

UNITED STATES SECURITIES AND EXCHANGE COMMISSION  
Washington, DC 20549

Form 10-K

(Mark One)

ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d)  
OF THE SECURITIES EXCHANGE ACT OF 1934  
For the fiscal year ended September 30, 2009

OR  
TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d)  
OF THE SECURITIES EXCHANGE ACT OF 1934

COMMISSION FILE NUMBER: 1-33901

**Fifth Street Finance Corp.**

(EXACT NAME OF REGISTRANT AS SPECIFIED IN ITS CHARTER)

DELAWARE  
(State or jurisdiction of  
incorporation or organization)

10 Bank Street, 12th Floor  
White Plains, NY  
(Address of principal executive office)

26-1219283  
(I.R.S. Employer  
Identification No.)

10606  
(Zip Code)

REGISTRANT'S TELEPHONE NUMBER, INCLUDING AREA CODE:  
(914) 286-6800

SECURITIES REGISTERED PURSUANT TO SECTION 12(b) OF THE ACT:

| Title of Each Class                      | Name of Each Exchange<br>on Which Registered |
|--|--|
| Common Stock, par value \$0.01 per share | New York Stock Exchange                      |

SECURITIES REGISTERED PURSUANT TO SECTION 12(g) OF THE ACT:

None

Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act. YES  No

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Act. YES  No

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter periods as the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. YES  NO

Indicate by check mark whether the registrant has submitted electronically and posted on its corporate Web site, if any, every Interactive Data File required to be submitted and posted pursuant to Rule 405 of Regulation S-T during the preceding 12 months (or for such shorter period that the registrant was required to submit and post such files). Yes  No

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K is not contained herein, and will not be contained, to the best of registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K.

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. See the definitions of "large accelerated filer," "accelerated filer" and "smaller reporting company" in Rule 12b-2 of the Exchange Act. (Check one):

Large accelerated filer

Accelerated filer

Non-accelerated filer   
(Do not check if a smaller reporting company)

Smaller reporting company

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Act) YES  NO

The aggregate market value of the registrant's common stock held by non-affiliates of the registrant as of March 31, 2009 is \$164,916,706. The registrant had 37,878,987 shares of common stock outstanding as of November 30, 2009.

DOCUMENTS INCORPORATED BY REFERENCE

None

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## PART I

### Item 1. Business

#### General

We are a specialty finance company that lends to and invests in small and mid-sized companies in connection with investments by private equity sponsors. We define small and mid-sized companies as those with annual revenues between \$25 million and \$250 million. We are externally managed and advised by Fifth Street Management LLC, whose six principals collectively have over 50 years, and individually have between four years and 14 years, of experience lending to and investing in small and mid-sized companies. Fifth Street Management LLC, which we also refer to as our “investment adviser,” is an affiliate of Fifth Street Capital LLC, a private investment firm founded and managed by Leonard M. Tannenbaum who has led the investment of over \$600 million in small and mid-sized companies, including the investments made by Fifth Street Finance Corp., since 1998.

Our investment objective is to maximize our portfolio’s total return by generating current income from our debt investments and capital appreciation from our equity investments. To meet our investment objective we seek to (i) capitalize on our investment adviser’s strong relationships with private equity sponsors; (ii) focus on transactions involving small and mid-sized companies which we believe offer higher yielding debt investment opportunities, lower leverage levels and other terms more favorable than transactions involving larger companies; (iii) continue our growth of direct originations; (iv) employ disciplined underwriting policies and rigorous portfolio management practices; (v) structure our investments to minimize risk of loss and achieve attractive risk-adjusted returns; and (vi) leverage the skills and experience of our investment adviser.

As of September 30, 2009, we have originated \$343.4 million of funded debt and equity investments and our portfolio totaled \$299.6 million at fair value and was comprised of 28 investments, 26 of which were in operating companies and two of which were in private equity funds. The weighted average annual yield of our debt investments as of September 30, 2009 was approximately 15.7%. Our investments generally range in size from \$5 million to \$40 million and are principally in the form of first and second lien debt investments, which may also include an equity component. As of September 30, 2009, all of our debt investments were secured by first or second priority liens on the assets of our portfolio companies. Moreover, we held equity investments consisting of common stock, preferred stock, or other equity interests in 22 out of 28 portfolio companies as of September 30, 2009.

Fifth Street Mezzanine Partners III, L.P., our predecessor fund, commenced operations as a private partnership on February 15, 2007. Effective as of January 2, 2008, Fifth Street Mezzanine Partners III, L.P. merged with and into us. We are an externally managed, closed-end, non-diversified management investment company that has elected to be treated as a business development company under the Investment Company Act of 1940, or the “1940 Act.” We were formed in late 2007 for the purpose of acquiring Fifth Street Mezzanine Partners III, L.P. and continuing its business as a public entity.

As a business development company, we are required to comply with regulatory requirements, including limitations on our use of debt. We are permitted to, and expect to, finance our investments using debt and equity. See “Item 1. Business — Regulation.” We elected, effective as of January 2, 2008, to be treated for federal income tax purposes as a regulated investment company, or “RIC,” under Subchapter M of the Internal Revenue Code, or “Code.” See “Item 1. Business — Taxation as a Regulated Investment Company.” As a RIC, we generally will not have to pay corporate-level federal income taxes on any net ordinary income or capital gains that we distribute to our stockholders as dividends if we meet certain source-of-income, distribution and asset diversification requirements.

Our principal executive office is located at 10 Bank Street, 12th Floor, White Plains, New York 10606 and our telephone number is (914) 286-6800.

## The Investment Adviser

Our investment adviser is led by six principals who collectively have over 50 years, and individually have between four years and 14 years, of experience lending to and investing in small and mid-sized companies. Our investment adviser is affiliated with Fifth Street Capital LLC, a private investment firm founded and managed by Leonard M. Tannenbaum who has led the investment of over \$600 million in small and mid-sized companies, including the investments made by Fifth Street, since 1998. Mr. Tannenbaum and his respective private investment firms have acted as the lead (and often sole) first or second lien investor in over 50 investment transactions. The other investment funds managed by these private investment firms generally are fully committed and, other than follow-on investments in existing portfolio companies, are no longer making investments.

We benefit from our investment adviser's ability to identify attractive investment opportunities, conduct diligence on and value prospective investments, negotiate investments and manage a diversified portfolio of those investments. The principals of our investment adviser have broad investment backgrounds, with prior experience at investment funds, investment banks and other financial services companies and have developed a broad network of contacts within the private equity community. This network of contacts provides our principal source of investment opportunities.

The principals of our investment adviser are Mr. Tannenbaum, our president and chief executive officer and our investment adviser's managing partner, Marc A. Goodman, our chief investment officer and our investment adviser's senior partner, Juan E. Alva, a partner of our investment adviser, Bernard D. Berman, our chief compliance officer, executive vice president and secretary and a partner of our investment adviser, Ivelin M. Dimitrov, a partner of our investment adviser, and William H. Craig, our chief financial officer.

## Business Strategy

Our investment objective is to maximize our portfolio's total return by generating current income from our debt investments and capital appreciation from our equity investments. We have adopted the following business strategy to achieve our investment objective:

- *Capitalize on our investment adviser's strong relationships with private equity sponsors.* Our investment adviser has developed an extensive network of relationships with private equity sponsors that invest in small and mid-sized companies. We believe that the strength of these relationships is due to a common investment philosophy, a consistent market focus, a rigorous approach to diligence and a reputation for delivering on commitments. In addition to being our principal source of originations, we believe that private equity sponsors provide significant benefits including incremental due diligence, additional monitoring capabilities and a potential source of capital and operational expertise for our portfolio companies.
- *Focus on established small and mid-sized companies.* We believe that there are fewer finance companies focused on transactions involving small and mid-sized companies than larger companies, and that this is one factor that allows us to negotiate favorable investment terms. Such favorable terms include higher debt yields and lower leverage levels, more significant covenant protection and greater equity grants than typical of transactions involving larger companies. We generally invest in companies with established market positions, seasoned management teams, proven products and services and strong regional or national operations. We believe that these companies possess better risk-adjusted return profiles than newer companies that are building management or in early stages of building a revenue base.
- *Continue our growth of direct originations.* We directly originated 100% of our investments. Over the last several years, the principals of our investment adviser have developed an origination strategy designed to ensure that the number and quality of our investment opportunities allows us to continue to directly originate substantially all of our investments. We believe that the benefits of direct originations include, among other things, our ability to control the structuring of investment protections and to generate origination and exit fees.

- *Employ disciplined underwriting policies and rigorous portfolio management.* Our investment adviser has developed an extensive underwriting process which includes a review of the prospects, competitive position, financial performance and industry dynamics of each potential portfolio company. In addition, we perform substantial diligence on potential investments, and seek to invest with private equity sponsors who have proven capabilities in building value. As part of the monitoring process, our investment adviser will analyze monthly and quarterly financial statements versus the previous periods and year, review financial projections, meet with management, attend board meetings and review all compliance certificates and covenants.
- *Structure our investments to minimize risk of loss and achieve attractive risk-adjusted returns.* We structure our loan investments on a conservative basis with high cash yields, cash origination fees, low leverage levels and strong investment protections. As of September 30, 2009, the weighted average annual yield of our debt investments was approximately 15.7%, which includes a cash component of 12.9%. The 26 debt investments in our portfolio as of September 30, 2009, had a weighted average debt to EBITDA (Earnings Before Interest, Taxes, Depreciation and Amortization) multiple of 3.6x calculated at the time of origination of the investment. Finally, our debt investments have strong protections, including default penalties, information rights, board observation rights, and affirmative, negative and financial covenants, such as lien protection and prohibitions against change of control. We believe these protections, coupled with the other features of our investments described above, should allow us to reduce our risk of capital loss and achieve attractive risk adjusted returns; however, there can be no assurance that we will be able to successfully structure our investments to minimize risk of loss and achieve attractive risk-adjusted returns.
- *Leverage the skills and experience of our investment adviser.* The six principals of our investment adviser collectively have over 50 years, and individually have between four years and 14 years, of experience lending to and investing in small and mid-sized companies. The principals of our investment adviser have broad investment backgrounds, with prior experience at private investment funds, investment banks and other financial services companies and they also have experience managing distressed companies. We believe that our investment adviser's expertise in valuing, structuring, negotiating and closing transactions provides us with a competitive advantage by allowing us to provide financing solutions that meet the needs of our portfolio companies while adhering to our underwriting standards.

#### **Investment Criteria**

The principals of our investment adviser have identified the following investment criteria and guidelines for use in evaluating prospective portfolio companies and they use these criteria and guidelines in evaluating investment opportunities for us. However, not all of these criteria and guidelines were, or will be, met in connection with each of our investments.

- *Established companies with a history of positive operating cash flow.* We seek to invest in established companies with sound historical financial performance. We typically focus on companies with a history of profitability on an operating cash flow basis. We do not intend to invest in start-up companies or companies with speculative business plans.
- *Ability to exert meaningful influence.* We target investment opportunities in which we will be the lead/sole investor in our tranche and in which we can add value through active participation, often through advisory positions.
- *Private equity sponsorship.* We generally seek to invest in companies in connection with private equity sponsors who have proven capabilities in building value. We believe that a private equity sponsor can serve as a committed partner and advisor that will actively work with the company and its management team to meet company goals and create value. We assess a private equity sponsor's commitment to a portfolio company by, among other things, the capital contribution it has made or will make in the portfolio company.

- *Seasoned management team.* We generally will require that our portfolio companies have a seasoned management team, with strong corporate governance. We also seek to invest in companies that have proper incentives in place, including having significant equity interests, to motivate management to act in accordance with our interests.
- *Defensible and sustainable business.* We seek to invest in companies with proven products and/or services and strong regional or national operations.
- *Exit strategy.* We generally seek to invest in companies that we believe possess attributes that will provide us with the ability to exit our investments. We expect to exit our investments typically through one of three scenarios: (i) the sale of the company resulting in repayment of all outstanding debt, (ii) the recapitalization of the company through which our loan is replaced with debt or equity from a third party or parties or (iii) the repayment of the initial or remaining principal amount of our loan then outstanding at maturity. In some investments, there may be scheduled amortization of some portion of our loan which would result in a partial exit of our investment prior to the maturity of the loan.

#### **Deal Origination**

Our deal originating efforts are focused on building relationships with private equity sponsors that are focused on investing in the small and mid-sized companies that we target. We divide the country geographically into Eastern, Central and Western regions and emphasize active, consistent sponsor coverage. Over the last ten years, the investment professionals of our investment adviser have developed an extensive network of relationships with these private equity sponsors. We estimate that there are approximately 1,400 of such private equity firms and our investment adviser has active relationships with approximately 120 of them. An active relationship is one through which our investment adviser has received at least one investment opportunity from the private equity sponsor within the last year.

Our investment adviser reviewed over 240 potential investment transactions with private equity sponsors for the year ended September 30, 2009. All of the investment transactions that we have completed to date were originated through our investment adviser's relationships with private equity sponsors. We believe that our investment adviser has a reputation as a reliable, responsive and efficient source of funding to support private equity investments. We believe that this reputation and the relationships of our investment adviser with private equity sponsors will provide us with significant investment opportunities.

Our origination process is designed to efficiently evaluate a large number of opportunities and to identify the most attractive of such opportunities. A significant number of opportunities that clearly do not fit our investment criteria are screened by the partners of our investment adviser when they are initially identified. If an originator believes that an opportunity fits our investment criteria and merits consideration, the investment is presented to our investment adviser's Investment Committee. This is the first stage of our origination process, the "Review" stage. During this stage, the originator gives a preliminary description of the opportunity. This is followed by preliminary due diligence, from which an investment summary is created that includes a scoring of the investment against our investment adviser's proprietary scoring model. The opportunity may be discussed several times by the full Investment Committee of our investment adviser, or subsets of that Committee. At any point in this stage, we may reject the opportunity, and, indeed, we have historically decided not to proceed with more than 80% of the investment opportunities reviewed by our investment adviser's Investment Committee.

For the subset of opportunities that we decide to pursue, we issue preliminary term sheets and classify them in the "Term Sheet Issued" stage. This term sheet serves as a basis for negotiating the critical terms of a transaction. At this stage we begin our underwriting and investment approval process, as more fully described below. After the term sheet for a potential transaction has been fully negotiated, the transaction is presented to our investment adviser's Investment Committee for approval. If the deal is approved, the term sheet is signed. Approximately half of the term sheets we issue result in an executed term sheet. Our underwriting and investment approval process is ongoing during this stage, during which we begin documentation of the loan. The final stage, "Closings," culminates with the funding of an investment only after all due diligence is

satisfactorily completed and all closing conditions, including the sponsor's funding of its investment in the portfolio company, have been satisfied.

## **Underwriting**

### ***Underwriting Process and Investment Approval***

We make our investment decisions only after consideration of a number of factors regarding the potential investment including, but not limited to: (i) historical and projected financial performance; (ii) company and industry specific characteristics, such as strengths, weaknesses, opportunities and threats; (iii) composition and experience of the management team; and (iv) track record of the private equity sponsor leading the transaction. Our investment adviser uses a proprietary scoring system that evaluates each opportunity. This methodology is employed to screen a high volume of potential investment opportunities on a consistent basis.

If an investment is deemed appropriate to pursue, a more detailed and rigorous evaluation is made along a variety of investment parameters, not all of which may be relevant or considered in evaluating a potential investment opportunity. The following outlines the general parameters and areas of evaluation and due diligence for investment decisions, although not all will necessarily be considered or given equal weighting in the evaluation process.

### ***Management assessment***

Our investment adviser makes an in-depth assessment of the management team, including evaluation along several key metrics:

- The number of years in their current positions;
- Track record;
- Industry experience;
- Management incentive, including the level of direct investment in the enterprise;
- Background investigations; and
- Completeness of the management team (lack of positions that need to be filled).

### ***Industry dynamics***

An evaluation of the industry is undertaken by our investment adviser that considers several factors. If considered appropriate, industry experts will be consulted or retained. The following factors are analyzed by our investment adviser:

- Sensitivity to economic cycles;
- Competitive environment, including number of competitors, threat of new entrants or substitutes;
- Fragmentation and relative market share of industry leaders;
- Growth potential; and
- Regulatory and legal environment.

### ***Business model and financial assessment***

Prior to making an investment decision, our investment adviser will undertake a review and analysis of the financial and strategic plans for the potential investment. There is significant evaluation of and reliance upon the due diligence performed by the private equity sponsor and third party experts including accountants and consultants. Areas of evaluation include:

- Historical and projected financial performance;
- Quality of earnings, including source and predictability of cash flows;

- Customer and vendor interviews and assessments;
- Potential exit scenarios, including probability of a liquidity event;
- Internal controls and accounting systems; and
- Assets, liabilities and contingent liabilities.

**Private equity sponsor**

Among the most critical due diligence investigations is the evaluation of the private equity sponsor making the investment. A private equity sponsor is typically the controlling shareholder upon completion of an investment and as such is considered critical to the success of the investment. The equity sponsor is evaluated along several key criteria, including:

- Investment track record;
- Industry experience;
- Capacity and willingness to provide additional financial support to the company through additional capital contributions, if necessary; and
- Reference checks.

**Investments**

We target debt investments that will yield meaningful current income and provide the opportunity for capital appreciation through equity securities. We typically structure our debt investments with the maximum seniority and collateral that we can reasonably obtain while seeking to achieve our total return target. In most cases, our debt investment will be collateralized by a first or second lien on the assets of the portfolio company. As of September 30, 2009, all of our debt investments were secured by first or second priority liens on the assets of the portfolio company.

**Debt Investments**

We tailor the terms of our debt investments to the facts and circumstances of the transaction and prospective portfolio company, negotiating a structure that seeks to protect our rights and manage our risk while creating incentives for the portfolio company to achieve its business plan. A substantial source of return is monthly cash interest that we collect on our debt investments. As of September 30, 2009, we directly originated 100% of our loans. We are currently focusing our new origination efforts on first lien loans.

- *First Lien Loans.* Our first lien loans generally have terms of four to six years, provide for a variable or fixed interest rate, contain prepayment penalties and are secured by a first priority security interest in all existing and future assets of the borrower. Our first lien loans may take many forms, including revolving lines of credit, term loans and acquisition lines of credit.
- *Second Lien Loans.* Our second lien loans generally have terms of five to six years, primarily provide for a fixed interest rate, contain prepayment penalties and are secured by a second priority security interest in all existing and future assets of the borrower. Our second lien loans often include payment-in-kind, or PIK, interest, which represents contractual interest accrued and added to the principal that generally becomes due at maturity. As of September 30, 2009, all second lien loans had intercreditor agreements requiring a standstill period of no more than 180 days. During the standstill period, we are generally restricted from exercising remedies against the borrower or the collateral in order to provide the first lien lenders time to cure any breaches or defaults by the borrower.
- *Unsecured Loans.* Although we currently do not have any investments in unsecured loans, we may in the future. We would expect any unsecured investments generally to have terms of five to six years and provide for a fixed interest rate. We may make unsecured investments on a stand-alone basis, or in connection with a senior secured loan, a junior secured loan or a “one-stop” financing. Our unsecured



investments may include payment-in-kind, or PIK, interest, which represents contractual interest accrued and added to the principal that generally becomes due at maturity, and an equity component, such as warrants to purchase common stock in the portfolio company.

We typically structure our debt investments to include covenants that seek to minimize our risk of capital loss. Our debt investments have strong protections, including default penalties, information rights, board observation rights, and affirmative, negative and financial covenants, such as lien protection and prohibitions against change of control. Our debt investments also have substantial prepayment penalties designed to extend the life of the average loan, which we believe will help to grow our portfolio.

The 26 debt investments in our portfolio as of September 30, 2009, had a weighted average debt to EBITDA multiple of 3.6x calculated at the time of origination of the investment.

#### ***Equity Investments***

When we make a debt investment, we may be granted equity in the company in the same class of security as the sponsor receives upon funding. In addition, we may from time to time make non-control, equity co-investments in connection with private equity sponsors. We generally seek to structure our equity investments, such as direct equity co-investments, to provide us with minority rights provisions and event-driven put rights. We also seek to obtain limited registration rights in connection with these investments, which may include "piggyback" registration rights.

