

**WEST CRE VENTURE 2010-2 Structured Transaction**

**SERVICING AGREEMENT**

**by and between**

**COLFIN MILESTONE WEST FUNDING, LLC**

**and**

**COLONY AMC MILESTONE WEST, LLC**

**Dated as of December 14, 2010**

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### Exhibits

<u>Exhibit A</u>	Asset Schedule
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### Schedules

<u>Schedule 1</u>	List of Various Failed Financial Institutions
<u>Schedule 2</u>	Fee Schedule
<u>Schedule 3</u>	Servicing Obligations
<u>Schedule 4</u>	Reimbursement of Servicer Advances
<u>Schedule 5</u>	Form of Electronic Report on the Assets and Collateral
<u>Schedule 6</u>	Termination Without Cause
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## SERVICING AGREEMENT

THIS SERVICING AGREEMENT (as the same shall be amended or supplemented, this "**Agreement**") is made and entered into as of the 14th day of December, 2010, intending to be effective December 15, 2010 (the "**Effective Date**"), by and between ColFin Milestone West Funding, LLC, a Delaware limited liability company (including its successors and assigns, the "**Manager**"), and Colony AMC Milestone West, LLC (including those of its successors and assigns as are expressly permitted pursuant to this Agreement, the "**Servicer**").

### RECITALS

WHEREAS, West CRE Venture 2010-2, LLC (the "**Company**") owns the Assets described on the Asset Schedule attached hereto as Exhibit A (the "**Asset Schedule**");

WHEREAS, the Manager is the "Manager" of the Company with the authority and responsibility to service and manage the Assets and the related Collateral (as defined below) pursuant to the LLC Operating Agreement;

WHEREAS, the Manager desires to delegate to the Servicer the Manager's responsibilities under the LLC Operating Agreement and other Transaction Documents with respect to the corresponding obligations of Servicer under this Agreement; and

WHEREAS, the Manager and the Servicer desire that the Servicer service and administer the Assets and Collateral on behalf of the Company and the Manager in a manner that is, at all times, consistent with the requirements of this Agreement.

NOW, THEREFORE, in consideration of the foregoing and the mutual promises and agreements contained herein, and for other good and valuable consideration the receipt and sufficiency of which are hereby acknowledged, the Manager and the Servicer hereby agree as follows:

### ARTICLE I DEFINITIONS AND CONSTRUCTION

Section 1.1 Definitions. Capitalized terms used in this Agreement shall have the meanings assigned to them in, or by reference in, that certain Agreement of Common Definitions, dated as of the Closing Date, among the Initial Member, the Servicer, the Private Owner, the Manager, the Purchase Money Notes Guarantor and others with respect to the transaction (the "**Agreement of Common Definitions**").

"**Agreement**" shall have the meaning given in the preamble.

"**Controlled Affiliate**" with respect to the Servicer or any Subservicer, shall mean any Affiliate thereof that is Controlled by the Servicer or such Subservicer, as applicable, or by its Specified Parent (in the case of the Servicer).

"**Default**" shall have the meaning given in Section 7.1.

**“Effective Date”** shall have the meaning given in the preamble of this Agreement.

**“Electronic Report”** shall have the meaning given in Section 5.2(e).

**“Fee Schedule”** shall mean Schedule 2, as the same may be amended from time to time by the Manager and the Servicer without the consent of the Required Consenting Parties.

**“Indemnified Parties”** shall have the meaning given in Section 8.2.

**“Other Accounts”** shall have the meaning given in Section 2.7.

**“Servicer Advances”** shall mean advances made by or on behalf of the Servicer to fund Servicing Expenses.

**“Servicing Fee”** shall have the meaning given in Section 2.3.

**“Servicing Obligations”** shall have the meaning given in Section 2.4.

**“Servicing Standard”** shall have the meaning given in Section 2.4.

**“Site Assessment”** shall have the meaning given in Section 3.3.

**“Specified Date”** shall mean the 10<sup>th</sup> day of each month, or such other day as is agreed to by the Servicer and the Manager, provided, however, that, in any case, if such day is not a Business Day, the Specified Date shall be the immediately preceding Business Day.

**“Termination Notice”** shall mean any written notice of termination required pursuant to **Article VII**.

Section 1.2 **Construction**. This Agreement shall be construed and interpreted in accordance with the following:

(a) References to “Affiliates” include, with respect to any specified Person, only such other Persons which from time to time constitute “Affiliates” of such specified Person, and do not include, at any particular time, other Persons that may have been, but at such time have ceased to be, “Affiliates” of such specified Person, except to the extent that any such reference specifically provides otherwise.

(b) The term “or” is not exclusive.

(c) A reference to a Law includes any amendment, modification or replacement to such Law.

(d) References to any document, instrument or agreement (including this Agreement) (a) shall be deemed to include all appendices, exhibits, schedules and other attachments thereto and all documents, instruments or agreements issued or executed in replacement thereof, and (b) shall mean such document, instrument or agreement, or replacement thereto, as amended, modified and supplemented from time to time in accordance with its terms and as the same is in effect at any given time.

(e) Unless otherwise specified, the words “hereof,” “herein” and “hereunder” and words of similar import shall refer to this Agreement as a whole and not to any particular provision of this Agreement.

(f) The words “include” and “including” and words of similar import are not limiting, and shall be construed to be followed by the words “without limitation,” whether or not they are in fact followed by such words.

(g) The word “during” when used with respect to a period of time shall be construed to mean commencing at the beginning of such period and continuing until the end of such period.

(h) Unless the context otherwise requires, singular nouns and pronouns when used herein shall be deemed to include the plural and vice versa and impersonal pronouns shall be deemed to include the personal pronoun of the appropriate gender.

## **ARTICLE II**

### **SERVICING OBLIGATIONS OF THE SERVICER**

Section 2.1 Appointment and Acceptance as Servicer. Effective as of the date hereof (and, with respect to each Asset or Group of Assets, as of the applicable Servicing Transfer Date with respect thereto), the Manager appoints the Servicer to service, administer, manage and dispose of the Assets and the Collateral on behalf of and as an agent of the Manager.

Section 2.2 Limited Power of Attorney. The Manager hereby grants to the Servicer a limited power of attorney to execute all documents on its behalf (including as the “Manager” of the Company, in turn acting on behalf of the Company) in accordance with the Servicing Standard set forth below and as may be necessary to effectuate the Servicer’s obligations under this Agreement until such time as the Manager revokes said limited power of attorney. Revocation of the limited power of attorney shall take effect upon: (i) the receipt by the Servicer of written notice thereof from or on behalf of the Manager, or (ii) termination of this Agreement pursuant to Article VII.

Section 2.3 Servicing Fee. As consideration for servicing the Assets and the Collateral, the Manager shall pay the Servicer a servicing fee in the amount and at such times as are set forth on the Fee Schedule (the “**Servicing Fee**”).

Section 2.4 Servicing Standard. The Servicer shall take such actions and perform such duties in connection with the servicing, administration, management and disposition of the Assets and Collateral as are set forth on Schedule 3, as the same may be amended from time to time by the Manager and the Servicer (the “**Servicing Obligations**”). The Servicer shall perform its Servicing Obligations (i) in the best interests and for the benefit of the Company, (ii) in accordance with the terms of the Assets (and related Asset Documents), (iii) in accordance with the terms of this Agreement (including this Article II), (iv) in accordance with all applicable Laws, (v) subject to Section 5.7, in accordance with the requirements of the LLC Operating Agreement, the Custodial and Paying Agency Agreement and the other Transaction Documents, and (vi) to the extent consistent with the foregoing terms, in the same manner in which a prudent servicer would service and administer similar loans and in which a prudent servicer would



manage and administer similar properties for its own portfolio or for other Persons, whichever standard is higher, but using no less care and diligence than would be customarily employed by a prudent servicer following customary and usual standards of practice of prudent mortgage lenders, loan servicers and asset managers servicing, managing and administering similar loans and properties on an arms' length basis, provided that, with respect to each Asset and related Collateral, in the absence of a customary and usual standard of practice, the Servicer shall comply with the applicable Fannie Mae Guidelines, if any, with respect to similar loans or properties in similar situations (the requirements in clauses (i) through (vi) collectively, the "**Servicing Standard**"). In addition, the Servicer shall perform its Servicing Obligations without regard to (a) any relationship that the Servicer, the Company, the Manager or any Subservicer or any of their respective Affiliates may have to any Borrower or Obligor or any of their respective Affiliates, including any other banking or lending relationship and any other relationship described in Section 5.1(h), (b) the Company's, the Manager's, the Servicer's or any Subservicer's obligation to make disbursements and advances with respect to the Assets and the Collateral, (c) any relationship that the Servicer or any Subservicer may have to each other or to the Company, the Manager or any of their respective Affiliates, or any relationship that any of their respective Affiliates may have to the Company, the Manager or any of their respective Affiliates (other than the contractual relationship evidenced by this Agreement or any Subservicing Agreement), and (d) the Servicer's or any Subservicer's right to receive compensation (including the Servicing Fee) for its services under this Agreement or any Subservicing Agreement.

#### Section 2.5 Collection Account.

(a) The Servicer shall deposit into the Collection Account all Asset Proceeds on a daily basis (without deduction or setoff as provided in Section 11.2 hereof) within two Business Days after receipt thereof by the Servicer. The Servicer shall not cause funds from any other source (other than interest or earnings on the Asset Proceeds, amounts released from the Working Capital Reserve Account, and the proceeds of Excess Working Capital Advances and Discretionary Funding Advances and other funds expressly permitted to be deposited into the Collection Account pursuant to the Custodial and Paying Agency Agreement) to be commingled in the Collection Account.

(b) Except as otherwise directed by the Manager, any and all amounts on deposit in (or that are required to have been deposited into) the Collection Account (including interest and earnings thereon) shall be disbursed strictly in accordance with this Agreement (including the additional terms and conditions set forth in the Servicing Obligations) for purposes of payment of applicable Working Capital Expenses (including the making of applicable Funding Draws); provided, however, that if the Servicer or any Subservicer erroneously deposits any amounts into the Collection Account, it may withdraw such erroneously deposited amount.

(c) Except as otherwise directed by the Manager, any and all amounts required to be remitted by the Servicer to the Collection Account under this Agreement shall be remitted by wire transfer, in immediately available funds.

(d) The Collection Account (and all funds therein) will be subject to an account control agreement among the Company, the Collateral Agent and the Paying Agent.

Section 2.6 Working Capital Reserve Account.

(a) Pursuant to the LLC Operating Agreement and the Custodial and Paying Agency Agreement, the Company has established the Working Capital Reserve Account to be maintained with the Paying Agent, and the Initial Member and the Private Owner have funded into such Working Capital Reserve Account a reserve (together with such additional amounts as may from time to time be in such Working Capital Reserve Account, the “**Working Capital Reserve Account**”) in an initial amount equal to the Working Capital Reserve Account Floor for purposes of funding Working Capital Expenses of the Company to the extent there are insufficient funds for payment of the same from the funds in the Collection Account. Except as otherwise directed by the Manager, the Servicer shall not cause funds from any other source (other than interest or earnings on the Working Capital Reserve Account) to be commingled in the Working Capital Reserve Account (it being understood that deposits into such Working Capital Reserve Account shall be made only pursuant to the Custodial and Paying Agency Agreement and the LLC Operating Agreement).

(b) Except as otherwise directed by the Manager, any and all amounts on deposit in the Working Capital Reserve Account (including interest and earnings thereon) shall be disbursed strictly in accordance with this Agreement (including the additional terms and conditions set forth in the Servicing Obligations).

(c) The Working Capital Reserve Account (and all funds therein) will be subject to an account control agreement among the Company, the Collateral Agent and the Paying Agent.

Section 2.7 Escrow Accounts. Except as otherwise directed by the Manager, the Servicer shall establish and maintain one or more Eligible Accounts, each of which shall be held in trust for the benefit of the Company and the Collateral Agent (each, an “**Escrow Account**”, which term shall include all so-called “lockbox” accounts maintained under the Asset Documents and any other accounts maintained by the Company under the Asset Documents for amounts deposited or required to be deposited therein by the applicable Borrower). Except as otherwise directed by the Manager, the Servicer shall deposit into the applicable Escrow Account on a daily basis within two (2) Business Days of receipt all collections from the Borrowers for the payment of taxes, assessments, hazard insurance premiums, and comparable items for the account of the Borrowers, and all other amounts required to be deposited in such Escrow Account pursuant to the applicable Asset Documents. The Servicer shall pay to the Borrowers interest on funds in Escrow Accounts to the extent required by Law or the applicable Asset Documents.

