

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

**REDACTED DECISION FOR PUBLIC RELEASE**

SIZE APPEAL OF:

Gregory Landscape Services, Inc.

Appellant,

Appealed From  
Size Determination No. 3-2017-007

SBA No. SIZ-5817

Decided: March 3, 2017

**APPEARANCE**

Bethany Kellis, President, Gregory Landscape Services, Inc., Lexington, South Carolina

**DECISION**<sup>1</sup>

**I. Introduction and Jurisdiction**

On December 16, 2016, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination 3-2017-007 finding that Gregory Landscape Services, Inc. (Appellant) is not a small business under the size standard associated with the subject procurement. Appellant contends that the size determination is clearly erroneous and requests that SBA's Office of Hearings and Appeals (OHA) reverse. For the reasons discussed *infra*, the appeal is denied and the size determination is affirmed.

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 after 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.

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<sup>1</sup> This decision was originally issued under the confidential treatment provision of 13 C.F.R. § 134.205. OHA afforded Appellant an opportunity to file a request for redactions if desired. Appellant requested certain redactions to the decision, and OHA now publishes a redacted version of the decision for public release.

## II. Background

### A. Prior Proceedings

On March 10, 2016, the U.S. Army Contracting Command issued Invitation for Bids No. W9124G-16-B-0002 seeking grounds maintenance of airfields and stage fields at Fort Rucker, Alabama. The Contracting Officer (CO) set aside the procurement for women-owned small businesses, and assigned North American Industry Classification System (NAICS) code 561730, Landscaping Services, with a corresponding size standard of \$7.5 million average annual receipts. On April 14, 2016, bids were opened and the CO announced Appellant as the apparent awardee.

On August 9, 2016, the Area Office dismissed as untimely a size protest that had been filed by Draughon, LLC (Draughon), a disappointed bidder. Seeing merit to Draughon's allegations, though, the Area Director adopted Draughon's protest and ordered a size determination of Appellant.

On September 12, 2016, the Area Office issued Size Determination No. 3-2016-081, concluding that Appellant is not a small business due to affiliation with four concerns: RBK Company, LLC (RBK); Pine Straw Supply Company, LLC (PSS); Kellis Joint Venture, LLC (KJV); and NaturChem, Inc. (NaturChem). The Area Office found that Bethany Kellis owns 51% of Appellant and her husband, Rhett Kellis, owns the remaining 49%. As spouses, Bethany Kellis and Rhett Kellis are treated as one party with a shared identity of interest as there is no clear line of fracture between them. Bethany Kellis and Rhett Kellis also each own 50% of RBK and PSS. Thus, the Area Office determined, Bethany Kellis and Rhett Kellis jointly own and control Appellant, RBK, and PSS, and these firms are affiliated.

With regard to KJV and NaturChem, the Area Office presumed that Rhett Kellis shares an identity of interest with his parents and six siblings. Rhett Kellis's parents each hold [XXX]% of KJV, and his six siblings each hold [XXX]%. Similarly, Rhett Kellis's parents are the majority shareholders of NaturChem, and his brother is the minority shareholder. In addition, the Area Office noted, Rhett Kellis is employed by NaturChem as its Vice President of Sales and pursues business with NaturChem. Based on these findings, the Area Office concluded that KJV and NaturChem are affiliated with Appellant.

Appellant appealed Size Determination No. 3-2016-081 to OHA, and on November 28, 2016, OHA granted the appeal and remanded the matter to the Area Office for further review. *Size Appeal of Gregory Landscape Services, Inc.*, SBA No. SIZ-5793 (2016) (“*GLS I*”). OHA found that the Area Office did not properly notify Appellant that it intended to presume an identity of interest between Rhett Kellis and his parents and siblings, and did not offer Appellant fair opportunity to rebut this presumption. *GLS I*, SBA No. SIZ-5793, at 5-6.

