

NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
207 GENESEE STREET
UTICA, NEW YORK 13501

In the Matter

- of -

**the Application of Arkhouse Management Co. LP
for Certification as a Minority-owned Business Enterprise
pursuant to Executive Law Article 15-A.**

NYS DED File ID No. 70997

REVISED RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
November 2, 2024

This matter considers the written appeal by Arkhouse Management Co. LP (“Arkhouse” or “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 (5 NYCRR) parts 140-144, challenging the determination of the Division of Minority and Women’s Business Development (“Division”) of the New York State Department of Economic Development (“DED”) that the business enterprise does not meet the eligibility criteria for certification as a minority-owned business enterprise (“MBE”).

PROCEDURAL HISTORY

1. On June 16, 2023, Mr. Jonathon Blackwell, as Managing Partner, applied on behalf of Arkhouse for certification as a minority-owned business enterprise (“MBE”) (DED Exhibit 1).
2. On February 5, 2024, the Division denied the application on the following grounds (DED Exhibit 2):
 - (a) Minority group members or women relied upon for certification have not demonstrated having made a capital contribution to the business enterprise proportionate to their equity interest therein, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required under 5 NYCRR § 144.2(b)(2);
 - (b) Minority group members or women do not share in the risks and profits of the business enterprise in proportion to their equity interests therein, as required under 5 NYCRR §144.2(b)(3);
 - (c) Minority group members or women must not be encumbered in their ability to realize the benefits of ownership of the business enterprise for which certification is sought, or

- subject to undue restrictions against alienating such ownership interests, as required under 5 NYCRR §144.2(b)(4);
- (d) Minority group members or women relied upon for certification must be the highest-ranking officer of the business enterprise for which certification is sought, and, where applicable, control the board of directors, as required under 5 NYCRR §144.2(d)(1);
 - (e) Minority group members or women relied upon for certification do not negotiate business contracts and represent themselves to clients as the principals of the business enterprise, as demonstrated by fully executed business agreements, as required under 5 NYCRR §144.2(d)(2); and
 - (f) The business enterprise does not operate independently, as required under 5 NYCRR § 144.2(e).
3. Arkhouse filed a Request to Appeal on March 4, 2024 (DED Exhibit 3).
 4. A notice to proceed via written appeal was sent to Arkhouse on March 6, 2024 (DED Exhibit 4).
 5. Arkhouse filed its written appeal by letter dated April 5, 2024 (APP Exhibit A).
 6. The Division filed an Affidavit of Eugenio Alcantara, Certification Director, dated September 20, 2024, and a brief of Dennie Byam Esq., counsel for the Division, dated September 20, 2024.
 7. The denial determination does not contain any facts to support NYCRR §144.2(b)(4) and the Division states that “this ground is cited in error and is hereby withdrawn”.

FINDINGS OF FACT

8. Arkhouse is an investment manager who provides expertise on investment-making decisions and manages the capital that makes those investments (DED Exhibit 1).

9. Jonathon Blackwell is a Managing Partner and has a 51% ownership interest. Gavriel Kahane has a 28% ownership interest. Paul Acquasanta has a 10% ownership interest. Yeshaya Rubin has 10% ownership interest. Arkhouse GP LLC is the General Partner and has a 1% ownership interest (DED Exhibit 1).
10. Section 2E of the application states that Mr. Blackwell contributed \$[REDACTED] as his capital contribution in the form of expertise to help start the business on December 1, 2022 (DED Exhibit 1). Mr. Blackwell also stated that Arkhouse “was capitalized through receipt of a private loan and through the expertise of its founding partners.” (DED Exhibit 5).
11. CA ARK Investor LLC made a \$[REDACTED] bridge loan to Arkhouse and Arkhouse Manager LLC. Arkhouse and Arkhouse Manager LLC were co-borrowers and signers of the loan. Both borrowers are jointly liable for paying the loan. (DED Exhibit 8).
12. First Republic Bank is the financial institution where all business bank accounts for Arkhouse are maintained (DED Exhibit 1). The bank signature card lists Paul Acquasanta as the only authorized signer of the accounts at First Republic Bank (DED Exhibit 10).
13. Mr. Blackwell is one of two Managing Partners of Arkhouse. The other Managing Partner is Gavriel Kahane. Mr. Blackwell is also a Limited Partner. (DED Exhibit 1).
14. Section 5 of The Limited Partnership Agreement states “The business and affairs of the Partnership shall be managed by the General Partner. The General Partner (or its designee(s)) shall have the power to do any and all acts necessary or convenient to, or for the furtherance of, the purposes described herein, including all powers, statutory or otherwise possessed under RULPA.” Section 8 states “the General Partner shall at the end of each year (and at such other times in their discretion) determine a Participating Percentage for each Partner for the subsequent year.” (DED Exhibit 9).

