United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Truveta, Inc., Appellant, Appealed From Size Determination No. 06-2024-024	SBA No. SIZ-6294 Decided: June 28, 2024

APPEARANCES

Daniel J. Cook, Esq., Christie M. Alvarez, Esq., DLA Piper LLP, Washington, D.C., for Truveta, Inc.

Stephanie M. Harden, Esq., David L. Bodner, Esq., Shane M. Hannon, Esq., Blank Rome LLP, Washington, D.C., for HealthVerity, Inc.

DECISION[1]

I. Introduction and Jurisdiction

On March 29, 2024, the U.S. Small Business Administration (SBA) Office of Government Contracting — Area VI (Area Office) issued Size Determination No. 06-2024-024, concluding that Truveta, Inc. (Appellant) is not a small business due to affiliation with Microsoft Corp. (Microsoft) under the newly-organized concern rule, 13 C.F.R. § 121.103(g). On appeal, Appellant maintains 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 granted and the size determination is reversed.

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 timely filed the instant appeal on April 15, 2024.[2] Accordingly, this matter is properly before OHA for decision.

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[1] This decision was originally issued under a protective order. After receiving and considering one or more timely requests for redactions, OHA now issues this redacted decision for public release.

[2] Pursuant to applicable regulations, a size appeal ordinarily "must be filed within 15 calendar days after receipt of the formal size determination." 13 C.F.R. § 134.304(a). Here, Appellant received the size determination on March 29, 2024. Fifteen calendar days after March

II. Background

A. The RFP

On May 1, 2023, the Centers for Disease Control and Prevention (CDC) issued Request for Proposals (RFP) No. 75D301-23-R-72635, seeking a contractor to provide deidentified and interoperable national health data. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 513210, Software Publishers, with a corresponding size standard of $47 million average annual receipts. (RFP at 1.) Appellant submitted its initial proposal, including price, on May 31, 2023, self-certifying as a small business.

B. Protest and Prior Proceedings

On September 1, 2023, the CO notified HealthVerity, Inc. (HealthVerity), an unsuccessful offeror, that Appellant was the apparent awardee. On September 8, 2023, HealthVerity filed a size protest with the CO challenging Appellant's size. The protest alleged, *inter alia*, that Appellant is affiliated with Microsoft under the newly-organized concern rule. HealthVerity contended that all elements of the rule are met because Appellant receives financial and/or technical assistance from Microsoft, and because Appellant's founders and executives are former high-ranking employees of Microsoft. (Protest at 12-13.) HealthVerity characterized Microsoft as the "lead investor" in Appellant. (*Id.* at 6.)

The CO forwarded HealthVerity's protest to the Area Office for review. On September 28, 2023, the Area Office issued Size Determination No. 06-2023-043, concluding that Appellant is a small business. The Area Office reviewed HealthVerity's allegations and found that Appellant is not affiliated with Microsoft or its health system investors on any of the protest grounds. (Size Determination No. 06-2023-043, at 2.)

With regard to the relationship between Appellant and Microsoft, the Area Office found that, contrary to HealthVerity's allegations, Microsoft holds no ownership interest in Appellant, and is not represented on Appellant's Board. (*Id.* at 6.) In June 2021, Appellant and Microsoft entered into [an Agreement]. (*Id.*) Under this Agreement, Appellant may, at its sole discretion, [XXXXXXXXXX] from Microsoft, in exchange for the [XXXXXXXXXXXXXXXXXX]. (*Id.*) Appellant has not [XXXXXXXXXXXX], and consequently, no such promissory notes have been issued. (*Id.* at 6-7.) The Area Office "reviewed a copy of the Agreement and found that [it] is arms-length in nature." (*Id.* at 6.) The Area Office further commented that it is "not unusual for technology companies," such as Microsoft, to offer such arrangements to customers "as a way to attract business." (*Id.* at 7.)

With regard to the newly-organized concern rule, the Area Office determined that, as of May 31, 2023, the date for determining size, Appellant's co-founder and Chief Executive Officer

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29, 2024 was April 13, 2024. However, because April 13, 2024 was a Saturday, the appeal was due at OHA on the next business day: Monday, April 15, 2024. 13 C.F.R. § 134.202(d)(1)(ii).

(CEO), Mr. Terry Myerson, "was an employee at [Appellant] but was not employe[d] at Microsoft." (*Id.* at 7.) The Area Office reasoned that because "the current owners, officers, directors, principal stockholders at [Appellant] do not currently serve as owners, officers, directors, principal stockholders at any other entity" there could be no affiliation under the newly-organized concern rule. (*Id.* at 8.)

