January 27, 2017

Washington Utilities and Transportation Commission

1300 S. Evergreen Park Drive SW

Olympia, WA 98504

**Re: WUTC Docket No. UG-151663
In the Matter of the Petition of Puget Sound Energy, Inc.**

**Nonconsolidation opinion regarding Puget Sound Energy, Inc.
and Certain of its Affiliates**

Commissioners and Staff:

We have acted as special counsel to Puget Sound Energy, Inc., a Washington corporation (“PSE”), for the purpose of providing this opinion to you in connection with the proposed formation by Puget Energy, Inc., a Washington corporation (“Puget Energy”), of a new, wholly-owned, unregulated subsidiary to be known as Puget LNG LLC, a Washington limited liability company (“Puget LNG”).

You have requested our opinion as to whether in the event one or more Relevant Parties (as defined below) were to become a debtor in a case under Title 11 of the United States Code, as amended (the “Bankruptcy Code”), a court having jurisdiction over such case (the “bankruptcy court”) would order substantive consolidation of the assets and liabilities of PSE with those of one or more Relevant Parties.

**BACKGROUND**

PSE is a public utility regulated by the Washington Utilities and Transportation Commission (“WUTC”). PSE is wholly owned by Puget Energy. Puget LNG will also be wholly owned by Puget Energy. Puget Energy is wholly owned by Puget Equico LLC, a Washington limited liability company (“Equico”). Equico is wholly owned by Puget Intermediate Holdings, Inc., a Washington corporation (“Puget Intermediate”). Puget Intermediate is wholly owned by Puget Holdings LLC, a Delaware limited liability company (“Puget Holdings”). Puget Holdings, Puget Energy, Equico, Puget Intermediate and Puget LNG are hereinafter collectively referred to as the “Relevant Parties” and each individually as a “Relevant Party.” None of the Relevant Parties is a public utility regulated by WUTC.

For purposes of this opinion we have only examined Order 08 entered on December 30, 2008 in Docket U-072375 by the WUTC (the “2008 Order”), Order 10 entered on November 1, 2016 in Docket UG-151663 by the Washington State Utilities and Transportation Commission (the “2016 Order” and together with the 2008 Order, the “Orders”) and the certificates attached hereto as Exhibit A (the “Officer’s Certificates”), and have assumed the accuracy thereof in all respects material to the opinion. We have assumed in all respects material to our opinion that: (i) each of the Relevant Parties and PSE is validly existing under the laws of the jurisdiction of its organization; and (ii) creditors of PSE and WUTC have reasonably relied on the separateness of PSE from any Relevant Party and such creditors and the public would suffer prejudice from, or would be harmed by, a consolidation of PSE with any Relevant Party. We have conducted no independent factual investigation of our own, but rather have relied solely upon the Officer’s Certificates and the assumptions set forth herein, all of which we assume to be true, complete and accurate in all material respects.

**ADDITIONAL FACTUAL ASSUMPTIONS**

**A. PSE.**

1. To the extent material to its separateness, PSE at all times will comply with the ring-fencing provisions of the Orders.

2. PSE is, and intends in the future to remain, solvent; provided, however, that our opinion is not based on any assumption as to PSE’s future solvency.

3. PSE maintains, and intends in the future to maintain, adequate capital in light of its contemplated business operations; provided, however, that our opinion is not based on any assumption as to PSE’s future adequate capitalization.

4. PSE will not engage in any type of fraudulent activity material to its separateness.

B**. Relevant Parties.**

1. To the extent material to PSE’s separateness, each Relevant Party that is a direct or indirect owner of PSE has caused, and at all times hereafter will cause, PSE to be operated and managed in compliance with the foregoing assumptions.

2. No Relevant Party will engage in any type of fraudulent activity material to PSE’s separateness.

# DISCUSSION

* + 1. **General Principles**

The general principle is well-established that the legal separateness of corporate entities will presumptively be recognized. Substantive consolidation is a judicially created doctrine that runs counter to this well-established principle.[[1]](#footnote-1) Under the doctrine of substantive consolidation, a bankruptcy court may, if appropriate circumstances are determined to exist, consolidate the assets and liabilities of different entities by merging the assets and liabilities of the entities and treating the related entities as a consolidated entity for purposes of distribution in a bankruptcy case. Some courts have held that substantive consolidation can be used with similar effect to extend a debtor’s bankruptcy proceeding to include in the debtor’s estate the assets of a related entity that is not a debtor in a case under the Bankruptcy Code. In addition, some courts have held that a court can consolidate estates as to certain unsecured claims (e.g., trade claims) even if it is not consolidating as to all unsecured claims.

