

NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
633 THIRD AVENUE
NEW YORK, NY 10017

In the Matter

- of -

the Application of **Corporate Branding, Inc.**,
for Certification as a Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 61256

RECOMMENDED ORDER

- by -



Lisa A. Wilkinson
Administrative Law Judge

August 31, 2017

SUMMARY

This report recommends that the determination of the Division of Minority and Women's Business Development (Division) of the New York State Department of Economic Development to deny the application filed by Corporate Branding, Inc. (Corporate Branding or applicant) for certification as a woman-owned business enterprise (WBE) be affirmed for the reasons set forth below.

PROCEEDINGS

Corporate Branding submitted an application for certification as a woman-owned business enterprise on August 29, 2016 (*see* WBE Exhibit 1). By letter dated December 9, 2016 (*see* WBE Exhibit 2), the Division determined that Corporate Branding does not meet the eligibility requirements to be certified as a woman-owned business enterprise, and denied its application. By letter dated January 13, 2017, Jamie P. Green and Kenneth P. Greenfield appealed from the Division's determination to deny Corporate Branding's application for WBE certification (*see* Applicant Exhibit 1). The Division notified Corporate Branding that a hearing had been scheduled for August 1, 2017 at 10:00 a.m. at the Division's offices located at 633 Third Avenue, New York, New York by letter dated June 19, 2017.

The hearing was convened as scheduled. Phillip Harmonick, Esq., Assistant Counsel, New York State Department of Economic Development, appeared on behalf of the Division and Alan Culbreath, Senior Certification Analyst, testified. Tara D. McDevitt, Esq. (Goldberg & Connolly) appeared on behalf of applicant and Kenneth P. Greenfield and Jamie P. Green testified. During the hearing the parties offered eleven exhibits, all of which were received into evidence. A list of exhibits is attached to this recommended order.

An audio recording of the proceedings was made and one compact audio disk containing two files was received by the Office of Hearings and Mediation Services (CD File ____).

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a woman-owned business enterprise are set forth in the regulations at Title 5 of the Official Compilation of Codes, Rules, and Regulations of the State of New York (5 NYCRR) § 144.2. To determine whether an applicant should be granted WBE status, the Division assesses the ownership, operation, control, and independence of the business enterprise on the basis of information supplied through the application process. The Division reviews the business enterprise as it existed at the time that the application was made, based on representations in the application itself, and on information

presented in supplemental submissions as well as any interviews that the Division's analyst may have conducted. (See 5 NYCRR 144.5[5].)

STANDARD OF REVIEW

On this administrative appeal, Corporate Branding bears the burden of proving that the Division's denial of the application for WBE certification is not supported by substantial evidence (*see* State Administrative Procedure Act § 306[1]). The substantial evidence standard "demands only that a given inference is reasonable and plausible, not necessarily the most probable," and applicant must demonstrate that the Division's conclusions and factual determinations are not supported by "such relevant proof as a reasonable mind may accept as adequate" (*Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d 494, 499 [2011] [internal quotation marks and citations omitted]).

POSITIONS OF THE PARTIES

The Division

The Division denied the application filed by Corporate Branding for certification as a woman-owned business enterprise with a letter dated December 9, 2016 (*see* WBE Exhibit 2). The Division determined (1) that applicant failed to demonstrate that woman owner Jamie Green contributed money, property, equipment or expertise to Corporate Branding in proportion to her fifty-one percent ownership in the business enterprise as required by 5 NYCRR 144.2(a)(1); (2) that Jamie Green does not share in the risks and profits in proportion to her ownership interest in the business enterprise as required by 5 NYCRR 144.2(c)(2); and (3) that the bylaws of Corporate Branding do not permit Jamie Green to make decisions without restriction as required by 5 NYCRR 144.2(b)(2).

Corporate Branding

Applicant contends that Jamie Green has contributed significant experience and expertise to the business resulting in an increase of revenues for the business far in excess of her 51% ownership interest and that she is vested with unfettered and ultimate decision making responsibility with respect to the operation of the business. Applicant also contends that the reason Kenneth Greenfield receives greater compensation than Jamie Green is that Ms. Green agreed to defer compensation so that she could pay Kenneth Greenfield, her father, to buy out the business completely.