#### ***Limited Partnership Investments***

We make investments in Limited Partnership funds of our equity sponsors. In general, we make these investments where we have a long term relationship and are comfortable with the sponsor's business model and investment strategy.

#### **Portfolio Management**

##### ***Active Involvement in our Portfolio Companies***

As a business development company, we are obligated to offer to provide managerial assistance to our portfolio companies and to provide it if requested. In fact, we provide managerial assistance to our portfolio companies as a general practice and we seek investments where such assistance is appropriate. We monitor the financial trends of each portfolio company to assess the appropriate course of action for each company and to evaluate overall portfolio quality. We have several methods of evaluating and monitoring the performance of our investments, including but not limited to, the following:

- review of monthly and quarterly financial statements and financial projections for portfolio companies;
- periodic and regular contact with portfolio company management to discuss financial position, requirements and accomplishments;
- attendance at board meetings;
- periodic formal update interviews with portfolio company management and, if appropriate, the private equity sponsor; and
- assessment of business development success, including product development, profitability and the portfolio company's overall adherence to its business plan.

##### ***Rating Criteria***

In addition to various risk management and monitoring tools, we use an investment rating system to characterize and monitor the credit profile and our expected level of returns on each investment in our

portfolio. We use a five-level numeric rating scale. The following is a description of the conditions associated with each investment rating:

- Investment Rating 1 is used for investments that are performing above expectations and/or a capital gain is expected.
- Investment Rating 2 is used for investments that are performing substantially within our expectations, and whose risks remain neutral or favorable compared to the potential risk at the time of the original investment. All new loans are initially rated 2.
- Investment Rating 3 is used for investments that are performing below our expectations and that require closer monitoring, but where we expect no loss of investment return (interest and/or dividends) or principal. Companies with a rating of 3 may be out of compliance with financial covenants.
- Investment Rating 4 is used for investments that are performing below our expectations and for which risk has increased materially since the original investment. We expect some loss of investment return, but no loss of principal.
- Investment Rating 5 is used for investments that are performing substantially below our expectations and whose risks have increased substantially since the original investment. Investments with a rating of 5 are those for which some loss of principal is expected.

In the event that we determine that an investment is underperforming, or circumstances suggest that the risk associated with a particular investment has significantly increased, we will undertake more aggressive monitoring of the effected portfolio company. While our investment rating system identifies the relative risk for each investment, the rating alone does not dictate the scope and/or frequency of any monitoring that we perform. The frequency of our monitoring of an investment is determined by a number of factors, including, but not limited to, the trends in the financial performance of the portfolio company, the investment structure and the type of collateral securing our investment, if any.

The following table shows the distribution of our investments on the 1 to 5 investment rating scale at fair value as of September 30, 2009:

| <u>Investment Rating</u> | <u>Fair Value</u>     | <u>% of Portfolio</u> |
|--------------------------|-----------------------|-----------------------|
| 1                        | \$ 22,913,497         | 7.65%                 |
| 2                        | 248,506,393           | 82.94%                |
| 3                        | 6,122,236             | 2.04%                 |
| 4                        | 16,377,904            | 5.47%                 |
| 5                        | 5,691,107             | 1.90%                 |
| Total                    | <u>\$ 299,611,137</u> | <u>100.00%</u>        |

#### ***Exit Strategies/Refinancing***

We expect to exit our investments typically through one of three scenarios: (i) the sale of the company resulting in repayment of all outstanding debt, (ii) the recapitalization of the company in which our loan is replaced with debt or equity from a third party or parties or (iii) the repayment of the initial or remaining principal amount of our loan then outstanding at maturity. In some investments, there may be scheduled amortization of some portion of our loan which would result in a partial exit of our investment prior to the maturity of the loan.

#### **Determination of Net Asset Value and the Valuation Process**

We determine the net asset value per share of our common stock on a quarterly basis. The net asset value per share is equal to the value of our total assets minus liabilities and any preferred stock outstanding divided by the total number of shares of common stock outstanding.

We are required to report our investments that are not publicly traded or for which current market values are not readily available at fair value. The fair value is deemed to be the value at which an enterprise could be sold in a transaction between two willing parties other than through a forced or liquidation sale.

Under the guidance included in FASB Accounting Standard Codification ("ASC") Topic 820 *Fair Value Measurements and Disclosures*, which we adopted effective October 1, 2008, we perform detailed valuations of our debt and equity investments on an individual basis, using market based, income based, and bond yield approaches as appropriate.

Under the market approach, we estimate the enterprise value of the portfolio companies in which we invest. There is no one methodology to estimate enterprise value and, in fact, for any one portfolio company, enterprise value is best expressed as a range of fair values, from which we derive a single estimate of enterprise value. To estimate the enterprise value of a portfolio company, we analyze various factors, including the portfolio company's historical and projected financial results. Typically, private companies are valued based on multiples of EBITDA (Earnings Before Interest, Taxes, Depreciation and Amortization), cash flows, net income, revenues, or, in limited cases, book value. We generally require portfolio companies to provide annual audited and quarterly and monthly unaudited financial statements, as well as annual projections for the upcoming fiscal year.

Under the income approach, we generally prepare and analyze discounted cash flow models based on our projections of the future free cash flows of the business. Under the bond yield approach, we use bond yield models to determine the present value of the future cash flow streams of our debt investments. We review various sources of transactional data, including private mergers and acquisitions involving debt investments with similar characteristics, and assess the information in the valuation process.

We also may, when conditions warrant, utilize an expected recovery model, whereby we use alternate procedures to determine value when the customary approaches are deemed to be not as relevant or reliable.

Our Board of Directors undertakes a multi-step valuation process each quarter in connection with determining the fair value of our investments:

- Our quarterly valuation process begins with each portfolio company or investment being initially valued by the deal team within our investment adviser responsible for the portfolio investment;
- Preliminary valuations are then reviewed and discussed with the principals of our investment adviser;
- Separately, an independent valuation firm engaged by the Board of Directors prepares preliminary valuations on a selected basis and submits a report to us;
- The deal team compares and contrasts its preliminary valuations to the report of the independent valuation firm and resolves any differences;
- The deal team prepares a final valuation report for the Valuation Committee of our Board of Directors;
- The Valuation Committee of our Board of Directors reviews the final valuation report, and the deal team responds and supplements the final valuation report to reflect any comments provided by the Valuation Committee;
- The Valuation Committee of our Board of Directors makes a recommendation to the Board of Directors; and
- The Board of Directors discusses valuations and determines the fair value of each investment in our portfolio in good faith.

The fair value of all of our investments at September 30, 2009, and September 30, 2008, was determined by our Board of Directors. Our Board of Directors is solely responsible for the valuation of our portfolio investments at fair value as determined in good faith pursuant to our valuation policy and our consistently applied valuation process.

Our Board of Directors has engaged an independent valuation firm to provide us with valuation assistance. Upon completion of its process each quarter, the independent valuation firm provides us with a written report regarding the preliminary valuations of selected portfolio securities as of the close of such quarter. We will continue to engage an independent valuation firm to provide us with assistance regarding our determination of the fair value of selected portfolio securities each quarter; however, our Board of Directors is ultimately and solely responsible for determining the fair value of our investments in good faith.

An independent valuation firm, Murray, Devine & Co., Inc., provided us with assistance in our determination of the fair value of 91.9% of our portfolio for the quarter ended December 31, 2007, 92.1% of our portfolio for the quarter ended March 31, 2008, 91.7% of our portfolio for the quarter ended June 30, 2008, 92.8% of our portfolio for the quarter ended September 30, 2008, 100% of our portfolio for the quarter ended December 31, 2008, 88.7% of our portfolio for the quarter ended March 31, 2009 (or 96.0% of our portfolio excluding our investment in IZI Medical Products, Inc., which closed on March 31, 2009 and therefore was not part of the independent valuation process), 92.1% of our portfolio for the quarter ended June 30, 2009, and 28.1% for the quarter ended September 30, 2009.

Our \$50 million credit facility with Bank of Montreal was terminated effective September 16, 2009. The facility required independent valuations for at least 90% of the portfolio on a quarterly basis. With the termination of this facility, this valuation test is no longer required. However, we still intend to have a portion of the portfolio valued by an independent third party on a quarterly basis, with a substantial portion being valued on an annual basis.

Determination of fair values involves subjective judgments and estimates. The notes to our financial statements will refer to the uncertainty with respect to the possible effect of such valuations, and any change in such valuations, on our financial statements.

#### **Competition**

We compete for investments with a number of business development companies and investment funds (including private equity funds and mezzanine funds), as well as traditional financial services companies such as commercial banks and other sources of financing. Many of these entities have greater financial and managerial resources than we do. We believe we are able to be competitive with these entities primarily on the basis of the experience and contacts of our management team, our responsive and efficient investment analysis and decision-making processes, the investment terms we offer, and our willingness to make smaller investments.

We believe that some of our competitors make first and second lien loans with interest rates and returns that are comparable to or lower than the rates and returns that we target. Therefore, we do not seek to compete solely on the interest rates and returns that we offer to potential portfolio companies. For additional information concerning the competitive risks we face, see "Item 1A. Risk Factors — Risk Relating to Our Business and Structure — We may face increasing competition for investment opportunities, which could reduce returns and result in losses."

#### **Employees**

We do not have any employees. Our day-to-day investment operations are managed by our investment adviser. See "Item 1. Business — Investment Advisory Agreement." Our investment adviser employs a total of 16 investment professionals, including its six principals. In addition, we reimburse our administrator, FSC, Inc., for the allocable portion of overhead and other expenses incurred by it in performing its obligations under an administration agreement, including the compensation of our chief financial officer and his staff, and the staff of our chief compliance officer. For a more detailed discussion of the administration agreement, see "Item 1. Business — Administration Agreement."

## **Legal Proceedings**

Although we may, from time to time, be involved in litigation arising out of our operations in the normal course of business or otherwise, we are currently not a party to any pending material legal proceedings.

## **Investment Advisory Agreement**

### **Overview of Our Investment Adviser**

#### ***Management Services***

Our investment adviser, Fifth Street Management, is registered as an investment adviser under the Investment Advisers Act of 1940, or the "Advisers Act." Our investment adviser serves pursuant to the investment advisory agreement in accordance with the 1940 Act. Subject to the overall supervision of our Board of Directors, our investment adviser manages our day-to-day operations and provides us with investment advisory services. Under the terms of the investment advisory agreement, our investment adviser:

- determines the composition of our portfolio, the nature and timing of the changes to our portfolio and the manner of implementing such changes;
- determines what securities we purchase, retain or sell;
- identifies, evaluates and negotiates the structure of the investments we make; and
- executes, monitors and services the investments we make.

Our investment adviser's services under the investment advisory agreement may not be exclusive and it is free to furnish similar services to other entities so long as its services to us are not impaired.

#### ***Management Fee***

##### ***Base Management Fee***

We pay our investment adviser a fee for its services under the investment advisory agreement consisting of two components — a base management fee and an incentive fee. The cost of both the base management fee payable to our investment adviser and any incentive fees earned by our investment adviser will ultimately be borne by our common stockholders.

The base management fee is calculated at an annual rate of 2% of our gross assets, which includes any borrowings for investment purposes. The base management fee is payable quarterly in arrears, and is calculated based on the value of our gross assets at the end of each fiscal quarter, and appropriately adjusted on a pro rata basis for any equity capital raises or repurchases during such quarter. The base management fee for any partial month or quarter will be appropriately prorated.

In addition to the proration described above, for the quarter ended September 30, 2009, our investment advisor waived approximately \$172,000 of the base management fee on a portion of the proceeds raised in connection with the equity offerings that we completed in the quarter and which were held in cash or cash equivalents at September 30, 2009.

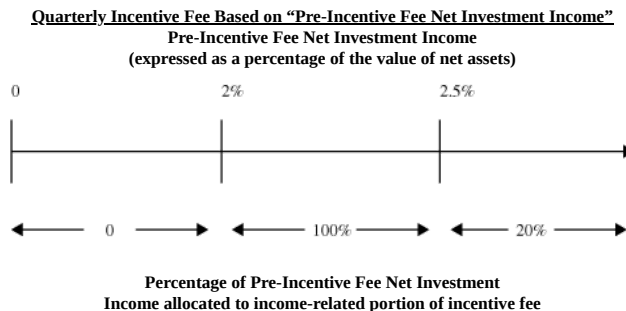
##### ***Incentive Fee***

The incentive fee has two parts. The first part is calculated and payable quarterly in arrears based on our "Pre-Incentive Fee Net Investment Income" for the immediately preceding fiscal quarter. For this purpose, "Pre-Incentive Fee Net Investment Income" means interest income, dividend income and any other income (including any other fees (other than fees for providing managerial assistance), such as commitment, origination, structuring, diligence and consulting fees or other fees that we receive from portfolio companies) accrued during the fiscal quarter, minus our operating expenses for the quarter (including the base management fee, expenses payable under the administration agreement with FSC, Inc., and any interest expense and dividends paid on any issued and outstanding preferred stock, but excluding the incentive fee). Pre-Incentive Fee Net Investment Income includes, in the case of investments with a deferred interest feature (such as

original issue discount, debt instruments with PIK interest and zero coupon securities), accrued income that we have not yet received in cash. Pre-Incentive Fee Net Investment Income does not include any realized capital gains, realized capital losses or unrealized capital appreciation or depreciation. Pre-Incentive Fee Net Investment Income, expressed as a rate of return on the value of our net assets at the end of the immediately preceding fiscal quarter, will be compared to a "hurdle rate" of 2% per quarter (8% annualized), subject to a "catch-up" provision measured as of the end of each fiscal quarter. Our net investment income used to calculate this part of the incentive fee is also included in the amount of our gross assets used to calculate the 2% base management fee. The operation of the incentive fee with respect to our Pre-Incentive Fee Net Investment Income for each quarter is as follows:

- no incentive fee is payable to the investment adviser in any fiscal quarter in which our Pre-Incentive Fee Net Investment Income does not exceed the hurdle rate of 2% (the "preferred return" or "hurdle").
- 100% of our Pre-Incentive Fee Net Investment Income with respect to that portion of such Pre-Incentive Fee Net Investment Income, if any, that exceeds the hurdle rate but is less than or equal to 2.5% in any fiscal quarter (10% annualized) is payable to the investment adviser. We refer to this portion of our Pre-Incentive Fee Net Investment Income (which exceeds the hurdle rate but is less than or equal to 2.5%) as the "catch-up." The "catch-up" provision is intended to provide our investment adviser with an incentive fee of 20% on all of our Pre-Incentive Fee Net Investment Income as if a hurdle rate did not apply when our Pre-Incentive Fee Net Investment Income exceeds 2.5% in any fiscal quarter.
- 20% of the amount of our Pre-Incentive Fee Net Investment Income, if any, that exceeds 2.5% in any fiscal quarter (10% annualized) is payable to the investment adviser once the hurdle is reached and the catch-up is achieved.

The following is a graphical representation of the calculation of the income-related portion of the incentive fee:



The second part of the incentive fee is determined and payable in arrears as of the end of each fiscal year (or upon termination of the investment advisory agreement, as of the termination date), commencing on September 30, 2008, and equals 20% of our realized capital gains, if any, on a cumulative basis from inception through the end of each fiscal year, computed net of all realized capital losses and unrealized capital depreciation on a cumulative basis, less the aggregate amount of any previously paid capital gain incentive fees, provided that, the incentive fee determined as of September 30, 2008 was calculated for a period of shorter than twelve calendar months to take into account any realized capital gains computed net of all realized capital losses and unrealized capital depreciation from inception.

### Example 1: Income Related Portion of Incentive Fee for Each Fiscal Quarter

#### Alternative 1

##### Assumptions

Investment income (including interest, dividends, fees, etc.) = 1.25%

Hurdle rate(1) = 2%

Management fee(2) = 0.5%

Other expenses (legal, accounting, custodian, transfer agent, etc.)(3) = 0.2%

Pre-Incentive Fee Net Investment Income

(investment income – (management fee + other expenses) = 0.55%

Pre-Incentive Fee Net Investment Income does not exceed hurdle rate, therefore there is no income-related incentive fee.

#### Alternative 2

##### Assumptions

Investment income (including interest, dividends, fees, etc.) = 2.9%

Hurdle rate(1) = 2%

Management fee(2) = 0.5%

Other expenses (legal, accounting, custodian, transfer agent, etc.)(3) = 0.2%

Pre-Incentive Fee Net Investment Income

(investment income – (management fee + other expenses) = 2.2%

Incentive fee = 100% × Pre-Incentive Fee Net Investment Income (subject to “catch-up”)(4)

= 100% × (2.2% – 2%)

= 0.2%

Pre-Incentive Fee Net Investment Income exceeds the hurdle rate, but does not fully satisfy the “catch-up” provision, therefore the income related portion of the incentive fee is 0.2%.

#### Alternative 3

##### Assumptions

Investment income (including interest, dividends, fees, etc.) = 3.5%

Hurdle rate(1) = 2%

Management fee(2) = 0.5%

Other expenses (legal, accounting, custodian, transfer agent, etc.)(3) = 0.2%

Pre-Incentive Fee Net Investment Income

(investment income – (management fee + other expenses) = 2.8%

Incentive fee = 100% × Pre-Incentive Fee Net Investment Income (subject to “catch-up”)(4)

Incentive fee = 100% × “catch-up” + (20% × (Pre-Incentive Fee Net Investment Income – 2.5%))

Catch up = 2.5% – 2%

= 0.5%

Incentive fee = (100% × 0.5%) + (20% × (2.8% – 2.5%))

= 0.5% + (20% × 0.3%)

= 0.5% + 0.06%

= 0.56%

Pre-Incentive Fee Net Investment Income exceeds the hurdle rate, and fully satisfies the “catch-up” provision, therefore the income related portion of the incentive fee is 0.56%.

(1) Represents 8% annualized hurdle rate.

(2) Represents 2% annualized base management fee.

(3) Excludes organizational and offering expenses.

- (4) The “catch-up” provision is intended to provide our investment adviser with an incentive fee of 20% on all Pre-Incentive Fee Net Investment Income as if a hurdle rate did not apply when our net investment income exceeds 2.5% in any fiscal quarter.

**Example 2: Capital Gains Portion of Incentive Fee(\*):**

**Alternative 1:**

*Assumptions*

Year 1: \$20 million investment made in Company A (“Investment A”), and \$30 million investment made in Company B (“Investment B”)

Year 2: Investment A sold for \$50 million and fair market value (“FMV”) of Investment B determined to be \$32 million

Year 3: FMV of Investment B determined to be \$25 million

Year 4: Investment B sold for \$31 million

The capital gains portion of the incentive fee would be:

Year 1: None

Year 2: Capital gains incentive fee of \$6 million — (\$30 million realized capital gains on sale of Investment A multiplied by 20%)

Year 3: None — \$5 million (20% multiplied by (\$30 million cumulative capital gains less \$5 million cumulative capital depreciation)) less \$6 million (previous capital gains fee paid in Year 2)

Year 4: Capital gains incentive fee of \$200,000 — \$6.2 million (\$31 million cumulative realized capital gains multiplied by 20%) less \$6 million (capital gains incentive fee taken in Year 2)

**Alternative 2**

*Assumptions*

Year 1: \$20 million investment made in Company A (“Investment A”), \$30 million investment made in Company B (“Investment B”) and \$25 million investment made in Company C (“Investment C”)

Year 2: Investment A sold for \$50 million, FMV of Investment B determined to be \$25 million and FMV of Investment C determined to be \$25 million

Year 3: FMV of Investment B determined to be \$27 million and Investment C sold for \$30 million

Year 4: FMV of Investment B determined to be \$35 million

Year 5: Investment B sold for \$20 million

The capital gains incentive fee, if any, would be:

Year 1: None

Year 2: \$5 million capital gains incentive fee — 20% multiplied by \$25 million (\$30 million realized capital gains on Investment A less unrealized capital depreciation on Investment B)

Year 3: \$1.4 million capital gains incentive fee(1) — \$6.4 million (20% multiplied by \$32 million (\$35 million cumulative realized capital gains less \$3 million unrealized capital depreciation)) less \$5 million capital gains incentive fee received in Year 2

Year 4: None

Year 5: None — \$5 million (20% multiplied by \$25 million (cumulative realized capital gains of \$35 million less realized capital losses of \$10 million)) less \$6.4 million cumulative capital gains incentive fee paid in Year 2 and Year 3(2)

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\* The hypothetical amounts of returns shown are based on a percentage of our total net assets and assume no leverage. There is no guarantee that positive returns will be realized and actual returns may vary from those shown in this example.