HealthVerity appealed Size Determination No. 06-2023-043 to OHA. On February 14, 2024, OHA issued its decision in *Size Appeal of HealthVerity, Inc.*, SBA No. SIZ-6266 (2024), granting the appeal in part. OHA found that the Area Office properly rejected most of HealthVerity's protest allegations. *HealthVerity*, SBA No. SIZ-6266, at 16-17. With regard to the newly-organized concern rule, however, OHA found that the Area Office's review was "flawed and perfunctory." *Id.* at 14. In particular, the Area Office erred by basing its decision "solely on the grounds that Mr. Myerson did not work for Microsoft as of May 31, 2023, without considering that he may be a former Microsoft officer or key employee." *Id.* at 15. Additionally, because two other co-founders of Appellant also were former high-level Microsoft employees, the Area Office "clearly erred by limiting its analysis solely to Mr. Myerson." *Id.* OHA remanded the question of the newly-organized concern rule to the Area Office for further review, but otherwise affirmed Size Determination No. 06-2023-043. *Id.* at 18.

C. Remand

On remand, Appellant submitted supplemental arguments addressing the newly-organized concern rule. Appellant sought to elaborate upon "(1) the historical relationships between [Appellant's] founders and Microsoft; (2) whether [Appellant] and Microsoft operate in the same or related industries; and (3) whether Microsoft provided [Appellant] with any technical or financial assistance." (Supp. Response at 1.)

Appellant explained that Mr. Myerson "was an Executive Vice President at Microsoft, with responsibility for the Windows operating system, the Xbox gaming system and hardware devices such as laptops and phones." (*Id.*) Mr. Myerson, though, did not engage in healthcare-related work while at Microsoft, and left Microsoft in 2018, more than a year before Appellant was founded in 2020. (*Id.* at 1-2.) Appellant asserted that Mr. Myerson recruited four then-current or former Microsoft employees to join Appellant in senior roles. None of these other individuals, however, was ever an officer or key employee of Microsoft, and two of the four were no longer employed by Microsoft at the time they joined Appellant. (*Id.* at 2-3.) Appellant highlighted that none of the individuals went to work for Appellant "at the behest of Microsoft." (*Id.* at 3.) On the contrary, in November 2020, Microsoft threatened legal action against Mr. Jay Nanduri, Appellant's Chief Technology Officer and a former Microsoft employee, if he attempted to induce other employees to leave Microsoft and join Appellant. (*Id.*)

Appellant denied that it operates in the same or a related industry as Microsoft. (*Id.*) Microsoft's core lines of business are computer hardware and software as well as gaming and cloud computing, whereas Appellant is a "healthcare data and analytics company." (*Id.*) More specifically, Appellant "collect[s] patient data from health systems, process[es] it in various ways, and mak[es] it available for research to large pharmaceutical companies and others." (*Id.*) Microsoft does not engage in such efforts. (*Id.*) Although Appellant and Microsoft may utilize

some of the same NAICS codes, thousands of other businesses do as well, and the NAICS codes in question are broadly defined. (*Id.* at 3-4.)

Appellant also denied receiving financial or technical assistance from Microsoft. (*Id.* at 4.) As OHA noted in its *HealthVerity* decision, Microsoft offers Appellant [XXXXX] through [the Agreement], but Appellant has never [XXXXXXXXXX]. (*Id.*) Furthermore, Appellant and Microsoft entered into this Agreement months after Appellant was founded. (*Id.*) Regardless, the [XXXXX] alone does not amount to financial assistance under the newly-organized concern rule, since it is not vital to Appellant's economic survival. (*Id.* at 5, citing *Size Appeal of Nat'l Techs. Assocs., Inc.*, SBA No. 2472 (1986).) Even if Appellant had [XXXXXXX], financial assistance still should not be found, because the [XXXXXX] that would then be issued to Microsoft would not enable Microsoft to exert any control over Appellant. (*Id.*, citing *Size Appeal of Randy Kinder Excavating, Inc. d/b/a RKE Contractors*, SBA No. SIZ-6120 (2021).)

