Active Aero, Appellant avers that Active Aero and its subsidiaries only employ 368 employees. It further concedes that Berkshire US Fund V owns 37.29% of Active Aero; GMAC CF owns 16.285%; Greenbriar US Fund owns 10.865% of Active Aero; and that no other stockholder owns more than 5.4%. Appellant also states:

The Area Office found, and USA Jet does not challenge on appeal, that Berkshire (US) Fund V, LP [Fund V] controls Active Aero because its holdings are large compared to other outstanding blocks of stock. . . . The Area Office also found, and USA Jet does not challenge, that Berkshire (US) Fund V, LP is controlled by its general partner, Fifth Berkshire Associates, LLC and that Fifth Berkshire Associates, LLC, is also the general partner of and affiliated with three other funds that invest in companies. . . .

USA Jet remains small if all employees associated with Berkshire and of all companies controlled by Fifth Berkshire Associates, LLC are added to the Active Aero employees.[] It only can be found to be other than small if certain companies controlled by other funds bearing the Berkshire name [FN 7] or companies associated with Greenbriar and GMAC are included in the calculation. In so including them, the Area Office erred.

FN 7 As the Area Office noted, many of the Berkshire funds do not exercise control over any other entity. . . . Thus, the Area Office looked to the relationship between Fund V and Fund VI. Although Fund V does not control any entity by itself, if its interests are aggregated with interests held by Fund VI, the aggregation would control some entities. . . . The Area Office correctly concluded that “[a]lthough there are other entities in which more than one Berkshire investment fund holds shares, no other common investments confer control (or create affiliation) through combined shareholdings.”

(Appeal Petition, at 2-3 (citations and one footnote omitted)).

1. Affiliation of Berkshire Entities

Appellant’s main premise is that the Area Office erred in finding “horizontal” affiliation between Fifth Berkshire and other Berkshire Funds controlled by other general partners. In particular, Appellant argues there is no affiliation between Berkshire US Fund V and Fund VI. Appellant asserts it is the combined holdings of Berkshire US Fund V and Fund VI that led to the finding that it is other than small. Appellant also states:

The Area Office used the term “Fund V” in its decision, and defined that as Berkshire (US) Fund V, LP. . . . Berkshire (US) Fund V, LP only has an interest in Active Aero/USA Jet. . . . Berkshire Fund V, LP, however, which has the same general partner as Berkshire (US) Fund V, LP, does have interests in other

companies. . . . The companies the decision discusses as being owned, in part, by “Fund V” in fact are owned in part by Berkshire Fund V, LP, not Berkshire (US) Fund V, LP. When this petition refers generally to Fund V, it refers to Berkshire Fund V, LP. . . . To the extent that the Area Office decision is based on Berkshire (US) Fund V, LP owning companies other than Active Aero, it is clearly erroneous.

(Appeal Petition, at 4-5, n.8) (citations omitted).

Appellant disputes the Area Office’s finding that the general partners of Berkshire US Fund V and Fund VI are affiliated. Appellant asserts the managers common to Berkshire US Fund V and Fund VI cannot control Fund VI. Specifically, Appellant asserts, “Although USA Jet pointed out that four of the nine managing members of Fifth Berkshire comprise a majority of the voting rights of that entity, but that they comprise only four of eleven managers of Sixth Berkshire and that they do not comprise a majority of the decision-making authority of Sixth Berkshire, the Area Office nonetheless found affiliation” (Appeal Petition, at 5).

Appellant argues that the Area Office has essentially read out the requirement for control stated in 13 C.F.R. § 121.103(e) to find that Berkshire US Fund V and Fund VI are affiliated because the individuals who can control Fifth Berkshire cannot control Sixth Berkshire. Thus, there is no common management for the Area Office to base affiliation upon. To support its position that control is required, Appellant cites OHA’s decision in *Size Appeal of Hunot Retardant Co.*, SBA No. SIZ-4629 (2004).

Assuming, *arguendo*, that there is an identity of interest between the general partner managers of Fund V and Fund VI, Appellant also alleges it has rebutted the determination of affiliation with evidence showing that the interests of Fund V and Fund VI are separate pursuant to 13 C.F.R. § 121.103. Moreover, Appellant alleges the Area Office committed a clear error of law when it failed to consider the evidence Appellant presented that clearly rebutted such an identity of interest.