The doctrine of substantive consolidation continues to evolve, and there is no uniform consensus as to the method of analyzing cases in which substantive consolidation is sought. The fluidity and uncertainty associated with the factors and tests described below has been noted by several courts, but is best illustrated by the often-paraphrased comment “that as to substantive consolidation, precedents are of little value” and, therefore, each analysis must be made “on a case-by-case basis.”[[2]](#footnote-2)

The modern statement of the doctrine is found in the opinions of the Third,[[3]](#footnote-3) Second,[[4]](#footnote-4) and District of Columbia[[5]](#footnote-5) (D.C.) Circuit Courts of Appeal. In 2005, the Third Circuit established a test in In re Owens Corning under which the proponent seeking substantive consolidation must establish either: (1) that the entities disregarded their separateness prepetition “so significantly [that] their creditors relied on the breakdown of entity borders and treated them as one legal entity,” or (2) that postpetition the assets and liabilities of the entities “are so scrambled that separating them is prohibitive and hurts all creditors.”[[6]](#footnote-6) Under the Second Circuit’s formulation, in In re Augie/Restivo Baking Co., a court analyzes (1) “whether creditors dealt with the entities as a single economic unit and did not rely on their separate identity in extending credit,” or (2) ”whether the affairs of the two entities are so entangled that consolidation will benefit all creditors.”[[7]](#footnote-7) Under the D.C. Circuit test, established in In re Auto-Train Corp., Inc., the proponent of consolidation must make a prima facie case by demonstrating that: (1) there is “substantial identity between the entities to be consolidated;” and (2) ”consolidation is necessary to avoid some harm or to realize some benefit.”[[8]](#footnote-8) Once the proponent for consolidation has made this showing, a creditor may then “object on the grounds that it relied on the separate credit of one of the entities and that it will be prejudiced by the consolidation.”[[9]](#footnote-9) Although the D.C. Circuit’s test states a less severe standard than the tests adopted by the Second and Third Circuits, courts applying the Auto-Train test will substantively consolidate in the event of actual reliance by a creditor on the separateness of the entities who is prejudiced by consolidation only if the benefits of substantive consolidation “heavily outweigh” the harm to the objecting creditor harmed by consolidation.[[10]](#footnote-10) The Courts of Appeals’ decisions uniformly deny consolidation if separate assets and liabilities of the entities can be identified and there is reliance by a significant creditor on the separateness of the entities.[[11]](#footnote-11)

In circuits where there is no controlling Court of Appeals authority, the courts may rely on an analysis based upon lists of factors.[[12]](#footnote-12) Two sets of substantive consolidation factors are often cited. One list of factors taken from the older alter ego veil piercing cases is collected in the Tenth Circuit’s opinion in Fish v. East.[[13]](#footnote-13) The second commonly cited list of factors appears in In re Vecco Construction Industries, Inc.[[14]](#footnote-14)

The presence or absence of some or all of these “elements” does not necessarily lead to a determination that substantive consolidation is or is not appropriate.[[15]](#footnote-15) Indeed, many of the “elements” are present in most bankruptcy cases involving affiliated companies or a holding company structure but do not necessarily lead to substantive consolidation. The Third Circuit and other courts have noted that some of these factors, particularly the “consolidation of financial statements,” “difficulty of separating assets,” “commingling of assets,” and “profitability to all creditors,” may be more important than others.[[16]](#footnote-16)

We also note that several cases have considered a factor articulated in 1942 in Stone v. Eacho *—* i.e., whether “by . . . ignoring the separate corporate entity of the [subsidiaries] and consolidating the proceedings . . . with those of the parent corporation . . . all the creditors receive that equality of treatment which it is the purpose of the bankruptcy act to afford.”[[17]](#footnote-17) Arguably, these cases reflect “the courts’ recognition of the increasingly widespread existence in the business world of parent and subsidiary corporations with interrelated corporate structures and functions”[[18]](#footnote-18) and suggest that, in the absence of harm or prejudice to any particular group, a court would be less concerned with traditional concepts of actual or constructive blameworthy behavior. There are bankruptcy court decisions in which courts have ordered substantive consolidation where consolidation would enhance the debtors’ chances of successful reorganization.[[19]](#footnote-19) It is important, however, to note that the courts in these cases have emphasized the absence of any harm or prejudice to any particular group or have concluded, after considering the equities, that any harm or prejudice is outweighed by the benefits of substantive consolidation.[[20]](#footnote-20) The United States Courts of Appeals for the Second Circuit and the Third Circuit, however, have ruled that merely furthering the reorganization effort is not, in the absence of the more traditional factors, enough to warrant substantive consolidation.[[21]](#footnote-21)

Given that the power to order substantive consolidation derives from the equity jurisdiction of the bankruptcy courts, the issue is determined on a case-by-case basis and the decisions reflect the courts’ analysis of the particular factual circumstances presented. A court’s inquiry involves an examination of the organizational structures of the entities proposed to be consolidated, their relationships with each other, and their relationships with their respective creditors and other third-parties. In particular, the court will consider the impact upon the creditors of each entity if consolidation were to be ordered and whether such parties would be unfairly prejudiced or treated more equitably by substantive consolidation.

While substantive consolidation was originally developed in the corporate context, the standards have more recently been applied in the context of partnerships and limited liability companies. Courts have ordered substantive consolidation of a general partnership with its general partners,[[22]](#footnote-22) a corporation with individuals,[[23]](#footnote-23) and individuals with corporations.[[24]](#footnote-24)

We believe that a bankruptcy court considering the issue of substantive consolidation of a limited liability company with another entity or person would apply the general principles of substantive consolidation that have been developed in cases under the Bankruptcy Code, most of which address consolidating the assets and liabilities of one corporation with those of another corporation. Accordingly, we have relied, in our analysis, on the general body of substantive consolidation case law and believe that such law would be applicable to the court’s determination as to whether to substantively consolidate PSE with one or more Relevant Parties.

* + 1. **Application of General Principles to the Present Transaction**

The question whether, and in what circumstances, a court should order substantive consolidation of the assets and liabilities of PSE with those of one or more Relevant Parties cannot be answered in the abstract, but must take into account the actual facts and circumstances of the operations and relations of those entities over time. In light of the lack of a detailed, clearly prescribed standard for determining the appropriateness of substantive consolidation under existing case law, and given the equitable basis for the remedy, any opinion regarding substantive consolidation must, of necessity, be a reasoned opinion based on the various “elements” and, to the extent applicable, the balancing test applied by some courts.

In expressing our opinion, we note the following considerations presented by the facts of this case:

(1) PSE, consistent with the ring-fencing provisions of the Orders, will:

* not pledge its assets or guarantee or otherwise obligate itself with respect to any debts, liabilities or obligations of any Relevant Party or hold out itself or its credit as being available to satisfy any debts, liabilities or obligations of any Relevant Party;
* not acquire any obligations or securities of any Relevant Party or otherwise advance credit to or make loans to any Relevant Party;
* maintain its debt separate from the financial securities and debt of any Relevant Party;
* maintain its own books, records and accounts that are separate and apart from any Relevant Party’s books, records and accounts, provided that the foregoing will not prevent PSE, for non-Washington regulatory purposes, from being included in consolidated financial statements in accordance with generally accepted accounting principles, consolidated tax returns and tax reporting in accordance with applicable tax law and regulations, and other consolidated financial presentation and reporting;
* not commingle its funds or assets with those of any Relevant Party, other than pursuant to a centralized cash management system with a record keeping procedure that permits one to determine the portion of the commingled cash owned by PSE;
* transact business with any Relevant Party only on commercially reasonable terms that are no less favorable to PSE than terms obtainable in an arms length relationship with an unrelated third party;
* hold itself out as a corporation separate and apart from any Relevant Party and observe all corporate formalities;
* conduct its own business in its own name or an acronym (such as “PSE”) commonly associated with PSE; and
* allocate expenses and overhead shared with any Relevant Party fairly and reasonably.

