So Ordered.

Dated: November 19, 2021

Katherine M. Perhach
Katherine Maloney Perhach
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

In re:
Eatertainment Milwaukee, LLC,
Debtor.

Chapter 11 (Subchapter V)
Case No. 21-25733-kmp

ORDER ON MOTION FOR RELIEF FROM THE AUTOMATIC STAY FILED BY NEW PUNCH BOWL MILWAUKEE, LLC

For all intents and purposes, this "Emergency Motion for Relief from the Automatic Stay, to the Extent it May Apply, to Property Owned by Creditor New Punch Bowl Milwaukee, LLC" is the continuation of a dispute that took place in a Delaware bankruptcy case involving "Punch Bowl Social" restaurants and "eatertainment" venues.[1] Only some of the Punch Bowl Social venues were debtors in the Delaware bankruptcy case. "New Punch Bowl" purchased these assets. The Debtor in this bankruptcy case (Punch Bowl Milwaukee (n/k/a Eatertainment Milwaukee, LLC)) was not a debtor in the Delaware bankruptcy case and New Punch Bowl's acquisition did not include Punch Bowl Milwaukee. Instead, "Old Punch Bowl" acquired Punch Bowl Milwaukee and other non-debtor remnant Punch Bowl assets at locations around the country as part of a compromise of a claim that it had in the Delaware bankruptcy proceeding.

Punch Bowl Milwaukee (n/k/a Eatertainment Milwaukee, LLC and the Debtor in this bankruptcy case) was the tenant in a lease with MKE BLK4L2 LLC, an affiliate of the Milwaukee Bucks, for the premises located at 1122 North Vel Phillips Avenue in Milwaukee, Wisconsin (the "Premises"). A Punch Bowl Social restaurant and entertainment facility operated at that location until April 2020 when the location closed because of the COVID-19 pandemic. After New Punch Bowl and Old Punch Bowl both acquired certain assets as part of the Delaware bankruptcy case, New Punch Bowl and Old Punch Bowl separately solicited the Milwaukee Bucks to reopen a restaurant at the Premises. The Milwaukee Bucks opted to work with the New

[1] The Delaware bankruptcy case was complex and involved a number of entities, many with similar names, so for the purpose of the introduction to this decision, the Court has significantly simplified the facts and the names of the entities (and hopefully not overly so) to provide relevant background and the context within which the current dispute has arisen. A more exact and thorough tracing of the entities and transactions follows in the findings of fact below.

Punch Bowl team, led by the former chief financial officer of Punch Bowl Social, and not the Old Punch Bowl team, led by the former chief executive officer of Punch Bowl Social.

The parties are now disputing who owns the property located in the Punch Bowl Milwaukee location, including the bars, the walk-in cooler, the bowling alleys, the pin setters, the bowling balls and shoes, the shoe rack, the stove, the coolers on casters, the toilets, the sinks, the waitress stations, the tables and chairs, and the kitchenwares, amongst other items. New Punch Bowl would like to open the venue on an essentially turnkey basis. Old Punch Bowl believes it owns many of the assets at the location and would like to remove them.

There are two main issues for the Court to decide in the Motion before the Court: (1) whether the Debtor/Old Punch Bowl abandoned the property at the Premises; and (2) if the Debtor/Old Punch Bowl did not abandon the property at the Premises, what property is a fixture that was intended to remain at the Premises and therefore not property of the Debtor or the Debtor's bankruptcy estate and what property is personal property that is removable from the Premises and therefore property of the Debtor or the Debtor's bankruptcy estate.

New Punch Bowl intended to reopen the Punch Bowl Milwaukee location on October 29, 2021, and indeed did reopen the location for one night. After the Debtor/Old Punch Bowl filed this bankruptcy case, filed a motion for a temporary restraining order seeking to enjoin New Punch Bowl from using its personal property, and filed an adversary proceeding seeking turnover of its personal property, New Punch Bowl closed the restaurant again and agreed not to reopen it until this Court decided its motion for relief from the automatic stay. Counsel for the Debtor and New Punch Bowl agreed that the Court should determine the issues identified above in the context of this motion for relief from stay.

New Punch Bowl's motion for relief from the automatic stay requests a determination that the stay does not apply to any of the personal property or fixtures remaining at the Premises. New Punch Bowl argues that all of the property remaining at the Premises was abandoned by the Debtor/Old Punch Bowl such that it cannot be property of the Debtor or property of the bankruptcy estate, and the Court should enter an order stating that the stay does not apply to any of the property that remains at the Premises. New Punch Bowl further argues that if this Court finds that the property was not abandoned, much of the property at the Premises is a fixture and not personal property, and the Court should enter an order stating that the stay does not apply to those fixtures and the fixtures should remain at the Premises.

The Debtor/Old Punch Bowl argues that all of the property remaining at the Premises was certainly not abandoned by the Debtor/Old Punch Bowl, that the property remains the property of the Debtor or property of the bankruptcy estate, and the stay remains in effect. The Debtor/Old Punch Bowl further argues that almost everything in the Premises is personal property, and almost none of it is fixtures, so the Debtor/Old Punch Bowl should be able to take almost everything out of the Premises and take it to the new restaurant it is planning to open in New Orleans, Louisiana.

The Court held an evidentiary hearing on November 15, 2021. For the reasons that follow, the Court determines that the Debtor/Old Punch Bowl did not abandon the property at the

Premises. The Court further determines that some of the items at the Premises are fixtures and some of the items at the Premises are personal property. The stay does not apply to the items that the Court has identified as fixtures. With regard to certain other items, based upon the evidence that was presented, the Court is unable to make a determination as to whether those items are personal property or fixtures so the stay will remain in effect as to those items to the extent those items are personal property.

Findings of Fact

1. On or about June 27, 2018, the Debtor and MKE BLK4L2 LLC (the "Landlord") entered into a lease for the premises located at 1122 North Vel Phillips Avenue, Milwaukee, Wisconsin (the "Premises"). Stipulation of Facts ¶¶ 1, 14; Ex. 3, 500.