Appellant argues there is a fundamental difference between this appeal and most cases OHA might consider. Appellant claims that fundamental difference is that those exercising control reap the benefits of control with ownership interests or other financial ties, or family relationships. In the present instance, control and ownership are separate. That is, those who control the various Berkshire Funds do so for the benefit of investors in the particular funds and thus have a fiduciary duty to the limited partners to decide matters for the benefit of those funds.

Appellant notes the owners/limited partners that invest in the various Berkshire funds are not identical and argues that disparate ownership is relevant because the fund managers (the general partner managers) have a fiduciary duty to the limited partners of the various Berkshire funds. Accordingly, the fiduciary duties of the various managers run to a different group of investors for each fund. Thus, they do not manage the funds in their own interest or in the interest of Berkshire Partners but for different groups and “if this distinction is not recognized by OHA, small businesses will not be able to avail themselves of the venture capital market.” (Appeal Petition, at 8).

2. Affiliation with EMD and the Greenbriar Entities

Appellant also alleges the Area Office's finding that Appellant is affiliated with EMD and the various Greenbriar entities is in error. Appellant asserts the error comes from two erroneous conclusions. Appellant's first allegation of error is that since there is no affiliation between Berkshire US Fund V and Fund VI for the reasons it explained elsewhere in its Appeal Petition, Fund VI's ownership of EMD shares is irrelevant. Second, Appellant asserts there is no affiliation simply because Greenbriar and Fund VI are large minority shareholders in EMD pursuant to 13 C.F.R. § 121.103(c)(2). Beyond that, Appellant claims there is no other authority permitting an area office to find affiliation merely because two entities are both minority shareholders in a third company. Thus, the finding of affiliation is clearly erroneous.

3. Affiliation with GM and GMAC

Appellant argues the Area Office erred in finding GM and GMAC are Appellant's affiliates. Appellant asserts the precise reason why the Area Office found it to be an affiliate of Appellant is not clear. Moreover, the Area Office conceded GM does not control Appellant. Instead, Appellant asserts the Area Office found an identity of interest with Berkshire and Greenbriar because all three have investments in Active Aero.

Appellant asserts the common investment in Active Aero signifies nothing nor does it give rise to an identity of interest. Moreover, even presuming GM and Greenbriar's investments in Active Aero and EMD are sufficient to give rise to an identity of interest and thus make them affiliated, the Area Office still did not analyze how that results in affiliation with Active Aero, for neither GM nor Greenbriar can control Active Aero since they are minority shareholders. Appellant also points out: "An identity of interest of persons that cannot control the concern at issue is of no moment." (Appeal Petition, at 10).

Appellant further argues that there is no basis to find an identity of interest between GM and Greenbriar under SBA's identity of interest rules. Appellant states that 13 C.F.R. § 121.103(f) and previous OHA decisions require there to be substantially identical business or economic interests that cause persons, because of their commonality of interest, to act as one. Appellant claims there is nothing in the Record to suggest GM's interests in Active Aero and EMD are sufficient to cause it to have identical or substantially identical economic or business interests with Greenbriar, especially since GM (really GMAC) only acquired its Active Aero shares as a result of a debtor-creditor relationship and not the result of any design to do business with Greenbriar. In consideration of its arguments, Appellant claims the Area Office's finding that Appellant is affiliated with GM is clearly erroneous.

C. Ross Aviation's Response to the Appeal

Ross first notes that since it did not have access to the factual material provided by Appellant to the Area Office, it could not evaluate many of the factual issues raised by the

Appeal.⁶ Despite this, Ross provided a cogent response. Nevertheless, I find it more likely than not that Ross' Response would have been more helpful if it had accessed the Record, to include the various Berkshire agreements and Appellant's SBA Form 355.

1. Affiliation with Berkshire

Ross' overriding argument is that Appellant's Appeal Petition and the size determination ignore the vertical affiliation of all the Berkshire Funds and their general partners with Berkshire Partners. Accordingly, it rejects Appellant's contention that Berkshire US Fund V and Fund VI are not affiliated with one another because the individuals who control the funds owe their allegiance to different owners.

According to Ross, neither Appellant nor the Area Office addressed the issue of who controls the general partners that control the limited partnerships. Ross claims this is contrary to my instructions in the December 21, 2006 Remand Order wherein I asked:

(1) Why does Berkshire even exist?; (2) Who established Fifth Berkshire?; (3) Who appointed its managers?; (4) Who are these manager(s) affiliated with?; and (5) Why does Berkshire advertise on the web that it is an active manager of the firms it invests in? In other words, what is the connection or affiliation between Berkshire and Fifth Berkshire? [Rhetorically speaking,] is it not inescapable that some individual or group of individuals is ultimately in charge of the entity called Berkshire and is it also likely they have some connection to Fifth Berkshire? Affiliation will depend upon the answers to these questions and thus the Area Office must "run the string" and completely track vertical and horizontal affiliates of Fifth Berkshire.

