

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

In the Matter

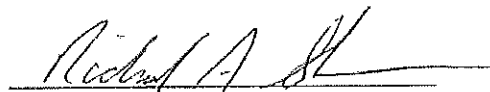
- of -

the Application of **Scherzi Systems, LLC**  
for Certification as a Women-owned Business Enterprise  
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 61587

RECOMMENDED ORDER

- by -



Richard A. Sherman  
Administrative Law Judge

July 25, 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 Scherzi Systems, LLC ("Scherzi Systems" or "applicant") certification as a women-owned business enterprise ("WBE")<sup>1</sup> be reversed for the reasons set forth below.

## PROCEEDINGS

This matter involves the appeal by applicant, 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 Scherzi Systems does not meet the eligibility criteria for certification as a WBE.

The Division denied the application (exhibit 1) filed by Scherzi Systems for WBE certification by letter dated October 10, 2017 (exhibit 12 [denial letter]). The denial letter sets forth four grounds under 5 NYCRR 144.2 for the denial. Applicant filed a notice of appeal ("notice of appeal"), dated December 8, 2017, and the Division advised applicant that the appeal hearing would be held on June 11, 2019 in Albany, New York (letter from the Division to applicant, dated May 14, 2019).

Applicant filed a pre-hearing memorandum ("memorandum"), dated June 7, 2019 wherein applicant challenges, among other things, the use of the substantial evidence standard in this proceeding (memorandum at 4-9). Division staff responded to the memorandum both at the hearing and in its closing brief.

I convened the hearing at approximately 11:00 a.m. on June 11, 2019, at the Division's offices, 625 Broadway, Albany, New York. James P. Youngs, Esq., Hancock Estabrook, LLP, appeared on behalf of applicant and called two witnesses: Dana Scherzi, Chief Executive Officer, Scherzi Systems, and James Scherzi, President, Scherzi Systems. Simon Wynn, Esq., Senior Counsel, Empire State Development, represented the Division and called one witness: Natia Simon, a senior certification analyst for the Division. All of the exhibits proffered by the parties at the hearing were received into evidence by stipulation of the parties. A list of the exhibits is appended to this report.

Consistent with 5 NYCRR 145.1(m), an audio recording of the hearing was made. A copy of the audio recording, consisting of five compact discs, was received by this office on June 14, 2019. The Division arranged to have the audio recording transcribed, however, the transcription is incomplete. Accordingly, this recommended order will cite to the transcript (cited herein as "tr" followed by the page number) where available, and to the compact disc

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<sup>1</sup>The term "women-owned business enterprise" applies to an enterprise that meets the requisite criteria on the basis of the ownership and control of one woman or of multiple women (*see* 5 NYCRR 140.1[tt] [defining a women-owned business enterprise as one that is, inter alia, "at least 51 percent owned by one or more United States citizens or permanent resident aliens who are women"]).

rights were violated by the hearing officer's adoption of the substantial evidence standard of proof, rather than the preponderance of the evidence standard" was "without merit").

Here, neither Executive Law Article 15-A nor its implementing regulations specify the evidentiary standard that is to be applied to these proceedings (*see* Executive Law § 314[3] [providing that, where an application for certification is denied, the applicant is "entitled to a hearing before an independent hearing officer"]; 5 NYCRR 145.1 [setting forth the procedures for conduct of hearings]). Accordingly, the substantial evidence standard set forth under SAPA applies to this proceeding.

## POSITIONS OF THE PARTIES

### Position of the Division

The Division cited four eligibility criteria for the denial of Scherzi Systems' application. Specifically, the Division argues that applicant failed to establish that the woman owner, Dana Scherzi, (i) made a contribution to Scherzi Systems in proportion to her equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise (exhibit 12 at 2 [citing 5 NYCRR 144.2(a)(1)]); (ii) makes decisions pertaining to the operation of the business enterprise (*id.* [citing 5 NYCRR 144.2(b)(1)]); (iii) has adequate managerial experience or technical competence to operate the business enterprise (*id.* at 3 [citing 5 NYCRR § 144.2(b)(1)(i)]); and (iv) has the working knowledge and ability needed to operate the business enterprise (*id.* [citing 5 NYCRR 144.2(b)(1)(ii)]).

