

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

FOR PUBLIC RELEASE

SIZE APPEALS OF:

MPC Containment Systems, LLC, and
GTA Containers, Inc.,

Appellants,

RE: Avon Engineered Fabrications, Inc.

Appealed from
Size Determinations Nos. 03-2016-074 and
-075

SBA No. SIZ-5802

Decided: January 11, 2017

APPEARANCES

Benjamin Beiler, Chief Executive Officer, MPC Containment Systems, LLC, Chicago, Illinois

Scott E. Pickens, Esq., Clinton K. Yu, Esq., Barnes & Thornburg, LLP, Washington, D.C., for GTA Containers, Inc.

Jonathan D. Shaffer, Esq., Mary Pat Buckenmeyer, Esq., Smith Pachter McWhorter PLC, Tysons Corner, Virginia; Jill M. McClune, Vice President, Contracts & Federal Compliance, Avon Protection Systems, Inc., Belcamp, Maryland, for Avon Engineered Fabrications, Inc.

Constance M. Kobayashi, Esq., Office of Procurement Law, U.S. Small Business Administration, San Francisco, California, for the Agency

DECISION¹I. Introduction and Jurisdiction

On August 12, 2016, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination Nos. 03-2016-074 and -075 finding that Avon Engineered Fabrications, Inc. (Avon) is a small business for the subject procurement. On August 26, 2016, MPC Containment Systems, LLC (MPC), which had previously protested Avon's size, appealed the size determination to the SBA Office of Hearings and Appeals (OHA). On August 29, 2016, GTA Containers, Inc. (GTA), another protester, timely appealed the same size determination.² The two appeals arose from the same size determination and presented similar issues, so OHA consolidated them.

MPC and GTA (collectively, “Appellants”) maintain that the size determination is flawed and should be reversed or remanded. For the reasons discussed *infra*, the appeals are denied, and the size determination is affirmed.

II. BackgroundA. Procedural History

On October 2, 2015, the U.S. Department of Defense, Defense Logistics Agency issued Request for Proposals (RFP) No. SPRDL1-15-R-0349 for collapsible fuel tanks with handles, fitting, accessories, berm liners, hose support pads, and emergency and long term repair kits. The Contracting Officer (CO) set aside the procurement entirely for small businesses and assigned North American Industry Classification System (NAICS) code 313320, Fabric Coating Mills, with a corresponding size standard of 1,000 employees. Avon submitted its proposal on February 5, 2016, self-certifying as a small business.

On April 11, 2016, the CO announced that Avon was the apparent awardee. On April 13, 2016, GTA protested Avon's size. On April 15, 2016, MPC protested Avon's size. In their protests, Appellants argued that Avon is not an eligible small business because it is affiliated with Avon Rubber p.l.c. (AR), a publicly-traded British company with more than 500 employees. According to GTA, AR owns 15 companies on three continents. To support this claim, GTA included a screenshot from AR's website and other information.

¹ This decision was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded the parties an opportunity to file a request for redactions if desired. After reviewing the decision, the parties informed OHA that there were no requested redactions. Therefore, OHA now issues the entire decision for public release.

² Ordinarily, a size appeal must be filed within 15 calendar days of receipt of the size determination. 13 C.F.R. § 134.304(a). Here, GTA received the size determination on August 12, 2016. Fifteen calendar days after August 12, 2016 was August 27, 2016. Because August 27, 2016 was a Saturday, the appeal petition was due on the next business day: Monday, August 29, 2016. 13 C.F.R. § 134.202(d).

MPC made additional allegations. Specifically, MPC maintained that a 500-employee size standard should apply because Avon is not the manufacturer of the materials utilized for the storage tanks at the center of this procurement. MPC added that Avon is not a small business concern because it is dominant in its field of operation and is not independently owned and operated.

On May 24, 2016, the Area Office issued Size Determination Nos. 03-2016-053 and -054 finding that Avon is a small business. Appellants appealed Size Determination Nos. 03-2016-053 and -054 to OHA, and on July 7, 2016, OHA granted the appeals in part and remanded certain issues to the Area Office for further review. *Size Appeals of GTA Containers, Inc. et al.*, SBA No. SIZ-5760 (2016). OHA instructed the Area Office to determine whether Avon is the manufacturer of the collapsible fuel tanks, and if not, whether Avon qualifies as a nonmanufacturer. *GTA Containers*, SBA No. SIZ-5760, at 6-8. In addition, OHA directed the Area Office to clarify whether Hudstar Systems, Inc. (Hudstar) is affiliated with Avon, and if so, to include Hudstar's employees in the calculations. *Id.* Lastly, OHA instructed the Area Office to consider whether AR's large stockholders share an identity of interest. *Id.* OHA rejected Appellants' remaining arguments as meritless. *Id.* at 7.