Ross contends that Berkshire Partners' website identifies its relationship to the various funds, *i.e.*:

Berkshire Partners is a private equity firm whose primary objective is to provide superior returns to our investors. For more than 20 years -- and across six funds comprising more than \$3.5 billion in private equity capital we have achieved this goal.

...

We work with the senior management of our portfolio companies to support them in creating value.

...

We at Berkshire are financially committed to every one of our investments. In fact we are our own single biggest investor. So we are "partners" in the most important sense of that word.

⁶ Counsel for Ross may gain access to the entire Record if she requests and applies for admission under a protective order.

Based on Berkshire Partners' own website, Ross contends it is clear that Berkshire Partners is the top of the pyramid and that each of the funds and their general partners are simply part of the larger whole. Hence, the funds are affiliated both horizontally, as the Area Office found, and also vertically since these entities are merely components of the larger whole that is Berkshire Partners.

Ross alleges the Berkshire entities share interlocking management with one another as defined by FAR 19.101(6) and (6)(1). Specifically, the 11 Managing Directors listed on Berkshire Partners' website⁷ serve as the working majority of the board of directors or officers of another concern. Ross identified Berkshire's 11 Managing Directors and asserted that only two are not found among the nine managing partners of Fifth Berkshire. Ross then notes that evidence available publicly proves that all of the managers for Fourth, Fifth, Sixth, and Seventh Berkshire Associates are congruent with the 11 Managing Directors or principals of Berkshire and that: "This is interlocking management indeed."

Ross reiterates that common management flows from Berkshire Partners to the various Berkshire entities, such as Berkshire US Fund V and Fund VI. However, Ross asserts that Appellant seeks to limit the inquiry concerning entities affiliated with Berkshire US Fund V without looking higher "to find the ties that bind all the Funds into the single entity of Berkshire Partners, LLC" (Response, at 5). Ross states that Appellant's argument that the: (1) various Funds and their managers owe allegiance to different owners; and (2) managers of the funds have different masters and thus do not manage the funds or the funds' investment portfolios in their own interest or in the interest of Berkshire, is "blatantly disingenuous." (Response, at 5).

Even though Ross admits that the results achieved for the investors in Berkshire's funds are an essential element of success, Ross argues Appellant's argument ignores that Berkshire is not conducting business for free. Ross notes that Berkshire Partners benefits from the success of the funds it manages and has an active interest in the success of all of its investments or it would not be in business. Hence, Ross alleges Berkshire Partners and its Berkshire Associates LLC general partners to its funds (*e.g.*, Fifth Berkshire and Sixth Berkshire), and Berkshire Partners' managing directors and principals have an identity of interest in managing the investments as anticipated by 13 C.F.R. § 121.103(f).

Ross also argues all the Berkshire entities share common facilities at One Boston Place, 33d Floor, Boston, MA., which is relevant under FAR 19.101(6)(ii).

Ross's final substantive argument involves affiliation through the newly organized concern rule, which seems to be an argument that Berkshire forms various investment partnerships controlled by the same individuals who control existing Berkshire entities. Seemingly, Ross claims affiliation exists pursuant to 13 C.F.R. § 121.103(g).

⁷ Appellant has stipulated to these 11 Managing Directors in the Record.

2. Affiliation Among Berkshire, Greenbriar, and GM

Because the Area Office found that three large shareholders of EMD are each controlling shareholders pursuant to 13 C.F.R. § 121.103(c)(2), Ross alleges that they are affiliates pursuant to 13 C.F.R. § 121.103(a)(1), which provides that “Concerns and entities are affiliates of each other when one controls or has the power to control the other, . . .” Therefore, since Berkshire, Greenbriar, and GM each are controlling shareholders of EMD, each is affiliated with EMD. *See, e.g., Size Appeal of Mission Solutions, Inc.*, SBA No. SIZ-4828 (2006).

3. Affiliation Between Berkshire and Greenbriar

In its protest, Ross identified the well-publicized joint venture and Coinvestment Agreement between Greenbriar and Berkshire as a basis the Area Office should use to find that the two concerns act in concert for transportation investments and thus are affiliated.