2. The Landlord owns the Premises located in Deer District, adjacent to the home of the Milwaukee Bucks. The Landlord is affiliated with the Milwaukee Bucks basketball franchise. Stipulation of Facts ¶ 1.

3. The Debtor, formerly known as Punch Bowl Milwaukee LLC, is the former tenant of the Premises and previously operated a "Punch Bowl Social" restaurant and entertainment venue on the Premises. Stipulation of Facts ¶ 2.

4. Section 9.4 of the lease between the Debtor and the Landlord provides:

> Surrender of Premises. Upon expiration or termination of this Lease, either by lapse of time or otherwise, Tenant shall peaceably surrender to Landlord the Premises, including the alterations, additions, improvements, changes and fixtures, other than Tenant's unattached movable trade fixtures, in broom-clean condition and in good condition and repair except for reasonable wear and tear and loss by fire or other casualty. Notwithstanding the foregoing or anything else contained herein to the contrary, Tenant may remove all personal property, including furnishings, machinery, trade fixtures, and equipment (trade or otherwise), which Tenant installs in the Premises and Outdoor Seating Area. In addition, Tenant may remove from the Premises and Outdoor Seating Area all items and structural characteristics installed by Tenant that are indicative of Tenant's business and may otherwise "de-identify" the Premises and Outdoor Seating Area, as Tenant reasonably believes necessary or appropriate for the protection of Tenant's interest in Tenant's trademarks, trade names or copyrights, provided Tenant repairs all damage caused by such removal. If Tenant fails to remove any personal property, signage or other items which Tenant is entitled to remove pursuant to this Section prior to any termination, Landlord may remove the same without any liability to Tenant. Any such personal property, fixtures or other items not so removed upon the vacancy of the Premises by Tenant will be

> conclusively presumed to have been abandoned by Tenant, and to the extent Landlord elects to accept the same, title to such property will pass to Landlord without any payment or credit. Landlord may, at its option and at Tenant's expense, store and/or dispose of any such property remaining in the Premises.

Ex. 3, 500.

5. Under Section 25.33 of the lease, the Landlord "expressly waives any and all statutory or common law lien rights Landlord may have upon any of Tenant's property or any other party's property usually kept on the Premises." Ex. 3, 500.

6. Section 25.32 provides that

> Landlord agrees as follows with respect to any Tenant's Lender to whom Landlord been provided prior written notice of and contract information for: (i) to provide Tenant's Lender (upon written request of Tenant (accompanied by the name and address of Tenant's Lender) with respect to any Tenant's Lender) with a copy of any default notice(s) given to Tenant under this Lease, and (ii) to allow Tenant's Lender, prior to any termination of this Lease or repossession of Premises by Landlord, the same period of time, after its receipt of such copy of default notice, to cure such default as is allowed Tenant under this Lease, and (iii) to permit Tenant's Lender to go upon the Premises for the purpose of removing Tenant's property any time within 30 days after the effective date of any termination of this Lease or any repossession of the Premises by Landlord (with Landlord having given Tenant's Lender prior written notice of such date of termination or repossession).

Ex. 3, 500.

7. In March of 2019, the Debtor opened its Punch Bowl Social operations on the Premises. Stipulation of Facts ¶ 15.

8. The Debtor operated a Punch Bowl Social restaurant and entertainment venue on the Premises until April 2020 and the onset of the COVID-19 pandemic. Stipulation of Facts ¶ 2.

9. On April 1, 2020, the Debtor failed to make a rent payment of $73,500, and failed to pay trash removal and other applicable charges in the amount of $2,055.33. Stipulation of Facts ¶ 16.

10. On April 3, 2020, the Landlord provided the Debtor with a "Notice of Lease Default." Stipulated Facts ¶ 17. The Notice cited the failure to make the payments above as events of default, as well as the Debtor's failure to deposit a letter of credit in the amount of $550,000. Ex. 4.

11. The Debtor, along with several of its related entities, entered into a note and a loan and security agreement dated December 10, 2020 with PBS Lender LLC ("PBS Lender"), through which PBS Lender loaned $261,500 for the purpose of paying retainers, fees, and expenses of restructuring counsel and a financial advisor for a bankruptcy case to be filed in Delaware (the "Loan"). Stipulation of Facts ¶ 6.

12. PBS Lender is managed by PBS Manager, LLC, which is in turn owned and managed by Sortis Holdings, Inc. Paul Brenneke is the executive chairman of Sortis. Stipulation of Facts ¶ 7.

13. Mr. Brenneke testified during the hearing that the Loan referred to in paragraph 11 above subsequently grew to approximately $1.3 million.

14. On December 21, 2020 and December 31, 2020, Punch Bowl Social, Inc., PBS Brand Co., and 14 subsidiaries filed Chapter 11 cases in Delaware (the "Delaware Debtors"). The Debtor in this bankruptcy case was not among them. Stipulation of Facts ¶ 4.

15. On January 27, 2021, the Delaware Debtors filed a motion seeking entry of an order approving the sale of substantially all of their assets free and clear of claims, liens, liabilities, rights, interests, and encumbrances to CrowdOut Capital LLC, the Delaware Debtors' prebankruptcy lender and debtor-in-possession lender. PBS Lender objected to the sale to the extent it proposed to sell the Delaware Debtors' property free and clear of PBS Lender's security interests. PBS Lender further argued that its liens should be attached to the proceeds deposited into a trust account for general unsecured creditors (the "GUC Trust"). Stipulation of Facts ¶ 9.

16. On March 16, 2021, the Delaware Bankruptcy Court approved the sale to CrowdOut Capital (through its entity, New PBS Brand Co., LLC), but reserved all parties' rights with respect to the disposition of the GUC Trust assets pending further proceedings. Stipulation of Facts ¶ 10.