Section 2.8 Other Accounts. At the direction of the Manager, the Servicer shall establish and maintain such other Eligible Accounts as may be directed by the Manager, each of which shall be held in trust for the benefit of the Company and the Collateral Agent, and shall be funded and disbursed only in accordance with such instructions as are provided by the Manager (“**Other Accounts**”).

Section 2.9 Maintenance of Insurance Policies; Errors and Omissions and Fidelity Coverage.

(a) The Servicer and each Subservicer shall cause insurance coverage to be maintained for the Collateral (including any Acquired Property) as required under the Reimbursement, Security and Guaranty Agreement and the LLC Operating Agreement, including, whether or not so required (but in all events subject to the requirements in the LLC Operating Agreement and, for so long as the same remains in effect the Reimbursement, Security and Guaranty Agreement), insurance from an insurer reasonably acceptable to the Manager for each Asset with respect to which the Borrower has failed to maintain required insurance, fire, hurricane, flood and hazard insurance with extended coverage as is customary in the area in which the Collateral is located and in such amounts and with such deductibles as, from time to time, are directed by the Manager.

(b) The Servicer and each Subservicer shall maintain each of the following types of insurance coverage having such limits as described below:

(i) Errors & omissions liability with limits of not less than \$10,000,000 per claim and \$10,000,000 in the aggregate. The Manager shall be notified immediately upon the reduction of or potential reduction of 50% of the limits. The Manager may require that the Servicer and each Subservicer purchase additional limits to provide back to the required limits as stated above. "Potential reduction of 50%" shall mean any knowledge by the Servicer or Subservicer, as applicable, that a claim or the sum of all claims, current or initiated after the effective date of the policy would reduce the limits by 50%.

(ii) Directors & officers liability with limits of not less than \$10,000,000 each claim and \$10,000,000 in the aggregate.

(iii) Crime insurance or a fidelity bond in an amount of not less than \$10,000,000 covering employee theft, forgery and alteration, wire/funds transfer, computer fraud, and client coverage. Such coverage shall insure all employees or any other persons authorized by the Servicer or Subservicer to handle any funds, money, documents or papers relating to any Asset, and shall protect the Servicer or Subservicer, as applicable, against losses arising out of theft, embezzlement, fraud, misplacement, and other similar causes. The Manager and the Company shall each be named as a loss payee with respect to claims arising out of Assets handled under this Agreement or any applicable Servicing Agreement or Subservicing Agreement.

(iv) General liability with limits of not less than \$1,000,000 each occurrence, \$2,000,000 in the aggregate, including coverage for products/completed operations, advertising and personal injury. The Manager and the Company shall each be named as additional insured. The policy shall include a waiver of subrogation in favor of the Manager and the Company.

(v) Auto liability with a combined single limit of not less than \$1,000,000 to provide coverage for any owned, hired, or non-owned vehicles.

(vi) Workers compensation in such amount as required by the states in which the Servicer or Subservicer, as applicable, operates, including coverage for employer's liability in an amount not less than, \$1,000,000. The policy shall include a waiver of subrogation in favor of the Manager and the Company.

(vii) Umbrella liability in an amount of not less than \$10,000,000 each occurrence and in the aggregate.

All such policies shall be written with carriers having a minimum insurer rating of "A- VIII" from A.M. Best and "A" from Standard & Poor's. All such policies shall have a minimum notice of cancellation of thirty (30) days, except for non-payment of premium whereby a ten (10) day notice of cancellation is acceptable. Certificates shall show each of the Manager and the Company as certificate holder, or as otherwise designated by the language in clauses (i)-(vii) above.

The Servicer shall provide (or shall cause each Subservicer to provide) each Required Consenting Party and the Manager with certificates evidencing all such policies on the Effective Date (and, with respect to each Asset, the applicable Servicing Transfer Date with respect thereto) and each anniversary of the Closing Date thereafter, and otherwise upon request of any Required Consenting Party or the Manager. Copies of fidelity bonds and insurance policies required to be maintained pursuant to this Section 2.9 shall be made available to the Manager, the Required Consenting Parties or their respective representatives on the Effective Date (and, with respect to each Asset, on the applicable Servicing Transfer Date with respect thereto), and shall otherwise be made available to the Manager and any of the Required Consenting Parties and their respective representatives upon request.

Section 2.10 Funding of Working Capital Expenses and Funding Draws. To the extent set forth in, and subject to the terms of, this Agreement (including the Servicing Obligations), the Servicer shall, on behalf of the Manager, in turn acting on behalf of the Company (and from Company funds made available by the Manager), make applicable Funding Draws and pay other applicable Working Capital Expenses; provided that the making of the same is consistent with the applicable terms and conditions in the Custodial and Paying Agency Agreement and, subject to Section 5.7, the applicable terms and conditions in the LLC Operating Agreement and the other Transaction Documents. Servicer acknowledges that (a) subject to the Custodial and Paying Agency Agreement (and any permitted transfer or release of funds as provided therein), the Working Capital Reserve Account shall be used exclusively for funding of Working Capital Expenses (including the making of applicable Funding Draws with respect to specified Assets or related Acquired Property), but only if there are insufficient available funds in the Collection Account; (b) proceeds of Discretionary Funding Advances shall be used exclusively for making Funding Draws with respect to specified Assets or related Acquired Property (and in no event may Discretionary Funding Advances be used for payment of any Working Capital Expenses other than Funding Draws); and (c) proceeds of Excess Working Capital Advances shall be used exclusively for payment of Working Capital Expenses other than Funding Draws (and in no event may Excess Working Capital Advances be used for the making of any Funding Draws) and

for such other purposes as may be expressly permitted pursuant to the LLC Operating Agreement.

Section 2.11 Expenses. Except as otherwise directed by the Manager, the Servicer shall use its reasonable best efforts to recover from Borrowers and Obligors all amounts of Servicing Expenses that are advanced by the Servicer (as permitted or required pursuant to the Servicing Obligations) as Servicer Advances to the extent that the Borrowers and Obligors are responsible for such Servicing Expenses under the Asset Documents. All such amounts not recovered from Borrowers or Obligors and all other Servicer Advances shall be reimbursed only in accordance with the terms set forth on Schedule 4, as the same may be amended from time to time by the Manager (without the consent of the Initial Member) and the Servicer. In no event may any Servicer Advances be deducted from or netted against any Asset Proceeds. In the event the Servicer is reimbursed for any amount that does not qualify as a Servicing Expense, the Servicer shall be obligated to refund such amounts to the Manager, or, if so directed by the Manager, directly to the Company (to the Collection Account) on the Specified Date immediately following the Servicer's receipt of notice from the Manager requesting the same. No Servicer Advances shall bear interest chargeable in any way to the Company or deductible from any Asset Proceeds.

Section 2.12 Insured or Guaranteed Assets. If any Assets being serviced pursuant to this Agreement are insured or guaranteed by any Governmental Authority, the Servicer acknowledges and agrees that, if the Manager so directs pursuant to the Servicing Obligations with respect to such Assets, it shall take any and all actions as may be necessary to insure that such insurance or guarantees remain in full force and effect. The Servicer acknowledges and agrees that, upon assumption of the Servicing Obligations with respect to the Assets pursuant to this Agreement, it shall fulfill all of the Company's obligations under the contracts of insurance or guaranty.

Section 2.13 Registration with MERS. In the event that any of the Assets are (or are required by the Servicing Obligations to be) registered on the MERS® System, the Servicer shall maintain (or register, as applicable) such Asset on the MERS® System and execute and deliver on behalf of the Company (including, as applicable, on behalf of the Manager, in turn on behalf of the Company) any and all instruments of assignment and other comparable instruments with respect to such assignment or re-recording of a mortgage securing an Asset in the name of MERS®, solely as nominee for the Company and its successors and assigns. With respect to each Asset that is registered on the MERS® System, (A) the Servicer shall be designated as the "servicer" and the 1000002 Org Id shall be designated as the "investor" with respect to such Asset, and, if applicable, the Manager may cause or permit an applicable Subservicer to be designated as the "subservicer" with respect to such Asset (provided, that, at the option of the Manager in accordance with the LLC Operating Agreement and so long as each applicable designee is and remains a MERS member in good standing, (1) the Company may be designated as the "investor" with respect to any such Asset, and (2) the Manager may be designated as the "servicer" with respect to any such Asset, in which case the Servicer shall be designated as the "subservicer" with respect thereto), and (B) no other Person shall be identified on the MERS® System as having any interest in such Asset unless otherwise consented to by the Manager (or required pursuant to the Electronic Tracking Agreement). Except as otherwise directed by the Manager (in connection with a voluntary removal by the Manager of any Asset from the

MERS® System pursuant to Section 12.3(g) of the LLC Operating Agreement), all Assets registered on the MERS® System shall remain registered on the MERS® System unless default, foreclosure or similar legal or MERS® requirements dictate otherwise. The Servicer shall provide the Manager and the Initial Member with such reports from the MERS® System as the Manager or the Initial Member, from time to time, may request, including to allow the Manager and the Initial Member to verify the Persons identified on the MERS® System as having any interest in any of the Assets and to confirm that the Assets required to be registered on the MERS® System are so registered. For so long as any Assets remain registered with MERS, the same shall be subject to an Electronic Tracking Agreement in the form of Exhibit B, and, to the extent any such Assets are so registered with MERS as of the Closing Date, the Servicer, together with the Manager, the Collateral Agent and the Initial Member, shall execute such Electronic Tracking Agreement on the Closing Date and deliver the same to MERS. Without limiting the foregoing, upon the request of the Manager or the Initial Member, the Servicer shall cause MERS to run a query with respect to any and all specified fields on the MERS® System with respect to any or all of the Assets registered on the MERS® System and provide the results to the Manager and the Initial Member and, if requested by the Manager or the Initial Member (and subject to any applicable provisions of the Electronic Tracking Agreement), shall cause MERS to change the information in such fields, to the extent MERS will do so in accordance with its policies and procedures, to reflect its instructions.

### **ARTICLE III**

#### **DEFAULTS; ACQUISITION OF COLLATERAL**

Section 3.1 Delinquency Control. Except as otherwise directed by the Manager, the Servicer shall maintain, or caused to be maintained, a collection department that complies with the Servicing Standard and protects the Company's interests in the Assets and the Collateral in accordance with the Servicing Standard.

Section 3.2 Discretion of the Servicer in Responding to Defaults of Borrower. Upon the occurrence of an event of default under any of the Asset Documents, but subject to the other terms and conditions of this Agreement, including the Servicing Obligations of the Servicer and such direction as the Manager may otherwise provide that is consistent with the Servicer's compliance with the Servicing Standard, the Servicer, with the consent of the Manager, shall determine the response to such default and the course of action with respect to such default, including (a) the selection of attorneys to be used in connection with any action, whether judicial or otherwise, to protect the interests of the Company in the Asset and the Collateral, (b) the declaration and recording of a notice of such default and the acceleration of the maturity of the Asset, (c) the institution of proceedings to foreclose the Asset Documents, Collateral or Acquired Property or appoint a receiver securing the Asset pursuant to the power of sale contained therein or through a judicial action, (d) the institution of proceedings against any Obligor, (e) the acceptance of a deed in lieu of foreclosure, (f) the purchase of the real property Collateral at a foreclosure sale or trustee's sale or the purchase of the personal property Collateral at a UCC sale, and (g) the institution or continuation of proceedings to obtain a deficiency judgment against the related Borrower or any Obligor and the collection of any judgment. Notwithstanding anything to the contrary contained herein, but subject to Section 5.7, the Servicer shall not, in connection with any such default or otherwise, take (or refrain from taking) any action if the taking (or refraining from taking) of such action is inconsistent with the terms of

the LLC Operating Agreement or any other Transaction Documents without the prior written consent of the Manager.