15. Article II Section 11 of the Bylaws states “Any action which may be taken at any annual or special meeting of the shareholders may be taken without a meeting on written consent, setting forth the action so taken, signed by the holders of all outstanding shares entitled to vote thereon. Written consent thus given by the holders of all outstanding shares entitled to vote shall have the same effect as a unanimous vote of the shareholders.” (DED Exhibit 9).
16. The lease for Arkhouse’s physical space was signed by Paul Acquasanta. (DED Exhibit 14) Paul Acquasanta or Gavriel Kahane signed the other contracts presented by Applicant. (DED Exhibits 13 and 15).

APPLICABLE LAW

5 NYCRR §144.2(b)(2) states in relevant part as follows:

Sources of a capital contribution. Minority group members and women relied upon for certification must demonstrate a capital contribution to the business enterprise for which certification is sought proportionate to their equity interest therein.

- (i) Sources of capital contribution. Minority group members and women may demonstrate a capital contribution by providing documentary evidence of, for example and without limitation, one of more of the following:
1. Money;
 2. Property;
 3. Equipment; or
 4. Expertise, provided that the contribution of such expertise must be uncompensated, the expertise must be specialized and directly applicable to one or more critical aspects of the operation of the business enterprise, and a reasonable assessment of the fair market value of the expertise must be clearly documented.

5 NYCRR §144.2(b)(3) states as follows:

Risks and profits. Minority group members and women relied upon for certification must share in the risks and profits of the business enterprise for which certification is sought in proportion to their equity interest therein...

5 NYCRR §144.2(d) states as follows:

Control. Minority group members or women relied upon for certification must have the power to control the business enterprise for which certification is sought. The division shall assess whether minority group members and women possess such control based upon the following criteria:

- (1) Control of business management. A minority group member or woman relied upon for certification must be the highest-ranking officer of the business enterprise for which certification is sought, and, where applicable, control the board of directors or serve as a general partner. Any agreements describing the management of the business enterprise shall be consistent with the foregoing.
- (2) Control of business negotiations. Minority group members and women relied upon for certification must negotiate business contracts and represent themselves to clients as the principals of business entities for which certification is sought, as demonstrated by fully executed business agreements.

5 NYCRR §144.2(e) states as follows:

Independence. Business enterprises for which certification is sought must operate independently. In order to determine whether such business enterprises operate independently, the division shall consider but not be limited to the following criteria:

- (1) Whether the business enterprise shares resources with another entity, including, but not limited to, personnel, equipment, office space, warehouse and other storage space, and yard space;
- (2) Whether the business enterprise transacts business primarily with one other entity; and
- (3) Whether the business enterprise receives tangible benefits as a result of a connection to another entity, and whether such benefits are consistent with standard industry practices.

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 Arkhouse for certification as a MBE 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 Division staff’s conclusions and factual determinations are not supported by “such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact.” (*Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d 494, 499 [2011]).

The review is limited to such information that was before the division at the time of the denial determination (5 NYCRR 145.2(b)(1)). Evidence that seeks to clarify and explain previously submitted materials will be considered, however new evidence will not be considered. *See Scherzi Systems, LLC v. White*, 197 A.D.3d 1466 (3d Dept 2021).