### Position of Applicant

Applicant argues that "it was error" for the Division to conclude that the application failed to demonstrate that Dana Scherzi had made any contributions to Scherzi Systems and asserts that "[i]f anything, Ms. Scherzi's contributions to Scherzi Systems exceed her equity interest" (notice of appeal at 1-2). Applicant further argues that "the Division's determination that Ms. Scherzi does not make decisions pertaining to the business enterprise's operations is clearly erroneous" and that "the Division erred in determining that Ms. Scherzi lacks the managerial or technical competence to operate the business enterprise" (*id.* at 2-3).

## FINDINGS OF FACT

1. Scherzi Systems is a limited liability company, established on May 11, 2011<sup>2</sup> that offers "Custom Software," "IT Consulting," and "Professional Training and Consulting" (exhibit 1 at 2 [application, items 1.Q]; *id.* at 3 [application, items 3.B-D]; exhibit A-21 at 8 [operating agreement signature page]).

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<sup>2</sup> The application states that Scherzi Systems was established on January 1, 2014 (*see* exhibit 1 at 2 [item 1.R]). That date, however, is the date that Ms. Scherzi became a member and majority owner of Scherzi Systems under the terms of an assignment agreement (*see* exhibit A-22 at 1 [stating that the assignment agreement was "made as of this 1<sup>st</sup> day of January, 2014"]).

2. Dana Scherzi is the Chief Executive Officer of Scherzi Systems and has held a 51 percent interest in Scherzi Systems since January 1, 2014 (exhibit 1 at 2-3 [application, items 1.P, 2.A, 2.D]).

3. James Scherzi is the founder and President of Scherzi Systems and has held a 49 percent interest in Scherzi Systems since January 1, 2014 (exhibit 1 at 2-3 [application, items 2.A, 2.D]).

4. Dana Scherzi and James Scherzi are, and have been, the only directors and the only members of Scherzi Systems since January 1, 2014 (exhibit 1 at 2-3 [application, items 2.A, 2.D]).

5. Neither Dana Scherzi nor James Scherzi made a monetary contribution to Scherzi Systems for their respective ownership interests in the business enterprise (exhibit 1 at 3 [item 2.C, stating that Dana Scherzi contributed "\$0" for her interest in Scherzi Systems]; exhibit A-21 at 9 [operating agreement, exhibit A, stating that James Scherzi contributed "\$0.00" for his interest in Scherzi Systems]; tr at 28-29, 35 [Simon testimony regarding monetary capital contributions of the two owners]).

6. Prior to acquiring her ownership interest in Scherzi Systems, Dana Scherzi was a "Senior Manager" and, subsequently, a "Lead Manager" in the Information Technology ("IT") Department of AXA US (exhibit A-36) . Her responsibilities at AXA US included project management of multiple IT projects for new and existing IT products (*see id.* at 2).

7. Dana Scherzi holds multiple professional certifications in the information technology field for project management and for software testing (exhibit A-25; exhibit A-36 at 2 [listing numerous certifications in project management and software testing]; *see also* tr at 88-91 [D. Scherzi testimony that her certifications are needed for the training work that Scherzi Systems does and the certifications also "legitimize[] us as a company that can manage projects to get done in the software sphere"]).

8. Dana Scherzi has volunteered as a mentor with the Cicero-North Syracuse chapter of Girls Who Code, and also as a director and a trainer with the Syracuse Project Management Institute (exhibit 4; exhibit A-36 at 2).

9. James Scherzi does not have any specialized training, certifications, or volunteer work relating to IT project management (exhibits 3, A-41; *see also* tr at 110-111 [J. Scherzi testimony that he did not have any managerial or supervisor responsibilities at his former employer]; 119 [J. Scherzi testimony that he has no relevant licenses or certifications]; tr at 127 [J. Scherzi testimony that "[o]nly Dana has the credentials to do [training and consulting work] in the company"]).

## DISCUSSION

This report considers applicant's appeal from the Division's determination to deny certification of Scherzi Systems as a WBE pursuant to Executive Law Article 15-A. As discussed below, the Division cites one "ownership" criterion and three "operations" criteria in support of upholding the denial.