FINDINGS OF FACT

1. Corporate Branding, Inc. is located at 2024 Brian Drive in Merrick, New York, and supplies promotional products and apparel, including print material, shirts, jackets, hats, corporate gifts, B2B gifts, marketing materials and uniforms (WBE Exhibit 1 § 1.D, § 3.C).
2. Corporate Branding was established on October 22, 2008 by Kenneth Greenfield (see WBE Exhibit 1 § 1.R; CD File 1 at 4:12).
3. Kenneth Greenfield is the father of Jamie Green (CD File 1 at 3:34).
4. Jamie Green joined Corporate Branding in 2011, initially to help her father with sales, hiring employees, and office organization (*see* CD File 1 at 5:26). In 2014, Kenneth Greenfield and Jamie Green began to discuss Mr. Greenfield stepping back from day to day operations and Ms. Green assuming ownership of the business and its operation and management (*see* CD File 1 at 9:38). Mr. Greenfield and Ms. Green reached an understanding as to how Ms. Green would buy out Mr. Greenfield but they did not reduce their understanding to writing (*see* CD File 1 at 10:26).
5. Jamie Green contributed expertise valued at [REDACTED] to Corporate Branding on January 1, 2015. Kenneth Greenfield contributed expertise valued at [REDACTED] on March 1, 2016. (WBE Exhibit 1 § 2.C.)
6. On January 1, 2009, Corporate Branding issued a stock certificate to Kenneth Greenfield for 100 shares of common stock. This certificate was subsequently cancelled and a new certificate was issued in 2015 for 200 shares with no par value. Jamie Green owns 102 shares of common stock which equates to a 51% equity interest in Corporate Branding. Kenneth Greenfield owns 98 shares of common stock which equates to a 49% equity interest in Corporate Branding. (WBE Exhibit 1 §§ 2.A, 2.D., 2E and Exhibit 3.)
7. According to the 2015 federal income tax returns for Corporate Branding, Jamie Green received [REDACTED] in compensation and profit distributions and Kenneth Greenfield received [REDACTED] in compensation and profit distributions (*see* Exhibit 5 [Schedule M-2, at 5 line 7], [Schedule K-1 Shareholder's Share of Income, Deductions, Credits, etc.], [Form 1125E Compensation of Officers]).
8. Kenneth Greenfield is the president and chief executive officer (CEO) of Corporate Branding. Jamie Green is the chief operating officer of Corporate Branding. (WBE Exhibit 1 § 2.A.; Exhibit 7.)

9. Both Jamie Green and Kenneth Greenfield jointly share responsibility for the managerial operations of Corporate Branding (WBE Exhibit 1 § 4.A).
10. The bylaws of Corporate Branding provide for the offices of president, vice-president, secretary and treasurer (*see* WBE Exhibit 6, Article V. Officers). The president “shall preside at all meetings of the board” and “perform whatever duties the board of directors may from time to time assign” (*see* WBE Exhibit 6, Article V. Officers, § 2).
11. The bylaws do not designate the position of chief operating officer (*see* WBE Exhibit 6).
12. At a special meeting of the Board of Directors of Corporate Branding held on January 1, 2015, Kenneth Greenfield was designated as president of Corporate Branding and Jamie Green was designated as the chairman of the board (*see* WBE Exhibit 7).

DISCUSSION

This recommended order considers Corporate Branding’s January 13, 2017 appeal from the Division’s December 9, 2016 determination to deny Corporate Branding’s application for certification as a woman-owned business enterprise pursuant to Executive Law Article 15-A. The discussion below addresses the bases for the Division’s denial.

The standards for determining whether an applicant is eligible to be certified as a woman-owned business enterprise are set forth in 5 NYCRR 144.2. According to the Division’s December 9, 2016 denial letter (*see* Exhibit WBE 2), Corporate Branding did not demonstrate that Jamie Green’s capital contribution was proportionate to her equity interest in the business enterprise or that she shared in the risks and profits in proportion to her ownership interest as required by 144.2(a)(1) and (c)(2), respectively. The Division also determined that Corporate Branding’s bylaws did not permit Jamie Green to make decisions without restrictions as required by 5 NYCRR 144.2(b)(2).