In response to the remand, Avon informed the Area Office that the collapsible fuel tanks are made from a rubber fabric, which Avon will purchase from outside suppliers. Avon claimed, however, that “[w]ithout [Avon's] labor, proprietary processes and assets, the fabric would not be in usable form for the agency.” (Letter from J. McClune to K. Silvia (July 15, 2016), at 3.)

B. The Instant Size Determination

On August 12, 2016, the Area Office issued Size Determination Nos. 03-2016-074 and -075, again finding that Avon is a small business.

The Area Office explained that Avon is 100% owned by Avon Rubber and Plastics, Inc. (ARP), which also owns 100% of Avon Protection Systems, Inc. (APS). APS, Avon's sister company, owns 100% of Hudstar. Avon owns 50% of Flexss, LLC, an unpopulated joint venture, with the remaining 50% owned by Dynamic Shelters, Ltd. (Size Determination Nos. 03-2016-074 and -075, at 3.) ARP, Avon's parent company, is 100%-owned by Avon Rubber Overseas Limited (ARO). In addition to ARP, ARO owns 99% of Avon Dairy America Do Sul Soluções Para Ordenha LTDA (ADA) and 75% of Avon Hi-Life, Inc. (AHL). ARP owns the remaining 25% of AHL. (*Id.* at 4.)

ARO, which owns Avon through ARP, is 100%-owned by AR. In addition to ARO, AR owns the remaining 1% of ADA and 100% of Avon Dairy Solutions (Shanghai) International Trading Company Limited (ADSI), Avon Rubber Pension Trust Limited (ARPT), Avon Rubber Italia S.R.L. (ARI) and Avon Polymer Products Limited (APP). ARI owns 100% of Interpuls S.P.A. (ISPA). APP owns 100% of Avon Group Limited (AGL) and Avon Protection Systems UK Limited (APSUK). (*Id.*) The Area Office determined that due to AR's ownership and structure, AR's board of directors and CEO are deemed to control AR. (*Id.*, citing 13 C.F.R. § 121.103(c)(3).) AR's CEO and board of directors do not “hold a controlling interest in, or

manage any other business entity; nor do these individuals have an identity of interest among themselves such that they would constitute a voting block.” (*Id.*) The Area Office found that Avon is affiliated with AR, ARP, APS, Hudstar, ARI, ISPA, AHL, ARO, APP, ARA, ARPT, ADSI, AGL, APSUK and ADA. (*Id.*)

The Area Office then proceeded to examine whether Avon is the manufacturer of the end items in question. The Area Office explained that the procurement calls for the delivery of “50,000 gallon capacity ('50k') collapsible fabric tanks that are used to store liquids, in this instance fuel, along with various accessories, repair kits, and ground liners that the tank can sit on when deployed to minimize damage/punctures.” (*Id.* at 5.) The fabric which comprises the tanks is processed rubber, which is “rolled or pressed into sheets of ‘fabric’ that can be used for numerous applications.” (*Id.*) The Area Office found that Avon will transform the rubber fabric and other components and assemblies into the contract deliverables, and that Avon therefore qualifies as the manufacturer. (*Id.*)

The Area Office reviewed the three-part test set forth at 13 C.F.R. § 121.406(b)(2)(i) to determine whether Avon is the manufacturer of the end items. The Area Office found that the rubber fabric represents “67% of all material costs and 54% of total product cost.” (*Id.*) Avon, though, is responsible for transforming the rubber fabric into collapsible fuel tanks, which is of critical importance because “coated fabric is not the product being procured.” (*Id.*) Avon also provided the Area Office with a list of manufacturing equipment to be used, pictures of its facilities, and a detailed explanation of its manufacturing processes “to convert the materials (coated fabric and other parts) through cutting, bonding and welding processes into a collapsible tank.” (*Id.* at 6.) The Area Office concluded that Avon is the manufacturer of the end items because “without [Avon]'s modification and assembly the coated fabric alone would not function as a collapsible fuel tank.” (*Id.*)

Next, the Area Office explained that the omission of Hudstar and ISPA from the list of Avon's affiliates in Size Determination Nos. 03-2016-053 and -054 was an oversight. The Area Office stated, however, that its prior size calculation did include the employees of Hudstar and ISPA. (*Id.*)

Regarding AR's largest shareholders, the Area Office found that AR's 20 largest shareholders, out of over 1600, own 58.7% of AR's outstanding stock, with interests ranging from 11.83% to less than 1%. The five largest blocks of stock are held by Shroder Investment Management (11.83%), Blackstone Investment Management (10.31%), JPMorgan Asset Management (UK) (4.88%), Franklin Templeton Funds Management, Ltd. (4.14%), and Henderson Global Investors (3.27%). (*Id.*) The Area Office found that 19 of the 20 largest blocks of stock are held by asset management firms that do not have investment managers in common with each other. (*Id.* at 6-7.) No asset management firm shareholder has the power to control any of the other asset management firm shareholders. Therefore, the Area Office concluded, AR's largest shareholders do not share an identity of interest.

