

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

In the Matter

- of -

the Application of Keith Titus Corporation, Inc.  
for Certification as a Woman-owned Business Enterprise  
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 49538

RECOMMENDED ORDER

- by -

A handwritten signature in cursive script that reads "Daniel P. O'Connell". The signature is written in black ink and is positioned above a horizontal line.

Daniel P. O'Connell  
Administrative Law Judge

October 9, 2019

## 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 Keith Titus Corporation, Inc. (KTC or applicant) for certification as a woman-owned business enterprise (WBE) be modified and, as so modified, affirmed, for the reasons set forth below.

## PROCEEDINGS

This matter considers the appeal by KTC, pursuant to New York State Executive Law article 15-A and title 5 of the Official Compilation of Codes, Rules and Regulations of the State of New York (NYCRR) parts 140-144, challenging the determination of the Division that the business enterprise does not meet the eligibility criteria for certification as a WBE.

Piper Titus Kline (Ms. Titus)<sup>1</sup> serves as the Chief Financial Officer for the business enterprise, and submitted an application on behalf of KTC for certification as a WBE on January 20, 2016 (*see* WBE Exhibit 1). The Division denied KTC's application by letter dated September 25, 2017 (*see* WBE Exhibit 2). The September 25, 2017 denial letter set forth three grounds for the denial.

With a letter dated October 17, 2017 (*see* WBE Exhibit 3), Ms. Titus responded, on behalf of KTC, to the Division's September 25, 2017 denial letter, and requested a hearing. The Division issued a Notice of Appeal Hearing dated May 6, 2019, which scheduled the hearing for May 14, 2019, at 2:00 p.m. at the Division's offices located at 625 Broadway, Albany, New York (*see* WBE Exhibit 4).

The hearing convened as scheduled on May 14, 2019, and continued on June 5, 2019 at 11:00 a.m. The hearing concluded on June 5, 2019. Kathleen Centolella, Esq. (Kathleen Centolella, Esq, PLLC [Dewitt, New York]), appeared at the hearing on behalf of KTC. Piper Titus and Daniel F. Griffin, CPA, CVA (Grossman St. Amor Certified Public Accountants, PLLC [Syracuse, New York]), testified for the business enterprise. Gretchen Robinson, Esq., Senior Counsel, New York State Department of Economic Development, appeared on behalf of the Division. Clenice Mincey, Senior Certification Analyst, testified for the Division.

An audio recording of the administrative adjudicatory hearing was made. Over the course of the two hearing sessions, six compact disks (CDs) were used to record the hearing. An index of the CDs is attached. During the hearing, the parties offered 23 exhibits. All but WBE Exhibits 7 and 22 were received into evidence (*see* June CD 3, Track 2 at 02:23, 02:50, 03:11, and 05:26). An exhibit chart is attached to this recommended order.

I granted the parties' requests to submit written closing statements. On June 21, 2019, I timely received a closing statement from each party, and the hearing record closed.

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<sup>1</sup> During the hearing, Piper Titus Kline referred to herself as Piper Titus (*see* May CD 1, Track 1 at 23:12).

## ELIGIBILITY CRITERIA

The eligibility criteria for certification as a woman-owned business enterprise are established by regulation (*see* 5 NYCRR 144.2). Based on the information provided during the application process, Division staff evaluate the ownership, operation, and control of the applicant to determine whether it should be certified as a woman-owned business enterprise. Staff reviews the business enterprise as it existed at the time the application was filed based on representations in the application as well as information filed in supplemental submissions. (*See* 5 NYCRR 144.4[e] and 144.5[a]; *see also* May CD 1, Track 1 at 03:11, June CD 2, Track 3 at 32:45-33:00.)

## STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proof to establish that Division staff's determination to deny the application filed by KTC for certification as a WBE is not supported by substantial evidence (*see* SAPA § 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 Division staff'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 NY 3d 494, 499 [2011] [internal quotation marks and citations omitted]).

## POSITIONS OF THE PARTIES

### Division Staff

In the September 25, 2017 denial letter, Division staff contended that KTC failed to meet two criteria for WBE certification set forth in 5 NYCRR 144.2 concerning Ms. Titus's ownership of the business enterprise, and whether the business enterprise is independent. According to staff, KTC did not demonstrate that Ms. Titus shares in the risks and profits in proportion to her ownership interest in the business enterprise, as required by 5 NYCRR 144.2(c)(2). In addition, staff concluded that KTC is not an independent business enterprise, as required by 5 NYCRR 144.2(a)(2) and (c)(2). Finally, staff contended further that the adjusted personal net worth of the woman owner relied upon for certification exceeds \$3.5 million as outlined in 5 NYCRR 140.1(tt)(1)(v). (*See* WBE Exhibit 2.) At the hearing, staff argued that the September 25, 2017 determination is based on substantial evidence (May CD 1, Track 1 at 04:18-04:41).

### Keith Titus Corporation, Inc.

In her letter dated October 17, 2017, Piper Titus asserted, on behalf of the business enterprise, that she shares in the risks and profits of KTC in proportion to her ownership interest. According to Ms. Titus, her distributions are "exactly in line with 51% ownership as mandated by the S-corp election." In addition, Ms. Titus explained that she and Daniel Titus are siblings. From a tax perspective, Ms. Titus said that it does not make sense to tax the business for money that she does not need. Ms. Titus also said that the equity that she accrues annually, based on her 51% ownership, exceeds any disparity in salaries earned by her brother and other employees. (*See* WBE Exh. 2; *see also* May CD 3, Track 1 at 42:03.)

With respect to independence, Ms. Titus explained that Division staff instructed her to obtain WBE certification for KTC before seeking WBE certification for the related subsidiaries. Finally, Ms. Titus requested clarification of the requirement concerning personal net worth.

At the hearing, KTC argued that the application materials show that KTC complies with the eligibility criteria for certification as a WBE. According to KTC, the tax returns and loan documents show that Piper Titus shares 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 May CD 1, Track 1 at 03:34-04:18.)

### FINDINGS OF FACT

1. Keith Titus Corporation, Inc. was established in October 1977. It is an S-Corporation, and serves as a holding company for the following subsidiaries: Page E.T.C., Inc.; KIS Logistics, Inc.; Page Transportation, Inc.; John Pfrommer, LLC; Impact Transport, LLC; Exit 40 Truck Services, LLC; Page Warehousing, LLC; and Page Material Management, LLC. (See WBE Exhs. 1 at § 1.R, and 8; see also June CD 2, Track 2 at 00:28-00:57.)
2. Since June 2012, Piper Titus owns 51% of KTC, and serves as the corporation's Chief Financial Officer. Her brother, Daniel Titus, owns 49% of the business enterprise, and serves as KTC's President. (See May CD 1, Track 1 at 09:16, 1:04:05; May CD 3, Track 1 at 28:30, 31:25.)
3. On January 20, 2016, Ms. Titus filed an application with the Division seeking certification for KTC as a woman-owned business enterprise (see WBE Exhibit 1).
4. By letter dated September 25, 2017, the Division denied KTC's application for WBE certification (see WBE Exhibit 2).
5. With a letter dated October 17, 2017, Ms. Titus responded to the Division's September 25, 2017 denial letter, and requested a hearing on behalf of KTC (see WBE Exhibit 3).

#### I. Ownership

6. From April 1, 2012 to September 30, 2012, Daniel Titus received [REDACTED] in wages from KTC, and Piper Titus received [REDACTED]. During that same period, Mr. Titus's distributions from KTC were [REDACTED], and Ms. Titus's distributions were [REDACTED]. The sum of Daniel Titus's wages and distribution from KTC was [REDACTED]. The sum of Piper Titus's wages and distributions from KTC was [REDACTED]. (See WBE Exhibit 17.)
7. From October 1, 2012 to September 30, 2013, Daniel Titus received [REDACTED] in wages from KTC, and Piper Titus received [REDACTED]. During that same period, Mr. Titus's distributions from KTC were [REDACTED], and Ms. Titus's distributions were [REDACTED]. The sum of Daniel Titus's wages and distribution from KTC was [REDACTED]. The sum of Piper Titus's wages and distributions from KTC was [REDACTED]. (See WBE Exhibit 18.)

8. From October 1, 2013 to September 30, 2014, Daniel Titus received [REDACTED] in wages from KTC, and Piper Titus received [REDACTED]. During the same period, Mr. Titus's distributions from KTC were [REDACTED], and Ms. Titus's distributions were [REDACTED]. The sum of Daniel Titus's wages and distribution from KTC was [REDACTED]. The sum of Piper Titus's wages and distributions from KTC was [REDACTED]. (See WBE Exhibit 5.)

## II. Personal Net Worth

9. Piper Titus signed an Individual Personal Net Worth Affidavit (Attachment A) before a notary public on December 8, 2015, and attached a copy of it to KTC's application for WBE certification. According to the affidavit, Ms. Titus calculated her personal net worth to be [REDACTED]. (See WBE Exhibit 1 at 7 of 9, and WBE Exhibit 9; see also May CD 1, Track 1 at 44:19, 44:36; May CD 3, Track 1 at 33:45.)
10. At staff's request, Ms. Titus prepared a personal financial statement worksheet (Attachment B), and filed it with the Division on September 13, 2019. The adjusted personal net worth on Attachment B is listed as [REDACTED]. (See WBE Exhibit 1 at 9 of 9, and WBE Exhibit 10; see also May CD 1, Track 1 at 46:55; May CD 3, Track 1 at 34:00.)

## DISCUSSION

This recommended order considers KTC's appeal from the Division's September 25, 2017 determination (see WBE Exhibit 2) to deny the certification of KTC as a woman-owned business enterprise pursuant to Executive Law article 15-A. Referring to the eligibility criteria outlined in 5 NYCRR 144.2, the Division identified the two bases for the denial with respect to the operation of the business enterprise. Specifically, the Division contended that the woman owner 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). In addition, the Division contended that KTC is not an independent business enterprise pursuant to 5 NYCRR 144.2(a)(2) and (c)(2). Finally, with respect to the regulatory definition outlined at 5 NYCRR 140.1(tt)(1)(v), the Division contended that the adjusted personal net worth of the woman owner relied upon for certification exceeds \$3.5 million. Each basis is addressed below.

Based on the application materials and the hearing record, I find that applicant failed to meet its burden to demonstrate that the Division's denial of WBE certification to KTC is not based on substantial evidence with respect to the eligibility criterion related to ownership, and personal net worth limit. Accordingly, I recommend that the Director modify and as so modified affirm Division staff's determination to deny WBE certification to KTC.