- (1) As illustrated in Year 3 of Alternative 1 above, if we were to be wound up on a date other than our fiscal year end of any year, we may have paid aggregate capital gains incentive fees that are more than the amount of such fees that would be payable if we had been wound up on our fiscal year end of such year.
- (2) As noted above, it is possible that the cumulative aggregate capital gains fee received by our investment adviser (\$6.4 million) is effectively greater than \$5 million (20% of cumulative aggregate realized capital gains less net realized capital losses or net unrealized depreciation (\$25 million)).

#### ***Payment of Our Expenses***

Our primary operating expenses are the payment of a base management fee and any incentive fees under the investment advisory agreement and the allocable portion of overhead and other expenses incurred by FSC, Inc. in performing its obligations under the administration agreement. Our investment management fee compensates our investment adviser for its work in identifying, evaluating, negotiating, executing, monitoring and servicing our investments. We bear all other expenses of our operations and transactions, including (without limitation) fees and expenses relating to:

- offering expenses;
- the cost of calculating our net asset value;
- the cost of effecting sales and repurchases of shares of our common stock and other securities;
- management and incentive fees payable pursuant to the investment advisory agreement;
- fees payable to third parties relating to, or associated with, making investments and valuing investments (including third-party valuation firms);
- transfer agent and custodial fees;
- fees and expenses associated with marketing efforts (including attendance at investment conferences and similar events);
- federal and state registration fees;
- any exchange listing fees;
- federal, state and local taxes;
- independent directors' fees and expenses;
- brokerage commissions;
- costs of proxy statements, stockholders' reports and notices;
- costs of preparing government filings, including periodic and current reports with the SEC;
- fidelity bond, liability insurance and other insurance premiums; and
- printing, mailing, independent accountants and outside legal costs and all other direct expenses incurred by either our investment adviser or us in connection with administering our business, including payments under the administration agreement that will be based upon our allocable portion of overhead and other expenses incurred by FSC, Inc. in performing its obligations under the administration agreement and the compensation of our chief financial officer and his staff, and the staff of our chief compliance officer.

#### ***Duration and Termination***

The investment advisory agreement was first approved by our Board of Directors, including all of the directors who are not "interested persons" as defined in the 1940 Act, on December 13, 2007 and by a majority of the limited partners of Fifth Street Mezzanine Partners III, L.P. through a written consent first solicited on December 14, 2007. On March 14, 2008, our Board of Directors, including all of the directors who are not "interested persons" as defined in the 1940 Act, approved an amendment to the investment

advisory agreement that revised the investment advisory agreement to clarify the calculation of the base management fee. Such amendment was also approved by a majority of our outstanding voting securities through a written consent first solicited on April 7, 2008. Unless earlier terminated as described below, the investment advisory agreement, as amended, will remain in effect for a period of two years from the date it was approved by the Board of Directors and will remain in effect from year-to-year thereafter if approved annually by the Board of Directors or by the affirmative vote of the holders of a majority of our outstanding voting securities, including, in either case, approval by a majority of our directors who are not interested persons. The investment advisory agreement will automatically terminate in the event of its assignment. The investment advisory agreement may be terminated by either party without penalty upon not more than 60 days' written notice to the other. The investment advisory agreement may also be terminated, without penalty, upon the vote of a majority of our outstanding voting securities.

#### ***Indemnification***

The investment advisory agreement provides that, absent willful misfeasance, bad faith or gross negligence in the performance of their respective duties or by reason of the reckless disregard of their respective duties and obligations, our investment adviser and its officers, managers, agents, employees, controlling persons, members (or their owners) and any other person or entity affiliated with it, are entitled to indemnification from us for any damages, liabilities, costs and expenses (including reasonable attorneys' fees and amounts reasonably paid in settlement) arising from the rendering of our investment adviser's services under the investment advisory agreement or otherwise as our investment adviser.

#### ***Organization of our Investment Adviser***

Our investment adviser is a Delaware limited liability company that registered as an investment adviser under the Advisers Act. Our investment adviser maintains addresses at 10 Bank Street, 12th floor, White Plains, NY 10606 and 500 W. Putnam Ave., Suite 400, Greenwich, CT 06830.

#### **Board Approval of the Investment Advisory Agreement**

At a meeting of our Board of Directors held on December 13, 2007, our Board of Directors unanimously voted to approve the investment advisory agreement and the administration agreement. In reaching a decision to approve the investment advisory agreement and the administration agreement, the Board of Directors reviewed a significant amount of information and considered, among other things:

- the nature, quality and extent of the advisory and other services to be provided to us by Fifth Street Management, our investment adviser;
- the fee structures of comparable externally managed business development companies that engage in similar investing activities; and
- various other matters.

Based on the information reviewed and the discussions detailed above, the Board of Directors, including all of the directors who are not "interested persons" as defined in the 1940 Act, concluded that the investment advisory fee rates and terms are fair and reasonable in relation to the services provided and approved the investment advisory agreement and the administration agreement as being in the best interests of our stockholders.

On March 14, 2008, our Board of Directors, including all of the directors who are not "interested persons" as defined in the 1940 Act, approved an amendment to the investment advisory agreement that revised the investment advisory agreement to clarify the calculation of the base management fee. In reaching the decision to approve the amendment, our Board of Directors, including all of the directors who are not "interested persons" as defined in the 1940 Act, followed the same process, and made the same findings, as described above.

## Administration Agreement

We have also entered into an administration agreement with FSC, Inc. under which FSC, Inc. provides administrative services for us, including office facilities and equipment and clerical, bookkeeping and recordkeeping services at such facilities. Under the administration agreement, FSC, Inc. also performs, or oversees the performance of, our required administrative services, which includes being responsible for the financial records which we are required to maintain and preparing reports to our stockholders and reports filed with the SEC. In addition, FSC, Inc. assists us in determining and publishing our net asset value, overseeing the preparation and filing of our tax returns and the printing and dissemination of reports to our stockholders, and generally overseeing the payment of our expenses and the performance of administrative and professional services rendered to us by others. For providing these services, facilities and personnel, we reimburse FSC, Inc. the allocable portion of overhead and other expenses incurred by FSC, Inc. in performing its obligations under the administration agreement, including rent and our allocable portion of the costs of compensation and related expenses of our chief financial officer and his staff, and the staff of our chief compliance officer. FSC, Inc. may also provide on our behalf managerial assistance to our portfolio companies. The administration agreement may be terminated by either party without penalty upon 60 days' written notice to the other party.

The administration agreement provides that, absent willful misfeasance, bad faith or gross negligence in the performance of their respective duties or by reason of the reckless disregard of their respective duties and obligations, FSC, Inc. and its officers, managers, agents, employees, controlling persons, members and any other person or entity affiliated with it are entitled to indemnification from us for any damages, liabilities, costs and expenses (including reasonable attorneys' fees and amounts reasonably paid in settlement) arising from the rendering of services under the administration agreement or otherwise as administrator for us.

## Securities Exchange Act Reports

We maintain a website at [www.fifthstreetfinance.com](http://www.fifthstreetfinance.com). The information on our website is not incorporated by reference in this annual report on Form 10-K.

We make available on or through our website certain reports and amendments to those reports that we file with or furnish to the Securities and Exchange Commission (the "SEC") in accordance with the Securities Exchange Act of 1934, as amended (the "Exchange Act"). These include our annual reports on Form 10-K, our quarterly reports on Form 10-Q and our current reports on Form 8-K. We make this information available on our website free of charge as soon as reasonably practicable after we electronically file the information with, or furnish it to, the SEC.

## Regulation

We have elected to be regulated as a business development company under the 1940 Act. The 1940 Act contains prohibitions and restrictions relating to transactions between business development companies and their affiliates, principal underwriters and affiliates of those affiliates or underwriters. The 1940 Act requires that a majority of the directors be persons other than "interested persons," as that term is defined in the 1940 Act. In addition, the 1940 Act provides that we may not change the nature of our business so as to cease to be, or to withdraw our election as, a business development company unless approved by a majority of our outstanding voting securities.

The 1940 Act defines "a majority of the outstanding voting securities" as the lesser of (i) 67% or more of the voting securities present at a meeting if the holders of more than 50% of our outstanding voting securities are present or represented by proxy or (ii) 50% of our voting securities.

As a business development company, we will not generally be permitted to invest in any portfolio company in which our investment adviser or any of its affiliates currently have an investment or to make any co-investments with our investment adviser or its affiliates without an exemptive order from the SEC.

### **Qualifying Assets**

Under the 1940 Act, a business development company may not acquire any asset other than assets of the type listed in Section 55(a) of the 1940 Act, which are referred to as qualifying assets, unless, at the time the acquisition is made, qualifying assets represent at least 70% of the company's total assets. The principal categories of qualifying assets relevant to our business are any of the following:

(1) Securities purchased in transactions not involving any public offering from the issuer of such securities, which issuer (subject to certain limited exceptions) is an eligible portfolio company, or from any person who is, or has been during the preceding 13 months, an affiliated person of an eligible portfolio company, or from any other person, subject to such rules as may be prescribed by the SEC. An eligible portfolio company is defined in the 1940 Act as any issuer which:

- (a) is organized under the laws of, and has its principal place of business in, the United States;
- (b) is not an investment company (other than a small business investment company wholly-owned by the business development company) or a company that would be an investment company but for certain exclusions under the 1940 Act; and
- (c) satisfies any of the following:
  - (i) does not have any class of securities that is traded on a national securities exchange;
  - (ii) has a class of securities listed on a national securities exchange, but has an aggregate market value of outstanding voting and non-voting common equity of less than \$250 million;
  - (iii) is controlled by a business development company or a group of companies including a business development company and the business development company has an affiliated person who is a director of the eligible portfolio company;
  - (iv) is a small and solvent company having total assets of not more than \$4 million and capital and surplus of not less than \$2 million; or
  - (v) meets such other criteria as may be established by the SEC.

(2) Securities of any eligible portfolio company that we control.

(3) Securities purchased in a private transaction from a U.S. issuer that is not an investment company or from an affiliated person of the issuer, or in transactions incident thereto, if the issuer is in bankruptcy and subject to reorganization or if the issuer, immediately prior to the purchase of its securities was unable to meet its obligations as they came due without material assistance other than conventional lending or financing arrangements.

(4) Securities of an eligible portfolio company purchased from any person in a private transaction if there is no ready market for such securities and we already own 60% of the outstanding equity of the eligible portfolio company.

(5) Securities received in exchange for or distributed on or with respect to securities described in (1) through (4) above, or pursuant to the exercise of warrants or rights relating to such securities.

(6) Cash, cash equivalents, U.S. government securities or high-quality debt securities maturing in one year or less from the time of investment.

In addition, a business development company must be operated for the purpose of making investments in the types of securities described in (1), (2) or (3) above.

### **Managerial Assistance to Portfolio Companies**

In order to count portfolio securities as qualifying assets for the purpose of the 70% test, we must either control the issuer of the securities or must offer to make available to the issuer of the securities (other than small and solvent companies described above) significant managerial assistance; except that, where we

purchase such securities in connection with one or more other persons acting together, one of the other persons in the group may make available such managerial assistance. Making available managerial assistance means, among other things, any arrangement whereby the business development company, through its directors, officers, employees or other agents, offers to provide, and, if accepted, does so provide, significant guidance and counsel concerning the management, operations or business objectives and policies of a portfolio company.

#### ***Temporary Investments***

Pending investment in other types of “qualifying assets,” as described above, our investments may consist of cash, cash equivalents, U.S. government securities or high-quality debt securities maturing in one year or less from the time of investment, which we refer to, collectively, as temporary investments, so that 70% of our assets are qualifying assets. Typically, we will invest in U.S. Treasury bills or in repurchase agreements, provided that such agreements are fully collateralized by cash or securities issued by the U.S. government or its agencies. A repurchase agreement (which is essentially a secured loan) involves the purchase by an investor, such as us, of a specified security and the simultaneous agreement by the seller to repurchase it at an agreed-upon future date and at a price that is greater than the purchase price by an amount that reflects an agreed-upon interest rate. There is no percentage restriction on the proportion of our assets that may be invested in such repurchase agreements. However, if more than 25% of our total assets constitute repurchase agreements from a single counterparty, we would not meet the diversification tests in order to qualify as a RIC for federal income tax purposes. Thus, we do not intend to enter into repurchase agreements with a single counterparty in excess of this limit. Our investment adviser will monitor the creditworthiness of the counterparties with which we enter into repurchase agreement transactions.

#### ***Senior Securities***

We are permitted, under specified conditions, to issue multiple classes of debt and one class of stock senior to our common stock if our asset coverage, as defined in the 1940 Act, is at least equal to 200% immediately after each such issuance. In addition, while any senior securities remain outstanding, we may be prohibited from making a distribution to our stockholders or repurchasing shares of our capital stock under certain circumstances unless we meet the applicable asset coverage ratios at the time of the distribution or repurchase. We may also borrow amounts up to 5% of the value of our total assets for temporary or emergency purposes without regard to asset coverage. For a discussion of the risks associated with leverage, see “Item 1A. Risk Factors — Risks Relating to Our Business and Structure — Regulations governing our operation as a business development company and RIC will affect our ability to raise, and the way in which we raise, additional capital or borrow for investment purposes, which may have a negative effect on our growth.”

#### ***Common Stock***

We are not generally able to issue and sell our common stock at a price below net asset value per share. We may, however, sell our common stock, warrants, options or rights to acquire our common stock, at a price below the current net asset value of the common stock if our board of directors determines that such sale is in our best interests and that of our stockholders, and our stockholders approve such sale. In any such case, the price at which our securities are to be issued and sold may not be less than a price which, in the determination of our board of directors, closely approximates the market value of such securities (less any distributing commission or discount). On June 24, 2009, our stockholders approved a proposal that authorizes us to sell shares of our common stock below the then-current net asset value per share of our common stock in one or more offerings for a period ending on the earlier of June 24, 2010 or the date of our next annual meeting of stockholders. In connection with the receipt of such stockholder approval, we agreed to limit the number of shares that we issue at a price below net asset value pursuant to this authorization so that the aggregate dilutive effect on our then outstanding shares will not exceed 15%. We have completed two offerings of shares of our common stock at a price below the then-current net asset value pursuant to this authorization, which closed on July 21, 2009 and September 25, 2009, respectively. The aggregate dilutive effect that these two offerings have had on our outstanding shares of common stock is 9.1%, which leaves 5.9% remaining of the

dilution limit we have imposed. We may also make rights offerings to our stockholders at prices per share less than the net asset value per share, subject to applicable requirements of the 1940 Act. See “Item 1A. Risk Factors — Risks Relating to Our Business and Structure — Regulations governing our operation as a business development company and RIC will affect our ability to raise, and the way in which we raise, additional capital or borrow for investment purposes which may have a negative effect on our growth.”

#### ***Code of Ethics***

We have adopted a code of ethics pursuant to Rule 17j-1 under the 1940 Act and we have also approved the investment adviser’s code of ethics that was adopted by it under Rule 17j-1 under the 1940 Act and Rule 204A-1 of the Advisers Act. These codes establish procedures for personal investments and restrict certain personal securities transactions. Personnel subject to either code may invest in securities for their personal investment accounts, including securities that may be purchased or held by us, so long as such investments are made in accordance with the requirements of the applicable code. You may also read and copy the codes of ethics at the SEC’s Public Reference Room located at 100 F Street, NE, Washington, DC 20549. You may obtain information on the operation of the Public Reference Room by calling the SEC at 1-800-SEC-0330. In addition, the codes of ethics are available on the EDGAR Database on the SEC’s website at <http://www.sec.gov> and on our website at <http://www.fifthstreetfinance.com>.

#### ***Compliance Policies and Procedures***

We and our investment adviser have adopted and implemented written policies and procedures reasonably designed to prevent violations of the federal securities laws and are required to review these compliance policies and procedures annually for their adequacy and the effectiveness of their implementation. Our chief compliance officer is responsible for administering these policies and procedures.

#### ***Proxy Voting Policies and Procedures***

We have delegated our proxy voting responsibility to our investment adviser. The proxy voting policies and procedures of our investment adviser are set forth below. The guidelines are reviewed periodically by our investment adviser and our non-interested directors, and, accordingly, are subject to change.

##### *Introduction*

As an investment adviser registered under the Advisers Act, our investment adviser has a fiduciary duty to act solely in the best interests of its clients. As part of this duty, it recognizes that it must vote client securities in a timely manner free of conflicts of interest and in the best interests of its clients.

These policies and procedures for voting proxies for the investment advisory clients of our investment adviser are intended to comply with Section 206 of, and Rule 206(4)-6 under, the Advisers Act.

##### *Proxy policies*

Our investment adviser will vote proxies relating to our securities in the best interest of its clients’ stockholders. It will review on a case-by-case basis each proposal submitted for a stockholder vote to determine its impact on the portfolio securities held by its clients. Although our investment adviser will generally vote against proposals that may have a negative impact on its clients’ portfolio securities, it may vote for such a proposal if there exists compelling long term reasons to do so.

The proxy voting decisions of our investment adviser are made by the senior officers who are responsible for monitoring each of its clients’ investments. To ensure that its vote is not the product of a conflict of interest, it will require that: (a) anyone involved in the decision making process disclose to its chief compliance officer any potential conflict that he or she is aware of and any contact that he or she has had with any interested party regarding a proxy vote; and (b) employees involved in the decision-making process or vote administration are prohibited from revealing how our investment adviser intends to vote on a proposal in order to reduce any attempted influence from interested parties.

*Proxy voting records*

You may obtain information, without charge, regarding how we voted proxies with respect to our portfolio securities by making a written request for proxy voting information to: Fifth Street Finance Corp., Chief Compliance Officer, 10 Bank Street, 12<sup>th</sup> Floor, White Plains, NY 10606.

**Other**

We are subject to periodic examination by the SEC for compliance with the 1940 Act.

We are required to provide and maintain a bond issued by a reputable fidelity insurance company to protect us against larceny and embezzlement. Furthermore, as a business development company, we are prohibited from protecting any director or officer against any liability to us or our stockholders arising from willful misfeasance, bad faith, gross negligence or reckless disregard of the duties involved in the conduct of such person's office.

**Small Business Administration Regulations**

Fifth Street Mezzanine Partners IV, L.P., our wholly-owned subsidiary, is seeking to be licensed by the Small Business Administration, or SBA, as a small business investment company, or SBIC, under Section 301(c) of the Small Business Investment Act of 1958. We are the sole limited partner of Fifth Street Mezzanine Partners IV, L.P. and the sole member of FSMP IV GP, LLC, the general partner of Fifth Street Mezzanine Partners IV, L.P.

On May 19, 2009, we received a letter from the Investment Division of the SBA that invited us to continue moving forward with the licensing of an SBIC subsidiary. Although our application to license this entity as an SBIC with the SBA is subject to the SBA approval, we remain cautiously optimistic that we will complete the licensing process. Our SBIC subsidiary will have an investment objective similar to ours and will make similar types of investments in accordance with SBIC regulations.

