REDACTED DECISION FOR PUBLIC RELEASE

Cite as: *Size Appeal of Novalar Pharmaceuticals, Inc.*, SBA No. SIZ-4977 (2008)

United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF:	
Novalar Pharmaceuticals, Inc.	SBA No. SIZ-4977
Appellant	Decided: August 4, 2008
Appealed from Size Determination No. 6-2007-037	

APPEARANCES

Jason P. Matechak, Esq., Keith D. Coleman, Esq., and Michael Sanders, Esq., Reed Smith LLP, Washington, D.C., for Appellant.

DECISION

HOLLEMAN, Administrative Judge:

I. Jurisdiction

This appeal is decided 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. Background

A. Request for a Size Determination

On January 23, 2007, the Department of Health and Human Services, Food and Drug Administration (FDA) requested the Small Business Administration (SBA), Office of Government Contracting, Area VI, in San Francisco, California (Area Office), to perform a size determination on Novalar Pharmaceuticals, Inc. (Appellant), in accordance with 13 C.F.R. § 121.901. Appellant had requested a small business waiver of the Prescription Drug User Fee Act (PDUFA) fee the company owes FDA for reviewing a human drug application under the

user fee provisions of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 379g & 379h(d)(4).

B. The Area Office's Investigation

On January 23, 2007, the Area Office informed Appellant of the FDA's request to conduct a formal size determination of its company to determine Appellant's eligibility for a small business waiver. The Area Office requested Appellant to complete and submit SBA Form 355, and to provide other information. The Area Office explained the size standard for the FDA waiver is 500 employees (including affiliates' employees).[1] The Area Office also noted the FDA had indicated Appellant may be affiliated with investors listed on the company's website: **[Investor-2]**, **[Investor-3]**, **[Investor-4]**, **[Domain]**, and **[Investor-1]**.

On February 1, 2007, Appellant responded to the Area Office's initial request for information. Appellant submitted: (1) SBA Form 355; (2) Amended and Restated Certificate of Incorporation, dated January 13, 2005 (2005 Certificate of Incorporation); (3) Bylaws, dated August 10, 2000; (4) Audited Financial Statements, dated December 31, 2005; and (5) an Employee Calculation Worksheet. Appellant asserted it is not affiliated with the investors listed on its website but would supply SBA additional information if needed.

Appellant and SBA then began a dialogue and exchange of information that continued for several months. On February 6 and 28, 2007, Appellant provided additional information in response to the Area Office's e-mailed questions. On March 8, 9, and 12, 2007, following the resignation of Dr. Eckard Weber (Dr. Weber) from Appellant's Board of Directors, Appellant provided the Area Office with the pertinent documents and an updated SBA Form 355.

On March 12, 2007, **[Domain]**, submitted its Amended and Restated Operating Agreement (Domain Operating Agreement), and on March 15, 2007, Domain submitted a single-page summary of its ownership structure. On April 30, 2007, Domain submitted a summary of its portfolio companies and their directors and investors. On May 8, 14, 18, and June 27, 2007, Appellant and/or Domain provided employee counts for Domain's portfolio companies and some updated information to the Area Office.

On July 12, 2007, Appellant's counsel provided arguments (the July 12th Letter) in response to specific control issues raised by the Area Office. On August 31, September 4, and September 12, 2007, Appellant submitted to the Area Office its Third Amended and Restated Voting Agreement dated January 14, 2005 (2005 Voting Agreement), the Unanimous Written Consent of Directors dated January 11, 2005 (2005 Written Consent), the written consents for the August 1, 2007, election of Appellant's independent director, and other information. The Area Office also contains Appellant's Third Amended and Restated Investor Rights Agreement dated January 11, 2005 (2005 Investor Rights Agreement), and Series C Preferred Stock Purchase

[1] The 500 employee size standard required by 21 U.S.C. § 379h(d) and used by the Area Office is smaller than that for Appellant's designated North American Industry Classification System (NAICS) code. Appellant's designated NAICS code, 325412, Pharmaceutical Preparation Manufacturing, has a 750 employee size standard.

Agreement dated January 11, 2005 (2005 Series C Preferred Agreement).

From time to time, as the Area Office record accumulated, the Size Specialist provided Appellant with her developing position on the issue of Appellant's size status and presented additional questions and document requests to further develop the record. On September 14, 2007, the Area Office provided an advance copy of the size determination and, on September 18, 2007, Domain provided its comments on it.

C. Findings of Fact based on the Record before the Area Office

1. Appellant's Stock and Stock Ownership

Appellant is a Delaware corporation established on August 10, 2000. As noted above, several of Appellant's organizational documents date from January 2005. These January 2005 documents include Appellant's 2005 Certificate of Incorporation, the 2005 Voting Agreement, the 2005 Written Consent, the 2005 Investor Rights Agreement, and the 2005 Series C Preferred Agreement. Appellant's 2000 Bylaws remained unchanged.

Article IV of Appellant's 2005 Certificate of Incorporation authorizes common stock and three series of preferred stock. The preferred stock has voting rights; the number of votes per share is determined by a conversion rate formula set out there.

Article V, § 5 contains "protective provisions" to protect the interests of (1) all preferred stock, and (2) Series C preferred stock. These provisions prohibit certain corporate actions that might negatively affect the stock rights, unless the specified percentage (59.9%) of the affected class votes to approve an otherwise prohibited action. Several of the protective provisions attached to the Series C preferred stock prohibit certain large transactions unless a majority of the Board of Directors approves them.

Appellant's common stock shareholders are: **[Domain]** - 35.70%; **[Investor-1]** - 15.44%; **[Investor-2]** - 15.25%; and all others - 33.61%. July 12th Letter at 5.[2] Dr. Weber holds 5.31% of Appellant's common stock.[3]

Appellant's preferred stock shareholders, by Series, are:

Series A:	Domain - 63.16%;	**[Investor-1]** - 26.92%;	9 others - 9.92%
Series B:	**[Investor-1]** - 45.15%;	Domain - 39.57%;	7 others - 15.28%
Series C:	Domain - 40.74%;	**[Investor-2]** - 29.74%;	9 others - 29.52%

In all, Domain owns 45.05% of Appellant's preferred shares. July 12th Letter at 5.

[2] These percentages differ from those submitted on the Forms 355 in February and March because of ownership changes. *Id.* The size determination appears based on these more recent percentages. These same percentages are also stated in the Appeal Petition at 9.

[3] This figure is taken from Exhibit E to the July 12th Letter rather than from the letter itself, which attributes an impossibly high percentage of common stock to Dr. Weber.

2. Dr. Weber's Role in Domain

On March 9, 2007, Domain's Chief Financial Officer responded to the Area Office's request for more information on Dr. Weber by letter (March 9th Letter). She stated he has been an employee since 2001 and carries the title of Partner although he is not a managing partner and has no ownership interest in **[Domain]**. Further:

> Dr. Weber is a key employee of **[Domain]**. His focus is to actively search for novel, investment-worthy drug products or technologies and to found biotechnology and biopharmaceutical start-up companies around those products or technologies. In this role, Dr. Weber has been founding CEO of multiple biopharmaceutical companies in the Domain venture fund portfolios.

March 9th Letter. The Area Office file also contains a document titled "novel solutions Novalar Printable Website Document" (Website Document) which contains informational sketches on Appellant's Directors. Following text similar to that excerpted in the March 9th Letter, this document contains the following:

> Dr. Weber actively manages, on an interim-basis, the companies he founds until permanent, full-time management has been recruited. Dr. Weber has been founding CEO of multiple biopharmaceutical companies in the Domain portfolio including **[Public-3]**, **[Private A-5]**, **[Public-4]**, **[Private B-12]**, **[and six others]**. He currently serves as interim CEO of **[Private A-8]** and **[Private B-19]**, two seed-stage biopharmaceutical companies. He is Chairman of the Board at **[Public-3]**, **[Private A-5]**, **[Public-4]**, **[Private B-12]**, **[and three others]**. In addition, he is a board member of **[Company]**, **[Private B-9]**, and **[Majority-2]**.

Website Document.[4]

3. Appellant's Board of Directors

Under Appellant's Bylaws, a quorum for shareholder business is a "majority of the stock issued and outstanding and entitled to vote" and when a quorum is present, a simple majority of the stock having voting power decides the question. Article II, § 4. The Bylaws provide for the election of two Directors. Article III, § 1; Article II, § 4. Appellant's property and business "shall be managed or under the direction of its Board of Directors." Article III, § 1. A quorum of the Board is the majority of the authorized number of Directors and the vote of a majority of Directors present is needed for action. Article III, § 7.

In January 2005, Appellant, Domain, **[Investor-1]**, **[Investor-2]**, and others (the parties) executed a Voting Agreement providing for six Directors. 2005 Voting Agreement, § 2(a). The parties agreed to vote for six Directors, designated (and removable) as follows:

[4] Appellant's website no longer contains this document, but does contain informational sketches on Appellant's current Directors.

1 by Domain (based on its preferred stock);
1 by **[Investor-1]** (based on its preferred stock);
1 by **[Investor-2]** (based on its preferred stock) ("Series C Representative");
1 by a majority of the common stock;
1 who is Appellant's CEO (removable by a majority of the Board); and
1 Independent Director, by a majority of the Board, including the Series C Representative.

Id., §§ 2(a), 4(b). The parties also agreed they will not vote to change the number of directors or vote for other changes inconsistent with the 2005 Voting Agreement. *Id.*, § 3. Waiver or amendment of any provision of the 2005 Voting Agreement requires consent by Appellant, by the holders of the specified percentage (59.9%) of the preferred stock, and by the holders of the majority of common stock. *Id.*, § 7.

With the resignation of Dr. Weber on March 8, 2007, the subsequent election of his replacement, and the election of the Independent Director on July 31, 2007, Appellant's Board consisted of the following six people on August 1, 2007: Robert J. More, for Domain; Robert W. Jevon, for **[Investor-1]**; Joyce A. Lonergan, for **[Investor-2]**; Donna Janson, Appellant's CEO; Lowell E. Sears, for common stock; and Steven J. Semmelmayer (Independent Director).

D. The Size Determination

On September 20, 2007, the Area Office issued Size Determination No. 6-2007-037 finding Appellant to be other than a small business concern. The Area Office determined Appellant's size status as of August 1, 2007. The Area Office found Appellant affiliated with Domain on two grounds: first, Domain and Dr. Weber, with whom Domain has an identity of interest, together own most of Appellant's stock; second, Domain can control Appellant's Board of Directors. The Area Office also found Domain, in turn, is affiliated with 36 other companies whose combined employee counts exceed the size standard.

1. Affiliation with Domain

The Area Office found that there are three principal shareholders who owned more than 10% of Appellant's common stock. These are: Domain, **[Investor-1]**, and **[Investor-2]**. Domain owns twice as much of Appellant's stock as the next two investors.

Dr. Weber is a shareholder in Appellant, and Domain's Chief Financial Officer stated that Dr. Weber is also a key employee of Domain. Thus, the Area Office concluded, it would be doubtful he would vote his shares against Domain's interests. Dr. Weber has common investments with Domain in several other firms. Thus, the Area Office concluded Dr. Weber and Domain have an identity of interest based on common investments and common economic interests. Domain and Dr. Weber together hold a majority of Appellant's common stock, but if options are given present effect, Domain's interest drops to about 28%, still the largest single block of stock, and twice as large as the next largest holding.

Domain has a majority interest in Appellant's Preferred Series A stock, more than double

that of the next largest shareholder, **[Investor-1]**. **[Investor-1]** is the majority shareholder of Appellant's Preferred Series B, Domain the second largest shareholder with approximately 40%. Appellant's Preferred Series C stock is held 40.74% by Domain and 30% by **[Investor-2]**. The Area Office found that Domain has the power to control the Preferred Series C stock, as one of the two largest shareholders compared to all other shareholders.

The Area Office found that Appellant's stock is not widely held because it is a privately-held company with fewer than 60 shareholders of record. Therefore, Appellant's Board could not be found to control Appellant under 13 C.F.R. § 121.103(c)(3).

The Area Office found Appellant's Board of Directors is authorized to have six members, but has only five at present. These are Robert More, for Domain; Robert Jevon, for **[Investor-1]**; Joyce Lonergan, for **[Investor-2]**; Donna Janson, Appellant's President and Chief Executive Officer; and Lowell E. Sears. A quorum of the Board of Directors is four members.

The Area Office noted Appellant's argument that Domain does not have the power to control the Board because it could elect only one member, while **[Investor-1]** and **[Investor-2]** also have the power to elect one member. Dr. Weber was initially designated as the director elected by the majority of common stock. Appellant informed the Area Office that it had been agreed that Domain would not designate a second individual to sit on the Board, but Appellant has not changed its Articles of Incorporation to reflect this agreement. Domain still can name a second director, and since a quorum of the Board is four directors, Domain's two directors could block any action requiring a quorum.

Further, contrary to Appellant's argument, Domain has the capacity to block certain actions which require approval of holders of at least the specified percentage (59.9%) of all outstanding preferred stock, as it has 44.9% of all preferred stock.

Accordingly, the Area Office found Domain has the power to control Appellant and, thus, is affiliated with Appellant. As for the other investors in Appellant noted by the FDA and mentioned on Appellant's website, the Area Office found none of them to be affiliated with Appellant. The other investors were **[Investor-1]**, **[Investor-2]**, **[Investor-3]**, and **[Investor-4]**.

2. Affiliation with Domain's Portfolio Companies

The Area Office then considered whether Domain, a venture capital firm, might be affiliated with any of 36 other companies in which it has investments (portfolio companies). First, the Area Office determined that Domain has a majority interest in two of these companies, **[Majority-2]** and **[Majority-1]**, and therefore is affiliated with them. Next, the Area Office identified ten companies in which Domain's interest, while a minority interest, is large in comparison to all other interests, and determined that Domain has the power to appoint and/or elect directors.[5] The Area Office concluded Domain is affiliated with these companies, listed in Exhibit A of the size determination. These companies are:

[5] I present the specific fact findings on each company *infra*, in the Discussion.

[Private A-1]	**[Private A-3]**	**[Private A-5]**	**[Private A-7]**	**[Public-1]**
[Private A-2]	**[Private A-4]**	**[Private A-6]**	**[Private A-8]**	**[Public-2]** .

Then the Area Office found Domain affiliated with 24 companies in which Domain and one or more other shareholders have minority holdings that are equal or approximately equal in size, and the aggregate of these holdings is large as compared to any other holding.[6] In such situations, each shareholder has control or the power to control the company, and the companies are thus affiliated. These companies, listed in Exhibit B of the size determination, are:

[Private B-1]	**[Private B-6]**	**[Private B-11]**	**[Private B-16]**	**[Private B-21]**
[Private B-2]	**[Private B-7]**	**[Private B-12]**	**[Private B-17]**	**[Private B-22]**
[Private B-3]	**[Private B-8]**	**[Private B-13]**	**[Private B-18]**	**[Public-3]**
[Private B-4]	**[Private B-9]**	**[Private B-14]**	**[Private B-19]**	**[Public-4]** .
[Private B-5]	**[Private B-10]**	**[Private B-15]**	**[Private B-20]**	

Finally, the Area Office reviewed the employee counts for these 36 portfolio companies and concluded that Appellant, together with Domain and its affiliates, exceeds the 500-employee size standard and thus is other than small.

E. The Appeal

Appellant received the size determination on September 20, 2007, and filed this appeal with the Office of Hearings and Appeals (OHA) on October 22, 2007. Appellant reiterates and amplifies the arguments made in its July 12, 2007, letter to the Area Office. Essentially, Appellant argues: (1) it is not affiliated with Domain, and (2) Domain is not affiliated with its portfolio companies. Appellant encloses several documents with its Appeal Petition.[7]

1. Appellant's Argument that it is not Affiliated with Domain

Appellant argues that the Area Office ignored the factual evidence submitted regarding the business practices of national venture capital firms investing in the life sciences industry. Appellant asserts that in order to obtain capital, a syndicate of venture capital firms must be formed. These investors insist that no one investor has the ability to unilaterally approve or block any transaction in the invested company. Therefore, the invested company is organized so that individual investors do not have positive or negative control of it. Further, investors enter into agreements to insure that no one investor has the unilateral ability to approve or to block approval of any act by the company.

Appellant asserts it was expressly organized so that Domain does not control or have the power to control Appellant. Domain is only one of a group of venture capital firms owning

[6] See previous note.

[7] Except for Attachment E, these documents are all in the record that was before the Area Office. Appellant provides Attachment E, its most recent Amended and Restated Certificate of Incorporation dated October 18, 2007, as a matter of information and update only, as this document did not exist on August 1, 2007, the date as of which Appellant's size was determined.

shares of Appellant, and the Voting Agreement, Certificate of Incorporation, and other agreements ensure that Domain does not control Appellant. Domain has less than 50% of Appellant's stock, and the right to name only one of Appellant's six directors. Domain has also stated that even if the Voting Agreement is terminated or amended, it will not have a second person who is a partner of or affiliated with Domain serve on Appellant's Board.

Appellant concedes that Domain technically owns enough shares to block approval of some of Appellant's shareholder actions, those relating to the rights, preferences, and privileges of the Preferred Stock and to extraordinary events that do not involve Appellant's day-to-day operations. Appellant notes, however, that Domain has never exercised this power.

As for the Area Office's finding that Dr. Weber and Domain have an identity of interest, Appellant asserts the Area Office failed to consider that Dr. Weber resigned from Appellant's Board on March 8, 2007. Domain and Dr. Weber have no common investments or economic interests. Dr. Weber holds Appellant's common stock and is an employee of Domain, but he was not a director of Appellant as of August 1, 2007, having resigned from the Board on March 8, 2007. Appellant argues that Dr. Weber and Domain's ownership interests are different because he holds common stock and Domain holds preferred stock, citing *Size Appeal of Cytel Software, Inc.*, SBA No. SIZ-4822 (2006), where OHA found shareholders of common stock could not be presumed to act together. Appellant also asserts the Voting Agreement prohibits Dr. Weber and Domain from acting in unison.

Alternatively, Appellant argues the size determination fails to account for the fact that, even if their respective holdings are aggregated, Domain and Dr. Weber still have only a minority interest in Appellant. Appellant asserts the Area Office presented no analysis supporting its finding that Domain and Dr. Weber together own over 50% of Appellant's common stock, and the largest block even when calculated considering all options exercised.

Regarding its Board of Directors, Appellant asserts that its Bylaws require a majority of the authorized number of directors for a quorum and a majority vote for Board action. Because Domain names only one member of the six-member Board, it cannot unilaterally cause or block either a quorum or any Board action. Further, Appellant asserts the Area Office failed to consider the March 8, 2007, letter from Domain's designee on the Board, which states Domain has the right to designate only one member of the Board, and will designate no more even if it were to have the right to do so.

Appellant also argues that the Area Office improperly speculated that Domain could appoint a director to Appellant's Board and that person could be Dr. Weber. Further, this speculation is unreasonable because it assumes that Board members would abandon common law and statutory duties and act unlawfully in blocking a quorum.

2. Appellant's Argument that Domain is not Affiliated with its Portfolio Companies

Appellant further assigns error to the Area Office's findings of affiliation between

Domain (and thus Appellant) and all but two[8] of Domain's portfolio companies. Appellant asserts the Area Office did not perform the necessary analysis comparing Domain's holdings in these companies with those of other shareholders. Appellant further asserts that, in many cases, the Area Office did not have the necessary information to make those affiliation determinations.

a. Four Publicly-Traded Portfolio Companies

Based on public information,[9] Appellant first asserts that Domain does not control or have the power to control the four portfolio companies that are publicly traded. Therefore, the Area Office erred in finding that Domain (and Appellant) are affiliated with all of them. The four publicly-traded companies are: **[Public-1]**, **[Public-3]**, **[Public-4]**, and **[Public-2]**. Specifically, Domain owns only 19.71% of **[Public-1]**, with one designee on an eight-member board. Domain owns only 14.3% of **[Public-3]**, with two designees on a nine-member board. Domain owns only 16.9% of **[Public-4]**, with two designees on a nine-member board. Domain owns only 18% of **[Public-2]**, and has only one designee on its eight-member board. Appellant further asserts that Domain intends to reduce its interest in these four companies.

Appellant further argues that the four publicly-traded companies also must be considered to have "widely held" stock, and thus control of the companies rests not with Domain (a less than 20% shareholder), but with the management of each company under 13 C.F.R. § 121.103(c)(3). In support, Appellant cites *Size Appeal of MPC Computers, LLC*, SBA No. SIZ-4806 (2006) (defining "widely held") and *Size Appeal of Flying Scotsman, Inc. and Scotsman Timber Co.*, SBA No. SIZ-1190 (1978) (holding a block of stock amounting to 30% controls a publicly-held company). Accordingly, Appellant argues Domain cannot be affiliated with any of the four publicly-traded companies in its portfolio.

b. Seven Privately-Held Portfolio Companies

Next, Appellant asserts the Area Office erred in finding Domain controls or has the power to control seven of the privately-held companies in its portfolio. These companies are: **[Private B-1]**, **[Private B-5]**, **[Private B-8]**, **[Private B-13]**, **[Private B-15]**, **[Private B-16]**, and **[Private B-21]**. Domain does not control any of these companies because Domain's minority interest in each is not large compared to other outstanding blocks of voting stock.

Further, in the case of each of these seven companies, either its corporate charter or a voting agreement among shareholders contains "protective provisions" including supermajority requirements, that prevent Domain or any other shareholder from unilaterally dictating or blocking transformative corporate transactions. Appellant argues that, because Domain does not control any of these seven companies, the Area Office erred in finding affiliation.

[8] These are **[Majority-1]** and **[Majority-2]**, which the Area Office found were majority-owned by Domain.

[9] The Area Office file contains portions of various public SEC filings identifying the 5% stockholders, directors, and executive officers of these companies.

c. Other Privately-Held Portfolio Companies

Appellant asserts that the Area Office erred generally in ascribing the power to control to Domain in the case of any company where Domain is the single largest shareholder but owns less than 40% of the stock or less than twice as much as the next-largest shareholder. In support, Appellant cites *Size Appeal of Cytel Software, Inc.*, SBA No. SIZ-4822 (2006) (44.07% of voting stock is large compared to the next block of 24.75%), *Size Appeal of Procedyne Corp.*, SBA No. SIZ-4354 (1999) (42.1% is large compared to the next block of 18.9%), *Size Appeal of Asphalt Products Corp.*, SBA No. SIZ-2589 (1987) (45% is large compared to the next block of 30%), *Size Appeal of Lebanon Foundry & Machine Company*, SBA No. SIZ-2433 (1986) (45% is large compared to the next block of 30%), and *Size Appeal of U.S. Grounds Maintenance, Inc.*, SBA No. SIZ-4601 (2003) (46.67% is large compared to the next block of 33.33%). Appellant points out that the seven privately-held companies discussed earlier (**[Private B-1]**, **[Private B-5]**, **[Private B-8]**, **[Private B-13]**, **[Private B-15]**, **[Private B-16]**, and **[Private B-21]**), all fall into this pattern.

Also Appellant selects only one director for each of the privately-held portfolio companies except for **[Private A-1]** and **[Private A-8]**, in which Domain selects two directors. Appellant asserts the Area Office erred to find Domain controls the board of directors in any company in which Domain is entitled to appoint only one director for boards that consist of from three to nine directors.

IV. Discussion

A. Timeliness

Appellant filed the instant appeal within 30 days of receiving the size determination, and thus the appeal is timely. 13 C.F.R. § 134.304(a)(2).

B. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, it must prove the area office size determination is based on a clear error of fact or law. 13 C.F.R. § 134.314; *Size Appeal of Procedyne Corp.*, SBA No. SIZ-4354, at 4-5 (1999). OHA will disturb the area office's size determination only if the Administrative Judge, after reviewing the record and pleadings, has a definite and firm conviction the area office erred in making its key findings of fact or law. *Size Appeal of Taylor Consultants, Inc*., SBA No. SIZ-4775, at 11 (2006).

C. Governing Law

The Area Office applied a 500-employee size standard (as opposed to the 750-employee size standard corresponding to Appellant's NAICS code 325412, *see* 13 C.F.R. § 121.201), and also applied the affiliation rules found at 13 C.F.R. § 121.103 to its size determination, rather then using Delaware corporate law to determining who controls and thus is affiliated with the

Appellant, a Delaware corporation. As a preliminary matter, I must determine whether the Area Office applied the correct law to its size determination.[10]

The Small Business Act authorizes the SBA to determine the size status of concerns for the purposes of that statute. Small Business Act §§ 3(a)(2)-(3), 8(b)(6); 15 U.S.C. §§ 632(a)(2), 637(b)(6). The SBA's authority includes rulemaking authority for establishing the size standards such as the one for Appellant's NAICS code 325412 and for other rules and regulations necessary to carry out the purpose of the statute. *See* Small Business Act §§ 3(a)(2)-(3), 5(b)(6); §§ 15 U.S.C. 632(a)(2)-(3), 634(b)(6). These other necessary rules include the affiliation rules as well as the other size regulations at 13 C.F.R. Part 121.

The SBA's size regulations authorize SBA to provide a size determination on request from other Agencies of the Federal Government. 13 C.F.R. § 121.901. This regulation contains no specific size standard to be used in the case of a request by the FDA under the Prescription Drug User Fee Act (PDUFA). *Compare* 13 C.F.R. § 121.901 *with* § 121.702 (the latter containing special size rules for the Small Business Innovation Research Program). The PDUFA itself, however, provides a size standard of 500 employees in its own definition of "small business," which is:

> [A]n entity that has fewer than 500 employees, including employees of affiliates, and that does not have a drug product that has been approved under a human drug application and introduced or delivered for introduction into interstate commerce.

21 U.S.C. §379h(d)(4)(A). Accordingly, because the 500-employee size standard comes from the statute pursuant to which the FDA requested a small business size determination, I hold that the Area Office was correct to use that size standard, as opposed to the 750-employee size standard corresponding to Appellant's NAICS code 325412, in its size determination of Appellant.

Regarding the use of SBA's affiliation regulation, the PDUFA defines "affiliate" as:

> [A] business entity that has a relationship with a second business entity if, directly or indirectly--(A) one business entity controls, or has the power to control, the other business entity; or (B) a third party controls, or has power to control, both of the business entities.

21 U.S.C. § 379g(11). The PDUFA does not define the operative phrase "controls, or has power to control," nor does it specify what other substantive rules apply to size determinations provided for the purpose of small business fee waivers. As I noted in *Size Appeal of Cellegy Pharmaceuticals*, SBA No. SIZ-4439 (2001), however, this statutory definition of "affiliate" is very similar to the SBA's first general principle of affiliation, which provides:

> 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.

[10] Appellant does not squarely raise the issue of the correct law; however, its appeal petition constantly refers to both the 750-employee and the 500-employee size standards.

13 C.F.R. § 121.103(a)(1) (emphasis added). The rest of the SBA's affiliation regulation, and OHA's precedental case law interpreting that regulation, details what the operative phrase "controls or has the power to control" means under the various affiliation theories. Accordingly, I conclude that the Area Office was correct to use this body of law in its size determination.

D. Merits of the Appeal

1. Appellant's Affiliation with Domain

a. Domain's Identity of Interest with Dr. Weber

The Area Office found an identity of interest between Domain and Dr. Weber, with the result that the interests owned by each in Appellant must be aggregated for the purpose of determining the ownership of Appellant. The identity of interest rule provides:

> 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.

13 C.F.R. § 121.103(f) (emphasis added).

By its plain language, this rule is not limited to situations where an identity of interest arises solely from a family relationship or solely from common investments or solely from economic dependence through contractual or other relationships. The "such as" in the regulatory text clearly does not exclude other sources of identity of interest affiliation, such as an individual's key role in a concern when accompanied by some common investments (even though the common investments, by themselves, might not be sufficient to give rise to an identity of interest).

Here, Domain and Dr. Weber, in addition to their investments in Appellant, also own stock in **[Private A-5]**, **[Public-3]**, **[Private B-12]**, **[Public-4]**, **[Private B-19]**, and **[Private A-8]**, all Domain portfolio companies. Domain itself identifies Dr. Weber as one of its key employees, who plays a vital role in Domain and many of its portfolio companies, and was an important figure in Domain's early years. Dr. Weber has clearly been an important figure in the growth of Domain and its portfolio companies. I thus conclude that when an individual is a key employee who has played such a major role in a concern's growth and also shares ownership with that concern in the portfolio companies he helped develop, that individual has an identity of interest with that concern.

In rebuttal of the Area Office's conclusion that Domain and Dr. Weber have an identity of interest, Appellant asserts that Domain's and Dr. Weber's ownership interests are different

because he holds common stock and Domain holds preferred stock. Appellant also asserts the Voting Agreement prohibits Dr. Weber and Domain from acting in unison. I must reject these arguments, because Dr. Weber's role in Domain's business plan is to work for the benefit of Domain at a level that transcends the rights and preferences of any particular class of stock. Dr. Weber actively manages the companies he founds until permanent, full-time management is in place. He has been founding CEO of multiple companies in Domain's portfolio. He carries the title of Partner. Thus, even though he is neither a managing partner nor an owner in Domain Associates, Domain publicly holds him out, and he holds himself out, as someone so intimately connected to Domain as to be called its Partner.

Accordingly, I conclude that the Area Office correctly determined that Dr. Weber and Domain share an identity of interest, and that they must be considered as a single person for purpose of a size determination.

b. Domain's Stock Ownership in Appellant

Under the SBA's size regulations, a concern will be found affiliated with a single shareholder (or a group of shareholders) on the basis of stock ownership even though the block of stock in question is less than 50% of the concern's voting stock, if that minority block of stock is "large compared to other outstanding blocks of voting stock." 13 C.F.R. § 121.103(c)(1); *Size Appeal of H.L. Turner Group, Inc.*, SBA No. SIZ-4896, at 4-5 (2008). SBA has consistently applied this single-largest minority shareholder rule for many years despite corporate law arguments that legal control of the concern does not rest with a minority shareholder under state corporate law. *See, e.g., Size Appeal of Ochoco Lumber Company,* SBA No. 541 (1972). Thus, in order for a concern to obtain benefits under the Small Business Act, including small business size status for Federal programs such as the small business fee waiver under the PDUFA, affiliation under the single-largest minority shareholder rule must be considered.

Neither the regulation nor OHA's case law defines exactly how much larger the single-largest minority interest must be "compared to other outstanding blocks of voting stock" in order to cause affiliation under 13 C.F.R. § 121.103(c)(1). *H.L. Turner,* at 5. However, OHA's decisions do show particular percentage-point comparisons between largest- and next-largest stockholdings that have been held to be large (or not large) in prior cases. If an area office finding regarding a particular concern is within the ambit of earlier OHA decisions dealing with similar percentage-point comparisons, I will not find clear error in that area office finding. For example, in *Size Appeal of Procedyne Corp.,* SBA No. SIZ-4354 (1999), I held that a 42.1% block of voting stock is large compared to the next block of 18.9%. I note the largest block in *Procedyne* was 2.23 times (more than twice) the size of the next-largest block, with the difference between them 23 percentage points.

In a more recent case on this issue, I agreed with the area office that a 49% block of stock is large in comparison to a 36% block (causing affiliation), but disagreed that a 49% block is large in comparison to a 41% block (not causing affiliation). *H.L. Turner, at* 6. I note the largest block in the *Turner* concern where I found affiliation was 1.36 times (one and one-third times) the size of the next largest block, whereas in the other concern the largest block was only

1.20 times the size of the next largest. The differences between the largest and next-largest blocks in these concerns were 13 as opposed to 8 percentage points.

Here, Appellant's common stock shareholders are: Domain - 41.01% (including Dr. Weber's 5.31%); **[Investor-1]** - 15.44%; **[Investor-2]** - 15.25%; and all others - 33.61%. The Domain/Weber block is well over 2½ times the size of the next largest block (held by **[Investor-1]**) with about 25 percentage points difference. This comparison is well within the ambit of *Turner* and even *Procedyne*.

Appellant's preferred stock shareholders, by Series, are:

Series A:	Domain - 63.16%;	**[Investor-1]** - 26.92%;	9 others - 9.92%
Series B:	**[Investor-1]** - 45.15%;	Domain - 39.57%;	7 others - 15.28%
Series C:	Domain - 40.74%;	**[Investor-2]** - 29.74%;	9 others - 29.52%

Domain owns 2.35 times (more than twice) the amount of Series A Preferred as the next largest shareholder (**[Investor-1]**), with a 36 percentage-point difference. This comparison is well within the ambit of *Turner* and *Procedyne*. Domain is the largest shareholder of the Series C Preferred, owning 1.37 times (more than one and one-third times) the amount owned by the next largest shareholder (**[Investor-2]**), with an 11 percentage-point difference. This comparison is well within the ambit of *Turner*. Domain is a close second-largest shareholder in Series B Preferred. Domain also owns 45.05% of Appellant's preferred shares taken together, a percentage which has to be close to twice that of each of the next two shareholders (**[Investor-1]** and **[Investor-2]**).

Here, if all Appellant's outstanding options are exercised, Domain would have a block of stock twice as large as the next largest block. Further, Domain has the power to block certain actions which require the approval of the specified percentage (59.9%) of all outstanding preferred stock. These actions include any alteration in rights or powers of the Preferred Stock, any increase in the number of authorized shares, declaring or paying dividends on the Common Stock, authorizing or issuing any class of shares with equal or superior rights to the Preferred Stock, and amending the Certificate of Incorporation or Bylaws to increase or decrease the number of directors. The existence of veto power over an important aspect of a business constitutes negative control. *Size Appeal of Kansas City LLC d/b/a Best Harvest Bakeries*, SBA No. SIZ-4574, at 7 (2003). This ability to block important actions may be limited to certain important business transactions, such as those Domain may block as a holder of more than 44.9% of all preferred stock. *Size Appeal of Cytel Software, Inc.*, SBA No. SIZ-4822 (2006).

The corporate actions requiring supermajority approval here go beyond the type of actions discussed in *Size Appeal of EA Engineering Science and Technology, Inc.*, SBA No. SIZ-4973 (2008), which were found merely to be protection of the stockholder's investment, and thus, the ability to block them did not constitute negative control. Here, there is a key distinction in Domain's ability to block decisions regarding dividends, which are important decisions in the operation of the business, and thus Domain's ability to block them constitutes negative control.

Accordingly, I conclude the Area Office correctly determined that Appellant is affiliated with its largest shareholder, Domain, as the single-largest minority shareholder of Appellant's common stock and of two out of the three Series of its preferred stock.

c. Domain's Control of Appellant's Board of Directors

The Area Office determined that Domain controlled Appellant's Board of Directors and thus had a second ground underlying its determination that Domain is affiliated with Appellant. The SBA's size regulations approach the issue of who controls a concern's board of directors through the concept of negative control. The pertinent regulation provides:

> 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.

13 C.F.R. § 121.103(a)(3).

Under Appellant's Bylaws and the 2005 Voting Agreement, the Board of Directors consists of six members, with four members the quorum for business and a majority required for Board action. The record that was before the Area Office shows there were six Directors as of August 1, 2007. They were: Robert J. More, for Domain; Robert W. Jevon, for **[Investor-1]**; Joyce A. Lonergan, for **[Investor-2]**; Donna Janson, Appellant's CEO; Lowell E. Sears, for common stock; and Steven J. Semmelmayer (Independent Director). Therefore, I conclude the Area Office erred in its finding that Appellant has five Directors.

The Area Office also determined that for Domain to be affiliated with Appellant through negative control of Appellant's Board of Directors, Domain would need to control only two Directors. With six Directors and a quorum of four, however, two Directors would not suffice to block action by preventing a quorum. Three Directors would be needed. As for blocking action by the Board, Domain would need to control three, not two, Directors, because an act of the Board, when four or five Directors are present, requires three votes and when six Directors present, requires four votes. Therefore, I conclude the Area Office erred in its finding that Domain would need only two Directors to control Appellant's Board of Directors.

Finally, the Area Office determined that Domain does control two Directors. Under the 2005 Voting Agreement, however, Domain controls only one of the six Directors. **[Investor-1]** and **[Investor-2]** control one each. One is selected by the common stock, of which Domain, even with Dr. Weber's stock aggregated, has only 41% and therefore not enough to control the position. The fifth Director is Appellant's CEO, and the sixth is the Independent Director; both of these sit at the pleasure of the majority of the entire Board. Therefore, I conclude the Area Office erred in its finding that Domain controls two Directors.

Accordingly, for these reasons, I conclude the Area Office erred in its determination that Appellant is affiliated with Domain through its control of Appellant's Board of Directors. Because Domain is affiliated with Appellant through its stock ownership, however, my reversal

of the Area Office's finding of Board of Directors affiliation does not change my ultimate conclusion that Appellant and Domain are affiliated.

2. Domain's Affiliation with its Portfolio Companies

Affiliation with Domain itself does not cause Appellant to exceed the size standard; however, the Area Office identified 36 portfolio companies as affiliated with Domain (and thus with Appellant) and whose aggregate employee counts do cause Appellant to exceed the size standard. Thus, the Area Office concluded Appellant exceeds the size standard. Appellant contests the Area Office's affiliation findings regarding 34 of these companies.

a. Majority Stock Ownership

The size regulations provide that a person (including any individual or entity) that owns, or has the power to control, 50 percent or more of a concern's voting stock controls or has the power to control the concern. 13 C.F.R. § 121.103(c)(1). The Area Office found two portfolio companies affiliated with Domain under the majority stock ownership rule. These companies are **[Majority-2]** and **[Majority-1]**. On appeal, Appellant does not contest these findings. Moreover, Domain's majority ownership of both companies is apparent in the materials submitted to the Area Office on April 30, 2007. Accordingly, I conclude the Area Office did not err in its conclusion that Domain, therefore Appellant, is affiliated with both **[Majority-2]** and **[Majority-1]**.

b. Minority Stock Ownership

The Area Office found Domain affiliated with 34 of its portfolio companies through its minority stock ownership. On appeal, Appellant first addressed the four companies that are publicly-traded, then seven of the companies listed in Exhibit B, and then the other privately-held companies in a more general way. I address the publicly-traded companies first, then address the companies listed on Exhibit A, and then those listed on Exhibit B.

1. Publicly-Traded Companies

SBA does not normally differentiate between publicly-traded companies and privately-held companies for the purpose of size determination issues such as affiliation. *Size Appeal of Geo-Seis Helicopters, Inc.*, SBA No. SIZ-3918 (1994). However, the affiliation based on stock ownership regulation does have a special rule for widely-held companies:

> 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.

13 C.F.R. § 121.103(c)(3) (emphasis added).

This rule is conjunctive; it contains two conditions, both of which must be satisfied before it can be invoked. In order for SBA to deem a concern controlled by its officers and directors under this rule, it is not sufficient that the concern's stock is widely held. There also must be no single block of stock that is large compared with all other stock holdings. If one or the other of these two conditions is not met, the special deeming rule cannot apply and the concern cannot be said to be controlled by its officers and directors under 13 C.F.R. § 121.103(c)(3). On the other hand, if there is no single block of stock in a widely-held concern that is large as compared to all other blocks, management will be deemed in control absent evidence to the contrary.

Here, Appellant asserts Domain cannot be affiliated with its four publicly-traded portfolio companies because 13 C.F.R. § 121.103(c)(3) deems management to be in control of them. As publicly-traded companies, the stock of all four is widely held. *Size Appeal of MPC Computers, LLC*, SBA No. SIZ-4806 (2006). Thus, the first condition of the rule has been met. The second condition, that there be no single largest shareholder, is met by only two of the four companies, as indicated in the table below, which contains information collected by the Area Office from the companies' public SEC filings.

Company	Domain %	Other Largest Shareholders %			
[Public-3]	21.05*	21.42	9.85	9.21	7.29
[Public-4]	18.1*	14.6	10.9	10.8	5.4

* Includes the holdings of Dr. Weber, with whom Appellant has an identity of interest.

As shown in the table, **[Public-3]** and **[Public-4]** have no single-largest minority shareholder, under the analysis set out, *supra*, in the discussion of Domain's stock ownership in Appellant. Thus, each meets both conditions of 13 C.F.R. § 121.103(c)(3) and SBA must deem them to be controlled by their management. Accordingly, the Area Office erred in its conclusion that **[Public-3]** and **[Public-4]** are affiliated with Domain and with Appellant.

2. Single-Largest Minority Shareholder (Exhibit A)

The Area Office found ten portfolio companies affiliated with Domain under the single-largest minority shareholder rule. *See* 13 C.F.R. § 121.103(c)(1). These companies, listed in the size determination at Exhibit A, along with pertinent facts,[11] are as follows:

Company	Domain %	Other Largest Shareholders %				
[Private A-1]	39.7	10.7	7.0	2.5	2.4	
[Private A-2]	33.1	17.8				
[Private A-3]	32.1	23.6	9.2	8.6	8.6	3.7
[Private A-4]	28.2	11.3	11.0	8.4	4.5	3.7
[Private A-5]	22.4	14.1	13.8	12.3	9.4	9.4
[Private A-6]	23.3	10.5	9.3	1.2		
[Private A-7]	44.4	28.3				
[Private A-8]	27.1	15.3	15.3	8.5	1.7	

[11] This data was submitted to the Area Office on April 30, 2007.

Company	Domain %	Other Largest Shareholders %				
[Public-1]*	19.6**	10.6	8.7	6.9	6.9	6.0
[Public-2]*	18.0***	8.1	8.0	6.2	5.1	

* Public company

** Appellant's July 12, 2007, Letter reports Domain owns 19.71%; Appellant's April 30, 2007, submission reports Domain owns 19.4% and .2%.

*** **[Public-2]**'s March 31, 2007, Proxy Statement reports Domain owns 21.5%; Appellant's July 12th Letter reports Domain owns 18%

As shown in the table, Domain is the single-largest minority shareholder in each of these ten companies and, under the *Turner* analysis set out, *supra,* each is affiliated with Domain. The Area Office did not err in finding all ten companies affiliated with Domain and, therefore, with Appellant under the single-largest minority shareholder rule.

3. Multiple-Largest Minority Shareholders (Exhibit B)

The Area Office found two publicly-traded portfolio companies and 22 privately-held ones affiliated with Domain under 13 C.F.R. § 121.103(c)(2), based on Domain's status as one of the largest minority holders of each company's voting stock. I discussed the two publicly-traded companies, **[Public-3]** and **[Public-4]**, *supra.* I now turn to the remaining twenty companies listed by the Area Office in the size determination at Exhibit B.

The multiple-largest minority shareholders rule provides:

> 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.

13 C.F.R. § 121.103(c)(2).

Under this rule, OHA has held that a concern where four shareholders own 32.5%, 32.3%, 6.9%, 3.9%, and 29 others own a total of 24.4%, the two largest shareholders each have the power to control the concern. *Size Appeal of Ceramatec, Inc.,* SBA No. SIZ-3040 (1989). In another case, OHA found in control the three owners of substantially equal holdings of 19%, 14%, and 12% (total 45% of the stock, with no other shareholder owning over 5%). *Size Appeal of River Equipment Company, Inc.,* SBA No. SIZ-3024 (1988). In a third case, OHA held that one individual controlled four concerns even though he owned only minority stock; for example, he owned 24.24% of the stock in a concern where two others owned 24.25% and 25% of the stock. *Size Appeal of SN/M, a Joint Venture,* SBA No. SIZ-2778 (1987).

In yet another decision, OHA concluded that three shareholdings of 24.9%, 21.2%, and 15% are substantially equal in size and thus each of the three shareholders controlled the concern. *Size Appeal of Betagen Corporation,* SBA No. SIZ-3171 (1989). In a decision of

OHA's predecessor, the Size Appeals Board,[12] shareholdings of 14.5%, 14.2%, 14.4%, and 13.l8% all were found to control the concern in question under this rule. *Size Appeal of Devac, Inc.,* SBA No. SIZ-612 (1973).

The 22 privately-held portfolio companies the Area Office found affiliated with Domain under the multiple-largest minority shareholders rule and listed in the size determination at Exhibit B, along with pertinent facts,[13] are as follows:

Company	Domain %	Other Largest Shareholders %					
[Private B-1]	15.4	17.6	16.7	16.7	7.2	3.1	
[Private B-2]	22.8	25.7	22.9				
[Private B-3]	20.9	19.2	17.7				
[Private B-4]	15.5	15.5	15.5	15.5	12.9	2.0	
[Private B-5]	18.6	18.6	7.9	7.8	5.7	4.3	
[Private B-6]	27.5	29.9	15.8				
[Private B-7]	33.3	33.2	3.2				
[Private B-8]	16.7	16.1	13.4	13.3	13.3	8.5	1.7
[Private B-9]	24.5	24.5	23.6				
[Private B-10]	17.8	17.8	17.8	11.0	9.7	7.9	
[Private B-11]	22.7	20	16.4	7.6	4.5		
[Private B-12]	28.0	28.0	15.5				
[Private B-13]	18.9	19.6	12.5	9.8	6.5	5.4	
[Private B-14]	23.4	23.5	12.8	4.5			
[Private B-15]	24.5	25.3	23.4				
[Private B-16]	19.9	20.8	20.8	2.4			
[Private B-17]	17.2	17.1	16.5	2.8			
[Private B-18]	21.1	18.1	13.6	11.5	4.8		
[Private B-19]	25.0	21.7	6.7	6.7	6.3		
[Private B-20]	20.5	23	22.7	5.7			
[Private B-21]	15.8	15.1	14	8.2	5.4	5.0	
[Private B-22]	21.1	21	14	14	4.9		

Given the clear precedents which apply this rule in prior cases where shareholdings were similarly structured to portfolio companies listed in Exhibit B, I cannot hold that it was clear error for the Area Office to have found Domain affiliated with them. All of the concerns the Area Office listed in Exhibit B fall within the ambit of OHA's case law finding affiliation under the multiple-largest minority shareholders rule. In the case of these firms, Domain's ownership of a significant block of stock, of approximately equal size to that of one or more other shareholders (as interpreted by OHA case law), and those holdings, taken together, represent a controlling block of the stock which brings the firm within the operation of the rule.

[12] Although the Size Appeals Board no longer exists, the OHA has adopted the body of cases decided by the Board as valid precedent, pursuant to the principle of *stare decisis. Size Appeal of Genie Services, Inc.,* SBA No. SIZ-1857 (1983).

[13] This data was submitted to the Area Office on April 30, 2007.

Domain's argument that in seven cases the corporate documents contain impediments to its exercising sole control is irrelevant. The regulation speaks to control exercised in concert with other shareholders, and this Domain clearly has the power to do. Accordingly, I cannot find that it was clear error for the Area Office to have found Domain affiliated with all the portfolio companies in Exhibit B.

4. Summary

Appellant is affiliated with Domain under the single-largest minority shareholder rule. Thus, Appellant also is affiliated with all of Domain's own affiliates. In reviewing the Area Office's findings and conclusions regarding Domain's portfolio companies, I conclude that 26 of those portfolio companies are affiliated with Domain, and thus also with Appellant.

Two portfolio companies are affiliated with Domain (and thus with Appellant) through Domain's majority stock ownership in them. The Area Office's affiliation determination with respect to these companies is AFFIRMED:

[Majority-1] **[Majority-2]**.

Two portfolio companies are not affiliated with Domain and Appellant because they are publicly-held companies that are controlled by their own managements. The Area Office's affiliation determination with respect to these companies is REVERSED:

[Public-3] **[Public-4]**.

Ten portfolio companies are affiliated with Domain (and thus with Appellant) under the single-largest minority shareholder rule. The Area Office's affiliation determination with respect to these companies is AFFIRMED:

[Private A-1]	**[Private A-3]**	**[Private A-5]**	**[Private A-7]**	**[Public-1]**
[Private A-2]	**[Private A-4]**	**[Private A-6]**	**[Private A-8]**	**[Public-2]**.

Twenty-two portfolio companies are affiliated with Domain (and thus with Appellant) under the multiple-largest minority shareholders rule. The Area Office's affiliation determination with respect to these companies is AFFIRMED:

[Private B-1]	**[Private B-6]**	**[Private B-11]**	**[Private B-16]**	**[Private B-21]**
[Private B-2]	**[Private B-7]**	**[Private B-12]**	**[Private B-17]**	**[Private B-22]**.
[Private B-3]	**[Private B-8]**	**[Private B-13]**	**[Private B-18]**	
[Private B-4]	**[Private B-9]**	**[Private B-14]**	**[Private B-19]**	
[Private B-5]	**[Private B-10]**	**[Private B-15]**	**[Private B-20]**	

The employees of Appellant, combined with those of Domain and Domain's thirty-four affiliated portfolio companies exceeds the applicable 500-employee size standard. Accordingly, the Area Office correctly determined that Novalar Pharmaceuticals, Inc. is other than small as of August 1, 2007, for the purpose of the small business fee waiver under the Prescription Drug User Fee Act.

V. Conclusion

For the above reasons, I AFFIRM the Area Office's size determination and DENY the instant appeal.

This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(b).

CHRISTOPHER HOLLEMAN
Administrative Judge