### Ownership: Contribution Proportionate to Equity Interest

The 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 Division argues that applicant failed to demonstrate that Dana Scherzi made contributions to Scherzi Systems in proportion to her ownership interest in the enterprise (exhibit 12 at 2 [citing 5 NYCRR 144.2(a)(1)]). Specifically, the Division asserts that "it is undisputed that Ms. Scherzi did not make a monetary capital contribution to the company" (staff closing brief at 2). Division staff notes that applicant's WBE application states that Ms. Scherzi contributed "zero dollars" for her 51 percent ownership interest in Scherzi Systems (*id.* [citing exhibit 1 at 3 (item 2.C)]). With regard to applicant's assertion that Ms. Scherzi's expertise satisfies the capital contribution criterion, staff argues that "it is completely irrelevant what Petitioner now claims was her capital contribution as none [was] stated anywhere in the application [and] there was no quantifiable value assigned to any alleged skills, areas of expertise, and experience in the application that was submitted to the Division for review" (staff closing brief at 4).

The record before the Division at the time of its determination to deny the application demonstrates that neither owner made a monetary contribution to the corporation at the time that they acquired their respective interests in Scherzi Systems. As noted above, the application states that in 2014 Dana Scherzi paid "\$0" for her ownership interest. The record also shows, however, that James Scherzi made no monetary contribution for his ownership interest. As set forth in the original operating agreement for Scherzi Systems, in 2011 Mr. Scherzi contributed "\$0.00" for his 100 percent interest in the business enterprise (exhibit A-21 at 9 [operating agreement, exhibit A]). Accordingly, the record demonstrates that neither owner made a monetary contribution to the business enterprise.

The eligibility criterion at issue in this proceeding expressly states that the contribution of the woman owner may be "demonstrated by, but not limited to, contributions of money, property, equipment or expertise" (5 NYCRR 144.2[a][1]). As was stated in *Matter of PamTen, Inc.*, "[t]he analysis under this criterion does not end with the determination that no monetary contribution was made by the owners. Rather, the analysis must consider non-monetary forms of contribution such as property, equipment and expertise" (*Matter of PamTen, Inc.*, Recommended Order, June 26, 2018 [adopted by Final Order of the Executive Director, July 30, 2018]).

Here, the difference between Dana Scherzi's and James Scherzi's ownership interest is two percent (i.e., Ms. Scherzi's interest is 51 percent and Mr. Scherzi's interest is 49 percent).

Accordingly, the application need only demonstrate that Dana Scherzi's contribution to the business enterprise is marginally greater than James Scherzi's contribution.

As part of the application process, applicant submitted a narrative explanation of Dana Scherzi's capital contribution. Therein, Ms. Scherzi states that, before her acquisition of a majority interest in Scherzi Systems in 2014, the business enterprise was "built on [James Scherzi's] professional services" and that he was applicant's "only engineer" (exhibit 5; *see also* tr at 111-112 [J. Scherzi testimony that before Dana Scherzi joined applicant, he was "[b]asically . . . continuing the work that I was doing at [his former employer] on a freelance basis" and that he "was laid off" by his former employer]). Ms. Scherzi further states in the narrative that the professional contribution she brought to Scherzi Systems in 2014 "was worth as much if not more than [James Scherzi's contribution]" (exhibit 5). As evidence of this she notes that she was a "significantly higher earner in the private sector ([earning] \$██████████ [compared to James Scherzi's] prior income of ~\$██████████) and my skills bill at a higher rate" (*id.*).

The application materials support Scherzi Systems' assertion that Dana Scherzi's expertise and skills greatly enhanced the company's revenue generating potential. First among Dana Scherzi's stated duties at Scherzi Systems is "Strategic Planning" to, among other things, "grow business" (*see* exhibit A-29). The application shows that there was a substantial increase in Scherzi Systems' total receipts after Ms. Scherzi acquired her ownership interest in 2014 (*see* exhibit 1 at 2 [item 1.V.][reporting total receipts for 2014, 2015, and 2016]). Total receipts improved substantially each year from 2014 through 2016, increasing from ██████████ in 2014 to ██████████ in 2016, an increase of approximately 230 percent.

Ms. Scherzi's testimony at the hearing further illustrates the dramatic growth of Scherzi Systems after she acquired her ownership interest. Ms. Scherzi testified that in 2013, the last full year that Scherzi Systems' revenue was limited to income from James Scherzi's professional services, applicant's revenue was under \$██████████ (tr at 91). She further testified that in 2018 applicant's revenue rose to "somewhere around \$██████████ to \$██████████" and that revenue is projected to be "[o]ver ██████████" in 2019 (tr at 47-48). Although this testimony was not before the Division at the time of the denial determination, it is entirely consistent with the growth that is shown in the application materials.