To the extent that we receive an SBIC license, our SBIC subsidiary will be allowed to issue SBA-guaranteed debentures, subject to the required capitalization of the SBIC subsidiary. SBA guaranteed debentures carry long-term fixed rates that are generally lower than rates on comparable bank and other debt. Under the regulations applicable to SBICs, an SBIC may have outstanding debentures guaranteed by the SBA generally in an amount up to twice its regulatory capital, which generally equates to the amount of its equity capital. The SBIC regulations currently limit the amount that our SBIC subsidiary may borrow to a maximum of \$150 million. This means that our SBIC subsidiary may access the full \$150 million maximum available if it has \$75 million in regulatory capital. However, we are not required to capitalize this subsidiary with \$75 million and may determine to capitalize it with a lesser amount. In addition, if we are able to obtain financing under the SBIC program, our SBIC subsidiary will be subject to regulation and oversight by the SBA, including requirements with respect to maintaining certain minimum financial ratios and other covenants. On July 14, 2009, we received a letter from the SBA indicating that our SBIC subsidiary's application had been approved for further processing and our SBIC subsidiary is eligible to make pre-licensing investments. During the fiscal year ended September 30, 2009, our SBIC subsidiary funded one pre-licensing investment.

In connection with the filing of our SBIC license application, we will apply for exemptive relief from the SEC to permit us to exclude the debt of our SBIC subsidiary guaranteed by the SBA from our consolidated asset coverage ratio, which will enable us to fund more investments with debt capital. There can be no assurance that we will be granted an SBIC license or that, if granted, it will be granted in a timely manner, that if we are granted an SBIC license we will be able to capitalize the subsidiary to \$75 million to access the full \$150 million maximum borrowing amount available, or that we will receive the exemptive relief from the SEC.

If we receive an SBIC license, our SBIC subsidiary will be periodically examined and audited by the Small Business Administration's staff to determine its compliance with SBIC regulations.

## Taxation as a Regulated Investment Company

As a business development company, we have elected to be treated, and intend to qualify annually, as a RIC under Subchapter M of the Code. As a RIC, we generally will not have to pay corporate-level federal income taxes on any income that we distribute to our stockholders as dividends. To continue to qualify as a RIC, we must, among other things, meet certain source-of-income and asset diversification requirements (as described below). In addition, to qualify for RIC tax treatment we must distribute to our stockholders, for each taxable year, at least 90% of our "investment company taxable income," which is generally our ordinary income plus the excess of our realized net short-term capital gains over our realized net long-term capital losses (the "Annual Distribution Requirement").

If we:

- qualify as a RIC; and
- satisfy the Annual Distribution Requirement,

then we will not be subject to federal income tax on the portion of our income we distribute (or are deemed to distribute) to our stockholders. We will be subject to U.S. federal income tax at the regular corporate rates on any income or capital gains not distributed (or deemed distributed) to our stockholders.

We will be subject to a 4% nondeductible federal excise tax on certain undistributed income unless we distribute in a timely manner an amount at least equal to the sum of (1) 98% of our net ordinary income for each calendar year, (2) 98% of our capital gain net income for the one-year period ending October 31 in that calendar year and (3) any income recognized, but not distributed, in preceding years (the "Excise Tax Avoidance Requirement"). We generally will endeavor in each taxable year to make sufficient distributions to our stockholders to avoid any U.S. federal excise tax on our earnings.

In order to qualify as a RIC for federal income tax purposes, we must, among other things:

- continue to qualify as a business development company under the 1940 Act at all times during each taxable year;
- derive in each taxable year at least 90% of our gross income from dividends, interest, payments with respect to loans of certain securities, gains from the sale of stock or other securities, net income from certain "qualified publicly traded partnerships," or other income derived with respect to our business of investing in such stock or securities (the "90% Income Test"); and
- diversify our holdings so that at the end of each quarter of the taxable year:
  - at least 50% of the value of our assets consists of cash, cash equivalents, U.S. Government securities, securities of other RICs, and other securities if such other securities of any one issuer do not represent more than 5% of the value of our assets or more than 10% of the outstanding voting securities of the issuer; and
  - no more than 25% of the value of our assets is invested in the securities, other than U.S. government securities or securities of other RICs, of one issuer, of two or more issuers that are controlled, as determined under applicable Code rules, by us and that are engaged in the same or similar or related trades or businesses or of certain "qualified publicly traded partnerships" (the "Diversification Tests").

We may be required to recognize taxable income in circumstances in which we do not receive cash. For example, if we hold debt obligations that are treated under applicable tax rules as having original issue discount (such as debt instruments with PIK interest or, in certain cases, increasing interest rates or issued with warrants), we must include in income each year a portion of the original issue discount that accrues over the life of the obligation, regardless of whether cash representing such income is received by us in the same taxable year. We may also have to include in income other amounts that we have not yet received in cash, such as PIK interest and deferred loan origination fees that are paid after origination of the loan or are paid in non-cash compensation such as warrants or stock. Because any original issue discount or other amounts accrued will be included in our investment company taxable income for the year of accrual, we may be



required to make a distribution to our stockholders in order to satisfy the Annual Distribution Requirement, even though we will not have received any corresponding cash amount.

Although we do not presently expect to do so, we are authorized to borrow funds and to sell assets in order to satisfy distribution requirements. However, under the 1940 Act, we are generally not permitted to make distributions to our stockholders while our debt obligations and other senior securities are outstanding unless the "asset coverage" test is met. Moreover, our ability to dispose of assets to meet our distribution requirements may be limited by (1) the illiquid nature of our portfolio and/or (2) other requirements relating to our status as a RIC, including the Diversification Tests. If we dispose of assets in order to meet the Annual Distribution Requirement or the Excise Tax Avoidance Requirement, we may make such dispositions at times that, from an investment standpoint, are not advantageous.

**Item 1A. Risk Factors**

**RISK FACTORS**

*Investing in our common stock involves a number of significant risks. In addition to the other information contained in this annual report on Form 10-K, you should consider carefully the following information before making an investment in our common stock. The risks set out below are not the only risks we face. Additional risks and uncertainties not presently known to us or not presently deemed material by us might also impair our operations and performance. If any of the following events occur, our business, financial condition and results of operations could be materially and adversely affected. In such case, our net asset value and the trading price of our common stock could decline, and you may lose all or part of your investment.*

**Risks Relating to Our Business and Structure**

*We are currently in a period of capital markets disruption and recession and conditions may not improve in the near future.*

The U.S. capital markets experienced extreme volatility and disruption over the past 18 months, leading to recessionary conditions and depressed levels of consumer and commercial spending. Disruptions in the capital markets increased the spread between the yields realized on risk-free and higher risk securities, resulting in illiquidity in parts of the capital markets. While recent indicators suggest modest improvement in the capital markets, we cannot provide any assurance that these conditions will not worsen. If these conditions continue or worsen, the prolonged period of market illiquidity may have an adverse effect on our business, financial condition, and results of operations. Unfavorable economic conditions also could increase our funding costs, limit our access to the capital markets or result in a decision by lenders not to extend credit to us. These events could limit our investment originations, limit our ability to grow and negatively impact our operating results.

In addition, to the extent that recessionary conditions continue or worsen, the financial results of small to mid-sized companies, like those in which we invest, will continue to experience deterioration, which could ultimately lead to difficulty in meeting debt service requirements and an increase in defaults. Additionally, the end markets for certain of our portfolio companies' products and services have experienced, and continue to experience, negative economic trends. The performances of certain of our portfolio companies have been, and may continue to be, negatively impacted by these economic or other conditions, which may ultimately result in our receipt of a reduced level of interest income from our portfolio companies and/or losses or charge offs related to our investments, and, in turn, may adversely affect distributable income.

***Economic recessions or downturns could impair the ability of our portfolio companies to repay loans, which, in turn, could increase our non-performing assets, decrease the value of our portfolio, reduce our volume of new loans and harm our operating results, which would have an adverse effect on our results of operations.***

Many of our portfolio companies are and may be susceptible to economic slowdowns or recessions and may be unable to repay our loans during such periods. Therefore, our non-performing assets are likely to increase and the value of our portfolio is likely to decrease during such periods. Adverse economic conditions also may decrease the value of collateral securing some of our loans and the value of our equity investments. In this regard, as a result of current economic conditions and their impact on certain of our portfolio companies, we have agreed to modify the payment terms of our investments in nine of our portfolio companies as of September 30, 2009. Such modified terms include changes in payment-in-kind interest provisions and cash interest rates. These modifications, and any future modifications to our loan agreements as a result of the current economic conditions or otherwise, may limit the amount of interest income that we recognize from the modified investments, which may, in turn, limit our ability to make distributions to our stockholders and have an adverse effect on our results of operations.

***Stockholders will incur dilution if we sell shares of our common stock in one or more offerings at prices below the then-current net asset value per share of our common stock.***

At a special meeting of stockholders held on June 24, 2009, our stockholders approved a proposal designed to allow us to access the capital markets in a way that we were previously unable to as a result of restrictions that, absent stockholder approval, apply to business development companies under the 1940 Act. Specifically, our stockholders approved a proposal that authorizes us to sell shares of our common stock below the then-current net asset value per share of our common stock in one or more offerings for a period ending on the earlier of June 24, 2010 or the date of our next annual meeting of stockholders. Any decision to sell shares of our common stock below the then-current net asset value per share of our common stock would be subject to the determination by our Board of Directors that such issuance is in our and our stockholders' best interests. In connection with the receipt of such stockholder approval, we agreed to limit the number of shares that we issue at a price below net asset value pursuant to this authorization so that the aggregate dilutive effect on our then outstanding shares will not exceed 15%. We have completed two offerings of shares of our common stock at a price below the then-current net asset value pursuant to this authorization, which closed on July 21, 2009 and September 25, 2009, respectively. The aggregate dilutive effect that these two offerings have had on our outstanding shares of common stock is 9.1%, which leaves 5.9% remaining of the dilution limit we have imposed.

If we were to sell additional shares of our common stock below net asset value per share, such sales would result in an immediate dilution to the net asset value per share. This dilution would occur as a result of the sale of shares at a price below the then-current net asset value per share of our common stock and a proportionately greater decrease in a stockholder's interest in our earnings and assets and voting interest in us than the increase in our assets resulting from such issuance.

Further, if our current stockholders do not purchase any shares to maintain their percentage interest, regardless of whether such offering is above or below the then-current net asset value per share, their voting power will be diluted. Because the number of shares of common stock that could be so issued and the timing of any issuance is not currently known, the actual dilutive effect cannot be predicted.

***Changes in interest rates may affect our cost of capital and net investment income.***

Because we may borrow to fund our investments, a portion of our net investment income may be dependent upon the difference between the interest rate at which we borrow funds and the interest rate at which we invest these funds. A portion of our investments will have fixed interest rates, while a portion of our borrowings will likely have floating interest rates. As a result, a significant change in market interest rates could have a material adverse effect on our net investment income. In periods of rising interest rates, our cost of funds could increase, which would reduce our net investment income. We may hedge against such interest

rate fluctuations by using standard hedging instruments such as futures, options and forward contracts, subject to applicable legal requirements, including without limitation, all necessary registrations (or exemptions from registration) with the Commodity Futures Trading Commission. These activities may limit our ability to participate in the benefits of lower interest rates with respect to the hedged borrowings. Adverse developments resulting from changes in interest rates or hedging transactions could have a material adverse effect on our business, financial condition and results of operations.

***We have a limited operating history.***

Fifth Street Mezzanine Partners III, L.P. commenced operations on February 15, 2007. On January 2, 2008, Fifth Street Mezzanine Partners III, L.P. merged with and into Fifth Street Finance Corp., a Delaware corporation. As a result, we are subject to all of the business risks and uncertainties associated with any new business, including the risk that we will not achieve our investment objective and that the value of our common stock could decline substantially.

***We currently have a limited number of investments in our investment portfolio. As a result, a loss on one or more of those investments would have a more adverse effect on our company than the effect such a loss would have on a company with a larger and more diverse investment portfolio.***

As a company with a limited operating history, we have not had the opportunity to invest in a large number of portfolio companies. As a result, until we have increased the number of investments in our investment portfolio, a loss on one or more of our investments would affect us more adversely than such loss would affect a company with a larger and more diverse investment portfolio.

***A significant portion of our investment portfolio is and will continue to be recorded at fair value as determined in good faith by our Board of Directors and, as a result, there is and will continue to be uncertainty as to the value of our portfolio investments.***

Under the 1940 Act, we are required to carry our portfolio investments at market value or, if there is no readily available market value, at fair value as determined by our Board of Directors. Typically, there is not a public market for the securities of the privately held companies in which we have invested and will generally continue to invest. As a result, we value these securities quarterly at fair value as determined in good faith by our Board of Directors.

Certain factors that may be considered in determining the fair value of our investments include the nature and realizable value of any collateral, the portfolio company's earnings and its ability to make payments on its indebtedness, the markets in which the portfolio company does business, comparison to comparable publicly-traded companies, discounted cash flow and other relevant factors. Because such valuations, and particularly valuations of private securities and private companies, are inherently uncertain, may fluctuate over short periods of time and may be based on estimates, our determinations of fair value may differ materially from the values that would have been used if a ready market for these securities existed. Due to this uncertainty, our fair value determinations may cause our net asset value on a given date to materially understate or overstate the value that we may ultimately realize upon the sale of one or more of our investments. As a result, investors purchasing our common stock based on an overstated net asset value would pay a higher price than the realizable value of our investments might warrant.

***Our ability to achieve our investment objective depends on our investment adviser's ability to support our investment process; if our investment adviser were to lose any of its principals, our ability to achieve our investment objective could be significantly harmed.***

As discussed above, we were organized on February 15, 2007. We have no employees and, as a result, we depend on the investment expertise, skill and network of business contacts of the principals of our investment adviser. The principals of our investment adviser evaluate, negotiate, structure, execute, monitor and service our investments. Our future success will depend to a significant extent on the continued service and coordination of the principals of our investment adviser, Messrs. Tannenbaum, Goodman, Alva, Berman and

Dimitrov. The departure of any of these individuals could have a material adverse effect on our ability to achieve our investment objective.

Our ability to achieve our investment objective depends on our investment adviser's ability to identify, analyze, invest in, finance and monitor companies that meet our investment criteria. Our investment adviser's capabilities in structuring the investment process, providing competent, attentive and efficient services to us, and facilitating access to financing on acceptable terms depend on the employment of investment professionals in adequate number and of adequate sophistication to match the corresponding flow of transactions. To achieve our investment objective, our investment adviser may need to hire, train, supervise and manage new investment professionals to participate in our investment selection and monitoring process. Our investment adviser may not be able to find investment professionals in a timely manner or at all. Failure to support our investment process could have a material adverse effect on our business, financial condition and results of operations.

***Our investment adviser has no prior experience managing a business development company or a RIC.***

The 1940 Act and the Code impose numerous constraints on the operations of business development companies and RICs that do not apply to the other investment vehicles previously managed by the principals of our investment adviser. For example, under the 1940 Act, business development companies are required to invest at least 70% of their total assets primarily in securities of qualifying U.S. private or thinly traded companies. Moreover, qualification for taxation as a RIC under subchapter M of the Code requires satisfaction of source-of-income and diversification requirements and our ability to avoid corporate-level taxes on our income and gains depends on our satisfaction of distribution requirements. The failure to comply with these provisions in a timely manner could prevent us from qualifying as a business development company or RIC or could force us to pay unexpected taxes and penalties, which could be material. Our investment adviser does not have any prior experience managing a business development company or RIC. Its lack of experience in managing a portfolio of assets under such constraints may hinder its ability to take advantage of attractive investment opportunities and, as a result, achieve our investment objective.

***Our business model depends to a significant extent upon strong referral relationships with private equity sponsors, and the inability of the principals of our investment adviser to maintain or develop these relationships, or the failure of these relationships to generate investment opportunities, could adversely affect our business.***

We expect that the principals of our investment adviser will maintain their relationships with private equity sponsors, and we will rely to a significant extent upon these relationships to provide us with potential investment opportunities. If the principals of our investment adviser fail to maintain their existing relationships or develop new relationships with other sponsors or sources of investment opportunities, we will not be able to grow our investment portfolio. In addition, individuals with whom the principals of our investment adviser have relationships are not obligated to provide us with investment opportunities, and, therefore, there is no assurance that such relationships will generate investment opportunities for us.

***We may face increasing competition for investment opportunities, which could reduce returns and result in losses.***

We compete for investments with other business development companies and investment funds (including private equity funds and mezzanine funds), as well as traditional financial services companies such as commercial banks and other sources of funding. Many of our competitors are substantially larger and have considerably greater financial, technical and marketing resources than we do. For example, some competitors may have a lower cost of capital and access to funding sources that are not available to us. In addition, some of our competitors may have higher risk tolerances or different risk assessments than we have. These characteristics could allow our competitors to consider a wider variety of investments, establish more relationships and offer better pricing and more flexible structuring than we are able to do. We may lose investment opportunities if we do not match our competitors' pricing, terms and structure. If we are forced to match our competitors' pricing, terms and structure, we may not be able to achieve acceptable returns on our investments or may bear substantial risk of capital loss. A significant part of our competitive advantage stems

from the fact that the market for investments in small and mid-sized companies is underserved by traditional commercial banks and other financial sources. A significant increase in the number and/or the size of our competitors in this target market could force us to accept less attractive investment terms. Furthermore, many of our competitors have greater experience operating under, or are not subject to, the regulatory restrictions that the 1940 Act imposes on us as a business development company.

***Our incentive fee may induce our investment adviser to make speculative investments.***

The incentive fee payable by us to our investment adviser may create an incentive for it to make investments on our behalf that are risky or more speculative than would be the case in the absence of such compensation arrangement, which could result in higher investment losses, particularly during cyclical economic downturns. The way in which the incentive fee payable to our investment adviser is determined, which is calculated separately in two components as a percentage of the income (subject to a hurdle rate) and as a percentage of the realized gain on invested capital, may encourage our investment adviser to use leverage to increase the return on our investments or otherwise manipulate our income so as to recognize income in quarters where the hurdle rate is exceeded. Under certain circumstances, the use of leverage may increase the likelihood of default, which would disfavor the holders of our common stock.

The incentive fee payable by us to our investment adviser also may create an incentive for our investment adviser to invest on our behalf in instruments that have a deferred interest feature. Under these investments, we would accrue the interest over the life of the investment but would not receive the cash income from the investment until the end of the investment's term, if at all. Our net investment income used to calculate the income portion of our incentive fee, however, includes accrued interest. Thus, a portion of the incentive fee would be based on income that we have not yet received in cash and may never receive in cash if the portfolio company is unable to satisfy such interest payment obligation to us. Consequently, while we may make incentive fee payments on income accruals that we may not collect in the future and with respect to which we do not have a formal "claw back" right against our investment adviser per se, the amount of accrued income written off in any period will reduce the income in the period in which such write-off was taken and thereby reduce such period's incentive fee payment.

In addition, our investment adviser receives the incentive fee based, in part, upon net capital gains realized on our investments. Unlike the portion of the incentive fee based on income, there is no performance threshold applicable to the portion of the incentive fee based on net capital gains. As a result, our investment adviser may have a tendency to invest more in investments that are likely to result in capital gains as compared to income producing securities. Such a practice could result in our investing in more speculative securities than would otherwise be the case, which could result in higher investment losses, particularly during economic downturns.

Given the subjective nature of the investment decisions made by our investment adviser on our behalf, we will be unable to monitor these potential conflicts of interest between us and our investment adviser.

***Our base management fee may induce our investment adviser to incur leverage.***

The fact that our base management fee is payable based upon our gross assets, which would include any borrowings for investment purposes, may encourage our investment adviser to use leverage to make additional investments. Under certain circumstances, the use of leverage may increase the likelihood of default, which would disfavor holders of our common stock. Given the subjective nature of the investment decisions made by our investment adviser on our behalf, we will not be able to monitor this potential conflict of interest.

***Because we borrow money, the potential for loss on amounts invested in us will be magnified and may increase the risk of investing in us.***

Borrowings, also known as leverage, magnify the potential for loss on invested equity capital. If we continue to use leverage to partially finance our investments, through borrowings from banks and other lenders, you will experience increased risks of investing in our common stock. If the value of our assets decreases, leveraging would cause net asset value to decline more sharply than it otherwise would have had we not leveraged. Similarly, any decrease in our income would cause net income to decline more sharply than

it would have had we not borrowed. Such a decline could negatively affect our ability to make common stock distribution payments. Leverage is generally considered a speculative investment technique.

