

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

REDACTED DECISION FOR PUBLIC RELEASE

SIZE APPEAL OF:

Tenax Aerospace, LLC,

Appellant,

Appealed From
Size Determination No. 03-2015-097

SBA No. SIZ-5701

Decided: December 23, 2015

APPEARANCES

Pamela J. Mazza, Esq., Kathryn V. Flood, Esq., Megan C. Connor, Esq., PilieroMazza PLLC, Washington, D.C., for Appellant.

Anthony T. Mazzeo, Esq., Daniel R. Weckstein, Esq., Vandeventer Black LLP, Norfolk, Virginia, for Flight Support, Inc.

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DECISION¹

I. Introduction and Jurisdiction

On October 22, 2015, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 03-2015-097, finding that Tenax Aerospace, LLC (Appellant) is not an eligible small business. Appellant contends the size determination contains clear errors of fact and law, and requests that SBA's Office of Hearings and Appeals (OHA) reverse or remand the size determination for further consideration. For the reasons discussed *infra*, the appeal is denied, and the size determination is affirmed.

¹ This decision was originally issued under a protective order. OHA received one or more requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

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

II. Background

A. Solicitation and Protest

On June 17, 2015, the Department of Justice, Federal Bureau of Investigation (FBI) issued Request for Proposals (RFP) 14812 for a one-year dry lease of a Gulfstream 550 aircraft with four additional one-year option periods. The RFP was conducted under Federal Acquisition Regulations (FAR) Part 12, Acquisition of Commercial Items, and Part 15, Contracting by Negotiation. The Contracting Officer (CO) set the procurement aside for small businesses and designated North American Industry Classification System (NAICS) code 532411, Commercial Air, Rail, and Water Transportation Equipment Rental and Leasing, with a corresponding annual receipts size standard of \$32.5 million. Proposals were due July 8, 2015. Appellant submitted its proposal on July 7, 2015, self-certifying as a small business.

On August 25, 2015, the FBI notified unsuccessful offerors that it had awarded the contract to Appellant. On September 2, 2015, Flight Support, Inc. (FSI), an unsuccessful offeror, protested Appellant's status as a small business for the instant procurement. FSI alleged that Appellant is not a small business, for three reasons. First, Appellant is affiliated with 23 other companies “by virtue of shared management, facilities and ownership” and Appellant's access to capital via [Investor 1], who FSI alleged, controls Appellant. FSI's second allegation was that Appellant is unduly reliant and therefore affiliated with many of its subcontractors, but FSI did not identify any of these subcontractors. Third, FSI alleged, Appellant is affiliated with its vendors based on the totality of the circumstances.

B. Protest Response and Size Investigation

On September 15, 2015, Appellant responded to the protest. In its response, Appellant acknowledged affiliation with [a number of] entities, [many] of which were identified by FSI in its protest. (Protest Response at 5-6.) Appellant argued it has proposed no subcontractor for the instant procurement, so the ostensible subcontractor rule does not apply. (*Id.* at 9-11.)

Appellant maintained that, despite being affiliated with [a number of] other companies, it was still an eligible small business, because its aggregate receipts do not exceed the \$32.5 million size standard. To support this conclusion, Appellant provided a table to the Area Office calculating the receipts for Appellant and its acknowledged affiliates for the years 2012, 2013, and 2014. Combined, their receipts for these three years totaled \$XXXX, and the three-year average was [less than 32.5 million]. (Protest Response at 8.) In reaching these figures, Appellant deducted income that its parent company, Tenax Aerospace Holdings, LLC (TAH), received from Greenwood-Tenax, LLC (Green-T) and WGS Systems, LLC (WGS).

C. Size Determination

On October 22, 2015, the Area Office determined that Appellant is not an eligible small business. The Area Office determined Appellant is affiliated with [a number of] entities, [the majority] of which Appellant acknowledged in its response to the protest. The three additional affiliates are Tenax-Heritage, LLC (Heritage), The Vineyards of Brandon, LLC (Vineyards), and Tri-Jet, LLC (Tri-Jet).

The Area Office explained that Appellant is [majority] owned by TAH, which in turn is [majority]-owned by [Investor 1]. [Investor 1]'s children, [Investors 2 and 3], own [XX]% and [XX]% of TAH, respectively. Based on their direct family relationship and common investments, the Area Office determined that [Investor 1] and his children have an identity of interest. (Size Determination at 8, citing 13 C.F.R. § 121.103(f).)

Next, the Area Office explained that Appellant owns 33.33% of Tri-Jet, and the remaining interests are owned by two other entities that each own 33.33%. Because there is no majority interest in Tri-Jet, and the minority holdings are equal in size, each minority owner presumably controls Tri-Jet. 13 C.F.R. § 121.103(c)(2). Although the presumption of control is rebuttable, the Area Office determined Appellant did not rebut the presumption. Appellant argued it did not have the power to control Tri-Jet because, according to Tri-Jet's operating agreement, [XXXX], one of Tri-Jet's other owners, is the sole manager of Tri-Jet and has the exclusive right to manage and make all business decisions at Tri-Jet. Appellant cannot exercise negative control over Tri-Jet, either, because the only time it can prevent or block a quorum is in the case of extraordinary actions. *Size Appeal of EA Eng'g., Sci, and Tech., Inc.*, SBA No. SIZ-4973 (2008).