DISCUSSION

I. Ownership

The Division interprets 5 NYCRR §144.2(b)(2) to require an applicant to demonstrate that the minority-owner’s contribution came from assets belonging solely to the minority-owner. Given this criterion, the Division consistently denies applications for MWBE certification where, as here, an applicant fails to substantiate the source of the capital contribution by the minority-owner. *See Matter of Otone Mechanical Construction, Inc.*, Recommended Order dated April 24, 2015 (Final Order 17-28, dated May 2, 2017), *Matter of Spring Electric, Inc.*, Recommended Order dated March 17, 2017 (Final Order 17-21, dated March 27, 2017).

The Applicant bears the burden in establishing that he has met this certification requirement. Failure to satisfy this burden is proof that the denial was supported by substantial evidence. *See A.A.C. Contracting, Inc. v. NYS Dept. of Economic Development*, 195 A.D. 3d 1284, 151 NYS 3d 187 (3d Dept. 2021).

It is the responsibility of the applicant “to clearly identify, quantify, and explain on the certification application, what is to be considered a capital contribution.” *Matter of Scherzi Systems*, Final Order 19-16, dated September 6, 2019, *Scherzi Systems, LLC v. White*, 197 AD 3d 1466 (3d Dept. 2021).

Section 2E of the application states that Mr. Blackwell contributed \$[REDACTED] as his capital contribution in the form of expertise to help start the business on December 1, 2022 (DED Exhibit 1). Mr. Blackwell also stated that Arkhouse “was capitalized through receipt of a private loan and through the expertise of its founding partners.” (DED Exhibit 5).

CA ARK Investor LLC made a \$[REDACTED] bridge loan to Arkhouse and Arkhouse Manager LLC. Arkhouse and Arkhouse Manager LLC were co-borrowers and signers of the loan. Both borrowers are jointly liable for paying the loan. (DED Exhibit 8).

5 NYCRR §144.2(b)(2)(i) states that “Minority group members or women may demonstrate a capital contribution by providing documentary evidence of ... (4) Expertise, provided that the contribution of such expertise must be uncompensated, the expertise must be specialized and directly applicable to one or more critical aspects of the operation of the business enterprise, and a reasonable assessment of the fair market value of the expertise must be clearly documented.” Where applicant provided no valuation of the owner’s expertise, the Division was not able to ascertain whether the contribution was proportionate. *Matter of JVR Electric, Inc.*, Recommended Order dated August 31, 2016, Final Order 16-43 dated September 9, 2016.

In response to the Division’s request for clarification on Mr. Blackwell’s capital contribution of his expertise, Mr. Blackwell stated “this amount was quantified based upon the value of the experience that Mr. Blackwell, through his prior experience in the real estate and asset management sector...contributed to Arkhouse Management Co. LP (“Arkhouse”), his professional

network that ultimately enabled the firm to receive operational funding and his time spent in setting up the business without compensation during the months of July 2022 through November 2022.” (DED Exhibit 7).

Although applicant stated that no W-2s were issued for 2022, there is no documentation that reflects an agreement between Mr. Blackwell and Arkhouse that he was going to work uncompensated in exchange for his expertise to represent his capital contribution to Arkhouse. (DED Exhibit 6) Additionally, no documentation was submitted that clearly established the fair market value of his expertise, as a capital contribution.

Loans do not constitute contributions to the business, as they are viewed as an extension of credit in anticipation of repayment. See *Matter of Pam Ten*, Recommended Order dated June 26, 2018, Final Order 18-38, dated July 30, 2018. When a minority owner finances the purchase of the business through loans, the Division will evaluate the terms of the loan to determine if the loan is guaranteed and repaid by the minority owner, and thus qualifies as a capital contribution. *Matter of Mac Fhionaghaile & Sons Electrical Contracting*, Recommended Order dated November 16, 2017, Final Order 18-01, dated January 3, 2018.

The loan from CA Ark Investor LLC cannot be considered a capital contribution for the following reasons: (a) loan is to be repaid by Arkhouse and Arkhouse Manager LLC; (b) there are no details regarding how much of the loan is allocated to each borrower; and (c) the loan proceeds are comingled between Arkhouse and Arkhouse Manager LLC; which makes Arkhouse Manager LLC equally liable for repayment of the loan. Also, Mr. Blackwell is not personally liable for repayment of the loan. (DED Exhibit 8). When a loan is taken out by the business and not by the owner, it cannot be considered as a capital contribution. See *Matter of Jason Office Products Inc.*, Recommended Order dated November 22, 2023, Final Order 23-12, dated March 8, 2024. Even if

the loan is allocated to the individual owners, they are all jointly liable for the loan, which is not proportionate to Mr. Blackwell's ownership interest.