D. The Instant Size Determination

On March 29, 2024, the Area Office issued Size Determination No. 06-2024-024, concluding that Appellant is not a small business due to affiliation with Microsoft under the newly-organized concern rule.[3]

The Area Office reiterated its findings in the prior size determination with regard to Appellant's ownership and control. (Size Determination No. 06-2024-024, at 4.) Appellant was established as a corporation in the state of Delaware on August 7, 2020. (*Id.*) Mr. Myerson owns [XX]% of Appellant; [XXXXX] owns [XX]%; [XX]% is held by other employees of Appellant; [XXX] is held by [XX] unrelated entities, each with [XX]% ownership share; and the remaining [XX]% is held by [XX] unrelated entities, each owning [marginal shares]. (*Id.*) Microsoft holds no ownership interest in Appellant. (*Id.* at 6.) Although no single shareholder owns a majority interest, [XXXXXXXXXXXXXXXXXX]. (*Id.*)

The Area Office explained that Appellant's Board of Directors consists of 10 members: "Wasif Rasheed, Board Chair; [Mr.] Myerson, Director; Patrick Caubel, Director; Bobbie Byrne, Director; Laurence Kraemer, Director; Daniel Roth, M.D., Director; Robin Damschroder, Director; Richard Roth, Director; Jeff Graff, Director; and Ernest Franklin, Director." (*Id.*) The latter eight individuals are employees of entities invested in Appellant and appointed by their respective employers. (*Id.*) Microsoft has no representation on Appellant's Board. (*Id.* at 6.) The Board collectively has the power to control Appellant, but "[n]o one member (or represented entity) has the power to control the Board." (*Id.* at 4-5, citing 13 C.F.R. § 121.103(a)(1).)

Turning to the newly-organized concern rule, the Area Office explained that:

> SBA may find affiliation based on the newly-organized concern rule when former or current officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern in the same or related industry

[3] Although dated March 28, 2024, the size determination was transmitted to Appellant, via e-mail, on March 29, 2024. (E-mail from E. Sanchez to [XXXXXXX] (Mar. 29, 2024).)

> or field of operation, and serve as the new concern's officers, directors, principal stockholders, managing members, or key employees, and the one concern is furnishing or will furnish the new concern with contracts, financial or technical assistance, indemnification on bid or performance bonds, and/or other facilities, whether for a fee or otherwise.

(*Id.* at 5, citing 13 C.F.R. § 121.103(g).) The Area Office allowed that, in its prior determination, it "did not look very deeply" into the newly-organized concern rule, because, as of May 31, 2023, Appellant "had already been in operations close to three years," and because Mr. Meyerson "left Microsoft for another employer two years prior to establishing" Appellant. (*Id.*)

The Area Office found that Appellant and Microsoft operate in related industries. (*Id.* at 6.) Microsoft is a multi-national technology company involved in many different lines of business. Among other industries, Microsoft operates under NAICS code 513210, Software Publishing, the same NAICS code under which Appellant operates. (*Id.*) As such, while Microsoft does not specialize in healthcare data and analytics, Appellant and Microsoft work in "related" industries. (*Id.*) The Area Office emphasized that, under the newly-organized concern rule, concerns need not operate in identical industries but merely in related ones. (*Id.*)

Next, the Area Office found that Appellant has nine officers: "[Mr.] Myerson, CEO; [Mr.] Nanduri, Chief Technical Officer; Lisa Gurry, Chief Growth Officer; Ryan Ahern, Chief Medical Officer; David Heiner, Chief Policy Officer & General Counsel; Fabien Mousseau, Chief Financial Officer; Deb Nielsen, Chief People Officer; Oscar Papel, Chief Information Security Officer; and Martin Doerfler, Executive Vice President, Healthcare." (*Id.*) Five of these individuals are former employees of Microsoft. (*Id.*) The Area Office reviewed the past work experience of these five officers:

> Mr. Myerson:
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> · Mr. Myerson was an Executive Vice President at Microsoft, overseeing the Windows operating system, the Xbox gaming system, and hardware devices.
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> · Mr. Myerson announced his departure from Microsoft in March 2018 and thereafter "began working in private equity and venture capital." (*Id.* at 9.) He joined Madrona Venture Group and The Carlyle Group, both investment firms, in October 2018.
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> · Mr. Myerson established Appellant on August 7, 2020, although Appellant was not formally incorporated until September 21, 2020. The Area Office observed that "over two years [passed] after [Mr. Myerson] announced his plans to leave Microsoft back in March 2018, that he founded [Appellant]." (*Id.*)
>
> Mr. Nanduri:

· Mr. Nanduri was a Technical Fellow at Microsoft. He left Microsoft for Appellant in October 2020. At the time of his departure, Microsoft had about 280 employees with the same or higher level of seniority.

· After Mr. Nanduri left Microsoft, Microsoft sent a letter threatening legal action if Mr. Nanduri attempted to recruit any other Microsoft employees.

