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6 *Attorney for Secured Creditor*

7 **IN THE UNITED STATES BANKRUPTCY COURT**

8 **FOR THE DISTRICT OF ARIZONA**

9

10 **In Re:**

11 **Chapter 11**

12 **OSBORN RESTAURANT HOLDINGS, LLC,**

13 **Case No. 2:17-bk-00612**

14 **Debtor.**

15 **NOTICE OF NON-CONSENT TO**
16 **DEBTORS' USE OF CASH**
17 **COLLATERAL**

18 Capital Fund I, LLC and Capital Fund II, LLC, both Arizona Limited Liability
19 Companies (collectively "Capital Fund"), by and through undersigned counsel,
20 provides notice of its claim against and of its non-consent to the use of its cash
21 collateral by Debtor, Osborn Restaurant Holdings, LLC ("Debtor"). Capital Fund
22 requests that the Court enter an Order conditioning, restricting or prohibiting the
23 Debtor's use of Capital Fund's collateral and moves this Court for an Order of requiring
24 Debtor to place all moneys in a restricted account.

MEMORANDUM OF POINTS AND AUTHORITIES

1. This matter is a core proceeding under 28 U.S.C. §157(b) (2) (M) and may be a contested matter pursuant to Rule 9014 of the Federal Rules of Bankruptcy Procedure.

2. Debtor filed a petition for Chapter 11 bankruptcy protection on January 23, 2017 (the "Petition Date").

3. On February 5, 2015, Debtor borrowed \$1,300,000.00 from Capital Fund. Debtor's member, Ronald Pacioni, executed and delivered to Capital Fund a Promissory Note (the "1.3M Note") reflecting the agreement to pay back the loan. A copy of the Note is attached as Exhibit A and is incorporated by this reference.

4. As security for the Note, Debtor granted Capital Fund I a Deed of Trust which was recorded in the Official Records of Maricopa County, Arizona on February 6, 2015 at Recorder Nos. 2015-079981. A Copy of the Deed of Trust is attached as Exhibit B and incorporated by this reference. The Deed of Trust encumbers real property located at 1655 and 1725 E. Osborn Rd., Phoenix, AZ 85016.

On February 12, 2015 the Note and Deed of Trust were endorsed and assigned to Capital Fund II, LLC, respectively, which was recorded in the Official Records of Maricopa County, Arizona on at Recorder No. 2015-0091138. A copy of the Assignment is attached as Exhibit C and incorporated by this reference.

5. As additional security for the Note, Debtor agreed to an Assignment of Rents with Security Agreement and Financing Statement ("Assignment of Rents" and

1 "Fixture Filing") that was made a part of, and incorporated, into the Deed of Trust as
2 recorded. *See, Exhibit B.*

3 6. Debtor owns and operates an income producing restaurant Coup Des
4 Tartes and therefore, Capital Fund believes there is income from collection of
5 prepetition accounts receivable, prepetition rents (if so structured), funds in its
6 accounts, and any and all other income and monies in its possession or to which it is
7 entitled or may become entitled which is cash collateral of Capital Fund within the
8 meaning of 11 U.S.C. §363(a) ("Cash Collateral") and thus, are subject to the
9 restrictions of 11 U.S.C. §363(c) .

10 7. Debtor has failed to pay its monthly mortgage payment since August 1,
11 2016. As of January 10, 2017 the total amount due to bring the loan current was
12 \$227,423.52.

13 8. On October 10, 2016, Capital Fund, through its successor trustee,
14 recorded a Notice of Trustee Sale on its First Lien with the Maricopa County
15 Recorder's Office at Recorder Nos. 2016-0757446, giving notice that the Real property
16 would be sold pursuant to the power of sale under the Maricopa Deed of Trust at
17 public auction (the "Trustee's Sale") on January 17, 2017 at 11:00 a.m. and was
18 continued thereafter as the parties were attempting to work through the default.

19 9. The Debtor's bankruptcy filing on January 23, 2017 stayed the Trustee
20 Sale which is being continued from time to time while this case is pending.

21 10. The Deed of Trust with Assignment of Rents and Fixture Filing clauses
22 grant and perfect liens and secured interests in favor of Capital Fund and encumber
23

1 the Real Property and all present and future leases, rents, prepetition accounts
2 receivable, funds in all accounts and any and all other income and moneys in Debtor's
3 possession or arising therefrom.

4 11. Debtor is the present title record holder of the Real Property.

5 12. As of the Petition Date, Debtor owes to Capital Fund an amount totaling
6 over \$227,423.52, exclusive of interest, late charges, trustee fees, attorneys' fees and
7 costs that continue to accrue, pursuant to the Loan Documents.

8 13. Capital Fund has not consented nor does it consent, to Debtor's use of the
9 cash collateral. Based on information and belief provided by Debtor previously, the
10 business revenue covers the loan payments owed to Capital Fund by the Debtor.

11 14. Despite Capital Fund's interest in the cash collateral, Debtor has not
12 attempted to contact nor made any arrangement with Capital Fund to account for the
13 cash collateral or to sufficiently segregate the cash collateral which is the property of
14 Capital Fund.

15 15. Pursuant to 11 U.S.C. §546(b) and otherwise, Capital Fund hereby asserts
16 and notices Debtor of Capital Fund's perfected security interest in the cash collateral.
17 Any use thereof without an Order of this Court or Capital Fund's consent has been and
18 will be in violation of 11 U.S.C. §363(c)(2); and any such unauthorized use shall result
19 in direct liability to the responsible party. Capital Fund reserves its rights and
20 remedies in the event of such a violation.

16. The Cash Collateral may not be used by Debtors pursuant to 11 U.S.C. §363(c) (2) unless Culver City consents or this Court enters and Order authorizing said use.

17. Pursuant to U.S.C. §363(c) (4), Debtors and their counsel have the duty to segregate and account for any Cash Collateral that does not belong to them.

18. Pursuant to 11 U.S.C. §363(e), this Court has the authority to enter an Order conditioning, restricting or prohibiting Debtor's use of the cash collateral; Capital Fund requests that such an Order be entered.

RESPECTFULLY SUBMITTED this 25th day of January, 2017.

CYNTHIA L. JOHNSON

By: /s/ Cynthia L. Johnson

Cynthia L. Johnson

Attorney for Secured Creditor

COPY of the foregoing electronically filed
this 25th day of January, 2017 with:

Clerk of the U.S. Bankruptcy Court
District of Arizona
230 N. First Avenue
Suite 101
Phoenix, AZ 85003-1727

With copies mailed or served
via (email or fax* or electronic notification** if so marked)

**Office of the U.S. Trustee
230 N. 1st Avenue
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Phoenix, AZ 85003

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By: /s/ Cynthia Johnson