17. On March 18, 2021, CrowdOut Capital (through its entity, New PBS Brand Co., LLC) purchased substantially all of the Delaware Debtors' assets pursuant to the Delaware Bankruptcy Court's order. The Debtor was not included in the sale of assets or equity to CrowdOut Capital LLC (through its entity, New PBS Brand Co., LLC). Stipulation of Facts ¶ 11.

18. Between March 17, 2021 and March 18, 2021, Michael Belot and Paul Brenneke and Robert Thompson exchanged emails about scheduling a call to "broadly discuss strategy and cover a few timing related items." Ex. 516.

19. Mr. Belot is the Senior Vice President of Bucks Ventures and Development of Milwaukee Bucks, LLC, an affiliate of the Landlord.

20. Mr. Brenneke and Mr. Thompson were affiliated with PBS Lender which had objected to the motion to sell the Delaware Debtors' assets to Crowd Out Capital LLC and which

had retained all of its rights with respect to the proceeds deposited in the GUC Trust assets pending further proceedings in Delaware.

21. Mr. Thompson was the founder of Punch Bowl Social and its chief executive officer. Mr. Brenneke had conversations with Mr. Thompson when PBS Lender made the loan for the purpose of paying retainers, fees, and expenses of restructuring counsel and a financial advisor for a bankruptcy case to be filed in Delaware about his desire and willingness to run Punch Bowl if PBS Lender/Sortis was the successful bidder for Punch Bowl's assets in the Delaware bankruptcy. PBS Lender/Sortis tried to be the Delaware Debtors' debtor-in-possession lender but was not successful and then chose not to bid on the assets in the Delaware bankruptcy.

22. After unsuccessfully trying to become the Delaware Debtors' debtor-in-possession lender, PBS Lender/Sortis/Mr. Brenneke decided to pursue the "remnant assets" that were not part of the sale to CrowdOut Capital, including the Debtor (Punch Bowl Milwaukee), Punch Bowl Detroit, Punch Bowl Fort Worth, and Punch Bowl Schaumberg, amongst others, as part of the settlement of its claim to the proceeds deposited into the GUC Trust.

23. As of March 22, 2021, all of the business terms related to the sale of PBS Brand Co. LLC's "remnant assets" (i.e. its membership interests in eighteen subsidiary entities that were not Delaware Debtors, including Punch Bowl Milwaukee, the Debtor in this bankruptcy case), to PBS DIP Lender, LLC, an affiliate of PBS Lender and Sortis, were agreed to and PBS Lender/Sortis was waiting for the order from the Delaware Bankruptcy Court approving the sale of the "remnant assets" to PBS Lender/Sortis.

24. In anticipation of acquiring Punch Bowl Milwaukee, Mr. Brenneke had four to five telephone conversations and exchanged six to ten emails with Michael Belot about reopening the Punch Bowl Milwaukee location. The intent was to restructure the lease for the Premises and have Mr. Thompson operate the restaurant given Mr. Thompson's familiarity with the space.

25. On March 22, 2021, Mr. Thompson forwarded Mr. Belot a letter of intent containing "terms and conditions under which Punch Bowl Milwaukee, LLC and/or assignees would consider amending the existing lease" with the Landlord. One of the terms stated, "Prior to opening, previously due and future rents for COVID-related closure period shall be partially abated. In lieu of Minimum Rental due during such period, Tenant shall pay to Landlord $250,000 within 3 business day [sic] of executing the amendment described herein. Deposit of the letter of credit required by the lease must be made prior to opening. In the event that Tenant fails to timely make such payment or deliver the letter of credit Landlord shall have option to void at its sole discretion." Ex. 33, 517.

26. Four days later, on March 26, 2021, the Landlord sent a Notice of Termination of Possession to the Debtor, PBS Lender, and PBS Brand Co. LLC. Stipulation of Facts ¶ 18.

27. The Notice of Termination of Possession stated,

> Pursuant to Article 19 of the Lease captioned "DEFAULT," you are hereby notified that Landlord is terminating Tenant's right of possession on and under the Lease. Landlord will repossess the Premises effective immediately, and will change all locks and key codes in order to more effectively secure access to the Premises. Such action by Landlord in repossessing the Premises does not discharge the duties and obligations of Tenant under the Lease, nor the duties and obligations of Guarantor under the Guaranty.

Ex. 5, 504.

28. On March 31, 2021, PBS Brand Co. LLC sold its "remnant assets" (i.e. membership interests in eighteen subsidiary entities that were not Delaware Debtors, including the Debtor in this bankruptcy case), to PBS DIP Lender, LLC, an affiliate of PBS Lender and Sortis, in exchange for a payment of $20,000 and a waiver of all of Sortis's claims against the Delaware Debtors. Stipulation of Facts ¶ 12. The sale was approved by the Delaware Bankruptcy Court. Stipulation of Facts ¶ 13.

29. In accordance with the sale agreement, PBS Brand Co. LLC assigned its membership interest in the Debtor to Eatertainment 2.0, LLC, the Debtor's sole member. Stipulation of Facts ¶ 13.

30. Five days later, on April 5, 2021, counsel for PBS Lender sent the Landlord a letter "request[ing] and demand[ing] to schedule an inspection and ultimately remove the furniture, fixtures, and equipment from the Premises," concluding, "[p]lease contact this office to coordinate access and timing for such entry and removal." Ex. 13, 505.

31. The letter also stated, "Pursuant to Section 25.33 of the Lease, Landlord has waived all lien rights against the property kept on the Premises." Ex. 13, 505.

32. The letter further stated, "Furthermore, pursuant to Section 25.32 of the Lease, Landlord agrees 'to permit Tenant's Lender to go upon the Premises for the purpose of removing Tenant's property any time within 30 days after the effective date of any termination of this Lease or any repossession of the Premises by Landlord ...'" Ex. 13, 505.