The Area Office found all the Greenbriar entities are affiliated with one another based upon common management. In addition, the Area Office found Greenbriar controls and is thus affiliated with Stag-Parkway, Western Peterbilt, and Argo-Tech. However, the Area Office did not consider whether Berkshire and Greenbriar were affiliated with one another beyond their mutual investment in EMD. Ross claims this is too narrow a reading of its protest and that the Area Office ignored that the websites list seven companies that Berkshire and Greenbriar have invested in, including Active Aero and EMD. Ross concedes that if Active Aero and EMD are affiliated there is no need to go further to determine Appellant’s size through an examination of the Coinvestment Agreement between Berkshire and Greenbriar. However, Ross notes that if there is a question as to whether there is affiliation based upon the EMD analysis, it would be appropriate to examine the full scope of the affiliation between Berkshire and Greenbriar.

4. SBA’s Regulations Determine Exceptions to Affiliation for Venture Capital Firms

Ross avers that Appellant’s argument that denying its appeal will have an adverse effect on the ability of small businesses to obtain venture capital is an improper argument. Ross asserts that SBA’s regulations have already considered this issue and have limited the exception from affiliation to those venture capital firms licensed under the Small Business Investment Act of 1958. 13 C.F.R. § 121.103(b)(1) and *see Size Appeal of Apptis, Inc.*, SBA No. SIZ-4825 (December 11, 2006). Accordingly, a size appeal is not the proper forum for challenging SBA’s regulations.

IV. Discussion

A. Timeliness

Appeals must be filed and served at OHA within 15 days after an appellant receives a size determination. 13 C.F.R. § 134.304(a)(1).

B. Standard of Review

The standard of review for this appeal is whether the Area Office based its size determination upon clear error of fact or law. 13 C.F.R. § 134.314. In evaluating whether there is a clear error of fact or law, OHA does not consider Appellant's size *de novo*. Rather, OHA reviews the record to determine whether the Area Office based its size determination upon a clear error of fact or law. *See Size Appeal of Taylor Consulting, Inc.*, SBA No. SIZ-4775 (2006), for a full discussion of the clear error standard of review. Consequently, I will disturb the Area Office's size determination only if I have a definite and firm conviction the Area Office made key findings of law or fact that are mistaken.

C. The Merits

1. Introduction

Both Appellant and Ross have provided timely and well-written pleadings to OHA in this matter. Therefore, I am satisfied that through their efforts many of the matters I should consider have been addressed. Nevertheless, it is a matter of significant concern to me that the Record is still incomplete. The Schedules to the Operating Agreements for Fifth and Sixth Berkshire are missing and the Record does not contain the Agreement of Limited Partnership for Fund V and Fund VI. In addition, Appellant has asserted, more than once, that four of the managing members of Fifth Berkshire control a majority of the voting rights of Fifth Berkshire, and that these individuals do not hold a majority of the voting rights of Sixth Berkshire as of July 7, 2006. These assertions, including the Small Declaration, in addition to being self-serving, state legal conclusions or opinions rather than facts. Moreover, they are missing the predicate that would give them weight, *i.e.*, a reference to a document proving the truth of the matter alleged.

The Record indicates that principals (Managing Directors) of Berkshire Partners, who may be presumed to share an identity of interest as managers of Berkshire Partners and of the general partners of the Funds, have the power to control Appellant through their roles in the general partners of Berkshire US Fund V and possibly Fund VI. Further, as alleged by Ross, the limited partners' ownership of the Funds is irrelevant, for it is the identity of interest shared by the managers of the general partners controlling the Funds and who are also Managing Directors of Berkshire Partners that matters. This is because, based on the contents of the Operating Agreement for Berkshire US Fund V and applicable Massachusetts law, the power to manage the Funds rests exclusively with the general partners. Thus, the investors or owners (limited partners of the Funds themselves) have no control.

2. Applicable Regulations

The small business affiliation regulations provide:

§ 121.103 How does SBA determine affiliation?

(a) General Principles of Affiliation. (1) Concerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party

or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists.

(2) SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists.

(3) Control may be affirmative or negative. Negative control includes, but is not limited to, instances where a minority shareholder has the ability, under the concern's charter, by-laws, or shareholder's agreement, to prevent a quorum or otherwise block action by the board of directors or shareholders.

(4) Affiliation may be found where an individual, concern, or entity exercises control indirectly through a third party.