Section 3.3 Acquisition of Acquired Property. Any acquisition of Collateral shall conform with the terms and conditions of this Agreement (including the Servicing Obligations of the Servicer). With respect to any Asset as to which the Servicer has received actual notice of, or has actual knowledge of, any Environmental Hazard with respect to the related Collateral, the Servicer shall immediately provide written notice of same to the Manager. In addition, if the Manager so directs, prior to the acquisition of title to any Collateral, the Servicer shall cause to be commissioned with respect to such Collateral (i) a transaction screen process consistent with ASTM Standard E 1528-06, by an environmental professional or (ii) such other site inspections and assessments by a Person who regularly conducts environmental audits using customary industry standards as would customarily be undertaken or obtained by a prudent lender in order to ascertain whether there are any actual or threatened Environmental Hazards (a "Site Assessment"), and the cost of such Site Assessment shall be deemed to be a Servicing Expense as long as the costs for such Site Assessment were not paid to any Affiliate of the Manager or any Affiliate of the Servicer or any Subservicer. Except as otherwise directed by the Manager, the Servicer or any Subservicer shall not acquire or otherwise cause the Company or any Subsidiary or other entity in which the Company owns any interest to acquire all or any portion of any Collateral having any actual or threatened Environmental Hazard by foreclosure, deed in lieu of foreclosure, power of sale or sale pursuant to the UCC or otherwise. If title to any Collateral that constitutes real property is to be acquired by foreclosure, by deed in lieu of foreclosure, by power of sale or by sale pursuant to the UCC, or otherwise, title to such Acquired Property shall be taken by and held in the name of an Ownership Entity; provided, however, that for any Collateral which becomes Acquired Property after the Servicing Transfer Date relating thereto and with respect to which there exists any Environmental Hazard, the Ownership Entity that holds such Collateral may hold title only to the relevant Collateral with respect to which the Environmental Hazard exists.

Section 3.4 Administration of Acquired REO Properties. In addition to any other terms and conditions set forth herein, in connection with any Acquired REO Properties, the Servicer shall, in each case subject to applicable instructions from the Manager and the Servicing Obligations, comply with the following terms and conditions:

(a) The Servicer shall cause the applicable Ownership Entity to maintain insurance in compliance with applicable requirements herein and in the LLC Operating Agreement.

(b) The Servicer shall cause the applicable Ownership Entity to (i) perform the obligations that such Ownership Entity is required to perform under the leases to which it is a party in all material respects and (ii) enforce, in accordance with commercially reasonable practices for properties similar to the applicable Acquired REO Property, the material obligations to be performed by the tenants under such leases.

(c) The Servicer shall not permit any Ownership Entity to initiate or consent to any zoning reclassification of any portion of the Acquired REO Property owned by such Ownership Entity, or use or permit the use of any portion of an Acquired REO Property in any

manner that could result in such use (taking into account any applicable variance obtained in accordance with the Servicing Standard) becoming a non-conforming use under any zoning ordinance or any other applicable land use law, rule or regulation, without the prior consent of the Manager and the Required Consenting Parties.

(d) The Servicer shall not permit any Ownership Entity to suffer, permit or initiate the joint assessment of Acquired REO Property (i) with any other real property constituting a tax lot separate from such Acquired REO Property, and (ii) with any portion of an Acquired REO Property which may be deemed to constitute personal property, or any other procedure whereby the Lien of any Taxes which may be levied against such personal property shall be assessed or levied or charged to such Acquired REO Property.

(e) From and after the completion of any buildings or other improvements at an Acquired REO Property, the Servicer shall cause the applicable Ownership Entity to maintain such Acquired REO Property in a good and safe condition and repair (subject to such alterations as the Manager may from time to time determine to be appropriate in accordance with the Servicing Standard and applicable requirements herein and in the other Transaction Documents) and in accordance with applicable Law.

(f) All property managers with respect to any Acquired REO Property shall, in their respective property management agreements or by separate agreement, subordinate their rights under such agreements (including their right to receive management fees) to the rights and interest of the Collateral Agent under the applicable REO Mortgage.

(g) With respect to any Acquired REO Property that is leased under a ground or other lease, the Servicer shall cause the applicable Ownership Entity to (i) pay all rents and other sums required to be paid by the tenant under and pursuant to the provisions of the applicable ground lease as and when such rent or other charge is payable, and (ii) diligently and timely perform and observe all of the terms, covenants and conditions binding on the tenant under the ground lease. The Servicer shall not permit the applicable Ownership Entity to subordinate or consent to the subordination of any ground lease to any mortgage, lease or other interest on or in the ground lessor's interest in the applicable Acquired REO Property without the prior consent of the Manager and the Collateral Agent unless such subordination is required under the provisions of such ground lease.

(h) In the event the Manager elects to fund the construction of the Acquired REO Property (pursuant to Funding Draws for such purpose), then the Servicer shall cause each Ownership Entity to pursue with diligence the construction of the Acquired REO Property owned by such Ownership Entity (i) in accordance with the construction, construction management (if any) and all other material contracts relating to such construction, and all requirements of Law, all restrictions, covenants and easements affecting such Acquired REO Property, and all applicable governmental approvals, (ii) in substantial compliance with the plans and specifications therefor as in existence on the Closing Date and as thereafter modified by the Manager (or the Servicer, to the extent permitted in the Servicing Obligations), (iii) in a good and workmanlike manner and free of defects, (iv) in a manner such that such Acquired REO Property remains free from any Liens, claims or assessments (actual or contingent) for any material, labor or other item furnished in connection therewith and (v) in conformance with all



other applicable requirements set forth herein and in the other Transaction Documents for Funding Draws.

(i) Notwithstanding any other provision of this Section 3.4 to the contrary, (i) in operating, managing, leasing or disposing of any Acquired REO Property, the Servicer shall act in the best interests of the Company, and the members and creditors of the Company (including the FDIC in its various capacities) and in accordance with the Servicing Standard, and (ii) without relieving the Servicer of any obligation elsewhere in this Agreement, and subject to any applicable Servicing Obligations, the Servicer shall not be required to act in accordance with a specific provision of this Section 3.4 if such action is (A) not in the best interests of Company and the members and creditors of the Company (including the FDIC in its various capacities), as determined by the Servicer in the exercise of its reasonable discretion, or (B) not in accordance with the Servicing Standard.

(j) The Servicer shall furnish to the Manager, the Collateral Agent and the Initial Member such reports regarding the construction, leasing and sales efforts of or relating to the Acquired REO Property as the Manager, the Collateral Agent or the Initial Member shall reasonably request.

#### **ARTICLE IV** **SUBSERVICING**

Section 4.1 Retention of Subservicer. The Servicer may engage or retain one or more subservicers, including Affiliates of the Manager or of the Servicer (individually and collectively, "**Subservicer**"), as it may deem necessary and appropriate, provided that any Subservicer meets the requirements set forth in the definition of Qualified Servicer.

Section 4.2 Subservicing Agreement Requirements. Any subservicing agreement with any Subservicer ("**Subservicing Agreement**") shall, among other things:

(a) provide for the servicing of the Assets and management of the Collateral by the Subservicer in accordance with the Servicing Standard and the other terms of this Agreement and the LLC Operating Agreement;

(b) subject to Section 4.2(m) and Section 4.2(n) with respect to immediate termination, be terminable upon no more than thirty (30) days prior notice in the event of any Event of Default (as defined in the LLC Operating Agreement), any Default under this Agreement or any default under the Subservicing Agreement;

(c) provide that the Servicer as well as the Manager and the Initial Member shall each be entitled to exercise termination rights thereunder;

(d) provide that the Subservicer and the Servicer acknowledge that the Subservicing Agreement constitutes a personal services agreement between the Servicer and the Subservicer;

(e) provide that each of the Initial Member and the Manager is a third party beneficiary under the Subservicing Agreement for all purposes and is entitled to enforce the

Subservicing Agreement, and that each of the FDIC, the Purchase Money Notes Guarantor and the Company is a third party beneficiary thereunder to the extent of any rights expressly granted to such Person under the Subservicing Agreement (and such Subservicing Agreement shall include rights in favor of the FDIC, the Purchase Money Notes Guarantor and the Company that are equivalent to the rights granted to such Persons hereunder) and is entitled to enforce the Subservicing Agreement with respect to such rights; and further provide that in no event shall any amendment or waiver to any such Subservicing Agreement limit or affect any rights of any such third party beneficiary thereunder without the express written consent of such third party beneficiary;

(f) provide that (i) upon removal of the Manager as the “Manager” pursuant to the LLC Operating Agreement and/or notice from the Initial Member or the Manager of the occurrence of any Event of Default under the LLC Operating Agreement, the Initial Member (and any successor “Manager” under the LLC Operating Agreement) may exercise all of the rights of the Manager under this Agreement and any Subservicing Agreement and further cause the termination or assignment to any other Person of this Agreement (and, in the event of any such termination or assignment of this Agreement, the termination or assignment of any Subservicing Agreement), without penalty or payment of any fee, and (ii) upon the occurrence of any Default under this Agreement or an event described in clauses (ii), (iii) or (iv) of Section 7.2(a) hereof, each of the Manager (or applicable successor “Manager” under the LLC Operating Agreement) and the Initial Member may exercise all of the rights of (A) the Manager under this Agreement and cause the termination or assignment of this Agreement to any other Person, without penalty or payment of any fee, and (B) the Servicer under the Subservicing Agreement and cause the termination or assignment of the Subservicing Agreement to any other Person, without penalty or payment of any fee;

(g) provide that the Initial Member, the Manager, the Purchase Money Notes Guarantor and the Company (and each of their respective representatives) shall each have access to and the right to review, copy and audit the books and records of the Subservicer and that the Subservicer shall make available its officers, directors, employees, accountants and attorneys to answer the Initial Member’s, the Manager’s, the Purchase Money Notes Guarantor’s and the Company’s (and each of their respective representatives’) questions or to discuss any matter relating to the Subservicer’s affairs, finances and accounts, as they relate to the Assets, the Collateral, the Servicing Obligations, the Collection Account, the Escrow Accounts or any Other Accounts established or maintained pursuant to this Agreement or the Subservicing Agreement, accounts established or maintained pursuant to the Custodial and Paying Agency Agreement or any matters relating to this Agreement or the Subservicing Agreement or the rights or obligations thereunder;

(h) provide that all Asset Proceeds are to be deposited into the Collection Account on a daily basis (without reduction or setoff as provided in Section 11.12 hereof) within two (2) Business Days of receipt and that under no circumstances are any funds, other than Asset Proceeds and interest and earnings thereon and amounts released from the Working Capital Reserve Account, the proceeds of Excess Working Capital Advances and Discretionary Funding Advances, to be commingled into the Collection Account;

(i) provide that the Subservicer shall not sell, transfer or assign its rights under the Subservicing Agreement with the Servicer and that any prohibited sale, transfer or assignment shall be void *ab initio*;

(j) provide that the Subservicer consents to the immediate termination of the Subservicer pursuant to Section 7.2 and Section 7.3 of this Agreement;

(k) provide that there shall be no right of setoff on the part of the Subservicer against the Asset Proceeds (or the Company);

(l) provide for such other matters as are necessary or appropriate to ensure that the Subservicer is obligated to comply with the Servicing Obligations of the Servicer hereunder in the conduct of such matters as are delegated to the Subservicer;

(m) (i) contain default provisions that relate to the actions of the Subservicer that correspond to the provisions of Section 7.1(a), (b), (c), (d), (e), (f), (g), (h), and (i) of this Agreement, and (ii) provide that each of the Manager and the Initial Member has the right (x) to immediately terminate the Subservicing Agreement by providing written notice upon the occurrence of any such default or an event described in clauses (ii), (iii) or (iv) of Section 7.2(a) hereof, without any cure period other than as may be provided for in such default provisions under such Subservicing Agreement (which cure periods shall be no longer than the cure provisions in the corresponding provisions of Section 7.1 of this Agreement); and (y) otherwise to enforce the rights of the Servicer under the Subservicing Agreement;

(n) provide that (i) the Subservicer consents to its immediate termination under the Subservicing Agreement upon the occurrence of any of (x) a Default under Section 7.1(a), Section 7.1(b), or Section 7.1(c) of this Agreement, or (y) an Insolvency Event with respect to the Subservicer or any of its Related Parties, and (ii) the occurrence of any Insolvency Event with respect to the Subservicer or any of its Related Parties constitutes a default under the Subservicing Agreement;

(o) provide a full release and discharge of the Initial Member, the Company, the Existing Servicers (as defined in the Contribution Agreement), the FDIC, in relation to any particular Asset, the relevant Failed Bank and any predecessor-in-interest thereof, any Ownership Entities existing as of the applicable Servicing Transfer Date, and all of their respective officers, directors, employees, agents, attorneys, contractors and representatives, and all of their respective successors, assigns and Affiliates (but excluding, in all cases, the Manager) (any such Person, a "**Prior Servicer**" and collectively, the "**Prior Servicers**"), from any and all claims (including any counterclaim or defensive claim), demands, causes of action, judgments or legal proceedings and remedies of whatever kind or nature that the Subservicer had, has or might have in the future, whether known or unknown, which are related in any manner whatsoever to the servicing of the Assets by the Prior Servicers prior to the applicable Servicing Transfer Date (other than due to gross negligence, violation of law or willful misconduct of such Prior Servicer);

(p) provide that, to the extent required under Section 2.13 hereof (or Section 12.3(g) of the LLC Operating Agreement), all Assets registered on the MERS® System shall

remain registered unless default, foreclosure or similar legal or MERS requirements dictate otherwise or unless otherwise directed by the Manager;

(q) provide that the Subservicer shall immediately notify the Manager and the Initial Member upon becoming aware of any Subservicer or any Affiliate thereof at any time, (i) being or becoming a partner or joint venturer with any Borrower or Obligor, (ii) being or becoming an agent of any Borrower or Obligor, or allowing any Borrower or Obligor to be an agent of such Subservicer or of any Affiliate thereof, or (iii) having any interest whatsoever in any Borrower or Obligor; and

(r) not conflict with the Servicing Standard or any other terms or provisions of this Agreement, the LLC Operating Agreement, the Custodial and Paying Agency Agreement or any of the other Transaction Documents insofar as such other terms or provisions apply to the Subservicer or the Servicing Obligations. Nothing contained in any Subservicing Agreement shall alter any obligation of the Servicer under this Agreement or the Manager under the LLC Operating Agreement and, in the event of any inconsistency between the Subservicing Agreement and the terms of either this Agreement or the LLC Operating Agreement, the terms of this Agreement or the LLC Operating Agreement, as applicable, shall apply.