(2) Since PSE is a regulated public utility, it would be contrary to the public interest, and, thus, inequitable, to substantively consolidate PSE with one or more Relevant Parties.

(3) Since PSE is a regulated public utility, the separate assets and liabilities of PSE are a matter of public record. As a result, PSE’s creditors and the public in general (i) have no reasonable basis to conclude that PSE is not separate from each of the Relevant Parties and (ii) have reasonably relied on PSE’s separateness from each Relevant Party.

(4) PSE was established for a legitimate business purpose and not for the purpose of perpetuating a fraud or circumventing public policy.

**OPINIONS EXPRESSED**

 Based on the reasoning and subject to the assumptions, qualifications, exceptions and limitations set forth in this letter, in the event one or more Relevant Parties became a debtor in a case under the Bankruptcy Code, it is our opinion that in a properly presented and decided case the bankruptcy court would not order substantive consolidation of the assets and liabilities of PSE with those of one or more Relevant Parties.

**ADDITIONAL ASSUMPTIONS**

 In rendering the opinions set forth herein, we have relied upon the following additional assumptions:

A. Because the legal principles bearing on the matters on which we opine in this letter are applied to the existing facts and circumstances, we have assumed (i) that the Orders remain in effect without amendment material to our opinion and that PSE and the Relevant Parties comply with the terms thereof and with applicable law; and (ii) that the matters certified in the Officer’s Certificates and the factual assumptions in our opinion letter continue to exist and remain true and accurate in the future, except (x) to the extent that any such fact or circumstance relates to the financial condition of any Relevant Party or PSE other than on the date of this opinion, and (y) to the extent that any such representations and warranties expressly speak only as of a particular date.

B. There are no other agreements among any or all of the parties that would alter the terms of the Orders in any respect material to our opinion.

C. WUTC would object to and the public would be harmed and prejudiced by substantive consolidation of PSE with one or more Relevant Parties.

D. With respect to PSE and each Relevant Party, we have assumed in all respects material to our opinion expressed herein that none of them will engage in any type of fraudulent activity.

**LIMITATIONS QUALIFICATIONS AND EXCEPTIONS**

The opinions expressed herein are subject to the following limitations, qualifications, and exceptions:

A. This opinion relates solely to the Bankruptcy Code and is limited to the specific issues addressed. We express no opinion as to any other matter. Without limiting the generality of the preceding two sentences, this opinion does not canvass “alter ego,” instrumentality, enterprise, or similar “piercing the corporate veil” case law decided under applicable non-bankruptcy law in connection with our analysis of the doctrine of substantive consolidation.

B. We wish to re-emphasize that we have found no controlling reported decisional authority directly on point and that the existing authority is not conclusive as to the relative weight to be accorded to the factors to be considered and fails to provide consistently applied general principles or guidelines with which to analyze all of the factors present in this transaction. Instead, judicial decisions in this area are usually made on the basis of an analysis of the facts and circumstances of the particular case. We note that a court’s decision regarding matters upon which we opine in this letter is based on the court’s own analysis and interpretation of the factual evidence before the court (which may materially differ from the factual and other matters on which this letter is premised) and of applicable legal principles. Consequently, this opinion is not a prediction of what any particular court (including any appellate court) reaching the issue on the merits would hold, but instead is our opinion as to the proper result to be reached by a court applying existing legal rules to the facts as properly found (and consistent with the assumptions set forth herein) after a fully-contested trial and appropriate briefing and argument.[[25]](#footnote-25)

C. We note that legal opinions on bankruptcy law matters unavoidably have inherent limitations that generally do not exist in respect of other legal issues on which opinions to third parties are typically given. These inherent limitations exist primarily because of (1) the pervasive equity powers of bankruptcy courts; (2) the overriding goal of reorganization to which a bankruptcy court, purporting to exercise its equity powers, may subordinate other legal rights and policies (even though such a subordination would appear to be inconsistent with established legal claims and rights under applicable nonbankruptcy law and even though such equity powers arguably do not permit such a subordination); (3) the potential relevance to the exercise of judicial discretion of future-arising facts and circumstances; and (4) the nature of the bankruptcy and trial process.

D. We do not consider a case to have been properly presented and decided for purposes of this letter (i) if the issue of substantive consolidation, as applicable, is resolved in the context of the consideration by the bankruptcy court of a request for approval of a settlement involving such issue, as compared to the trial and adjudication of such issue on the merits, or (ii) if substantive consolidation were to be ordered as part of the confirmation of a plan of reorganization in respect of PSE under which the unsecured creditors of PSE, without objection from WUTC, voted to accept the plan within the meaning of the Bankruptcy Code.

E. Our opinion excludes the effects of the provisions of the *Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, et seq.*, under which affiliated entities may become liable for unfunded pension liabilities of entities under common control with them, and the applicability of certain provisions of tax laws or other statutory provisions under which affiliated persons may be made liable for debts of affiliated persons.

F. The foregoing analysis and opinions are based on and limited in all respects to factual matters that we have assumed to be in existence as of the date of this letter and to Bankruptcy Code as in effect on the date of this letter. Other than our review of the Orders and the Officer’s Certificates, we have not undertaken any investigation or independent confirmation of such assumed factual matters. We disclaim any obligation to revise or supplement this opinion, or to otherwise notify you, should such factual matters change or should such laws or regulations be changed by legislative or regulatory action, judicial decision or otherwise.

This opinion letter is rendered for the sole benefit of the addressee hereof and no other person or entity is entitled to rely hereon. The opinion expressed herein is given on the date hereof only, and we assume no obligation to update or supplement our opinion to reflect any fact or circumstance that may hereafter come to our attention or any change in law that may hereafter occur or become effective.

Very truly yours,

PERKINS COIE LLP

EXHIBIT A

OFFICER’S CERTIFICATES

SEE ATTACHED

**CERTIFICATE IN SUPPORT OF OPINION OF PERKINS COIE LLP**

January 27, 2017

This Certificate is given in connection with the opinion letter dated January 27, 2017 (the “Opinion Letter”) concerning substantive consolidation to be delivered by Perkins Coie LLP (the “Firm”) to the Washington Utilities and Transportation Commission. Unless otherwise specified, capitalized terms not defined herein have the meanings assigned to them in the Opinion Letter.

The undersigned, in his capacity as Senior Vice President, General Counsel, and Chief Ethics & Compliance Officer of Puget Sound Energy, Inc. (“PSE”), hereby certifies, acknowledges and confirms the following:

1. I have knowledge of PSE’s business and affairs. I have reviewed the Orders and the portions of the Opinion Letter entitled “BACKGROUND”, “ADDITIONAL FACTUAL ASSUMPTIONS” and “ADDITIONAL ASSUMPTIONS” and have, or someone assisting me has, examined such corporate records, and made such inquiries of PSE’s officers and counsel as I deemed reasonable and necessary in order to reasonably insure the material accuracy of the certifications set forth herein. With respect to the matters covered in this Certificate, it is understood that I am certifying as to matters of fact and not as to conclusions of law. It is further understood and acknowledged that I am executing this Certificate not in an individual capacity, but solely in my capacity as an officer and that I am without personal liability as to the matters contained in this Certificate. Neither PSE nor I am aware of any fact or circumstance that would render any factual statement or conclusion reached in this Certificate inaccurate, misleading or untrue in any material respect.

2. I am duly authorized by PSE to execute this Certificate on its behalf.

3. I acknowledge that the representations contained in this Certificate may be relied on by the Firm in rendering the Opinion Letter. PSE agrees to indemnify the Firm against any and all liability resulting from any material misrepresentation or misstatement contained in this Certificate.

4. The facts and assumptions contained under the headings “BACKGROUND”, “ADDITIONAL FACTUAL ASSUMPTIONS” and “ADDITIONAL ASSUMPTIONS” of the Opinion Letter that relate to PSE are, to the best of my knowledge and belief, true and correct in all material respects as of the date hereof, and PSE has no reason to believe that any statement or fact expressed in the Opinion Letter relating to PSE is untrue inaccurate or incomplete in any material respect.

PUGET SOUND ENERGY, INC.