(5) In determining whether affiliation exists, SBA will consider the totality of the circumstances, and may find affiliation even though no single factor is sufficient to constitute affiliation.

(6) In determining the concern's size, SBA counts the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit.

...

(c) Affiliation based on stock ownership. (1) A person (including any individual, concern or other entity) that owns, or has the power to control, 50 percent or more of a concern's voting stock, or a block of voting stock which is large compared to other outstanding blocks of voting stock, controls or has the power to control the concern.

(2) If two or more persons (including any individual, concern or other entity) each owns, controls, or has the power to control less than 50 percent of a concern's voting stock, and such minority holdings are equal or approximately equal in size, and the aggregate of these minority holdings is large as compared with any other stock holding, SBA presumes that each such person controls or has the power to control the concern whose size is at issue. This presumption may be rebutted by a showing that such control or power to control does not in fact exist.

(3) If a concern's voting stock is widely held and no single block of stock is large as compared with all other stock holdings, the concern's Board of Directors and CEO or President will be deemed to have the power to control the concern in the absence of evidence to the contrary.

...

(e) Affiliation based on common management. Affiliation arises where one or more officers, directors, managing members, or partners who control the board of directors and/or management of one concern also control the board of directors or management of one or more other concerns.

(f) Affiliation based on identity of interest. Affiliation may arise among two or more persons with an identity of interest. Individuals or firms that have identical

or substantially identical business or economic interests (such as family members, individuals or firms with common investments, or firms that are economically dependent through contractual or other relationships) may be treated as one party with such interests aggregated. Where SBA determines that such interests should be aggregated, an individual or firm may rebut that determination with evidence showing that the interests deemed to be one are in fact separate.

3. Affiliation Among the Berkshire Funds

a. Common Management

Contrary to Appellant's argument, the analysis for determining whether Berkshire US Fund V (the limited partnership Appellant concedes is the controlling shareholder of Appellant's corporate parent, Active Aero) and Fund VI (the limited partnership with the power to control EMD) are affiliated through common management must extend beyond their respective general partners, Fifth Berkshire and Sixth Berkshire, which are separate and distinct legal entities. Indeed, identifying the individuals with the power to control the management of each separate entity is the only methodology that makes sense, for an entity may act only through the people who manage it.

This methodology is vital because neither Fifth nor Sixth Berkshire has any employees (Fact 6). Instead, Berkshire Partners is the only "Berkshire" entity with any employees. Logically, this lack of employees collapses the importance of all of the intervening "Berkshire" entities. Since the managing members of both Fifth and Sixth Berkshire may spend their time as they please on Prior Funds without conflict (Fact 7) and given this collapsible structure, Appellant must explain how either Fifth or Sixth Berkshire is even relevant to support its assertion that the Area Office's common management analysis must not extend beyond Fifth Berkshire.

The common management rule at 13 C.F.R. § 121.103(e) provides that affiliation arises "where one or more officers, directors, managing members, or partners *who* control the board of directors and/or management of one concern also control the board of directors or management of one or more other concerns." This rule requires an area office (1) to identify *who* are the "officers, directors, managing members, or partners" *who control*⁸ each concern's management; and (2) to determine whether those "officers, directors, managing members, or partners" *also control* one or more other concerns (emphasis added). The rule takes into account various types of business entities and focuses on "who" has the power to control an entity.

Berkshire US Fund V and Fund VI are limited partnerships whose general partners, Fifth Berkshire and Sixth Berkshire, are both LLCs. These LLCs are managed by their managing members. Appellant informed the Area Office that Fifth Berkshire has nine managing members and that Sixth Berkshire has these same nine, plus two more, for a total of eleven managing members. To rebut the possible conclusion that Fifth Berkshire and Sixth Berkshire share common management by virtue of the nine common managing members, Appellant also

⁸ The guiding general principle requires power to control (13 C.F.R. § 121.103(a)).

informed the Area Office that Fifth Berkshire is controlled (or can be controlled) by four of its nine managing members, who comprise a majority of voting rights, and that those four managing members do not represent a majority of the decision-making authority of Sixth Berkshire. Thus, Appellant claimed they are not affiliated. Appellant supported its argument by citing *Size Appeal of Hunot Retardant Company*, SBA No. SIZ-4629 (2004), which held that common management affiliation requires a common “controlling element.” The Area Office rejected this argument, and Appellant reiterates it on appeal.