33. The same day, April 5, 2021, Mr. Brenneke emailed Mr. Belot and advised him that, "We are open to continuing discussions to lease the space if you are interested, otherwise let's coordinate on removal of the collateral." Ex. 24, 506.

34. Mr. Belot responded the following morning and said, "We continue to evaluate options with our ownership perform our due diligence." Ex. 24, 506.

35. Mr. Brenneke followed up with an email to Mr. Belot, copying Mr. Thompson:

> Copying Robert in as he is on point if this is an operating store. My understanding of what was sent was typical for what we are seeing

> post bankruptcy in these kinds of deals. We were willing to expedite the restart to capture a portion of the season if there was some incentive from the landlord. We did not formally change the offer, but suggested a willingness to expedite opening if that was desired.
>
> I'm concerned that this process has been very slow when it seems as if all parties lose due to a day for day loss of the NBA season. As I said on the call, 'no' is a fine answer if you have another deal you prefer. We have other PBS opportunities where we can move the FF&E and we are anxious to do so if the answer is 'no' to our new entity operating the MKE store. We didn't give you the hard pitch on the previous call, but I think you would find our evolution of the PBS concept and our team (in addition to Robert) compelling.
>
> We were a little reluctant to share much as it sounded as if you were dealing with CrowdOut and possibly other competitors. I was presuming we would continue dialogue to share more if you had serious interest, but it feels like you are evaluating options in a vacuum.
>
> Let us know if there is reason to talk further as we'd like direction by the end of the week as the clock is ticking for us to schedule removal of FF&E due to your letter.

Ex. 39, 507.

36. Mr. Belot's April 7, 2021 response was, "Thanks Paul. Yes, we are working towards having some direction by the end of the week." Ex. 39, 507.

37. On April 9, 2021, counsel for the Landlord responded to counsel for PBS Lender, agreeing "to provide Lender with access to the Premises, albeit accompanied by Landlord or its representatives, in order for Lender to inventory and provide to Landlord a list of any of Tenant's personal property upon which it claims a lien." Ex. 14, 508.

38. The next day, April 10, 2021, Mr. Brenneke emailed Mr. Belot:

> I'll weigh in with my partner hat here rather than as the lender. If you've made a decision already we totally understand and will remove our items and move on. If you are truly evaluating options you really haven't seen or heard what we are thinking other than one short phone call. We are collaborating with Robert to put together the evolution of Eatertainment. Punch Bowl was great, but it was put together in 2010 and we are working on the 2020's version. We are happy to take the FF&E to another location as it

> has real value for us, but it seems like a shame to tear it apart and lose the season when you have a great team standing ready. We have a partically [sic] constructed location that needs this equipment ASAP if it is going to move so the timing on your decision is critical. As stated in my other email, we will have someone at your doorstep Monday and be ready to load out by end of the week if that is your decision.

Ex. 509, 519.

39. Mr. Belot responded, "Yes we truly are evaluating. Multiple groups have reached out. Happy to connect early this week if you have more info to share or provide. All we have received to this point is an eatertainment concept constructed by Robert. We don't know where it will all be and we are assuming the LOI provided stands as is." Ex. 510, 519.

40. On April 12, 2021, Mr. Brenneke wrote to Mr. Belot:

> Thanks for helping coordinate our inspection this morning. Our lawyer just turned around redlines to your access agreement. Please do remember this is just an inspection as that was a fairly aggressive agreement to get someone onsite to inspect. If we are unable to reach a lease deal, we are in a hurry to remove the FF&E as it will go to another site that is under construction. Hopefully, we can get the inspection out of the way today and if we can't reach a lease deal in the next few days we'd like to schedule the equipment move later this week or early next. Presuming you will have a follow up agreement for the removal it would be helpful to see a draft of that as early as possible.
>
> In regards to our business plan, we are concerned about sharing too much information outside of the Milwaukee location as you are obviously talking to competitors in our space. If you think it would be helpful we can send an NDA and have a follow up conversation. We had already started an [sic] MKE specific brand deck for you with the same group who did the Bucks rebrand as they are friends of ours, we put a hold on that as it doesn't seem like we are close to a deal. Thanks.

Ex. 510, 519.

41. On April 22, 2021, counsel for the Landlord sent the Debtor, PBS Brand Co. LLC, PBS Lender/Sortis, and CrowdOut Capital, LLC a "Notice Regarding Personal Property." Stipulation of Facts ¶ 19; Ex. 6, 511.

42. The Notice stated, "Pursuant to Section 9.4 of the Lease captioned 'Surrender of Premises,' Landlord is hereby notifying Tenant that all personal property, trade fixtures or other items of Tenant remaining on the Premises as of the date hereof are deemed abandoned by

Tenant, and Landlord is electing to take title thereto pursuant to the Lease without any payment or credit." *Id.*

43. On April 29, 2021, the Landlord's counsel told PBS Lender's counsel that he would not respond to the redlined document, "given that your client has waived its right to remove the collateral under the Lease, and my client now has ownership of the personal property (my client always had ownership of the fixtures, many of which (bowling alleys, bar, etc.) inexplicably show up on your list of collateral)." Additionally, his "client continues to move forward with its plan to place another occupant in the premises." Ex. 513.

44. On May 12, 2021, counsel for PBS Lender and Punch Bowl Milwaukee, LLC wrote to the Landlord's counsel after reviewing "correspondence between you and PBS [Lender] and regarding PBS's intention and effort to remove the Tenant Property," asserting that neither entity had waived its rights to any property, trade fixtures, or equipment. Ex. 34.

45. On July 30, 2021, the Landlord entered into a lease with New Punch Bowl. The Landlord also assigned to New Punch Bowl all of its rights and obligations associated with the original lease between the Landlord and the Debtor. Stipulation of Facts ¶¶ 3, 22.

Questions Presented

1. Did the Debtor abandon the personal property located at the Premises?

2. If the Debtor did not abandon the personal property located at the Premises, what property is personal property (i.e. property of the Debtor or the Debtor's bankruptcy estate) and what property is a fixture (i.e. not property of the Debtor or the Debtor's bankruptcy estate)?