Section 4.3 Servicer Liable for Subservicers. Notwithstanding anything to the contrary contained herein, the use of any Subservicer shall not release the Servicer from any of its Servicing Obligations or other obligations under this Agreement, and the Servicer shall remain responsible and liable for all acts and omissions of each Subservicer as fully as if such acts and omissions were those of the Servicer. All actions of any Subservicer performed pursuant to the Subservicing Agreement with the Servicer shall be performed as an agent of the Servicer. No Subservicer shall be paid any fees or indemnified out of any Asset Proceeds, it being understood that all fees and related costs and liabilities of retaining any Subservicers shall be the sole responsibility of the Servicer.

Section 4.4 Manager Approval Required. Each Subservicing Agreement and all amendments and modifications thereto and the selection of the Subservicer, regardless of whether the Subservicer is an Affiliate of the Servicer, shall be subject to the prior written approval of the Manager (which approval shall not be unreasonably withheld, delayed or conditioned so long as the provisions required under Section 4.2 are not modified or deleted). A copy of all Subservicing Agreements, as executed and delivered and all amendments thereto, shall be provided to the Manager and, upon request of any Required Consenting Party, to such Required Consenting Party.

Section 4.5 Regulation AB Requirements. The Servicer shall use commercially reasonable efforts to maintain in place, and to confirm, where applicable, that each Subservicer has in place, policies and procedures to comply with the relevant servicing criteria provisions of Section 1122(d)(1) of Regulation AB that are applicable and relate to the servicing being conducted under this Agreement, including for purposes of preparation and delivery of the annual reports (including the independent accountant report) required pursuant to Section 5.2(g) below; provided that the following Regulation AB criteria shall not be deemed relevant to the servicing being conducted under this Agreement: Section 1122(d)(1)(iii) regarding backup

servicer requirements; Sections 1122(d)(3)(i-iv) regarding paying agent requirements; and Section 1122(d)(4)(xv) regarding external credit enhancement.

**ARTICLE V**  
**REPRESENTATIONS, WARRANTIES AND COVENANTS OF THE SERVICER**

Section 5.1 Representations and Warranties. The Servicer hereby makes the following representations and warranties as of the date hereof:

(a) The Servicer (i) is a limited liability company duly organized, validly existing and in good standing under the laws of the State of Delaware; (ii) has qualified or will qualify to transact business as a foreign entity and will remain so qualified, in the state or states and other jurisdictions where the Assets or the nature of the Servicer's activities under this Agreement makes such qualification necessary; (iii) has all licenses and other governmental approvals necessary to carry on its business as now being conducted and to perform its obligations hereunder; and (iv) has established and shall maintain its principal place of business in the United States.

(b) The Servicer has all requisite power, authority and legal right to service each Asset, and to execute, deliver and perform, and to enter into and consummate the transactions contemplated by, this Agreement, and this Agreement has been duly authorized by all requisite partnership action on the part of the Servicer.

(c) This Agreement and all agreements contemplated hereby to which the Servicer is or will be a party constitute the valid, legal, binding and enforceable obligations of the Servicer, except as such enforcement may be limited by bankruptcy, insolvency, reorganization or other similar laws affecting the enforcement of creditors' rights generally, and by general principles of equity (regardless of whether such enforcement is considered in a proceeding in equity or at law); and all requisite partnership action has been taken by the Servicer to make this Agreement and all agreements contemplated hereby to which the Servicer is or will be a party valid and binding upon the Servicer in accordance with their terms and conditions.

(d) The Persons executing this Agreement on behalf of the Servicer are duly authorized to do so.

(e) The execution and delivery of this Agreement by the Servicer, the servicing of the Assets and the Collateral under this Agreement, the consummation of any other of the transactions contemplated by this Agreement, and the fulfillment of or compliance with the terms hereof are in the ordinary course of business of the Servicer and will not (i) result in a breach of any term or provision of the articles or charter or bylaws or other organizational documents of the Servicer; (ii) conflict with, result in a breach, violation or acceleration of, or result in a default (or an event which, with notice or lapse of time, or both, would constitute a default) under the terms of any agreement or other instrument to which the Servicer is a party or by which it may be bound; or (iii) constitute a violation of any Law applicable to the Servicer, and the Servicer is not in breach or violation of any agreement or instrument, or in violation of

any Law of any Governmental Authority having jurisdiction over it which breach or violation may impair the Servicer's ability to perform or meet any of its obligations under this Agreement.

(f) No litigation is pending or, to the Servicer's knowledge, threatened, against the Servicer that would prohibit the Servicer from entering into this Agreement or is likely to materially and adversely affect either the ability of the Servicer to perform its obligations under this Agreement or the financial condition of the Servicer.

(g) Any consent, approval, authorization or order of any Governmental Authority required for the execution, delivery and performance by the Servicer of or compliance by the Servicer with this Agreement or the consummation of the transactions contemplated by this Agreement has been obtained and is effective.

(h) Neither the Servicer nor any Subservicer or their respective Controlled Affiliates shall, at any time, (i) be a partner or joint venturer with any Borrower or Obligor, (ii) be an agent of any Borrower or Obligor, or allow any Borrower or Obligor to be an agent of the Servicer or any Subservicer or any such Controlled Affiliate of either, or (iii) have any interest whatsoever in any Borrower or Obligor.

(i) The Servicer is, and all times so long as this Agreement is in effect shall remain, a Qualified Servicer.

Section 5.2 Reporting, Books and Records and Compliance Covenants. The Servicer covenants to the Manager as follows:

(a) The Servicer shall be responsible for submitting all Internal Revenue Service information returns related to each Asset for all applicable periods commencing with the Servicing Transfer Date with respect thereto (or, if later, the Effective Date). Information returns include reports on Forms 1098 and 1099 and any other reports required by Law. The Servicer shall be responsible for submitting all information returns required under applicable Law of any foreign Governmental Authority, to the extent such are required to be filed by the Company under such Law, relating to the Assets, for the calendar or tax year in which the Effective Date falls and thereafter.

(b) The Servicer shall cause to be kept and maintained, at all times, at the Servicer's principal place of business, a complete and accurate set of files, books and records (including records transferred by the Manager to the Servicer) regarding the Assets and the Collateral, and the Company's and the relevant secured parties' interests in the Assets and the Collateral, including records relating to the Collection Account, the Working Capital Reserve Account, the Escrow Accounts and any Other Accounts maintained in connection with the Assets, Servicer Advances, Funding Draws and other Working Capital Expenses and collection and remittance of Asset Proceeds. The books of account shall be maintained in a manner that provides sufficient assurance that: (i) transactions of the Company are executed in accordance with the general or specific authorization of the Manager consistent with the provisions of the LLC Operating Agreement; and (ii) transactions of the Company are recorded in such form and manner as will: (A) permit preparation of federal, state and local income and franchise tax returns and information returns in accordance with the LLC Operating Agreement and as

required by Law; (B) permit preparation of the Company's financial statements in accordance with GAAP and the LLC Operating Agreement and the provisions of the reports required to be provided thereunder; and (C) maintain accountability for the Company's assets.

(c) The Servicer shall cause all such books and records to be maintained and retained until the date that is the later of ten (10) years after the Closing Date and three (3) years after the date on which the Final Distribution is made, which date shall be established by notice to the Servicer from the Manager. All such books and records shall be available during such period for inspection by the Manager, the FDIC, the Purchase Money Notes Guarantor, and the Initial Member (and their respective representatives, including any applicable Governmental Authority) at all reasonable times during business hours on any Business Days (or, in the case of any such inspection after the term hereof, at such other location as is provided by notice to the Manager, the FDIC, the Purchase Money Notes Guarantor and the Initial Member, as applicable), in each instance upon not less than two (2) Business Days' prior notice to the Servicer. Upon request by the Manager, the Servicer, at the sole cost and expense of the Manager, shall promptly send copies (the number of copies of which shall be reasonable) of such books and records to the Manager. The Servicer shall provide the Manager with reasonable advance notice of the Servicer's intention to destroy or dispose of any documents or files relating to the Assets and, upon the request of the Manager, shall allow the Manager, at its own expense, to recover the same from the Servicer. The Servicer shall also maintain complete and accurate records reflecting the status of taxes, ground rents and other recurring charges which could become a Lien on any Collateral.

(d) The covenants set forth in Section 5.2(b) and (c) above to maintain a complete and accurate set of records shall encompass all files in the Servicer's custody, possession or control pertaining to the Assets and the Collateral, including (except as required to be held by the Custodian pursuant to the Custodial and Paying Agency Agreement) all original and other documentation pertaining to the Assets and the Collateral, all documentation relating to items of income and expense pertaining to the Assets and the Collateral, and all of the Servicer's (and any Subservicer's) internal memoranda pertaining to the Assets and the Collateral.

(e) The Servicer shall cause to be furnished to the Manager, each month on the Specified Date, commencing with February 2011 (or such other date as may be set forth in the Servicing Obligations), a monthly electronic report on the Assets and Collateral containing such information and substantially in the form set forth on Schedule 5 as the same may be amended from time to time by the Manager (without the consent of the Initial Member) and the Servicer (the "**Electronic Report**"). The Electronic Report shall include, but not be limited to, the information required for the Manager to prepare, in accordance with the LLC Operating Agreement, the "Distribution Date Report" and the "Monthly Report", and such other reports and information as the Manager shall reasonably require, to the extent such information is reasonably available to the Servicer. Notwithstanding the above, with respect to any period prior to the applicable Servicing Transfer Date, the applicable Electronic Reports may exclude certain of the information otherwise required to be included therein if and to the extent the Initial Member is obligated to provide such information (or other information that is a prerequisite to the Servicer being able to provide such information) to the Servicer and the Manager pursuant to the interim servicing and asset management support obligation set forth in Section 3.3 of the

Contribution Agreement and the Initial Member fails to timely deliver such information to the Servicer and the Manager.

(f) The Servicer shall deliver, and shall cause each Subservicer to deliver, to the Manager and each Required Consenting Party, on or before March 10<sup>th</sup> of each year, or such other day as the Manager and the Servicer may agree, commencing in the year 2012, an annual officer's certificate stating, as to the signer thereof, that (i) a review of such party's activities during the preceding calendar year (or other applicable period as set forth below in this Section 5.2(f)) and of its performance under this Agreement (or, as applicable, any Subservicing Agreement) has been made under such officer's supervision, and (ii) to the best of such officer's knowledge and belief, based on such review, such party has fulfilled all of its obligations under this Agreement (or, as applicable, any Subservicing Agreement) in all material respects throughout such year or portion thereof or, if there has been a failure to fulfill any such obligation in any material respect, specifying each such failure and the nature and status thereof. The first such officer's certificate shall, with respect to any Asset, shall cover the period commencing on the Servicing Transfer Date and continuing through the end of the 2011 calendar year. In the event any Subservicer was terminated, resigned or otherwise performed in such capacity for only part of a year (or other applicable period, as the case may be, with respect to the period commencing, with respect to any Asset, on the Servicing Transfer Date through the end of the 2011 calendar year), such party shall provide an officer's certificate pursuant to this Section 5.2 with respect to such portion of the year (or other applicable period).