The common management rule requires an area office to identify the individuals with the power to control the management of each concern in question or, as Appellant correctly points out, the “controlling element” as in *Hunot*. In the case of LLCs whose managing members govern by a “Majority in Number” rule (the default parameter in Massachusetts), the Area Office’s approach of simply comparing the number of common managing members among the LLCs to the number of total managing members of each LLC may well suffice to determine if common management affiliation exists. Here, however, that approach will not suffice, because the Operating Agreements of both Fifth Berkshire and Sixth Berkshire specifically provide that actions of managing members (and special members) require a “Majority in Voting Interest,” and, as Appellant asserts, the managing members of Fifth Berkshire and Sixth Berkshire represent differing amounts of voting interest. *See* Operating Agreements § 5.1; Mass. Gen. Laws ch. 156C § 26.

As noted in my Introduction, the Record does not contain sufficient or reliable evidence to support Appellant’s proposition that the “controlling elements” of Fifth Berkshire and Sixth Berkshire are sufficiently different that “common management” affiliation cannot be found and, thus, that Berkshire US Fund V and Fund VI are not affiliated. I also observe that, at the Area Office level, there may have been confusion as to what evidence was required.

Further Factual Development and Argument

Accordingly, I ORDER Appellant and/or Berkshire Partners to provide to the Area Office documents specifying the “Voting Interest” of each managing member (and special member) of Fifth Berkshire and Sixth Berkshire, along with brief analysis in support of Appellant’s proposition that the “controlling elements” of each firm are sufficiently different that “common management” affiliation cannot be found. These documents may be accompanied by any necessary explanation from a competent witness in the form of a Declaration, and must be received by the Area Office not later than November 1, 2007. Appellant bears the burden of proof in this matter. *See* 13 C.F.R. §§ 121.1008(d); 134.308(b).

b. Identity of Interest Between Berkshire Entities

As Ross argued in its protest and in its Response to the Appeal, the issue of whether Berkshire US Fund V and Fund VI are affiliated stems from the essential identity of interest shared by the managers of their general partners. That is, while it is undisputed that the general partners must act to the benefit of their respective investment funds, the evidence indicates that the members of both general partner teams: (1) Are virtually identical to the Managing Directors or principals of Berkshire Partners; (2) Have interlocking contractual relationships; (3) Are

identical from one fund to the next; (4) Have identical or substantially identical economic interests because the members of the general partners are Managing Directors or principals of Berkshire Partners; and (5) Are unlikely to have a conflict with their management of one fund from the other based upon the terms of the US Fund V Agreement of Limited Partnership available to me.

It is also difficult to ignore the large common investments and common investment strategy between Berkshire Fund V and Fund VI, which comprise significant investments in their portfolio companies, *e.g.*, AAH Holdings, Corp. (Amscan); Advanced Drainage Systems, Inc.; Bare Escentuals, Inc.; and Bartlett Holdings, Inc. It is logical to conclude these large common investments are sufficient to establish an identity of interest between Berkshire Fund V and Fund VI and thus an identity of interest between Fifth Berkshire and Sixth Berkshire as their respective general partners. Such findings would establish affiliation between Berkshire US Fund V and Fund VI.

The terms of the Berkshire US Fund V Agreement of Limited Partnership materially strengthen Ross' argument of an identity of interest affiliation. This Agreement permits the managers of the general partners, who are Berkshire Partners' Managing Directors, to spend what time they need to operate other Prior Funds and Berkshire (Fact 7, Section 7.1). In other words, the managers of the General Partners may act for the benefit of another fund without conflict and have the right to spend whatever time they feel reasonable operating the various funds. Thus, again, the power to control and the discretion on how best to control Berkshire US Fund V rests in the hands of Berkshire Partners' Managing Directors. This conclusion is strongly supported by the Berkshire/Greenbriar Coinvestment Agreement, which is binding upon Berkshire Partners, but not the funds actually investing in the portfolio companies.

While I find it highly likely there is an identity of interest among the Berkshire entities based upon my review of the Record, the facts and analysis present in the size determination do not sufficiently set out the basis for the conclusion of an identity of interest. Accordingly, I REMAND this issue consistent with this discussion and instruct the Area Office to delineate specific common investments between Fifth Berkshire and Sixth Berkshire controlled funds that are sufficient to constitute an independent ground for affiliation based upon identity of interest under 13 C.F.R. § 121.103(f).⁹ The Area Office must also weigh whether the Managing Directors of Berkshire Partners share an economic interest sufficient to constitute another independent ground for affiliation based upon identity of interest making it irrelevant which Managing Directors actually have the power to control Fifth and Sixth Berkshire.

c. Common Ownership Between Funds and Portfolio Companies

In addition to the Common Management and Identity of Interest issues between the general partners of the Berkshire Fund V family of funds and Berkshire Fund VI, a complete treatment of the affiliation issues also requires analysis of the various ownership interests held by Berkshire Fund V and Fund VI in their respective portfolio companies and any constraints placed by the Funds on these companies, such as negative control. *See* 13 C.F.R. § 121.103(a)(3).