The increase in applicant's revenue is also reflected in the two largest-dollar contracts identified in the application. The two contracts relate to projects that commenced after Dana Scherzi acquired her interest in the business enterprise (*see* exhibit 1 at 4-5 [items 4.C, 4.D]). The largest contract is valued in excess of ██████████ dollars and is for "staffing services" (*see id.*; exhibit 7 at 1 [Description of Services § 1.1]<sup>3</sup>). The next largest contract, denominated as a "Course Instructor Agreement," is valued in excess of ██████████ (exhibit 1 at 4-5 [item 4.D]) and describes applicant as a "consultant specializing in PM and BA courses"<sup>4</sup> (exhibit 10 at 1).

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<sup>3</sup> The application states, under a column entitled "Type of Work," that the contract is for "Software Engineering" (exhibit 1 at 4 [item 4.D]). The contract proffered by the Division at the hearing clarifies, however, that the contract is for staffing services and obligates Scherzi Systems to "recruit[], screen[] and plac[e] qualified personnel . . . for [the client]" (exhibit 7 at 1 [Description of Services § 1.1]). Accordingly, Scherzi Systems may well recruit, screen and place software engineers under the contract, but Scherzi Systems is not undertaking software engineering for the client.

Under the contract, applicant is obligated to "[p]repare and deliver the course material" for "PM and BA courses" (*id.* [Responsibilities of the Instructor § 2.1]).

The narrative that applicant provided to the Division setting forth the owners' respective duties at Scherzi Systems demonstrates that Dana Scherzi's duties correlate to the services provided under these large-dollar contracts. Specifically, the narrative states that Ms. Scherzi's duties include "Develop[ing] the company's . . . strategy with regards to . . . types of services, duration of contracts, and staffing," "Staff Development," and "Corporate Training . . . in Project Management, Business Analysis, Agile Methodologies, and Waterfall SDLC" (exhibit A-29; *see also* findings of fact ¶¶ 6-8). Ms. Scherzi testified that "Agile" and "Waterfall SDLC" are project management methodologies; Agile "is a framework of different ways to run software projects" that was devised by software developers as a "better way . . . to create software" (CD3 at 16:40), and Waterfall SDLC refers to management through all phases of the "software development life cycle" (CD3 at 13:30-14:10).

The narrative describing James Scherzi's duties does not mention staffing, staff development, training, project management, business analysis or related duties (exhibit A-29; *see also* findings of fact ¶ 9). Rather, Mr. Scherzi's duties are limited to "Software Engineering" and "Finances," neither of which directly relate to the services to be provided as stated in the two large-dollar contracts (exhibit A-29).

The owners both have undergraduate degrees, but in fields other than information technology (*see* exhibits 3, 4). Dana Scherzi's degree is in astrophysics and James Scherzi's degree is in applied physics and electrical engineering (*id.*). Dana Scherzi has extensive experience in corporate IT, has "managed complex projects with budgets over \$██████████" and is a certified project manager and software tester (exhibits 4, A-25, A-36). James Scherzi has extensive experience in software development and "has partnered with" both large and small business and government organizations (exhibits 3, A-41).

I conclude that the record that was before the Division at the time of its determination to deny the WBE application does not contain substantial evidence to support the Division's assertion that "[t]he application does not include any documentation demonstrating that Ms. Scherzi has made any contributions to Scherzi Systems" (*see* exhibit 12 at 2). At the time that Ms. Scherzi acquired her ownership interest in Scherzi Systems, she brought extensive expertise in IT program management, business analysis, and training to the business enterprise, expertise that Scherzi Systems lacked. Given that there is no record of other qualifying contributions to the business enterprise from either owner, Ms. Scherzi's more extensive expertise in areas relevant to applicant's growth demonstrates that she contributed to the business enterprise in proportion to her 51 percent interest.