The Area Office calculated Avon's size as of February 5, 2016, the date Avon submitted its offer including price. The Area Office reiterated that Avon is affiliated with “AR, ARP, APS, [Hudstar], ARI, ISPA, AHL, ARO, APP, ARA, ARO, ARPT, ADSI, AGL, APSUK and ADA.”

(*Id.* at 7.) After reviewing documentation concerning the employees of Avon and its affiliates from February 1, 2015 through January 31, 2016, the Area Office found that Avon does not exceed the 1,000-employee size standard associated with the instant procurement. (*Id.*)

C. MPC's Appeal

On August 26, 2016, MPC filed its appeal with OHA. MPC argues that the size determination contains several errors and should be overturned.

MPC complains that the Area Office's analysis of whether AR's largest shareholders have an identity of interest was superficial and erroneous. MPC maintains that large shareholder blocks have the potential to exercise power that is disproportionate to their actual ownership share. Because large shareholder blocks have a larger financial interest, they more actively seek to exercise control over the concern. (MPC Appeal, at 3.) MPC also highlights that AR's shares are publicly traded on the London Stock Exchange, and urges that such a company should not be allowed to qualify as a small business concern, especially when “nearly 60% of its shareholders are essentially hedge funds.” (*Id.* at 5.) This type of business concern, according to MPC, should be subjected to a “heightened scrutiny of the facts.” (*Id.*)

MPC contends that AR's Articles of Association give control to the largest blocks of shareholders, and that AR's “**board of directors are merely the pawns of those large shareholder blocks.**” (*Id.* at 6 (emphasis in original).) MPC argues that AR's Articles of Association allow for a quorum when only three shareholders are present. This low number “can only exist for the benefit of the largest shareholder blocks”, as they can exercise control over AR in any shareholder meeting. (*Id.* at 7.) MPC further suggests that asset management shareholders have an incentive to act in unison with other asset management shareholders in order to exert control over AR to their mutual benefit.

Next, MPC argues that the Area Office erroneously found that no single shareholder is large compared to other shareholders. Given that the single largest block owns 11.83% of AR, and 42% of shareholders own small blocks of shares, usually under 1,000 shares, the 11.83% shareholder has the largest share compared to any other, and 13 C.F.R. § 121.103(c)(1) applies here. (*Id.* at 9.) MPC also notes that the two largest shareholders hold a combined 22.14% of the shares of AR, and together they are large compared to the next largest shareholder, which holds only 4.88% of the shares. The Area Office failed to consider whether the two largest shareholders control AR pursuant to 13 C.F.R. § 121.103(c)(2). (*Id.* at 9-10.)

MPC alleges that the Area Office conducted a “superficial” analysis of whether an identity of interest exists in this instance. (*Id.* at 10.) The Area Office should have applied 13 C.F.R. § 121.103(a)(5) in order to determine “whether large blocks of shares are in practical control of the entity.” (*Id.*) The Area Office also failed to support its finding that the asset management companies are competitors of one another, and therefore do not share an identity of interest. MPC insists that the asset management companies do share common interests, and likely have common investments beyond their holdings in AR. Finding that such concerns do not share an identity of interest is thus “absurd on its face.” (*Id.* at 11.) The large shareholders have a

substantial stake in AR's future and it would be inconceivable that the large shareholders would not act in concert in controlling AR's decisions. (*Id.* at 11-12.)

Next, MPC argues that OHA erred in concluding in *GTA Containers* that a concern that meets the applicable size standard is not dominant in its field. MPC argues further that *Size Appeal of Silver Enterprise Associates, Inc.*, SBA No. SIZ-5124 (2010), which OHA relied upon in *GTA Containers*, should be overturned. (*Id.* at 12.) MPC contends that OHA misinterpreted 13 C.F.R. § 121.102(b), and in any case, the instant RFP required offerors to meet all elements of the definition of a “small business concern”. (*Id.*)

MPC argues that the Area Office incorrectly determined that Avon is the manufacturer of the end items being procured. MPC contends that the end item is not the assembled tanks but rather the material used to create the tanks as it is the most expensive component of the end item. Because the assigned NAICS code is for Fabric Coating Mills, only such a mill can produce the material that comprises the tanks. (*Id.* at 13.) Avon is not a fabric mill, and MPC urges that “if the fabricator is not milling the fabric, then a smaller employees' standard should apply.” (*Id.* at 13-14.) Therefore, MPC reasons, the appropriate size standard here is 500 employees, not 1,000 employees.

Lastly, MPC urges OHA to reconsider *GTA Containers* to the extent that OHA ruled in Avon's favor. (*Id.* at 14.) MPC does not identify any specific errors in the decision.

D. GTA's Appeal and Supplemental Appeal

On August 29, 2016, GTA filed its appeal of the size determination. GTA contends that Size Determination Nos. 03-2016-074 and -075 is flawed and should be reversed.

GTA argues that the procurement here called not only for 50k fuel tanks, but also for items that accompany the tanks, and which may have their own specifications. (GTA Appeal, at 4-5.) GTA notes that these items are packaged together and the fuel tanks themselves cannot properly function without a number of these items. GTA highlights that, according to the RFP, a government representative will inspect the tank assembly for conformance prior to accepting delivery.

GTA asserts the Area Office incorrectly focused on the collapsible tanks alone, while ignoring the remaining items specified in the RFP. (*Id.* at 7.) Because Avon is not the manufacturer of most of the other tank assembly items, Avon “can only qualify to supply those items if it qualifies as a nonmanufacturer with less than 500 employees (which it does not).” (*Id.*) Additionally, a number of these other constituent items are kits, which Avon does not manufacture and therefore must purchase from vendors. SBA regulations provide, however, that in order to qualify as a kit assembler a concern must have 500 or fewer employees. Therefore, the Area Office erred in failing to consider whether Avon is the manufacturer of the entire fuel tank assembly. (*Id.* at 8.)

GTA maintains that the combined total interests of AR's three largest shareholders amount to nearly one third of the outstanding shares, and “[s]uch a large percentage in an aligned

group is itself an indicator of affiliation and control.” (*Id.* at 9 (citing *Size Appeal of Government Contracting Resources, Inc.*, SBA No. SIZ-5706 (2015) and *Size Appeal of Tenax Aerospace, LLC*, SBA No. SIZ-5701 (2015), *vacated in part on other grounds*, SBA No. SIZ-5747 (2016)).) The large percentage of shares held by the top three shareholders meets the requirements of 13 C.F.R. § 121.103(c)(2), and these shareholders should be deemed to control AR, and their employees added to the calculation of Avon's size. GTA adds that the Area Office failed to consider the totality of the circumstances in assessing whether the three largest shareholders have the power to control AR. Specifically, GTA argues, the Area Office improperly assumed that the large shareholders are competitors of each other, an invalid assumption due to their shared interests in AR and their power to exert control by influencing operations and decisions. (*Id.* at 11-12.)

Lastly, GTA alleges that the Area Office failed to properly calculate Avon's size. According to GTA, the employees of concerns acquired by AR and its affiliates must be added for “the entire period of the evaluation, not just from the point of acquisition and later.” (*Id.* at 13, citing 13 C.F.R. § 121.106(b)(4) (emphasis GTA's).) The size determination indicates that the Area Office used data for the time after these new employees became Avon-affiliated employees, thus the calculations performed by the Area Office were erroneous. (*Id.*) This issue is material because several acquisitions occurred in late 2015, prior to the submission of Avon's proposal.

On September 21, 2016, after reviewing the Area Office file under the terms of a protective order, GTA supplemented its appeal. GTA renews its argument that Avon is not the manufacturer of the end items being procured. According to GTA, the RFP called for the delivery of collapsible fuel storage tank assembly kits, not just the individual tanks. (Supp. Appeal, at 3.) Avon's own submissions to the Area Office, as contained in the Area Office file, characterize the end item as a kit. (*Id.*) Because these kit items have their own specifications and the fuel tanks cannot function without many of the accompanying items, the fuel tanks alone are not the end product. (*Id.* at 4.) Given that the end product is a kit, the 500-employee size standard applies to the winning offeror. GTA cites to *Size Appeal of B GSE Group, LLC*, SBA No. SIZ-5679 (2015) in arguing that “a concern which purchases some or all of such items and packages them into kit form is considered to be a nonmanufacturer for size determination purposes.” (*Id.* at 5.)

With regard to the issue of the employee count, GTA maintains that Avon only included them for the period after they became Avon-affiliated employees, not the pre-acquisition period as directed by SBA regulations. The Area Office relied upon information provided by Avon that did not contain pre-acquisition data, so the calculation of Avon's average number of employees is understated. (*Id.* at 6-7.)

Lastly, GTA asserts that the Area Office's analysis of whether the large shareholders of AR share an identity of interest failed to account for the special access granted to these shareholders. GTA argues that the record supports GTA's claims that the largest three shareholders have common interests and have the power to exercise control over AR. (*Id.* at 9.)

E. Avon's Response

On September 14, 2016, Avon responded to the appeals. Avon insists that the size determination is correct, and requests that OHA deny the appeals.

Avon avers that, contrary to Appellants' arguments, Avon qualifies as the manufacturer of the end items in question. Avon explains that the collapsible fabric tanks are utilized to store liquids. (Avon Response, at 3.) Avon will process the rubber fabric that makes up the tanks, and then assemble the fabric with other components and assemblies to create the end item. Although Avon will not manufacture the fabric, the fabric alone does not meet contract requirements. Rather, the fabric must be modified and transformed in order to meet the requirements of the RFP. (*Id.* at 5.) Avon asserts that “considerable labor, proprietary processes, and assets are used to transform the fabric into the deliverable tanks.” (*Id.*) Because Avon will modify and assemble components to create the collapsible tanks, Avon qualifies as the manufacturer.

Avon argues that SBA regulations do not require that the manufacturer produce all of the parts and components of an end item. (*Id.* at 7, citing *Size Appeal of Sea Box, Inc.*, SBA No. SIZ-5613 (2014).) Similar to the facts seen in *Sea Box*, Avon here will transform items it did not itself manufacture into the required end item. Additionally, the proportion of the total value of the end item is not the only factor considered when determining whether a concern is the manufacturer of a product. The relative importance of the concern's work also must be taken into account, as well as whether the concern is performing the work with its own personnel in its own facilities, and has experience performing the work. Here, Avon's work with the rubber fabric, which will be performed in Avon's own facilities with Avon's own employees, is essential to creating the requested end item. (*Id.* at 9.) Despite Appellants' claims, the end items here are the “50K Tank[s], Fabric, Collapsible”, not a kit of multiple end items. (*Id.*)

Avon then addresses Appellants' arguments that AR is controlled by, and affiliated with, its largest shareholders. Avon states that AR's largest shareholders are asset management firms that lack the power to control each other and do not have any investment managers in common with each other. Just because they share in the common goal of ensuring that AR is a successful business concern does not mean that the largest shareholders are affiliated with each other. (*Id.* at 10-11.) Citing past OHA cases, Avon argues that in order to have an identity of interest through common investments, more than one common investment must be found. (*Id.* at 13; citing *Size Appeal of Manroy USA, LLC*, SBA No. SIZ-5244 (2011) and *Size Appeal of Summit Techs. & Solutions, Inc.*, SBA No. SIZ-5132 (2010).) Therefore, the shared interest in AR does not give rise to an identity of interest. Avon notes that the three largest shareholders are independently owned and none has the power to control the others. Lacking a common purpose, the asset management firms cannot be found to be affiliated with each other based on their investments in AR.

Regarding concerns with widely-held stock, OHA has found that affiliation applies when a single block of stock is large relative to others, such as a shareholder owning 35.70% of a concern's stock, while the next two largest investors hold 15.44% and 15.25%. (*Id.* at 15, citing *Size Appeal of Novalar Pharmaceuticals, Inc.*, SBA No. SIZ-4977 (2008).) No such facts are present here. AR's largest shareholder holds 11.8%, while the next largest owns 10.3%. Thus

no single block is large as compared to all others. Further, the top ten shareholders in AR hold less than 50% of the total stock, and given that in the United Kingdom shareholder resolutions require a 50% or 75% majority for any resolution to pass, none of the largest shareholders may control AR. (*Id.* at 16-17.)

MPC's argument that OHA should overturn *Size Appeal of Silver Enter. Assocs., Inc.*, SBA No. SIZ-5124 (2010) is meritless, Avon contends. In its original appeal, MPC argued that the Area Office should have conducted additional investigation to determine whether Avon is dominant in its field of operations, a claim which OHA flatly rejected in *GTA Containers*.

Lastly, Avon contends that the Area Office correctly counted Avon's employees, despite GTA's protestations. Again, OHA had already dealt with this issue when it found that any disagreement with the method for calculating a concern's employees lacked merit because it challenged SBA regulations. (*Id.* at 19, citing *GTA Containers*, SBA No. SIZ-5760, at 7.) Avon argues GTA failed to demonstrate that the Area Office failed to comply with 13 C.F.R. § 121.106 in calculating Avon's size. Avon provided the Area Office with documented information regarding all employees, including contract, part-time, and full-time employees for Avon and all its affiliates. The Area Office utilized this information in making its calculations, and correctly found that Avon does not exceed the 1,000-employee size standard.

On September 27, 2016, Avon opposed GTA's motion to supplement its appeal and MPC's motion to reply. Alternatively, Avon moved for leave to supplement its response in the event OHA grants Appellants' motions. As explained below, MPC's motion to reply is denied. GTA's motion to supplement its appeal is granted and I therefore also grant Avon's motion to supplement its response.

In response to GTA's claims that the end item is assembled kits, Avon maintains that the RFP is clear that the end item is the collapsible tanks. GTA's reliance on *Size Appeal of B GSE Group, LLC*, SBA No. SIZ-5679 (2015) is misplaced. In *B GSE Group*, OHA found that the challenged concern was performing minimal operations on a frequency converter acquired from a large business. (Supp. Response, at 3.) That instant situation is wholly different, as the most significant part of the RFP is the collapsible tanks that will be manufactured by Avon. There are no large items that will be packaged together, instead Avon will be taking items that by themselves do not meet the RFP's requirements and will transform them to meet the requirements.

GTA's arguments that the Area Office failed to properly account for the employees of Avon's affiliates for the time period in question are equally meritless. Avon highlights that it provided the Area Office with detailed employment records, and maintains that any complaint about the methodology for performing the calculations amounts to disagreement with SBA regulations, which OHA specifically rejected in *GTA Containers*. (*Id.* at 6.) In its supplemental appeal, GTA alluded to a discrepancy in a spreadsheet contained in the Area Office file. Although GTA did not specify which spreadsheet it is referring to, Avon surmises that it was the spreadsheet entitled "Avon Rubber Size Determinations -053 -054 Headcount Reconciliation.xlsx." Avon explains that the spreadsheet in question merely "reconciles all the

headcount information provided to the [Area Office] to date along with the additional information requested.” (*Id.* at 7.)

Avon argues that in order to find an identity of interest through common investments, more than one common investment is required. Further, despite Appellants' arguments to the contrary, the record is clear in that AR's large shareholders do not have common owners and do not control each other. (*Id.* at 9.)

F. MPC's Reply

On September 28, 2016, after the deadline specified by OHA for close of record, MPC requested leave to reply to Avon's response to the appeals. The reply is warranted, MPC argues, because Avon mischaracterized MPC's appeal and has endeavored to create a “smokescreen” in order to distract OHA from the relevant facts and legal issues. (MPC Motion, at 1.) Under applicable regulations governing size appeals, a reply to a response is not permitted unless OHA so directs. 13 C.F.R. § 134.309(d). No such direction occurred here. Further, OHA does not entertain evidence or argument filed after the close of record. *Id.* § 134.225(b). Accordingly, MPC's motion to reply is DENIED, and the reply is EXCLUDED from the record.

G. New Evidence

Accompanying its appeal, MPC attached two exhibits. Specifically, MPC provided a “Memorandum of Association” for AR amended in January 2006, and a research paper entitled “Shareholder Voting Power and Ownership Control of Companies” dated April 2002. MPC did not submit the requisite motion to introduce new evidence, nor did MPC explain whether the documents contained information not previously disclosed to the Area Office. Upon review, it appears that MPC did provide the two documents to the Area Office during the size review, and both documents are already in the Area Office file. Accordingly, the documents are not new evidence and need not be admitted into the record. *E.g., Size Appeals of Med. Comfort Sys., Inc., et al.*, SBA No. SIZ-5640, at 12 (2015).

H. SBA's Response

By order of November 2, 2016, OHA requested that SBA address the issue of whether the Area Office appropriately applied 13 C.F.R. § 121.103(c)(3), rather than § 121.103(c)(2), in the instant case. SBA submitted its response on November 14, 2016.

SBA asserts that § 121.103(c)(3) applies when two conditions are met: (1) the concern's voting stock is widely held and (2) no single block of stock is large when compared to other stock. (SBA Comments, at 3.) Here, the Area Office found, and Appellants do not dispute, that AR's stock is widely held and that no single block of stock is large compared to others. SBA further notes that Appellants have not attempted to explain why § 121.103(c)(3) is not applicable here. (*Id.*) SBA contends that if § 121.103(c)(3) was not intended to apply when there are two or more blocks of stock that are similar in size, then the regulation would so state, or it would direct the reader to § 121.103(c)(2). Accordingly, when the voting stock is widely held and there is no

large single block of stock, the regulation mandates that management controls the concern, absent evidence to the contrary. (*Id.*)

SBA maintains that, in *Size Appeal of MPC Computers, LLC*, SBA No. SIZ-4806 (2006), OHA held that § 121.103(c)(3) is “mandatory” if the requisite conditions are met, and overturned an area office's determination which had instead applied § 121.103(c)(2). (*Id.* at 4.) Under *MPC Computers*, then, “13 C.F.R. § 121.103(c)(2) does not apply to fact situations where 13 C.F.R. § 121.103(c)(3) applies.” (*Id.*)

III. Discussion

A. Standard of Review

Appellants have the burden of proving, by a preponderance of the evidence, all elements of the appeals. Specifically, Appellants 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. Analysis

In *Size Appeals of GTA Containers, Inc. et al.*, SBA No. SIZ-5760 (2016), OHA partially granted appeals of Size Determination Nos. 03-2016-053 and -054 and instructed the Area Office to re-examine three particular issues: (1) “whether Avon is the manufacturer of the collapsible fuel tanks, and if not, whether Avon qualifies as a nonmanufacturer”; (2) “whether Hudstar is affiliated with Avon, and if so [whether] Hudstar's employees [are included] in the size calculation”; and (3) “whether there is an identity of interest among AR's largest shareholders such that they should be treated as one entity.” *GTA Containers*, SBA No. SIZ-5760, at 8. OHA determined that Appellants' remaining contentions “lack[ed] merit” and thus granted the appeals only “to the extent discussed above”. *Id.* at 7-8. Following remand, the Area Office clarified that Hudstar indeed was included in the prior calculations, and that the failure to reference Hudstar in the earlier size determination was an oversight. Appellants do not challenge this conclusion on appeal, so further discussion of the issue is unnecessary. *Size Appeal of Envi'l Restoration, LLC*, SBA No. SIZ-5395, at 6-7 (2012) (when issue is not appealed, the area office's determination “remains the final decision of the SBA.”). Accordingly, the principal issues to be decided here are whether Avon is the manufacturer of the end items, and whether there is an identity of interest among AR's largest shareholders.

I note that MPC, in the instant appeal, attempts to re-argue certain issues that were decided by OHA in *GTA Containers* and that were not part of the remand order. MPC repeats the argument, rejected in *GTA Containers*, that a concern may be dominant in its field of operation even if that concern meets the applicable size standard. MPC further argues that OHA should overturn or reconsider its ruling in *GTA Containers*. MPC, though, did not file a Petition for Reconsideration (PFR) of *GTA Containers*, nor has MPC made “a clear showing of an error of

fact or law material to the decision”, as would be necessary to prevail on a PFR. 13 C.F.R. § 134.227(c). Thus, MPC has not established any valid grounds to disturb *GTA Containers*.

1. Manufacturing

SBA regulations stipulate that, when a manufacturing or supply contract is set aside for small businesses, the prime contractor either must be the manufacturer of the end item being acquired, or must fall within certain non-manufacturer exceptions. 13 C.F.R. § 121.406(a). The manufacturer is the concern that, with its own facilities, performs the primary activities in transforming inorganic or organic substances, including the assembly of parts and components, into the end item being acquired. *Id.* § 121.406(b)(2). “The end item must possess characteristics which, as a result of mechanical, chemical or human action, it did not possess before the original substances, parts or components were assembled or transformed.” *Id.* The regulations identify three factors to be considered in deciding whether a concern is the “manufacturer” of an end item: (1) the proportion of total value in the end item added by the concern, excluding costs of overhead, testing, quality control, and profit; (2) the importance of the elements added by the concern to the function of the end item, irrespective of their relative value; and (3) the concern's technical capabilities, such as plant, facilities and equipment. *Id.* § 121.406(b)(2)(i).

In the instant case, Appellants contend that Avon is not the manufacturer of the end items being acquired. Appellants highlight that Avon will not itself manufacture the rubber fabric that constitutes the bulk of the contract value. Section II.B, *supra*. Appellants further observe that the procurement was assigned NAICS code 313320, Fabric Coating Mills, again underscoring the importance of the rubber fabric.

Appellants have not shown error in the Area Office's analysis. OHA has recognized in several case decisions that the proportion of value added by the manufacturer can be “a very small proportion of [the] total value,” provided that the concern adds important functionality. *Size Appeal of NMC/Wollard, Inc.*, SBA No. SIZ-5668, at 14 (2015) (quoting 52 Fed. Reg. 32,870, 32,875 (Aug. 31, 1987)); *see also Size Appeal of OSG, Inc.*, SBA No. SIZ-5718 (2016), *recons. denied*, SBA No. SIZ-5728 (2016) (PFR) (finding no violation of the nonmanufacturer rule when the challenged concern was not adding a large proportion of the total value, because the modifications performed by the challenged concern were essential to the function of the end product); *Size Appeal of Potomac Elec. Corp.*, SBA No. SIZ-5714 (2016). Here, the Area Office determined, and the record confirms, that the instant procurement is “not for coated fabric, but for a product produced from coated fabric, a collapsible fuel tank. . . .” Section II.B, *supra*. The Area Office found that, although the rubber fabric will be manufactured by a third party, Avon will transform the fabric through a “series of labor and machine steps” into collapsible tanks. *Id.* Avon's work is of crucial importance, the Area Office concluded, because “[w]ithout [Avon's] modification and assembly the coated fabric alone would not function as a collapsible fuel tank. . . .” *Id.* Further, Avon will perform this modification and assembly work in its own facilities and with its own employees. On these facts, then, the Area Office reasonably determined that Avon will transform raw materials into the end items being acquired, and therefore qualifies as the “manufacturer” within the meaning of 13 C.F.R. § 121.406(b)(2).

GTA also argues that the end items being procured are not the collapsible tanks alone but rather a “kit” of miscellaneous items. OHA has explained, however, “the assembly of parts and components does not make a contractor a ‘kit assembler’ under SBA regulations.” *Size Appeal of B GSE Group, LLC*, SBA No. SIZ-5679, at 5 (2015). Instead:

Comparing these definitions of a “kit assembler” with the definition of a “manufacturer,” the distinction between the concepts is clear. Although both obtain inputs from other firms, the kit assembler gathers a group of finished items and packages them together, without transforming the items themselves. An example of such a kit is a tool kit. A manufacturer, by contrast, does not merely collect separate parts and package them together. Instead, the manufacturer transforms those parts and substances into a new end item.

Id. at 6. In the instant case, as discussed above, Avon is not merely assembling a collection of finished items, but will transform the rubber fabric into the principal end item. Therefore, the Area Office appropriately analyzed Avon's contribution as a manufacturer rather than as a kit assembler.

2. Identity of Interest

In Size Determination Nos. 03-2016-053 and -054, the Area Office found that AR is a widely-held company, because AR is publicly traded with 31.02 million shares outstanding. *GTA Containers*, SBA No. SIZ-5760, at 3. The Area Office further determined that no single block of AR stock is large relative to the other blocks of voting stock. *Id.* Therefore, the Area Office reasoned, AR is controlled by its board of directors and CEO pursuant to 13 C.F.R. § 121.103(c)(3). Following remand, the Area Office reiterated its prior findings and clarified that 19 of AR's 20 largest shareholders, including its five largest shareholders, are asset management/investment management firms. Section II.B, *supra*. The Area Office found no identity of interest between AR's largest shareholders because these firms compete with one another, do not control one another, and “do not have investment managers (fund managers) in common with each other.” *Id.*

On appeal, Appellants contend that the Area Office erred in applying 13 C.F.R. § 121.103(c)(3) rather than § 121.103(c)(2). Appellants urge that § 121.103(c)(2) applies here because AR's two largest shareholders have approximately equal minority interests — 11.83% and 10.31%, respectively — and those interests together are large as compared with any other stock holding. *Id.* The issue is significant because, unlike § 121.103(c)(3), § 121.103(c)(2) would create a rebuttable presumption that AR is affiliated with its largest shareholders.

Nevertheless, as SBA observes in its comments, OHA considered a substantially similar situation in *Size Appeal of MPC Computers, LLC*, SBA No. SIZ-4806 (2006). In *MPC Computers*, the challenged firm's stock was widely held, and the largest shareholders held approximately equal minority interests, which were large compared with any other shareholder. *MPC Computers*, SBA No. SIZ-4806, at 8-9. The area office determined that the challenged firm was affiliated with largest shareholders under § 121.103(c)(2), but OHA reversed, explaining that § 121.103(c)(3) takes precedence over § 121.103(c)(2), even though the

fact pattern arguably fit under either provision. Likewise, in the instant case, it is undisputed that AR's stock is widely held and that no single block of stock is large compared to others. Following *MPC Computers*, then, the Area Office correctly analyzed Avon's identity of interest under § 121.103(c)(3).

MPC also suggests that AR's largest shareholders have an incentive to act in unison with other asset management shareholders in order to exert control over AR to their mutual benefit. This argument, though, amounts to an assertion that AR's largest shareholders have an identity of interest due to their common investment in AR, and OHA has long held that “one common investment is not enough to support a finding of identity of interest.” *Size Appeal of W. Harris, Gov't Servs. Contractor, Inc.*, SBA No. SIZ-5717, at 6 (2016). Accordingly, MPC has not established that AR's largest shareholders share an identity of interest.

3. Average Number of Employees

GTA also argues that the Area Office failed to properly calculate the average number of employees of Avon and its affiliates. Specifically, GTA contends that the Area Office did not consider employees of newly-acquired affiliates for the entire period of evaluation, as contemplated by 13 C.F.R. § 121.106(b)(4). This argument fails for two reasons. First, as noted above, OHA considered and rejected a similar argument in *GTA Containers*, so the issue therefore is not appropriately before OHA on remand. *E.g.*, *Size Appeal of BryMak & Assocs., Inc.*, SBA No. SIZ-5777, at 10-11 (2016), *recons. denied*, SBA No. SIZ-5789 (2016) (PFR) (declining to examine allegation that was “beyond the scope of the remand ordered by OHA”). Second, while GTA correctly summarizes the applicable law, GTA has not established that the Area Office failed to consider all employees for the entire period of measurement. The size determination specifically stated that the Area Office analyzed the employees of Avon and its affiliates for the period February 1, 2015 through January 31, 2016. Section II.B, *supra*. Moreover, the record demonstrates that the Area Office requested the employee counts for Avon and all its affiliates, including acquisitions that occurred during the period of measurement, and to further account for any contract employees that were not included in prior employee count information. Thus, GTA has failed to show the Area Office committed an error of fact or law in calculating Avon's average number of employees.

IV. Conclusion

For the above reasons, the appeals are DENIED and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge