Dated: November 17, 2023
The following is ORDERED:

M. Ruthie Hagan
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re:

Holiday Ham Holdings, LLC and	Case No. 23-23313
Holiday Erin LLC,	Case No. 23-23685
Debtors.	Chapter 11 Subchapter V

MEMORANDUM OPINION AND ORDER ON DEBTORS' EXPEDITED MOTION TO SUBSTANTIVELY CONSOLIDATE CASE

This matter came before the Court upon the Motion of both Holiday Ham Holdings, LLC and Holiday Erin LLC and to Substantively Consolidate Case [DEs 73, 20] filed on August 9 and August 8, 2023, respectively, and ErinWay Partners, L.P.'s Objection [DEs 88, 34] filed on August 22, 2023. The Court held a hearing on August 30, 2023, and upon reviewing the supporting documentation and hearing arguments of counsel, the Court held a ruling in abeyance.

This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O); accordingly this Court has the statutory and constitutional authority to hear and determine these proceedings subject to the statutory appellate provisions of 28 U.S.C. § 158(a)(1) and Part VIII ("Bankruptcy Appeals") of the Federal Rules of Bankruptcy Procedure. Regardless of whether specifically referred to in this decision, the Court has examined the submitted materials, considered the statements of counsel, testimony of witnesses, and reviewed the entire record of the cause. Based upon that review, and for the following reasons, Debtors' Expedited Motion to Substantively Consolidate these cases is hereby **GRANTED**.

BACKGROUND FACTS AND PROCEDURAL HISTORY

Holiday Ham Holdings, LLC (individually, "Holiday Ham") and Holiday Erin LLC (individually, "Holiday Erin") (collectively, the "Holiday Entities") filed their respective Chapter 11 Subchapter V bankruptcy petitions on July 7 and July 28, 2023. The Holiday Entities are represented by the same counsel. Although Holiday Erin is a subsidiary of Holiday Ham, the two entities initially elected to file and pursue separate bankruptcy cases. However, each Debtor has now filed identical Expedited Motions to Substantively Consolidate Case. ErinWay Partners, L.P. ("ErinWay"), Holiday Erin's landlord, is the only party to object to consolidation.

In support of their Motion to Consolidate, Debtors allege that Holiday Erin is devoid of assets, and its only liability is to its landlord, ErinWay;[1] Holiday Erin's bank account that existed prior to the bankruptcy—but has since been closed for months prior to bankruptcy—was a "sweep" account, wherein the balance of the account was "swept" (i.e., deposited) into the accounts of

[1] However, since filing, Holiday Erin believes there is an existing unsecured debt to TOAST, a creditor of Holiday Ham as provider of Point-of-Sale equipment, in the amount of $68,222.00. Debtors' Mot. Substant. Consol. Case, p. 1. Holiday Erin's Schedule E/F names TOAST as a nonpriority creditor but lists the amount of claim as $0.00. Pinnacle Bank is the secured creditor of Holiday Ham, Holiday Erin and Holiday Germantown - the three entities that were operating at the time of these bankruptcy cases.

Holiday Ham at the end of each day; Holiday Ham handled—and will continue to handle—all bills and expenses of Holiday Erin; and that Holiday Erin maintained limited financial records while operating as a subsidiary and/or "profit center" of Holiday Ham (e.g., Holiday Ham even went as far as filing and paying all taxes owed by Holiday Erin). Debtors' Mot. Substant. Consol. Case, pp. 1-2. Further, the Holiday Entities allege that substantive consolidation in the instant cases is necessary to both avoid unnecessary costs, such as duplication of attorney time and expenses, and allow for an orderly plan of liquidation. *Id.* at 2.

In its lengthy Objection, landlord ErinWay alleges that allowing the substantive consolidation of the Holiday Entities' cases would be unduly and irreparably prejudicial to ErinWay by forcing it into a pool with Holiday Ham's creditors, which would serve to dilute ErinWay's claim in the amount of $189,561.05. Creditor's Obj., pp. 2, 7, 9. By keeping the cases separate, ErinWay maintains that it would be more likely to recover the full amount that it is owed and that any remaining equity—based on a $600,000.00 "going concern" value—would pass to Holiday Ham as sole member of Holiday Erin, which would benefit Holiday Ham's creditors. *Id.* at 9.

ErinWay also contends that the Holiday Entities: (1) failed to establish how they disregarded or abandoned the corporate structure or formalities such that their creditors, including ErinWay, perceived them to be a single entity; (2) failed to allege how the assets of Holiday Entities are so "scrambled" that unwinding them would do more harm than good; and (3) failed to show that untangling the two estates would be overly burdensome. *Id.* at 7-9.

In support of these contentions, ErinWay first points to the history of the lease between the parties, stating that the original agreement[2] was between Holiday Ham and Turkey, Inc. and White

[2] Described as a "Standard Commercial Shopping Center Lease . . . for lease and use of the premises located at 585 Erin Drive, Memphis, TN 38119."

Station Partners, L.P., which was then assigned to Holiday Erin and ErinWay. *Id.* at 2. The terms of the lease preclude further assignment by Holiday Erin, including to a related entity, demonstrating that the lease is between ErinWay and Holiday Erin—not Holiday Ham—with who ErinWay maintains it had no dealings respecting the lease. *Id.* at 7. Next, it notes that a Business Information Search on the Tennessee Secretary of State's website demonstrates that Holiday Ham and Holiday Erin are both presently active, distinct, and separate entities under the laws of Tennessee. *Id.* In addition, ErinWay refutes that Holiday Erin's "sweep" account, in and of itself, establishes interconnectedness of it and Holiday Ham, or that Holiday Erin operating as a "profit center" for Holiday Ham, which filed federal taxes on behalf of Holiday Erin, renders the entities commingled. *Id.* In fact, ErinWay contends that the allegations included in the Motion to Consolidate strongly suggest that Holiday Erin kept separate financial records. *Id.*

Strengthening its language, ErinWay states "[t]here can be no question that [the Holiday Entities] maintained separate corporate formalities and identities prior to either of Debtors' respective Petition Dates." *Id.* Although the account in question was a "sweep" account, it was nevertheless owned by Holiday Erin and served as the account through which Holiday Erin conducted its own operations. *Id.* at 8. According to ErinWay, this was the case up until the Holiday Entities' petition dates, upon which Holiday Erin's bank account was closed. *Id.* ErinWay notes that to date, "[Holiday Erin] has offered no explanation as to why Erin's pre-petition bank account was closed, what is currently happening to the funds that belong to [Holiday Erin] and its separate bankruptcy estate, or why it would be unduly burdensome to resurrect [Holiday Erin's] separate bank account." *Id.* Further, "the fact that [Holiday Erin] maintained a separate bank account . . . inherently discounts the argument that [Holiday Erin] and [Holiday Ham's] finances are 'hopelessly' commingled." *Id.*

Finally, ErinWay states that it has no objection to a joint administration of Holiday Erin's case with Holiday Ham's case pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure, acknowledging the "administrative convenience that may be afforded." *Id.* at 9-10. However, ErinWay objects to the substantive consolidation of the cases, and respectfully requests this Court to deny the Debtors' Motion. *Id.* at 10.

At a hearing held on August 30, 2023, the Court heard arguments from counsel regarding the Holiday Entities' Expedited Motion to Substantively Consolidate Case, as well as testimony from two witnesses—Holiday Ham's President, Mr. Lucius "Trey" D. Jordan, III, and its Chief Administrative Officer, Mr. John Strand. At close, the Court took the matter under advisement, holding a ruling in abeyance, and now addresses the issue before the Court in this Opinion and Order.

LAW

Substantive consolidation is defined as "a judicially created doctrine, stemming from the Court's equitable powers under § 105 of the Bankruptcy Code, that treats separate entities as one, pooling their assets into a common fund that can be used to satisfy the liabilities of both entities." *Bavely v. Daniels* (*In re Daniels*), 641 B.R. 165, 191 (Bankr. S.D. Ohio 2022) (*citing Huntington Nat'l Bank v. Richardson* (*In re Cyberco Holdings, Inc.*), 734 F.3d 432, 438-39 (6th Cir. 2013). Its purpose is "to ensure the equitable treatment of all creditors . . . . [and] functions as 'an alternative to avoidance actions and other more specific measures to corral and distribute assets.'" *Id.* (*quoting Union Savs. Bank v. Augie/Restivo Baking Co. (In re Augie/Restivo Baking Co.),* 860 F.2d 515, 518 (2d Cir. 1988)*, Alexander v. Compton (In re Bonham),* 229 F.3d 750, 764 (9th Cir. 2000)*, and Hardesty v. City Med. Nursing Ctr., LLC* (*In re Felix*), 572 B.R. 892, 893 (Bankr. S.D. Ohio 2017)). Because substantive consolidation has a profound effect on creditor's rights, it is no

mere procedural formality; rather, it is considered an extraordinary remedy to be used sparingly, only when no other adequate remedies are available. *Id.* at 191-92 (citations omitted).

Many courts have articulated tests that are useful in determining whether substantive consolidation is warranted in a given case. Although the issue of substantive consolidation has been discussed by the Sixth Circuit, the Circuit court has yet to articulate a test of its own or to adopt one of the many available tests from other circuits in order to provide instruction to its lower courts. *Spradlin v. Beads and Steeds Inns, LLC* (*In re Howland*), 674 F. App'x 482, 488 n.3 (6th Cir. 2017) ("This court has not adopted a test for evaluating a substantive consolidation claim." (*citing In re Cyberco Holdings, Inc.*, 734 F.3d 432, 439 (6th Cir. 2013))). This lack of direction permits this Court the freedom to pioneer its own trail, or perhaps follow in the footsteps of another.

Although there are currently four separate and distinct tests available—the Second Circuit's *Augie/Restivo*, the Third Circuit's *Owens Corning*, the Eleventh Circuit's *Eastgroup*, and the D.C. Circuit's *Auto-Train*—they each share two effectively common elements: (1) the entities shared a substantial identity pre-petition; and (2) consolidation is necessary to avoid some harm or realize some benefit. *See In re Owens Corning*, 419 F.3d 195, 211 (3rd Cir. 2005); *Eastgroup Props. v. S. Motel Ass'n, Ltd.*, 935 F.2d 245, 249 (11th Cir. 1991); *Union Sav. Bank v. Augie/Restivo Baking Co., Ltd.* (*In re Augie/Restivo Baking Co., Ltd.*) 860 F.2d 515, 518 (2d Cir. 1988); *Drabkin v. Midland-Ross Corp.* (*In re Auto-Train Corp., Inc.*), 810 F.2d 270, 276 (D.C. Cir. 1987). Given these similarities, it would be difficult to maintain that following any one of them would lead this Court astray in analyzing the merits of substantive consolidation in the instant case. However, the Court is drawn to one test in particular.

Rendered in 2005, *Owens Corning* had the good fortune of being decided 14, 17, and 18 years after *Eastgroup*, *Augie/Restivo*, and *Auto-Train*, respectively. This positioning permitted the Third Circuit to analyze the legal landscape regarding substantive consolidation in the intervening time between those courts' decisions and its own. What this revealed was that "most courts slipstreamed behind two rationales—those of the Second Circuit in *Augie/Restivo* and the D.C. Circuit in *Auto-Train*." *In re Owens Corning*, 419 F.3d at 207. This allowed the Third Circuit to analyze its own case history, revealing that despite having "commented on substantive consolidation only generally . . . if presented with a choice of analytical avenues, we favor essentially that of *Augie/Restivo*." *Id.* at 209. The reason for this preference is that *Auto-Train* included a "low bar of avoiding some harm or discerning some benefit by consolidation," which to the Third Circuit "fails to capture completely the few times substantive consolidation may be considered and then, when it does hit one chord, it allows a threshold not sufficiently egregious and too imprecise for easy measure." *Id.* at 210. While somewhat resistant towards a checklist approach that it felt "[t]oo often . . . fail[s] to separate the unimportant from the important" and "often results in rote following of a form containing factors where courts tally up and spit out a score without an eye on the principles[3] that gave the rationale for substantive consolidation," *Id.,* the Third Circuit ultimately *did* adopt what has been characterized as a variation of *Augie/Restivo*. *Paris v. Walker* (*In re Walker*), 566 B.R. 503, 530 (Bankr. E.D. Tenn. 2017).

> For this test,
>
> [W]hat must be proven (absent consent) concerning the entities for whom substantive consolidation is sought is that
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> (i) prepetition they disregarded separateness so significantly their creditors relied on the breakdown of entity borders and treated them as one legal entity, **OR**

[3] *See In re Owens Corning*, 419 F.3d at 211, for a list of principles the Third Circuit focused on.

(ii) postpetition their assets and liabilities are so scrambled that separating them is prohibitive and hurts all creditors.

In re Owens Corning, 419 F.3d at 211 (emphasis added). As this test is formed using the disjunctive "or," the burden is squarely on the proponent(s) of substantive consolidation to demonstrate one element, or the other. In demonstrating the first element, a *prima facie* case "typically exists when, based on the parties' prepetition dealings, a proponent proves corporate disregard creating contractual expectations of creditors that they were dealing with debtors as one indistinguishable entity." *Id.* at 212 (citations omitted). A creditor opposing consolidation can defeat this *prima facie* showing if it can prove both that it will be adversely affected and actually relied on the separate existence of the entities to be consolidated. *Id.* As for the second element, the Third Circuit is of the opinion that it "needs no explanation." *Id.*

This Court is satisfied that the *Owens Corning* analysis will serve it well for its intended purposes. This approach has been met with similar approval and has been used by sister courts within our Circuit. *See Spradlin v. Beads and Steeds Inns, LLC* (*In re Howland*), 579 B.R. 411, 420 (E.D. Ky. 2016); *Simon v. ASIMCO Techs., Inc.* (*In re American Camshaft Specialties, Inc.*), 410 B.R. 765, 787 (Bankr. E.D. Mich. 2009). As such, the Court is comfortable in endorsing the use of the *Owens Corning* analysis for addressing future substantive consolidation issues that come before it.

ANALYSIS

Because the burden is on the proponents of substantive consolidation, it is necessary that the Court begin with the Holiday Entities' Expedited Motion to Substantively Consolidate Case to determine whether that burden has been met. Should they make a *prima facie* showing as to the first element, the burden will then shift to ErinWay to prove that it (1) will be adversely affected; and (2) actually relied on the separate existence of the Holiday Entities. As a reminder, the

proponents here need only demonstrate one rationale, or the other, in order to be successful. The Court will consider each in turn.

In support of the first element, which requires the proponent to demonstrate a pre-petition disregard for corporate formalities to such a degree that creditors treated two entities as one, the Holiday Entities' Motion states that Holiday Ham is a holding company, of which Holiday Erin is a subsidiary, and that further, Holiday Erin holds no assets; that Holiday Erin's pre-petition bank account, which has since been closed, was a "sweep account" wherein the balance at the end of each night was "swept" and deposited into an account belonging to Holiday Ham; that Holiday Ham paid all of Holiday Erin's bills and/or expenses; and that Holiday Erin operated strictly as a profit center of Holiday Ham, resulting in limited financial recordkeeping, including tax records. Holiday Erin's tax returns were filed by Holiday Ham, and Holiday Erin's tax liabilities were paid by Holiday Ham.

In attempting to rebut that it treated Holiday Ham and Holiday Erin as a single entity, ErinWay states unequivocally in its Objection that "[ErinWay] had no dealings with [Holiday Ham] with respect to the Lease Agreement." Creditor's Obj., p. 7. However, at the hearing held on August 30, 2023, counsel for Holiday Ham and Holiday Erin averred that Holiday Ham wrote all checks for the monthly payments due under the lease, of which ErinWay most assuredly would have been aware—if somehow not actually, then at least constructively. Counsel for ErinWay did not contest this assertion, which impliedly refutes ErinWay's statement that it had no prior dealings with Holiday Ham. Notably, counsel for the Holiday Entities also stated that Holiday Ham paid all the bills of Holiday Erin, as well as funding the payroll for its employees, which, in the Court's opinion, lends credence to the idea that corporate formalities were disregarded. Furthermore, all Holiday Entities used a payment system called TOAST which processed payments at each

location. TOAST deposits were directly deposited into Holiday Ham's account, therefore bolstering the argument that funds were comingled. Taken together, the Court is of the opinion that the behavior of the Holiday Entities is sufficient to establish a *prima facie* case of a pre-petition disregard of separateness such that the burden shifts to ErinWay to prove both that it will be adversely affected and that it actually relied on the separate existence of the Holiday Entities.