By: Steve. R. Secrist

Title: Senior Vice President, General Counsel, and Chief Ethics & Compliance Officer

**CERTIFICATE IN SUPPORT OF OPINION OF PERKINS COIE LLP**

January 27, 2017

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The undersigned, in his capacity as Senior Vice President and Chief Financial Officer of Puget Holdings LLC (“Puget Holdings”), hereby certifies, acknowledges and confirms the following:

1. I have knowledge of the business and affairs of the Relevant Parties. I have reviewed the Orders and the portions of the Opinion Letter entitled “BACKGROUND”, “ADDITIONAL FACTUAL ASSUMPTIONS” and “ADDITIONAL ASSUMPTIONS” and have, or someone assisting me has, examined such corporate records, and made such inquiries of the Relevant Parties’ officers and counsel as I deemed reasonable and necessary in order to reasonably insure the material accuracy of the certifications set forth herein. With respect to the matters covered in this Certificate, it is understood that I am certifying as to matters of fact and not as to conclusions of law. It is further understood and acknowledged that I am executing this Certificate not in an individual capacity, but solely in my capacity as an officer and that I am without personal liability as to the matters contained in this Certificate. Neither any Relevant Party nor I am aware of any fact or circumstance that would render any factual statement or conclusion reached in this Certificate inaccurate, misleading or untrue in any material respect.

2. I am duly authorized by Puget Holdings to execute this Certificate on its behalf and on behalf of the Relevant Parties.

3. I acknowledge that the representations contained in this Certificate may be relied on by the Firm in rendering the Opinion Letter. Puget Holdings agrees to indemnify the Firm against any and all liability resulting from any material misrepresentation or misstatement contained in this Certificate.

4. The facts and assumptions contained under the headings “BACKGROUND”, “ADDITIONAL FACTUAL ASSUMPTIONS” and “ADDITIONAL ASSUMPTIONS” of the Opinion Letter that relate to the Relevant Parties are, to the best of my knowledge and belief, true and correct in all material respects as of the date hereof, and no Relevant Party has any reason to believe that any statement or fact expressed in the Opinion Letter relating to the Relevant Parties is untrue inaccurate or incomplete in any material respect.