The Area Office rejected this argument, noting that the manager can be removed without cause by the members, so it is the members who ultimately have the ability to control Tri-Jet. “The mere fact that a minority [owner] cannot individually control a concern is not sufficient to overcome the presumption under [§] 121.103(c)(2) that individuals with equal ownership all are presumed to have the power to control.” (*Id.* at 10, citing *Size Appeal of ADVENT Envntl., Inc.*, SBA No. SIZ-5325 (2012).) The Area Office also noted that all profits, loss, cash and property are distributed based on each Member's ownership interest, not on their contribution to managing the company, further indicating the Members equally own and control the company. Appellant and Tri-Jet, then, are ultimately owned and controlled by the same people, and are therefore affiliated.

In addition to the investments [Investor 1] has in common with his children, he also invests in eight other companies with his brother-in-law, [Investor 4]. Presumably, then, [Investors 1 and 4] have an identity of interest based on their common investments and are treated as one party with their interests aggregated. (*Id.* at 12, citing 13 C.F.R. § 121.103(f).) The Area Office determined Appellant did not rebut this presumption, either. Appellant argued there is no such identity of interest because [Investor 4] is not [Investor 1]'s immediate family member. The Area Office rejected this argument, noting that the finding of identity of interest was not based on [Investors 1 and 4]'s familial relationship, but on their common investments. (*Id.*)

Heritage and Vineyards are two of the companies in which [Investors 1 and 4] have common ownership interests. They each own [at least 25%] of Heritage and [at least 25%] of Vineyards. As a result of their combined [at least 50%] ownership interest in Heritage and their combined majority interest in Vineyards, they have the ability to control Heritage and Vineyards. Because [Investor 1] has the power to control Appellant, Heritage, and Vineyards, the firms are affiliated. (*Id.* at 15-16, citing 13 C.F.R. § 121.103(c)(1).)

The Area Office then calculated the combined receipts of Appellant and its affiliates for the years 2012, 2013, and 2014, and determined Appellant exceeds the \$32.5 million size standard. The Area Office noted that, although TAH has income from Green-T and WGS, this income should not be deducted as an inter-affiliate transaction from TAH's receipts. The exclusion for inter-affiliate transactions “applies only if the concerns in question have a parent-subsidiary relationship and are eligible to file a consolidated tax return.” *Size Appeals of G&C Fab-Con, LLC*, SBA No. SIZ-5649, at 8 (2015). Here, TAH is not Green-T's or WGS's parent, and none of these firms files a consolidated tax return; nor are they eligible to do so. Accordingly, the amounts in question should not be excluded. (Size Determination at 19.)

D. Appeal Petition

On November 6, 2015, Appellant filed its appeal of the size determination with OHA. Appellant argues the size determination contains clear errors of fact and law, so OHA should either reverse it or vacate and remand it to the Area Office.

Appellant argues the Area Office's findings of affiliation with Heritage, Vineyards, and Tri-Jet are clearly erroneous. Appellant argues [Investors 1 and 4] do not have an identity of interest based on common investments, and “there is simply no evidence that [Appellant] can control Vineyards or Heritage, that they in turn can control [Appellant], or that a third party can control all three.” (Appeal at 15.) Appellant argues there is clear fracture between Appellant and Vineyards and Heritage, so the presumption of identity of interest is rebutted. *Size Appeal of Carwell Prods., Inc.*, SBA No. SIZ-5507, at 7 (2013). Appellant does not share officers, employees, facilities, or equipment with these firms and is in a separate line of business. Further, no financial assistance, loans, or subcontracting has taken place. Appellant, then, is totally separate and independent from Vineyards and Heritage. Because there is not an identity of interest, [Investors 1 and 4]'s interests should not have been aggregated. As a result, the finding that they control Vineyards and Heritage is clearly erroneous. Because there is not common control, the Area Office should not have found Appellant affiliated with these firms. (*Id.* at 16.)

With respect to Tri-Jet, Appellant argues it rebutted the presumption of identity of interest. Tri-Jet's operating agreement makes clear that Tri-Jet is managed by an owner other than Appellant and that Appellant can only block a quorum on “major decisions.” (*Id.* at 17, citing Tri-Jet Operating Agreement § 7.3.) Appellant argues *ADVENT Environmental* is distinguishable from the facts of this case, so the Area Office erred in relying on it. Unlike Appellant's relationship with Tri-Jet, the owner in *ADVENT Environmental* had “direct, personal involvement in [the affiliate's] affairs, including oversight of its more important strategic decisions.” (*Id.* at 18, quoting *ADVENT Envntl., Inc.*, SBA No. SIZ-5325 at 8 (2012).) Appellant,

by contrast, has no managerial role in Tri-Jet. Also dissimilar to the facts in *ADVENT Environmental*, Appellant and Tri-Jet do not share employees. Appellant argues *Size Appeal of Mark Dunning Industries, Inc.*, SBA No. SIZ-5488 (2013) is the more relevant precedent. In that case, OHA determined the presumption of control was rebutted when one of the nine owners could not block a quorum. (*Id.* at 19-20.)

Appellant also contests the Area Office's calculation of TAH's receipts, arguing that the calculation should not have included the income TAH received from Green-T and WGS. In Appellant's view, including this income constitutes double counting and is contrary to the plain language of the regulation, OHA precedent, and SBA policy. Appellant explains that the regulation lists certain exclusions from its definition of "receipts." One such exclusion is for "proceeds from transactions between a concern and its domestic or foreign affiliates." (*Id.* at 6, quoting 13 C.F.R. § 121.104(a).) Accordingly, the plain meaning of this regulation "**is that the proceeds from transactions between a business entity and its commonly controlled entities should be excluded from the entity's calculation of receipts.**" (*Id.*, emphasis Appellant's.)