(g) On or before March 10<sup>th</sup> of each year, or such other day as the Manager and the Servicer agree, commencing in the year 2012, the Servicer shall, or shall cause each applicable Subservicer to, provide to the Manager and each Required Consenting Party (and/or to such other Person as the Manager may direct) the annual reports (including the independent accountant report) for the prior year (or other applicable period as set forth below) required under Section 1122 of Regulation AB (regardless of whether any such requirements apply, by their terms, only to companies registered or required to file reports with the Securities and Exchange Commission) with respect to the relevant servicing criteria provisions of Section 1122(d)(1) of Regulation AB that are applicable to the servicing being conducted under this Agreement pursuant to Section 4.5 above. The first such reports shall cover the period commencing on the Effective Date (and for each Asset, covering the period from the applicable Servicing Transfer Date) and continuing through the end of the 2011 calendar year.

(h) In connection with the Manager's obligations under the LLC Operating Agreement to prepare, review and periodically update Business Plans and Consolidated Business Plans, the Servicer shall prepare and deliver to the Manager, and thereafter periodically update, such Business Plans and Consolidated Business Plans, or relevant portions thereof or information to be included therein, in each case to the extent set forth and required pursuant to Schedule 7 hereto as the same may be amended from time to time by the Manager and the Servicer without the consent of the Initial Member (the "Business Plan Schedule"). Upon reasonable notice by any Required Consenting Party or the Manager, the Servicer shall make its personnel who are familiar with the Business Plans and Consolidated Business Plans (or relevant portions thereof) available during normal business hours for the purposes of discussing such Business Plans and Consolidated Business Plans with representatives of the Required Consenting Party and/or the Manager and responding to questions therefrom.



Section 5.3 Audits. Until the later of the date that is ten (10) years after the Closing Date and the date that is three (3) years after the Final Distribution, which date shall be established by notice to the Servicer from the Manager, the Servicer shall, and shall cause each Subservicer to, (a) provide the Manager, the Purchase Money Notes Guarantor and the Initial Member and their respective representatives (including any Governmental Authority), during normal business hours and on reasonable notice, with access to and the right to review all of the books of account, reports and records relating to the Assets or any Collateral, the Servicing Obligations, the Collection Account, the Working Capital Reserve Account, the Escrow Accounts, any Other Accounts or any matters relating to this Agreement or the rights or obligations hereunder or the other Transaction Documents, (b) permit such representatives to make copies of and extracts from the same, (c) allow the Manager, the Purchase Money Notes Guarantor and the Initial Member to cause such books to be audited by accountants selected by the Manager, the Purchase Money Notes Guarantor or the Initial Member, as applicable, and (d) allow the Manager, the Purchase Money Notes Guarantor and the Initial Member to discuss the Servicer's and Subservicer's affairs, finances and accounts, as they relate to the Assets, the Collateral, the Servicing Obligations, the Collection Account, the Escrow Accounts, the Working Capital Reserve Account, and any Other Accounts or any other matters relating to this Agreement, the other Transaction Documents or the rights or obligations hereunder and thereunder, with its officers, directors, employees, accountants (and by this provision the Servicer hereby authorizes such accountants to discuss such affairs, finances and accounts with such representatives), Subservicers, and attorneys. Any expense incurred by the Manager, the Purchase Money Notes Guarantor or the Initial Member and any reasonable out-of-pocket expense incurred by the Servicer in connection with the exercise by the Manager, the Purchase Money Notes Guarantor or the Initial Member of its rights in this Section 5.3 shall be borne by the Manager, the Purchase Money Notes Guarantor or the Initial Member, as applicable (and in all events subject to any obligation of the Manager to bear such expenses of the Purchase Money Notes Guarantor or the Initial Member pursuant to the LLC Operating Agreement); provided, however, that any expense incident to the exercise by the Manager, the Purchase Money Notes Guarantor or the Initial Member of their respective rights pursuant to this Section 5.3 as a result of or during the continuance of a Default by the Servicer hereunder shall in all cases be borne by the Servicer.

Section 5.4 No Liens. The Servicer (i) shall not place or voluntarily permit any Lien to be placed on any of the Assets, the Collateral, the Asset Documents or the Asset Proceeds, except, in the case of the Collateral, (x) as permitted under the Asset Documents where the applicable Borrower is not in default thereunder and (y) as permitted by the terms of the Reimbursement, Security and Guaranty Agreement, and (ii) shall not take any action to interfere with the Collateral Agent's rights as a secured party with respect to the Assets, the Collateral and the Asset Proceeds.

Section 5.5 Servicer's Duty to Advise; Delivery of Certain Notices. In addition to such other reports and access to records and reports as are required to be provided to the Manager, any Required Consenting Party, or the Purchase Money Notes Guarantor, the Servicer shall cause to be delivered to the Manager such information relating to the Assets, the Collateral, the Servicer and any Subservicer as the Manager may reasonably request from time to time and, in any case, shall ensure that the Manager is promptly advised, in writing, of any matter of which the Servicer or any Subservicer becomes aware relating to the Assets, any of the Collateral, the

Collection Account, the Escrow Accounts, the Working Capital Reserve Account, any accounts created under the Custodial and Paying Agency Agreement, any Other Accounts or any Borrower or Obligor that materially and adversely affects the interests of the Company, any Required Consenting Party or the Purchase Money Notes Guarantor. Without limiting the generality of the foregoing, the Servicer shall immediately notify the Manager of (i) any claim, threatened claim or litigation against the Servicer, the Company, the Manager or the Initial Member arising out of or with respect to any Asset, (ii) any material notice from any Governmental Authority relating to any Collateral, (iii) any occurrence which could reasonably be expected to result in cost overruns with respect to any Asset or Acquired Property for which Funding Draws have been, or are contemplated to be, made, or (iv) any other occurrence which would reasonably be expected to materially hamper, prevent or interfere with the effectuation of any then-applicable Business Plans or Consolidated Business Plan. In addition, the Servicer shall cause to be delivered to the Manager information indicating any possible Environmental Hazard with respect to any Collateral. Further, the Servicer shall cause to be furnished to the Manager, each month on the Specified Date, commencing the first month following the Effective Date and together with the Electronic Report, a report with respect to each Asset and Collateral (i) containing a summary of the progress made, to the extent applicable, in the construction, marketing and leasing of the applicable project since the last such report, (ii) in the case of any Asset, describing the remedial efforts or enforcement actions, if any, being undertaken by the Servicer with respect to the applicable Asset, (iii) describing the status of the activities contemplated by the Business Plans and the Consolidated Business Plan (which, among other things, identifies any facts or circumstances which are reasonably likely to hamper, interfere with, prevent or postpone effectuation of the applicable Business Plans or Consolidated Business Plan), (iv) to the extent applicable, containing an itemized statement of costs and expenses remaining to be paid in order to complete construction of the applicable project (including capitalized interest, real estate taxes and other soft costs), (v) to the extent requested by the Manager, any materials delivered by the Borrower to the Company or the Servicer pursuant to the applicable Asset Documents not theretofore delivered to the Manager (including, without limitation, copies of all plans and specifications, construction budgets and construction schedules, construction contracts, architect's agreements, leasing and brokerage agreements, management agreements (and modifications to each of the foregoing) and materials delivered by the applicable Borrower in connection with each request for an advance under the related Asset and (vi) such other information as the Manager reasonably requests.

Section 5.6 Notice of Breach or Change of Control. The Servicer shall immediately notify the Manager of (i) any failure or anticipated failure on its part to observe and perform any warranty, representation, covenant or agreement required to be observed and performed by it as the Servicer, and (ii) any Change of Control with respect to the Servicer.

Section 5.7 Copies of Documents. Copies of the LLC Operating Agreement and the other Transaction Documents (or portions thereof) as Manager has determined to be necessary for the Servicer to be familiar with in order to perform its obligations hereunder have been delivered to the Servicer by the Manager, and the Servicer acknowledges receipt thereof. The Manager may from time to time deliver to the Servicer such amendments, modifications or additional Transaction Documents (or portions of any thereof) as Manager may determine to be so necessary for the continued performance by Servicer of its obligations hereunder. All references herein to the Servicer's obligations with respect to such LLC Operating Agreement

and other Transaction Documents shall, as between the Manager and the Servicer (and without limitation of obligations of the Manager, or the rights of the Initial Member or the Purchase Money Notes Guarantor, under this Agreement, the LLC Operating Agreement or the other Transaction Documents), be deemed to refer to the LLC Operating Agreement and other Transaction Documents (or portions thereof) as have been, or from time to time are, delivered to the Servicer.

Section 5.8 Financial Information. The Servicer shall submit to the Company, with copies thereof to be delivered by the Servicer to each Required Consenting Party, the Purchase Money Notes Guarantor and the Initial Member, (i) within forty-five (45) days after the end of each of its fiscal quarters, commencing on the Effective Date, and (ii) within ninety (90) days after the end of each of its fiscal years, commencing on the Effective Date, a letter certified by an officer of the Servicer that details certain agreed upon financial trends and ratios relating to the Servicer (and/or such other financial information as the Manager, the Purchase Money Notes Guarantor or such Required Consenting Party may reasonably request from time to time).

## **ARTICLE VI** **MANAGER CONSENT**

Section 6.1 Actions Requiring Manager Consent. Notwithstanding anything to the contrary contained in this Agreement, the Servicer shall not cause or permit to be taken any of the following actions without the prior written consent of the Manager (which may require the Manager to obtain the written consent of each Required Consenting Party and/or the Purchase Money Notes Guarantor), which consent may be withheld or conditioned in the sole and absolute discretion of the Manager:

(a) conducting Bulk Sales except as expressly permitted in the Servicing Obligations (and in all events subject to the limitations set forth in the LLC Operating Agreement);

(b) the payment of fees to, the sale or other transfer (including through foreclosure or by deed in lieu thereof) of any Asset or Collateral or Acquired Property (or any portion thereof) to, or any other transaction with (whether or not at usual and customary rates), any Affiliate of the Company, the Manager, the Servicer, any Affiliate of the Servicer, any Subservicer, or any Affiliate of any Subservicer;

(c) the financing of the sale or other transfer of any Assets, Collateral or Acquired Property (or any portion thereof);

(d) the sale of any Asset or Collateral or Acquired Property (or any portion thereof) that provides for any recourse against the Company, the Initial Member or the FDIC in any capacity, or against any interest in the Company held by the Initial Member or any share of the Asset Proceeds allocable to the Initial Member;

(e) any disbursement of any funds in the Collection Account (including any such funds made available through Discretionary Funding Advances or Excess Working Capital Advances), the Working Capital Reserve Account, the accounts created under the Custodial and Paying Agency Agreement or any Other Accounts other than in accordance with the provisions

of this Agreement, the LLC Operating Agreement, the Reimbursement, Security and Guaranty Agreement and the Custodial and Paying Agency Agreement;

(f) advancing additional funds that would increase the Unpaid Principal Balance of any Asset other than (i) Funding Draws, or (ii) Servicing Expenses to the extent that capitalizing such Servicing Expenses is or would have been, prior to the conversion of the Asset to Acquired Property, in each case as permitted under the applicable Asset Documents;

(g) in connection with its servicing and administration of any Asset and management of the Collateral or Acquired Property, (i) approving (x) any material modification or amendment to, or cancellation or termination of, any Asset Documents, or (y) plans and specifications, construction budgets or construction schedules with respect to the projects which are the subject of such Asset (or material modifications to any of such items, including any change orders); (ii) waiving or forbearing from exercising any of the lender's rights under, or any conditions precedent to the funding of any advances under, such Asset; (iii) forgiving or reducing or forbearing from collecting any indebtedness; (iv) releasing any parties liable for the payment of the Asset or the performance of any other obligation relating thereto; (v) granting any consent under any Asset Documents (including, without limitation, with respect to any proposed transfers of any Collateral or transfers, pledges or changes in management of any direct or indirect interests in any Borrower, proposed alterations, proposed settlements of insurance claims, condemnation claims or deficiencies or proposed applications of insurance proceeds or condemnation awards); (vi) consenting to any agreement in any Insolvency Proceeding relating to any Asset, any Borrower or any Obligor with respect to an Asset, or any Collateral, including voting for a plan of reorganization; (vii) subordinating the liens of the Loan Document; (viii) amending or waiving any provision of any intercreditor agreement or making any decisions with respect to the Assets under any intercreditor agreement; or (ix) taking any other action regarding such Asset, Collateral or Acquired Property that is prohibited under the LLC Operating Agreement or the other Transaction Documents or otherwise inconsistent with the Servicing Standard; or

(h) reimbursement for any expense or cost incurred (or paid) to any Affiliate of the Company, any Affiliate of the Servicer or any Affiliate of any Subservicer.