I am cognizant of the fact that Scherzi Systems has the burden to demonstrate that Ms. Scherzi's contributions were proportionate to her ownership interest, and that the application did not quantify the value of Ms. Scherzi's contribution to the business enterprise. "Nevertheless,

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<sup>4</sup> The contract does not define "PM" and "BA." However, in the context of the contract and the services offered by Scherzi Systems, these acronyms are assumed to mean "project management" and "business analysis," respectively (*see e.g.* exhibit A-29 [stating that Ms. Scherzi's duties include corporate training in "Project Management" and "Business Analysis"]).

where, as here, the application fails to indicate that there were any qualifying contributions (e.g., money, property, equipment, or expertise) by any owner (*see* 5 NYCRR 144.2[a][1]), the application materials should be scrutinized for evidence of a qualifying contribution" (*PamTen*, Recommended Order at 6). In this matter, Ms. Scherzi's extensive project management expertise in the information technology field, and the leveraging of that expertise to substantially grow the business enterprise, provides sufficient basis to conclude that Dana Scherzi's contribution to Scherzi Systems was greater than James Scherzi's contribution.

Operation: Decision Making, Managerial/Technical, Working Knowledge

The Division cites three separate operational criteria as bases for the denial (*see* exhibit 12 at 2-3). Division staff addresses these criteria collectively in the Division's closing brief (*see* staff closing brief at 5-8 [Point II]), and I will do the same here.

The operational criteria cited by the Division are:

- "Women do not make decisions pertaining to the operation of the business enterprise. 5 NYCRR § 144.2(b)(1)."
- "The woman owner of the business enterprise has not demonstrated adequate managerial experience or technical competence to operate the business enterprise. 5 NYCRR § 144.2(b)(1)(i)."
- "Women have not demonstrated the working knowledge and ability needed to operate the business enterprise. 5 NYCRR § 144.2(b)(1)(ii)."

(exhibit 12 at 2-3).

The Division's denial on the basis of operational criteria is premised, in large part, on the Division's assessment that the core function of Scherzi Systems is custom software development and that this is the province of James Scherzi, not Dana Scherzi (*see* exhibit 12 at 2-3 [asserting custom software development is one of applicant's primary services and is James Scherzi's area of expertise]; staff closing brief at 6 [arguing that the Division's denial on operational grounds is warranted because Dana Scherzi "does not seem to have the required skills to develop and engineer customized software — a core revenue generating function of Scherzi Systems"]).

With regard to the core functions of Scherzi Systems, the record establishes that software development is only one of the core revenue generating functions of the business enterprise. The application expressly states that Scherzi Systems also provides "IT Consulting" and "Professional Training and Consulting" (exhibit 1 at 3 [item 3.C]; *see also supra* at 6-7 [noting that Scherzi Systems' two largest-dollar contracts are for staffing services and course instruction]). These services include project management and training client personnel (*see* exhibit 1 at 3 [item 3.C] [stating that Scherzi Systems will "manag[e projects] for you or train[] your team to manage projects with Waterfall Processes or the Agile framework"]).

As previously discussed, Dana Scherzi has expertise in IT project management using both Agile and Waterfall methodologies (*see supra* at 6-7; *see also* exhibit A-36 [setting forth



Ms. Scherzi's project management experience with AXA US]). Ms. Scherzi is also a certified project manager and has several professional certifications relating to Agile (*see* exhibit A-25; *see also* findings of fact ¶ 7). There is nothing in the record that indicates James Scherzi has any certifications or specialized training relating to project management or training services (*see* findings of fact ¶ 9).

As the Division notes, custom software is also one of the principal services offered by Scherzi Systems (*see* exhibit 1 at 3 [item 3.C]). The Division argues that "Mr. Scherzi has more than ten (10) years of relevant managerial experience in the development of custom software" and although "Ms. Scherzi has significant managerial experience in management consulting, [she] does not have experience developing custom software" (exhibit 12 at 3; *see also* staff closing brief at 7 [stating that the application shows that Dana Scherzi has "considerable technical background in project management in the information technology industry, [but] provides no evidence that she has the required skills to develop and engineer applications software programming services"]).

Although the resumes of applicant's two owners evince that James Scherzi has more experience than Dana Scherzi in writing code, it is evident that Ms. Scherzi has the skills and experience to oversee such work. James Scherzi testified that "[y]ou can't confuse project management and software development. They're intricately tied" (tr at 123-124). He further testified that Dana Scherzi's "strength is in the knowledge of software development that allows her to manage the people" (tr at 124). Similarly, Dana Scherzi testified that "custom software development by definition for a project require[s] project management . . . [a]nd for people in the industry, that's implied" (tr at 104).