PUGET HOLDINGS LLC

By: Daniel A. Doyle

Title: Senior Vice President and
Chief Financial Officer

1. The authority of Bankruptcy Courts to substantively consolidate is generally believed to derive from the Bankruptcy Court's general equitable powers provided in Section 105 of the Bankruptcy Code. However, one Bankruptcy Court has concluded that Section 542 of the Bankruptcy Code serves as the statutory authority for substantive consolidation (In re Cyberco Holdings, Inc., 431 B.R. 404, 432 (Bankr. W.D. Mich. July 2, 2010)). [↑](#footnote-ref-1)
2. In re Crown Mach. & Welding, Inc., 100 B.R. 25, 27–28 (Bankr. D. Mont. 1989). [↑](#footnote-ref-2)
3. In re Owens Corning, 419 F.3d 195 (3d Cir. 2005). [↑](#footnote-ref-3)
4. Union Savings Bank v. Augie/Restivo Baking Co., Ltd. (In re Augie/Restivo Baking Co.), 860 F.2d 515 (2d Cir. 1988). The Ninth Circuit expressly adopted the Second Circuit's *Augie/Restivo* test in Alexander v. Compton (In re Bonham), 229 F.3d 750, 766 (9th Cir. 2000). [↑](#footnote-ref-4)
5. Drabkin v. Midland-Ross Corp. (In re Auto-Train Corp., Inc.), 810 F.2d 270 (D.C. Cir. 1987). The Eleventh Circuit expressly adopted the D.C. Circuit's two-prong Auto-Train test in Eastgroup Properties v. S. Motel Ass'n, Ltd., 935 F.2d 245, 249 (11th Cir. 1991), whereas the Eighth Circuit established a similar three-prong test in In re Giller, 962 F.2d 796, 799 (8th Cir. 1992). [↑](#footnote-ref-5)
6. Owens Corning, 419 F.3d at 211. [↑](#footnote-ref-6)
7. Augie/Restivo Baking Co., 860 F.2d at 518. [↑](#footnote-ref-7)
8. Auto-Train, 810 F.2d at 276. [↑](#footnote-ref-8)
9. Id. [↑](#footnote-ref-9)
10. Eastgroup, 935 F.2d at 249. This “modern trend” was explicitly rejected in *Owens Corning*, 419 F.3d at 210. [↑](#footnote-ref-10)
11. SeeOwens Corning, 419 F.3d at 212; Augie/Restivo Baking Co., 860 F.2d at 520 (“Where, as in the instant case, creditors . . . knowingly made loans to separate entities and no irremediable commingling of assets has occurred, a creditor cannot be made to sacrifice the priority of its claims against its debtor by fiat based on the bankruptcy court's speculation that it knows the creditor's interests better than does the creditor itself.”). ButseeEastgroup, 935 F.2d at 249 n.11 (describing how a creditor may be estopped from claiming reliance “where a reasonable creditor in a similar situation would not have relied on the separate credit of one of the entities to be consolidated”). [↑](#footnote-ref-11)
12. See, for example, In re Tureaud, 45 B.R. 658, 662 (Bankr. N. D. Okla. 1985), aff'd, 59 B.R. 973 (N.D. Okla. 1986), and In re Gulfco, 593 F.2d 921, 928–29 (10th Cir. 1979); for additional cases citing factors and related cases, seeIn re Drexel Burnham Lambert Group, Inc., 138 B.R. 723, 764 (Bankr. S.D.N.Y. 1992) (citing cases); seealso In re Affiliated Foods, Inc., 249 B.R. 770, 776–84 (Bankr. W. D. Mo. 2000); In re Giller, 962 F.2d at 798–99; Eastgroup, 935 F.2d at 249–50; In re Apex Oil Co., 118 B.R. 683, 692–93 (Bankr. E.D. Mo. 1990) (relying, in part, on such factors, but also considering fairness of substantive consolidation to creditors). [↑](#footnote-ref-12)
13. 114 F.2d 177, 191 (10th Cir. 1940): (a) the parent corporation owns all or a majority of the capital stock of the subsidiary; (b) the parent and subsidiary corporations have common directors or officers; (c) the parent corporation finances the subsidiary; (d) the parent corporation subscribes to all the capital stock of the subsidiary or otherwise causes its incorporation; (e) the subsidiary has grossly inadequate capital; (f) the parent corporation pays the salaries or expenses or losses of the subsidiary; (g) the subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation; (h) in the papers of the parent corporation, and in the statements of its officers, “the subsidiary” is referred to as such or as a department or division; (i) the directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take direction from the parent corporation; and (j) the formal legal requirements of the subsidiary as a separate and independent corporation are not observed. [↑](#footnote-ref-13)
14. 4 B.R. 407, 410 (Bankr E.D. Va. 1980): (a) the degree of difficulty in segregating and ascertaining individual assets and liability; (b) the presence or absence of consolidated financial statements; (c) profitability of consolidation at a single physical location; (d) the commingling of assets and business functions; (e) the unity of interests and ownership between the various corporate entities; (f) the existence of parent or inter-corporate Guaranty on loans; and (g) the transfer of assets without formal observance of corporate formalities. [↑](#footnote-ref-14)
