United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Siga Technologies, Inc. Appellant, Appealed From Size Determination No. 1-SD-2011-005	SBA No. SIZ-5201 Decided: February 15, 2011

APPEARANCES

W. Jay DeVecchio, Esq., Leslie H. Lepow, Esq., Marc A. Goldman, Esq., Eric R. Haren, Esq., and Damien C. Specht, Esq., Jenner & Block LLP, Washington, D.C., for Appellant

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Jason L. Kent, Esq., Cooley LLP, San Diego, California, For Chimerix, Inc.

DECISION[1]

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 Area Office's determination that Appellant is affiliated with its largest minority shareholder was based upon clear error of fact or law. *See* 13 C.F.R. § 134.314.

[1] This Decision originally was issued under a Protective Order. I ordered each party to file a request for redactions if it desired any information redacted from the published Decision. OHA received one or more timely requests for redactions and considered any requests in redacting the Decision. OHA now publishes a redacted version of the Decision for public release.

III. Background

A. The Solicitation and Protest

On March 11, 2009, the Department of Health and Human Services, Office of the Assistant Secretary for Preparedness & Response, Biomedical Advanced Research Development Authority (BARDA), issued the subject Solicitation No. RFP-BARDA-09-35 for advanced development and acquisition of smallpox antiviral drugs for the Strategic National Stockpile to support a smallpox public health emergency. The Contracting Officer (CO) set the solicitation aside for small business concerns. The CO designated North American Industry Classification System (NAICS) code 325414, Biological Product (Except Diagnostic) Manufacturing, with a corresponding 500 employee size standard, as the appropriate NAICS code for this procurement. The CO changed this in Amendment 3 to NAICS code 541711, Research and Development in Biotechnology, also with a corresponding 500 employee size standard. The due date for initial offers was April 30, 2009, later extended by Amendment 4 to May 14, 2009.

On October 1, 2010, BARDA notified the unsuccessful offeror that SIGA Technologies, Inc. (Appellant), was the apparent successful offeror. On October 8, 2010, Chimerix, Inc. (Chimerix), filed a timely size protest with the CO, alleging that Appellant was other than small. Chimerix alleged Appellant was controlled by and affiliated with its largest shareholder, MacAndrews & Forbes Holdings, Inc. (M&FH). Further, Chimerix alleged an M&FH-controlled company; TransTech Pharma, Inc. (TransTech) is the second largest shareholder. The CO referred the protest to the Small Business Administration (SBA) Office of Government Contracting—Area 1, in New York, New York (Area Office). On October 12, 2010, the Area Office notified Appellant of the protest and requested that Appellant submit a response to the protest, together with its completed SBA Form 355, and certain other information. On October 15, 2010, Appellant submitted its response to the protest, and followed up with further clarifications as the Area Office requested.

B. Size Determination No. 1-SD-2011-005

1. Appellant's Ownership

On November 5, 2010, the Area Office issued Size Determination No. 1-SD-2011-005 (Size Determination) finding Appellant other than small.

The Area Office found that Appellant is a publicly traded company on NASDAQ with more than 4,400 shareholders. Appellant's headquarters is in New York, New York, and its principal laboratory is in Corvallis, Oregon. Appellant submitted its initial offer on the instant procurement on May 11, 2009, and so the Area Office properly used that date to determine size. Appellant has no majority shareholder. The three largest shareholders are:

Investor	Basic % Interest	Fully Diluted Interest[2]
M&F	12.56%	13.39%
TransTech	9.41%	10.38%
BlackRock Fund Advisors	4.47%	3.23%

2. MacAndrews & Forbes

The Area Office found that MacAndrews & Forbes, LLC (M&F) owns 4,635,235 or 12.56% of Appellant's outstanding shares, as well as warrants to purchase another 2,210,806 shares, for a total of 6,841,041 shares of Appellant on a fully diluted basis out of a possible 51,132,418 or 13.39%. The Investment Agreement between M&F and Appellant provides that M&F may require SIGA to sell, or SIGA may require M&F to purchase, up to $8 million worth of new SIGA common shares. Prior to May 11, 2009, SIGA called upon M&F to invest $1.5 million under the Investment Agreement. The Area Office thus concluded that M&F held 13.39% of SIGA's shares. M&F is a wholly-owned subsidiary of M&FH, whose sole shareholder is Ronald O. Perelman. MF&H controls a number of other firms which together have thousands of employees. Area Office concluded Mr. Perelman had the power to control M&FH and M&F.

3. TransTech

The Area Office found that TransTech owns 3,472,222 or 9.41% of Appellant's outstanding shares, and warrants to purchase another 1,835,822 shares for a total interest in Appellant of 10.38% on a fully diluted basis.

The Area Office further found Mr. Perelman owns a majority of TransTech voting stock, and is one of TransTech's five directors. The second largest shareholder is Dr. Adnan Mjalli who owns 19.5% of TransTech's fully diluted shares. In addition, 17% of TransTech is owned by the MacAndrews Group, with Mr. Perelman as the lead investor.

The Area Office noted Appellant's argument that [xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx], which does not include Mr. Perelman, M&F or M&FH. [xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]. [xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]. The three directors [xxxxxxxxxxxxxxxxx] are Dr. Mjalli, Thomas R.B. Wardell, and Paul G. Savas.[3] Mr. Savas is President and Chief

[2] Gives present effect to options. Because SBA gives present effect to stock options, treating them as though the rights have been exercised, I use these percentages in this appeal. 13 C.F.R. § 121.103(d)(1).

[3] Further, Mr. Savas is Executive Vice President and Chief Financial Officer of M&F Worldwide Corporation (M&FW). M&FW is a publicly traded company. M&FH is the largest stockholder, holding 42.4% through intermediaries. No other block has as much as 10%. Mr. Perelman personally owns 1%. M&F provides M&FW's senior management by agreement between the firms. The Area Office determined Mr. Perelman has the power to control M&FW.

Financial Officer of M&FH, and is also a member of the [xxxxxxxxxxxx xxxxxxxxxx].[4] The directors [xxxxxxxxxxxxxxxxxxxxxxxxx] are Mr. Perelman and Barry F. Schwartz. Mr. Schwartz is Executive Vice Chairman, Chief Administrative Officer, and Director of M&FH.

The Area Office concluded that Mr. Perelman controls TransTech through his control of the majority of its stock and because, despite the firm's structure, he controls the Board of Directors through [xxxxxxxxxxxxxxxxxxx] two directors, himself and Mr. Schwartz, and through Mr. Savas, another officer of M&FH, a company wholly owned by Mr. Perelman.

4. Control of Appellant's Largest Single Block of Stock

The Area Office found that because Mr. Perelman had the power to control M&F (through M&FH), and TransTech, these companies are affiliated, and their interests are aggregated. Thus aggregated, Mr. Perelman controls 21.97% of Appellant's outstanding undiluted stock and 23.77% of the fully diluted shares. The next largest block of stock, BlackRock Fund Advisors, is 4.47% of undiluted and 3.23% of the fully diluted stock. Thus, Mr. Perelman controls the largest single block of Appellant's stock, which is large as compared to the other outstanding blocks of stock. The Area Office concluded that Mr. Perelman thus has the power to control Appellant, Appellant is therefore affiliated with Mr. Perelman and the other concerns he controls, and Appellant is, thus, other than small.

5. Totality of the Circumstances

a. PharmaCore and M&FW

The Area Office further found that Mr. Perelman and some of the directors, officers, employees or investors of MacAndrews or a MacAndrews-affiliated firm have investments in common in PharmaCore, Inc. (PharmaCore) and TransTech with Dr. Mjalli. PharmaCore and TransTech have the same directors. Mr. Perelman owns 41.4% of PharmaCore's undiluted and 36.6% of its fully diluted stock and is a director. The second largest shareholder is Dr. Mjalli, who owns 33.3% of undiluted and 29.5% of fully diluted shares. The total percentage held by the MacAndrews Group exceeds 50%, and Mr. Perelman has the power to control the MacAndrews Group. Further, PharmaCore's Board of Directors is structured similarly to TransTech's, with Mr. Perelman and Mr. Schwartz [xxxxxxxxxxxxxxxxxxxxxxxxxx], and Dr. Mjalli, Mr. Savas, and Mr. Wardell [xxxxxxxxxxxxxxx]. Again, the Area Office found Mr. Perelman had the power to control PharmaCore's Board of Directors, for the same reasons. Therefore, Mr. Perelman has the power to control PharmaCore.

The Area Office further found that, based on the fact that Mr. Perelman and Dr. Mjalli

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[4] The Area Office did not note that Mr. Savas personally owns 17,361 shares of Appellant, with warrants for 74,180 more, for a total of 91,541 fully diluted shares or .0019%. Mr. Schwartz owns 34,722 of Appellant's shares with warrants for 18,359 more, for a total of 53,081 fully diluted shares or .001%.

had common investments in TransTech and PharmaCore, two TransTech/PharmaCore directors (Dr. Mjalli and Mr. Savas) are also members of Appellant's Board, and three of the remaining directors are also officers of M&FH, Mr. Perelman and Dr. Mjalli and/or the MacAndrews Group has an identity of interest. Therefore M&FH, M&F, TransTech and PharmaCore are affiliated under the identity of interest rule. The Area Office also found M&FW affiliated with M&FH, M&F, TransTech, PharmaCore, and any other firm Mr. Perelman had the power to control, because of MF&H's ownership interest and common management with other Perelman-controlled firms.

b. Appellant's Directors

The Area Office examined the interests of five of Appellant's directors.

Dr. Eric Rose is Appellant's Chairman of the Board and CEO. He is also M&FH's Executive Vice President for Life Sciences. He owns less than 1% of Appellant's stock on an undiluted and over 1% on a fully diluted basis. He also has ownership interests in TransTech's Founders Group and MacAndrews Group and in both of PharmaCore's shareholders groups.

Steven L. Fasman is Senior Vice President-Law at M&FH and Senior Vice President, Chief Legal Officer & Chief Compliance Office of M&FW. He owns less than 1% of Appellant on a fully diluted basis, and is part of TransTech's MacAndrews Group.

Paul G. Savas is Chief Financial Officer, M&FH and M&FW, Executive Vice President, M&FW, [xxxxxxxxxxxxxxxxxxxx] on the TransTech and PharmaCore Boards, shareholder of TransTech and PharmaCore, owns less than 1% of Appellant on a fully diluted basis.

Adnan M. Mjalli is President, Chairman and CEO of TransTech, Chairman of PharmaCore, lead investor in the TransTech Founders Group and one of PharmaCore's shareholder groups.

Bruce Slovin is also a director of M&FW, stockholder of TransTech and PharmaCore, owns less than 1% of Appellant on a fully diluted basis.

The Area Office concluded, after examining these directors and their interests, that the interests of Appellant, TransTech, PharmaCore, the Founders Group and the MacAndrews Group, are all intertwined and closely aligned. Therefore, Appellant is affiliated under the totality of the circumstances with M&FH, M&F, TransTech, PharmaCore, M&FW, and the companies controlled by Mr. Perelman.

The Area Office noted that Appellant stated on its Form 355 that M&FH and M&F, including subsidiaries, have over 500 employees. Thus, in concluding that Appellant is affiliated with M&FH, M&F, TransTech, PharmaCore, M&FW, and the companies controlled by Mr. Perelman, Appellant is other than small.

C. The Appeal

On November 19, 2010, Appellant filed the instant appeal with the Office of Hearings and Appeals (OHA). Appellant's three arguments are summarized below.

1. TransTech is not affiliated with M&F

Appellant first argues that TransTech's Stockholders' Agreement ensures that the Founders Group controls TransTech. [xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]. [xxxxxxxxxxx]. [xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]. [xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]. [xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]. [xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx].

Appellant argues that Mr. Perelman, although he owns a majority of TransTech's stock, does not own a majority of voting stock. Appellant argues that the right to vote must be within the control of the shareholder if the stock is to be considered voting stock, citing *Pioneer Parachute Co. v. Comm'r*, 162 F.2d 249, 252 (2d Cir. 1947) (*Pioneer Parachute*). Appellant further argues the ultimate expression of voting power is the ability to elect the board of directors, [xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx], citing *Hermes Consol., Inc. v. United States*, 14 Cl. Ct. 398, 405 (1988) (*Hermes*). Appellant asserts that when there is an agreement that shareholders will not vote their shares or vote them only in specified manner nominal ownership of voting power will be disregarded in determining which shareholders actually held voting power. *Nano-Proprietary v. Canon, Inc.*, 2006 WL 6058423, at 6 (W.D. Tex. Nov. 14, 2006), *aff'd* 537 F.3d 394 (5th Cir. 2008) (*Nano-Proprietary*).

Appellant further argues that OHA precedents give full weight to bylaws and arrangements to control corporate boards in determining affiliation, citing *Size Appeal of DMS Facility Services, LLC*, SBA No. SIZ-4913, at 4-5 (2008) *(DMS); Size Appeal of Black's Guide, Inc.*, SBA No. SIZ-4046, at 2-4 (1995) (*Black's Guide*) and *Size Appeal of Ferguson Propeller, Inc.*, SBA No. SIZ-2332 (1985) (*Ferguson*).

Thus, Appellant concludes, Mr. Perelman does not control a majority of TransTech voting stock [xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx].

Further, Appellant asserts that it was clear error to finds that Mr. Perelman controlled Mr. Savas, because Dr. Mjalli selected him for the Board, and has the power to remove him. Appellant argues that there is no basis to presume an officer or employee of a company has an identity of interest with its employer, because employees of one company often serve on boards of other, unrelated companies.

2. Mr. Perelman and Dr. Mjalli do not have an identity of interest

Appellant argues that Mr. Perelman and Dr. Mjalli do not have an identity of interest. An identity of interest cannot be found merely because two individuals own stock in one company.

Rather, Mr. Perelman is an investor with many widespread business interests, and Dr. Mjalli is a scientist who founded TransTech and spun PharmaCore off from it.

Appellant further argues that it is therefore error to find that Mr. Perelman controls the largest block of Appellant's stock, because without TransTech, M&F controls only 13.39% of Appellant's stock, an interest which has never been found sufficient to be a block large in comparison to all other blocks of stock.

3. The record does not support a finding of affiliation based on totality of the circumstances

Appellant further asserts that the record does not support a finding of affiliation based upon the totality of the circumstances. Appellant argues the Area Office erred in finding Mr. Perelman controls PharmaCore, for the same reasons it erred in finding Mr. Perelman controls TransTech. Appellant also argues M&FW has no connection to Appellant. Further, the finding that all of Appellant's directors are related to affiliated companies directly or indirectly controlled by Mr. Perelman is wrong. Dr. Mjalli's efforts [xxxxxxxxxxxxxxxxxxxxxxx] establish that he and M&F do not act in concert. Mr. Slovin is an independent director of both M&FW and Appellant.

Further, SIGA does not have five directors, but 13. The five named directors, a minority, do not have the power to control the firm, because a clear majority of the 13 are independent directors under NASDAQ listing rules, and have no ties to M&FW, M&F, or TransTech.

Appellant further asserts that even if M&F and TransTech are affiliates, together they own only 23.77% of SIGA's stock. This is not a large enough block to exercise dominance over the firm. Appellant asserts this is smaller than the blocks of stock OHA has previously found to be controlling in a publicly-held company, except for *Size Appeal of Novalar Pharmaceuticals, Inc.*, SBA No. SIZ-4977 (2008) which Appellant characterizes as “an outlier”. Further, this block of stock is not even large enough to form a quorum at a shareholders' meeting, and cannot control the Board. Even if this amount of stock were enough to create affiliation, TransTech and M&F are not, in fact, affiliated.

D. Chimerix's Response

On December 14, 2010, Chimerix filed an Opposition to the instant appeal. First, Chimerix asserts Mr. Perelman controls SIGA because he controls the largest block of stock, large compared to other blocks of stock. Chimerix argues that OHA has found blocks of stock as small as Mr. Perelman's to be controlling *Size Appeal of Forterra Systems, Inc.*, SBA No. SIZ-5029 (2009); *Size Appeal of Procedyne Corp.*, SBA No. SIZ-4354 (1999); *Size Appeal of Eagle Pharmaceuticals, Inc.*, SBA No. SIZ-5023 (2009); and *Size Appeal of Automated Systems Design, Inc.*, SBA No. SIZ-3927 (1994). Appellant asserts the M&FH/TransTech block of stock, while a minority, is still better suited to exercise control than any other shareholder group. While not a quorum themselves, they are nearer to comprising a quorum than any other block of stock. They are the only blocks of stock which pass the 10% threshold necessary to call a special stockholders meeting.

Chimerix asserts that the Area Office finding that Mr. Perelman controls M&F and TransTech is rooted in law and fact. Mr. Perelman, through M&F and M&FH, is TransTech's majority shareholder. Under SBA's regulations, a majority shareholder has the power to control a concern. *Size Appeal of DMS Facility Services, LLC*, SBA No. SIZ-4913, at 4 (2008). Further, as majority shareholder, Mr. Perelman controls TransTech's ability to amend the Stockholders' Agreement. Sugary Decl. ¶ 5.5. Further, there a number of corporate actions which require the approval of a majority of the preferred stock Ex. 1 to appeal at § B.4. [xxxxxxxxxxxx] xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx] xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx]. Conversely, the agreement in *Nano Proprietary*limited the right to vote on directors *and* the major business of the company.

Chimerix further argues that [xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx] is irrelevant in the light of actual Board composition. Mr. Savas, [xxxxxxxxxxxxxxxxxxxxxxxxx], has significant ongoing connections to M&FH. Also, the NASDAQ definition of "independent" director is not the same as under SBA's size regulations.

Chimerix further asserts that the overlapping relationships of directors and officers between SIGA, TransTech, and the M&F entities is compelling indicia of affiliation based upon the totality of the circumstances rule. Further the fact that the five directors are a minority of SIGA's Board is still a strong indicia of affiliation, citing *Procedyne*, SBA No. SIZ-4354. Finally, Chimerix points to other pieces of evidence supporting a finding of affiliation. SIGA shares a corporate address with M&FH, and SIGA has been reliant upon M&F for funding through the purchase of stock.

E. Appellant's Reply

On December 17, 2010, Appellant requested leave to file a reply, together with the reply. Appellant asserts the [xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx] as the types of negative rights OHA has found insufficient to create affiliation in *Size Appeal of EA Engineering, Science and Technology*, SBA No. SIZ-4973 (2008). Further, Chimerix's argument is based upon documents not before the Area Office and should not be considered here. [xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx], and it is with the Board that corporate governance rests. Further, the Board may place day-to-day managerial decision in the hands of an officer, and that is what the TransTech Board did by selecting Dr. Mjalli as its President. Appellant reiterates its arguments in the appeal.

F. Chimerix's Surreply

On December 22, 2010, Chimerix requested leave to file a surreply, together with the surreply. Chimerix asserts that SBA, in a preamble to the regulations, stated that a person with 50% or more of the stock of a business would deemed to control it, regardless of any voting agreements, and that 50% ownership of stock creates affiliation, not a rebuttable presumption of affiliation. *Size Appeal of Miltope Corporation*, SBA No. SIZ-5066 (2009). Chimerix also asserts the *EA Engineering* is not applicable here, as it dealt with a minority shareholder, and Mr. Perelman has more control than the minority shareholder in *EA Engineering*. Chimerix also reasserts that Mr. Perelman controls TransTech's board.

IV. Discussion

A. Timeliness and Additional Pleadings

Appellant filed its appeal within 15 days of receiving the Size Determination. Thus, the appeal is timely. 13 C.F.R. § 134.304(a)(1). A reply to a response is not permitted unless the Judge directs otherwise. 13 C.F.R. § 134.309(d). Here both Appellant and Chimerix requested permission, and I find that their pleadings do not unduly enlarge the issues, and therefore GRANT the motions of both parties for additional pleadings.

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 Consultants, 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. Mr. Perelman controls TransTech

SBA's size regulations provide that concerns are affiliates when one controls or has the power to control the other, or a third party controls or has the power to control both. 13 C.F.R. § 121.103(a). Prior to 1996, SBA's regulations presumed that a person controlled or had the power to control a concern if that person owned or controlled or had the power to control 50% or more of the concern's stock. 13 C.F.R. § 121.401(e)(1) (1995).

However, in 1996, SBA revised its regulations to provide:

> A person (including any individual 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.

13 C.F.R. § 121.103(c)(1).

SBA thus deliberately changed the regulation from one that established a presumption that a majority shareholder was in control of the concern, to a categorical statement that a person who owns 50% or more of a concern's stock controls, and is thus affiliated with, that concern.

In the preamble to the final rule, SBA clarified that 50% or more stock ownership creates affiliation, not merely a rebuttable presumption of affiliation:

> Another commenter objected to the language of proposed § 121.103(c)(1) that eliminated the 'presumption' of control for persons that own, control, or have the power to control 50 percent or more of a concern's voting stock contained in the predecessor regulation at § 121.401(e)(1). The commenter felt that the regulation should provide only for a presumption of control which can be negated by specific facts in a particular case (e.g., person may own over 50% of voting stock, but through voting agreements or proxies may have divested control of the company). SBA disagrees. *SBA believes that a person owning 50 percent of a concern should be deemed to control that concern regardless of any voting agreements*. A person that has voting control of 50 percent of a concern, even if he or she does not own the stock associated with the voting rights, would also be deemed to control the concern, but that does not do away with the interests attendant to a 50 percent owner.

61 Fed. Reg. 3280, 3281 (Jan. 31, 1996) (emphasis added).

SBA thus explicitly rejected the argument that voting agreements [xxxxxxxxxxxxxxxx] can divest a majority shareholder of his power to control, and thus his affiliation with, the concern in which he holds a majority stake. OHA affirmed this view in *Size Appeal of Miltope Corporation*, SBA No. SIZ-5066 (2009). In that case, the appellant argued that a Special Security Agreement severed its parent company's control of its board, and therefore the firms were not affiliated. OHA found otherwise, and held that "[T]he regulation clearly states that 50% or more ownership *is* control and thus affiliation." *Id.* at 7.

Further, when promulgating the regulation, SBA explicitly considered whether it should require lack of control of small concerns for an investor to benefit from the exclusion from affiliation. SBA concluded that a small concern must be independently owned and operated, in addition to being small, in order to be eligible for SBA assistance. *See* 15 U.S.C. §§ 632, 662. SBA further concluded that a firm controlled by its large investors does not meet that statutory requirement. 61 Fed. Reg. 3280, 3281 (Jan. 31, 1996).

Appellant's cited authorities to the contrary are inapposite. *DMS* and *Hermes* deal with whether the firms in question were affiliated under the Internal Revenue Code. Similarly, *Nano-Proprietary* concerned the interpretation of a particular agreement under New York law. Appellant thus attempts to argue the general principles of tax and corporate law to interpret the phrase "voting stock" in SBA's size regulation. However, here these general principles must give way to the more specific language of the size regulation and the clear intent, expressed in the preamble to the size regulation, and upheld in this Office's precedent, that under the size regulations voting agreements which limit a stockholder's discretion in voting do not convert that stock into non-voting stock, and ownership of a majority of concern's stock constitutes control of that concern. OHA has consistently held that the Internal Revenue Code and the IRS regulations are a general corpus of law which are inapposite to size cases and do not supersede SBA's more specific regulations. *Size Appeal of Phillips National, Inc.*, SBA No. SIZ-4332 (1998).

Therefore, Appellant's argument based upon these inapposite cases is meritless.

The OHA cases Appellant relies upon are also inapposite. *Ferguson* turns on an obsolete regulation dealing with voting trusts, which SBA eliminated in 1996. 61 Fed. Reg. 3280 (Jan. 31, 1996). *Black's Guide* interprets a firm's by-laws, but not in any way that would reach a result contrary to SBA's size regulation. *DMS* also dealt with the interpretation of that appellant's operating agreement, but again, not in any way that would contradict the size regulation.

In sum then, SBA's regulations provide that a person who owns 50% or more of the stock of a corporation controls it, regardless of any voting agreements that may limit the majority shareholder's discretion in voting his stock. Mr. Perelman owns over 50% of TransTech's stock. Therefore, for size determination purposes, Mr. Perelman controls TransTech.[5]

2. Mr. Perelman controls SIGA

Because Mr. Perelman controls both M&F and TransTech, their ownership interests in Appellant must be aggregated to determine whether he has the power to control Appellant. M&F and TransTech's combined ownership interest in Appellant is 23.77%. The next largest block of stock is BlackRock Fund Advisors, 3.23% of the fully diluted stock. It is thus clear that the M&F/TransTech block of stock, while not a majority, is the largest single block of stock, and it is large compared to any other outstanding block of Appellant's stock.

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 Novalar Pharmaceuticals, Inc.*, SBA No. SIZ-4977, at 13 (2008).[6] SBA has consistently applied this single-largest minority shareholder rule for many years despite arguments that legal control of the concern does not rest with a minority shareholder under state corporate law. *Size Appeal of Eagle Pharmaceuticals, Inc.*, SBA No. SIZ-5023, at 8 (2009). Thus, in order to determine whether a firm is an eligible small business, affiliation under the

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[5] Mr. Perelman's control is reinforced by the fact that, [xxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxx], the third of the five directors, Mr. Savas, is President and Chief Financial Officer of M&FH, a firm solely owned by Mr. Perelman, and Executive Vice President and Chief Financial Officer of M&FW, a firm Mr. Perelman controls because M&FH is its largest single stockholder, and large in comparison to all other blocks. 13 C.F.R. § 121.103(c)(1). Accordingly, while Mr. Savas [xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx], the fact that his main employment is with two entities controlled by Mr. Perelman is such a strong indicia of affiliation that it supports a finding that Mr. Perelman controls him, and thus with him, TransTech's Board. With these clear factors mandating a finding of control and thus, affiliation, I need not consider the Area Office's finding of an identity of interest between Mr. Perelman and Dr. Mjalli, based upon their common investments in Appellant, TransTech and PharmaCore.

[6] *Novalar*, far from being the "outlier" described by Appellant, is the most extensive recent discussion of the single-largest minority shareholder rule.

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). *Novalar*, at 13. 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's percentage-point comparison 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), OHA 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 *Novalar*, OHA found that a firm which owned 19.6% of another firm, when the next largest block was 10%, and 18% of another firm, when the next largest block was 8.1%, controlled those firms under the single largest minority shareholder rule. *Novalar*, at 17-18. In *Size Appeal of Forterra Systems, Inc.*, SBA No. SIZ-5029 (2009) a single largest minority shareholder with 28.7% of stock was found to control a firm when the next largest block was 17.3%. In *Eagle Pharmaceuticals*, OHA found a firm affiliated with its 35.7% largest minority shareholder, when the next largest block is 19.6%. *Eagle Pharmaceuticals*, at 8.

Here, Mr. Perelman, through M&F and TransTech, controls a 23.77% block of Appellant's stock, when the next largest block is 3.23%. Mr. Perelman's block of stock is nearly seven times as large as the next largest block. Under the *Procedyne* and *Novalar* precedents, this is a large enough block to find that Mr. Perelman controls Appellant under the single-largest minority shareholder rule, and thus Appellant is affiliated with Mr. Perelman. Given that Mr. Perelman is sole shareholder of M&FH, which controls, and is thus affiliated with, a number of firms which together have thousands of employees, Appellant therefore must be found other than small.

3. Appellant and Mr. Perelman are not affiliated under the totality of the circumstances

The Area Office found Appellant affiliated with Mr. Perelman under the totality of the circumstances. SBA may consider the totality of the circumstances and find affiliation even though no one single factor is sufficient to constitute affiliation. 13 C.F.R. § 121.103(a)(5). The Area Office examined Mr. Perelman's and Dr. Mjalli's common investments and found an identity of interest between them, noted that Appellant had five directors tied to either Mr. Perelman or Dr. Mjalli, and found affiliation based on the totality of the circumstances.

OHA has stated its preference that size determinations be based upon the specific affiliation factors in 13 C.F.R. § 121.103, rather than finding affiliation based upon the totality of the circumstances. *Size Appeal of Lance Bailey & Associates, Inc.*, SBA No. SIZ-4817, at 14 (2006). Here, the Area Office's examination of the ties between Mr. Perelman and Dr. Mjalli, examining PharmaCore and M&FW, do not show affiliation with Appellant. There are no further ties to Appellant, other than the ownership discussed above. While five of Appellant's directors

may have had ties to Mr. Perelman or Dr. Mjalli, Appellant has 13 directors. The fact that five of them have ties to Mr. Perelman is simply not enough to find affiliation, absent some power by this block to exercise negative control, and the Area Office has found no such power.

Accordingly, I find that the Area Office erred in finding Appellant affiliated with Mr. Perelman under the totality of the circumstances.

Nevertheless, I find that the Area Office did not err in finding that Mr. Perelman controls TransTech, and that through TransTech and M&F, he controls the single largest minority block of Appellant's stock. Under these circumstances, Mr. Perelman must be found to control Appellant. 13 C.F.R. § 121.103(c)(1). Appellant has failed to meet its burden of establishing clear error by the Area Office.

V. Conclusion

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

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

CHRISTOPHER HOLLEMAN
Administrative Judge