***Substantially all of our assets could potentially be subject to security interests under secured revolving credit facilities and if we default on our obligations under the facilities, the lenders could foreclose on our assets.***

As is common in the business development company industry, our obligations under secured revolving credit facilities may be secured by liens on substantially all of our assets. If we default on our obligations under these facilities, the lenders may have the right to foreclose upon and sell, or otherwise transfer, the collateral subject to their security interests.

***Because we intend to distribute between 90% and 100% of our income to our stockholders in connection with our election to be treated as a RIC, we will continue to need additional capital to finance our growth. If additional funds are unavailable or not available on favorable terms, our ability to grow will be impaired.***

In order to qualify for the tax benefits available to RICs and to minimize corporate-level taxes, we intend to distribute to our stockholders between 90% and 100% of our annual taxable income, except that we may retain certain net capital gains for investment, and treat such amounts as deemed distributions to our stockholders. If we elect to treat any amounts as deemed distributions, we must pay income taxes at the corporate rate on such deemed distributions on behalf of our stockholders. As a result of these requirements, we will likely need to raise capital from other sources to grow our business. As a business development company, we generally are required to meet a coverage ratio of total assets, less liabilities and indebtedness not represented by senior securities, to total senior securities, which includes all of our borrowings and any outstanding preferred stock, of at least 200%. These requirements limit the amount that we may borrow. Because we will continue to need capital to grow our investment portfolio, these limitations may prevent us from incurring debt and require us to raise additional equity at a time when it may be disadvantageous to do so.

While we expect to be able to borrow and to issue additional debt and equity securities, we cannot assure you that debt and equity financing will be available to us on favorable terms, or at all. Also, as a business development company, we generally are not permitted to issue equity securities priced below net asset value without stockholder approval. If additional funds are not available to us, we could be forced to curtail or cease new investment activities, and our net asset value and share price could decline.

***Unfavorable economic conditions or other factors may affect our ability to borrow for investment purposes, and may therefore adversely affect our ability to achieve our investment objective.***

Unfavorable economic conditions or other factors could increase our funding costs, limit our access to the capital markets or result in a decision by lenders not to extend credit to us. An inability to successfully access the capital markets could limit our ability to grow our business and fully execute our business strategy and could decrease our earnings, if any.

***Our ability to enter into transactions with our affiliates is restricted.***

We are prohibited under the 1940 Act from participating in certain transactions with certain of our affiliates without the prior approval of the members of our independent directors and, in some cases, the SEC. Any person that owns, directly or indirectly, 5% or more of our outstanding voting securities is our affiliate for purposes of the 1940 Act and we are generally prohibited from buying or selling any securities (other than our securities) from or to such affiliate, absent the prior approval of our independent directors. The 1940 Act also prohibits certain "joint" transactions with certain of our affiliates, which could include investments in the same portfolio company (whether at the same or different times), without prior approval of our independent directors and, in some cases, the SEC. If a person acquires more than 25% of our voting securities, we are prohibited from buying or selling any security (other than any security of which we are the issuer) from or to such person or certain of that person's affiliates, or entering into prohibited joint transactions with such person, absent the prior approval of the SEC. Similar restrictions limit our ability to transact business with our officers or directors or their affiliates. As a result of these restrictions, we may be prohibited from buying or selling

any security (other than any security of which we are the issuer) from or to any portfolio company of a private equity fund managed by our investment adviser without the prior approval of the SEC, which may limit the scope of investment opportunities that would otherwise be available to us.

***There are significant potential conflicts of interest which could adversely impact our investment returns.***

Our executive officers and directors, and the members of our investment adviser, serve or may serve as officers, directors or principals of entities that operate in the same or a related line of business as we do or of investment funds managed by our affiliates. Accordingly, they may have obligations to investors in those entities, the fulfillment of which might not be in the best interests of us or our stockholders. For example, Mr. Tannenbaum, our president and chief executive officer, and managing partner of our investment adviser, is the managing partner of Fifth Street Capital LLC, a private investment firm. Although the other investment funds managed by Fifth Street Capital LLC and its affiliates generally are fully committed and, other than follow-on investments in existing portfolio companies, are no longer making investments, in the future, the principals of our investment adviser may manage other funds which may from time to time have overlapping investment objectives with those of us and accordingly invest in, whether principally or secondarily, asset classes similar to those targeted by us. If this should occur, the principals of our investment adviser will face conflicts of interest in the allocation of investment opportunities to us and such other funds. Although our investment professionals will endeavor to allocate investment opportunities in a fair and equitable manner, we and our common stockholders could be adversely affected in the event investment opportunities are allocated among us and other investment vehicles managed or sponsored by, or affiliated with, our executive officers, directors, and the members of our investment adviser.

***The incentive fee we pay to our investment adviser in respect of capital gains may be effectively greater than 20%.***

As a result of the operation of the cumulative method of calculating the capital gains portion of the incentive fee we pay to our investment adviser, the cumulative aggregate capital gains fee received by our investment adviser could be effectively greater than 20%, depending on the timing and extent of subsequent net realized capital losses or net unrealized depreciation. For additional information on this calculation, see the disclosure in footnote 2 to Example 2 under the caption "Item 1. Business — Investment Advisory Agreement — Management Fee — Incentive Fee." We cannot predict whether, or to what extent, this payment calculation would affect your investment in our stock.

***The involvement of our investment adviser's investment professionals in our valuation process may create conflicts of interest.***

Our portfolio investments are generally not in publicly traded securities. As a result, the values of these securities are not readily available. We value these securities at fair value as determined in good faith by our Board of Directors based upon the recommendation of the Valuation Committee of our Board of Directors. In connection with that determination, investment professionals from our investment adviser prepare portfolio company valuations based upon the most recent portfolio company financial statements available and projected financial results of each portfolio company. The participation of our investment adviser's investment professionals in our valuation process could result in a conflict of interest as our investment adviser's management fee is based, in part, on our gross assets.

***A failure on our part to maintain our qualification as a business development company would significantly reduce our operating flexibility.***

If we fail to continuously qualify as a business development company, we might be subject to regulation as a registered closed-end investment company under the 1940 Act, which would significantly decrease our operating flexibility. In addition, failure to comply with the requirements imposed on business development companies by the 1940 Act could cause the SEC to bring an enforcement action against us. For additional information on the qualification requirements of a business development company, see the disclosure under the caption "Item 1. Business — Regulation."

***Regulations governing our operation as a business development company and RIC will affect our ability to raise, and the way in which we raise, additional capital or borrow for investment purposes, which may have a negative effect on our growth.***

As a result of the annual distribution requirement to qualify for tax free treatment at the corporate level on income and gains distributed to stockholders, we need to periodically access the capital markets to raise cash to fund new investments. We generally are not able to issue or sell our common stock at a price below net asset value per share, which may be a disadvantage as compared with other public companies. We may, however, sell our common stock, or warrants, options or rights to acquire our common stock, at a price below the current net asset value of the common stock if our Board of Directors and independent directors determine that such sale is in our best interests and the best interests of our stockholders, and our stockholders as well as those stockholders that are not affiliated with us approve such sale. In any such case, the price at which our securities are to be issued and sold may not be less than a price that, in the determination of our Board of Directors, closely approximates the market value of such securities (less any underwriting commission or discount). If our common stock trades at a discount to net asset value, this restriction could adversely affect our ability to raise capital. See "Item 1A. Risk Factors — Risks Relating to Our Business and Structure — Stockholders will incur dilution if we sell shares of our common stock in one or more offerings at prices below the then-current net asset value per share of our common stock" for a discussion of a proposal approved by our stockholders that permits us to issue shares of our common stock below net asset value.

We also may make rights offerings to our stockholders at prices less than net asset value, subject to applicable requirements of the 1940 Act. If we raise additional funds by issuing more shares of our common stock or issuing senior securities convertible into, or exchangeable for, our common stock, the percentage ownership of our stockholders may decline at that time and such stockholders may experience dilution. Moreover, we can offer no assurance that we will be able to issue and sell additional equity securities in the future, on terms favorable to us or at all.

In addition, we may issue "senior securities," including borrowing money from banks or other financial institutions only in amounts such that our asset coverage, as defined in the 1940 Act, equals at least 200% after such incurrence or issuance. Our ability to issue different types of securities is also limited. Compliance with these requirements may unfavorably limit our investment opportunities and reduce our ability in comparison to other companies to profit from favorable spreads between the rates at which we can borrow and the rates at which we can lend. As a business development company, therefore, we may need to issue equity more frequently than our privately owned competitors, which may lead to greater stockholder dilution.

We expect to continue to borrow for investment purposes. If the value of our assets declines, we may be unable to satisfy the asset coverage test, which could prohibit us from paying dividends and could prevent us from qualifying as a RIC. If we cannot satisfy the asset coverage test, we may be required to sell a portion of our investments and, depending on the nature of our debt financing, repay a portion of our indebtedness at a time when such sales may be disadvantageous.

In addition, we may in the future seek to securitize our portfolio securities to generate cash for funding new investments. To securitize loans, we would likely create a wholly-owned subsidiary and contribute a pool of loans to the subsidiary. We would then sell interests in the subsidiary on a non-recourse basis to purchasers and we would retain all or a portion of the equity in the subsidiary. An inability to successfully securitize our loan portfolio could limit our ability to grow our business or fully execute our business strategy and may decrease our earnings, if any. The securitization market is subject to changing market conditions and we may not be able to access this market when we would otherwise deem appropriate. Moreover, the successful securitization of our portfolio might expose us to losses as the residual investments in which we do not sell interests will tend to be those that are riskier and more apt to generate losses. The 1940 Act also may impose restrictions on the structure of any securitization.

***We may experience fluctuations in our quarterly results.***

We could experience fluctuations in our quarterly operating results due to a number of factors, including our ability or inability to make investments in companies that meet our investment criteria, the interest rate



payable on the debt securities we acquire, the level of our expenses, variations in and the timing of the recognition of realized and unrealized gains or losses, the degree to which we encounter competition in our market and general economic conditions. As a result of these factors, results for any period should not be relied upon as being indicative of performance in future periods.

***Our Board of Directors may change our investment objective, operating policies and strategies without prior notice or stockholder approval, the effects of which may be adverse.***

Our Board of Directors has the authority to modify or waive our current investment objective, operating policies and strategies without prior notice and without stockholder approval. We cannot predict the effect any changes to our current investment objective, operating policies and strategies would have on our business, net asset value, operating results and value of our stock. However, the effects might be adverse, which could negatively impact our ability to pay you distributions and cause you to lose part or all of your investment.

***We will be subject to corporate-level income tax if we are unable to maintain our qualification as a RIC under Subchapter M of the Code or do not satisfy the annual distribution requirement.***

To maintain RIC status and be relieved of federal taxes on income and gains distributed to our stockholders, we must meet the following annual distribution, income source and asset diversification requirements.

- The annual distribution requirement for a RIC will be satisfied if we distribute to our stockholders on an annual basis at least 90% of our net ordinary income and realized net short-term capital gains in excess of realized net long-term capital losses, if any. We will be subject to a 4% nondeductible federal excise tax, however, to the extent that we do not satisfy certain additional minimum distribution requirements on a calendar-year basis. Because we may use debt financing, we are subject to an asset coverage ratio requirement under the 1940 Act and we may be subject to certain financial covenants under our debt arrangements that could, under certain circumstances, restrict us from making distributions necessary to satisfy the distribution requirement. If we are unable to obtain cash from other sources, we could fail to qualify for RIC tax treatment and thus become subject to corporate-level income tax.
- The income source requirement will be satisfied if we obtain at least 90% of our income for each year from dividends, interest, gains from the sale of stock or securities or similar sources.
- The asset diversification requirement will be satisfied if we meet certain asset diversification requirements at the end of each quarter of our taxable year. To satisfy this requirement, at least 50% of the value of our assets must consist of cash, cash equivalents, U.S. government securities, securities of other RICs, and other acceptable securities; and no more than 25% of the value of our assets can be invested in the securities, other than U.S. government securities or securities of other RICs, of one issuer, of two or more issuers that are controlled, as determined under applicable Code rules, by us and that are engaged in the same or similar or related trades or businesses or of certain "qualified publicly traded partnerships." Failure to meet these requirements may result in our having to dispose of certain investments quickly in order to prevent the loss of RIC status. Because most of our investments will be in private companies, and therefore will be relatively illiquid, any such dispositions could be made at disadvantageous prices and could result in substantial losses.

If we fail to qualify for or maintain RIC status or to meet the annual distribution requirement for any reason and are subject to corporate income tax, the resulting corporate taxes could substantially reduce our net assets, the amount of income available for distribution and the amount of our distributions.

***We may not be able to pay you distributions, our distributions may not grow over time and a portion of our distributions may be a return of capital.***

We intend to pay quarterly distributions to our stockholders out of assets legally available for distribution. We cannot assure you that we will achieve investment results that will allow us to make a specified level of

cash distributions or year-to-year increases in cash distributions. Our ability to pay distributions might be adversely affected by, among other things, the impact of one or more of the risk factors described in this annual report on Form 10-K. In addition, the inability to satisfy the asset coverage test applicable to us as a business development company can limit our ability to pay distributions. All distributions will be paid at the discretion of our Board of Directors and will depend on our earnings, our financial condition, maintenance of our RIC status, compliance with applicable business development company regulations and such other factors as our Board of Directors may deem relevant from time to time. We cannot assure you that we will pay distributions to our stockholders in the future.

When we make quarterly distributions, we will be required to determine the extent to which such distributions are paid out of current or accumulated earnings and profits. Distributions in excess of current and accumulated earnings and profits will be treated as a non-taxable return of capital to the extent of an investor's basis in our stock and, assuming that an investor holds our stock as a capital asset, thereafter as a capital gain.

***We may have difficulty paying our required distributions if we recognize income before or without receiving cash representing such income.***

For federal income tax purposes, we include in income certain amounts that we have not yet received in cash, such as original issue discount or accruals on a contingent payment debt instrument, which may occur if we receive warrants in connection with the origination of a loan or possibly in other circumstances. Such original issue discount is included in income before we receive any corresponding cash payments. We also may be required to include in income certain other amounts that we do not receive in cash.

Since, in certain cases, we may recognize income before or without receiving cash representing such income, we may have difficulty meeting the annual distribution requirement necessary to be relieved of federal taxes on income and gains distributed to our stockholders. Accordingly, we may have to sell some of our investments at times and/or at prices we would not consider advantageous, raise additional debt or equity capital or forgo new investment opportunities for this purpose. If we are not able to obtain cash from other sources, we may fail to satisfy the annual distribution requirement and thus become subject to corporate-level income tax.

***We may in the future choose to pay dividends in our own stock, in which case you may be required to pay tax in excess of the cash you receive.***

We may distribute taxable dividends that are payable in part in our stock. Taxable stockholders receiving such dividends will be required to include the full amount of the dividend as ordinary income (or as long-term capital gain to the extent such distribution is properly designated as a capital gain dividend) to the extent of our current and accumulated earnings and profits for United States federal income tax purposes. As a result, a U.S. stockholder may be required to pay tax with respect to such dividends in excess of any cash received. If a U.S. stockholder sells the stock it receives as a dividend in order to pay this tax, the sales proceeds may be less than the amount included in income with respect to the dividend, depending on the market price of our stock at the time of the sale. Furthermore, with respect to non-U.S. stockholders, we may be required to withhold U.S. tax with respect to such dividends, including in respect of all or a portion of such dividend that is payable in stock. In addition, if a significant number of our stockholders determine to sell shares of our stock in order to pay taxes owed on dividends, it may put downward pressure on the trading price of our stock.

In addition, as discussed elsewhere in this annual report on Form 10-K, our loans typically contain a payment-in-kind ("PIK") interest provision. The PIK interest, computed at the contractual rate specified in each loan agreement, is added to the principal balance of the loan and recorded as interest income. To avoid the imposition of corporate-level tax on us, this non-cash source of income needs to be paid out to stockholders in cash distributions or, in the event that we determine to do so, in shares of our common stock, even though we have not yet collected and may never collect the cash relating to the PIK interest. As a result, if we distribute taxable dividends in the form of our common stock, we may have to distribute a stock dividend to account for PIK interest even though we have not yet collected the cash.

***Changes in laws or regulations governing our operations may adversely affect our business or cause us to alter our business strategy.***

We and our portfolio companies are subject to regulation at the local, state and federal level. New legislation may be enacted or new interpretations, rulings or regulations could be adopted, including those governing the types of investments we are permitted to make or that impose limits on our ability to pledge a significant amount of our assets to secure loans, any of which could harm us and our stockholders, potentially with retroactive effect.

Additionally, any changes to the laws and regulations governing our operations relating to permitted investments may cause us to alter our investment strategy in order to avail ourselves of new or different opportunities. Such changes could result in material differences to the strategies and plans set forth in this annual report on Form 10-K and may result in our investment focus shifting from the areas of expertise of our investment adviser to other types of investments in which our investment adviser may have less expertise or little or no experience. Thus, any such changes, if they occur, could have a material adverse effect on our results of operations and the value of your investment.

**Risks Relating to Our Investments**

***Our investments in portfolio companies may be risky, and we could lose all or part of our investment.***

Investing in small and mid-sized companies involves a number of significant risks. Among other things, these companies:

- may have limited financial resources and may be unable to meet their obligations under their debt instruments that we hold, which may be accompanied by a deterioration in the value of any collateral and a reduction in the likelihood of us realizing any guarantees from subsidiaries or affiliates of our portfolio companies that we may have obtained in connection with our investments, as well as a corresponding decrease in the value of the equity components of our investments;
- may have shorter operating histories, narrower product lines, smaller market shares and/or significant customer concentrations than larger businesses, which tend to render them more vulnerable to competitors' actions and market conditions, as well as general economic downturns;
- are more likely to depend on the management talents and efforts of a small group of persons; therefore, the death, disability, resignation or termination of one or more of these persons could have a material adverse impact on our portfolio company and, in turn, on us;
- generally have less predictable operating results, may from time to time be parties to litigation, may be engaged in rapidly changing businesses with products subject to a substantial risk of obsolescence, and may require substantial additional capital to support their operations, finance expansion or maintain their competitive position; and
- generally have less publicly available information about their businesses, operations and financial condition. If we are unable to uncover all material information about these companies, we may not make a fully informed investment decision, and as a result may lose part or all of our investment.

In addition, in the course of providing significant managerial assistance to certain of our portfolio companies, certain of our officers and directors may serve as directors on the boards of such companies. To the extent that litigation arises out of our investments in these companies, our officers and directors may be named as defendants in such litigation, which could result in an expenditure of funds (through our indemnification of such officers and directors) and the diversion of management time and resources.

***An investment strategy focused primarily on privately held companies presents certain challenges, including the lack of available information about these companies.***

We invest primarily in privately held companies. Generally, little public information exists about these companies, including typically a lack of audited financial statements and ratings by third parties. We must therefore rely on the ability of our investment adviser to obtain adequate information to evaluate the potential risks of investing in these companies. These companies and their financial information may not be subject to the Sarbanes-Oxley Act and other rules that govern public companies. If we are unable to uncover all material information about these companies, we may not make a fully informed investment decision, and we may lose money on our investments. These factors could affect our investment returns.

***If we make unsecured investments, those investments might not generate sufficient cash flow to service their debt obligations to us.***

We may make unsecured investments. Unsecured investments may be subordinated to other obligations of the obligor. Unsecured investments often reflect a greater possibility that adverse changes in the financial condition of the obligor or in general economic conditions (including, for example, a substantial period of rising interest rates or declining earnings) or both may impair the ability of the obligor to make payment of principal and interest. If we make an unsecured investment in a portfolio company, that portfolio company may be highly leveraged, and its relatively high debt-to-equity ratio may create increased risks that its operations might not generate sufficient cash flow to service its debt obligations.

***If we invest in the securities and obligations of distressed and bankrupt issuers, we might not receive interest or other payments.***

We are authorized to invest in the securities and obligations of distressed and bankrupt issuers, including debt obligations that are in covenant or payment default. Such investments generally are considered speculative. The repayment of defaulted obligations is subject to significant uncertainties. Defaulted obligations might be repaid only after lengthy workout or bankruptcy proceedings, during which the issuer of those obligations might not make any interest or other payments.

***The lack of liquidity in our investments may adversely affect our business.***

We invest, and will continue to invest, in companies whose securities are not publicly traded, and whose securities will be subject to legal and other restrictions on resale or will otherwise be less liquid than publicly traded securities. In fact, all of our assets may be invested in illiquid securities. The illiquidity of these investments may make it difficult for us to sell these investments when desired. In addition, if we are required to liquidate all or a portion of our portfolio quickly, we may realize significantly less than the value at which we had previously recorded these investments. Our investments are usually subject to contractual or legal restrictions on resale or are otherwise illiquid because there is usually no established trading market for such investments. The illiquidity of most of our investments may make it difficult for us to dispose of them at a favorable price, and, as a result, we may suffer losses.

***We may not have the funds or ability to make additional investments in our portfolio companies.***

After our initial investment in a portfolio company, we may be called upon from time to time to provide additional funds to such company or have the opportunity to increase our investment through the exercise of a warrant to purchase common stock. There is no assurance that we will make, or will have sufficient funds to make, follow-on investments. Any decisions not to make a follow-on investment or any inability on our part to make such an investment may have a negative impact on a portfolio company in need of such an investment, may result in a missed opportunity for us to increase our participation in a successful operation or may reduce the expected yield on the investment.

***Our portfolio companies may incur debt that ranks equally with, or senior to, our investments in such companies.***

We invest primarily in first and second lien debt issued by small and mid-sized companies. Our portfolio companies may have, or may be permitted to incur, other debt that ranks equally with, or senior to, the debt in which we invest. By their terms, such debt instruments may entitle the holders to receive payments of interest or principal on or before the dates on which we are entitled to receive payments with respect to the debt instruments in which we invest. Also, in the event of insolvency, liquidation, dissolution, reorganization or bankruptcy of a portfolio company, holders of debt instruments ranking senior to our investment in that portfolio company would typically be entitled to receive payment in full before we receive any distribution. After repaying such senior creditors, such portfolio company may not have any remaining assets to use for repaying its obligation to us. In the case of debt ranking equally with debt instruments in which we invest, we would have to share on an equal basis any distributions with other creditors holding such debt in the event of an insolvency, liquidation, dissolution, reorganization or bankruptcy of the relevant portfolio company.

***The disposition of our investments may result in contingent liabilities.***

Most of our investments will involve private securities. In connection with the disposition of an investment in private securities, we may be required to make representations about the business and financial affairs of the portfolio company typical of those made in connection with the sale of a business. We may also be required to indemnify the purchasers of such investment to the extent that any such representations turn out to be inaccurate or with respect to certain potential liabilities. These arrangements may result in contingent liabilities that ultimately yield funding obligations that must be satisfied through our return of certain distributions previously made to us.

***There may be circumstances where our debt investments could be subordinated to claims of other creditors or we could be subject to lender liability claims.***

Even though we have structured some of our investments as senior loans, if one of our portfolio companies were to go bankrupt, depending on the facts and circumstances, including the extent to which we actually provided managerial assistance to that portfolio company, a bankruptcy court might recharacterize our debt investment and subordinate all or a portion of our claim to that of other creditors. We may also be subject to lender liability claims for actions taken by us with respect to a borrower's business or instances where we exercise control over the borrower. It is possible that we could become subject to a lender's liability claim, including as a result of actions taken in rendering significant managerial assistance.

***Second priority liens on collateral securing loans that we make to our portfolio companies may be subject to control by senior creditors with first priority liens. If there is a default, the value of the collateral may not be sufficient to repay in full both the first priority creditors and us.***

Certain loans that we make to portfolio companies will be secured on a second priority basis by the same collateral securing senior secured debt of such companies. The first priority liens on the collateral will secure the portfolio company's obligations under any outstanding senior debt and may secure certain other future debt that may be permitted to be incurred by the company under the agreements governing the loans. The holders of obligations secured by the first priority liens on the collateral will generally control the liquidation of and be entitled to receive proceeds from any realization of the collateral to repay their obligations in full before us. In addition, the value of the collateral in the event of liquidation will depend on market and economic conditions, the availability of buyers and other factors. There can be no assurance that the proceeds, if any, from the sale or sales of all of the collateral would be sufficient to satisfy the loan obligations secured by the second priority liens after payment in full of all obligations secured by the first priority liens on the collateral. If such proceeds are not sufficient to repay amounts outstanding under the loan obligations secured by the second priority liens, then we, to the extent not repaid from the proceeds of the sale of the collateral, will only have an unsecured claim against the company's remaining assets, if any.

The rights we may have with respect to the collateral securing the loans we make to our portfolio companies with senior debt outstanding may also be limited pursuant to the terms of one or more intercreditor agreements that we enter into with the holders of senior debt. Under such an intercreditor agreement, at any time that obligations that have the benefit of the first priority liens are outstanding, any of the following actions that may be taken with respect to the collateral will be at the direction of the holders of the obligations secured by the first priority liens: the ability to cause the commencement of enforcement proceedings against the collateral; the ability to control the conduct of such proceedings; the approval of amendments to collateral documents; releases of liens on the collateral; and waivers of past defaults under collateral documents. We may not have the ability to control or direct such actions, even if our rights are adversely affected.

***We generally will not control our portfolio companies.***

We do not, and do not expect to, control most of our portfolio companies, even though we may have board representation or board observation rights, and our debt agreements may contain certain restrictive covenants. As a result, we are subject to the risk that a portfolio company in which we invest may make business decisions with which we disagree and the management of such company, as representatives of the holders of their common equity, may take risks or otherwise act in ways that do not serve our interests as a debt investor. Due to the lack of liquidity for our investments in non-traded companies, we may not be able to dispose of our interests in our portfolio companies as readily as we would like or at an appropriate valuation. As a result, a portfolio company may make decisions that could decrease the value of our portfolio holdings.

***Defaults by our portfolio companies will harm our operating results.***

A portfolio company's failure to satisfy financial or operating covenants imposed by us or other lenders could lead to defaults and, potentially, termination of its loans and foreclosure on its secured assets, which could trigger cross-defaults under other agreements and jeopardize a portfolio company's ability to meet its obligations under the debt or equity securities that we hold. We may incur expenses to the extent necessary to seek recovery upon default or to negotiate new terms, which may include the waiver of certain financial covenants, with a defaulting portfolio company.

***We may not realize gains from our equity investments.***

Certain investments that we have made in the past and may make in the future include warrants or other equity securities. In addition, we have made in the past and may make in the future direct equity investments in companies. Our goal is ultimately to realize gains upon our disposition of such equity interests. However, the equity interests we receive may not appreciate in value and, in fact, may decline in value. Accordingly, we may not be able to realize gains from our equity interests, and any gains that we do realize on the disposition of any equity interests may not be sufficient to offset any other losses we experience. We also may be unable to realize any value if a portfolio company does not have a liquidity event, such as a sale of the business, recapitalization or public offering, which would allow us to sell the underlying equity interests. We often seek puts or similar rights to give us the right to sell our equity securities back to the portfolio company issuer. We may be unable to exercise these puts rights for the consideration provided in our investment documents if the issuer is in financial distress.

***We are subject to certain risks associated with foreign investments.***

We make investments in foreign companies. As of September 30, 2009, we had an investment in one foreign company.

Investing in foreign companies may expose us to additional risks not typically associated with investing in U.S. companies. These risks include changes in foreign exchange rates, exchange control regulations, political and social instability, expropriation, imposition of foreign taxes, less liquid markets and less available information than is generally the case in the U.S., higher transaction costs, less government supervision of

exchanges, brokers and issuers, less developed bankruptcy laws, difficulty in enforcing contractual obligations, lack of uniform accounting and auditing standards and greater price volatility.

Our success will depend, in part, on our ability to anticipate and effectively manage these and other risks. We cannot assure you that these and other factors will not have a material adverse effect on our business as a whole.

#### **Risks Relating to Our Common Stock**

*Shares of closed-end investment companies, including business development companies, may trade at a discount to their net asset value.*

Shares of closed-end investment companies, including business development companies, may trade at a discount from net asset value. This characteristic of closed-end investment companies and business development companies is separate and distinct from the risk that our net asset value per share may decline. We cannot predict whether our common stock will trade at, above or below net asset value.

*Investing in our common stock may involve an above average degree of risk.*

The investments we make in accordance with our investment objective may result in a higher amount of risk than alternative investment options and a higher risk of volatility or loss of principal. Our investments in portfolio companies involve higher levels of risk, and therefore, an investment in our shares may not be suitable for someone with lower risk tolerance.

*The market price of our common stock may fluctuate significantly.*

The market price and liquidity of the market for shares of our common stock may be significantly affected by numerous factors, some of which are beyond our control and may not be directly related to our operating performance. These factors include:

- significant volatility in the market price and trading volume of securities of business development companies or other companies in our sector, which are not necessarily related to the operating performance of these companies;
- changes in regulatory policies, accounting pronouncements or tax guidelines, particularly with respect to RICs and business development companies;
- loss of RIC status;
- changes in earnings or variations in operating results;
- changes in the value of our portfolio of investments;
- any shortfall in revenue or net income or any increase in losses from levels expected by investors or securities analysts;
- departure of our or our investment adviser's key personnel; and
- general economic trends and other external factors.

*Certain provisions of our restated certificate of incorporation and amended and restated by-laws as well as the Delaware General Corporation Law could deter takeover attempts and have an adverse impact on the price of our common stock.*

Our restated certificate of incorporation and our amended and restated by-laws as well as the Delaware General Corporation Law contain provisions that may have the effect of discouraging a third party from making an acquisition proposal for us. These anti-takeover provisions may inhibit a change in control in

circumstances that could give the holders of our common stock the opportunity to realize a premium over the market price for our common stock.

**Item 1B.      *Unresolved Staff Comments***

None.

**Item 2.        *Properties***

We do not own any real estate or other physical properties materially important to our operation; however, we lease office space for our principal executive office at 10 Bank Street, 12<sup>th</sup> Floor, White Plains, NY 10606. Our investment advisor also maintains additional office space at 500 W. Putnam Ave., Suite 400, Greenwich, CT 06830. We believe that our current office facilities are adequate for our business as we intend to conduct it.

**Item 3.        *Legal Proceedings***

Although we may, from time to time, be involved in litigation arising out of our operations in the normal course of business or otherwise, we are currently not a party to any pending material legal proceedings.

**Item 4.        *Submission of Matters to a Vote of Security Holders***

During the quarter ended September 30, 2009, there were no matters submitted to a vote of our security holders through the solicitation of proxies or otherwise.



## PART II

### Item 5. *Market for Registrant's Common Equity, Related Stockholder Matters and Issuer Purchases of Equity Securities*

#### Price Range of Common Stock

Our common stock is traded on the New York Stock Exchange under the symbol "FSC." The following table sets forth, for each fiscal quarter since our initial public offering, the range of high and low sales prices of our common stock as reported on the New York Stock Exchange.

|                                      | <u>High</u> | <u>Low</u> |
|--------------------------------------|-------------|------------|
| Fiscal year ended September 30, 2008 |             |            |
| Third quarter (from June 12, 2008)   | \$ 13.32    | \$ 10.10   |
| Fourth quarter                       | \$ 11.48    | \$ 7.56    |
| Fiscal year ended September 30, 2009 |             |            |
| First quarter                        | \$ 10.24    | \$ 5.02    |
| Second quarter                       | \$ 8.48     | \$ 5.80    |
| Third quarter                        | \$ 11.14    | \$ 6.92    |
| Fourth quarter                       | \$ 11.36    | \$ 9.02    |

The last reported price for our common stock on November 30, 2009 was \$9.77 per share. As of November 30, 2009, we had 16 stockholders of record, which did not include stockholders for whom shares are held in nominee or "street" name.

#### Sales of Unregistered Securities

On August 5, 2009, our Board of Directors declared a dividend of \$0.25 per share of common stock, payable on September 25, 2009 to stockholders of record as of September 8, 2009. On September 25, 2009, we issued a total of 56,890 shares of our common stock under our dividend reinvestment plan pursuant to an exemption from the registration requirements of the Securities Act of 1933. The aggregate value of the shares of our common stock distributed under the dividend reinvestment plan was \$0.6 million.

#### Distributions

Our dividends, if any, are determined by our Board of Directors. We have elected to be treated for federal income tax purposes as a RIC under Subchapter M of the Code. As long as we qualify as a RIC, we will not be taxed on our investment company taxable income or realized net capital gains, to the extent that such taxable income or gains are distributed, or deemed to be distributed, to stockholders on a timely basis.

To maintain RIC tax treatment, we must, among other things, distribute at least 90% of our net ordinary income and realized net short-term capital gains in excess of realized net long-term capital losses, if any. Depending on the level of taxable income earned in a tax year, we may choose to carry forward taxable income in excess of current year distributions into the next tax year and pay a 4% excise tax on such income. Any such carryover taxable income must be distributed through a dividend declared prior to filing the final tax return related to the year in which such taxable income was generated. We may, in the future, make actual distributions to our stockholders of our net capital gains. We can offer no assurance that we will achieve results that will permit the payment of any cash distributions and, if we issue senior securities, we may be prohibited from making distributions if doing so causes us to fail to maintain the asset coverage ratios stipulated by the 1940 Act or if distributions are limited by the terms of any of our borrowings. See "Item 1. Business — Regulation" and "— Taxation as a Regulated Investment Company."

We have adopted an "opt out" dividend reinvestment plan for our common stockholders. As a result, if we make a cash distribution, then stockholders' cash distributions will be automatically reinvested in additional shares of our common stock, unless they specifically "opt out" of the dividend reinvestment plan so as to receive cash distributions.

The following table summarizes our dividends declared for our two most recent fiscal years:

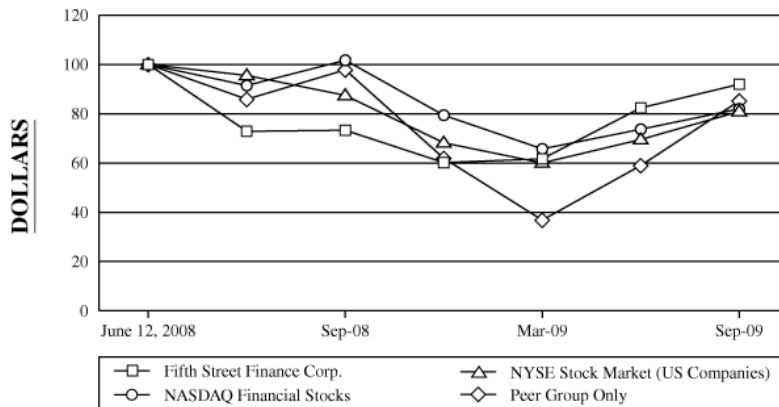
| <u>Dividend Type</u> | <u>Date Declared</u> | <u>Record Date</u> | <u>Payment Date</u> | <u>Amount</u> |
|----------------------|----------------------|--------------------|---------------------|---------------|
| Quarterly            | 5/1/2008             | 5/19/2008          | 6/3/2008            | \$0.30        |
| Quarterly            | 8/6/2008             | 9/10/2008          | 9/26/2008           | \$0.31        |
| Quarterly            | 12/9/2008            | 12/19/2008         | 12/29/2008          | \$0.32        |
| Quarterly            | 12/9/2008            | 12/30/2008         | 1/29/2009           | \$0.33        |
| Special              | 12/18/2008           | 12/30/2008         | 1/29/2009           | \$0.05        |
| Quarterly            | 4/14/2009            | 5/26/2009          | 6/25/2009           | \$0.25        |
| Quarterly            | 8/3/2009             | 9/8/2009           | 9/25/2009           | \$0.25        |

**Stock Performance Graph**

The following graph compares the stockholder return on our common stock from June 12, 2008 to September 30, 2009 with the NASDAQ Financial Stock Index, the NYSE Stock Market (US Companies) Index and the Fifth Street Finance Corp. Peer Group index. The comparison assumes \$100.00 was invested on June 12, 2008 (the date our common stock began to trade on the NYSE Stock Market in connection with our initial public offering) in our common stock and in the comparison groups and assumes the reinvestment of all cash dividends prior to any tax effect. The comparisons in the graph below are based on historical data and are not intended to forecast the possible future performance of our common stock.

**Comparison of Stockholder Return  
Among Fifth Street Finance Corp., the NASDAQ Financial Stock Index, the NYSE  
Index and Fifth Street Finance Corp. Peer Group(1)  
(For the Period June 12, 2008 to September 30, 2009)**

**Comparison of 1 Year Cumulative Total Return  
Assumes Initial Investment of \$100  
September 2009**



(1) The Fifth Street Finance Corp. Peer Group index consists of the following investment companies that have elected to be regulated as business development companies under the 1940 Act: BlackRock Kelso Capital Corporation, Ares Capital Corporation, Apollo Investment Corporation, Gladstone Capital Corporation, MCG Capital Corporation, and MVC Capital, Inc.

**Open Market Stock Repurchase Program**

In October 2008, our Board of Directors authorized a stock repurchase program to acquire up to \$8 million of our outstanding common stock. Stock repurchases under this program may be made through the open market at times and in such amounts as our management deems appropriate. The stock repurchase program expires December 2009 and may be limited or terminated by the Board of Directors at any time without prior notice.

**Item 6. Selected Financial Data**

The following selected financial data should be read together with our financial statements and the related notes and the discussion under "Management's Discussion and Analysis of Financial Condition and Results of Operations" which is included elsewhere in this Form 10-K. Effective as of January 2, 2008, Fifth Street Mezzanine Partners III, L.P. merged with and into Fifth Street Finance Corp. The financial information as of and for the period from inception (February 15, 2007) to September 30, 2007 and for the fiscal years ended September 30, 2008 and 2009, set forth below was derived from our audited financial statements and related notes for Fifth Street Mezzanine Partners III, L.P. and Fifth Street Finance Corp., respectively.

|  | At and for the<br>Year Ended<br>September 30,<br>2009 | At and for the<br>Year Ended<br>September 30,<br>2008 | At September 30, 2007<br>and for the Period<br>February 15, 2007<br>through September 30,<br>2007 |
|--|---|---|---|
|  | (In thousands, except per share amounts)              |   |   |
| <b>Statement of Operations data:</b>                                   |   |   |   |
| Total investment income  | \$ 49,828   | \$ 33,219   | \$ 4,296  |
| Base management fee, net   | 5,889   | 4,258   | 1,564   |
| Incentive fee  | 7,841   | 4,118   | —   |
| All other expenses   | 4,736   | 4,699   | 1,773   |
| Net investment income  | 31,362  | 20,144  | 959   |
| Unrealized appreciation (depreciation) on investments                  | (10,795)  | (16,948)  | 123   |
| Realized gain (loss) on investments                                    | (14,373)  | 62  | —   |
| Net increase in partners' capital/net assets resulting from operations | 6,194   | 3,258   | 1,082   |
| <b>Per share data:</b>   |   |   |   |
| Net asset value per common share at period end                         | \$ 10.84  | \$ 13.02  | N/A   |
| Market price at period end(1)  | 10.93   | 10.05   | N/A   |
| Net investment income  | 1.27  | 1.29  | N/A   |
| Net realized and unrealized loss on investments                        | (1.02)  | (1.08)  | N/A   |
| Net increase in partners' capital/net assets resulting from operations | 0.25  | 0.21  | N/A   |
| Dividends declared   | 1.20  | 0.61  | N/A   |
| <b>Balance Sheet data at period end:</b>                               |   |   |   |
| Total investments at fair value  | \$299,611   | \$273,759   | \$ 88,391   |
| Cash and cash equivalents  | 113,205   | 22,906  | 17,654  |
| Other assets   | 3,071   | 2,484   | 1,285   |
| Total assets   | 415,887   | 299,149   | 107,330   |
| Total liabilities  | 5,331   | 4,813   | 514   |
| Total stockholders' equity   | 410,556   | 294,336   | 106,816   |
| <b>Other data:</b>   |   |   |   |
| Weighted average annual yield on investments(2)                        | 15.7%   | 16.2%   | 16.8%   |
| Number of investments at period end                                    | 28  | 24  | 10  |

| Selected Quarterly Data<br>(unaudited)   | September 30,<br>2009 | June 30,<br>2009 | March 31,<br>2009 | December 31,<br>2008 | September 30,<br>2008 | June 30,<br>2008 | March 31,<br>2008 | December 31,<br>2007 | September 30,<br>2007 | June 30,<br>2007 | March 31,<br>2007(3) |
|--|-----------------------|------------------|-------------------|----------------------|-----------------------|------------------|-------------------|----------------------|-----------------------|------------------|----------------------|
| Total investment income  | \$12,484              | \$12,839         | \$11,920          | \$ 12,585            | \$11,748              | \$ 9,190         | \$ 6,854          | \$5,427              | \$2,753               | \$1,481          | \$ 62                |
| Net investment income (loss)   | 7,777                 | 7,887            | 7,488             | 8,210                | 7,255                 | 5,135            | 4,080             | 3,674                | 1,070                 | (72)             | (39)                 |
| Net realized and unrealized gain (loss)  | (86)                  | (1,949)          | (4,651)           | (18,482)             | (4,396)               | (10,445)         | (1,569)           | (476)                | 123                   | —                | —                    |
| Net increase (decrease) in partners' capital/net assets<br>resulting from operations | 7,691                 | 5,938            | 2,837             | (10,272)             | 2,859                 | (5,310)          | 2,511             | 3,198                | 1,193                 | (72)             | (39)                 |
| Net asset value per common share at period end                                       | \$ 10.84              | \$ 11.95         | \$ 11.94          | \$ 11.86             | \$ 13.02              | \$ 13.20         | \$ 14.12          | \$13.92              | N/A                   | N/A              | N/A                  |

- (1) Our common stock commenced trading on the New York Stock Exchange on June 12, 2008. There was no established public trading price for the stock prior to that date.
- (2) Weighted average annual yield is calculated based upon our debt investments at the end of the period.
- (3) For the period February 15, 2007 (inception) through March 31, 2007.