Ms. Gurry:

· Ms. Gurry left Microsoft for Appellant in October 2020. At the time of her departure, Ms. Gurry had the same seniority level as approximately 2,000 other Microsoft employees.

Mr. Heiner:

· Mr. Heiner retired in November 2019 from Microsoft, where he worked in the legal department.

· Mr. Heiner left retirement to join Appellant in March 2021.

Mr. Mousseau:

· Before joining Appellant in May 2021, Mr. Mousseau was Senior Vice President of Finance at Core Scientific, a position he held since September 2018.

· Prior to Core Scientific, Mr. Mousseau worked for Microsoft in various financial positions.

(*Id.* at 6-9.) Based on the foregoing, the Area Office found that Mr. Myerson held a "very high position" at Microsoft and "was an officer." (*Id.* at 9.) However, the remaining four individuals — Ms. Gurry and Messrs. Nanduri, Heiner, and Mousseau — are not former officers or former key employees of Microsoft. (*Id.*)

Lastly, the Area Office considered whether Microsoft has provided financial assistance to Appellant. (*Id.*) The Area Office focused upon [the Agreement], through which Microsoft offers Appellant [XXXXXXXXXX]. (*Id.*) The Area Office found that the Agreement "is arms-length in nature," and that it was executed [] "[several] months after [Appellant] was formed and capitalized." (*Id.* at 5, 9.)

On remand, Appellant emphasized that Appellant has never [XXXXXXX], because Appellant already was adequately financed by [XXXXXXXX] and the other investors that have purchased equity stakes in Appellant. (*Id.* at 9.) The Area Office, though, could not rule out the possibility that Appellant may have benefited from the [Agreement], by informing prospective investors or lenders of the existence of the Agreement. (*Id.* at 9-10.) The Area Office reasoned:

> [T]he mere fact that a large profitable firm like Microsoft expresses an interest in providing funding to [Appellant] results in the firm looking more promising and appealing to future investors or lenders. After all, would not future investors or lending institutions appreciate that a firm like Microsoft has performed significant due diligence as to the candidacy of [Appellant] for a $[XXXXXX] before making such an offer?

(*Id.* at 10.) Additionally, according to the Area Office, "having the option to exercise the [Agreement], serves as valuable assistance particularly coveted by early-stage startups looking to fuel growth and reach key milestones." (*Id.*)

The Area Office reiterated that the newly-organized concern rule applies when "(1) a current [or former] officer of one concern organizes a new concern (2) in the same or related industry, (3) serves as the new concern's officers and (4) the concern is furnishing or will furnish the new concern [with financial or technical assistance]." (*Id.*) Here, all four elements are present. (*Id.*) Mr. Myerson, Appellant's founder, is a former officer and key employee of Microsoft. (*Id.* at 10-11.) Microsoft and Appellant operate in related industries. (*Id.* at 11.) Mr. Myerson is Appellant's CEO as well as [a] shareholder. (*Id.*) And, Microsoft has extended "an offer of financial assistance" to Appellant, through the [Agreement]. (*Id.*) As such, Appellant is affiliated with Microsoft under the newly-organized concern rule. (*Id.*) Because Appellant and Microsoft are affiliated, Appellant is not small for the subject procurement. (*Id.*)

E. Appeal

On April 15, 2024, Appellant filed the instant appeal. Appellant contends that Size Determination No. 06-2024-024 is fundamentally flawed, because the Area Office found affiliation under the newly-organized concern rule even though "(i) a large firm (Microsoft) played no role in the formation of a small firm ([Appellant]); (ii) the large firm has no ability to control the small firm; and (iii) the [two firms] are involved in completely different unrelated lines of business." (Appeal at 2.)

Appellant first highlights that the purpose of the newly-organized concern rule is to "prevent circumvention of the size standards by the creation of 'spin-off' firms that appear to be small, independent firms but are, in actuality, affiliates or extensions of large firms." (*Id.* at 6, quoting *Size Appeal of J.W. Mills Mgmt.*, SBA No. SIZ-4909, at 4 (2008).) Appellant contends that, on this ground alone, the size determination is clearly erroneous, as Microsoft, among the world's largest companies, did not create Appellant as a "spin-off" in an effort to compete for small business set-aside contracts. (*Id.*)

Next, Appellant maintains that the newly-organized concern rule is inapplicable here because Appellant is not "newly organized." (*Id.* at 6-7.) The Area Office itself expressed skepticism whether the rule should apply, given that Appellant already had been in operation for close to three years as of May 31, 2023. (*Id.* at 7.) OHA precedent similarly indicates that "[o]nce a firm has been an active concern for an extended period, it is not appropriate to apply the 'newly organized concern' rule without considering whether the challenged firm can still reasonably be considered a new business." (*Id.* at 8, quoting *Size Appeal of Coastal Mgmt. Sols.,*

Inc., SBA No. SIZ-5281, at 5 (2011).) Even if the elements of the newly-organized concern rule were otherwise met, affiliation cannot be found here because Appellant is not a nascent business, is not controlled by Microsoft, and does not depend on Microsoft for survival. (*Id.* at 8-9, citing *Size Appeal of Neal R. Gross & Co., Inc.*, SBA No. 3888, at 6 (1994).)