Dana Scherzi has 12 years of experience in corporate IT and has managed IT projects with budgets in excess of \$ [REDACTED] (exhibits 4, A-36). Immediately prior to acquiring her ownership interest in Scherzi Systems, Ms. Scherzi earned a six-figure income as a "Senior Manager" and, subsequently, as a "Lead Manager" in the IT Department of AXA US (exhibit A-36). Ms. Scherzi's responsibilities at AXA US included project management of multiple IT projects using Agile and Waterfall SDLC methodologies (*see* exhibit A-36 [stating that Ms. Scherzi "Managed IT programs for new and existing products" and noting her Agile and SDLC project management expertise and certifications]). Ms. Scherzi is also a certified software tester (exhibit A-25 at 1). Notably, Ms. Scherzi also volunteers as a mentor with the local chapter of Girls Who Code, an organization that encourages girls to learn software coding (exhibit 4).

Given the foregoing, the Division's statement that "Mr. Scherzi has more than ten (10) years of relevant managerial experience in the development of custom software" (exhibit 12 at 3), appears to more aptly apply to Dana Scherzi. As detailed above, Ms. Scherzi has significant managerial experience relating to IT projects. Consistent with this, the application states that Ms. Scherzi alone is "responsible for managerial operations" relating to "Supervising Field Operations" (exhibit 1 at 4 [item 4.A.8]). In contrast, James Scherzi's resume does not identify him as a project manager. Rather, his resume emphasizes his experience as a software coder (*see* exhibit A-41; *see also* CD2, track 2, at 48:00-49:00 [Simon testimony that, in assessing Mr. Scherzi's "managerial experience," the Division considered "his expertise in the development of custom software" rather than his management of projects or people]; tr at 110-111 [J. Scherzi testimony that he had no managerial or supervisory responsibilities at his

former employer]; tr at 114 [J. Scherzi testimony that "[a]ll I want to do is sit in front of a computer and code. I never wanted to run a company").

The Division notes that the application indicates that "the only responsibilities that Ms. Scherzi performs on her own as it pertains to the business, are Negotiating Bonding, Supervision of Field Operations, and Managing and Signing Payroll" (staff closing brief at 5-6). Of these, Division staff asserts, neither bonding nor payroll are functions of the business, leaving only supervision of field operations as a managerial operation that is solely within Dana Scherzi's purview (*id.* at 6). Staff asserts that the remaining managerial operations set forth in the application are "done by or with the help of [James Scherzi], a non-qualifying individual" (*id.*).

Although Division staff correctly identifies the managerial operations that applicant assigns to Dana Scherzi alone, or to both Dana and James Scherzi together, these designations do not, standing alone, meet the substantial evidence standard. Notably, although staff questions the extent to which certain functions assigned to Dana Scherzi are relevant to applicant's business, she is identified in each of the 12 categories as having managerial responsibility (exhibit 1 at 3-4 [items 4.A.1-12]). James Scherzi is not named under all 12 of the categories and, in each of the categories under which he is named, he is named second, after Dana Scherzi (*id.*).

Moreover, applicant provided detailed descriptions of the respective duties undertaken by Dana Scherzi and James Scherzi at Scherzi Systems (*see* exhibit A-29). Therein, the list of Dana Scherzi's duties is extensive and includes several that relate directly to Scherzi Systems' core revenue generating functions (*id.* [listing her duties to include, among other things, management of employees, corporate training, and project management consulting]). In contrast, Mr. Scherzi's duties are listed as including only software engineering and finances (*id.*). Furthermore, under the heading "Finances," Ms. Scherzi's duties include oversight of "all estimates, invoices, and contract[s]" with full signing authority for each type of document (*id.*). In contrast, James Scherzi's duties under "Finances" include only "some estimates, invoices, and contracts" with signing authority only for those documents that he "created . . . himself" (*id.*).

I conclude that the record that was before the Division at the time of its determination to deny the WBE application does not contain substantial evidence to support the Division's determination that Dana Scherzi does not (i) make decisions pertaining to the operation of the business enterprise, (ii) have adequate managerial experience or technical competence to operate the business enterprise, or (iii) have the working knowledge and ability needed to operate the business enterprise. Dana Scherzi has extensive expertise in program management and business analysis in the IT field and her experience is directly related to core revenue generating functions of the business enterprise.