The failure to exclude this income is also contrary to OHA case law. In *Crown Moving & Storage Co.*, SBA No. SIZ-4872 (2007), OHA determined the exemption applied without inquiring into whether there was a parent-subsidiary relationship. (*Id.* at 7.) OHA's decision in *G&C Fab-Con, LLC*, moreover, is not inconsistent with this approach, because *G&C Fab-Con* "should be read as shedding light on the type of affiliation for which the avoidance of double-counting is necessary." (*Id.* at 10, emphasis Appellant's.) Appellant argues that *G&C Fab-Con* is distinguishable because affiliation was found based on common management, not common ownership, and the receipts in question did not ultimately go to the same owner, as they do here. Appellant contends further that *Size Appeal of Hal Hays Construction Inc.*, SBA No. SIZ-5234 (2011) supports this distinction. (*Id.* at 11.)

Appellant argues SBA has a policy of avoiding counting amounts twice. (*Id.* at 10, citing 69 Fed. Reg. 29,192, 29,197 (May 21, 2004).) Appellant notes this "preference for avoidance of double counting" shows up in other regulations, too, such as 13 C.F.R. § 121.103(h)(5), the regulation governing the size of a firm that joint ventures with other firm.

Appellant argues Green-T is a joint venture, so the Area Office should only include TAH's proportionate share of Green-T's receipts. (*Id.* at 12.)

E. Agency Response

On November 30, 2015, SBA responded to the appeal. SBA argues the size determination is correct, so OHA should affirm it.

SBA argues the findings of affiliation based on identity of interest, 13 C.F.R. § 121.103(f), and the minority shareholder rule, 13 C.F.R. § 121.103(c)(2), are correct. The finding of identity of interest between [Investors 1 and 4] was based on their common investments in multiple businesses. The rationale behind finding identity of interest based on common investments "that persons who have a relationship because of common interests will act in concert to benefit each other." (*Id.*) OHA has held that "significant ownership interests in a

multitude of companies . . . clearly bespeaks a common purpose such that a finding of identity of interest is appropriate.” *Size Appeal of Seacon Phoenix, LLC*, SBA No. SIZ-5523 (2013); *accord Size Appeal of H.L. Turner Group, Inc.*, SBA No. SIZ-4896 (2008) (“numerous common investments establish a relationship that bespeaks a concert of purpose and effort”) (citations omitted).

Therefore, it is unnecessary for the Area Office to explicitly find Appellant can control Vineyards or Heritage, because due to the identity of interest between [Investors 1 and 4], their interests are combined and together they own at least 50% of Vineyards and Heritage. Under SBA regulations, the power to control can be found on many different grounds, and these grounds are not mutually exclusive. *E.g.*, *Size Appeal of ETI Prof'ls., Inc.*, SBA No. SIZ-4603 (2004) (finding control based on ownership and management). SBA argues Appellant has provided no evidence that the finding of common ownership is erroneous, so Appellant has not rebutted the presumption of identity of interest. (SBA Response at 6-9.)

SBA further argues the Area Office correctly determined Appellant is affiliated with Tri-Jet based on minority ownership. SBA points out that the “rationale for the minority shareholder presumption is that all concerns must be controlled by someone or some group at all times. The alternative, to consider none of the minority stockholders as possessing the power to control the concern, would ignore reality and leave the locus of power uncertain and unresolved.” *Size Appeal of Tech. Support Servs., Inc.*, SBA No. SIZ-4794, at 15 (2006) (citing *Size Appeal of Zygo Corp.*, SBA No. SIZ-2514 (1986).) In keeping with this principle, OHA has found that an approximately equal distribution of voting power among minority shareholders is sufficient to find that each minority owner has the power to control the firm based on his or her minority interest. *Size Appeal of ADVENT Env'tl., Inc.*, SBA No. SIZ-5325 (2012) (four 25% owners each had the power to control); *Size Appeal of Marine Transp. Servs. Sea-Barge Group, Inc.*, SBA No. SIZ-3210 (1989) (three 33.3% owners each had the power to control); *Size Appeal of Ceramatec, Inc.*, SBA No. SIZ-3040 (1989) (32.5% and 32.3% owners each had the power to control); *Size Appeal of Top Mgmt. Inc.*, SBA No. SIZ-3028 (1988) (33.3% shareholder did not rebut presumption of control based on claim that each shareholder was also a board member); *Size Appeal of River Equip. Corp.*, SBA No. SIZ-3024 (1988) (19%, 14%, and 12% shareholders presumed to have power to control, and claim that 19% owner could not control the board did not rebut presumption); *Size Appeal of Midland O'Leary, Inc.*, SBA No. SIZ-2972 (1988) (three minority owners each had the power to control).

To SBA, Appellant's attempts to distinguish *ADVENT Environmental* are unavailing. In that case, OHA's discussion of the management role played by the 25% owner bolstered the finding of control. OHA did not hold that such involvement was necessary for the minority shareholder rule to apply. (SBA Response at 12.)

Appellant's reliance on *Size Appeal of Mark Dunning Industries, Inc.*, SBA No. SIZ-5488 (2013) is misguided, SBA argues, because “*Mark Dunning* is an anomaly.” (*Id.* at 13.) It is at odds with OHA's longstanding precedent that, unless a firm's stock is widely held, some owner controls the firm in question. *Size Appeal of EA Engineering, Science, and Technology, Inc.*, SBA No. SIZ-4973 (2008) is inapposite because that case did not involve the minority shareholder rule.