⁹ *See Size Appeal of Grounds Maintenance, Inc.*, SBA No. SIZ-4601, at 10 (2003).

Power to control the portfolio companies is important because it is beyond cavil that Fifth and Sixth Berkshire, as the general partners of the various Funds, have the power to control those Funds. Thus, the Area Office must determine whether Berkshire Fund V and Fund VI have the power to control their respective portfolio companies by examining evidence of their ownership and control structures, complete evidence of which is not in the Record.

d. Further Factual Development

In addition to there being incomplete evidence in the Record of the ownership and control structures of the Berkshire Fund V and Fund VI portfolio companies, the Record also lacks:

1. The Agreement of Limited Partnership for Berkshire Fund V and Fund VI (including schedules and exhibits);
2. Exhibit B and Schedules to the Agreement of Limited Partnership for Berkshire US Fund V; and
3. The Schedules to the Operating Agreements for Fifth and Sixth Berkshire.

Absent this information, I would have to speculate which portfolio companies the Fifth Berkshire family of funds has the power to control and should be aggregated with Appellant. Similarly, I would have to speculate whether Berkshire Partners' Managing Directors ultimately have the same powers in regard to Fund VI as they do to the Fifth Berkshire family of funds.

Further, as Ross correctly alleges, the Area Office did not follow all of the instructions in the Remand Order. Accordingly, I must REMAND the common management issue to the Area Office with the following instructions:

a. Appellant or Berkshire Partners shall provide to the Area Office complete copies of the documents noted above and any management contracts not included as exhibits to those documents (including fee schedules) that involve the Berkshire V family of funds or Fund VI;

b. Because the submissions already in the record strongly suggest (and as the Area Office concluded) that Berkshire Fund V and/or Fund VI control certain portfolio companies through their ownership interests (and, thus, that they are affiliated with Active Aero), Appellant or Berkshire Partners shall provide to the Area Office additional evidence of the ownership and control structure of the following companies: Amscan, Advanced Drainage Systems, American Tire Distributors, Aritzia, Bare Escentuals, Bartlett Holdings, Casella Waste Systems, Citizens of Humanity, EMD, National Vision, Tinnerman Palnut, Vi-Jon, and Waterworks. This evidence (including but not limited to: corporate charters, bylaws, shareholder agreements, meeting minutes, and lists of directors and shareholders by class), may support Appellant's assertion that these Funds do not have the power to control these companies. Alternatively, Appellant or Berkshire Partners may concede that a fund or funds have the power to control a particular portfolio company; and

c. Appellant will address the issue of whether there is an identity of interest or common management because of the identity of interest between Berkshire Partners and Fifth and Sixth Berkshire, either through operation of various contracts (e.g., partnership agreements) or a common economic interest (Berkshire Partners or common investments in portfolio companies).

Appellant or Berkshire Partners is ORDERED to comply with these instructions on or before November 1, 2007. Failing compliance, the Area Office is ORDERED to determine: (1) The Fifth Berkshire family of funds or Sixth Berkshire has the power to control Amscan, Advanced Drainage Systems, American Tire Distributors, Aritzia, Bare Escentuals, Bartlett Holdings, Casella Waste Systems, Citizens of Humanity, EMD, National Vision, Tinnerman Palnut, Vi-Jon, and Waterworks; and (2) Fifth and Sixth Berkshire are affiliated.

The Area Office is further ORDERED that if the Fund VI Agreement of Limited Partnership contains provisions similar to those found in Fact 7, *e.g.*, Sections 6.1, 6.2, 6.6, and 7.1, and the management contracts relevant to Berkshire US Fund V and Fund VI are similar, that it should find affiliation between Berkshire US Fund V and Fund VI because the managers or general partners of these funds have common controlling elements and can be said to share an identity of interest through both contractual and economic factors relevant to Berkshire Partners.