## CONCLUSION

Applicant met its burden to demonstrate that the record lacks substantial evidence to support the Division's determination to deny Scherzi Systems' WBE application on the basis of whether the woman owner, Dana Scherzi, made contributions to Scherzi Systems in proportion to her equity interests in the enterprise (*see* 5 NYCRR 144.2[a][1]). Applicant also met its burden to demonstrate that the record lacks substantial evidence to support the Division's

determination to deny Scherzi Systems' WBE application on the bases that the woman owner, Dana Scherzi, does not (i) make decisions pertaining to the operation of the business enterprise (*see* 5 NYCRR 144.2[b][1]); (ii) have adequate managerial experience or technical competence to operate the business enterprise (*see* 5 NYCRR 144.2[b][1][i]); or (iii) have the working knowledge and ability needed to operate the business enterprise (*see* 5 NYCRR 144.2[b][1][ii]).

### **RECOMMENDATION**

For the reasons stated herein, the determination of the Division to deny Scherzi Systems, LLC certification as a women-owned business enterprise should be reversed.

**Matter of Scherzi Systems, LLC**  
**DED File ID No. 61587**

**Exhibit List**

<b>Exhibit #</b>	<b>Description</b>
1	Scherzi Systems WBE Application, submitted April 4, 2017
2	Scherzi Systems Operating Agreement (2013)
3	Resume of James Scherzi
4	Resume of Dana Scherzi
5	Letter from Dana Scherzi to the Division (undated)
6	Narrative Description of Dana Scherzi's Duties
7	Staffing Services Agreement with SAAB Defense and Security Corp.
8	Estimate for The Athenians of Syracuse
9	Estimate for Exhibits and More
10	Course Instructor Agreement with American Society of Professional Education
11	Independent Contractor Agreement with Kids Oneida
12	Division Denial Letter, dated October 10, 2017
A	Scherzi System WBE Application*
B	Email Chain Between Dana Scherzi and the Division

\*Exhibit A is a copy of the complete application submitted by Scherzi Systems. Individual documents are separated by numbered tabs and are cited in the recommended order by exhibit letter and document number (e.g., the 25<sup>th</sup> document is cited herein as "A-25").



audio recording (cited herein as "CD" followed by the CD number and approximate time) where the transcription is not available.

I authorized written closing briefs in this matter and directed the parties to file their respective briefs on or before July 9, 2019. At Division staff's request, I granted two short extensions to the filing deadline. The parties timely filed their respective briefs on July 12, 2019 and, thereupon, the hearing record closed.

### **ELIGIBILITY CRITERIA**

The eligibility criteria pertaining to certification as a WBE are established by regulation (*see* 5 NYCRR 144.2). For the purposes of determining whether an applicant should be granted or denied WBE status, the ownership, operation, control, and independence of the business enterprise are assessed on the basis of information supplied through the application process. The Division reviews the enterprise as it existed at the time that the application was made, based on representations in the application itself, and on information revealed in supplemental submissions or interviews that are conducted by Division analysts.

### **STANDARD OF REVIEW**

On this administrative appeal, applicant bears the burden of proving that the Division's denial of WBE certification for Scherzi Systems 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]).

Appellant objects to the use of the substantial evidence standard in this proceeding (*see* memorandum at 4-9). Applicant argues that the substantial evidence standard "applies to judicial review of agency decisions, not . . . to adjudicatory hearings, which should apply a preponderance of the evidence standard" (memorandum at 4 [Point I, heading]). Applicant's argument on this issue is without merit.

Where the evidentiary standard to be applied in an administrative hearing is not established by law or regulation, the standard set forth in the State Administrative Procedures Act ("SAPA") controls (*see Matter of Miller v DeBuono*, 90 NY2d 783, 789 [1997] [holding that where "the statute sets forth no specific evidentiary standard, the [administrative] hearing is governed by the State Administrative Procedure Act which provides: '[n]o decision, determination or order shall be made except upon consideration of the record as a whole . . . and as supported by and in accordance with substantial evidence'" (quoting SAPA § 306[1] [emphasis supplied by the Court])]; *see also Matter of Lebron v Village of Spring Val.*, 143 AD3d 720, 721-722 [2d Dept 2016] [holding that petitioner's contention that "his due process