Appellant argues that the Area Office erred by giving no consideration as to whether there is "clear line of fracture" between Appellant and Microsoft. (*Id.* at 10.) Pursuant to the text of 13 C.F.R. § 121.103(g), affiliation under the newly-organized concern rule may be rebutted by demonstrating a clear line of fracture. (*Id.*) Here, the Area Office should have found a clear line of fracture. (*Id.*) Appellant emphasizes that, as the Area Office itself determined, Mr. Myerson left Microsoft 23 months before forming Appellant. (*Id.* at 11.) In light of this extended separation, it is not plausible that Mr. Myerson could have been "tasked as a Microsoft employee to run [Appellant] as a 'spin-off' company." (*Id.*)

Appellant also contends that the Area Office did not adequately analyze the fourth element of the newly-organized concern rule, whether Microsoft provides financial or technical assistance to Appellant. (*Id.*) Contrary to the Area Office's reasoning, the mere existence of [XXXXXXXX] is not, by itself, sufficient to satisfy this element. (*Id.* at 12.) Under OHA case law, "a finding of affiliation under the newly organized concern rule has been made only where *several, rather than one, types of assistance* have been provided by the large firm or where the nature of the single form of assistance has been such as to *guarantee dependence* upon the large firm." (*Id.*, quoting *Size Appeal of Nat'l Techs. Assocs., Inc.*, SBA No. 2472, at 7 (1986) (emphasis added by Appellant).)

Appellant observes that, in *Nat'l Techs.*, OHA found the fourth element of the rule to be met by a single type of assistance, a $1.25 million per year consulting contract, which "constituted a 'key [element] in [the new firm's] balance sheet profile [and] . . . ability to secure the bonding necessary' and placed the new firm's sole owner at the 'beck and call' of the large firm." (*Id.*, quoting *Nat'l Techs.*, SBA No. 2472, at 7.) No comparable circumstances exist here. (*Id.*) In *Nat'l Techs.*, OHA also discussed other situations where assistance was properly found, such as shared employees, facilities, and equipment; loans; technical assistance with proposal preparation; and subcontracting. (*Id.* at 13, citing *Size Appeal of W. Mifflin Constr. Co.*, SBA No. 1980 (1984); *Size Appeal of Golden Bear Arborists, Inc.*, SBA No. 1899 (1984); and *Size Appeal of Gulf S. Sec., Inc.*, SBA No. 1885 (1984).) Again, though, none of these is applicable in the instant case. OHA also has found affiliation to be rebutted when the financial assistance did not sufficiently connect the two concerns. (*Id.* at 13-14, citing *Randy Kinder Excavating, Inc. d/b/a RKE Contractors*, SBA No. SIZ-6120 (2021); *Size Appeal of DMI Educ. Training LLC*, SBA No. SIZ-5276 (2011); and *Size Appeal of Bldg. Sys. Design, Inc.*, SBA No. 3231 (1989).)

Appellant lastly contends that the question of affiliation ultimately should have turned upon whether Microsoft has the power to control Appellant. (*Id.*) OHA has explained that "[a]s in all affiliation analysis, the touchstone issue is control. A connection between two concerns does not necessarily cause affiliation. There must be an element of control present." (*Id.*, quoting *Size Appeal of Carwell Prods., Inc.*, SBA No. SIZ-5507, at 10 (2013).) Here, the Area Office unearthed no mechanism whereby Microsoft could exert any control over Appellant. (*Id.*) Mr. Myerson left Microsoft long before he founded Appellant. (*Id.*) Appellant has never

[XXXXXX] offered by Microsoft. (*Id.*) Even if Appellant had done so, or were in the future to do so, the resulting [XXXXXXXXX] would not give Microsoft any power to control Appellant. (*Id.*) No other forms of financial or technical assistance were found to exist. (*Id.*) Accordingly, Size Determination No. 06-2024-024 is clearly erroneous and should be reversed. (*Id.*)

F. HealthVerity's Response

On May 1, 2024, HealthVerity responded to the appeal. HealthVerity maintains that the Area Office did not err in its findings and asks that OHA affirm the size determination. (Response at 1.)