Additionally, the loan was not taken out until March 26, 2023, more than 3 months after Mr. Blackwell obtained his ownership shares (December 1, 2022) (DED Exhibits 1 and 8). Therefore, the loan was not taken out to provide for the shares Mr. Blackwell obtained in December 2022.

Applicant argues on appeal that "The Loan Agreement implies a valuation of Arkhouse that was in excess of \$ [REDACTED] and therefore implies that Mr. Blackwell's contribution to the goodwill of Arkhouse is well in excess of \$ [REDACTED]." (APP Exhibit A). This is inconsistent with the information provided with the application regarding his contribution, which did not "clearly identify, quantify, and explain on the certification application, what is to be considered a capital contribution." *Matter of Scherzi Systems*, Final Order 19-16, dated September 6, 2019, *Scherzi Systems, LLC v. White*, 197 AD 3d 1466 (3d Dept. 2021).

The Division's determination to deny the application on the basis that Arkhouse failed to demonstrate that Mr. Blackwell made capital contributions to Arkhouse in proportion to his ownership interest, as required under 5 NYCRR §144.2(b)(2) is supported by substantial evidence.

The Division denied also denied Arkhouse's application for certification as a MBE on the basis that the applicant business failed to demonstrate that Mr. Blackwell shared in the risks and profits in proportion to his equity interest therein, as required by 5 NYCRR § 144.2(b)(3). (DED Exhibit 2). 5 NYCRR §144.2(b)(3) requires that the minority-owner must enjoy the customary incidents of ownership and must share in the risks and profits in proportion to his ownership interest in the business. It is well settled that the Division may rely upon financial records as support for the determination that an applicant does not share in the risks and profits in proportion

with his ownership interest. See *Sunrise Credit Services, Inc. v. Zapata*, 57 Misc. 3d 1225 (Sup. Ct. NY County, 2017).

Loans and guarantees are not enough to satisfy the requirement that the owner share in the risks in proportion to his ownership interest. See *Matter of Frank Scobbo Contractors, Inc.*, Recommended Order dated August 16, 2023, Final Order 23-08, dated September 8, 2023. If the owner relied upon for certification does not bear the financial risks associated with operating the business, he does not meet this requirement. See *Matter of Tambe Metal Products, Inc.*, Recommended Order dated January 19, 2017, Final Order 17-05, dated January 24, 2017.

Mr. Blackwell submitted a Loan Agreement with the application, representing the loan that was used to help fund the business. This agreement provided that CA ARK Investor LLC made a \$ [REDACTED] loan to Arkhouse and Arkhouse Manager LLC. Arkhouse is neither solely receiving the loan proceeds nor solely responsible for repaying the loan. (DED Exhibit 8).

On appeal, Mr. Blackwell cites the Limited Partnership Agreement which states “any net profits or net losses of the Partnership shall be allocated to the Partners in proportion to the Participating Percentages of the Partners in effect for that year... Arkhouse and Arkhouse Manager essentially act as a single business and the necessity for creating Arkhouse Manager is due to legal and regulatory requirements within the investment management industry.... Mr. Blackwell is also a 51% owner of Arkhouse Manager, and the remainder of the owners of Arkhouse Manager are virtually identical to Arkhouse... Mr. Blackwell’s ownership of Arkhouse and Arkhouse Manager form a substantial portion of his net worth... If there was a default under the Loan Agreement which provided recourse against Arkhouse or Arkhouse Manager, Mr. Blackwell would bear the loss of his investment.” (APP Exhibit A). However, Mr. Blackwell’s Personal Financial Statement

Worksheet does not list Arkhouse or Arkhouse Manager LLC as an asset or liability (DED Exhibit 16).