Section 6.2 Amendments, Modification and Waivers. No provision of this Agreement may be amended, modified or waived except in writing executed by the Manager and the Servicer, and each such amendment and modification shall be subject to the prior written consent of the Initial Member, except for those provisions that may be amended by the express terms hereof without the Initial Member's consent. In no event shall any such amendment or waiver limit or affect the rights of the FDIC (as a third party beneficiary hereunder as specified in Section 11.8) without the express written consent of the FDIC.

**ARTICLE VII**  
**DEFAULTS; TERMINATION; TERMINATION WITHOUT CAUSE**

Section 7.1 Defaults. A default ("Default") means the occurrence of:

(a) any failure by the Servicer to remit to the Company or deposit in the Collection Account, the Escrow Accounts, any accounts created under the Custodial and Paying Agency Agreement or any Other Accounts any amount required to be so remitted or deposited under the terms of (i) this Agreement or (ii) the Custodial and Paying Agency Agreement or the LLC Operating Agreement; or

(b) any Insolvency Event (without any cure period other than as may be provided for in the definition of Insolvency Event) (i) with respect to the Servicer or any of its Related Parties, or (ii) with respect to any Subservicer or any of its Related Parties; provided, that any such Insolvency Event under this clause (ii) (that is not otherwise an Insolvency Event under clause (i) hereof) shall not be an Event of Default hereunder (but shall in all events be a default under the applicable Subservicing Agreement) so long as the Servicer shall have fully replaced such affected Subservicer within thirty (30) days after the occurrence of such Insolvency Event; or

(c) any failure by the Servicer to duly perform its obligations in (i) Section 5.2(e), which failure continues unremedied for a period of five (5) days, or such other period as the Manager and the Servicer agree, after the date on which written notice of such failure, requiring the same to be remedied, shall have been given by the Manager to the Servicer, or (ii) Section 5.2(f) or Section 5.2(g), which failure continues unremedied for a period of twenty-five (25) days, or such other period as the Manager and the Servicer agree, after the date on which written notice of such failure, requiring the same to be remedied, shall have been given by the Manager to the Servicer; or

(d) any failure by the Servicer at any time (i) to be a Qualified Servicer and to renew and maintain any permit or license necessary to carry out its responsibilities under this Agreement in compliance with Law, (ii) to have an Acceptable Rating or otherwise be approved by the Initial Member or (iii) to cause each Subservicer to meet the applicable characteristics of a Qualified Servicer as required under Section 4.1 and to renew or maintain any permit or license necessary to carry out its responsibilities under any Subservicing Agreement, which, in the case of either (i), (ii) or (iii), continues unremedied for a period of thirty (30) days after the date on which written notice of such failure requiring the same to be remedied shall have been given by the Manager or the Initial Member to the Servicer; or

(e) any failure by the Servicer to cause any Subservicer to comply with the terms of its Subservicing Agreement with the Servicer, the occurrence of a default or material breach by any Subservicer under its Subservicing Agreement or the failure by the Servicer to replace any Subservicer upon the occurrence of any such event in accordance with the terms governing material breach or default under the applicable Subservicing Agreement; or

(f) any other failure (other than those specified in any of Section 7.1(a) through (e)) by the Servicer to duly observe or perform any other covenants or agreements on the

part of the Servicer contained in this Agreement or to perform any Servicing Obligation in compliance with the Servicing Standard, and such failure continues unremedied for a period of thirty (30) days, or such other period as the Manager, with the consent of the Initial Member, and the Servicer agree, after the date on which written notice of such failure shall have been given by the Manager or the Initial Member to the Servicer; provided, however, that in the case of a failure that cannot be cured within thirty (30) days (or such other period as the Manager, with the consent of the Initial Member, and the Servicer agree) with the exercise of reasonable diligence, the cure period shall be extended for an additional thirty (30) days if the Servicer can demonstrate to the reasonable satisfaction of the Manager and the Initial Member that the Servicer is diligently pursuing remedial action; and provided, further, that, with respect to any such failure under this Section 7.1(f) that relates exclusively to obligations included in any applicable Schedule hereto that can be amended or otherwise modified without the consent of the Initial Member, then no such consent of the Initial Member shall be required with respect to an applicable cure period hereunder so long as such failure hereunder is not, or would not result in, a failure by the Manager to comply with its obligations under the LLC Operating Agreement and the other Transaction Documents; or

- (g) [Reserved]; or
- (h) [Reserved]; or
- (i) [Reserved]; or
- (j) the occurrence of any Restricted Servicer Change of Control.

#### Section 7.2 Termination with Cause.

(a) Upon (i) the occurrence of a Default pursuant to this Agreement, in each case, without any cure period other than as may be provided for in Section 7.1 above (ii) the occurrence of any “Event of Default” as defined in the LLC Operating Agreement, (iii) the failure by the Servicer to perform its obligations in Section 11.9; provided, that in the event of such failure the Servicer is due to the failure of any Subservicer to comply with the provisions of Section 11.9, then it shall not be an Event of Default (but shall in all events be a default under the applicable Subservicing Agreement) so long as Servicer shall have replaced such Subservicer within thirty (30) days after the occurrence of such Subservicer’s failure to comply with Servicer’s obligations under Section 11.9, or (iv) receipt by the Manager or the Servicer of notice from the Purchase Money Notes Guarantor that an “Event of Default” as defined in the Reimbursement, Security and Guaranty Agreement has occurred and is continuing, the Manager (including, if applicable, any successor “Manager” pursuant to the LLC Operating Agreement), the Initial Member or the Purchase Money Notes Guarantor, in addition to any other rights the Manager, the Initial Member or the Purchase Money Notes Guarantor may have at law (including under the UCC) or equity, including injunctive relief, specific performance or otherwise, may (i) immediately terminate this Agreement by providing a Termination Notice to the Servicer, (ii) immediately terminate the Subservicing Agreements by providing a written termination notice to the Servicer and the applicable Subservicers, and (iii) otherwise enforce this Agreement, in any case, without penalty or payment of any fee.

(b) In addition to the rights set forth above in Section 7.2(a), (i) upon the removal of the Manager as the “Manager” pursuant to the LLC Operating Agreement and/or notice from the Initial Member or the Manager of the occurrence of any Event of Default under the LLC Operating Agreement, the Initial Member (or any successor “Manager” to the Manager under the LLC Operating Agreement) may exercise all of the rights of the Manager under this Agreement and further cause the termination or assignment of this Agreement from the Manager to any other Person, without penalty or payment of any fee, and (ii) upon the occurrence of any Default under this Agreement or an event described in clauses (ii), (iii) or (iv) of Section 7.2(a) hereof, each of the Manager (or applicable successor “Manager” to the Manager under the LLC Operating Agreement) and the Initial Member may exercise all of the rights of (A) the Manager under this Agreement and cause the termination or assignment of this Agreement to any other Person, without penalty or payment of any fee, and (B) the Servicer under the Subservicing Agreement and cause the termination or assignment of the Subservicing Agreement to any other Person, without penalty or payment of any fee.

(c) The Servicer hereby consents to its immediate and automatic termination under this Agreement upon a Default under Section 7.1(a) and/or Section 7.1(b) of this Agreement.

(d) Upon a default or failure of the Manager to perform its obligations under this Agreement in a material manner, including but not limited to, the failure of the Manager to pay to the Servicer the Servicing Fee in a full and timely manner, the Servicer, in addition to any other rights it may have pursuant to this Agreement, at law or in equity, may terminate this Agreement by providing a Termination Notice to the Manager, with a copy to each Required Consenting Party and the Purchase Money Notes Guarantor. The Termination Notice shall set forth with specificity the nature of the default or failure to perform of the Manager and provide the Manager with no less than thirty (30) days to cure any such default or failure to perform. In the event that the default or failure to perform is not cured within thirty (30) days after the date of delivery of the Termination Notice, the Servicer shall provide a second Termination Notice to the Manager with a copy to each Required Consenting Party and the Purchase Money Notes Guarantor, which second Termination Notice shall be prominently labeled as the “Second Termination Notice”. Such Second Termination Notice shall confirm to the Manager that the Servicer shall continue to perform the Servicing Obligations under this Agreement until the earlier to occur of (i) ninety (90) days after the delivery of the Second Termination Notice to the Manager, the Purchase Money Notes Guarantor and each Required Consenting Party, and (ii) the transfer of the Servicing Obligations to a successor Servicer. The duty of the Servicer to continue to perform the Servicing Obligations as provided in the Second Termination Notice is contingent upon the timely and full payment of the Servicing Fee to the Servicer during such period. The Servicer shall cooperate fully and completely with the transition of the Servicing Obligations to a successor Servicer in order to assure an orderly transfer.

### Section 7.3 Termination without Cause.

(a) The Manager may, without cause, terminate this Agreement, upon providing a Termination Notice to the Servicer, but only as and in accordance with the provisions set forth on Schedule 6 as the same may be amended from time to time by the Manager (without the Initial Member’s consent) and the Servicer.

(b) The Servicer may, at any time after the first anniversary of the Effective Date and thereafter, without cause, terminate this Agreement. No termination of this Agreement by the Servicer shall be effective unless the Servicer delivers to the Manager, with a copy to each Required Consenting Party and the Purchase Money Notes Guarantor, a Termination Notice, which for the purpose of this Section 7.3(b) shall be a notice of the Servicer's intent to terminate this Agreement. Such Termination Notice shall be provided at least sixty (60) days prior to any date specified by the Servicer as the date of termination of the Servicer's Obligations under this Agreement. Notwithstanding the foregoing, such Termination Notice shall not be effective unless the Termination Notice contains confirmation of the intent and obligation of the Servicer to continue to perform its Servicing Obligations until the earlier of (i) ninety (90) days after the Termination Notice is given and (ii) such other date on which the Servicing Obligations are transferred to a successor Servicer in an orderly manner. Servicer shall cooperate fully and completely with the transition of the Servicing Obligations to a successor Servicer, to be designated by the Manager, in order to assure an orderly transfer. The Servicer issuing the Termination Notice shall be liable for all costs associated with the transfer of Servicing Obligations to the successor Servicer, including but not limited to the costs of transporting the servicing files and the provision of any notices to any Borrowers.

Section 7.4 Effective Termination Date. Termination as specified in this Article VIII shall be effective at such time as is specified in the Termination Notice. In the event of such termination, all authority and power of the Servicer under this Agreement, whether with respect to the Assets or otherwise, shall pass to and be vested in the Manager or the successor servicer designated by the Manager in the case of termination by the Manager or as designated solely by the Initial Member (or any successor "Manager" under the LLC Operating Agreement) in the case of termination by the Initial Member (or such successor "Manager" under the LLC Operating Agreement). The Servicer agrees to cooperate with the Manager, the Initial Member, any successor "Manager" under the Operating Agreement and any successor servicer with respect to the timely and orderly transition of its obligations under this Agreement. The Servicer shall be liable for all obligations of the Servicer that have accrued under this Agreement or at Law prior to such termination.

Section 7.5 Accounting. Upon termination of this Agreement as set forth herein, the Servicer shall account for and turn over to the Manager or its designee (or, if applicable, pursuant to such instructions as may be provided by the Initial Member or any successor "Manager" pursuant to the LLC Operating Agreement) funds collected under the terms of this Agreement. The Servicer shall provide written notice in conformance with all applicable Law to the Borrowers to indicate that their Assets will henceforth be serviced by the Manager (or applicable successor "Manager" under the LLC Operating Agreement) or any applicable successor Servicer designated by the Manager (or any successor "Manager" under the LLC Operating Agreement) or the Initial Member as the case may be, and transfer its duties as the Servicer to the Manager (or successor "Manager" under the LLC Operating Agreement) or such successor Servicer.



**ARTICLE VIII**  
**INDEPENDENCE OF PARTIES; INDEMNIFICATION**

Section 8.1 Independence of Parties. The Servicer shall have the status of, and act as, an independent contractor. Nothing herein contained shall be construed to create a partnership or joint venture or any similar relationship between the Manager and the Servicer.