Conclusions of Law

I. The Debtor Did Not Abandon the Personal Property Located at the Premises.

New Punch Bowl argues that all of the property remaining at the Premises was abandoned by the Debtor such that it cannot be property of the Debtor or property of the bankruptcy estate so the Court should enter an order stating that the stay does not apply to any of the property that remains at the Premises.

New Punch Bowl argues that the Debtor relinquished possession of the Premises and abandoned the property at the Premises following the Notice of Termination of Possession sent by counsel for the Landlord to the Debtor, PBS Lender, and PBS Brand Co. LLC on March 26, 2021. Ex. 5, 504. New Punch Bowl relies on Section 9.4 of the lease between the Debtor and the Landlord which provides:

> Surrender of Premises. Upon expiration or termination of this Lease, either by lapse of time or otherwise, Tenant shall peaceably surrender to Landlord the Premises, including the alterations,

> additions, improvements, changes and fixtures, other than Tenant's unattached movable trade fixtures, in broom-clean condition and in good condition and repair except for reasonable wear and tear and loss by fire or other casualty. Notwithstanding the foregoing or anything else contained herein to the contrary, Tenant may remove all personal property, including furnishings, machinery, trade fixtures, and equipment (trade or otherwise), which Tenant installs in the Premises and Outdoor Seating Area. In addition, Tenant may remove from the Premises and Outdoor Seating Area all items and structural characteristics installed by Tenant that are indicative of Tenant's business and may otherwise "de-identify" the Premises and Outdoor Seating Area, as Tenant reasonably believes necessary or appropriate for the protection of Tenant's interest in Tenant's trademarks, trade names or copyrights, provided Tenant repairs all damage caused by such removal. If Tenant fails to remove any personal property, signage or other items which Tenant is entitled to remove pursuant to this Section prior to any termination, Landlord may remove the same without any liability to Tenant. Any such personal property, fixtures or other items not so removed upon the vacancy of the Premises by Tenant ***will be conclusively presumed to have been abandoned by Tenant***, and to the extent Landlord elects to accept the same, ***title to such property will pass to Landlord without any payment or credit. Landlord may, at its option and at Tenant's expense, store and/or dispose of any such property remaining in the Premises***.

Ex. 3, 500 (emphasis provided in New Punch Bowl's Motion). New Punch Bowl argues that while PBS Lender made various overtures to the Landlord to inventory what they claimed to be the lender's collateral on the Premises, no one from the Debtor ever sought to reclaim or even discuss the personal property that the Debtor left behind at the Premises. Therefore, on April 22, 2021, the Landlord informed the Debtor and PBS Lender in a "Notice Regarding Personal Property" that it was deeming all of the property at the Premises "abandoned" by the Debtor and taking title to all of the property at the Premises as permitted under the lease. Ex. 6, 511. On April 29, 2021, the Landlord further notified PBS Lender that it had waived its right to remove the collateral under the lease and accordingly the Landlord took title to all of the property at the Premises pursuant to the terms of the lease. Ex. 513.

The Court disagrees with New Punch Bowl that the Debtor abandoned all of the property at the Premises. The lease specifically provides that the Debtor "may remove all personal property, including furnishings, machinery, trade fixtures, and equipment (trade or otherwise), which Tenant installs in the Premises and Outdoor Seating Area." Ex. 3, 500, Section 9.4. The Landlord expressly waived "any and all statutory or common law lien rights Landlord may have upon any of Tenant's property or any other party's property usually kept on the Premises." *Id.*, Section 25.33. The lease does not provide a specific time period by which the Debtor was required to remove its property before the property would be deemed abandoned and instead states that "any such personal property, fixtures or other items not so removed *upon the vacancy*

of the Premises by Tenant will be conclusively presumed to have been abandoned by Tenant . . .". *Id.*, Section 9.4. New Punch Bowl wants this Court to conclude that the Notice of Termination of Possession coupled with the Notice Regarding Personal Property coupled with the Debtor's alleged lack of contact with the Landlord after those notices were delivered resulted in the Debtor abandoning the property at the Premises such that the Landlord could take title to all of the Debtor's personal property at the Premises. The Court rejects this conclusion.

The parties agree that for there to be abandonment of property under Wisconsin law "there must be a relinquishment coupled with an intent to part with it permanently." *See* Motion, pp. 10-11; Debtor's Brief, p. 11 ("Abandonment, as applied to leases, involves an absolute relinquishment of premises by a tenant, and consists of act or omission and an intent to abandon."). The following evidence presented at the hearing demonstrated that the Debtor did not abandon the property at the Premises and instead repeatedly asserted its interest in the property at the Premises and repeatedly requested to remove its property from the Premises:

- Between March 17, 2021 and March 18, 2021, Paul Brenneke and Robert Thompson, who were about to acquire Punch Bowl Milwaukee as part of the Delaware bankruptcy case, exchanged emails with Michael Belot about scheduling a call to "broadly discuss strategy and cover a few timing related items." Ex. 516.

- In anticipation of acquiring Punch Bowl Milwaukee as part of the Delaware bankruptcy proceeding, Mr. Brenneke had four to five telephone conversations and exchanged six to ten emails with Michael Belot about reopening the Punch Bowl Milwaukee location, using the Debtor's personal property at that location. The intent was to restructure the lease for the Premises and have Mr. Thompson operate the restaurant given Mr. Thompson's familiarity with the space.

- On March 22, 2021, Mr. Thompson forwarded Mr. Belot a letter of intent containing "terms and conditions under which Punch Bowl Milwaukee, LLC and/or assignees (i.e. the Debtor) would consider amending the existing lease" with the Landlord, including paying $250,000 of back rent. Ex. 33, 517.

- On April 5, 2021, Mr. Brenneke emailed Mr. Belot and advised him that "We are open to continuing discussions to lease the space if you are interested, otherwise let's coordinate on removal of the collateral." Ex. 24, 506.