On that front, ErinWay outlines the adverse effects that would be wrought upon it should the cases be substantively consolidated. This mainly includes forcing ErinWay into a pool of Holiday Ham's creditors, diluting its $189,561.05 (and presumably rising) claim, thereby inflicting severe, unfair, undue, and irreparable prejudice upon it. The Court certainly recognizes the plight of ErinWay in this regard, and agrees that such an allegation constitutes an adverse effect; however, the Court simply cannot agree that ErinWay will be prejudiced. A review of the Holiday Ham claims register confirms that Pinnacle Bank is the secured creditor of Holiday Ham, Holiday Erin and Holiday Germantown, the three entities that were operating at the time of these bankruptcy cases. Given the size of Pinnacle Bank's secured claim and its lien on all assets of Holiday Erin (and Holiday Ham and Holiday Germantown), there is no recovery to ErinWay given the proposed sale of business assets, as these cases are administratively insolvent.

The Court is also not swayed that ErinWay relied on the separate existence of Holiday Erin. As noted above, ErinWay happily accepted checks (when they were still coming in) written by Holiday Ham. In this instance, it strains credulity to maintain that ErinWay did not rely on the creditworthiness of Holiday Ham when it was the entity footing the bill, and the Court has serious doubts that if Holiday Ham were to write a check today to settle Holiday Erin's debt with ErinWay, that ErinWay would refuse to accept it given the historical payment arrangement. Further, any adverse effect substantive consolidation would have here is mitigated, at least in part, by the

liquidation of Holiday Ham's grocery brand—to which there was no objection—that infused $75,000.00 worth of carve-outs to help fund the ongoing operations of Holiday Erin so that it could maintain its going concern value, which there can be no doubt serves to the benefit of ErinWay. As a result, ErinWay has failed to defeat the Holiday Entities' *prima facie* showing of a pre-petition disregard of separateness because it will not be adversely affected given these cases are administratively insolvent, and it cannot prove that it actually relied on the separate existence of the Holiday Entities.

Normally, this would end the inquiry; however, the Court believes it is important that it also briefly analyze the element that "needs no explanation"—a prohibitive unscrambling of assets and liabilities post-petition. Here, the Holiday Entities allege that all TOAST deposits were made directly into the Holiday Ham account, Holiday Erin's pre-petition bank account was a "sweep account" which was closed pre-petition, that Holiday Ham paid all of the bills and expenses of Holiday Erin (including payroll), and that Holiday Erin maintained limited financial records due to Holiday Ham filing and paying taxes on its behalf—which includes the filing of a consolidated tax return, but separate state franchise tax returns. While Mr. John Strand, Holiday Ham's Chief Administrative Officer, admitted during testimony given at the hearing held on August 30, 2023, that it would be relatively easy to discern the "swept" amounts from Holiday Erin's pre-petition bank account, the strain that requiring separate checking accounts for the Holiday Entities would place upon Mr. Strand as CAO and sole administrative employee would be too great for him and the company to bear (given that both bankruptcy estates are likely administratively insolvent). This reality was attested to by Mr. Strand as well as Holiday Ham's President, Mr. Trey Jordan. Further, the Court recognizes that there are affiliated entities of Holiday Ham—other than, but also including, Holiday Erin—for which Holiday Ham made various payments, which the Court notes

may be subject to numerous preference actions and/or fraudulent transfer actions if the cases are not consolidated. *See Bavely v. Daniels (In re Daniels),* 641 B.R. 165, 191 (Bankr. S.D. Ohio 2022) (citations omitted) (Substantive consolidation functions as "an alternative to avoidance actions and other more specific measures to corral and distribute assets."). For this reason, the Court finds that the post-petition unscrambling of the Holiday Entities' assets and liabilities are prohibitive in this case.

CONCLUSION

For the reasons stated herein, Debtors' Expedited Motion to Substantively Consolidate Case is hereby **GRANTED.** In re Holiday Ham Holdings, LLC (Case No. 23-23313) and In re Holiday Erin LLC (Case No. 23-23685) are hereby substantively consolidated and shall proceed under the Holiday Ham namesake, as it is the parent company to Holiday Erin.

IT IS SO ORDERED.

The Bankruptcy Court Clerk shall serve a copy of this Opinion and Order on the following interested parties:

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