Section 8.2 Indemnification. The Servicer agrees to indemnify, defend and hold harmless the Company, the Purchase Money Notes Guarantor, the Initial Member and each of their respective Affiliates, directors, officers, employees and agents and each of their respective successors and assigns (the "**Indemnified Parties**") from and against any and all claims, demands, suits, actions, proceedings, assessments, losses, costs, expenses (including attorneys' fees), damages and liabilities of any kind or nature whatsoever directly or indirectly resulting from or arising out of or related to (i) any inaccuracy in any of the Servicer's warranties or representations contained in this Agreement, (ii) any failure by the Servicer to observe or perform any or all of the Servicer's covenants, agreements or warranties contained in this Agreement, (iii) any act taken by the Servicer purportedly pursuant to a power of attorney granted by the Manager which act results in a claim related to the unlawful use of such power of attorney, or (iv) any failure by the Servicer or any Subservicer to discharge obligations on any Collateral relating to taxes, ground rents or other such recurring charges generally accepted by the mortgage servicing industry, which would become a Lien on the Collateral. The Servicer shall immediately notify the Indemnified Party if a claim is made in connection with the Servicer's responsibilities under this Agreement (including the Servicer's responsibilities in connection with the Assets and Collateral under this Agreement), assume (with prior consent of the Indemnified Party) the defense of any such claim and pay all expenses in connection therewith, including attorneys' fees, and promptly pay, discharge and satisfy any judgment or decree which may be entered against it or any Indemnified Party in respect of such claim. No expenses incurred by the Servicer or any Subservicer in connection with its obligations under this Section 8.2 shall constitute Servicing Expenses or otherwise be deducted from or reimbursed out of Asset Proceeds. The Servicer shall follow any reasonable written instructions received from the Indemnified Party in connection with such claims, it being understood that the Indemnified Party shall have no duty to monitor or give instructions with respect to such claims.

Section 8.3 Procedure for Indemnification. Promptly upon receipt of written notice of any claim in respect of which indemnity may be sought pursuant to the terms of this Agreement, the Indemnified Party will use its best efforts to notify the Servicer in writing thereof in sufficient time for the Servicer to respond to such claim. Except to the extent that the Servicer is prejudiced thereby, the failure of the Indemnified Party to promptly notify the Servicer of any such claim shall not relieve the Servicer from any liability which it may have to the Indemnified Party in connection therewith. If any claim shall be asserted or commenced against the Indemnified Party, the Servicer will be entitled to participate therein, and to the extent it may wish to assume the defense, conduct or settlement thereof, it shall be entitled to do so with counsel reasonably satisfactory to the Indemnified Party; provided, however, that in the event the Servicer fails, in the reasonable judgment of the Indemnified Party, to vigorously defend or pursue or attempt to settle such claim, the Manager shall have the right to assume the conduct, defense or settlement thereof, provided that the Manager shall obtain the prior written approval of the Indemnified Party before ceasing to defend against any claim or entering into any

settlement, adjustment or compromise of such claim involving injunctive or similar equitable relief being imposed upon any Indemnified Party or any of its Affiliates. After notice from the Servicer to the Manager of its election to assume the defense, conduct or settlement thereof, the Servicer will not be liable to the Manager for any legal or other expenses consequently incurred by the Manager in connection with the defense, conduct or settlement thereof.

Section 8.4 Pre-Effective Date Liabilities. Notwithstanding anything to the contrary herein, but without limitation of the release set forth in Section 11.13, it is understood and agreed that the Servicer shall not be liable to the Manager for any liabilities or obligations attributable to an act, omission or circumstances of the Initial Member, the FDIC, the Failed Banks and the Company that occurred or existed prior to the Effective Date or, with respect to any particular Asset, the Servicing Transfer Date applicable thereto (the "Pre-Existing Liabilities"). In the event there is asserted against the Company, the Manager, the Servicer or any Subservicer any claim or action with respect to any such Pre-Existing Liabilities, the Servicer or Subservicer, as applicable, shall notify the Manager and the Initial Member of such claim or action in accordance with Article IX. Except as provided otherwise in Section 8.2 and 8.3 above (in the event that such claim or action is subject to the indemnification obligations of Servicer pursuant to Section 8.1 above), the Manager shall have the right to control and assume the defense of the Company, the Servicer and the Subservicer with respect to such claim or action at the Manager's expense. The Servicer shall be reimbursed by the Manager in connection with the foregoing only to the extent of and in accordance with the terms set forth on Schedule 4, as the same may be amended from time to time by the Manager (without the consent of the Initial Member) and the Servicer.

## **ARTICLE IX** **NOTICES**

All notices, requests, demands and other communications required or permitted to be given or delivered under or by reason of the provisions of this Agreement shall be in writing and shall be given by certified or registered mail, postage prepaid, by delivery by hand or by nationally recognized courier service, or by electronic mail (followed up by a hard copy delivered through an alternate manner permitted under this Article IX), in each case mailed or delivered to the applicable address or electronic mail address specified in, or in the manner provided, in this Article IX below. All such notices, requests, demands and other communications shall be deemed to be given or made upon the earlier to occur of (i) actual receipt (or refusal thereof) by the relevant party hereto and (ii) (A) if delivered by hand or by nationally recognized courier service, when signed for (or refused) by or on behalf of the relevant party hereto; (B) if delivered by mail, four (4) Business Days after deposit in the mails, postage prepaid; and (C) if delivered by electronic mail (which form of delivery is subject to the provisions of this paragraph), when delivered and capable of being accessed from the recipient's office computer, provided that any notice, request, demand or other communication that is received other than during regular business hours of the recipient shall be deemed to have been given at the opening of business on the next business day of the recipient. In no event shall a voice mail message be effective as a notice, communication or confirmation hereunder. From time to time, any party may designate a new address for purposes of notice to it hereunder by notice to such effect to the other parties hereto in the manner set forth in this Article IX.

If to the Manager:

ColFin Milestone West Funding, LLC  
2450 Broadway, 6th Floor  
Santa Monica, CA 90404  
Attention: Paul A. Fuhrman  
Email: [REDACTED]

with a copy to:

Colony Capital, LLC  
660 Madison Avenue  
New York, NY 10065  
Attention: Ronald M. Sanders  
Email: [REDACTED]

If to the Initial Member, the  
Collateral Agent or the Purchase  
Money Notes Guarantor:

Assistant Director, Structured Transactions  
c/o Federal Deposit Insurance Corporation  
550 17th Street, NW (Room F-7014)  
Washington, D.C. 20429-0002  
Attention: Ralph Malami  
Email: [RMalami@fdic.gov](mailto:RMalami@fdic.gov)

with a copy to:

Senior Counsel  
FDIC Legal Division  
Litigation and Resolutions Branch, Receivership  
Section  
Special Issues Unit  
3501 Fairfax Drive (Room E-7056)  
Arlington, Virginia 22226  
Attention: David Gearin  
Email: [DGearin@fdic.gov](mailto:DGearin@fdic.gov)

If to the Servicer:

COLONY AMC MILESTONE WEST, LLC  
2450 Broadway, 6th Floor  
Santa Monica, CA 90404  
Attention: Paul A. Fuhrman  
Email: [REDACTED]

with a copy to:

Colony Capital, LLC  
660 Madison Avenue  
New York, NY 10065  
Attention: Ronald M. Sanders  
Email: [REDACTED]

**ARTICLE X**  
**GOVERNING LAW; JURISDICTION**

Section 10.1 Governing Law. EACH PARTY TO THIS AGREEMENT AGREES AND ELECTS THAT, IN ACCORDANCE WITH SECTION 5-1401 OF THE GENERAL OBLIGATIONS LAW OF THE STATE OF NEW YORK, THIS AGREEMENT IS TO BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAW OF THE STATE OF NEW YORK, EXCLUDING ANY CONFLICT OF LAWS RULE OR PRINCIPLE THAT MIGHT REFER THE GOVERNANCE OR THE CONSTRUCTION OF THIS AGREEMENT TO THE LAW OF ANOTHER JURISDICTION, AND EACH PARTY TO THIS AGREEMENT UNCONDITIONALLY AND IRREVOCABLY WAIVES ANY CLAIM TO ASSERT THAT THE LAWS OF ANY OTHER JURISDICTION GOVERN THIS AGREEMENT. Nothing in this Agreement shall require any unlawful action or inaction by any party hereto.

Section 10.2 Jurisdiction; Venue and Service. Each of the parties hereto, for itself and each of its Affiliates, hereby irrevocably and unconditionally:

(a) (i) agrees that any suit, action or proceeding instituted against it by any other party with respect to this Agreement may be instituted, and that any suit, action or proceeding instituted by it against any other party with respect to this Agreement shall be instituted, only in the Supreme Court of the State of New York, County of New York, or the U.S. District Court for the Southern District of New York, as the party instituting such suit, action or proceeding may choose (and appellate courts from any of the foregoing),

(ii) consents and submits, for itself and its property, to the jurisdiction of such courts for the purpose of any such suit, action or proceeding instituted against it by any other party, and

(iii) agrees that a final judgment in any such suit, action or proceeding shall be conclusive and may be enforced in other jurisdictions by suit on the judgment or in any other manner provided by Law;

(b) agrees that service of all writs, process and summonses in any suit, action or proceeding pursuant to Section 10.2(a) may be effected by the mailing of copies thereof by registered or certified mail, postage prepaid, to it at its address for notices pursuant to Article IX (with copies to such other Persons as specified therein); provided, however, that nothing contained in this Section 10.2(b) shall affect the ability of any party to be served process in any other manner permitted by Law;

(c) (i) waives any objection that it may now or hereafter have to the laying of venue of any suit, action or proceeding arising out of or relating to this Agreement brought in any court specified in Section 10.2(a), (ii) waives any claim that any such suit, action or proceeding brought in any such court has been brought in an inconvenient forum and (iii) agrees not to plead or claim either of the foregoing; and

(d) agrees that nothing contained in this Section 10.2 shall be binding upon or construed to constitute consent to jurisdiction by any Failed Bank or the FDIC, in any capacity, or constitute a limitation on any removal rights the FDIC, in any capacity, may have.

Notwithstanding the above, if at any time the Initial Member shall replace the Manager hereunder pursuant to the terms of the LLC Operating Agreement, the terms of this Section 10.2 shall be restated as follows:

“The Servicer, on behalf of itself and its Affiliates, hereby irrevocably and unconditionally:

(a) (i) consents to the jurisdiction of the United States District Court for the Southern District of New York and to the jurisdiction of the United States District Court for the District of Columbia for any suit, action or proceeding against it or any of its Affiliates commenced by the FDIC, in any capacity, arising out of, relating to, or in connection with this Agreement, and waives any right to:

(A) remove or transfer such suit, action or proceeding to any court or dispute-resolution forum other than the court in which the FDIC, in any capacity, files the action, suit or proceeding without the consent of the FDIC;

(B) assert that venue is improper in either the United States District Court for the Southern District of New York or the United States District Court for the District of Columbia; or

(C) assert that the United States District Court for the Southern District of New York or the United States District Court for the District of Columbia is an inconvenient forum;

(ii) consents to the jurisdiction of the Supreme Court of the State of New York, County of New York, for any suit, action or proceeding against it or any of its Affiliates commenced by the FDIC, in any capacity, arising out of, relating to, or in connection with this Agreement, and waives any right to:

(A) remove or transfer such suit, action or proceeding to any other court or dispute-resolution forum without the consent of the FDIC;

(B) assert that venue is improper in the Supreme Court of the State of New York, County of New York; or

(C) assert that the Supreme Court of the State of New York, County of New York is an inconvenient forum;

(iii) agrees to bring any suit, action or proceeding against the FDIC, in any capacity, arising out of, relating to, or in connection with this Agreement, the LLC Operating Agreement or any Ancillary Document in only either the United States District Court for the Southern District of New York or the United States District Court for the District of Columbia, and waives any right to remove or transfer such suit, action or proceeding to any other court or

dispute-resolution forum without the consent of the FDIC, and agrees to consent thereafter to transfer of the suit, action or proceeding to either the United States District Court for the Southern District of New York or the United States District Court for the District of Columbia at the option of the FDIC;

(iv) agrees, if the United States District Court for the Southern District of New York and the United States District Court for the District of Columbia both lack jurisdiction to hear a suit, action or proceeding falling within Section 10.2(a)(iii), to bring that suit, action or proceeding in only the Supreme Court of the State of New York, County of New York, and waives any right to remove or transfer such suit, action or proceeding to any other court or dispute-resolution forum without the consent of the FDIC; and

(v) agrees that any final judgment entered against it in any suit, action or proceeding falling within Section 10.2(a) may be enforced in any court of competent jurisdiction.