### I. Ownership

Section 144.2(c)(2) of 5 NYCRR requires that the woman owner must enjoy the customary incidents of ownership, and must share in the risks and profits, in proportion to her ownership interest in the business enterprise. According to the Division, Ms. Titus owns 51% of the outstanding common stock of KTC and, her brother, Daniel Titus, owns 49% of the

outstanding common stock. Based on the tax documents filed with the application for WBE certification, Mr. Titus's salary and distributions from KTC were greater than what Ms. Titus received. (See Exhibit WBE Exhibit 2). For the following reasons, the Division's denial on this ground is based on substantial evidence.

As part of the application materials, Ms. Titus provided the most recent three years of federal tax returns for KTC (see WBE Exhibit 1 at 7 of 9). In the hearing record, these returns are identified as WBE Exhibit 17 (Form 1120S, April 1, 2012 to September 30, 2012), WBE Exhibit 18 (Form 1120S, October 1, 2012 to September 30, 2013), and WBE Exhibit 5 (Form 1120S, October 1, 2013 to September 30, 2014).<sup>2</sup> (See May CD 2, Track 1 at 09:40-09:50.) The total compensation of officers is reported on line 7, page 1 of Form 1120S. On each return, a reference at Line 7 is made to either Statement 2 (see WBE Exhibits 17 and 18) or Form 1125-E (see WBE Exhibit 5), which were also provided with each return.

In WBE Exhibit 17 (Form 1120S, April 1, 2012 to September 30, 2012), the total compensation reported on Line 7 was [REDACTED], and reference is made to Statement 2. Statement 2 of WBE 17 listed the individual compensation of Debra Titus at [REDACTED], Daniel Titus at [REDACTED], Christopher Jorolemon at [REDACTED], and Piper Titus at [REDACTED].

With respect to WBE Exhibit 18 (Form 1120S, October 1, 2012 to September 30, 2013), the total compensation reported on Line 7 was [REDACTED], and referenced Statement 2. Statement 2 of WBE 17 listed the compensation of Daniel Titus at [REDACTED] and Piper Titus at [REDACTED].

In WBE Exhibit 5 (Form 1120S, October 1, 2013 to September 30, 2014), the total compensation reported on Line 7 was [REDACTED], and reference is made to Form 1125-A. Form 1125-A of WBE 17 listed the compensation of Daniel Titus at [REDACTED] and Piper Titus at [REDACTED].

For each tax return submitted with the certification application, the compensation reported for Daniel Titus exceeded that for Piper Titus. Based on the review of the tax returns, Division staff witness, Clenice Mincey, concluded that Ms. Titus, as the woman owner of KTC, did not enjoy the customary incidents of ownership, and did 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).<sup>3</sup> (See May CD 2, Track 1 at 06:45; June CD 1, Track 1 at 05:55.)

According to Mr. Griffin, KTC's accountant, the compensation reported on Line 7 of Form 1120S is considered the wages reported on federal W-2 forms (May CD 3, Track 1 at 10:11-10:24, and 16:37). In addition to wages, Mr. Griffin said that sharing in the business enterprise's income or profits as well as dividends should also be considered. Mr. Griffin referred to Schedule K-1 in the returns as the source of this additional information. (See May CD 2, Track 3 at 38:00.) However, Division staff did not consider additional factors in reaching its determination (see May CD 2, Track 1 at 06:25).

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<sup>2</sup> These exhibits are considered chronologically from earliest (see WBE Exhibit 17 [April 1, 2012 to September 30, 2012]) to most recent (see WBE Exhibit 5 [October 1, 2013 to September 30, 2014]).

<sup>3</sup> See *Matter of CW Brown v Canton*, 216 AD2d 841, 843 (1995).

For corporate returns, the ordinary business income or loss is reported on Line 21 of Form 1120S. On each return, the ordinary business income or loss is reported on each shareholder's Schedule K-1 based on the shareholder's percentage of stock ownership. (See WBE Exhibits 5, 17, and 18.)

In WBE Exhibit 17 (Form 1120S, April 1, 2012 to September 30, 2012), the ordinary business income reported on Line 21 was [REDACTED]. For the reported period on her Schedule K-1, Ms. Titus's percentage of stock ownership was 35.980000%. Based on this percentage, Ms. Titus's ordinary business income was [REDACTED] (Part III, Box 1), and her distributions were [REDACTED] (Part III, Box 16D). For the same reported period, Mr. Titus's percentage of stock ownership was 34.569000% on his Schedule K-1. Based on this percentage, Mr. Titus's ordinary business income was [REDACTED] (Part III, Box 1), and his distributions were [REDACTED] (Part III, Box 16D). (See May CD 2, Track 3 at 38:00-38:51.)

With respect to WBE Exhibit 18 (Form 1120S, October 1, 2012 to September 30, 2013), the ordinary business income reported on Line 21 was [REDACTED]. For the reported period on her Schedule K-1, Ms. Titus's percentage of stock ownership was 51.000000%. Based on this percentage, Ms. Titus's ordinary business income was [REDACTED] (Part III, Box 1), but her distributions were [REDACTED] (Part III, Box 16D). For the same reported period, Mr. Titus's percentage of stock ownership was 49.000000% on his Schedule K-1. Based on this percentage, Mr. Titus's ordinary business income was [REDACTED] (Part III, Box 1), but his distributions were [REDACTED] (Part III, Box 16D).