- On April 6, 2021, Mr. Brenneke followed up with an email to Mr. Belot, copying Mr. Thompson, stating, "As I said on the call, 'no' is a fine answer if you have another deal you prefer. We have other PBS opportunities where we can move the FF&E and we are anxious to do so if the answer is 'no' to our new entity operating the MKE store. We didn't give you the hard pitch on the previous call, but I think you would find our evolution of the PBS concept and our team (in addition to Robert) compelling. . ." Ex. 39, 507.

- On April 10, 2021, Mr. Brenneke, "wearing his partner hat," emailed Mr. Belot, stating, "If you've made a decision already we totally understand and will remove our

items and move on. If you are truly evaluating options you really haven't seen or heard what we are thinking other than one short phone call. We are collaborating with Robert to put together the evolution of Eatertainment. Punch Bowl was great, but it was put together in 2010 and we are working on the 2020's version. We are happy to take the FF&E to another location as it has real value for us, but it seems like a shame to tear it apart and lose the season when you have a great team standing ready. We have a partically [sic] constructed location that needs this equipment ASAP if it is going to move so the timing on your decision is critical. As stated in my other email, we will have someone at your doorstep Monday and be ready to load out by end of the week if that is your decision." Ex. 509, 519.

- On April 12, 2021, Mr. Brenneke again emailed Mr. Belot, stating, "If we are unable to reach a lease deal, we are in a hurry to remove the FF&E as it will go to another site that is under construction. Hopefully, we can get the inspection out of the way today and if we can't reach a lease deal in the next few days we'd like to schedule the equipment move later this week or early next. Presuming you will have a follow up agreement for the removal it would be helpful to see a draft of that as early as possible. . ." Ex. 510, 519.

The Debtor repeatedly asserted its interest in the property remaining at the Premises and repeatedly requested an opportunity to remove its property from the Premises if the Landlord was not interested in continuing to do business with the Debtor. The evidence demonstrated that there was no relinquishment of the property at the Premises by the Debtor nor was there an intent by the Debtor to part with the property at the Premises permanently.

New Punch Bowl Milwaukee would like the Court to conclude that each and every communication made between the Landlord and Mr. Brenneke was made with Mr. Brenneke acting as the Debtor's lender and not as the Debtor and to find that the Debtor made no overtures about the property at the Premises and thereby abandoned all of the property at the Premises. Such a conclusion is contrary to the evidence that was presented. PBS Lender/Sortis acquired Punch Bowl Milwaukee as part of a compromise of a claim that it had in the Delaware bankruptcy proceeding, and Mr. Brenneke is, of course, the executive chairman of Sortis. But Mr. Brenneke was much more than just a lender; he was intimately involved as a partner in attempting to negotiate a lease with the Landlord to reopen the Punch Bowl Social in Milwaukee with Mr. Thompson. And he explicitly told the Landlord on more than one occasion on behalf of the Debtor that if there was going to be no deal, he wanted to remove all of the Debtor's personal property from the Premises. For these reasons, the Court finds that the Debtor did not abandon the personal property at the Premises.

II. Fixtures Are Not the Debtor's Property or Property of the Bankruptcy Estate, but Personal Property is the Debtor's Property or Property of the Bankruptcy Estate.

Having concluded that the Debtor did not abandon its property at the Premises, the Court's task is to determine what property at the Premises constitutes a fixture and what property at the Premises constitutes personal property. According to the lease, the Debtor is required to surrender to the Landlord "alterations, additions, improvements, changes and fixtures, other than

Tenant's unattached movable trade fixtures," but is permitted to remove "all personal property, including furnishings, machinery, trade fixtures, and equipment (trade or otherwise), which Tenant installs in the Premises and Outdoor Seating Area." Ex 3, 500, Section 9.4.

The parties each brought an expert witness to offer testimony to support their respective positions as to whether an item is a fixture or personal property. Salvatore Purpora, owner of S&P Equipment, testified on behalf of New Punch Bowl. He has significant experience removing the contents of restaurants. Joel Cielak, a commercial and industrial auctioneer and appraiser with Great Lakes Auction and Appraisal, testified on behalf of the Debtor. Mr. Cielak has auctioned similar assets.

Wisconsin courts review three factors to determine whether property is a fixture:

(1) actual physical annexation to the real estate;

(2) application or adaptation to the use or purpose to which the realty is devoted; and

(3) an intention on the part of the person making the annexation to make a permanent accession to the freehold.

Wis. Dep't of Revenue v. A. O. Smith Harvestore Prods., Inc., 72 Wis. 2d 60, 67-68 (1976) (citations omitted).

Annexation requires the property to be attached or affixed to real property. *Premonstratensian Fathers v. Badger Mut. Ins. Co.*, 46 Wis. 2d 362, 367-68 (1970). Wisconsin courts consider the relative ease with which an object annexed to realty may be removed, though "the element of removability without material damage to the building" is only one of the factors courts consider. *Id.* at 369 and n.6.

Adaptation "refers to the relationship between the chattel and the use which is made of the realty to which the chattel is annexed." *Id.* at 370. "The test here is not the adaptability to the building, but the adaptability to the use to which the building is put." *Id.* One court has observed that "[t]he practical efficiency of such a criterion of a fixture may well be questioned. It would but rarely occur that an article attached to land is used otherwise than in furtherance of the purpose for which the land is used." *500 Wis., LLC v. JPMorgan Chase Bank, N.A.*, No. 18-CV-1845, 2020 U.S. Dist. LEXIS 136169, at *23 (E.D. Wis. July 31, 2020) (quoting Character of Article, 2 Tiffany Real Prop. § 610 (3d ed.)).

Intention is the most important of the three factors. *Harvestore Prods.*, 72 Wis. 2d at 68. The relevant intention "is that of the annexor . . . and the question is whether he intends to make a permanent accession to the freehold." *Id.* at 69. The inquiry is "not the actual subjective intent of the landowner making the annexation, but an objective and presumed intention of that hypothetical ordinary reasonable person, to be ascertained in the light of the nature of the article, the degree of annexation, and the appropriateness of the article to the use to which the realty is put." *Id.* (citation omitted).

As the Wisconsin Supreme Court has stated, the degree of annexation is part of the Court's consideration in determining the intent of a hypothetical ordinary reasonable person. Both experts agreed that it is possible to remove practically anything if one is willing to spend enough money to remove the item and repair the damage caused by the removal. Ultimately, though, an ordinary reasonable person would draw a line. For example, if the cost of removing an item and repairing the building is significant and the item is not unique, a hypothetical reasonable annexor would likely intend to leave the item installed. The same holds true if removing an item would destroy it.

A. The Court Determines the Following Items Are Fixtures.

1. The exhaust hood, including the rooftop unit, fire suppression system, and stainless steel portion.

The Debtor concedes that the fire protection system with hoods is a fixture. *See* Debtor's Brief, p. 9. The evidence also supports a conclusion that the exhaust hood, including the rooftop unit, the fire suppression system, and the stainless steel portion are fixtures. The exhaust hood is firmly affixed to the property. Mr. Purpora testified that the fire protection system alone would take a day to disconnect. He would have to disconnect electrical, gas, and cut the welded heavy gauge black piping right below the roof. Removing the air system and fans from the roof would require the use of a crane and cost between $50,000 and $60,000. Mr. Cielak agreed that due to the cost of renting a crane, he would often leave the rooftop air unit when disconnecting a hood system. Given the degree of annexation of the hood system to the roof of the building, requiring a crane for removal, a hypothetical reasonable annexor would have intended for the system to remain in place. The building was constructed as a restaurant and the hood was adapted to that use. In fact, Mr. Cornog testified that the Landlord was required to install the kitchen exhaust, suggesting that this was intended to remain part of the space in this particular case.

2. All bars (defined as the structures patrons put drinks on) and associated foot railings.

The bars are large items adapted to use in a restaurant space that are securely attached to the building and would require a reciprocating saw to remove, as evidenced by the testimony of both experts and Mr. Purpora's photographs, indicating that a hypothetical reasonable annexor would have intended them to remain with the building. The testimony showed the bars are firmly affixed to the property. According to Mr. Purpora, the downstairs bar is anchored in with angle iron and the foot railing is secured to the floor. The two bars upstairs are secured in a similar way. *See* Ex. 30 at 5, 8, 11, 13.

3. The walk-in cooler(s)/beer cooler(s), walk-in freezer(s), and beer system shown in Exhibit 30 at page 9.

The walk-in cooler is also so affixed to the property as to evidence an intent that it be a permanent annexation, requiring removal of a concrete curb and diamond flooring. According to Mr. Purpora, the walk-in cooler/beer cooler pictured in Exhibit 30 at page 9 had concrete edgings to protect the cooler and seal it. The space had diamond plate flooring that was screwed down to

the floor and difficult to remove, requiring hours of work that would cause damage to the concrete floor and require repairs. Mr. Cielak testified that coolers are generally modular these days, and the panels and door come apart. However, he agreed that the coolers had a concrete curb around the outside to protect the cooler and he did not contradict Mr. Purpora's testimony about the difficulty involved in removing the diamond flooring. A walk-in cooler is adapted to use in a restaurant, and there is a close connection between a walk-in cooler and a restaurant. *See Premonstratensian Fathers*, 46 Wis. 2d at 370 (discussing walk-in coolers used in retail grocery and finding them to be fixtures).

4. The bowling lanes and pin setters.

The space also contains bowling alleys. Mr. Purpora testified that he has assisted in disassembling bowling alleys and it was a lot of work. Mr. Cielak conceded that removing the lanes would cause damage. If he were to remove the lanes, he would use a reciprocating saw, and if he hit the concrete while doing so, it would need to be repaired with epoxy. The bowling lanes are so firmly affixed to the building that a hypothetical reasonable annexor would have intended for them to remain in place. The lanes themselves are sixty-foot synthetic lanes. Mr. Robert Cornog, Jr., the President of New Punch Bowl Milwaukee, testified that removal of the lanes would require ripping them out and essentially destroying them.

Mr. Purpora further testified about the difficulty of removing the pin setters and how the pin setters at the Premises would need to be disassembled to fit through doors. Mr. Cornog noted the additional challenges presented by the removal of the pin setters from the second floor of the building. Based upon the testimony, the Court finds that the pin setters are so firmly affixed to the building that a hypothetical reasonable annexor would have intended for them to remain in place.

5. The bowling shoe cage.

Along with the bowling lanes, the space also contains a firmly affixed bowling shoe cage pictured in Exhibit 30 at page 4. It is quite large, and Mr. Purpora testified that it is secured to the concrete floor with screws and is secured to the ceiling. Mr. Purpora stated that it would be a "nightmare to remove something like this and to piece it back together." He thought it would take three to four of his workers to remove the bowling shoe cage and that it would need to be cut from the floor using Sawzalls and disassembled, suggesting that a hypothetical annexor would have intended it to remain with the Premises.

6. The sink at the waitress station shown in the photograph located at Exhibit 30, page 10 and all similar sinks.

Mr. Purpora testified that the waitress station pictured in Exhibit 30 at page 10 is secured to the walls. Such a station is adapted to the use of the space as a restaurant and the degree of annexation suggests that a hypothetical annexor would intend it to remain. Additionally, the Debtor concedes in its brief that sinks are fixtures under Wisconsin law. *See* Debtor's Brief, p. 9 n.2.

7. The tables shown in the photograph located at Exhibit 30, page 6 and the stairwell and built-in furniture underneath it.

Mr. Purpora testified that some of the tables are bolted down and affixed to the walls. They would require a reciprocating saw to remove them from the wall and the process could require chipping remaining metal off the floor to level it. Additionally, Mr. Purpora testified that removing the built-in furniture under the stairwell would cause damage. Although Mr. Cielak testified that the seating described in his appraisal could be removed and sold, the tables that were pictured were affixed to the building, adapted to the use of the Premises as a restaurant, and the level of damage potentially caused by removing them suggested a hypothetical annexor would have intended them to remain.

8. All toilets and restroom sinks.

Mr. Purpora also noted that the toilets and everything in the restrooms are screwed down. Not only are restroom appliances adapted to a restaurant, they would be adapted to many other uses to which a building might be put. Thus, a hypothetical reasonable annexor would intend that these items remain with the building. Plus, the Debtor concedes in its brief that the toilets and sinks are fixtures under Wisconsin law. *See* Debtor's brief, p. 9 n.2.

Contributing to the Court's conclusion that the items listed above are fixtures is Mr. Purpora's testimony that it would cost approximately $250,000 to "disassemble everything, take it all apart, and rip it down to the walls." Mr. Purpora's estimate included four weeks of work with eight people and four semi-truck loads of property. He also thought it would cost approximately $150,000 to $200,000 to repair the Premises, requiring a total of $400,000 to $450,000 to return the space to "four square walls." In light of the cost and the degree of destruction necessary to accomplish this result, it is clear that a reasonable annexor would have intended the items listed above to remain with the Premises.

B. The Court Determines the Following Items Are Not Fixtures.

1. Handheld radios, computers, smallwares (like glasses, chafing dishes, and plates), movable and unattached chairs, foosball tables, bowling shoes, bowling balls, and similar items.

The parties agree that a number of items are not fixtures. These include items like handheld radios, computers, smallwares (like glasses, chafing dishes, and plates), movable chairs, foosball tables, bowling balls, and bowling shoes. Because this property is neither physically nor constructively affixed to the property, these items are not fixtures.

2. The fryer(s), oven(s), and the grill(s)/griddle(s).

Although these items are technically affixed to the building, their removal would not be difficult or cause significant damage to the space. Mr. Cielak testified that the fryers, the ovens, and the grill/griddle are "quick disconnect," and those and like kitchen equipment could be moved out over a three to four day period. Mr. Purpora concurred that there was a "quick

disconnect" line on these items and that the griddle/grill was on casters and could be rolled out for cleaning.

3. The small coolers with and without casters located behind any bar.

Mr. Cielak testified that there are Perlick modular systems underneath and behind the bars. Some of these coolers are on casters, making them easy to move, and the ones that are not could be moved with a pallet jack. Mr. Purpora testified that coolers behind the circular upstairs bar did not have casters, but were not permanently installed, and the coolers behind the other upstairs bar did have casters. This testimony supports a conclusion that these small coolers are not annexed to the Premises and were not intended to be a permanent attachment to the real estate and thus are not fixtures.

4. The speakers located in the karaoke rooms.

According to Mr. Purpora, the speakers in the karaoke rooms are mounted to the wall, but the wires could easily be removed from the speakers and unscrewing the speakers would not be difficult. There is no indication that a hypothetical reasonable annexor would have intended them to remain with the Premises.

C. The Court Is Unable to Determine the Status of Some Items.

Given the evidence presented at the hearing, the Court is unable to determine whether other items are fixtures. New Punch Bowl filed a long list of items that it identified as fixtures and abandoned property. *See* Corrected Exhibit F to the Motion, Corrected List of Fixtures and Abandoned Property Located at the Premises, filed as Docket No. 14-1. The list contains a lot of very vaguely described pieces of property that remain at the Premises. New Punch Bowl's Motion requested a determination that all of these items are fixtures or abandoned property, not property of the Debtor or the bankruptcy estate, and a determination that the automatic stay does not extend to them. Given the lack of evidence presented at the hearing on the remaining items on the list, and the lack of further specificity about many of the items on the list, the Court will deny the relief requested in the Motion as to the remaining items on the list. To the extent the items on the list are not fixtures, they are property of the Debtor or property of the estate and the automatic stay applies to them.[2]

IT IS THEREFORE ORDERED: the Motion's request for a determination that property is not property of the Debtor or property of the bankruptcy estate is granted as to the following:

1. The exhaust hood, including the rooftop unit, fire suppression system, and stainless steel portion;

2. All bars (defined as the structures patrons put drinks on) and associated foot railings;

[2] *But see City of Chicago. v. Fulton*, 141 S. Ct. 585 (2021) (mere retention of property does not violate 11 U.S.C. § 362(a)(3)).

3. The walk-in cooler(s)/beer cooler(s), walk-in freezer(s), and beer system shown in Exhibit 30 at page 9;

4. The bowling lanes and pin setters;

5. The bowling shoe cage;

6. The sink at the waitress station shown in the photograph located at Exhibit 30, page 10 and all similar sinks;

7. The tables shown in the photograph located at Exhibit 30, page 6 and the stairwell and built-in furniture underneath it; and

8. All toilets and restroom sinks.

IT IS FURTHER ORDERED: the Motion's request for a determination that property is not property of the Debtor or property of the bankruptcy estate is denied as to the following property because it is property of the Debtor or property of the estate:

1. Handheld radios, computers, smallwares (like glasses, chafing dishes, and plates), movable and unattached chairs, foosball tables, bowling shoes, bowling balls, and similar items;

2. The fryer(s), oven(s), and the grill(s)/griddle(s);

3. The small coolers with and without casters located behind any bar; and

4. The speakers located in the karaoke rooms.

IT IS FURTHER ORDERED: the Motion's request for a determination about the status of property is denied as to all other property listed on the Corrected List of Fixtures and Abandoned Property Located at the Premises filed as Docket No. 14-1.

IT IS FURTHER ORDERED: New Punch Bowl Milwaukee, LLC's request for relief from stay pursuant to 11 U.S.C. § 362(d)(1) is denied.

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