(b) The Servicer, on behalf of itself and its Affiliates, hereby irrevocably and unconditionally agrees that any final judgment entered against it in any suit, action or proceeding falling within Section 10.2(a) may be enforced in any court of competent jurisdiction.

(c) Subject to the provisions of Section 10.2(d), the Servicer, on behalf of itself and its Affiliates, and the FDIC hereby irrevocably and unconditionally agrees that service of all writs, process and summonses in any suit, action or proceeding pursuant to Section 10.2(a) or Section 10.2(b) may be effected by the mailing of copies thereof by registered or certified mail, postage prepaid, to it at its address for notices pursuant to Article IX (with copies to such other Persons as specified therein); provided, however, that nothing contained in this Section 10.2(c) shall affect the right of any party to serve process in any other manner permitted by law.

(d) Nothing in this Section 10.2 shall constitute consent to jurisdiction in any court by the FDIC, other than as expressly provided in Section 10.2(a)(iii) and Section 10.2(a)(iv), or in any way limit the FDIC's right to remove, transfer, seek to dismiss, or otherwise respond to any suit, action, or proceeding against it in any forum.

**Section 10.3 Waiver of Jury Trial. EACH OF THE PARTIES HERETO, FOR ITSELF AND EACH OF ITS AFFILIATES, HEREBY IRREVOCABLY AND UNCONDITIONALLY WAIVES ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY OF ANY DISPUTE ARISING OUT OF OR RELATING TO THIS AGREEMENT AND AGREES THAT ANY SUCH DISPUTE SHALL BE TRIED BEFORE A JUDGE SITTING WITHOUT A JURY.**

## **ARTICLE XI MISCELLANEOUS**

**Section 11.1 No Assignment by Servicer; No Transfer of Ownership Interests in Servicing Rights.**

(a) The Servicer hereby acknowledges that this Agreement constitutes a personal services agreement between the Manager and the Servicer. Any of the following shall constitute an assignment for all purposes of this Agreement: (a) any merger, consolidation or

dissolution involving the Servicer or (b) any transfer or all or substantially all of the assets of the Servicer, notwithstanding whether any of the foregoing transactions occur at one time or in the aggregate over a period of time. The Servicer shall not assign any rights or obligations hereunder to any other Person other than as is expressly provided in this Agreement. In connection with the sale of an Asset, the Servicer shall, at the direction of the Manager, transfer, sell or assign its rights hereunder to service such Asset. Any purported sale, sub-participation or assignment or delegation in violation of this Section 11.1(a) shall be void *ab initio* and of no force or effect whatsoever.

(b) Under no circumstances shall the Servicer (i) transfer to any Subservicer or any other Person any ownership interest in the servicing of the Assets or any right to transfer or sell the servicing to the Assets (other than in connection with the sale of any Asset), or (ii) assign, pledge or otherwise transfer or purport to assign, pledge or otherwise transfer any interest to any Subservicer or other Person in the servicing of the Assets (other than in connection with the sale of any Asset). Any purported assignment, pledge, delegation or other transfer in violation of this Section 11.1(b) shall be void *ab initio* and of no force or effect whatsoever.

Section 11.2 Legal Fees. No party to this Agreement shall be responsible for the payment of the legal fees or expenses incurred by the other party hereto in connection with the negotiation and execution of this Agreement or any subsequent modifications or supplements hereto.

Section 11.3 Entire Agreement. As of the Closing Date, this Agreement contains the entire agreement between the Manager and the Servicer and supersedes any and all other prior agreements, whether oral or written, with respect to the subject matter hereof.

Section 11.4 Counterparts; Facsimile Signatures. This Agreement may be executed in two (2) or more counterparts, each of which shall be deemed an original but all of which together shall constitute but one and the same agreement. This Agreement and any amendments hereto, to the extent signed and delivered by facsimile or other electronic means, shall be treated in all manner and respects as an original agreement and shall be considered to have the same binding legal effect as if it were the original signed version thereof delivered in person. No signatory to this Agreement shall raise the use of a facsimile machine or other electronic means to deliver a signature or the fact that any signature or agreement was transmitted or communicated through the use of a facsimile machine or other electronic means as a defense to the formation or enforceability of a contract and each such Person forever waives any such defense.

Section 11.5 Headings. Paragraph titles or captions contained in this Agreement are inserted only as a matter of convenience and for reference and in no way define, limit, extend or describe the scope of this Agreement or the intent of any provisions hereof. All Section and paragraph references contained herein shall refer to Sections and paragraphs in this Agreement unless otherwise specified.

Section 11.6 Compliance with Law. Except as otherwise specifically provided herein, each party to this Agreement shall, at its own cost and expense, obey and comply with all applicable Laws, as they may pertain to such party's performance of its obligations hereunder.

Section 11.7 Severability. Any provision of this Agreement which is prohibited or unenforceable in any jurisdiction shall be ineffective, but such ineffectiveness shall be limited as follows: (i) if such provision is prohibited or unenforceable in such jurisdiction only as to a particular Person or Persons and/or under any particular circumstance or circumstances, such provision shall be ineffective, but only in such jurisdiction and only with respect to such particular Person or Persons and/or under such particular circumstance or circumstances, as the case may be; (ii) without limitation of clause (i), such provision shall in any event be ineffective only as to such jurisdiction and only to the extent of such prohibition or unenforceability, and such prohibition or unenforceability in such jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction; and (iii) without limitation of clauses (i) or (ii), such ineffectiveness shall not invalidate any of the remaining provisions of this Agreement. Without limitation of the preceding sentence, it is the intent of the parties to this Agreement that in the event that in any court proceeding, such court determines that any provision of this Agreement is prohibited or unenforceable in any jurisdiction (because of the duration or scope (geographic or otherwise) of such provision, or for any other reason) such court shall have the power to, and shall, (x) modify such provision (including without limitation, to the extent applicable, by limiting the duration or scope of such provision and/or the Persons against whom, and/or the circumstances under which, such provision shall be effective in such jurisdiction) for purposes of such proceeding to the minimum extent necessary so that such provision, as so modified, may then be enforced in such proceeding and (y) enforce such provision, as so modified pursuant to clause (x), in such proceeding. Nothing in this Section 11.7 is intended to, or shall, limit (1) the ability of any party to this Agreement to appeal any court ruling or the effect of any favorable ruling on appeal or (2) the intended effect of Section 10.1.

Section 11.8 Third Party Beneficiaries. The Initial Member shall be and is hereby designated as a third party beneficiary under this Agreement, and, as such, the Initial Member is entitled to enforce this Agreement as if the Initial Member were a party hereto. The Company, the Purchase Money Notes Guarantor, and the FDIC shall be and are hereby designated as third party beneficiaries under this Agreement with respect to those provisions of this Agreement which expressly grant rights to such Persons, and, as such, each is entitled to enforce such provisions of this Agreement as if such Person were a party hereto; provided, that, with respect to each Person (other than the Initial Member) that is a Required Consenting Party, at such time when such Person ceases to be a Required Consenting Party (and subject to any rights of such Required Consenting Party that, by their terms or nature, survive such date), such Person shall cease to have any of the specified rights set forth herein with respect to consents/approvals, the exercise of remedies following a Default or an event described in clauses (ii), (iii) or (iv) of Section 7.1(a) hereof and receipt of reports and other information with respect to the continued operation of the Business, in each case (i) to the extent relating exclusively to the period following such date on which such Person so ceases to be a Required Consenting Party, and (ii) with respect to the Purchase Money Notes Guarantor, except as to any rights or remedies relating to (or the exercise or non-exercise of which rights or remedies would affect) the Defeasance Account or the repayment of any Guaranteed Purchase Money Notes (in the case of the Purchase Money Notes Guarantor) in accordance with the terms hereof and of the other Transaction Documents, as determined by the Purchase Money Notes Guarantor, in its sole discretion. Notwithstanding the foregoing, none of the Purchase Money Notes Guarantor, the FDIC, the Company and the Initial Member shall have any obligation to undertake any of the duties of the



Manager hereunder and or have any liability whatsoever to the Servicer, any Subservicer or any other party related to this Agreement. There shall be no other third party beneficiaries.

Section 11.9 Protection of Confidential Information. The Servicer shall keep confidential (and shall cause any Subservicer to keep confidential) and shall not divulge (and shall cause any Subservicer to not divulge) to any party, without the Manager's prior written consent, any information pertaining to the LLC Operating Agreement, the Assets or any Borrower or Obligor or the Collateral, except as required pursuant to this Agreement and except to the extent that it is necessary and appropriate for the Servicer or a Subservicer, as applicable, to do so in working with legal counsel, auditors, taxing authorities, regulatory authorities or any other Governmental Authority or in accordance with the Servicing Standard; provided, that, to the extent that disclosure should be required by law, rule, regulation (including any securities listing requirements or the requirements of any self-regulatory organization), subpoena, or in connection with any legal or regulatory proceeding (including in connection with or pursuant to any action, suit, subpoena, arbitration or other dispute resolution process or other legal proceedings, whether civil or criminal, and including before any court or administrative or legislative body), the Servicer shall, and shall cause all Subservicers to, use all reasonable efforts to maintain confidentiality and shall (unless otherwise prohibited by law), and shall cause all Subservicers to (unless such Subservicers are otherwise prohibited by law), notify the Manager and the Initial Member and the Purchase Money Notes Guarantor within one (1) Business Day after its knowledge of such legally required disclosure so that the Manager, the Initial Member, and/or the Purchase Money Notes Guarantor may seek an appropriate protective order and/or direct the Manager to waive the Servicer's or Subservicer's, as the case may be, compliance with this Agreement. Notice shall be by telephone, by email and in writing. In the absence of a protective order or waiver, the Servicer and any applicable Subservicer may make such required disclosure if, in the written opinion of Servicer's outside counsel (which opinion shall be provided to the Manager, the Initial Member and the Purchase Money Notes Guarantor prior to disclosure pursuant to this Section 11.9), failure to make such disclosure would subject the Servicer or the Subservicer, as the case may be, to liability for contempt, censure or other legal penalty or liability.

Section 11.10 Time of Essence. Time is hereby declared to be of the essence of this Agreement and of every part hereof.

Section 11.11 No Presumption. This Agreement shall be construed fairly as to each party hereto and if at any time any such term or condition is desired or required to be interpreted or construed, no consideration shall be given to the issue of who actually prepared, drafted or requested any term or condition of this Agreement or any agreement or instrument subject hereto.

Section 11.12 No Right of Setoff. The Servicer hereby waives any and all rights it may otherwise have (whether by contract or operation of Law or otherwise) to any setoff, offset, counterclaim or deduction (or to assert any claim for any setoff, offset counterclaim or deduction) against the Asset Proceeds (or the Company).

Section 11.13 Release of Initial Member and Others. The Servicer hereby releases and discharges each Prior Servicer from any and all claims (including any counterclaim or defensive

claim), demands; causes of action, judgments or legal proceedings and remedies of whatever kind or nature that the Servicer had, has or might have in the future, whether known or unknown, which are related in any manner whatsoever to the servicing of the Assets or Collateral prior to the applicable Servicing Transfer Date by the Prior Servicers, in each case other than for acts or omissions constituting gross negligence, violation of law or willful misconduct of such Prior Servicers.


Section 11.14 Delegation by Manager. The Manager hereby delegates to the Servicer the Manager's responsibilities under the LLC Operating Agreement and other Transactional Agreements which correspond to the duties and obligations of the Servicer under this Agreement. As the Manager has delegated to the Servicer its corresponding duties and responsibilities, to the extent any action or inaction by the Servicer under this Agreement requires the consent or direction of the Manager, such action or inaction by the Servicer shall be deemed to have occurred with the approval or at the direction of the Manager.

*[Remainder of Page Intentionally Left Blank]*

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed as of the day and year first above written.

MANAGER:

**COLFIN MILESTONE NORTH FUNDING, LLC**, a Delaware limited liability partnership

By:   
Name: *Mark M. Hedstrom*  
Title: *Authorized Representative*

SERVICER:

**COLONY AMC MILESTONE NORTH, LLC**, a Delaware limited liability company

By: Colony Financial AMC, LLC,  
A Delaware limited liability company  
its managing member

By: Colony Financial, Inc.,  
a Maryland corporation  
its managing member

By:   
Name: Mark M. Hedstrom  
Title: Vice President