**Item 7. Management's Discussion and Analysis of Financial Condition and Results of Operations**

The following discussion should be read in connection with our financial statements and the notes thereto included elsewhere in this annual report on Form 10-K.

Some of the statements in this annual report on Form 10-K constitute forward-looking statements because they relate to future events or our future performance or financial condition. The forward-looking statements contained in this annual report on Form 10-K may include statements as to:

- our future operating results and dividend projections;
- our business prospects and the prospects of our portfolio companies;
- the impact of the investments that we expect to make;
- the ability of our portfolio companies to achieve their objectives;
- our expected financings and investments;
- the adequacy of our cash resources and working capital; and
- the timing of cash flows, if any, from the operations of our portfolio companies.

In addition, words such as "anticipate," "believe," "expect" and "intend" indicate a forward-looking statement, although not all forward-looking statements include these words. The forward-looking statements contained in this annual report on Form 10-K involve risks and uncertainties. Our actual results could differ materially from those implied or expressed in the forward-looking statements for any reason, including the factors set forth in "Item 1A. Risk Factors" and elsewhere in this annual report on Form 10-K. Other factors that could cause actual results to differ materially include:

- changes in the economy and the financial markets;
- risks associated with possible disruption in our operations or the economy generally due to terrorism or natural disasters;
- future changes in laws or regulations (including the interpretation of these laws and regulations by regulatory authorities) and conditions in our operating areas, particularly with respect to business development companies and RICs; and

- other considerations that may be disclosed from time to time in our publicly disseminated documents and filings.

We have based the forward-looking statements included in this annual report on Form 10-K on information available to us on the date of this annual report on Form 10-K, and we assume no obligation to update any such forward-looking statements. Although we undertake no obligation to revise or update any forward-looking statements, whether as a result of new information, future events or otherwise, you are advised to consult any additional disclosures that we may make directly to you or through reports that we in the future may file with the SEC, including annual reports on Form 10-K, quarterly reports on Form 10-Q and current reports on Form 8-K.

Except as otherwise specified, references to “the Company,” “we,” “us,” and “our,” refer to Fifth Street Finance Corp.

## Overview

We are a specialty finance company that lends to and invests in small and mid-sized companies in connection with investments by private equity sponsors. Our investment objective is to maximize our portfolio’s total return by generating current income from our debt investments and capital appreciation from our equity investments.

We were formed as a Delaware limited partnership (Fifth Street Mezzanine Partners III, L.P.) on February 15, 2007. Effective as of January 2, 2008, Fifth Street Mezzanine Partners III, L.P. merged with and into Fifth Street Finance Corp. At the time of the merger, all outstanding partnership interests in Fifth Street Mezzanine Partners III, L.P. were exchanged for 12,480,972 shares of common stock in Fifth Street Finance Corp.

Our consolidated financial statements prior to January 2, 2008 reflect our operations as a Delaware limited partnership (Fifth Street Mezzanine Partners III, L.P.) prior to our merger with and into a corporation (Fifth Street Finance Corp.).

On June 17, 2008, we completed an initial public offering of 10,000,000 shares of our common stock at the offering price of \$14.12 per share. Our shares are currently listed on the New York Stock Exchange under the symbol “FSC.”

On July 21, 2009, we completed a follow-on public offering of 9,487,500 shares of our common stock, which included the underwriters’ exercise of their over-allotment option, at the offering price of \$9.25 per share.

On September 25, 2009, we completed a follow-on public offering of 5,520,000 shares of our common stock, which included the underwriters’ exercise of their over-allotment option, at the offering price of \$10.50 per share.

## Current Market Conditions

Since mid-2007, the financial services sector has been negatively impacted by significant write-offs related to sub-prime mortgages and the re-pricing of credit risk. Global debt and equity markets have suffered substantial stress, volatility, illiquidity and disruption, with sub-prime mortgage-related issues being the most significant contributing factor. These forces reached unprecedented levels by the fall of 2008, resulting in the insolvency or acquisition of, or government assistance to, several major domestic and international financial institutions. These events have significantly diminished overall confidence in the debt and equity markets and caused increasing economic uncertainty. This reduced confidence and uncertainty could further exacerbate the overall market disruptions and risks to businesses in need of capital.

In particular, the disruptions in the financial markets have increased the spread between the yields realized on risk-free and higher risk securities, resulting in illiquidity in parts of the financial markets. This widening of spreads makes it more difficult for lower middle market companies to access capital as traditional senior lenders become more selective, equity sponsors delay transactions for better earnings visibility, and

sellers are hesitant to accept lower purchase multiples. As a result, we are seeing a smaller number of attractive transactions in the lower end of the middle market.

Despite these factors, our deal pipeline is robust, with high quality transactions backed by private equity sponsors in the lower middle market. As always, we remain cautious in selecting new investment opportunities, and will only deploy capital in deals which are consistent with our disciplined philosophy of pursuing superior risk-adjusted returns. In this regard, we had \$113.2 million of cash and cash equivalents on hand at September 30, 2009 to fund investments. As evidenced by recent activities (see — “Recent Developments”), we expect to grow the business in part by increasing the average investment size when and where appropriate. At the same time, we expect to focus more on first lien transactions. We also expect to invest in more floating rate facilities, with rate floors, to protect against interest rate decreases.

Although we currently have sufficient capital available to fund investments, a prolonged period of market disruptions may cause us to reduce the volume of loans we originate and/or fund, which could have an adverse effect on our business, financial condition, and results of operations. Furthermore, because our common stock has generally traded at a price below our current net asset value per share over the last several months and we are not generally able under the 1940 Act to sell our common stock at a price below net asset value per share, we may be limited in our ability to raise equity capital. See “Item 1. Business — Regulation — Common Stock” for a discussion of the approval we received from our stockholders to issue shares of our common stock below net asset value per share.

## **Critical Accounting Policies**

### ***FASB Accounting Standards Codification***

The issuance of *FASB Accounting Standards Codification*<sup>TM</sup> (the “Codification”) on July 1, 2009 (effective for interim or annual reporting periods ending after September 15, 2009), changes the way that U.S. generally accepted accounting principles (“GAAP”) are referenced. Beginning on that date, the Codification officially became the single source of authoritative nongovernmental GAAP; however, SEC registrants must also consider rules, regulations, and interpretive guidance issued by the SEC or its staff. The switch affects the way companies refer to U.S. GAAP in financial statements and in their accounting policies. All existing standards that were used to create the Codification were superseded by the Codification. Instead, references to standards will consist solely of the number used in the Codification’s structural organization. For example, it is no longer proper to refer to FASB Statement No. 157, *Fair Value Measurement*, which is now ASC Topic 820 *Fair Value Measurements and Disclosures* (“ASC 820”).

Consistent with the effective date of the Codification, financial statements for periods ending after September 15, 2009, refers to the Codification structure, not pre-Codification historical GAAP.

### ***Basis of Presentation***

Effective January 2, 2008, Fifth Street Mezzanine Partners III, L.P. (the “Partnership”), a Delaware limited partnership organized on February 15, 2007, merged with and into Fifth Street Finance Corp. The merger involved the exchange of shares between companies under common control. In accordance with the guidance on exchanges of shares between entities under common control, our results of operations and cash flows for the fiscal year ended September 30, 2008 are presented as if the merger had occurred as of October 1, 2007. Accordingly, no adjustments were made to the carrying value of assets and liabilities (or the cost basis of investments) as a result of the merger. Prior to January 2, 2008, references to the Company are to the Partnership. Since January 2, 2008, references to the Company, FSC, “we” or “our” are to Fifth Street Finance Corp., unless the context otherwise requires. The Company’s financial results for the fiscal year ended September 30, 2007 refer to the Partnership.

The preparation of financial statements in accordance with GAAP requires management to make certain estimates and assumptions affecting amounts reported in the consolidated financial statements. We have identified investment valuation and revenue recognition as our most critical accounting estimates. We continuously evaluate our estimates, including those related to the matters described below. These estimates

are based on the information that is currently available to us and on various other assumptions that we believe to be reasonable under the circumstances. Actual results could differ materially from those estimates under different assumptions or conditions. A discussion of our critical accounting policies follows.

#### **Investment Valuation**

We are required to report our investments that are not publicly traded or for which current market values are not readily available at fair value. The fair value is deemed to be the value at which an enterprise could be sold in a transaction between two willing parties other than through a forced or liquidation sale.

Under ASC 820, which we adopted effective October 1, 2008, we perform detailed valuations of our debt and equity investments on an individual basis, using market based, income based, and bond yield approaches as appropriate.

Under the market approach, we estimate the enterprise value of the portfolio companies in which we invest. There is no one methodology to estimate enterprise value and, in fact, for any one portfolio company, enterprise value is best expressed as a range of fair values, from which we derive a single estimate of enterprise value. To estimate the enterprise value of a portfolio company, we analyze various factors, including the portfolio company's historical and projected financial results. Typically, private companies are valued based on multiples of EBITDA (Earnings Before Interest, Taxes, Depreciation and Amortization), cash flows, net income, revenues, or in limited cases, book value. We generally require portfolio companies to provide annual audited and quarterly and monthly unaudited financial statements, as well as annual projections for the upcoming fiscal year.

Under the income approach, we generally prepare and analyze discounted cash flow models based on our projections of the future free cash flows of the business. Under the bond yield approach, we use bond yield models to determine the present value of the future cash flow streams of our debt investments. We review various sources of transactional data, including private mergers and acquisitions involving debt investments with similar characteristics, and assess the information in the valuation process.

We also may, when conditions warrant, utilize an expected recovery model, whereby we use alternate procedures to determine value when the customary approaches are deemed to be not as relevant or reliable.

Our Board of Directors undertakes a multi-step valuation process each quarter in connection with determining the fair value of our investments:

- Our quarterly valuation process begins with each portfolio company or investment being initially valued by the deal team within our investment adviser responsible for the portfolio investment;
- Preliminary valuations are then reviewed and discussed with the principals of our investment adviser;
- Separately, an independent valuation firm engaged by the Board of Directors prepares preliminary valuations on a selected basis and submits a report to us;
- The deal team compares and contrasts its preliminary valuations to the report of the independent valuation firm and resolves any differences;
- The deal team prepares a final valuation report for the Valuation Committee of our Board of Directors;
- The Valuation Committee of our Board of Directors reviews the preliminary valuations, and the deal team responds and supplements the preliminary valuations to reflect any comments provided by the Valuation Committee;
- The Valuation Committee of our Board of Directors makes a recommendation to the Board of Directors; and
- The Board of Directors discusses valuations and determines the fair value of each investment in our portfolio in good faith.



The fair value of all of our investments at September 30, 2009, and September 30, 2008, was determined by our Board of Directors. Our Board of Directors is solely responsible for the valuation of our portfolio investments at fair value as determined in good faith pursuant to our valuation policy and our consistently applied valuation process.

Our Board of Directors has engaged an independent valuation firm to provide us with valuation assistance. Upon completion of its process each quarter, the independent valuation firm provides us with a written report regarding the preliminary valuations of selected portfolio securities as of the close of such quarter. We will continue to engage an independent valuation firm to provide us with assistance regarding our determination of the fair value of selected portfolio securities each quarter; however, our Board of Directors is ultimately and solely responsible for determining the fair value of our investments in good faith.

An independent valuation firm, Murray, Devine & Co., Inc., provided us with assistance in our determination of the fair value of 91.9% of our portfolio for the quarter ended December 31, 2007, 92.1% of our portfolio for the quarter ended March 31, 2008, 91.7% of our portfolio for the quarter ended June 30, 2008, 92.8% of our portfolio for the quarter ended September 30, 2008, 100% of our portfolio for the quarter ended December 31, 2008, 88.7% of our portfolio for the quarter ended March 31, 2009 (or 96.0% of our portfolio excluding our investment in IZI Medical Products, Inc., which closed on March 31, 2009 and therefore was not part of the independent valuation process), 92.1% of our portfolio for the quarter ended June 30, 2009, and 28.1% of our portfolio for the quarter ended September 30, 2009.

Our \$50 million credit facility with Bank of Montreal was terminated effective September 16, 2009. The facility required independent valuations for at least 90% of the portfolio on a quarterly basis. With the termination of this facility, this valuation test is no longer required. However, we still intend to have a portion of the portfolio valued by an independent third party on a quarterly basis, with a substantial portion being valued on an annual basis.

As of September 30, 2009 and September 30, 2008, approximately 72.0% and 91.5%, respectively, of our total assets represented investments in portfolio companies valued at fair value.

Effective October 1, 2008, we adopted ASC 820. In accordance with that standard, we changed our presentation for all periods presented to net unearned fees against the associated debt investments. Prior to the adoption of ASC 820 on October 1, 2008, we reported unearned fees as a single line item on our Consolidated Balance Sheets and Consolidated Schedules of Investments. This change in presentation had no impact on the overall net cost or fair value of our investment portfolio and had no impact on our financial position or results of operations.

The following table summarizes the effect of the adoption of ASC 820 on the presentation of our investment portfolio in the Consolidated Financial Statements.

|   | Fair Value as<br>Reported in the<br>September 30, 2008<br>Financial Statements<br>as Filed in the<br>September 30, 2008<br>Form 10-K | Change in Presentation<br>of Unearned Fee Income<br>to Conform with<br>ASC 820 | Fair Value as Reported<br>in the September 30, 2008<br>Consolidated Financial<br>Statements as<br>Filed in the<br>September 30, 2009<br>Form 10-K |
|---|--|--|---|
| Affiliate investments                               | \$ 73,106,057  | \$ (1,755,640)   | \$ 71,350,417   |
| Non-control/Non-affiliate investments               | 205,889,362  | (3,480,625)  | 202,408,737   |
| Unearned fee income                                 | (5,236,265)  | 5,236,265  | —   |
| <b>Total investments net of unearned fee income</b> | <b>\$ 273,759,154</b>  | <b>\$ —</b>  | <b>\$ 273,759,154</b>   |

## **Revenue Recognition**

### *Interest and Dividend Income*

Interest income, adjusted for amortization of premium and accretion of original issue discount, is recorded on the accrual basis to the extent that such amounts are expected to be collected. We stop accruing interest on investments when it is determined that interest is no longer collectible. Distributions from portfolio companies are recorded as dividend income when the distribution is received.

### *Fee Income*

We receive a variety of fees in the ordinary course of our business, including origination fees. We account for our fee income in accordance with ASC Topic 605-25 *Multiple-Element Arrangements* ("ASC 605-25") which addresses certain aspects of a company's accounting for arrangements containing multiple revenue-generating activities. In some arrangements, the different revenue-generating activities (deliverables) are sufficiently separable and there exists sufficient evidence of their fair values to separately account for some or all of the deliverables (i.e., there are separate units of accounting). ASC 605-25 states that the total consideration received for the arrangement be allocated to each unit based upon each unit's relative fair value. In other arrangements, some or all of the deliverables are not independently functional, or there is not sufficient evidence of their fair values to account for them separately. The timing of revenue recognition for a given unit of accounting depends on the nature of the deliverable(s) in that accounting unit (and the corresponding revenue recognition model) and whether the general conditions for revenue recognition have been met. Fee income for which fair value cannot be reasonably ascertained is recognized using the interest method in accordance with ASC 310-20 *Nonrefundable Fees and Other Costs*.

As of September 30, 2009, we are also entitled to receive approximately \$6.8 million in aggregate exit fees across 11 portfolio investments upon the future exit of those investments. Exit fees are fees which are earned and payable upon the exit of a debt security and, similar to a prepayment penalty, are not accrued or otherwise included in net investment income until received. Such fees will be paid to us when a portfolio company exits our loan, for example in a refinancing, or when the loan matures. The receipt of such fees as well the timing of our receipt of such fees is contingent upon a successful exit event for each of the 11 investments.

### *Payment-in-Kind (PIK) Interest*

Our loans typically contain a contractual PIK interest provision. The PIK interest, which represents contractually deferred interest added to the loan balance that is generally due at the end of the loan term, is generally recorded on the accrual basis to the extent such amounts are expected to be collected. We generally cease accruing PIK interest if there is insufficient value to support the accrual or if we do not expect the portfolio company to be able to pay all principal and interest due. Our decision to cease accruing PIK interest involves subjective judgments and determinations based on available information about a particular portfolio company, including whether the portfolio company is current with respect to its payment of principal and interest on its loans and debt securities; monthly and quarterly financial statements and financial projections for the portfolio company; our assessment of the portfolio company's business development success, including product development, profitability and the portfolio company's overall adherence to its business plan; information obtained by us in connection with periodic formal update interviews with the portfolio company's management and, if appropriate, the private equity sponsor; and information about the general economic and market conditions in which the portfolio company operates. Based on this and other information, we determine whether to cease accruing PIK interest on a loan or debt security. Our determination to cease accruing PIK interest on a loan or debt security is generally made well before our full write-down of such loan or debt security.

For a discussion of risks we are subject to as a result of our use of PIK interest in connection with our investments, see "Item 1A. Risk Factors — Risks Relating to Our Business and Structure — We may have difficulty paying our required distributions if we recognize income before or without receiving cash representing such income," "— We may in the future choose to pay dividends in our own stock, in which case you may be required to pay tax in excess of the cash you receive" and "— Our incentive fee may induce our investment adviser to make speculative investments." In addition, if it is subsequently determined that we will

not be able to collect any previously accrued PIK interest, the fair value of our loans or debt securities would decline by the amount of such previously accrued, but uncollectible, PIK interest.

To maintain our status as a RIC, PIK income must be paid out to our stockholders in the form of dividends even though we have not yet collected the cash and may never collect the cash relating to the PIK interest. Accumulated PIK interest was approximately \$12.1 million and represented 4.0% of the fair value of our portfolio of investments as of September 30, 2009 and approximately \$5.4 million or 2.0% as of September 30, 2008. The net increase in loan balances as a result of contracted PIK arrangements are separately identified in our Consolidated Statements of Cash Flows.

#### Portfolio Composition

Our investments principally consist of loans, purchased equity investments and equity grants in privately-held companies. Our loans are typically secured by either a first or second lien on the assets of the portfolio company, generally have terms of up to six years (but an expected average life of between three and four years) and typically bear interest at fixed rates and to a lesser extent, at floating rates. We are currently focusing our new debt origination efforts on first lien loans.