Following remand, Appellant wrote the Area Office in an effort to rebut the presumption of identity of interest. (Letter from B. Kellis to S. Nirk (Dec. 8, 2016), at 1.) Appellant highlighted that Rhett Kellis holds no ownership stake or officer position in NaturChem and only a [XXX]% interest in KJV. (*Id.*) Although Rhett Kellis works for NaturChem, he does not

control NaturChem, and there have been only “minimal” business dealings between Appellant and NaturChem. (*Id.* at 1-2.) In addition, Appellant and NaturChem do not operate in the same line of business, and do not share employees, equipment, facilities, or finances. (*Id.* at 2-3.) KJV is a real estate holding company with no employees, and Rhett Kellis has no active involvement in KJV. (*Id.* at 1.) In Appellant's view, the family connection and the “miniscule” joint interest in KJV are insufficient to create affiliation under SBA regulations. (*Id.*)

#### B. Size Determination

On December 16, 2016, the Area Office issued Size Determination No. 3-2017-007, again finding that Appellant is affiliated with RBK, PSS, KJV, and NaturChem.

The Area Office determined that Appellant did not persuasively establish estrangement or a clear line of fracture between Rhett Kellis and his parents and siblings. Notwithstanding Appellant's contention that Rhett Kellis is an ordinary employee of NaturChem, the Area Office determined that “Rhett Kellis is, in fact, an officer of NaturChem” and that he “has a major role in the firm.” (Size Determination No. 3-2017-007, at 4, 8.) Specifically, he serves as NaturChem's Vice President of Sales, one of just three Vice Presidents at NaturChem. (*Id.* at 4.) Further, because NaturChem is a family-owned business, Rhett Kellis's “actions are certain to be more proactive and prolific as compared to the other employees of NaturChem that are not family members.” (*Id.* at 6.) The Area Office observed that NaturChem has hired Appellant to perform landscaping services for NaturChem and for two NaturChem customers. (*Id.* at 5.) In addition, documentation in the bid Appellant submitted for the instant procurement suggested that Appellant may have intended to subcontract the herbicide portion of the work to NaturChem. (*Id.*) Rhett Kellis also is part owner of KJV along with his parents and siblings. (*Id.* at 8.)

In reaching its decision, the Area Office acknowledged that Rhett Kellis holds no ownership interest in NaturChem; that Appellant and NaturChem do not share employees, facilities, or equipment; that there are “no loans, promissory notes or other financial assistance” between Appellant and NaturChem; that the two companies perform “different services” and are not in the same line of business; and that the business dealings between the companies amount to less than 1% of each company's annual revenues. (*Id.* at 5, 8.)

The Area Office found that Bethany Kellis and Rhett Kellis are a married couple and share an identity of interest. (*Id.* at 6.) As a result, “Bethany Kellis and Rhett Kellis each have the power to control [Appellant].” (*Id.*) NaturChem is controlled by Rhett Kellis's parents and brother, but they too share an identity of interest with Rhett Kellis. (*Id.* at 8.) As a result, Appellant and NaturChem are affiliated.

The Area Office concluded Appellant is affiliated with RBK, PSS, KJV, and NaturChem. The combined average annual receipts of Appellant and its affiliates exceed the \$7.5 million size standard, so Appellant is not a small business. (*Id.* at 9-10.)

### C. Appeal Petition

On December 30, 2016, Appellant filed the instant appeal, asserting that the size determination is clearly erroneous and requesting that OHA reverse. Appellant maintains that the Area Office misapplied the regulations governing affiliation, particularly familial identity of interest, and relied on “speculation rather than factual evidence.” (Appeal at 1.)

Appellant contends that the Area Office improperly treated the family relationship as an irrebuttable presumption. (*Id.* at 2.) Family connections alone are not enough to establish an identity of interest as these connections “are not conclusive by themselves.” (*Id.*) According to Appellant, broadly applying the identity of interest regulation to family members would “ostracize[] small business owners who happen to be related by marriage to people who own large businesses,” which was not the regulation's intent. (*Id.* at 4).