In WBE Exhibit 5 (Form 1120S, October 1, 2013 to September 30, 2014), the ordinary business income reported on Line 21 was [REDACTED]. On her Schedule K-1 for this period, Ms. Titus's percentage of stock ownership was 51.000000%. Based on this percentage, Ms. Titus's ordinary business income was [REDACTED] (Part III, Box 1), and her distributions were [REDACTED] (Part III, Box 16D). For the same reported period, Mr. Titus's percentage of stock ownership was 49.000000% on his Schedule K-1. Based on this percentage, Mr. Titus's ordinary business income was [REDACTED] (Part III, Box 1), and his distributions were [REDACTED] (Part III, Box 16D). (See May CD 2, Track 1 at 04:41, 04:48, )

In its closing brief (at 5), KTC argued that the sum of the W-2 wages, as well as information from each shareholder's Schedule K-1 should be considered when evaluating compliance with the criterion outlined at 5 NYCRR 144.2(c)(2). To support this argument, KTC cited the following administrative determinations: (1) *Matter of On Line Power Technologies, Inc.* (NYS DED File No. 60549), Recommended Order dated November 6, 2017, Final Decision dated November 16, 2017; (2) *Matter of Share Corp.* (NYS DED File No. 60410), Recommended Order dated November 13, 2017, Final Order dated January 5, 2018; (3) *Matter of Upstate Electrical, LLC* (NYS DED File No. 61808) Recommended Order dated June 11, 2018, Final Order dated August 30, 2018; and (4) *Matter of MS Analytical, LLC* (NYS DED File No. 50159), Recommended Order dated August 6, 2018, Final Order dated January 30, 2019.<sup>4</sup> Contrary to applicant's argument, however, allocations were not considered in any of these

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<sup>4</sup> For copies of the referenced recommended orders and final decisions, go to the Department's website at <https://esd.ny.gov/doing-business-ny/mwbe/mwbe-certification-appeal-hearings>.

cases. Rather, the consideration was limited to wages and distributions (or dividends).<sup>5</sup> (See KTC closing brief at 12-13.)

In its closing brief (at 5), applicant presented the information from WBE Exhibit 5. However, the information presented in the following table summarizes the information from WBE Exhibit 5, as well as Exhibits 17 and 18 (see WBE Exhibit 1 at 7 of 9). For each tax return provided, the totals show that, based on Mr. Griffin’s recommendations, Ms. Titus’s total compensation would be greater than that of her brother’s.

Shareholders	WBE Exhibit	Wages	Distributions	Ordinary Business Income	Total
Piper Titus	17	████████	████████	████████	████████
Daniel Titus	17	████████	████████	████████	████████
	Difference	████████			████████
Piper Titus	18	████████	████████	████████	████████
Daniel Titus	18	████████	████████	████████	████████
	Difference	\$100,000			\$40,323
Piper Titus	5	████████	████████	████████	████████
Daniel Titus	5	████████	████████	████████	████████
	Difference	████████			████████

As noted above, the ordinary business income or loss reported on a corporation’s Form 1120S on Line 21 is allocated among the shareholders based on the percentage of stock ownership. On each shareholder’s Schedule K-1, the allocation is reported in Box 1 of Part III. For each shareholder, the distribution of the allocation is reported in Box 16D of Part III. Generally, the distribution is a portion of the total allocation of each shareholder’s ordinary business income. Consequently, including a shareholder’s ordinary business income allocation as part of the total, as recommended here by applicant’s witness, is inappropriate. The result double counts the distribution. The shareholder’s distribution, or a portion thereof, not the shareholder’s allocation of the ordinary business income or loss, is reported on the individual’s personal return as income (see e.g. WBE Exhibit 6, Form 1040, Schedule E, Part II).<sup>6</sup>

Therefore, to avoid the double count, the relevant factors are limited to wages and distributions, which is consistent with the prior administrative determinations referenced above. The following table limits the shareholders’ total compensation to wages (i.e., Form 1120S, Line 7), and distributions (i.e., Schedule K-1, Box 16D of Part III), and shows the revised totals.

<sup>5</sup> See *On Line Power Technologies* at 6-7; *Share Corp.* at 7-10; *Upstate Electrical, LLC* at 5; and *MS Analytical, LLC* at 15-18. Like KTC, On-Line Power Technologies is an “S” Corporation.

<sup>6</sup> WBE Exhibit 6 is a copy of Ms. Titus’ Individual Income Tax Return, Form 1040 for 2013. It reflects that Ms. Titus included her distribution from KTC as part of her income for this tax year.



Shareholders	WBE Exhibit	Wages	Distributions	Total
Piper Titus	17	████████	████████	████████
Daniel Titus	17	████████	████████	████████
	Difference	████████	████████	████████
Piper Titus	18	████████	████████	████████
Daniel Titus	18	████████	████████	████████
	Difference	████████	████████	████████
Piper Titus	5	████████	████████	████████
Daniel Titus	5	████████	████████	████████
		████████	████████	████████

Another reason to exclude the allocation reported in Box 1 of Part III of Schedule K-1 from the total is that the allocation is a function of the shareholder's percentage of stock ownership. Within the context of an application for WBE certification, the majority shareholder would be the woman owner, whose allocation must be greater than the male shareholders' allocations. The issue, relevant to this eligibility criterion, is whether the woman owner receives the benefits, which is reflected in the distribution. The distribution, in turn, must be reflected as income in the woman owner's personal return.