The Division's determination to deny the application on the basis that Arkhouse failed to demonstrate that Mr. Blackwell shares in the risks of the business in proportion to his ownership interest, as required under 5 NYCRR §144.2(b)(3) is supported by substantial evidence

II. Control

The Division also denied certification on the ground that Mr. Blackwell is not the highest-ranking officer, and where applicable does not control the board of directors, or serve as a General Partner, as required under 5 NYCRR §144.2(d)(1).

Mr. Blackwell is one of two Managing Partners of Arkhouse. The other Managing Partner is Gavriel Kahane. Mr. Blackwell is also a Limited Partner. Pursuant to the Amended and Restated Limited Partnership Agreement, the business and affairs of the Partnership shall be managed by the General Partner. The only General Partner of Arkhouse is Arkhouse GP LLC. (DED Exhibits 1 and 9). Section 5 of the Limited Partnership Agreement states "The business and affairs of the Partnership shall be managed by the General Partner. The General Partner (or its designee(s)) shall have the power to do any and all acts necessary or convenient to, or for the furtherance of, the purposes described herein, including all powers, statutory or otherwise possessed under RULPA." Section 8 states "the General Partner shall at the end of each year (and at such other times in their discretion) determine a Participating Percentage for each Partner for the subsequent year." (DED Exhibit 9).

Mr. Blackwell's title as Managing Partner/Member and Limited Partner does not give him the ability to control the business affairs of Arkhouse. Only the General Partner, Arkhouse GP, LLC, has such power. (DED Exhibit 9).

Mr. Blackwell argues on appeal that because he is the majority owner of Arkhouse GP, LLC, he therefore is the 1% General Partner of Arkhouse. (APP Exhibit A). This is new evidence that was not submitted with the application and therefore will not be considered. See *Scherzi Systems, LLC v. White*, 197 A.D.3d 1466 (3d Dept 2021). Also, Section 5(c) of the Limited Partnership Agreement states that actions including the creation of an annual budget, creation of a business plan, the sale and conveyance of property, entering into contracts, creation of debt or contract obligations, distribution of cash or property and removal of any existing Members requires the approval of Gavriel Kahane. (DED Exhibit 9).

Mr. Blackwell is not the highest-ranking officer, since he is one of two Managing Partners, and is not the General Partner (DED Exhibits 1 and 9).

The Division's determination to deny the application on the basis that Arkhouse failed to demonstrate that Mr. Blackwell is the highest-ranking officer or serves as a General Partner, as required under 5 NYCRR §144.2(d)(1) is supported by substantial evidence.

The Division also found that Mr. Blackwell does not negotiate business contracts and represent himself to clients as the principal of the business, as demonstrated by fully executed business agreements, as required under 5 NYCRR §144.2(d)(2). Signing contracts demonstrates that a minority-owner exercises appropriate control over a business enterprise with respect to business negotiations. See *Matter of Darr Construction Equipment Corp.*, Recommended Order dated August 30, 2022, Final Order 22-11 dated November 7, 2022

First Republic Bank is the financial institution where all business bank accounts for Arkhouse are maintained (DED Exhibit 1). The bank signature card lists Paul Acquasanta as the only authorized signer of the accounts at First Republic Bank (DED Exhibit 10). Mr. Blackwell is not a signatory on Arkhouse's bank accounts. Also, Mr. Blackwell submitted several contracts,

including the lease for Arkhouse's physical space, which was signed by Paul Acquasanta. (DED Exhibit 14) Mr. Blackwell did not sign any of the contracts. Paul Acquasanta or Gavriel Kahane signed the contracts. (DED Exhibits 13 and 15).

On appeal, Mr. Blackwell notes that he signed the Loan Agreement with CA Ark Investor LLC (APP Exhibit A). However, this is the only document provided to show his signature on a contract and does not overcome the other documentation submitted showing Mr. Acquasanta or Mr. Kahane signing the contracts.

The Division's determination to deny the application on the basis that Arkhouse failed to demonstrate that Mr. Blackwell negotiates business contracts and represents himself to clients as the principal of the business, as demonstrated by fully executed business agreements, as required under 5 NYCRR §144.2(d)(2) is supported by substantial evidence.

III. Independence

The Division further found that Arkhouse is not an independent business enterprise, as required under 5 NYCRR §144.2(e). This section considers "(1) whether the business enterprise shares resources with another entity, including, but not limited to, personnel, office space, warehouse and other storage space, and yard space; (2) whether the business enterprise transacts business primarily with one other entity; and (3) whether the business enterprise receives tangible benefits as a result of a connection to another entity."

As noted above, Mr. Blackwell submitted a Loan Agreement with the application, representing the loan that was used to help fund the business. This agreement provided that CA ARK Investor LLC made a \$[REDACTED] loan to Arkhouse and Arkhouse Manager LLC. This Agreement makes both companies jointly liable for the loan. Arkhouse Manager LLC is a separate entity that is equally liable with Arkhouse for monies borrowed by Arkhouse and Arkhouse

Manager LLC. (DED Exhibit 8). Therefore, Arkhouse is sharing resources with another entity and receiving tangible benefits as a result of the connection with that entity.

Mr. Blackwell argues on appeal that Arkhouse is an independent because “it is standard industry practice for a unified fund business, which is the business of Arkhouse, to be executed by establishing separate limited liability companies as the general partner of the pooled investment vehicles they manage... Therefore, Arkhouse operates independently and does not rely upon another business enterprise to conduct its operations other than as a result of its connection to Arkhouse Manager, which is standard industry practice within the investment management industry.” (APP Exhibit A). However, Arkhouse Manager LLC is an affiliate of Arkhouse and the two businesses share owners.

The Division’s determination to deny the application on the basis that Arkhouse failed to demonstrate that Arkhouse operates independently, as required under 5 NYCRR §144.2(e) is supported by substantial evidence.

CONCLUSION

Arkhouse did not meet its burden to demonstrate that the Division’s determination to deny its application for certification as a minority-owned business enterprise with respect to the eligibility criteria at 5 NYCRR §§144.2(b)(2), 144.2(b)(3), 144.2(d)(1), 144.2(d)(2), and 144.2(e) was not based on substantial evidence. The Division has withdrawn the denial ground pertaining to NYCRR §144.2(b)(4).

RECOMMENDATION

For the reasons set forth above, I recommend that the Director affirm the Division's determination to deny Arkhouse's application for certification as a minority-owned business enterprise.

In the Matter of Arkhouse Management Co. LP
DED File ID No. 70997
Exhibit Chart

| Exhibit #: | Description of the Exhibits | Offered (Yes/No) | Admitted (Yes/No) |
|------------|---|------------------|-------------------|
| APP A | Appeal Submission | Y | Y |
| DED 1 | Application for Certification | Y | Y |
| DED 2 | Denial Letter | Y | Y |
| DED 3 | Applicant's Request to Appeal | Y | Y |
| DED 4 | Notice to Proceed Via Written Appeal | Y | Y |
| DED 5 | June 14, 2023 Application Narrative Response | Y | Y |
| DED 6 | November 9, 2023 Application Narrative Response | Y | Y |
| DED 7 | December 19, 2023 Application Narrative Response | Y | Y |
| DED 8 | March 26, 2023 Loan Agreement | Y | Y |
| DED 9 | December 1, 2022 Amended and Restated Limited Partnership Agreement | Y | Y |
| DED 10 | First Republic Business Master Signature Card | Y | Y |
| DED 11 | Jonathon Blackwell's Resume | Y | Y |
| DED 12 | Gavriel Kahane's Resume | Y | Y |
| DED 13 | December 28, 2022 Linear Technologies Contract | Y | Y |
| DED 14 | Arkhouse Management Co. LP Lease | Y | Y |
| DED 15 | Longacre Square Partners May 15, 2023 Contract | Y | Y |
| DED 16 | Jonathon Blackwell's Personal Financial Statement Worksheet | Y | Y |

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|--------|-------------------------------|---|---|
| DED 17 | Yeshaya "Shay" Rubin's Resume | Y | Y |
| DED 18 | Scarlett Adler's Resume | Y | Y |
| DED 19 | Paul Acquasanta's Resume | Y | Y |