15. SeeIn re Donut Queen, Ltd., 41 B.R. 706, 709–10 (Bankr. E.D.N.Y. 1984) (criteria “should not be mechanically applied” in determining consolidation; rather, factors should be evaluated within the larger context of balancing the prejudice resulting from the proposed order of consolidation with the prejudice alleged by creditor from the debtor's separateness.); seealsoIn re Drexel Burnham Lambert Group, Inc., 138 B.R. at 764–65 (the consolidation factors “must be evaluated within the larger context of balancing the prejudice resulting from the proposed consolidation against the effect of preserving separate debtor entities.”). [↑](#footnote-ref-15)
16. Owens Corning, 419 F.3d at 210–11 (“In assessing whether to order substantive consolidation, courts consider many factors. . . . They vary (with degrees of overlap) from court to court. Rather than endorsing any prefixed factors, in Nesbit we 'adopt[ed] an intentionally open-ended, equitable inquiry . . . to determine when substantively to consolidate two entities.'“)(internal citations omitted); seealsoMorse Operations, Inc. v. Robins Le‑Cocq, Inc., (In re Lease-A-Fleet, Inc.), 141 B.R. 869, 877 (Bankr. E.D. Pa. 1992) (noting that, in that particular case, “the more important factors” have not been alleged or asserted “with any degree of particularity”); R2 Investments, LDC v. World Access, Inc. (In re World Access, Inc.), 301 B.R. 217, 276 (Bankr. N.D. Ill. 2003) (describing certain factors as “more important”). *But* *see* Augie/Restivo, 860 F.2d at 519, and Owens Corning, 419 F.3d at 212, which point to explicit Guaranty as indicia of separateness. [↑](#footnote-ref-16)
17. Stone v. Eacho, 127 F.2d 284, 288 (4th Cir. 1942); seealsoIn re Richton Intern. Corp., 12 B.R. 555, 558 (Bankr. S.D.N.Y. 1981) (considering, as a key factor, that consolidation “will yield an equitable treatment of creditors without any undue prejudice to any particular group”); In re Manzey Land & Cattle Co*.*, 17 B.R. 332, 338 (Bankr. D.S.D. 1982); In re Food Fair, Inc., 10 B.R. 123, 127 (Bankr. S.D.N.Y. 1981). [↑](#footnote-ref-17)
18. In re F. A. Potts & Co., Inc., 23 B.R. 569, 571 (Bankr. E.D. Pa. 1982); seealsoEastgroup Props*.*, 935 F.2d at 248–49 (noting “a 'modern'“ or 'liberal' trend toward allowing substantive consolidation, which has its genesis in the increased judicial recognition of the widespread use of interrelated corporate structures by subsidiary corporations operating under a parent entity's corporate umbrella”) (citing In re Murray Indus., 119 B.R. 820, 828–29 (Bankr. M.D. Fla. 1990); In re Vecco Constr. Indus. Inc., 4 B.R. at 409); Richton Int'l Corp., 12 B.R. 555; In re Vecco Constr. Indus., Inc., 4 B.R. 407; Seth D. Amera & Alan Kolod, Substantive Consolidation: Getting Back to Basics, 14 Am. Bankr. Inst. L. Rev. 1 (2006); butseeOwens Corning, 419 F.3d at 209, n.15 (“[t]hus we disagree with the assertion of a 'liberal trend' toward increased use of substantive consolidation.”) [↑](#footnote-ref-18)
19. Manzey Land & Cattle, 17 B.R. at 337–38; F.A. Potts & Co., 23 B.R. at 573; Murray Indus., 119 B.R. at 832; In re Nite Lite Inns, 17 B.R. 367, 370 (Bankr. S.D. Cal . 1982). [↑](#footnote-ref-19)
20. See also In re Silver, No. 3-75-1710(D), 1976 U.S. Dist. LEXIS 17383, at \*11 (Bankr. D. Minn. 1976). [↑](#footnote-ref-20)
21. In Augie/Restivo, the Second Circuit found that consolidation would unfairly prejudice the principal creditor of one of the debtors. Augie/Restivo, 860 F.2d at 520. In Owens Corning, the Third Circuit stated: “Mere benefit to the administration of the case (for example, allowing a court to simplify a case by avoiding other issues or to make postpetition accounting more convenient) is hardly a harm calling substantive consolidation into play.” Owens Corning, 419 F.3d at 211. [↑](#footnote-ref-21)
22. F.D.I.C. v. Colonial Realty Co., 966 F.2d 57 (2d Cir. 1992). [↑](#footnote-ref-22)
23. Holywell Corp. v. The Bank of New York, 59 B.R. 340 (S.D. Fla. 1986), dismissed sub nom. Miami Ctr. Ltd. P'ship v. Bank of N.Y., 820 F.2d 376 (11th Cir. 1987). [↑](#footnote-ref-23)
24. In re Baker & Getty Fin. Servs., Inc., 78 B.R. 139 (Bankr. N.D. Ohio 1987). [↑](#footnote-ref-24)
25. Consistent with the foregoing, this opinion also is not a prediction that an appellate court would necessarily reach the merits of any appeal of an adverse determination by a bankruptcy court of the matters upon which we opine in this letter. For example, such a bankruptcy court determination may be contained in an order confirming a plan of reorganization or may otherwise be subject to the assertion of the doctrine of “equitable mootness”; in such an instance, if the bankruptcy court determination were not stayed pending appeal (which, even if a court were inclined to grant such a stay, would generally require the posting of a substantial bond as a condition thereof) and if the plan were substantially consummated, an appellate court might dismiss the appeal on “equitable mootness” grounds without ever reaching the merits of the appeal. [↑](#footnote-ref-25)