I. Ownership: Contribution Proportionate to Equity Interest

The ownership eligibility criterion at issue requires that “the contribution of the minority group member(s) or woman owner must be proportionate to their equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise” (5 NYCRR 144.2[a][1]). The purpose of the capital contribution test is to guard against the installation of woman owners as majority shareholders in a business enterprise for the purpose of obtaining certification. Where the contribution is in the form of property, equipment or expertise, the Division’s review often involves a quantification of the value of such contribution.

The Division interprets 5 NYCRR 144.2(a)(1) to require an applicant to demonstrate that the woman owner's contribution came from assets belonging solely to the woman owner and consistently denies applications for WBE certification where an applicant fails to substantiate the source of the capital contribution by the woman owner or where the contribution is derived from assets provided by, or jointly held with, an ineligible individual (*see e.g. Matter of OTONE Mechanical Construction, Inc.*, Recommended Order [April 25, 2017] available at: https://cdn.esd.ny.gov/mwbe/Data/Hearings/05022017_OTONEMechanicalConstruction_RecommendedOrder.pdf, Final Order 17-28 available from New York State Economic Development Division of Minority and Women's Business Development [proceeds from jointly held marital property did not constitute a capital contribution solely by the woman owner]; *Matter of Hertel Steel Inc.*, Recommended Order [February 10, 2017] available at https://cdn.esd.ny.gov/mwbe/Data/Hearings/03102017_HertelSteel_RecommendedOrder.pdf, Final Order 17-12 available from New York State Economic Development Division of Minority and Women's Business Development [business not eligible for WBE certification where the money to purchase the business was from a jointly owned bank account]; *Matter of Spring Electric, Inc.*, Recommended Order [March 17, 2017] available from New York State Economic Development Division of Minority and Women's Business Development, Final Order 17-21 available from New York State Economic Development Division of Minority and Women's Business Development [proceeds of a home equity line of credit on jointly held marital property did not qualify as capital contribution of the woman owner]).

Ms. Green claims that she has contributed significant expertise and experience to the business enterprise. Expertise is a permissible form of capital contribution under the Division's regulations (*see* 5 NYCRR 144.2[c][2]). To establish whether a woman owner's contribution of expertise to an enterprise is proportionate to her equity interest, however, an applicant must provide evidence of the value of such contributions (*see Matter of Casters, Wheels and Industrial Handling, Inc.*, Recommended Order [March 3, 2017] available from New York State Economic Development Division of Minority and Women's Business Development; Final Order 17-20 [March 13, 2017] available from New York State Economic Development Division of Minority and Women's Business Development). An applicant claiming that the woman owner's capital contribution consists of expertise provided to the business enterprise proportionate to her equity interest must include an objective quantification of the value of that expertise with the application materials (*see e.g. Matter of Bentley Bros., Inc.*, Recommended Order [May 11, 2016] available at: https://cdn.esd.ny.gov/mwbe/Data/Hearings/05112016_MatterofBentleyBros_RecommendedOrder.pdf; Final Order 16-16 available from New York State Economic Development Division of Minority and Women's Business Development).

In *Matter of Bentley*, the Division rejected a claim that a transfer of shares of stock to a woman owner in consideration for her expertise constituted a capital contribution where the application failed to substantiate the value of the purported expertise and the male partner's cash contribution far exceeded the claimed value of the woman owner's expertise. In *Matter of JVR Electric*, the Division rejected an applicant's claim that the woman owner made a proportionate capital contribution of time, personal resources, expertise and sweat equity where the application failed to include evidence of the value of such contributions (*see Matter of JVR Electric, Inc.*, Recommended Order [August 31, 2016], available at: https://cdn.esd.ny.gov/mwbe/Data/Hearings/09062016_JVRElectricRecommendedOrder.pdf, Final Order 16-43, available from New York State Economic Development Division of Minority and Women's Business Development). Similarly, in *Matter of Spur-Line Construction Corp.*, the Division concluded that a business was ineligible for certification where applicant failed to quantify the value of the woman owner's claimed contribution of expertise and the only quantifiable contribution to the business was from marital assets (*see Matter of Spur-Line Construction Corp.*, Recommended Order [October 26, 2016] available at: https://cdn.esd.ny.gov/mwbe/Data/Hearings/10272016_SpurLineConstructionRecommendedOrder.pdf, Final Order 16-52 available from New York State Economic Development Division of Minority and Women's Business Development). Notably, work experience at the business enterprise seeking certification does not constitute a form of expertise the Division recognizes for purposes of satisfying the capital contribution requirement of 5 NYCRR 144.2(a)(1) (*see Matter of Casters, Wheels and Industrial Handling, Inc.*, *supra*).

Even where the business enterprise has been inherited or gifted, the Division requires an applicant to demonstrate that the woman owner's contribution is proportionate to her equity interest in the business enterprise (*see e.g. Matter of Beam Mack Sales & Services, Inc.*, Recommended Order [October 31, 2016] and Final Order 16-55, both available from New York State Economic Development Division of Minority and Women's Business Development; *Matter of All Ways Concrete Pumping, LLC*, Recommended Order [August 5, 2016], and Final Order 16-40, both available from New York State Economic Development Division of Minority and Women's Business Development; *Matter of Friend Commercial Contracting Corp.*, Recommended Decision [May 11, 2016], available at: https://cdn.esd.ny.gov/mwbe/Data/Hearings/05112016_FriendCommercialContractingCorp_RecommendedOrder.pdf, Final Order 16-15 available from New York State Economic Development Division of Minority and Women's Business Development).

Here, Corporate Branding's application contains no supporting material that substantiates Ms. Green's claimed contribution of [REDACTED] in expertise, or demonstrates that the contribution is proportionate to her equity interest (*see* WBE Exhibit 1, § 2.C.). Even if Ms. Green had provided supporting documentation, the application states that her father contributed [REDACTED], nearly twice as much as Jamie Green contributed (*see id.*). That alone constitutes substantial

evidence for the Division's determination that Corporate Branding did not meet the eligibility criteria of 5 NYCRR 144.2(a)(1). In addition, a promissory note included with the application materials, documenting a line of credit provided by People's United Bank to Corporate Branding in the amount of [REDACTED], was signed by Kenneth Greenfield as the president of the company, not by Jamie Green in her individual capacity (*see* WBE Exhibit 4).

In sum, applicant has not met its burden to demonstrate that the record that was before the Division at the time of the denial did not contain substantial evidence to support the Division's determination that Jamie Green's contribution to Corporate Branding was not proportionate to her equity interest in the enterprise, as required by 5 NYCRR 144.2(a)(1).

II. Ownership: Risks and Profits

The eligibility criterion at issue requires that the "woman owner . . . must share in the risks and profits, in proportion with [her] ownership interest" (5 NYCRR 144.2[c][2]). This provision ensures that women and minority business owners receive the benefits that accrue to a business as a result of State contracting preferences from a MWBE certification and that persons who are not members of a protected class do not receive a disproportionate share of such benefits.

Mr. Culbreath testified that according to 2015 tax return records submitted with the application, Jamie Green received [REDACTED] in compensation and profit distributions from Corporate Branding while her father, Kenneth Greenfield, received a total of [REDACTED] a significantly greater amount than his daughter. The Division has consistently held that the woman owner must realize the majority of profits from the business enterprise to satisfy the criteria under 5 NYCRR 144.2(c)(2) (*see e.g. Matter of Spring Electric*, Recommended Order [March 17, 2017] and Final Order 17-21 [both available from the New York State Department of Economic Development Division of Minority and Women's Business Development]; *Matter of National Recovery Solutions, LLC*, Recommended Order [May 25, 2017], available at: https://esd.ny.gov/sites/default/files/052517_NationalRecoverySolutions_RO.pdf, Final Order 17-31, available from the New York State Department of Economic Development Division of Minority and Women's Business Development; [business not eligible for certification where the woman owner and majority shareholder received the same compensation as her husband]; *Matter of Spring Electric, Inc.*, Recommended Order [March 17, 2017] available from New York State Economic Development Division of Minority and Women's Business Development, Final Order 17-21 available from New York State Economic Development Division of Minority and Women's Business Development [business not eligible for WBE certification where the woman owner's husband received significantly more compensation she did]). Based on this information, Mr. Culbreath reasonably concluded that Jamie Green does not enjoy the customary incidents of ownership by sharing in the risks and profits in proportion to her ownership interest in the

business enterprise, as required by 5 NYCRR 144.2(c)(2). (See CD File 1 at 54:01; Exhibit 5 [Schedule M-2, at 5 line 7], [Schedule K-1 Shareholder's Share of Income, Deductions, Credits, etc.], [Form 1125E Compensation of Officers]).

Ms. Green testified that the disparate compensation paid to her father reflected the buyout agreement they reached whereby she would defer compensation for ten years and pay a greater amount of income to her father as a means to finance her purchase of the business and enable him to retire from the business. Ms. Green and her father valued the business at [REDACTED]. She stated that the money paid to her father would otherwise have gone to her as a salary, which she in turn would use to pay him. (See CD File 1 at 31:43.) This argument fails on two counts. First, the buyout agreement between Ms. Green and Mr. Greenfield was not reduced to writing or included in the application materials submitted to the Division. Thus, no information before the Division at the time it made its decision provided any details of the purported buyout arrangement between Ms. Green and Kenneth Greenfield.

Second, as counsel for the Division emphasized in his closing argument, the legislative intent of Article 15-A is to serve a remedial purpose and remedy past discrimination experienced by minority and women business owners. To pass constitutional muster, the MWBE must be narrowly tailored to confer benefits exclusively to members of the protected class to redress prior discrimination, namely minority and women business owners who made a significant financial investment in business, enjoy the risks and profits of the business (the value of the state benefit through state contract preferences in proportion to their ownership interest), operate the business in fact, and have control over the business as a formal matter. (See *Richmond v J.A. Croson*, 488 US 469, 506 [1989].) Programs that do not adequately limit benefits to members of protected classes, according to counsel, are not narrowly tailored under the Fourteenth Amendment to the U.S. Constitution (*id.*). Counsel argued that if Corporate Branding is certified, a majority of the benefits of received from state contracting preferences will adhere to Kenneth Greenfield, which is inconsistent with the remedial objectives of the MWBE program and the legal requirements for certification. (See Hearing Record, CD File 2 at 11:47.)

In *Matter of CW Brown, Inc. v Canton* (216 AD2d 841,843 [3d Dept 1995]), the court held that staff's review of tax returns, such as those considered during the review of Corporate Branding's application for WBE certification, was substantial evidence to support the Division's consideration of whether a woman-owned business meets the eligibility criterion at 5 NYCRR 144.2(c)(2). In 2015, Kenneth Greenfield's compensation was [REDACTED] higher the compensation paid to Jamie Green. Given the disparity in compensation that Mr. Greenfield received compared to Ms. Green, I conclude that staff's determination that Corporate Branding did not demonstrate that the woman-owner shared in the risks and profits of the business enterprise in proportion to her ownership interest was based on substantial evidence, and recommend that the Director conclude the same.

III. Control

The issue with respect to control is whether Corporate Branding demonstrated compliance with the requirement at 5 NYCRR 144.2(b)(2), which states, in full, that:

[a]rticles of incorporation, corporate bylaws, partnership agreements and other agreements including, but not limited to, loan agreements, lease agreements, supply agreements, credit agreements or other agreements must permit minority group members or women who claim ownership of the business enterprise to make those decisions without restrictions.

Corporate Branding's by-laws provide for a president, vice president, secretary, and treasurer, and identify the duties and responsibilities for each corporate officer to be appointed by the Board of Directors (*see* Exhibit WBE 6 at 4, Article V). The president shall preside at all meetings of the board of directors and shall perform whatever duties the board of directors may perform from time to time. The vice-president, secretary and treasurer are subordinate to the president. Pursuant to a special meeting of the board of directors held on January 1, 2015, Kenneth Greenfield was designated as president and Jamie Green was designated as the chief operating officer. The bylaws make no mention of a chief operating officer. (*See* WBE Exhibit 6 and Exhibit 7, Article V. Officers B. Duties.)

Kenneth Greenfield testified at the hearing that his daughter Jamie Green has no restrictions on her ability to make decisions and that her decision making process is superior to his. Mr. Greenfield testified that the formal designation of him as president is not indicative of how the business is actually operated and that formal designations and terminology should not be the basis for denying certification to Corporate Branding. (*See* CD File 1 at 15:12.) Ms. Green testified when she and her father designated her as chief operating officer they thought that title would be above the president and did not know that the designation would be an issue for certification (*see* CD File 1 at 37:29). Ms. Green stated that she restructured the business when she joined and that since 2014 her father has stepped back from day to day business operations of the business and that she is the point person who manages finances, employees, client accounts and relationships (*see* CD File 1 at 22:54, 44:20).

The Division argued that where, as here, the bylaws vest the authority to direct the business in individuals who are not women, the woman-owner is not in control of the business enterprise. The intent of the eligibility requirement at 5 NYCRR 144.2(b)(2) concerning the designation of woman-owners as the decision makers in the corporate documents of the business enterprise is to formalize functional designations. Formalized designations, as reflected in the corporate by-laws, ensure that woman-owners are in fact, the decision makers of the business

enterprise. Consequently, at the time that Corporate Branding filed its application for WBE certification, Division staff correctly found that Jamie Green's formal decision making authority was subordinate to that of her father in contravention of the eligibility criterion outlined at 5 NYCRR 144.2(b)(2). Therefore, staff appropriately determined that Jamie Green could not make business decisions without restrictions, as required by 5 NYCRR 144.2(b)(2) (*see Matter of C.W. Brown, Inc.*, 216 AD2d 841, 843 [3d Dept 1995] [general contracting company ineligible for WBE certification where the business was operated by the woman owner and her husband more in the form of a family-owned business]).

Accordingly, applicant has failed to meet its burden to demonstrate that the record before the Division at the time of the denial did not contain substantial evidence to support the Division's determination that Ms. Green does cannot make decisions for Corporate Branding without restrictions as required by 5 NYCRR 144.2(b)(2).

CONCLUSION

For the reasons outlined above, Corporate Branding failed to demonstrate that (1) Jamie Green contributed money, property, equipment or expertise to the business enterprise in proportion to her ownership interest as required by 5 NYCRR 144.2(a)(1), (2) Jamie Green shares in the risks and profits of the business enterprise in proportion to her ownership interest as required by 5 NYCRR 144.2(c)(2), and that the bylaws permit Jamie Green as the woman-owner of the business enterprise, to make decisions without restrictions as required by 5 NYCRR 144.2(b)(2).

RECOMMENDATION

For the reasons set forth above, the Director should affirm Division staff's December 9, 2016 determination to deny Corporate Branding's application for certification as a woman-owned business enterprise.

Attachment: Exhibit Chart

Matter of Corporate Branding, Inc.
NYS DED File ID No. 61256
Exhibit Chart

Exhibit No.	Description
WBE-1	Corporate Branding, Inc. Form Application for WBE Certification August 29, 2016
WBE-2	Division Denial Letter December 9, 2016
WBE-3	Corporate Branding, Inc. Stock Certificates
WBE-4	Corporate Branding, Inc. March 2014 Line of Credit
WBE-5	Corporate Branding, Inc. 2015 U.S. Income Tax Return for an S-Corporation
WBE-6	Corporate Branding, Inc. Bylaws
WBE-7	Minutes of the January 01, 2015 Meeting of the Corporate Branding, Inc. Board of Directors
A-1	Corporate Branding Inc.'s Request for Appeal January 13, 2017
A-2	Division Notice of Appeal Hearing June 19, 2017
A-3	July 27, 2017 Letter from Stephanie Ransom

A-4	July 31, 2017 Letter from Theresa Esnes-Johnson