Each of KTC's tax returns provided in support of the application for WBE certification show that the sum of Daniel Titus's wages and distributions was greater than the sum of Piper Titus's wages and distributions. As a result, the Division correctly concluded that KTC did not demonstrate compliance with the eligibility criterion outlined at 5 NYCRR 144.2(c)(2). With respect to this eligibility criterion, the Director should affirm this determination.

Ms. Titus said that she has the authority to set wages, and that she changed her wages upon receipt of the Division's September 25, 2017 denial letter (*see* WBE Exhibit 2, *see also* May CD 3, Track 3 at 38:50-41:19; June CD 2, Track 3 at 37:35.) This testimony is not relevant to the captioned matter because the scope of the appeal is limited to a review of the information provided to the Division during the application process (*see* 5 NYCRR 144.4[e] and 144.5[a]). The information concerning changes to wages may be relevant, however, to any subsequent application for WBE certification (*see* 5 NYCRR 144.5[b]).

## II. Personal Net Worth

The term *woman-owned business enterprise* is defined by regulation (*see also* Executive Law § 310[15]). Pursuant to 5 NYCRR 140.1(tt)(1)(v), the definition provides the following limitation concerning the woman owner's personal net worth:

an enterprise owned, either directly or through a holding company, by an individual or individuals, whose ownership, control and operation are relied upon for certification, with an individual personal net worth at the time of application that does not exceed three million five hundred thousand dollars [\$3,500,000], as adjusted annually on the first of January for inflation according to the consumer price index of the previous year starting in 2011.

In the September 25, 2017 denial letter, the Division stated that the personal financial statement worksheet filed by Ms. Titus shows that her personal net worth exceeded three million five hundred thousand dollars, as adjusted for inflation. Given the reported value of Ms. Titus's personal net worth, the Division concluded that KTC did not comply with the regulatory definition of a woman-owned business enterprise. (*See* WBE Exhibit 2.)

The adjusted personal net worth limit applicable to the captioned application was not offered for the hearing record.<sup>7</sup> However, the Director may take administrative notice (*see* SAPA § 306[4]) of the applicable limit concerning applications for WBE certification filed in 2016 based on the 2015 consumer price index.

The dispute centers on two hearing exhibits. The first is identified as WBE Exhibit 9, and the second is WBE Exhibit 10. WBE Exhibit 9 is a copy of Attachment A titled, *NYS MWBE Certification, Individual Personal Net Worth Affidavit*. Ms. Titus signed this document before a notary public on December 8, 2015, and attached a copy of it to KTC's application for WBE certification. According to WBE Exhibit 9, Ms. Titus calculated her personal net worth to be [REDACTED]. (*See* WBE Exhibit 1 at 7 of 9, and WBE Exhibit 9; *see also* May CD 1, Track 1 at 44:36, 45:04-45:28; May CD 3, Track 1 at 33:45; June CD 1, Track 1 at 19:45.)

To complete Attachment A, the Division provides Attachment B, which is titled, *Personal Financial Statement Worksheet*. According to the Division, the forms and associated instructions to complete Attachments A and B are posted on the Division's website, as well as at a link on the New York State Contract System website. With its closing brief, the Division included a copy of the instructions for completing Attachment B. (*see* Division's closing brief at 10).

During the hearing, KTC offered a copy of the Attachment B<sup>8</sup> that served as the worksheet for WBE Exhibit 9. KTC initially identified the document as A-9.<sup>9</sup> I sustained the Division's objection to the receipt of this document into the evidentiary record. KTC did not file this version of Attachment B with its application materials. Consequently, staff did not have the document to review prior to the September 25, 2017 determination. (*See* June CD 2, Track 3 at 43:30-47:56.)

After Division staff received the organizational chart (*see* WBE Exhibit 8) in response to staff's July 21, 2017 inquiry, and reviewed KTC's tax return ending September 30, 2014, staff requested clarification of [REDACTED] due from affiliates (*see* WBE Exhibit 5, Schedule L, Statement 9; *see also* May CD 1, Track 1 at 38:59; June CD 1, Track 3 at 05:50-06:26; June CD 2, Track 3 at 18:18-18:28, 21:35-22:17). In addition, staff requested that Ms. Titus complete and

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<sup>7</sup> In the closing brief (at 2, n 2), the Division noted that during the 2019 session, the legislature increased the personal net worth limit. As of June 21, 2019, the legislation was pending before the Governor. This legislative change to the personal net worth limit is not relevant to the captioned matter, but may be with respect to a future application for WBE certification.

<sup>8</sup> On December 5, 2015, Ms. Titus signed the Attachment B worksheet associated with the individual personal net worth affidavit identified as WBE Exhibit 9.