In any event, SBA argues, the issue of whether the Area Office erred in applying the minority ownership rule is moot. On this point, SBA represents that the Area Office unintentionally omitted Tri-Jet's revenues from the size calculation. (SBA Response at 9 n.6, 13.)

SBA asserts Appellant argues unpersuasively that the calculation of receipts should not have included income TAH received from Green-T and WGS. SBA explains Green-T is [less than 80%]-owned by Appellant, and the other [interest] is owned by an unrelated third party. WGS is [less than 80%]-owned by TAH, and the other [interest] is owned by an unrelated third party. As a result, because Green-T and WGS are not wholly-owned subsidiaries, they cannot be included in TAH's consolidated tax return. SBA reiterates "the inter-affiliate transaction exclusion applies only if the concerns in question have a parent-subsidary relationship and are eligible to file a consolidated tax return." *G&C Fab-Con*, SBA No. SIZ-5649 (2015). Therefore, SBA contends, the Area Office correctly calculated Green-T's and WGS's receipts based on the separate tax returns they filed, and correctly added the three-year-averaged sum to TAH's receipts. (SBA Response at 3.)

SBA argues it is clear from the plain meaning of the regulation that the exclusion for inter-affiliate transactions does not apply to this case. The exclusion for inter-affiliate transactions is limited to "proceeds from transactions between a concern and its . . . affiliates." 13 C.F.R. § 121.104(a). Indeed, OHA has held "by its plain language, the exception does not apply to transactions to which the challenged firm is not a party." *G&C Fab-Con*, SBA No. SIZ-5649 (2015). Here, the concern in question is Appellant, not TAH, and the receipts in question are between TAH and Green-T and between TAH and WGS. Because the proceeds flow to TAH, not Appellant, the exclusion does not apply. (SBA Response at 3.)

SBA contends Appellant's attempts to distinguish *G&C Fab-Con* are unconvincing. Contrary to Appellant's argument, OHA did in fact consider ownership when rendering its decision in *G&C Fab-Con*. Indeed, the fact that ownership of the companies did not fall into a parent-subsidary relationship was the basis for holding that "the inter-affiliate transaction exclusion applies *only* if the concerns in question have a parent-subsidary relationship and are eligible to file a consolidated return." *G&C Fab-Con*, SBA No. SIZ-5649 (2015) (emphasis SBA's).

Appellant's reliance on *Crown Moving & Storage* is misplaced, SBA argues, because the ownership structure at issue in that case was different than the ownership structure of Green-T and WGS. Unlike in *Crown Moving & Storage*, there is no common ownership such that Green-T, WGS, and TAH could file a consolidated tax return. *Hal Hays* is of no help to Appellant because the discussion in that case is inconclusive. In *Hal Hays*, the Area Office excluded certain amounts from its calculation of receipts because the companies were commonly owned. "However, the Area Office did not exclude other revenue at issue involving concerns that were not 'commonly owned' because those concerns were not eligible to file consolidated tax returns." (SBA Response at 5.)

SBA challenges the argument that it is SBA's policy to avoid double-counting of receipts. OHA has dispatched of this argument in several contexts and held that the "there is no general

'catch all' exclusion for double-counting in the regulation." *G&C Fab-Con*, SBA No. SIZ-5649, at 7 (2015) (quoting *Assoc. Constr. Co.*, SBA No. SIZ-5314, at 7 (2011)); see also *Size Appeal of Aerospace Eng'g Spectrum*, SBA No. SIZ-5497 (2013).

SBA argues that Appellant never informed the Area Office that Green-T was a joint venture, nor did Appellant submit a joint venture agreement to the Area Office. This claim therefore lacks evidentiary support. It is also being raised for the first time on appeal, so OHA cannot consider it. (SBA Response at 6.)

F. FSI Response

On November 30, 2015, FSI responded to the appeal. FSI concurs with SBA's arguments and adopts them.

G. Motion to Supplement Appeal

On November 30, 2015, upon reviewing the Area Office record under the terms of a protective order, Appellant moved to supplement the appeal. Appellant argues there is good cause to admit the supplement because "the record reveals circumstances and documents not previously known to [Appellant] or discussed in the Petition of Appeal." (Supp. Appeal at 1.) Appellant notes that FSI opposes the motion.

I find good cause to admit portions of the appeal supplement. "It is OHA's practice to permit parties to supplement their pleadings after reviewing the Area Office files for the first time under a protective order." *Size Appeal of GiaCare and MedTrust, JV, LLC*, SBA No. SIZ-5690 (2015) (citing *Size Appeal of Harbor Servs., Inc.*, SBA No. SIZ-5576 (2014).) Certain portions of the appeal supplement, however, address arguments in SBA's response. This is problematic because "a reply to a response is not ordinarily permitted, unless the judge directs otherwise." *Size Appeals of Med. Comfort Sys., Inc. et al.*, SBA No. SIZ-5640, at 13 (2015) (citing 13 C.F.R. § 134.309(d).) No such direction occurred here. Accordingly, Appellant's motion is GRANTED, and the supplemental appeal is ADMITTED IN PART. However, to the extent the supplement replies to SBA's response, such arguments are EXCLUDED.

H. Supplemental Appeal

With its motion, Appellant included its supplement to the appeal. Appellant states that, in reviewing the Area Office record, Appellant found errors in the Area Office's calculation of Appellant's size. Appellant states that "individually, these errors may be nominal." (Supp. Appeal at 5.)

Appellant contends that the size calculation includes 2012 and 2013 revenues for NT Investments, LLC (NTI), an acknowledged affiliate. Appellant argues, though, that NTI was not formed until 2014, so it did not have receipts in 2012 and 2013. Next, the calculation includes a note stating that 2014 tax returns for HT Properties, LLC were not submitted, which Appellant disputes. A third error is in the Area Office's approach for computing revenues from the TAH consolidated tax returns, which varied year-by-year. Specifically, negative rental income

associated with Green-T was not included in the revenue calculations for 2012 and 2014, but was included for 2013. Fourth, the Area Office put in incorrect figures from tax returns for WGS, Tenax, LLC, and CJ Properties of Jackson, LLC. Appellant argues that, although these errors may be nominal, “the sheer number of them underlines the general mishandling of [Appellant's] size calculation by the Area Office.” (*Id.*)

Appellant also repeats its argument that the Area Office should not have included TAH's income from Green-T and WGS.

I. New Evidence

With its appeal, Appellant moved to introduce new evidence into the record. Specifically, Appellant seeks to admit the services agreement it has with Green-T and Greenwood Group, Inc. Appellant argues there is good cause to admit this evidence because it clarifies the calculation of Appellant's revenues and demonstrates how Green-T's revenues should be apportioned between its two owners. (Motion at 1-3.)

On November 20, 2015, SBA opposed Appellant's motion. SBA notes that, because OHA's review is based on the evidence in the record at the time the Area Office made its determination, evidence that was available, but not submitted to the Area Office, during the size investigation is inadmissible. *Size Appeal of BCS, Inc.*, SBA No. SIZ-5654 (2015). In this case, the evidence Appellant seeks to admit was available during the size investigation, and Appellant was aware of the issue involving the calculation of receipts. Appellant even addressed it in response to the protest on September 15, 2015. Appellant therefore had “ample opportunity” to submit this evidence to the Area Office. Appellant, though, has provided no reason why it did not. (Opp. at 2.) Accordingly, OHA should deny the motion to admit new evidence.

In the supplemental appeal, Appellant argues SBA's opposition “wholly ignores the crux of [Appellant's] Motion.” (Supp. Appeal at 5 n. 5.) Appellant restates that the evidence it seeks to admit is directly relevant to the issues on appeal. Appellant does not explain, however, why it did not submit this information to the Area Office during the size investigation.

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. New Evidence

OHA's review is based upon the evidence in the record at the time the Area Office made its determination. As a result, evidence that was not previously presented to the Area Office is generally not admissible and will not be considered by OHA. *E.g.*, *Size Appeal of Maximum Demolition, Inc.*, SBA No. SIZ-5073, at 2 (2009) (“I cannot find error with the Area Office based on documents the Area Office was unable to review.”). New evidence may be admitted on appeal at the discretion of the administrative judge if “[a] motion is filed and served establishing good cause for the submission of such evidence.” 13 C.F.R. § 134.308(a). The proponent must demonstrate, however, that “the new evidence is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies the facts on the issues on appeal.” *Size Appeal of Vista Eng'g Techs., LLC*, SBA No. SIZ-5041, at 4 (2009).

Here, Appellant's proffered new evidence was available during the course of the size investigation, so Appellant could have submitted it to the Area Office. Appellant offered no reason for the late submission. OHA has consistently held it will not accept new evidence when the material in question was available during the course of the size investigation but not submitted to the Area Office. *Size Appeal of BCS, Inc.*, SBA No. SIZ-5654, at 10 (2015); *Size Appeal of Prod. Enhancement Corp.*, SBA No. SIZ-5604, at 9 (2014). Appellant's motion to supplement the record is therefore DENIED, and the proffered evidence is EXCLUDED from the record.

C. Analysis

Appellant has not met its burden of proving clear error in the size determination. The appeal is therefore denied.

1. Affiliation

Appellant argues unpersuasively that the Area Office clearly erred in finding Appellant affiliated with Vineyards, Heritage, and Tri-Jet. With respect to Vineyards and Heritage, the Area Office found affiliation based on identity of interest, 13 C.F.R. § 121.103(f). That regulation provides:

Affiliation may arise among two or more persons with an identity of interest. Individuals or firms that have identical or substantially identical business or economic interests (such as family members, individuals or firms with common investments, or firms that are economically dependent through contractual or other relationships) may be treated as one party with such interests aggregated. Where SBA determines that such interests should be aggregated, an individual or firm may rebut that determination with evidence showing that the interests deemed to be one are in fact separate.

13 C.F.R. § 121.103(f). “OHA has interpreted this regulation as creating a rebuttable presumption that family members, entities with common investments, and economically dependent firms are affiliated.” *Size Appeals of Med. Comfort Sys., Inc., et al.*, SBA No. SIZ-

5640, at 15 (2015). With respect to identity of interest based on common investments, OHA has held that common investments in eight firms other than the challenged firm itself constituted “significant ownership interests” that “clearly bespeaks a common purpose such that a finding of identity of interest is appropriate.” *Size Appeal of Seacon Phoenix, LLC*, SBA No. SIZ-5523 (2013). On the lower end, however, OHA has held that “three common [minority] investments are insufficient to justify a finding of an identity of interest.” *Size Appeal of SolarCity Corp.*, SBA No. SIZ-5257, at 8 (2011). I conclude, based on OHA precedent, that the common investments of the persons must be substantial, either in number of individual investments, or in total value, in order to find that there is an identity of interest between the investors. In this case, [Investors 1 and 4] invest together in eight firms that do not include Appellant, and they each have an interest of at least 15% in each firm. Based on OHA's previous cases, then, I find the Area Office did not err in determining that these ownership interests are sufficiently numerous, such that [Investors 1 and 4] share an identity of interest.

Appellant argues it rebutted the presumption of an identity of interest because it does not share officers, employees, facilities, or equipment with these Vineyards and Heritage, does not subcontract or receive financial assistance from them, and is in a separate line of business. Appellant argues there is a clear fracture between the firms, citing *Size Appeal of Carwell Prods., Inc.*, SBA No. SIZ-5507, at 7 (2013). This argument lacks merit. The clear fracture analysis is inapposite here. OHA considers a clear fracture analysis in determining whether firms owned by family members are affiliated based on an identity of interest. *E.g.*, *Size Appeal of RGB Group, Inc.*, SBA No. SIZ-5351, at 7 (2012). “The regulation creates a rebuttable presumption that family members have identical interests and must be treated as one person, unless the family members are estranged or not involved with each other's business transactions. *Size Appeal of Golden Bear Arborists, Inc.*, SBA No. SIZ-1899 (1984). The presumption arises, not from the degree of family members' involvement in each other's business affairs but, rather, from the family relationship itself.” *Size Appeal of Gallagher Transfer & Storage Co., Inc.*, SBA No. SIZ-4295 (1998). OHA has explained:

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 Tech.Support Servs.*, SBA No. SIZ-4794, at 17 (2006). A clear line of fracture exists if the family members have no business relationship or involvement with each other's business concerns, or the family members are estranged. *Size Appeal of Hal Hays Constr., Inc.*, SBA No. SIZ-5217, at 6 (2011).

Size Appeal of Carwell Prods., Inc., SBA No. SIZ-5507, at 7 (2013). A “clear fracture” analysis, then, is conducted where an identity of interest is found based on a familial relationship.

Here, on the other hand, the basis for the identity of interest finding is not a family relationship between [Investors 1 and 4]. Rather, it is based on their common investments. Where an identity of interest finding is based on common investments the presumption is that the investors have a common purpose such that their investments should be aggregated. *Seacon Phoenix, LLC*, SBA No. SIZ-5523 (2013); *Size Appeal of H.L. Turner Group, Inc.*, SBA No. SIZ-4896 (2008). When determining whether a common purpose exists between investors, it is not relevant whether the firms they invest in are in fact separate, because investors can share a

common purpose even though their investments do not have substantial ties. By contrast, such an inquiry is relevant when considering identity of interest based on family relationships, because family members may be estranged or may be in completely different lines of business from each other. Accordingly, because the presumptions are not the same with respect to identity of interest based on a familial relationship and an identity of interest based on common investments, the showings necessary to rebut each presumption are also different. Appellant's argument regarding clear fracture—which OHA applies when identity of interest is found based on a familial relationship—is therefore misguided. Rather, to rebut the presumption for common investors, an appellant must show that the parties have no common purpose. Significantly, Appellant does not argue that [Investors 1 and 4] do not share a common purpose or do not invest together in eight firms. They have thus failed to rebut the presumption that, as common investors, there is an identity of interest between them.

Further, as SBA notes, it is not necessary to specifically find that Appellant can control Vineyards or Heritage, because due to the identity of interest between [Investors 1 and 4], their interests are combined. The common interests establish a relationship which causes the parties to act in unison for their common benefit. Based on their combined majority ownership, together they are deemed to have the power to control Vineyards and Heritage. *Size Appeal of SolarCity Corp.*, SBA No. SIZ-5257, at 8 (2011); *Size Appeal of Seacon Phoenix, LLC*, SBA No. SIZ-5523 (2013) (“although an individual owner may not have the ability to control a firm based on his individual ownership interest, multiple owners may have the collective ability to control based on their aggregated interests.”); *see also Size Appeal of AcelRx Pharm., Inc.*, SBA No. SIZ-5501 (2013). [Investor 1]'s ability to control Appellant, Vineyards, and Heritage renders these firms affiliated with each other. 13 C.F.R. § 121.103(a)(1) (“entities are affiliates of one another when . . . a third party controls or has the power to control both.”)

Appellant's arguments regarding its affiliation with Tri-Jet are also unconvincing. The Area Office correctly recognized that, when a concern is owned by multiple owners with equal minority interests, all of those owners are presumed to control the concern. This presumption may be rebutted by showing that such control or power to control does not actually exist. The applicable regulation states:

If two or more persons (including any individual, concern or other entity) each owns, controls, or has the power to control less than 50 percent of a concern's voting stock, and such minority holdings are equal or approximately equal in size, and the aggregate of these minority holdings is large as compared with any other stock holding, SBA presumes that each such person controls or has the power to control the concern whose size is at issue. This presumption may be rebutted by a showing that such control or power to control does not in fact exist.

13 C.F.R. § 121.103(c)(2). In its case decisions, OHA has repeatedly rejected arguments that a concern with multiple owners is not controlled by any person or entity. *Size Appeal of Technibilt Ltd.*, SBA No. SIZ-5304 (2011); *Size Appeal of Tech. Support Servs.*, SBA No. SIZ-4794, at 15 (2006) (“[A]ll concerns must be controlled by someone or some group at all times. The alternative, to consider none of the minority stockholders as possessing the power to control the concern, would ignore reality and leave the locus of power uncertain and unresolved.”); *Size*

Appeal of Zygo Corp., SBA No. SIZ-2514 (1986). Nevertheless, a minority owner, and particularly if that owner is merely a passive investor, may rebut the presumption by showing that control rests with a different owner. *Allied Tech. Servs. Group, LLC*, SBA No. SIZ-5373, at 7 (2012); *Size Appeal of ADVENT Env't'l.*, SBA No. SIZ-5325, at 8 (2012) (finding that presumption was not rebutted due to challenged firm's "direct, personal involvement in [the affiliate's] affairs, including oversight of its most important strategic decisions.").

OHA has found that an approximately equal distribution of ownership among minority shareholders is sufficient to find that each minority owner has the power to control the firm based on his or her minority interest. *Size Appeal of ADVENT Env't'l., Inc.*, SBA No. SIZ-5325 (2012) (four 25% owners each had the power to control); *Size Appeal of Vocare Servs., Inc.*, SBA No. SIZ-5266, at 6 (2011) ("The Area Office correctly determined that the three individuals who own [the affiliate] can control that firm because they each hold equal shares of [the affiliate's] stock."); *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-5049, at 9 (2009) (affirming finding that one of four individuals who each own 25% of the challenged firm had the power to control that firm based on his minority interest). Because Appellant is one of three 33.33% owners of Tri-Jet, the Area Office was correct to determine that Tri-Jet's holdings are approximately equal in size and that the presumption of control applies.

Appellant argues the presumption is rebutted, not because it is merely a passive investor in Tri-Jet, but because it does not exercise direct control as a manager. This argument is unpersuasive because it relies on a misrepresentation of OHA's case law. In *ADVENT Environmental*, the case Appellant relies on to support its argument, the 25% owner served on a four-person Board of Managers and was the Treasurer. OHA found that, as a result of this owner's "direct, personal involvement" in the firm's affairs, the owner could not demonstrate that he was merely a passive investor, and therefore did not rebut the presumption of control based on his minority interest. Accordingly, *ADVENT Environmental* does not require a minority owner to have managerial responsibilities for the presumption of control to apply, as Appellant argues. Rather, managerial duties prevent the owner from rebutting the presumption. Appellant's attempt to explain away *ADVENT Environmental* does not withstand scrutiny.

Further, Tri-Jet's own Operating Agreement undercuts Appellant's argument that it does not control the firm. While the Operating Agreement provides that the Manager will have the exclusive right to manage the company, it also provides that the Manager may be removed at any time, without cause, by a majority vote of the Members. (Response to Protest Ex. 54, § 7.) It also provides that all profits and losses will be allocated among the members in accordance with their respective percentage interest in the company. (*Id.*, § 5.1.) The Operating Agreement thus ensures the Members are compensated in proportion to their interests and that they have the power to change firm management at will. Clearly, the minority shareholders here have, together, the power to control the firm.

Appellant's reliance on *Mark Dunning* is also misplaced, for two reasons. First, the ownership of the firm at issue in that case was divided among nine owners, so the ownership stake at issue was much less robust and more similar to of a passive investor. Here, by contrast Tri-Jet's ownership interests are divided equally among three owners. In *Size Appeal of Ceramatec, Inc.*, SBA No. SIZ-3040 (1989), where the two largest shareholders held interests

of 32.5% and 32.3%, with the remainder of the company owned by 31 other shareholders, OHA found that the two largest shareholders each had the power to control the concern. OHA explained that this “reflects the reality of the business world where two dominant stockholders, ‘although unable to singularly enact or block corporate action, wield great influence over company affairs . . . and . . . may easily enter into alliances or otherwise effect their wishes.’” *Ceramatec* at 6 (quoting *Size Appeal of River Equip. Co., Inc.*, SBA No. SIZ-3024, at 5 (1988)). In this case, Tri-Jet's ownership is much more concentrated than the ownership interests in *Mark Dunning*, and the ownership interests are similar in size to those in *Ceramatec*. Accordingly, I find no clear error in the Area Office's decision not to apply the rationale in *Mark Dunning* to the facts of this case.

Second, I agree with SBA that *Mark Dunning* is an outlier that represents an unexplained departure from OHA's longstanding precedent. It is also inconsistent with the rationale behind the minority ownership rule. As OHA has explained, “The best rationale for the minority shareholder presumption (13 C.F.R. § 121.103(c)(2)) is that all concerns must be controlled by someone or some group at all times. The alternative, to consider none of the minority stockholders as possessing the power to control the concern, would ignore reality and leave the locus of power uncertain and unresolved.” *Size Appeal of Technibilt, Ltd.*, SBA No. SIZ-5304, at 4 (2011) (quoting *Size Appeal of Tech. Support Servs.*, SBA No. SIZ-4794, at 13 (2006).) For this reason, OHA has held that an equal distribution of voting power among three minority stockholders was sufficient to give each the power to control the firm. *Size Appeal of Zygo Corp.*, SBA No. SIZ-2514 (1986). OHA reached this conclusion notwithstanding the fact that “alone, [each minority stockholder] could neither affirmatively establish policy and execute management decisions, nor negatively block action favored by a majority of the stockholders or management.” *Id.* OHA reaffirmed this approach in *Size Appeal of Technibilt, Ltd.*, SBA No. SIZ-5304 (2011) when it held that an owner's inability to block a quorum is insufficient to rebut the presumption of a minority owner's control. *Technibilt* at 3-4. In *Mark Dunning*, however, OHA stated, without referring to previous cases, that the presumption of control was rebutted because the minority owner could not block a quorum. *Mark Dunning*, SBA No. SIZ-5488, at 6. Accordingly, because this aspect of *Mark Dunning* is inconsistent with OHA's long line of cases, I conclude that I must overrule its holding that a finding of affiliation under 13 C.F.R. § 121.103(c)(2) may be rebutted by existence of a quorum requirement. I further find the Area Office did not err in declining to follow it.

2. Exclusion for Inter-affiliate Transactions

I find Appellant has not proved that the Area Office committed clear error in calculating the combined receipts of Appellant and its affiliates. Appellant's contention that the Area Office should have excluded the income TAH received from WGS and Green-T lacks merit. OHA has explained:

The exception [for inter-affiliate transactions] applies only to “transactions between a concern and its domestic or foreign affiliates.” 13 C.F.R. § 121.104(a). Thus, by its plain language, the exception does not apply to transactions to which the challenged firm is not a party. This interpretation is bolstered by OHA case precedent which has recognized that “exclusions are to be interpreted strictly and

are limited to those enumerated in the regulation.” *Size Appeal of J.M. Waller Assocs., Inc.*, SBA No. SIZ-5108, at 4 (2010). In addition, although Appellant argues that double-counting of receipts could arise even when the challenged firm is not a party to the transaction, 13 C.F.R. § 121.104(a) makes clear that “the only exclusions from receipts are those specifically provided for in this paragraph,” and OHA has similarly held that “there is no general ‘catch-all’ exclusion for double-counting in the regulation.” *Size Appeal of The Associated Construction Company*, SBA No. SIZ-5314, at 7 (2011).

Size Appeal of G&C Fab-Con, LLC, SBA No. SIZ-5649, at 7 (2015). As SBA explains, Appellant is not a party to the transactions it seeks to exclude. Accordingly, I find no clear error in the Area Office's determination that the income TAH received from WGS and Green-T should not be excluded.

Appellant argues it is SBA's general policy to avoid double counting of receipts. The problem with this argument, though, is that OHA has dispatched of it before. OHA has specifically held that “there is no general ‘catch-all’ exclusion for double-counting in the regulation.” *G&C Fab-Con*, at 7 (quoting *Assoc. Constr. Co.* at 7 (2011).) Moreover, the language in the *Federal Register* Appellant relies on for this point regards the inter-affiliate transaction exception itself, and does not announce a broad policy preference for exclusions beyond those enumerated in the regulation. *See* 69 Fed. Reg. 29,192, 29,197 (May 21, 2004).

On this point the regulatory history is instructive. Prior to 2004, the regulation on receipts provided in pertinent part, “the term receipts excludes proceeds from the transactions between a concern and its domestic or foreign affiliates (if also excluded from gross or total income on a consolidated return filed with the IRS).” 13 C.F.R. § 121.104(a)(1) (2003). When SBA removed the parenthetical in 2004, SBA stated that it “understands that not all firms file such consolidated returns, but that these amounts should nonetheless be excluded. Whether a consolidated return is filed should have no bearing on whether properly documented inter-affiliate transactions are excluded from annual receipts. To do otherwise would be to count such amounts twice.” 69 Fed. Reg. 29,192, 29,197 (May 21, 2004). OHA interpreted this language from the *Federal Register* in *G&C Fab-Con*. OHA explained that “SBA's intent was to allow the exclusion of inter-affiliate transactions in situations where the concerns in question would be eligible to file a consolidated tax return, even if they did not actually do so.” *G&C Fab-Con*, at 8. OHA then concluded that “the exclusion for inter-affiliate transactions is intended to prevent double-counting of receipts received by both a parent company and its subsidiary.” *Id.* at 9.

In this case, Appellant itself was not a party to the transactions in question, these were between TAH and Green-T and WGS. Further, Appellant does not argue that the concerns in question are eligible to file a consolidated tax return, and the record establishes that the relationship at issue is not one of a parent and its subsidiary. As a result, these transactions do not meet the test in *G&C Fab-Con* for exclusion from Appellant's receipts. Appellant has not demonstrated clear error in the Area Office's determination that TAH's income from Green-T and WGS should not be excluded.

OHA's reasoning in *Crown Moving* does not mandate a different result. In that case, the transactions at issue were between the challenged firm and its affiliate. The challenged firm submitted an opinion from its accountant that under generally accepted accounting principles, the transactions would be eliminated from a consolidated tax return. Here, by contrast, Appellant is not a party to the transactions it seeks to exclude. *Crown Moving*, then, is of no help to Appellant. Neither is *Hal Hays*. In that case, OHA did not reach the issue of whether the inter-affiliate transaction exclusion applied. *Size Appeal of Hal Hays Constr., Inc.*, SBA No. SIZ-5234, at 10 n.4 (2015).

Appellant argues that Green-T is a joint venture, so the Area Office should only have included TAH's proportionate share of Green-T's receipts. This argument is unpersuasive for several reasons. First, as SBA points out, Appellant did not submit a joint venture agreement to the Area Office, and I cannot find fault with the Area Office based on documents it was unable to review. *Size Appeal of Maximum Demolition, Inc.*, SBA raised for the first time on appeal, so OHA cannot consider it. 13 C.F.R. § 134.316(c); *Size Appeal of B GSE Group, LLC*, SBA No. SIZ-5678, at 4 (2015). Third, Appellant does not argue that any such overinclusion is material to the size calculation itself—that is, it is unclear that had the Area Office included less revenue received by TAH from Green-T that Appellant would not exceed the size standard. Similarly, Appellant does not argue that the errors identified in its supplement to the appeal are material, either. In fact, Appellant concedes that such “errors may be nominal.” Section II.H., *supra*. Accordingly, I cannot find that any of these identified irregularities or mistakes are more than harmless error. *E.g.*, *Size Appeal of WG Pitts Co.*, SBA No. SIZ-5575, at 7 n.4 (2014) (finding an area office's mistake immaterial to the decision and therefore harmless error.)

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).

CHRISTOPHER HOLLEMAN
Administrative Judge