Appellant asserts that a familial connection must be accompanied by control or ownership to establish an identity of interest, and such conditions are not present in this case. (*Id.* at 3.) Appellant highlights that Rhett Kellis does not control NaturChem and holds no ownership interest in NaturChem. It was improper for the Area Office to presume that Appellant is affiliated with NaturChem “for one major reason: NaturChem is **not owned or controlled** by Rhett Kellis together with his parents and siblings.” (*Id.*, emphasis Appellant's.) Appellant similarly argues that, although Rhett Kellis owns [XXX]% of KJV alongside his parents and siblings, “[h]e does not control it, have knowledge of its assets, or receive income from it.” (*Id.*)

Appellant renews its contention that Rhett Kellis is an employee but not an officer of NaturChem. According to Appellant, his position is “similar to being a director of sales”. (*Id.*) Appellant observes that NaturChem submitted a sworn SBA Form 355 to the Area Office, and did not identify Rhett Kellis as an officer of NaturChem. (*Id.*)

Appellant reiterates that it does not receive financial or managerial assistance from NaturChem, and does not share employees, equipment, or facilities with NaturChem. (*Id.*) The business dealings between the companies are extremely minor, and Appellant and NaturChem do not operate in the same line of business. Based on these facts, the Area Office should have found a clear line of fracture such that Appellant is not affiliated with NaturChem.

## III. Discussion

### 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. Analysis

SBA regulations in effect as of April 14, 2016, the date of bid opening, stated that:

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).<sup>2</sup> OHA has extensive case precedent interpreting the regulation as creating a rebuttable presumption that close family members have identical interests and must be treated as one person. *See, e.g., GLS I*, SBA No. SIZ-5793, at 5; *Size Appeal of Knight Networking & Web Design, Inc.*, SBA No. SIZ-5561 (2014). The presumption arises, not from the degree of family members' involvement in each other's business affairs, but rather from the family relationship itself. 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). 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 Quigg Bros., Inc.*, SBA No. SIZ-5786, at 9 (2016); *Size Appeal of Trailboss Enters., Inc.* SBA No. SIZ-5442, at 6 (2013), *recons. denied*, SBA No. SIZ-5450 (2013) (PFR).

In the instant case, Appellant identified several considerations that would tend to rebut the presumption of identity of interest. Appellant observed, and the Area Office acknowledged, that Rhett Kellis holds no ownership stake in NaturChem, the company owned by his parents and brother. Section II.B, *supra*. Nor do Appellant and NaturChem share common employees, facilities, or equipment. *Id.* Appellant argued, and the Area Office agreed, that there are “no loans, promissory notes or other financial assistance” between Appellant and NaturChem. *Id.* The two companies do not operate in the same line of business. *Id.* In addition, while there have been minor business dealings between Appellant and NaturChem, these transactions are well below the threshold that OHA considers *de minimis*. *Size Appeal of GPA Techs., Inc.*, SBA No. SIZ-5307, at 6 (2011).

Nevertheless, the major obstacle for Appellant in establishing a clear line fracture is Rhett Kellis's employment at NaturChem. OHA has recognized that, when a family member works at a company owned and controlled by other close family members, this may be grounds for finding

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<sup>2</sup> SBA has since amended this provision, but the revised regulation became effective June 30, 2016, and therefore is not applicable here. 81 Fed. Reg. 34,243 (May 31, 2016); *Size Appeal of CTSI-FM, LLC*, SBA No. SIZ-5809, at 8 n.1 (2017).

no clear fracture between them. *Size Appeal of Crosstown Courier Serv. Inc.*, SBA No. SIZ-5571 (2014) (owner of challenged firm served as Vice President of Operations in family-owned business); *Size Appeal of McLendon Acres, Inc.*, SBA No. SIZ-5222 (2011) (wife was Secretary/Treasurer of challenged firm, owned by her husband). Here, although Appellant insists that Rhett Kellis is not an officer of NaturChem, there is no dispute that Rhett Kellis is, at a minimum, a high-level, full-time employee of NaturChem, and one of the company's three Vice Presidents. Section II.B, *supra*. In addition to his employment at NaturChem, Rhett Kellis also shares a common investment with his parents and brother in KJV. *Id.* On these facts, the Area Office could reasonably conclude that Appellant did not establish a clear line of fracture, and did not rebut the presumption of identity of interest.

#### IV. Conclusion

Appellant has not demonstrated that the size determination is clearly erroneous. Accordingly, the appeal is 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