Cite as: *Size Appeal of Eagle Pharmaceuticals, Inc.*, SBA No. SIZ-5023 (2009)

REDACTED DECISION FOR PUBLIC RELEASE

United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF:	
Eagle Pharmaceuticals, Inc.	SBA No. SIZ-5023
Appellant	Decided: January 23, 2009
Appealed from Size Determination No. 1-2008-044	

APPEARANCE

John G. Stafford, Jr., Esq., Greenberg Traurig 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 September 11, 2008, the Department of Health and Human Services, Food and Drug Administration (FDA) requested the Small Business Administration (SBA), Office of Government Contracting, Area I, in Melville, New York (Area Office), to perform a size determination on Eagle 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 it owes the 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). The FDA also requested the Area Office to identify each company affiliated with Appellant, so that the FDA could complete the analysis required under the PDUFA.

B. The Area Office's Investigation

On September 15, 2008, the Area Office informed Appellant of the FDA's request for a formal size determination and asked Appellant to submit a completed SBA Form 355 and to provide other documents and information. The Area Office also asked Appellant about 12 other companies which the FDA had identified as possible affiliates.

On September 23, 2008, Appellant responded to the Area Office's initial request for information. Appellant submitted: (1) its completed SBA Form 355, with addenda; (2) its Second Amended and Restated Certificate of Incorporation (Certificate of Incorporation); (3) its Amended and Restated By-Laws (By-Laws); (4) Draft Financial Statements through September 30, 2007; (5) a letter discussing the 12 alleged affiliates; and (6) its Licensing Agreement with OncoGenex Pharmaceuticals, Inc. (OncoGenex).

Appellant was established in 2007. Appellant's Certificate of Incorporation authorizes common stock and two series of convertible preferred stock. All stock is voting stock, and the voting power of preferred stockholders is based on the number of common stock shares into which their preferred holdings may be converted. All stock votes together as a single class, except on certain matters.

Matters requiring the consent of the holders of two-thirds of the preferred stock are changes to the Certificate of Incorporation or By-Laws; changes to the size of the Board of Directors; any deemed "liquidation event" (including certain mergers and consolidations); and any "reorganization event" (including distributions or dividends). Creation of debt securities (except equipment leases of $250,000 or less) requires Board approval, including that of the Preferred Stock Director whom only preferred stockholders elect. Also, certain security issuances require approval by the holders of a majority of one or both series of preferred stock.

Appellant's largest shareholders and their percentages of outstanding voting stock (common stock plus preferred stock after conversion) are as follows:

Shareholder	%
[Investor-1]	35.7
[Investor-2]	19.6
[Investor-3]	7.2
[Investor-4]	5.1
[Investor-5]	4.1

There are 16 other stockholders in Appellant. Additionally, Management Options account for 14.9% of Appellant's common stock, and Board Options account for another 1.5%.

Appellant's Certificate of Incorporation vests the management of Appellant's business in

the Board of Directors. Appellant's five Directors are: **[Director-1]**; **[Director-2]** (General Partner, **[Investor-1]**); **[Director-3]** (Venture Partner, **[Investor-1]**); **[Director-4]**; and **[Director-5]**. **[Director-3, Director -4, and Director -5]** are "independent directors."

Appellant acknowledged affiliation with Eagle Pharmaceutical Holding, Inc. (Eagle Holding), and Eagle Pharmaceutical Holdings, Inc. (Eagle Holdings), both of which are inactive companies. Appellant also discussed its business relationships with OncoGenex, Sonus Pharmaceuticals (Sonus), and **[Private Company-A]**. Appellant stated it has no relationships with the other alleged affiliates the FDA had identified.

On September 26, 2008, the Area Office asked Appellant for additional information about management stock options and about **[Investor-1]**, Appellant's largest shareholder. The Area Office quoted the affiliation rule at 13 C.F.R. § 121.103(c)(2) and asked Appellant to "please take this opportunity to rebut the presumption that your firm is affiliated with **[Investor-1]**," based on that regulation. The information requested on **[Investor-1]** included its owners, officers, directors, number of employees, and the names of the firms **[Investor-1]** owns.

On September 26, 2008, Appellant responded to these questions and asserted it is not affiliated with **[Investor-1]** because **[Investor-1]** cannot by itself control Appellant's shareholder votes or its Board of Directors. **[Investor-1]** cannot control the vote in shareholder matters requiring a majority vote of all voting stock, because **[Investor-1]** has only 36% of all voting stock, and **[Investor-1]** cannot control shareholder matters requiring two-thirds of preferred stock (issuance of debt, change in size of Board, or matters involving a "liquidation event"), because **[Investor-1]** has only 52% of all preferred stock.

As for the Board of Directors, Appellant asserted **[Investor-1]** does not have control because **[Investor-1]** appoints only one of the five members, and three of the others are "independent directors" under NASDAQ rules. Appellant also noted that, while **[Director-3]** is a **[Investor-1]** Venture Partner, he is not employed at **[Investor-1]** and qualifies as an independent director.

Appellant stated **[Investor-1]** has over 40 portfolio companies, but asserted Appellant has no business relationship with any of them. To rebut the Area Office's presumption that **[Investor-1]** controls Appellant, Appellant stated it is working on a generic drug whose success would undermine the value of another portfolio company's brand-name drug, yet **[Investor-1]** does not move to stop Appellant from developing the generic.

Appellant provided a list, from **[Investor-1]**'s public website, of **[Investor-1]**'s portfolio companies. This list is in two parts: "Portfolio Companies" (27, including Appellant), and "Exited Investments" (20). The list does not indicate the amount of **[Investor-1]**'s investments in any company.

Portfolio Companies:

Eagle Pharmaceutical
[Portfolio Companies 2-27]

Exited Investments:

[Exited Companies 1-20]

On October 1, 2008, the Area Office again asked Appellant for information on **[Investor-1]**, and also asked for similar information about all of **[Investor-1]**'s portfolio companies. The Area Office set an October 6, 2008 deadline for Appellant's response.

On October 3, 2008, Appellant responded to the Area Office's October 1, 2008 request for information by asserting **[Investor-1]** is not Appellant's affiliate under 13 C.F.R. § 121.103(b)(5)(i) and (vi), which are affiliation exceptions for venture capital operating companies and investment companies. Appellant attached a letter from **[Investor-1]** making the same arguments and asserting, further, that it considers the requested information confidential.

C. The Size Determination

On October 7, 2008, the Area Office issued Size Determination No. 1-SD-2008-044 (Size Determination) concluding Appellant is not a small business concern under the applicable 500-employee size standard established by the PDUFA. The Area Office determined Appellant's size status as of September 11, 2008, the date of the FDA's request.

The Area Office first noted Appellant is affiliated with its admitted affiliates Eagle Holding and Eagle Holdings. Then, the Area Office discussed the OncoGenex Licensing Agreement and found it did not cause affiliation between Appellant and either OncoGenex or its predecessor Sonus Pharmaceuticals. The Area Office also found the agreement with **[Private Company-A]** did not cause affiliation.

Next, the Area Office found **[Investor-2]** controls 19.6% of the total stock outstanding, far less than **[Investor-1]**'s 35.7%, with the next block at 7.2%. Citing *Size Appeal of Cellegy Pharmaceuticals, Inc.*, SBA No. SIZ-4439 (2001), the Area Office concluded Appellant is affiliated with **[Investor-1]** under the minority shareholder rule at 13 C.F.R. § 121.103(c)(1).

After discussing the shareholder voting provisions of Appellant's Certificate of Incorporation, and Appellant's argument that **[Investor-1]** cannot overcome supermajority requirements in matters requiring preferred shareholder votes, the Area Office concluded **[Investor-1]** has negative control over Appellant through its preferred stock holdings.

In response to Appellant's assertion that it is not affiliated with **[Investor-1]** pursuant to the exceptions to affiliation in 13 C.F.R. § 121.103(b)(5)(i) and (vi), the Area Office noted those provisions apply only to assistance provided under the Small Business Investment Act by SBA-licensed companies. Thus, since **[Investor-1]** makes no claim to be such a licensed company, the Area Office concluded these provisions do not apply and **[Investor-1]** is affiliated with Appellant.

As for Appellant's Board of Directors, the Area Office concluded that **[Investor-1]** is

represented on Appellant's Board by both **[Director-2]** and **[Director-3]**; however, the Area Office drew no conclusion as to whether this finding causes a separate ground for affiliation.

Finally, the Area Office listed Appellant's affiliates as Eagle Holding, Eagle Holdings, and **[Investor-1]**, and concluded, under the adverse inference rule, that because Appellant had failed to provide the additional information requested, Appellant "and its affiliates" exceed the 500-employee size standard. Thus, Appellant is other than small and ineligible for the fee waiver.

D. The Appeal

Appellant received the size determination on October 9, 2008, and filed this appeal with the Office of Hearings and Appeals (OHA) on November 10, 2008. Appellant asserts the Area Office made clear errors of law in concluding that Appellant is affiliated with **[Investor-1]** (1) based on the minority shareholder rule, and (2) based on negative control. Thus, Appellant is not affiliated with **[Investor-1]**. Appellant challenges neither the Area Office's disallowance of the affiliation exceptions at 13 C.F.R. § 121.103(b) nor its application of an adverse inference regarding **[Investor-1]**'s size.

Regarding the Area Office's first ground for affiliation, the minority shareholder rule, Appellant argues that the Area Office failed to consider the identity of interest among **[Investor-2]** and other members of Appellant's management group. Appellant asserts this identity of interest means that management controls 34.5% of Appellant's voting stock. Thus, Appellant argues **[Investor-1]**'s 35.7% holding is not "large compared to other outstanding blocks of voting stock" and, therefore, it does not run afoul of the rule at 13 C.F.R. § 121.103(c)(1). Further, because Appellant's stock is "widely held," Appellant asserts the rule at 13 C.F.R. § 121.103(c)(3) applies, deeming **[Investor-2]** and Appellant's Board of Directors in control, rather than the rule at 13 C.F.R. § 121.103(c)(2), which would affiliate Appellant with **[Investor-1]**. Appellant relies on *Size Appeal of MPC Computers, LLC,* SBA No. SIZ-4806 (2006), for the proposition that Appellant's stock, owned by more than 20 separate owners, is widely held.

In support of Appellant's identity of interest argument, Appellant submits a Motion to Admit New Evidence. The proposed new evidence is the two-page Affidavit of [**Appellant's Officer]** (**[Appellant's Officer]**'s Affidavit). **[Appellant's Officer]** asserts that he cannot think of a single situation in which Appellant's management stockholders would not vote with **[Investor-2]** in a shareholder vote.

As for the Area Office's second ground for affiliation, negative control of preferred stock voting, Appellant argues that the Area Office failed to consider whether the limited class of preferred shareholder decisions that **[Investor-1]** may block are even ordinary decisions. Citing *Size Appeal of Novalar Pharmaceuticals, Inc.*, SBA No. SIZ-4977 (2008) and *Size Appeal of EA Engineering, Science, and Technology, Inc.*, SBA No. SIZ-4973 (2008), Appellant asserts its preferred shareholder decisions are also merely to protect the preferred shareholders' investments and, thus, do not confer negative control to **[Investor-1]**, and so do not cause affiliation.

Appellant also argues, because the fee waivers are intended to spur innovation, that disqualification of concerns like Appellant on account of their financial backing by venture capital is contrary to the public interest.

As relief, Appellant requests that I reverse the Area Office Size Determination and conclude that Appellant is a small business.

IV. Discussion

A. Threshold Issues

1. 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).

2. 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).

3. Governing Law

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 has rulemaking authority for establishing the size standards and other rules and regulations necessary to carry out the Small Business Act. *See* §§ 3(a)(2)-(3), 5(b)(6); §§ 15 U.S.C. 632(a)(2)-(3), 634(b)(6). These other necessary rules issued by SBA include the affiliation rules and 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 PDUFA; however the PDUFA itself provides for a 500-employee size standard. 21 U.S.C. §§ 379g(11), 379h(d)(4)(A). The SBA's other size regulations, including those governing affiliation and OHA's precedential case law interpreting the size regulations, also apply to size determinations. *Size Appeal of Novalar Pharmaceuticals, Inc.,* SBA No. SIZ-4977, at 10-12 (2008).

4. New Evidence

Appellant moves to admit the **[Appellant's Officer]** Affidavit as new evidence on appeal. New evidence may not be admitted on appeal unless the Administrative Judge orders it *sua sponte* or a motion is filed and served establishing good cause for its admission. 13 C.F.R. § 134.308(a). Although Appellant here has submitted a motion, I find Appellant's motion fails to establish good cause for admission of the new evidence. The evidence Appellant proposes was available and could have been submitted when this proceeding was before the Area Office. Appellant neglected to submit it then, and cannot submit it now on appeal. *Size Appeal of Management Support Technology, Inc.*, SBA No. SIZ-4976, at 3 (2008).

5. The Area Office's Adverse Inference

The Area Office's Size Determination concluded that Appellant is not a small business under 500-employee size standard because Appellant failed to comply with the Area Office's request to submit requested information. Relying on 13 C.F.R. § 121.1008(d), the Area Office presumed full disclosure of the requested information would show Appellant is not a small business.

OHA applies a three-part test to determine whether an Area Office has properly requested information from a firm and thus is permitted to draw an adverse inference in its absence. First, the requested information must be relevant to an issue in the size determination. Second, there must be a level of connection between the firm whose size is being calculated and the firm from which the information is requested. Third, the request for information must be specific. If all of these criteria are met, the firm must submit the information to the Area Office or suffer an adverse inference that the information would show that the challenged firm was other than small. *Size Appeal of Diversa Corporation,* SBA No. SIZ-4672 (2004).

Here, the Area Office's request satisfies the three-part test and the Area Office was justified in drawing an adverse inference when it did not receive the requested information. First, the Area Office determined Appellant is affiliated with **[Investor-1]** and, accordingly, the Area Office needed information about **[Investor-1]**'s employees and ownership interests to calculate Appellant's size. Second, the Area Office demonstrated **[Investor-1]**'s connection to Appellant through stock ownership and representation on Appellant's Board of Directors. Third, the request for information was specific; the Area Office requested the number of employees of **[Investor-1]**, **[Investor-1]**'s ownership in other firms in its investment portfolio, the number of employees of each of those firms, and disclosure of ownership of those firms.

Moreover, Appellant does not dispute the Area Office's conclusion, reached through the application of an adverse inference following Appellant's refusal to submit the requested information, that **[Investor-1]** is other than a small business.

B. Merits of the Appeal

It is undisputed that Appellant, Eagle Holding, and Eagle Holdings combined do not exceed the size standard of 500 employees. Thus, the only question before me is whether the

Area Office committed clear error of law in concluding that Appellant is affiliated with **[Investor-1]**.[1]

1. The Minority Shareholder Rule

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 the single-largest minority shareholder rule for many years despite arguments, based on state corporate law, that legal control of a concern does not rest with a minority shareholder. *Size Appeal of Novalar Pharmaceuticals, Inc.*, SBA No. SIZ-4977 (2008).

Here, the Area Office found **[Investor-1]** is the largest shareholder with 35.7% of Appellant's total voting stock, and the next-largest shareholder, **[Investor-2]**, has 19.6%. The Area Office concluded **[Investor-1]** is affiliated with Appellant under this rule. I agree with the Area Office. In *H.L. Turner*, I concluded that QCC was affiliated with its 49% shareholder where its next-largest shareholder held only 36%, because the 49% holding is large in comparison to the 36% holding. *H.L. Turner, at* 6. I note that the 49% holding is 1.36 times (one and one-third times) the size of the 36% holding.

In *Novalar*, I concluded that "Private A-3"[2] was affiliated with its 32.1% shareholder where its next-largest shareholder held only 23.6%, because the 32.1% holding is large in comparison to the 23.6% holding.. The 32.1% shareholder owns 1.36 times the holding of the 23.6% shareholder. *Novalar*, at 17-18. Here, the largest blocks of stock in Appellant are: **[Investor-1]** 35.7%, **[Investor-2]** 19.6%. **[Investor-1]**'s holding is 1.82 times that of **[Investor-2]**, well within the ambit of both *H.L. Turner* and *Novalar*.

On appeal, Appellant asserts that the Area Office erred in its failure to consider that **[Investor-2]** and other members of Appellant's management group share an identity of interest such that their shareholdings should be aggregated into a block of 34.5% which would counter **[Investor-1]**'s 35.7%. Appellant seeks to use the present effect rule (13 C.F.R. § 121.103(d)) to argue that management's options should be given present effect and then aggregated with **[Investor-2]**'s, to produce a block of stock nearly equal to **[Investor-1]**'s.

I disagree with Appellant, for three reasons. First, the present effect rule may not be used to *disaffiliate* concerns, because it cannot be used to allow an entity to use options to terminate

[1] Because Appellant does not raise on appeal the contention that it is not affiliated with **[Investor-1]** based on the exemptions to affiliation at 13 C.F.R. § 121.103(b)(5)(i) and (vi) it is deemed to have abandoned the issue, and it need not be considered in the adjudication of the instant appeal. *Size Appeal of the Apex Group, Inc.*, SBA No. SIZ-4300 (1998).

[2] "Private A-3" is a privately-held company whose name was redacted from the published version of the *Novalar* decision.

control before actually doing so. 13 C.F.R. § 121.103(d)(4). Accordingly, Appellant cannot count the options held by its management as having been exercised.

Second, the identity of interest rule does not affiliate two persons whose only common tie is that they are shareholders in a single concern. *Size Appeal of Cytel Software, Inc.*, SBA No. SIZ-4822, at 5 (2006). The rule provides:

> 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.

13 C.F.R. § 121.103(f). Identity of interest on the basis of "common investments" plainly requires, at minimum, more than one common investment between two persons. Appellant cannot establish that the shareholders here have any common investments in addition to their shares in Appellant, and thus its argument must fail.

Third, even if all management shareholdings were aggregated with those of **[Investor-2]**, Appellant still cannot avoid affiliation with **[Investor-1]**, under what is called the multiple-largest minority shareholders rule, which 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.

13 C.F.R. § 121.103(c)(2).

The three largest blocks of stock, after Appellant's proposed aggregation, would be: **[Investor-1]**: 35.7%; **[Investor-2]** Block: 34.5%; **[Investor-3]** 7.2%. With just over a one-point difference between **[Investor-1]**'s 35.7% holding and the **[Investor-2]** Block's 34.5% holding, and with the next-largest block at 7.2%, Appellant's ownership structure would quickly run afoul of the multiple-largest minority shareholder rule, because the **[Investor-1]** and **[Investor-2]** Block holdings would be "equal or approximately equal in size" and their aggregate would be "large as compared with any other stock holding." Appellant, in fact, is well within the range of comparative ownership percentages which caused affiliation under this rule in *Novalar*. *See Novalar*, at 19 (Private B-6, with its two largest minority shareholders at 29.9% and 27.5%, and the next-largest at 15.8%; Private B-14, with 23.5%, 23.4%, and 12.8% respectively; Private B-22, with 21.1%, 21%, and 14% respectively).[3]

On appeal, Appellant also asserts that the single-largest minority shareholder rule does

[3] "Private B-6," "Private B-14," and "Private B-22" are privately-held companies whose names were redacted from the published version of the *Novalar* decision.

not apply because Appellant's stock is "widely held." Thus, **[Investor-2]** and Appellant's Board of Directors is deemed in control. Appellant relies on *Size Appeal of MPC Computers, LLC*, SBA No. SIZ-4806 (2006), for the proposition that Appellant's stock, owned by more than 20 separate owners, is widely held. I disagree with Appellant. The rule provides:

> 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).

Appellant attempts to argue that the fact that it has more than 20 shareholders means the firms is "widely held", and thus the regulation applies, citing *Size Appeal of MPC Computers, LLC*, SBA No. SIZ-4806 (2006). However, in that case OHA found "widely held" a publicly traded corporation with 175 registered shareholders, and the largest single block of stock was 22.7%. Appellant, on the other hand, is not publicly traded, and has a relatively small number of shareholders, with one large shareholder with a block of stock large in relation to all the other blocks. Appellant cannot be said to be widely held.

Accordingly, I conclude the Area Office correctly determined that Appellant is affiliated with **[Investor-1]**, the single-largest minority shareholder of Appellant's voting stock, under 13 C.F.R. § 121.103(c)(1).

2. Affiliation with **[Investor-1]** through Negative Control

The Area Office determined that **[Investor-1]** had negative control over matters for vote by Appellant's Preferred shareholders. Appellant contests this finding asserting that the matters are not ordinary business. The SBA's size regulation on negative control 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).

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).

The Area Office found negative control based upon **[Investor-1]**'s ability to block certain actions. Appellant argues that these actions are similar to those which, in *Size Appeal of EA Engineering, Science, and Technology, Inc.*, SBA No. SIZ-4973 (2008), OHA found not to be ordinary actions essential to operating the company, but merely protections of the shareholder's investment. Here, however, Appellant's Certificate and By-Laws go beyond the limited actions found to be protection of a stockholder's investment in *EA Engineering*, to include the creation

of debt and payment of dividends, which are important decisions in the operation of the business. OHA has found that the ability to block this type of corporate action supports a finding of negative control. *Size Appeal of Novalar Pharmaceuticals, Inc.*, SBA No. SIZ-4977 (2008). Accordingly, I find that the Area Office did not err when it found that Appellant's supermajority voting requirements gave **[Investor-1]** negative control, and thus found **[Investor-1]** affiliated with Appellant.

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).

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CHRISTOPHER HOLLEMAN
Administrative Judge