<sup>9</sup> In the hearing record, this document is identified as WBE Exhibit 22 (*see* attached Exhibit Chart).

return a copy of Attachment B and explain the amount due from affiliates reported in the September 30, 2014 tax return in Section 9 on Attachment B. Ms. Titus completed, signed, and dated Attachment B on September 13, 2017, and filed it with the Division on that date. (See WBE Exhibit 1 at 9 of 9, and WBE Exhibit 10; *see also* May CD 1, Track 1 at 42:02, 44:02; May CD 3, Track 1 at 34:00; June CD 1, Track 1 at 20:00, and Track 2 at 22:25-26:30.)

In Attachment B, the adjusted personal net worth is listed as [REDACTED]. Although other sections of the worksheet are filled, Section 9 is blank, despite staff's instructions to complete it. (See WBE Exhibit 1 at 9 of 9, and WBE Exhibit 10.) Staff relied on the personal net worth reported in the September 13, 2017 Attachment B when staff concluded that Ms. Titus's personal net worth exceeded the regulatory limit set at 5 NYCRR 140.1(tt)(1)(v). (May CD 1, Track 1 at 46:55, 50:08-51:32; May CD 2, Track 3 at 14:20; June CD 1, Track 1 at 20:31-22:08, and Track 3 at 05:26-05:42, 08:50.)

During the hearing, Ms. Titus explained the disparity between the personal net worth calculations reported in WBE Exhibit 9 ([REDACTED]) and WBE Exhibit 10 ([REDACTED]). (See May CD 3, Track 1 at 34:00-37:34; June CD 2, Track 3 at 19:00-20:16.) In its closing brief, KTC noted that Ms. Titus provided an affidavit of her personal net worth when she filed the application for WBE certification, and that the affidavit shows that her personal net worth is less than the \$3.5 million limit (*see* WBE Exhibit 9). KTC argued that the Division cannot rely on the unsworn Statement B (*see* WBE Exhibit 10), which is a worksheet, rather than the sworn affidavit (*see* WBE Exhibit 9). According to KTC, the two documents are different, and the information in the affidavit should be relied upon in the first instance. (KTC's closing brief at 9-10; 17-18.)

Staff's reliance on WBE Exhibit 10 is substantial evidence that Ms. Titus's personal net worth exceeds the regulatory limit outlined in 5 NYCRR 140.1(tt)(1)(v) which, thereby, prevents KTC from qualifying as a WBE. With staff's September 13, 2017 request for Attachment B, staff also requested clarification of a dollar amount due from affiliates as reported on the September 30, 2014 tax return (*see* WBE Exhibit 1 at 9 of 9). KTC did not provide that information. The result was a substantial disparity in the personal net worth reported in WBE Exhibit 9 compared to what was reported in WBE Exhibit 10. As the business enterprise seeking WBE certification, KTC had the burden to provide the clarifying information and to resolve the disparity between the two documents. Accordingly, the Director should affirm the determination that Ms. Titus personal net worth exceeds the limit set by 5 NYCRR 140.1(tt)(1)(v) given the information before Division staff at the time of staff's September 25, 2017 determination.

### III. Independence

Pursuant to 5 NYCRR 144.2(a)(2), the business enterprise must show that it is an independent, continuing entity that has been actively seeking contracts or orders, and regularly and actively performs activities. In addition, 5 NYCRR 144.2(c)(2) states, in pertinent part, that an eligible applicant for WBE certification must be an independent enterprise. In the application for WBE certification, KTC stated that it provides onsite material handling services and heavy duty equipment repair services. In addition, KTC is the parent company to Page Transportation, Inc., and Page ETC, Inc., which provides long haul trucking services. (See WBE Exhibit 1 at § 3.C). According to the Division, the scope of KTC's activities is limited to providing services to

its subsidiaries and to no other entities (May CD1, Track 1 at 41:12). Based on the foregoing, the Division concluded that KTC is not an independent business enterprise as required by 5 NYCRR 144.2(a)(2) and (c)(2). (See WBE Exhibit 2.)

In the application for WBE certification, the address provided for Page Transportation, Inc., and Page E.T.C., Inc. is 2758 Trombley Road, Weedsport, New York 13166. Both enterprises are described as transportation businesses. (See WBE Exhibit 1 at § 6.F.) On January 20, 2017, Ms. Titus filed the following documents, among others, with the application for WBE certification: (1) Consolidated Balance Sheets for Keith Titus Corporation and Subsidiaries, marked as *DRAFT*, and dated September 30, 2015 (see WBE Exhibit 21); (2) M&T Bank Term Loads to Daniel K. Titus and Piper N. Titus (see WBE Exhibits 15, 16, and 19 [complete]); (3) a lease agreement (see WBE Exhibit 13). (See WBE Exhibit 1 at 7 of 9.)

In a document request made on July 21, 2017, Division staff sought information about the organizational structure of KTC and the subsidiaries identified in the certification application, as well as all other businesses associated with KTC (see WBE Exhibit 1 at 9 of 9). On July 28, 2017, Ms. Titus responded, and provided an organizational chart titled, *Keith Titus Corporation & Affiliated Entities* (see WBE Exhibit 8; see also May CD 1, Track 1 at 35:05, 36.11).

KTC is the parent company of numerous subsidiary entities identified in the organizational chart (see WBE Exhibit 8). Additional details about KTC and its subsidiaries are provided in the September 30, 2015 draft Consolidated Balance Sheet of Keith Titus Corporation and Subsidiaries (see WBE Exhibit 21). Ms. Titus explained that the corporate structure is in place to shield each line of business from liability associated with the others, which is standard business practice for a company in this industry and of this size. (See May CD 3, Track 3 at 44:20-45:44; June CD 2, Track 3 at 42:25-42:48.) Ms. Titus also explained that the two subsidiaries identified in the certification application are active, and have assets and earnings (June CD 3, Track 3 at 12:27). The other subsidiaries of KTC are: (1) KIS Logistics, Inc.; (2) John Pfrommer, LLC; (3) Impact Transport, LLC; (4) Exit 40 Truck Services, LLC; (5) Page Warehousing, LLC; and (6) Page Material Management, LLC (see WBE Exhibit 8).

In addition to KTC, Ms. Titus and her brother, Daniel Titus, own a second holding company known as Titus & Titus Holdings, LLC (TTH). The ownership interest of TTH is split 50/50 between Ms. Titus and her brother. (See WBE Exhibit 8; see also May CD 1, Track 1 at 36:51.) Because the ownership interest of TTH is split 50/50 between Ms. Titus and her brother, staff testified that TTH would not be eligible for WBE certification (see May CD 2, Track 3 at 18:45-19:00). For tax purposes, however, Mr. Griffin said that the two holding companies are distinct. As a result, he has prepared separate tax returns for each holding company. (See May CD 2, Track 3 at 30:25-30:43.)

TTH has several subsidiaries, and each subsidiary owns real estate. One of TTH's subsidiaries is 2758 Trombley Road, LLC, which owns property at 2758 Trombley Road in Weedsport, New York. (See WBE Exhibit 8; May CD 1, Track 1 at 49:35.) In December 2003, KTC and 2758 Trombley Road, LLC, entered into a lease agreement. (See WBE Exhibit 13; May CD 2, Track 3 at 17:00-18:20; June CD 2, Track 3 at 41:23).

Consistent with the Division's application instructions and recommendations made by Division staff, Ms. Titus said that she filed an application to certify KTC as a WBE in order to subsequently obtain WBE certification for each of KTC's wholly owned subsidiaries (*see* May CD 3, Track 1 at 46:15). Staff confirmed this practice by the Division concerning the certification of a holding company and its subsidiary business enterprises (*see* May CD 2, Track 3 at 5:22-06:10; June CD 2, Track 1 at 9:00-9:06). Nevertheless, staff also said that KTC would *not* be eligible for WBE certification because Ms. Titus owns TTH equally with her brother (June CD 2, Track 1 at 09:20-10:00; *see also* KTC's closing brief at 15-16). As noted above, the only relationship between the two holding companies (*i.e.*, KTC and TTH) is that 2758 Trombley Road, LLC, which is a subsidiary of TTH, rents the property it owns at 2758 Trombley Road in Weedsport to KTC (*see* June CD 3, Track 1 at 22:14-22:47).

In the closing brief, the Division contended that during the hearing, applicant provided significant details with respect to the holding companies, their ownership, their subsidiaries, and the relationships among these business enterprises. For example, the Division referenced the testimony offered by Mr. Griffin about his firm's preparation of the corporate tax returns for the holding companies and the other business enterprises, as well as Ms. Titus's personal income tax returns. Because KTC presented additional details about the two holding companies and their subsidiaries at the hearing, the Division argued that this information was not before staff during the review of KTC's application for WBE certification. The Division concluded that the information offered during the hearing should not be considered due to the limited scope of the administrative appeals hearing. (*See* Division's closing brief at 6-7.)

As part of the Division's presentation, however, staff did not provide a basis for the conclusion stated in the September 25, 2017 denial letter that KTC must operate independently from its subsidiaries in order to comply with the eligibility criteria outlined at 5 NYCRR 144.2(a)(2) and (c)(2) (*see* WBE Exhibit 2). As noted above, KTC seeks WBE certification so that its subsidiaries may subsequently apply for WBE certification. With these subsequent applications, it would be anticipated that the subsidiaries, rather than the holding company at this juncture in the certification process, would be required to show how they actively seek contracts and perform their respective business activities. Moreover, Division staff did not provide a basis for the regulatory interpretation that an applicant would not be eligible for WBE certification when, as here, that applicant's woman-owner also owns additional business enterprises where she is not the majority shareholder.

In order to determine KTC's compliance with the eligibility criteria at 5 NYCRR 144.2(a)(2) and (c)(2), the Division must provide additional guidance about the applicability and implementation of these criteria to holding companies and their respective subsidiaries (*see* May CD 2, Track 3 at 06:10-7:10). Absent such guidance, I cannot reach the question of how the eligibility criteria at 5 NYCRR 144.2(a)(2) and (c)(2) concerning independence applies to KTC and other holding companies. Accordingly, I recommend that the Director modify the determination to deny WBE status by striking the independence ground for denial.

## CONCLUSION

For the reasons outlined above, applicant has failed to meet its burden to demonstrate that the Division's determination to deny KTC's application for certification as a woman-owned

business enterprise with respect to the eligibility criterion at 5 NYCRR 144.2(c)(2), and the personal net worth limit prescribed by 5 NYCRR 140.1(tt)(1)(v) was not based on substantial evidence.

### **RECOMMENDATION**

For the reasons set forth above, I recommend that the Director modify the Division's determination to deny KTC's application for certification as a woman-owned business enterprise by striking the independence ground for denial and, as so modified, affirm the denial.

Attachments: Exhibit Chart  
CD Index

Division of Minority and Women's Business Development

Exhibit Chart  
**Matter of Keith Titus Corporation**  
**NYS DED File No. 49538**

Hearing Dates: May 14, 2019 and June 5, 2019

<b>WBE Exhibit No.</b>	<b>Division</b>	<b>Applicant</b>	<b>Description</b>
1	DED 1		Certification Application for Keith Titus Corporation (9 pages) Application No. 9074233 Started: January 19, 2016 Submitted: January 20, 2016
2	DED 2		Division's denial letter dated September 25, 2017.
3	DED 3		Applicant's appeal letter and request for hearing dated October 17, 2017.
4	DED 4		Notice of Appeal Hearing dated May 6, 2019.
5	DED 5		Keith Titus Corporation Inc. US Income Tax Return for S Corporation Form 1120S October 1, 2013 to September 30, 2014
6	DED 6		Piper T. (Titus) Kline Brian R. Kline 2013 US Individual Income Tax Return Form 1040
7	DED 7  ID only Withdrawn. <sup>10</sup>		Piper T. (Titus) Kline Brian R. Kline 2014 US Individual Income Tax Return Form 1040
8	DED 8		Keith Titus Corporation and Affiliated Entities Organizational Chart.

<sup>10</sup> See June CD 3, Track 2 at 02:05.

9	DED 9		Attachment A: NYS MWBE Certification Individual Personal Net Worth Affidavit Piper Titus Kline Sworn to December 8, 2015
10	DED 10		Attachment B: Personal Financial Statement Worksheet Piper Titus Kline Signed September 13, 2017
11	DED 11		Résumé of Piper N. Titus
12	DED 12		Résumé of Daniel K. Titus
13	DED 13		Lease Agreement between 2758 Trombley Road, LLC, and Keith Titus Corporation dated December 18, 2003.
14	DED14		Page Trucking Website <a href="http://www.pagetrucking.com">www.pagetrucking.com</a>
15	DED 15	A1	Term Note - M&T Bank June 20, 2012 Piper N. Titus <i>See WBE Exhibit 19 below</i>
16	DED 16	A2	Term Note - M&T Bank June 20, 2012 Daniel K. Titus <i>See WBE Exhibit 19 below</i>
17	DED 17	A3	Keith Titus Corporation Inc. US Income Tax Return for S Corporation Form 1120S April 1, 2012 to September 30, 2012
18	DED 18	A4	Keith Titus Corporation Inc. US Income Tax Return for S Corporation Form 1120S October 1, 2012 to September 30, 2013



19	DED 19		M&T Bank Documents Term Note Loans to Daniel K. Titus and Piper N. Titus June 20, 2012 301 page provided as PDF <i>See</i> WBE Exhibits 15 and 16 above
20		A7	Amended and Restated By-Laws of Keith Titus Corporation June 20, 2012
21		A8	Draft Consolidated Financial Statements of Keith Titus Corporation September 30, 2015
22		A9 Marked for ID only. Not Received. <sup>11</sup>	Attachment B: Personal Financial Statement Worksheet Piper Titus Kline Signed December 5, 2015
23		A5	Titus and Titus Holdings, LTD 2016 US Return of Partnership Income Form 1065

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<sup>11</sup> *See* June CD 2, Track 3 at 43:30-47:36.

Division of Minority and Women's Business Development

CD Index  
**Matter of Keith Titus Corporation**  
**NYS DEC File No. 49538**

Hearing Dates: May 14, 2019 and June 5, 2019

<b>May 2019</b>	<b>CD 1</b>	<b>Track 1</b>	<b>Direct of C. Mincey</b>	<b>05:18-51:42</b>
			Cross of C. Mincey	53:07-01:05:39
	CD 2	Track 1	Cross of C. Mincey (con't.)	00:00-14:40
		Track 2	Cross of C. Mincey (con't.)	00:00-10:35
		Track 3	Cross of C. Mincey (con't.)	00:00-19:12
			Direct of D. Griffin	28:23-43:00
	CD 3	Track 1	Cross of D. Griffin	00:00-14:46
			Re-direct of D. Griffin	14:50-17:10
			Re-cross of D. Griffin	17:12-18:34
			Re-re-direct of D. Griffin	18:35-20:00
			Direct of P. Titus	20:49-47:00
<b>June 2019</b>	CD 1	Track 1	Re-direct of C. Mincey	02:30-26:01
			Re-cross of C. Mincey	26:06-28:00
		Track 2	Re-cross of C. Mincey (con't.)	00:00-31:00
	CD 2	Track 1	Re-cross of C. Mincey (con't.)	00:00-11:08
			Cross of P. Titus	11:47-12:00
		Track 2	Cross of P. Titus (con't.)	00:00-09:20
		Track 3	Cross of P. Titus (con't.)	00:00-39:25
			Re-direct of P. Titus (con't.)	39:28-47:56
	CD 3	Track 1	Re-direct of P. Titus (con't.)	00:00-15:42
			Re-cross of P. Titus (con't.)	15:45-20:07
		Track 2		