HealthVerity first disputes the contention that Appellant cannot be considered "newly organized." (*Id.* at 2.) OHA has applied the newly-organized concern rule to firms that existed for less than three years. (*Id.* at 3, citing *Size Appeal of S.H. Tolliver Co.*, SBA No. 2962 (1988); *Size Appeal of Field Support Servs., Inc.*, SBA No. 4176 (1996); *Size Appeal of EXARC Skylights, Inc.*, SBA No. 3887 (1994); and *Size Appeal of Eyring, Inc.*, SBA No. 3197 (1989).) In its analysis, OHA will also consider when the new concern began generating income. (*Id.*, citing *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775 (2006).) Here, the date for determining size is May 31, 2023. (*Id.*) Appellant was incorporated on August 7, 2020, but [XXXXXXXXXXXX]. (*Id.*) Thus, HealthVerity contends, Appellant should be considered less than 18 months old as of May 31, 2023. (*Id.*) As such, Appellant would be "newly organized" under OHA case law. (*Id.*)

Next, HealthVerity agrees with the Area Office that all four elements of the newly-organized concern rule test are met. (*Id.* at 4.) Regardless of whether Microsoft has the power to control Appellant, Mr. Myerson is a former officer and key employee of Microsoft. (*Id.*) Appellant and Microsoft both organize and package deidentified healthcare records. (*Id.*) They also have experience under the same NAICS codes. (*Id.* at 4-5.) Mr. Myerson is the founder and [a] shareholder of Appellant, and Appellant's CEO. (*Id.* at 5.) As for the last element, HealthVerity contends that the Area Office correctly determined that the [Agreement] is analogous to a "performance bond" or, in other words, financial assistance. (*Id.*) HealthVerity further argues that Microsoft provides other technical assistance to Appellant through Microsoft's cloud computing platform, Microsoft Azure. (*Id.*) This platform is core to Appellant's business, and without it Appellant would be left inoperable. (*Id.* at 6.) Regardless, the [Agreement] provides Appellant with a greater magnitude of financial assistance than all other investments in Appellant. (*Id.* at 7.) Accordingly, a finding of affiliation is warranted. (*Id.*, citing *Size Appeal of Plasmaco, Inc.*, SBA No. 3139 (1989); *Size Appeal of JRR Constr. Co., Inc.*, SBA No. 2288 (1985); and *Size Appeal of J&J Oil Corp.*, SBA No. 3120 (1989).)

HealthVerity lastly rejects Appellant's assertion that there is a clear line of fracture between Appellant and Microsoft. (*Id.*) OHA has recognized that a continuing business relationship between two concerns defeats a finding of a clear line of facture. (*Id.*, citing *Size Appeal of Vortec Dev., Inc.*, SBA No. SIZ-4866 (2007) and *Size Appeal of Field Support Servs., Inc.*, SBA No. 4176 (1996).)

G. Motion to Reply

On May 16, 2024, approximately 15 days after the close of record, Appellant moved for leave to reply to HealthVerity's Response. Appellant seeks to "correct factual inaccuracies, and to address the clearly distinguishable OHA case law, in HealthVerity's Response." (Motion at 1.)

Under OHA's rules of procedure, a reply to a response generally is not permitted unless OHA so directs. 13 C.F.R. §§ 134.206(e) and 134.309(d). Furthermore, OHA will not consider evidence or argument filed after the close of record. 13 C.F.R. § 134.225(b). Here, OHA did not direct Appellant to reply, and the proposed Reply, which was filed after the close of record, elaborates upon arguments that Appellant raised, or could have raised, in its original appeal. Accordingly, Appellant's motion for leave to reply is DENIED and the proposed Reply is EXCLUDED from the record. *Size Appeal of Fed. Performance Mgmt. Sols., LLC*, SBA No. SIZ-6246, at 8 (2023); *Size Appeal of Focus Revision Partners*, SBA No. SIZ-6188, at 15 (2023).

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

Appellant has persuasively shown that the Area Office erred in its consideration of the newly-organized concern rule, 13 C.F.R. § 121.103(g). Accordingly, this appeal must be granted.

The newly-organized concern rule provides, in pertinent part, that:

> [A]ffiliation may arise where former or current officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern in the same or related industry or field of operation, and serve as the new concern's officers, directors, principal stockholders, managing members, or key employees, and the one concern is furnishing or will furnish the new concern with contracts, financial or technical assistance, indemnification on bid or performance bonds, and/or other facilities, whether for a fee or otherwise. A concern may rebut such an affiliation determination by demonstrating a clear line of fracture between the two concerns.

13 C.F.R. § 121.103(g).

OHA has distilled the rule into four required elements: (1) current or former officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern; (2) the new concern is in the same or related industry or field of operation; (3) the persons who organized the new concern serve as the new concern's officers, directors, principal stockholders, managing members, or key employees; and (4) the one concern is furnishing or will furnish the new concern with contracts financial or technical assistance, indemnification on bid or performance bonds and/or other facilities, whether for a fee or otherwise. *Size Appeal of Rio Vista Mgmt., LLC*, SBA No. SIZ-5316, at 10 (2012); *Size Appeal of Sabre88, LLC*, SBA No. SIZ-5161, at 6-7 (2010). If one or more element fails, "there can be no violation of the newly-organized concern rule, irrespective of whether the remaining conditions of the rule are met." *Size Appeal of Human Learning Sys., LLC*, SBA No. SIZ-5769, at 10 (2016). Furthermore, even when all four elements of the test are present, affiliation still may be rebutted by demonstrating "a clear line of fracture" between the two concerns. *Id.*

Here, the Area Office determined that the first element of the test was satisfied because Appellant's founder, Mr. Myerson, is a former Microsoft officer and key employee. Section II.D, *supra*. The second element is met because Appellant and Microsoft operate in "related" lines of business, *i.e.*, software publishing. *Id.* The third element is satisfied because Mr. Myerson is Appellant's CEO [XXXXXXXX]. *Id.* And, the fourth element is met because Microsoft made "an offer of financial assistance" to Appellant via the [Agreement]. *Id.*

On appeal, Appellant attacks the Area Office's analysis in multiple respects. Section II.E, *supra*. Appellant's strongest argument, however, is that the fourth element of the newly-organized concern rule test is not met, because there is no evidence that Microsoft was "furnishing or will furnish" any financial assistance to Appellant as of May 31, 2023, the relevant date for determining size. *Id.* The Area Office based this portion of its decision on the [Agreement], under which Appellant might, at its sole discretion, [XXXXXXXXXX]. Sections II.B — II.D, *supra*. The Area Office itself, though, characterized the [Agreement] as "arms-length in nature," and observed that large technology companies regularly offer such arrangements to prospective customers merely "as a way to attract business." *Id.* These facts are significant here because OHA has recognized that a "one time arm's length transaction" does not rise to the level of "assistance" under the newly-organized concern rule. *Size Appeal of Alex-Alternative Experts, LLC*, SBA No. SIZ-4974, at 4 (2008).

Moreover, it is undisputed that Appellant has never actually [XXXXXXXXX]. Sections II.B — II.D, *supra*. As of May 31, 2023, then, there were no loans, or other debt, outstanding between Appellant and Microsoft. *Id.* While it is true that Appellant could choose to [XXXXXXXXXX] in the future, the decision as to whether or not to do so rests solely with Appellant. *Id.* As a result, as the Area Office determined, Microsoft in effect made Appellant "an offer of financial assistance" through the [Agreement], but Appellant did not actually accept any such offer prior to May 31, 2023, and had no obligation to do so going forward. *Id.* The text of the newly-organized concern rule does not contemplate that a mere "offer" of assistance, without more, is sufficient to find violation of the rule. 13 C.F.R. § 121.103(g).

The Area Office also reasoned that, although Appellant has not [XXXXXXXXXXX] associated with the [Agreement], Appellant may have benefited from the Agreement, because

[XXXXXXXXX] could have made Appellant [XXXXXXXXX]. Section II.D, *supra*. This line of reasoning, however, appears largely speculative, as the Area Office did not identify any lenders or investors that might potentially have been influenced by the [Agreement]. *Id*. Furthermore, given the Area Office's determination that large technology companies regularly offer such arrangements as a means to attract business, there is no reason to believe that the instant Agreement would have been uniquely beneficial to Appellant. OHA generally will uphold a finding that the fourth element of the newly-organized concern rule is met only when the assistance is substantial in nature. *See, e.g., Size Appeal of Saint George Indus., LLC*, SBA No. SIZ-5474, at 6 (2013) (newer concern performed "substantial subcontracting work" for the older concern); *Size Appeal of eTouch Fed. Sys., LLC*, SBA No. SIZ-5280, at 6 (2011) (older concern assigned two contracts to the newer concern, and those assets represented "the greater portion" of the newer concern's receipts); *Size Appeal of Coastal Mgmt. Sols., Inc.*, SBA No. SIZ-5281, at 4 (2011) (subcontract from the older concern constituted "a significant percentage" of the newer concern's receipts).

The Area Office's conclusion that Appellant may have benefited from [XXXXXXX] also is undermined by the fact that, as the Area Office itself determined, Appellant and Microsoft did not enter into the [Agreement] until June 2021, [] "[several] months after [Appellant] was formed and capitalized." Section II.D, *supra*. Given this chronology, it appears implausible that the [Agreement] was, or could have been, a material factor affecting Appellant's ability to attract investors. *Cf., Size Appeal of Randy Kinder Excavating, Inc. d/b/a RKE Contractors*, SBA No. SIZ-6120, at 15 (2021) (explaining that the older concern "did not provide the financial assistance" to the newer concern, because the newer concern already owed the loans in question to an individual before he joined the older concern).

As Appellant observes in its appeal, an additional problem in the size determination is that Area Office failed to consider whether "a clear line of fracture" exists between Appellant and Microsoft. As discussed above, the applicable regulation specifically states that a finding under the newly-organized concern rule may be rebutted by demonstrating a clear line of fracture. Furthermore, under OHA case precedent, *de minimis* business dealings do not preclude a "clear line of fracture." *Size Appeal of GPA Techs., Inc.*, SBA No. SIZ-5307, at 7-8 (2011). Common examples of when a clear line of fracture will not be found are when the older concern retains an ownership interest in the newer concern, or when the newer concern derives substantial revenues from the older concern. *See, e.g., Saint George Indus.*, SBA No. SIZ-5474, at 8; *Size Appeal of Pointe Precision, LLC*, SBA No. SIZ-4466, at 13 (2001).

In the instant case, had the Area Office explored the question, the Area Office appears to have found facts sufficient to show a "clear line of fracture" between Appellant and Microsoft. The Area Office determined that Microsoft holds no ownership interest in Appellant, and has no representation on Appellant's Board. Sections II.B and II.D, *supra*. Appellant and Microsoft do not share employees or facilities, and do not collaborate on contracts. *Id.* Indeed, Microsoft at one point threatened Appellant with legal action, if Appellant induced employees to leave Microsoft for Appellant. *Id.* Appellant derives very little, if any, revenue from Microsoft; rather, Appellant's customers are primarily pharmaceutical companies unassociated with Microsoft. *Id.* Appellant also explained to the Area Office that it had no need to [XXXXXXXX], because Appellant's financing was already adequate. *Id.* As of May 31, 2023, then, the only ties between

Appellant and Microsoft were: (1) the offer of [XXXXX] through the [Agreement] (which Appellant has never actually utilized, and which expires [XXXXXXX]); (2) Appellant's use of Microsoft's Azure cloud computing platform (which also is used by thousands of other companies); and (3) that certain of Appellant's officers, and particularly Mr. Myerson, were previously employed by Microsoft. *Id.* In short, Appellant's business ties with Microsoft appear *de minimis*, and consistent with a "clear line of fracture."

HealthVerity maintains that there cannot be a clear line of fracture, due to the [Agreement] and the fact that Appellant uses Microsoft's cloud hosting and software. Section II.F., *supra*. In the OHA cases cited by HealthVerity, though, *Size Appeal of Vortec Development, Inc.*, SBA No. SIZ-4866 (2007) and *Size Appeal of Field Support Services, Inc.*, SBA No. SIZ-4176 (1996), far more evidence of a substantial continuing business relationships existed than in the case at hand. For example, in *Vortec*, the older concern furnished the newer concern with "equipment and facilities," the owners of the two companies were siblings and shared an identity of interest, and the companies operated in the same small town. *Vortec*, SBA No. SIZ-4866, at 7-8.

IV. Conclusion

For the above reasons, the appeal is GRANTED and Size Determination No. 06-2024-024 is REVERSED. The Area Office erred in finding that the fourth element of the newly-organized concern rule was met, and further erred by failing to explore whether a "clear line of fracture" existed between Appellant and Microsoft. In *Size Appeal of HealthVerity, Inc.*, SBA No. SIZ-6266 (2024), OHA affirmed the Area Office's prior determination that Appellant, alone, is small, and that Appellant has no other affiliates. Section II.B, *supra*. Accordingly, Appellant is eligible for award of the instant procurement because Appellant is not affiliated with Microsoft under the newly-organized concern rule. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge