

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

DECISION FOR PUBLIC RELEASE

SIZE APPEAL OF

W&T Travel Services, LLC,

Appellant

RE: BryMak & Associates, Inc.

Appealed from
Size Determination No. 3-2016-025

SBA No. SIZ-5721

Decided: March 21, 2016

APPEARANCES

Jonathan T. Williams, Esq., Megan C. Connor, Esq., Patrick T. Rothwell, Esq.,
PilieroMazza PLLC, Washington, D.C., for Appellant

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DECISION¹

I. Introduction and Jurisdiction

On January 12, 2016, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2016-025, finding that BryMak & Associates, Inc. (BryMak) is a small business under the size standard associated with the instant procurement. W&T Travel Services, LLC (Appellant), which had previously protested BryMak's size, contends that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse or remand for further consideration. For the reasons discussed *infra*, the appeal is granted. Parts of the size determination are reversed, and others are remanded.

¹ This decision was initially issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded counsel an opportunity to file a request for redactions if desired. No redactions were requested, and OHA now publishes the decision for public release.

OHA decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 121 and 134. Appellant filed the instant appeal within fifteen days of receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation and Protest

On April 16, 2015, the U.S. Department of the Air Force (Air Force) issued Request for Proposals (RFP) No. FA3089-15-R-0002, seeking a contractor to provide bus transportation services at bases around San Antonio, Texas. The Contracting Officer (CO) set the procurement aside entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 485113, Bus and Other Motor Vehicle Transit Systems, with an annual receipts size standard of \$15 million.

On November 16, 2015, the CO announced that BryMak was the apparent awardee. On November 23, 2015, Appellant, an unsuccessful offeror, protested BryMak's size. Appellant alleged that BryMak is affiliated with a number of Limited Liability Companies (LLCs): BryMak Universal, LLC, a Maryland LLC (BU-MD); BryMak Universal, LLC, a Kentucky LLC (BU-KY); Universal BryMak, a Maryland LLC (UB); and Universal Services Provider, LLC (USP). BryMak is affiliated with these firms, Appellant alleged, because they have common ownership, management, employees, and facilities. (Protest at 1.)

B. Size Determination

On January 12, 2016, the Area Office issued Size Determination No. 3-2016-025, finding that BryMak is a small business and is not affiliated with any of the concerns alleged in Appellant's protest.

The Area Office explained that BryMak is 100%-owned by Mr. Chris Hamby, who is BryMak's secretary/treasurer and sole director. His wife, Ms. Sherri Hamby, is vice president. The Area Office determined Chris Hamby has the ability to control BryMak as a result of his ownership. (Size Determination at 6, citing 13 C.F.R. § 121.103(c)(1).)

USP is 100%-owned by Ms. Diane Voudouris, who is also the president and director. The Area Office determined she has the ability to control USP as a result of her ownership. (*Id.*, citing 13 C.F.R. § 121.103(c)(1).)

In 2013, USP and BryMak established the joint venture, UB. USP is managing partner of UB and owns 51%. BryMak is the other partner and owns 49%. Ms. Voudouris is UB's president. (*Id.*) UB was awarded three contracts in 2014. However, because it was not awarded more than three contracts in a two-year period (3-in-2 rule), the Area Office

determined USP and BryMak are not affiliated, for purposes of the instant procurement, through its UB joint venture. (*Id.* at 9, citing 13 C.F.R. § 121.103(h).)

BryMak and USP also formed two other joint ventures: BU-MD and BU-KY. Each joint venture was awarded one contract. Because these joint ventures did not violate the 3-in-2 rule either, they also do not create affiliation between BryMak and USP. (*Id.* at 8-9, citing 13 C.F.R. § 121.103(h).)

In 2014, BU-MD and BU-KY merged to form Brymak Universal, LLC (BU). BryMak owns 51% of BU, and USP owns 49%. Ms. Voudouris is BU's vice president. (*Id.* at 6.) The size determination does not mention whether BU has been awarded any contracts.

BryMak also formed a joint venture with Facility Services Management, Inc. (FSM). In 2008, BryMak and FSM formed B-F Texas Transportation, LLC (BTT). At first, BryMak and FSM each owned 50% of BTT, but BryMak acquired FSM's interest in 2013. At the time of the acquisition, Chris Hamby's stepmother, Ms. Carolyn Hamby, was president, CEO, and 80%-owner of FSM. Because BryMak now owns 100% of BTT, the Area Office determined BryMak has the power to control BTT, and is therefore affiliated with BTT. (*Id.* at 6.)

In addition to BryMak, Chris Hamby has other ownership interests. He owns 49% of Hamby Enterprises Partnership, Ltd. (HEP). The remainder is owned by his sister, Ms. Angela Mitchell (49%); his father, Mr. Terry Hamby (1%); and his mother, Ms. Judy Hamby (1%). Chris Hamby is a limited partner in HEP, and his parents are managing general partners. The Area Office determined Terry and Judy Hamby have the power to control HEP as a result of their positions. (*Id.* at 7, citing Partnership Agreement, § 7.1(c) (“The Managing General Partners shall have the exclusive right and authority to manage and control the business. . . . Any act by the Managing General Partners alone shall be sufficient to bind and obligate the partnership.”).)²

The Area Office concluded Chris Hamby, Terry Hamby, Judy Hamby, and Angela Mitchell have an identity of interest based on their familial relationship. In reaching this conclusion, the Area Office stated, “There is no clear line of fracture between the four family members,” but gave no explanation as to how it arrived at this conclusion. (*Id.*) Because there was no clear fracture, the Area Office determined HEP and BryMak are affiliated based on identity of interest and ownership. (*Id.*, citing 13 C.F.R. §§ 121.103(c)(1) and 103(f).)

In addition to HEP, Terry Hamby owns 50% of Hamby Farms, LLC (HF), where he is the managing member. His wife, Ms. Carolyn Hamby (Chris Hamby's stepmother) owns the remaining 50%. As a result of their spousal relationship and ownership interests

² The Partnership Agreement provides further that removal of a general manager can occur “only upon a continuing material and substantial breach . . . which is not cured within 30 days of written notice thereof.” (Partnership Agreement § 8.2.)

in HF, the Area Office determined, Terry and Carolyn Hamby each have the power to control HF. (*Id.*, citing 13 C.F.R. §§ 121.103(c)(1) and 103(f).)

The Area Office then examined the relationship between HF and BryMak, and determined the firms are not affiliated. Although the Area Office did not explicitly state that it was undertaking a clear fracture inquiry, it remarked:

Chris Hamby, Sherri Hamby and BryMak have never owned any interest in HF. There has never been any business relationship between [HF] and any other entities addressed in this size determination. Further, neither Terry nor Carolyn Hamby provide any financial assistance, indemnification, loans, bonding assistance or any other support to any of the firms owned by Chris Hamby as well as the two Joint Ventures BryMak has in place and vice versa.

(*Id.* at 7-8.)

Next, the Area Office considered whether BryMak is affiliated with Evolution Insurance Company, Ltd. (EIC), a captive insurance company owned equally by 200 shareholders. The Area Office determined EIC's stock was widely held as a result of its relatively diffuse ownership, and so EIC's board of directors and president are deemed to control it. (*Id.* at 8, citing 13 C.F.R. § 121.103(c)(3).) EIC's stock is issued in units consisting of one common share and one preferred share. The common stock has voting rights, and the preferred stock does not. (EIC Articles ¶41). In addition, owners of common stock are entitled to appoint directors. (*Id.* ¶52(b).) Action requires majority vote by the directors, and a quorum requires half the number of directors then holding office. (*Id.* ¶¶ 66, 68.) The Area Office explained that BryMak owns one common share, and Chris Hamby and his wife, Sherri Hamby, jointly own one preferred share. Chris Hamby is BryMak's appointed director. Given EIC's structure, Chris Hamby, with a.5% interest and one of 184 directors, cannot control EIC through his ownership interest or his position as director. (Size Determination at 8.) EIC, therefore, is not affiliated with BryMak.

The Area Office then proceeded to determine BryMak's size for the years 2012, 2013, and 2014. In addition to the receipts for BryMak, the Area Office included BryMak's proportionate share of receipts from the joint ventures, BU and UB; and the receipts for BryMak's affiliates, BTT and HEP. These combined receipts, the Area Office found, do not exceed the \$15 million size standard. (*Id.* at 10.) The Area Office explicitly stated that BryMak is not affiliated with BU, UB, USP, HF, or EIC. (*Id.*)

C. Appeal

On January 28, 2016, Appellant filed the instant appeal with OHA, and requested a protective order so that Appellant's counsel could access the Area Office record. Appellant argues the size determination contains several clear errors that warrant reversal or remand.

Appellant argues that, although the Area Office determined BryMak and USP are not affiliated through their joint ventures, the Area Office did not consider whether they are affiliated for other reasons. The 3-in-2 rule specifically provides that, even though firms may create joint ventures and each new joint venture entity may be awarded up to three contracts, “[a]t some point . . . such a longstanding inter-relationship or contractual dependence between the same joint venture partners will lead to a finding of general affiliation between a nd among them.” (Appeal at 5, citing 13 C.F.R. § 121.103(h) (emphasis Appellant's).) Here, the Area Office determined the joint ventures between BryMak and USP did not receive more than three contracts in a two-year period; however, the Area Office did not go on to question whether the inter-relationship or contractual dependence between BryMak and USP gave rise to general affiliation. Because the Area Office's investigation of this issue is incomplete, OHA should remand this matter for further investigation. (*Id.* at 6, citing *Farmers Union Mktg. & Processing Ass'n*, SBA No. SIZ-4643, at 4 (2004) (“[T]he Area Office ... failed to do a full-text reading of the regulation. Such a partial reading of a regulation results in flawed analysis because it does not examine [a concern's] status under the entire regulation.”).)

Next, Appellant argues, the Area Office clearly erred in determining that BryMak is not affiliated with HF. The Area Office found that there is an identity of interest between Chris and Terry Hamby based on their father-son relationship; Terry Hamby controls HF; and his son, Chris Hamby, controls BryMak. Appellant contends there is no clear fracture between Chris and Terry Hamby because they have a business relationship in HEP. (*Id.* at 8, citing *Size Appeal of Speegle Constr., Inc.*, SBA No. SIZ-5147 (2010) (finding no clear fracture between a father and son because the father was involved in the son's business).) Accordingly, the Area Office should have determined that BryMak and HF are affiliated; its failure to do so is a clear error of law and plainly inconsistent with the finding of affiliation between BryMak and HEP. (*Id.*)

Appellant goes on to question whether the Area Office made a complete investigation into other firms Terry Hamby controls. For the first time on appeal, Appellant argues—and introduces evidence to support—that Terry Hamby “retains some association with BMAR & Associates, Inc. (BMAR).” (*Id.* at 8.) Appellant explains that it did not make this argument earlier in the proceedings because it did not know Terry Hamby was Chris Hamby's father until it received the size determination. Appellant observes the Area Office made no mention of BMAR in the size determination, which suggests one of two things: “either BryMak did not disclose BMAR as a potential affiliate, or the Area Office failed to consider BMAR as a potential affiliate.” (*Id.* at 9.) Appellant argues OHA should remand this issue for further consideration.

Appellant argues the Area Office should have investigated whether Chris Hamby and his stepmother, Carolyn Hamby, have an identity of interest, and whether BryMak is affiliated with the firms Carolyn Hamby controls: FSM, FSI, and HF. She controls FSM, Appellant argues, because she is its president, CEO, and owner; she controls FSI because she is its president and one of its directors; and she controls HF based on her 50% ownership. (*Id.* at 9-10).

Next, Appellant argues the Area Office determined that EIC's board and president control EIC without conducting any investigation as to whether this is true. For instance, the Area Office did not consider whether EIC's governing documents have any unanimity voting requirements. If they did, it would be possible for one director to exercise negative control over EIC. Furthermore, in determining EIC's stock is widely held, the Area Office should have determined that no block of stock was large relative to the others. Although EIC's stock is equally split, it is possible that some shares should be aggregated through an identity of interest. In such a case, some blocks of stock could be large relative to others, and the largest minority shareholder rule would apply. (*Id.* at 11-12.)

D. BryMak's Motion to Dismiss and Response

On February 16, 2016, BryMak responded to the appeal and moved to dismiss many of Appellant's arguments, contending that they are being made for the first time on appeal or they fail the pleading standard. Appellant, BryMak asserts, did not argue to the Area Office that Brymak is affiliated with HF or FSM, or that EIC's ownership is not widely held. BryMak argues it was “[the protester's] responsibility to present all relevant evidence and arguments to the Area Office when [the protester] submitted its protest.” (Response at 3, quoting *Size Appeal of Perry Mgmt., Inc.*, SBA No. SIZ-5100, at 3 (2009).) As for BMAR, Appellant's excuse that it did not know Terry Hamby was Chris Hamby's father until it received the size determination is weak. This information, BryMak argues, is publicly available. Appellant therefore could have, and should have, made this argument to the Area Office. (*Id.* at 17-18.) Further, Appellant argues that the Area Office should have investigated whether Chris and Carolyn Hamby have an identity of interest, but Appellant made no such allegation in the protest. (*Id.* at 9-10.) Because these arguments are being made for the first time on appeal, OHA should dismiss them.

Some of Appellant's other arguments, BryMak asserts, fail the pleading standard that requires a “full and specific statement as to why” the size determination is “based on clear error of fact or law.” (*Id.* at 9, quoting 13 C.F.R. §§ 134.305(a)(3) and 134.314.) For instance, Appellant argues that the size determination “suggests” the Area Office did not consider whether BryMak and BMAR are affiliated. (*Id.* at 9.) The argument that the largest minority shareholder rule may apply is similarly insufficient because “questions, possibilities and guesses do not meet the pleading standard.” (*Id.* at 10.).

BryMak next asserts OHA should deny Appellant's other arguments on the merits. BryMak argues it is not affiliated with USP because the firms do not have a longstanding inter-relationship or contractual dependence. The revenues BryMak derives from its joint ventures with USP are nominal (less than 5% of its annual receipts). Neither company provides the other with financial assistance, such as bonding. Nor do the firms share owners, employees, or an address. (*Id.* at 11-13, citing *Size Appeal of Rio Vista Mgmt., LLC*, SBA No. SIZ-5316 (2012) (no economic dependence found when revenues from alleged affiliate accounted for 27% of challenged firm's annual receipts and there was no bonding assistance).)

BryMak then takes issue with Appellant's argument that BryMak is affiliated with HF. BryMak asserts there is clear fracture between Chris and Terry Hamby because “there is no evidence in the record which confirms BryMak shares officers, employees, facilities, or equipment with Terry Hamby or [HF],” and the firms operate in separate lines of business. Other than Chris Hamby's interest in HEP, Chris Hamby was not participating in other business relationships with Terry Hamby as of the date for determining size. Accordingly, because the connections between Chris and Terry Hamby are only minimal, there is clear fracture and thus no identity of interest. (*Id.* at 15-16, citing *Size Appeal of GPA Techs., Inc.*, SBA No. SIZ-5307, at 6 (2011).)

BryMak argues further that there is a clear line of fracture between Chris and Carolyn Hamby and their respective companies. Well before the date for determining size, FSM sold all of its interest in BTT to BryMak, which “effectively fractured any purported affiliation between FSM and BryMak as a result of common investments.” (*Id.* at 19.) Moreover, Terry and Carolyn Hamby do not provide any financial assistance, indemnification, loans, bonding assistance or other support to any of the firms owned by Chris Hamby or the two joint ventures. (*Id.* at 20.)

As for EIC, BryMak contends the Area Office had ample evidence to conclude that EIC's stock was widely held. “Given the issuance of 200 shares, with each share owned by a separate company or individual, the [Area Office's] decision to find EIC stock ‘widely held’ was proper.” (*Id.* at 23.) Further, the minority shareholder rule does not apply “because each share is held separately by 200 different shareholders,” so “there is no single block of stock that is large compared to all other holdings.” (*Id.*) Accordingly, the Area Office was correct to analyze control under 13 C.F.R. § 121.103(c)(3) and presume that control rests with the board of directors and the president or CEO. BryMak, as one of 184 directors, can neither affirmatively nor negatively control EIC. (*Id.* at 24.)

E. Opposition to Motion to Dismiss

On March 2, 2016, Appellant opposed BryMak's motion to dismiss. Appellant contends the arguments in the appeal were not raised for the first time and they suffice the pleading standard. Accordingly, OHA should deny the motion.

Appellant's arguments are not new because they are all based on the size determination. *Size Appeal of Crosstown Courier Service, Inc.*, SBA No. SIZ-5571 (2014)(“it is settled law . . . that a protester has standing to appeal any issue addressed in a size determination, even if the protester did not raise the same issues in its underlying protest.”) BryMak's reliance on *Perry* is misplaced, Appellant points out, because the protester in that case argued the challenged firm was affiliated with fifteen firms not mentioned in the size determination or investigated by the area office. (Opp. to Motion at 3-4.)

The arguments in the appeal meet the pleading standard, Appellant contends, because OHA dismisses an appeal “only where there is a total failure to allege error in the

size determination.” (*Id.* at 6.) Using words like “questions,” “possibilities,” and “suggesting” does not mean the appeal fails to make a “full and specific statement as to why the size determination is alleged to be in error.” (*Id.*, citing 13 C.F.R. § 134.305(a)(3).)

F. Supplemental Appeal

On February 16, 2016, Appellant supplemented its appeal after viewing the Area Office file under the terms of a protective order. Appellant argues the record contains sufficient information to find BryMak affiliated with HF, FSM, and EIC. BryMak, therefore, is not an eligible small business for the subject procurement.

Appellant contends BryMak and HF are affiliated through HEP. Because BryMak is affiliated with HEP, and HEP is controlled by Terry Hamby, BryMak and HEP are also affiliated with other entities controlled by Terry Hamby, such as HF. 13 C.F.R. § 121.103(c)(1). The Area Office overlooked this issue, Appellant explains, by focusing exclusively on the direct connections between BryMak and HF. (Letter from S. Nirk to J. Dulske (Dec. 29, 2015) (“Since [Terry and Carolyn Hamby] have no ownership interest in BryMak, [HF] would not be considered an affiliate.”).)

Appellant then points out that—according to the evidence BryMak submitted in opposition to Appellant's motion to admit new evidence, *see* Section II.H., *infra*—Carolyn Hamby previously acknowledged affiliation between HEP, FSM, and HF in a size determination of FSM. (Size Determination No. 3-2015-093, at 3.) Based on this information, then, because BryMak is affiliated with HEP, it is also affiliated with FSM and HF. (Supp. Appeal at 4-5.)

Appellant argues further that BryMak and FSM are affiliated because Carolyn and Chris Hamby have an identity of interest, directly and indirectly. Indirectly, they have an identity of interest because Chris and Terry Hamby have an identity of interest based on their father-son relationship and Terry and Carolyn Hamby have an identity of interest due to their spousal relationship. Effectively, then, Carolyn and Chris Hamby have an identity of interest, and the firms they control are affiliated. Further, they have a direct identity of interest, even though their familial relationship is attenuated, because they share multiple business connections: (1) their respective companies, BryMak and FSM, formed the joint venture, BTT, and FSM later sold its interest in BTT to BryMak; (2) BryMak holds two subcontracts with FSM; and (3) they both are shareholders and directors of EIC. *Size Appeal of SolarCity Corp.*, SBA No. SIZ-5257, at 10 (2011) (finding an identity of interest among cousins because they “share business connections significant enough to constitute an identity of interest.”).

Next, Appellant repeats that EIC's ownership is not widely held and that the Area Office should have applied the minority shareholder rule. *Size Appeal of Gov't Contracting Resources, Inc.*, SBA No. SIZ-5706 (2016). EIC is not widely held, Appellant reasons, because its shares are not publicly-traded. *Size Appeal of MPC Computers, LLC*, SBA No. SIZ-4806 (2006). According to the record, “there is no public

or other market for the Common Shares, the Preferred Shares or the Units,” and “it is unlikely that any such market will develop.” (EIC Subscription Agreement at ¶ 2.5.) Had the Area Office analyzed EIC's ownership under the minority shareholder rule, Appellant contends, it would have aggregated the shares owned by BryMak, FSM, and Chris and Sherry Hamby based on an identity of interest. This aggregated block of stock is potentially large relative to the others, which would result in BryMak being affiliated with EIC as its largest minority shareholder. (Supp. Appeal at 13-15.)

Alternatively, even if the Area Office was correct to apply the widely held shareholder rule, BryMak would have the power to control EIC under this scenario, too. If EIC's stock is widely held, then unless there is evidence that one or more directors truly do not control it, each director has the power to control EIC. 69 Fed. Reg. 29,192, 29,194 (May 21, 2004) (“In the absence of evidence to the contrary, the SBA will find control in such circumstances to rest with the Board of Directors and with the highest ranking officer of the concern (either its CEO or President) because control of the concern must rest somewhere.”) (emphasis Appellant's.) In this case, EIC is actively managed by its members and directors. The directors of EIC have broad authority, and the president and other officers “do not perform any meaningful management role in the business.” (Supp. Appeal at 11.) BryMak is a shareholder of EIC; Chris Hamby is its appointed director and is on the EIC Risk Control Committee, which reviews shareholder loss control reports, prepares EIC loss control reports, and reviews EIC's loss control goals and makes recommendations to the Executive Committee or Board of Directors. (Supp. Decl. of Chris Hamby (Dec. 14, 2015), at ¶ 12; EIC Policies and Procedures Manual at 16.) FSM is also a shareholder of EIC, and Appellant presumes Carolyn Hamby is its appointed director. Because no one director has the power to control EIC, they are all deemed to control it. Accordingly, EIC is affiliated with BryMak as a result of Chris Hamby's directorship. If Carolyn Hamby is a director too, it would only bolster this conclusion. (Supp. Appeal at 16-18.)

Appellant then takes issue with the Area Office's calculation of receipts. The Area Office, Appellant argues, omitted BryMak's proportionate share of the joint venture receipts from BU-KY and UB. (*Id.* at 18.)

G. Response to Supplemental Appeal

On March 11, 2016, BryMak responded to the supplemental appeal. Appellant's arguments, BryMak contends, are meritless.

BryMak first challenges the contention that it is affiliated with HF. BryMak argues the Area Office did not look “only at direct connections between BryMak and [HF],” as Appellant argues. Rather, the Area Office considered whether the firms are affiliated based on identity of interest and found clear fracture. (Response to Supp. App. at 2-3, citing Size Determination at 7-8.) Appellant then cites to portions of the record that support a finding of clear fracture between BryMak and HF. (*Id.* at 3-5.)

The fact that Chris and Terry Hamby both have ownership interests in HEP does not prevent a finding of clear fracture, BryMak contends, because this connection is minimal, and “a minimal amount of economic or business activity between two concerns does not prevent a finding of clear fracture.” (*Id.* at 6, quoting *Size Appeal of GPA Techs., Inc.*, SBA No. SIZ-5307, at 6 (2011).)

Next, BryMak addresses the contention that Carolyn and Chris Hamby have an identity of interest. This is not the case, BryMak argues, because “SBA has generally not counted relations other than spouses, parents, children, or siblings as family members” when considering identity of interest. (*Id.* at 7, quoting *Size Appeal of [Drug Applicant]*, SBA No. SIZ-5362, at 8 (2012).)

BryMak goes on to argue that a finding of affiliation with HF would be unjust. BryMak notes “[t]he only involvement between Chris Hamby and Terry Hamby reflected in the record is HEP,” and HEP's income and assets are sparse. Further, HEP is particular to Chris Hamby, Terry Hamby, Judy Hamby, and Angela Mitchell. HF's ownership is contained to Terry and Carolyn Hamby. OHA therefore should not apply the identity of interest rule to find affiliation between BryMak and HF. (*Id.* at 9.)

As for the argument that the Area Office should have considered whether BryMak is affiliated with FSM, BryMak points out “it was not the responsibility of the Area Office to investigate all of BryMak's possible affiliations.” (*Id.* at 10, citing *Size Appeal of Perry Mgmt., Inc.*, SBA No. SIZ-5100 at 3 (2009).) The Area Office was only required to investigate those alleged in the protest. Because Appellant did not allege affiliation with FSM and the Area Office made no such finding, OHA should dismiss this argument. (*Id.* at 9 n.4, citing *Crosstown Courier Serv., Inc.*, SBA No. SIZ-5571 (2014).)

Nevertheless, BryMak contends, it is not affiliated with FSM for several reasons. First, BryMak reiterates that the stepparent-stepchild relationship does not give rise to a presumption of identity of interest. Next, Chris and Carolyn Hamby's shared business connections do not create affiliation, either, because FSM sold its interest in BTT to BryMak. At most, then, BryMak and FSM are former affiliates. Third, the subcontracting between BryMak and FSM is negligible. (*Id.* at 10-12.) Finally, Carolyn and Chris Hamby's ownership interests in EIC do not create affiliation between FSM and BryMak because the interests are “minuscul[e], non-controlling investments.” (*Id.* at 13.)

Next, BryMak contends the Area Office properly concluded that BryMak is not affiliated with EIC. Appellant's argument to the contrary relies on a misrepresentation of *MPC Computers*. Whether a concern's stock is publicly traded is a distraction, BryMak contends, because “SBA does not normally differentiate between publicly-traded companies and privately-held companies for the purpose of size determination issues such as affiliation.” (*Id.* citing *Novalar Pharm., Inc.*, SBA No. SIZ-4977 (2008).) Further, EIC has nearly 200 shareholders, so it is not closely held. (*Id.* at 14.)

BryMak then addresses the contention that the Area Office should have considered whether BryMak is the largest minority shareholder. This argument lacks

merit, BryMak explains, because it does not take into account the distinction between common shares, which have voting power, and preferred shares, which do not. (*Id.* at 14-15, citing EIC Articles, ¶¶ 2, 5, 41.) BryMak owns one common share and Chris and Sherry Hamby jointly own one preferred share. Therefore, because Chris and Sherry Hamby cannot vote, it is irrelevant whether their stock is aggregated with other voting interests. Further, because the Area Office did not find BryMak to be affiliated with FSM, there is no support for aggregating BryMak and FSM's interests. Even if such an aggregated block existed, it would amount to only two common shares, which is paltry given EIC's multitude of shareholders.

BryMak argues further that the minority shareholder rule does not apply, for two reasons. First, BryMak reiterates, a firm does not have to be publicly traded for it to be considered widely held. Second, the record does not support finding “the aggregate of the minority holdings in EIC are large as compared to *any other* stock holding.” (*Id.* at 16, citing 13 C.F.R. § 121.103(c)(2), emphasis BryMak's.)

BryMak contends Appellant's reliance on *Size Appeal of Government Contracting Resources, Inc.*, SBA No. SIZ-5706 (2016) is misplaced because that case involved 20 shareholders. Here, by contrast, EIC is owned by nearly 200 shareholders. “By suggesting the minority shareholder rule applies to the instant case, Appellant asks OHA to extend 13 C.F.R. § 121.103(c)(2) well past any other OHA decision.” (*Id.* at 17-18, citing *Size Appeal of Tenax Aerospace, LLC*, SBA No. SIZ-5701 (2015); *Size Appeal of ADVENT Envt'l., Inc.*, SBA No. SIZ-5325 (2012); *Size Appeal of Vocare Servs., Inc.*, SBA No. SIZ-5266, at 6 (2011); *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-5049, at 9 (2009).)

Alternatively, in the event OHA determines the minority shareholder rule applies, BryMak argues that EIC is controlled by the board of directors, which BryMak cannot control. (*Id.* at 18-19.) BryMak points out that it is one of nearly 200 shareholders. Because the Articles require a majority vote by the directors and a quorum requires half the number of directors holding office, Chris Hamby cannot exercise affirmative or negative control over EIC. (*Id.* at 19, citing EIC Articles at ¶ 66.)

Finally, BryMak addresses the alleged errors in calculating the joint venture receipts. BryMak contends the Area Office made a proper calculation, but notes that any error would not affect the outcome of the case. (*Id.* at 22.)

H. New Evidence

With its appeal, Appellant moved to submit new evidence. Specifically, Appellant seeks to admit: (1) a copy of the LinkedIn webpage for Terry Hamby; (2) a copy of a Real-Time Federal Campaign Finance webpage for April 2014 and a Courier-Journal article dated September 20, 2014; (3) the 2015 State of Georgia Corporation Annual Registration and 2014 North Carolina Business Corporation Annual Report for FSM; and (4) the 2013-2014 Missouri Biennial Registration Report for FSI. Appellant argues there

is good cause to admit this evidence because the Area Office did not consider whether BryMak is affiliated with FSM, FSI, or BMAR.

On February 12, 2016, BryMak opposed Appellant's motion. OHA should deny the motion, BryMak argues, because this evidence unduly enlarges the issues, does not clarify facts on appeal, and was publicly available prior to Appellant's submission of the protest. BryMak also asserts that Exhibits 1 and 2 “reveal the very relationships of which Appellant now claims it is unaware.” (Opp. at 4.) To support its argument that the information was publicly available, BryMak included two exhibits: (1) search results for BMAR from the Kentucky Secretary of State's webpage; and (2) Size Determination No. 3-2015-093, which Appellant referenced *supra*.

III. Analysis

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb an area office's size determination only if, after reviewing the record, the administrative judge has a definite and firm conviction that 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).

B. Motion to Dismiss

BryMak argues OHA should dismiss many of Appellant's arguments because they are either being made for the first time on appeal or they fail the pleading standard. For the most part, I find BryMak's contentions unpersuasive. Appellant's arguments satisfy the pleading standard, and all but one pertain to issues in the size determination. Therefore, it is only with respect to this one new issue that I grant BryMak's motion. BryMak's motion is thus GRANTED IN PART and otherwise DENIED.

SBA regulations provide that a proper appeal to OHA must contain a “full and specific statement as to why the size determination is alleged to be in error, together with argument supporting such allegations.” 13 C.F.R. § 134.305(a)(3). Therefore, OHA will dismiss a size appeal when it does not specifically argue that a size determination contains clear errors of fact or law. *E.g. Size Appeal of ProSouth Constr. Servs., LLC*, SBA No. SIZ-5708 (2016); *Size Appeal of Cherokee — Tech. Specialists, LLC*, SBA No. SIZ-5434, at 2 (2013); *Size Appeal of Alleghany Wood Prods., Inc.*, SBA No. SIZ-5366 (2012). Contrary to BryMak's contentions, OHA has not used this as a tool to dismiss arguments that are speculative or lack evidentiary support; rather, OHA decides such appeals on the merits. *E.g., Size Appeal of Potomac Elec. Corp.*, SBA No. SIZ-5714 (2016).

As for new arguments, it is true that SBA regulations provide, “The Judge will not decide substantive issues raised for the first time on appeal.” 13 C.F.R. § 134.316(c).

However, as OHA has explained, “[i]t is settled law ... that a protester ‘has standing to appeal any issue addressed in a size determination, even if the protester did not raise the same issues in its underlying protest.’” *Size Appeal of Crosstown Courier Serv., Inc.*, SBA No. SIZ-5571 (2014) (quoting *Size Appeals of BA Urban Solutions, LLC, et al.*, SBA No. SIZ-5521, at n.5 (2013)); accord *Size Appeal of Profl Performance Dev. Group, Inc.*, SBA No. SIZ-5398, at n.1 (2012)). Therefore, OHA will not consider an issue that was neither raised to, nor investigated by, the Area Office. *E.g., Size Appeal of OxyHeal Med. Sys., Inc.*, SBA No. SIZ-5707, at 8 (2016). In this case, the Area Office considered whether BryMak is affiliated with HF and FSM and whether EIC's ownership is widely held. As a result, even though Appellant did not raise these issues in the protest, Appellant may now argue that the Area Office erred in making these findings.

One issue, however, was neither addressed in the size determination nor alleged in the protest. That is BryMak's affiliation with BMAR. Because the Area Office did not consider this relationship, and Appellant did not make this argument to the Area Office, OHA will not consider it now. *Size Appeal of Perry Mgmt.*, SBA No. SIZ-5100, at 3 (2009).

C. Analysis

Having reviewed the record and the arguments of the parties, I agree with Appellant that the size determination contains several clear errors of law. One of the Area Office's conclusions—that BryMak and HF are not affiliated—is contravened by evidence in the record, so it is reversed. Others lack the legal and factual support necessary to be affirmed; they are remanded for further consideration consistent with this decision.

The record establishes that BryMak and HF are affiliated. SBA regulation 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 by showing that the interests deemed to be one are in fact separate.

13 C.F.R. § 121.103(f). OHA has extensive case precedent interpreting this regulation as creating a rebuttable presumption that close family members have identical interests and must be treated as one person. *See e.g., Size Appeal of Knight Networking & Web Design, Inc.*, SBA No. SIZ-5561 (2014). OHA has explained that “[t]he regulation creates a rebuttable presumption that family members have identical interests and must be treated as one person, unless the family members are estranged or not involved with each other's business transactions.” *Size Appeal of Tenax Aerospace, LLC*, SBA No. SIZ-5701, at 12

(2015) (quoting *Size Appeal of Golden Bear Arborists, Inc.*, SBA No. SIZ-1899 (1984).) “The presumption arises, not from the degree of family members' involvement in each other's business affairs but, rather, from the family relationship itself.” *Id.* (citing *Size Appeal of Gallagher Transfer & Storage Co., Inc.*, SBA No. SIZ-4295 (1998).)

A challenged firm may rebut the presumption of identity of interest if it is able to show “a clear line of fracture among the family members.” *Size Appeal of Carwell Prods., Inc.*, SBA No. SIZ-5507, at 8 (2013) (citing *Size Appeal of Tech. Support Servs.*, SBA No. SIZ-4794, at 17 (2006).). “A clear line of fracture exists if the family members have no business relationship or involvement with each other's business concerns, or the family members are estranged.” *Size Appeal of Hal Hays Constr., Inc.*, SBA No. SIZ-5217, at 6 (2011). “Factors that may be pertinent in examining clear line of fracture include whether the firms share officers, employees, facilities, or equipment; whether the firms have different customers and lines of business; whether there is financial assistance, loans, or significant subcontracting between the firms; and whether the family members participate in multiple businesses together.” *Size Appeal of Trailboss Enters., Inc.* SBA No. SIZ-5442, at 6 (2013), *recons. denied*, SBA No. SIZ-5450 (2013) (PFR). “OHA has recognized that a minimal amount of business or economic activity between two concerns does prevent a finding of clear fracture.” *Size Appeal of Carwell Prods., Inc.*, SBA No. SIZ-5507, at 8 (2013) (citing *Size Appeal of RBG Group, Inc.*, SBA No. SIZ-5351, at 7 (2012)); *accord Size Appeal of GPA Techs., Inc.*, SBA No. SIZ-5307, at 6 (2011).

In this case, the Area Office found that (1) there is an identity of interest between Chris and Terry Hamby, (2) Terry Hamby controls HF, and (3) Chris Hamby controls BryMak. Section II.B., *supra*. Chris and Terry Hamby, moreover, are not estranged and they both have ownership interests in HEP. The Area Office, nevertheless, determined HF and BryMak are not affiliated. In support of this conclusion, the Area Office remarked that BryMak and HF have no business relationships, and there is no financial assistance, indemnification, loans, bonding assistance or any other support between HF and BryMak. Although the Area Office did not explicitly state that there was clear fracture, it appears the Area Office found any connections between BryMak and HF were minimal.

The clear fracture analysis is faulty, though. Because it is the familial relationship that gives rise to the presumption, the inquiry takes place with respect to the family members themselves. *See Hal Hays Constr., Inc.*, SBA No. SIZ-5217, at 6 (2011) (“A clear line of fracture exists if the family members have no business relationship or involvement with each other's business concerns, or the family members are estranged.”) Accordingly, if a challenged firm does not rebut the presumption of identity of interest between family members, all of the family members' investments are aggregated. In this case, with respect to BryMak's affiliation with HEP, the Area Office found that there was an identity of interest between Chris and Terry Hamby and there was not clear fracture. Then, when considering whether BryMak is affiliated with HF, the Area Office seemingly found there was such clear fracture. This conclusion is clearly erroneous because it is incoherent to find an identity of interest between two family members when analyzing affiliation with one firm, and then, in the same size determination, find no

affiliation with a second firm controlled by one of those family members. Doing so implicitly denies the identity of interest just found. Accordingly, because the Area Office explicitly found that Chris and Terry Hamby have an identity of interest, it is irrelevant whether the business connections between HF and BryMak are minimal. Their interests are aggregated because they have mutual involvement in another concern—HEP. *See Size Appeal of Tenax Aerospace, LLC*, SBA No. SIZ-5701, at 2 (2015) (affirming size determination where the area office found an identity of interest among between parent and children based on the relationship and their mutual investment). As a result, I reverse the finding that BryMak and HF are not affiliated.

The size determination contains other errors of law. As Appellant contends, the Area Office's consideration of BryMak's potential affiliation with USP is incomplete. The Area Office determined USP and BryMak are not affiliated because their joint ventures did not violate the 3-in-2 rule. SBA regulation provides, however, that in addition to affiliation based on joint ventures, affiliation may arise between joint venturers when there is “a longstanding inter-relationship or contractual dependence between the same joint venture partners will lead to a finding of general affiliation between and among them.” 13 C.F.R. § 121.103(h). It appears the Area Office did not consider whether BryMak and USP are affiliated on these grounds. BryMak argues on appeal that there is no such longstanding relationship or contractual dependence. This argument, though, is not procedurally proper. “On appeal, OHA does not conduct a separate investigation into the size of a challenged firm.” *Size Appeal of Cherokee — Tech. Specialists, LLC*, SBA No. SIZ-5434, at 1 (2013) (citing 13 C.F.R. § 134.314; *Size Appeal of Am. Towing & Auto Dismantling, Inc.*, SBA No. SIZ-5123, at 2 (2010)). Because the Area Office did not consider the issue of general affiliation between BryMak and USP, OHA will not consider it for the first time on appeal. I therefore remand this issue to the Area Office and instruct it to solicit information and argument and make a determination as to whether BryMak and USP are generally affiliated.

Further, the Area Office did not adequately examine whether Carolyn and Chris Hamby have an identity of interest. As Appellant emphasizes, the Area Office determined that Chris Hamby has a familial identity of interest with his sister, mother, and father. *See* Section II.B, *supra*. The Area Office did not address, though, whether Chris Hamby similarly has an identity of interest with his stepmother or whether the presumption was rebutted. It is well-settled that identity of interest may exist between a parent and child. *E.g.*, *Size Appeal of Knight Networking & Web Design, Inc.*, SBA No. SIZ-5561 (2014) (finding identity of interest between father and son). More specifically, though, OHA has affirmed a size determination where the Area Office applied the presumption of affiliation based on familial identity of interest between a stepmother and stepson. *E.g.*, *Size Appeal of Avantara Corp.*, SBA No. SIZ-4225, at 4-5 (1996). BryMak contends that the presumption of identity of interest based on family ties applies only to spouses, parents, children, or siblings, but this is not true. Under certain circumstances, OHA has also applied the presumption to more distant relations such as cousins. *See Size Appeal of SolarCity Corp.*, SBA No. SIZ-5257, at 10 (2011). Accordingly, it does not follow that the stepparent and stepchild relationship is too tenuous for the familial identity of interest rule to apply. This makes sense as a policy matter because in some

instances the closeness of a stepparent-stepchild relationship can approach that of the parent-child relationship. The Area Office therefore should have considered whether Chris and Carolyn Hamby have an identity of interest such that the firms they control are affiliated. On remand, the Area Office is directed to solicit information and argument on this issue and make a determination as to whether there is clear fracture. *E.g.*, *Size Appeal of MCH Corp.*, SBA No. SIZ-5605 (2014) (remanding for further consideration of familial identity of interest); *Size Appeal of Crosstown Courier Serv., Inc.*, SBA No. SIZ-5571 (2014).

As for BryMak's affiliation with EIC, the Area Office determined EIC was widely held because its stock is divided among 200 shareholders, but cited no legal support for this conclusion. Although SBA regulation does not define “widely held,” OHA has expounded:

[A] corporation that is widely held is the opposite of a corporation that is “closely held,” which is commonly defined as “A corporation whose stock is not freely traded and is held by only a few shareholders (often within the same family).” BLACK'S LAW DICTIONARY 341 (7th ed. 1999). Therefore, if stock in a corporation is freely traded and held by more than a few shareholders, it is reasonable to state that it is widely held. Further, in the context of a small business, there can be no requirement that the concern be held by thousands or millions of shareholders.

Size Appeal of MPC Computers, LLC, SBA No. SIZ-4806, at 7 (2006). The test for determining whether stock is widely held, then, is a conjunctive two-part test. The stock must be (1) freely traded, and (2) held by more than a few shareholders. *Id.*; *Size Appeal of Novalar Pharm. Inc.*, SBA No. SIZ-SIZ-4977, at 16 (2008) (finding stock is widely held when it was publicly traded and owned by at least six shareholders); *Size Appeal of Eagle Pharm., Inc.* SBA No. SIZ-5023, at 9 (2009) (rejecting the argument that a company is widely held based solely on its number of shareholders, finding the firm was not publicly-traded and had a “relatively small number of shareholders.”). In this case, the Area Office determined the second part of the test is met, but did not consider the first part. Because the Area Office's conclusion that EIC's directors and president presumably control EIC relied on a flawed analysis, it cannot stand. I therefore remand this matter for further investigation as to whether EIC is widely held. In considering this matter, the Area Office must apply the test laid out in *MPC Computers*.

If the Area Office determines EIC is widely held, it should continue the analysis of control under 13 C.F.R. § 121.103(c)(3). In considering whether the directors and president are deemed to control EIC, the Area Office should be mindful that, “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.” *Novalar Pharm. Inc.*, SIZ-SIZ-4977, at 16.

The Area Office should also keep in mind that whether EIC's shareholders have an identity of interest is relevant in determining whether a block of stock is large

compared with all other stock holdings. The Area Office should therefore consider whether any such identity of interest exists and, in the event that it does, aggregate the respective shares. *Size Appeal of Seacon Phoenix, LLC*, SBA No. SIZ-5523 (2013) (“although an individual owner may not have the ability to control a firm based on his individual ownership interest, multiple owners may have the collective ability to control based on their aggregated interests.”); *see also Size Appeal of AcelRx Pharm., Inc.*, SBA No. SIZ-5501 (2013). If a single block of stock is large relative to the others, the Area Office should then determine control under the largest minority shareholder rule, 13 C.F.R. § 121.103(c)(1). *E.g.*, *AcelRx Pharm.*, SIZ-5501, at 5 (2013); *Novalar Pharm.*, SIZ-4977, at 12-14 (2008).

IV. Conclusion

Appellant has demonstrated that the size determination is clearly erroneous. Accordingly, the appeal is GRANTED, the size determination is VACATED, and the matter is REMANDED to the Area Office for further determination. Because I am remanding this case for further review and investigation, it is unnecessary to rule upon Appellant's motion to introduce new evidence on appeal or consider the evidence BryMak submitted in its opposition. *Size Appeal of Trailboss Enters., Inc.*, SBA No. SIZ-5442, at 4 (2013); *Size Appeal of Hardie's Fruit & Vegetable Co. S., LP*, SBA No. SIZ-5347, at 14 (2012); *Size Appeal of Mark Dunning Indus., Inc.*, SBA No. SIZ-5284, at 12 (2011); *Size Appeal of Alutiiq Int'l Solutions, LLC*, SBA No. SIZ-5069, at 5 (2009).

CHRISTOPHER HOLLEMAN
Administrative Judge