The Area Office is also ORDERED to examine the Berkshire Fund V family of funds controlled by Fifth Berkshire as general partner, *e.g.*, Berkshire Fund V, Berkshire Fund V Coinvestment Fund, Berkshire US Fund V, and Berkshire Foreign Fund V. The Area Office should determine whether the various funds have the power to control the various portfolio companies. If the Area Office concludes one of the Berkshire V family of funds has the power to control and thus is affiliated with a portfolio company, then the Area Office should count the total number of employees employed by that portfolio company. Then the Area Office should aggregate employees controlled by the Berkshire V Fund family of funds with those of Active Aero because they are all subject to the common control of Fifth Berkshire.

The questions raised in this appeal, while not novel in themselves, deal with such a complicated management structure that great precision is vital to producing an understandable size determination. Hence normal procedures used in writing size determinations will not suffice. Accordingly, the Area Office is ORDERED to find and state the facts in its size determination by making direct and detailed references to evidence in the Record and not to make cryptic references to the evidence before it. In other words, the Area Office must make the size determination sufficient to stand on its own so that it can be reviewed by OHA without exhaustive examination of the underlying evidence, as was in this instance required. The Area Office must not be concerned with protecting confidential information in its size determination, for its size determination must be comprehensible to a reviewing judge. Accordingly, the Area Office should issue an official un-redacted size determination and such redacted versions of the size determination as appropriate for release to non-government parties.

4. Greenbriar

a. Affiliation within Greenbriar

Appellant does not challenge or address the Area Office's findings of internal affiliation among the various Greenbriar entities. Rather, Appellant argues that since Berkshire US Fund V and Fund VI are not affiliated, Greenbriar's EMD ownership is irrelevant. Appellant also argues there is no affiliation between Appellant and Greenbriar simply because Berkshire Fund VI and Greenbriar US Fund are minority shareholders in EMD.

The reason internal affiliation among the Greenbriar entities is relevant is illustrated by the Area Office's list of the 41 entities it concluded are affiliated with Appellant. Some of these entities can be affiliated only through a Greenbriar entity. Hence internal affiliation amongst the Greenbriar entities is relevant. The Area Office also found Berkshire Partners and Greenbriar to be affiliated based upon their strategic venture in investing in transportation-related concerns. Therefore, the total employee count of Berkshire Partners or Greenbriar controlled concerns, may further demonstrate Appellant is other than small.

Nevertheless, from my examination of the evidence in the Record, I find that to the extent that it was necessary for the Area Office to conclude the Greenbriar entities are affiliated with one another, the Area Office was correct to do so. The Record shows a straight line connection from Greenbriar Fund to Greenbriar Capital and thence to Greenbriar Holdings, the general partner over the equity fund entities with controlling interest (or not) in the various portfolio companies. Accordingly, the Area Office's finding of affiliation among the Greenbriar entities is AFFIRMED.

b. Affiliation between Greenbriar and Berkshire Partners

Berkshire Partners and Greenbriar are not accidental partners. They have pursued an intelligent and focused strategy to invest in transportation sector companies for their mutual benefit since 1999. With regard to EMD, Berkshire Partners and Greenbriar acted in publicized concert to acquire a controlling interest in one of the two railroad engine manufacturers in the United States, a concern that has worldwide scope and influence. While the joint investment in EMD is a significant act, it is not the only time they have acted together through their Coinvestment Agreement. Accordingly, based upon the EMD venture, their stated purpose in making joint investments, and their substantial joint investments on several occasions, I cannot find the Area Office clearly erred in concluding that Berkshire and Greenbriar share an identity of interest because of the confluence of their contractual and economic interests under 13 C.F.R. § 121.103(f). Therefore, this part of the size determination is AFFIRMED.

5. GM and GMAC

I find no evidence that either GM or GMAC has the power to control Active Aero. Accordingly, this part of the size determination is REVERSED.

6. Affiliation with L-3 Communication

The Area Office found there was no violation of the ostensible subcontractor rule because there is no evidence of L-3 Communications being involved with Appellant's proposal. The Record supports the Area Office's findings. The Area Office's findings on this issue are AFFIRMED.¹⁰

THOMAS B. PENDER
Administrative Judge

¹⁰ Appellant also raises a policy issue in its assertion that, if the size determination is affirmed, small businesses will not be able to use venture capital. Policy issues are not appropriate in size appeals. *Size Appeal of ALROD Enterprises, Inc.*, SBA No. SIZ-4704 (2005). Therefore, I will not address this issue.