A summary of the composition of our investment portfolio at cost and fair value as a percentage of total investments is shown in the following tables:

|                    | September 30,<br>2009 | September 30,<br>2008 |
|--------------------|-----------------------|-----------------------|
| <b>Cost:</b>       |                       |                       |
| First lien debt    | 46.82%                | 37.41%                |
| Second lien debt   | 50.08%                | 59.38%                |
| Purchased equity   | 1.27%                 | 1.42%                 |
| Equity grants      | 1.83%                 | 1.79%                 |
| Total              | <u>100.00%</u>        | <u>100.00%</u>        |
| <b>Fair value:</b> |                       |                       |
| First lien debt    | 47.40%                | 39.54%                |
| Second lien debt   | 51.37%                | 58.78%                |
| Purchased equity   | 0.17%                 | 0.73%                 |
| Equity grants      | 1.06%                 | 0.95%                 |
| Total              | <u>100.00%</u>        | <u>100.00%</u>        |

The industry composition of our portfolio at cost and fair value were as follows:

| By Industry                             | September 30,<br>2009 | September 30,<br>2008 |
|---|-----------------------|-----------------------|
| <b>Cost:</b>                            |                       |                       |
| Healthcare technology                   | 11.37%                | 3.33%                 |
| Healthcare services                     | 10.04%                | 8.01%                 |
| Footwear and apparel                    | 6.85%                 | 6.21%                 |
| Restaurants                             | 6.20%                 | 6.65%                 |
| Construction and engineering            | 5.89%                 | 6.45%                 |
| Healthcare facilities                   | 5.50%                 | 6.27%                 |
| Trailer leasing services                | 5.21%                 | 5.85%                 |
| Manufacturing — mechanical products     | 4.71%                 | 5.33%                 |
| Data processing and outsourced services | 4.12%                 | 4.77%                 |
| Media — Advertising                     | 4.10%                 | 4.40%                 |

| By Industry                             | September 30, | September 30, |
|---|---------------|---------------|
|   | 2009          | 2008          |
| Merchandise display                     | 3.98%         | 4.40%         |
| Home furnishing retail                  | 3.93%         | 3.93%         |
| Housewares & specialties                | 3.68%         | 3.93%         |
| Emulsions manufacturing                 | 3.59%         | 3.28%         |
| Air freight and logistics               | 3.29%         | 0.00%         |
| Capital goods                           | 3.05%         | 3.32%         |
| Environmental & facilities services     | 2.73%         | 3.08%         |
| Food distributors                       | 2.73%         | 4.13%         |
| Household products/ specialty chemicals | 2.38%         | 4.08%         |
| Entertainment — theaters                | 2.32%         | 4.05%         |
| Leisure facilities                      | 2.20%         | 2.58%         |
| Building products                       | 2.13%         | 2.39%         |
| Lumber products                         | 0.00%         | 3.56%         |
| Total                                   | 100.00%       | 100.00%       |
| <b>Fair value:</b>                      |               |               |
| Healthcare technology                   | 12.27%        | 3.60%         |
| Healthcare services                     | 11.26%        | 8.54%         |
| Footwear and apparel                    | 7.37%         | 6.55%         |
| Healthcare facilities                   | 5.96%         | 6.66%         |
| Construction and engineering            | 5.96%         | 6.82%         |
| Restaurants                             | 5.94%         | 6.44%         |
| Manufacturing — mechanical products     | 5.03%         | 5.66%         |
| Data processing and outsourced services | 4.44%         | 5.00%         |
| Media — Advertising                     | 4.37%         | 4.57%         |
| Merchandise display                     | 4.36%         | 4.68%         |
| Emulsions manufacturing                 | 4.05%         | 3.48%         |
| Air freight and logistics               | 3.60%         | 0.00%         |
| Home furnishing retail                  | 3.45%         | 3.92%         |
| Trailer leasing services                | 3.29%         | 6.20%         |
| Capital goods                           | 3.26%         | 3.57%         |
| Food distributors                       | 3.00%         | 4.38%         |
| Entertainment — theaters                | 2.52%         | 4.30%         |
| Leisure facilities                      | 2.38%         | 2.74%         |
| Building products                       | 2.06%         | 2.55%         |
| Environmental & facilities services     | 2.04%         | 3.24%         |
| Housewares & specialties                | 1.90%         | 4.17%         |
| Household products/specialty chemicals  | 1.49%         | 1.33%         |
| Lumber products                         | 0.00%         | 1.60%         |
| Total                                   | 100.00%       | 100.00%       |

#### Portfolio Asset Quality

We employ a grading system to assess and monitor the credit risk of our loan portfolio. We rate all loans on a scale from 1 to 5. The system is intended to reflect the performance of the borrower's business, the collateral coverage of the loan, and other factors considered relevant to making a credit judgment.

- Investment Rating 1 is used for investments that are performing above expectations and/or a capital gain is expected.
- Investment Rating 2 is used for investments that are performing substantially within our expectations, and whose risks remain neutral or favorable compared to the potential risk at the time of the original investment. All new loans are initially rated 2.

- Investment Rating 3 is used for investments that are performing below our expectations and that require closer monitoring, but where we expect no loss of investment return (interest and/or dividends) or principal. Companies with a rating of 3 may be out of compliance with financial covenants.
- Investment Rating 4 is used for investments that are performing below our expectations and for which risk has increased materially since the original investment. We expect some loss of investment return, but no loss of principal.
- Investment Rating 5 is used for investments that are performing substantially below our expectations and whose risks have increased substantially since the original investment. Investments with a rating of 5 are those for which some loss of principal is expected.

The following table shows the distribution of our investments on the 1 to 5 investment rating scale at fair value, as of September 30, 2009 and September 30, 2008:

| Investment Rating | September 30, 2009 |                |                | September 30, 2008 |                |                |
|-------------------|--------------------|----------------|----------------|--------------------|----------------|----------------|
|                   | Fair Value         | % of Portfolio | Leverage Ratio | Fair Value         | % of Portfolio | Leverage Ratio |
| 1                 | \$ 22,913,497      | 7.65%          | 1.70           | \$ 7,705,461       | 2.76%          | 4.05           |
| 2                 | 248,506,393        | 82.94%         | 4.34           | 249,024,303        | 89.26%         | 4.23           |
| 3                 | 6,122,236          | 2.04%          | 10.04          | 17,707,790         | 6.35%          | 5.86           |
| 4                 | 16,377,904         | 5.47%          | 8.31           | 4,557,565          | 1.63%          | 9.80           |
| 5                 | 5,691,107          | 1.90%          | NM(1)          | —                  | 0.00%          | —              |
| Total             | \$ 299,611,137     | 100.00%        | 4.42           | \$ 278,995,119     | 100.00%        | 4.42           |

(1) Due to operating performance this ratio is not measurable.

As a result of current economic conditions and their impact on certain of our portfolio companies, we have agreed to modify the payment terms of our investments in nine of our portfolio companies as of September 30, 2009. Such modified terms include increased payment-in-kind interest provisions and reduced cash interest rates. These modifications, and any future modifications to our loan agreements as a result of the current economic conditions or otherwise, may limit the amount of interest income that we recognize from the modified investments, which may, in turn, limit our ability to make distributions to our stockholders. See note 9 to the Consolidated Schedule of Investments as of September 30, 2009 in our financial statements included herein.

#### Loans and Debt Securities on Non-Accrual Status

As of September 30, 2009, we had stopped accruing PIK interest and original issue discount on five investments, including two investments that had not paid their scheduled monthly cash interest payments or were otherwise on non-accrual status. At September 30, 2008, none of our loans or debt securities were on non-accrual status.

Income non-accrual amounts for the year ended September 30, 2009 were as follows:

|                      |                    |
|----------------------|--------------------|
| Cash interest income | \$2,938,190        |
| PIK interest income  | 1,398,347          |
| OID income           | 402,522            |
| Total                | <u>\$4,739,059</u> |

#### Discussion and Analysis of Results and Operations

##### Results of Operations

The principal measure of our financial performance is the net income (loss) which includes net investment income (loss), net realized gain (loss) and net unrealized appreciation (depreciation). Net investment income is

the difference between our income from interest, dividends, fees, and other investment income and total expenses. Net realized gain (loss) on investments is the difference between the proceeds received from dispositions of portfolio investments and their stated costs. Net unrealized appreciation (depreciation) on investments is the net change in the fair value of our investment portfolio.

We were formed as a Delaware limited partnership (Fifth Street Mezzanine Partners III, L.P.) on February 15, 2007 and we had limited operations through September 30, 2007. As a result, there is limited comparability for fiscal year ended September 30, 2008 and the prior period from February 15, 2007 (inception) through September 30, 2007.

#### **Comparison of years ended September 30, 2009 and September 30, 2008**

##### *Total Investment Income*

Total investment income includes interest and dividend income on our investments, fee income and other investment income. Fee income consists principally of loan and arrangement fees, annual administrative fees, unused fees, prepayment fees, amendment fees, equity structuring fees and waiver fees. Other investment income consists primarily of the accelerated recognition of deferred financing fees received from our portfolio companies on the repayment of the outstanding investment, the sale of the investment or reduction of available credit, and interest on cash and cash equivalents on deposit with financial institutions.

Total investment income for the years ended September 30, 2009 and September 30, 2008 was approximately \$49.8 million and \$33.2 million, respectively. For the year ended September 30, 2009, this amount primarily consisted of approximately \$46.0 million of interest income from portfolio investments (which included approximately \$7.4 million of payment-in-kind or PIK interest), and \$3.5 million of fee income. For the year ended September 30, 2008, this amount primarily consisted of approximately \$30.5 million of interest income from portfolio investments (which included approximately \$4.9 million of PIK interest), and \$1.8 million of fee income.

The increase in our total investment income for the year ended September 30, 2009 as compared to the year ended September 30, 2008 was primarily attributable to higher average levels of outstanding debt investments, which was principally due to an increase of two debt investments in our portfolio in the year-over-year period, partially offset by debt repayments received during the same period.

##### *Expenses*

Expenses (net of the waived portion of the base management fee) for the years ended September 30, 2009 and September 30, 2008 were approximately \$18.4 million and \$13.1 million, respectively. Expenses increased for the year ended September 30, 2009 as compared to the year ended September 30, 2008 by approximately \$5.3 million, primarily as a result of increases in base management fee, incentive fees and other general and administrative expenses.

The increase in base management fee resulted from an increase in our total assets as reflected in the growth of the investment portfolio offset partially by our investment adviser's unilateral decision to waive approximately \$172,000 of the base management fee for the year ended September 30, 2009. Incentive fees were implemented effective January 2, 2008 when Fifth Street Mezzanine Partners III, L.P. merged with and into Fifth Street Finance Corp., and reflect the growth of our net investment income before such fees.

##### *Net Investment Income*

As a result of the \$16.6 million increase in total investment income as compared to the \$5.3 million increase in total expenses, net investment income for the year ended September 30, 2009 reflected a \$11.3 million, or 55.7%, increase compared to the year ended September 30, 2008.

##### *Realized Gain (Loss) on Sale of Investments*

Net realized gain (loss) on the sale of investments is the difference between the proceeds received from dispositions of portfolio investments and their stated costs. During the year ended September 30, 2009, we

exited our investment in American Hardwoods Industries, LLC and recorded a realized loss of \$10.4 million, and recorded a \$4.0 million realized loss on our investment in CPAC, Inc. in connection with our determination that the investment was permanently impaired based on, among other things, our analysis of changes in the portfolio company's business operations and prospects. During the year ended September 30, 2008, we sold our equity investment in Filet of Chicken and realized a gain of approximately \$62,000.

*Net Change in Unrealized Appreciation or Depreciation on Investments*

Net unrealized appreciation or depreciation on investments is the net change in the fair value of our investment portfolio during the reporting period, including the reversal of previously recorded unrealized appreciation or depreciation when gains or losses are realized. During the year ended September 30, 2009, we recorded net unrealized depreciation of \$10.8 million. This consisted of \$14.3 million of reclassifications to realized losses, offset by \$23.1 million of net unrealized depreciation on debt investments and \$2.0 million of net unrealized depreciation on equity investments. During the year ended September 30, 2008, we recorded net unrealized depreciation of \$16.9 million. This consisted of \$12.1 million of net unrealized depreciation on debt investments and \$4.8 million of net unrealized depreciation on equity investments.

***Comparison of year ended September 30, 2008 and the period February 15, 2007 (inception) through September 30, 2007***

*Total Investment Income*

Total investment income for the year ended September 30, 2008 and the period February 15, 2007 (inception) through September 30, 2007 was approximately \$33.2 million and \$4.3 million, respectively. For the year ended September 30, 2008, this amount primarily consisted of approximately \$30.5 million of interest income from portfolio investments (which included approximately \$4.9 million of payment-in-kind or PIK interest), and \$1.8 million of fee income. For the period ended September 30, 2007, this amount primarily consisted of approximately \$4.1 million of interest income from portfolio investments (which included approximately \$0.6 million of PIK interest), and \$0.2 million of fee income.

The increase in our total investment income for the year ended September 30, 2008 as compared to the period ended September 30, 2007 was primarily attributable to higher average levels of outstanding debt investments, which was principally due to fourteen new debt investments in our portfolio in the year-over-year period, partially offset by debt repayments received during the same period.

*Expenses*

Expenses for the year ended September 30, 2008 and the period February 15, 2007 (inception) through September 30, 2007 were approximately \$13.1 million and \$3.3 million, respectively. Expenses increased for the year ended September 30, 2008 as compared to the period ended September 30, 2007 by approximately \$9.8 million, primarily as a result of increases in base management fee, incentive fees, professional fees and other general and administrative expenses.

The increase in base management fee resulted from an increase in our total assets as reflected in the growth of the investment portfolio. Incentive fees were implemented effective January 2, 2008 when Fifth Street Mezzanine Partners III, L.P. merged with and into Fifth Street Finance Corp., and reflect the growth of our net investment income before such fees.

*Net Investment Income*

As a result of the \$28.9 million increase in total investment income as compared to the \$9.8 million increase in total expenses, net investment income for the year ended September 30, 2008 reflected a \$19.1 million, or 2000%, increase compared to the period ended September 30, 2007.

#### *Realized Gain (Loss) on Sale of Investments*

During the year ended September 30, 2008 we sold our equity investment in Filet of Chicken and realized a gain of approximately \$62,000. During the period ended September 30, 2007 we had no realized gains or losses.

#### *Net Change in Unrealized Appreciation or Depreciation on Investments*

During the year ended September 30, 2008, we recorded net unrealized depreciation of \$16.9 million. This consisted of \$12.1 million of net unrealized depreciation on debt investments and \$4.8 million of net unrealized depreciation on equity investments. During the period ended September 30, 2007, we recorded net unrealized depreciation on equity investments of \$0.1 million.

#### **Financial Condition, Liquidity and Capital Resources**

##### *Cash Flows*

To fund growth, we have a number of alternatives available to increase capital, including, but not limited to, raising equity, increasing debt, or funding from operational cash flow. Additionally, we may reduce investment size by syndicating a portion of any given transaction.

For the year ended September 30, 2009, we experienced a net increase in cash and cash equivalents of \$90.3 million. During that period, we used \$19.7 million of cash in operating activities, primarily for the funding of \$62.0 million of investments, partially offset by \$18.3 million of principal payments received and \$31.4 million of net investment income. During the same period cash provided by financing activities was \$110.0 million, primarily consisting of \$138.6 million of proceeds from issuance of our common stock, partially offset by \$27.1 million of cash dividends paid, \$1.0 million of offering costs paid and \$0.5 million paid to repurchase shares of our common stock on the open market. We intend to fund our future distribution obligations through operating cash flow or with funds obtained through future equity offerings or credit lines, as we deem appropriate.

For the year ended September 30, 2008, we experienced a net increase in cash and equivalents of \$5.3 million. During that period, we used \$179.4 million of cash in operating activities primarily for the funding of \$202.4 million of investments, partially offset by \$2.2 million of principal payments received and \$20.1 million of net investment income. During the same period cash provided by financing activities was \$184.6 million, primarily consisting of \$131.3 million of proceeds from issuance of our common stock, partially offset by \$8.9 million of cash dividends paid and \$1.5 million of offering costs paid.

From inception (February 15, 2007) through September 30, 2007, our cash and equivalents increased by approximately \$17.7 million. During that period, our cash flow from operations was minimal at approximately \$1.0 million excluding investments in portfolio companies. \$89.0 million was invested in portfolio companies financed primarily from capital contributions of approximately \$105.7 million from partners.

As of September 30, 2009, we had \$113.2 million in cash and cash equivalents, portfolio investments (at fair value) of \$299.6 million, \$2.9 million of interest receivable, no borrowings outstanding and unfunded commitments of \$9.75 million. At November 30, 2009, we had \$114.2 million in cash and cash equivalents, \$3.1 million of interest receivable, \$10.2 of dividends payable, no borrowings outstanding and unfunded commitments of \$9.3 million.

As of September 30, 2008, we had \$22.9 million in cash and cash equivalents, portfolio investments (at fair value) of \$273.8 million, \$2.4 million of interest receivable, no borrowings outstanding under our secured revolving credit facility and unfunded commitments of \$24.7 million.

##### **Significant capital transactions that occurred from Inception through September 30, 2009**

On March 30, 2007, we closed on approximately \$78 million in capital commitments from the sale of limited partnership interests of Fifth Street Mezzanine Partners III, L.P. As of September 30, 2007, we had closed on additional capital commitments, bringing the total amount of capital commitments to \$165 million.



We then closed on capital commitments from the sale of additional limited partnership interests of Fifth Street Mezzanine Partners III, L.P., bringing the total amount of capital commitments to \$169.4 million as of November 28, 2007.

On January 2, 2008, Fifth Street Mezzanine Partners III, L.P. merged with and into Fifth Street Finance Corp. At the time of the merger, all outstanding partnership interests in Fifth Street Mezzanine Partners III, L.P. were exchanged for 12,480,972 shares of common stock of Fifth Street Finance Corp.

On January 15, 2008, we entered into a \$50 million secured revolving credit facility with the Bank of Montreal, at a rate of LIBOR (London Inter Bank Offered Rate) plus 1.5%, with a one year maturity date. The credit facility was secured by our existing investments.

On April 25, 2008, we sold 30,000 shares of non-convertible, non-participating preferred stock, with a par value of \$0.01 and a liquidation preference of \$500 per share ("Series A Preferred Stock") at a price of \$500 per share to a company controlled by Bruce E. Toll, one of our directors at that time, for total proceeds of \$15 million. For the three months ended June 30, 2008, we paid dividends of approximately \$234,000 on the 30,000 shares of Series A Preferred Stock. The dividend payment is considered and included in interest expense for accounting purposes since the preferred stock has a mandatory redemption feature. On June 30, 2008, we redeemed 30,000 shares outstanding of our Series A Preferred Stock at the mandatory redemption price of 101% of the liquidation preference, or \$15,150,000. The \$150,000 is considered and included in interest expense for accounting purposes due to the stock's mandatory redemption feature.

On May 1, 2008, our Board of Directors declared a dividend of \$0.30 per share of common stock payable to stockholders of record as of May 19, 2008. On June 3, 2008, we paid a cash dividend of \$1.9 million and issued 133,316 shares of common stock totaling \$1.9 million to those stockholders who did not opt out of reinvesting the dividend under our dividend reinvestment plan.

On June 17, 2008, we completed an initial public offering of 10,000,000 shares of our common stock at the offering price of \$14.12 per share and received gross proceeds of approximately \$141.2 million. Our shares are currently listed on the New York Stock Exchange under the symbol "FSC."

On August 6, 2008, our Board of Directors declared a dividend of \$0.31 per share of common stock payable to stockholders of record as of September 10, 2008. On September 26, 2008, we paid a cash dividend of \$5.1 million and purchased 196,786 shares of common stock totaling \$1.9 million on the open market to satisfy the share obligations under the dividend reinvestment plan.

In October 2008, we repurchased 78,000 shares of our common stock on the open market as part of our share repurchase program following its announcement on October 15, 2008.

On December 9, 2008, our Board of Directors declared a dividend of \$0.32 per share of common stock payable to stockholders of record as of December 19, 2008 and a dividend of \$0.33 per share of common stock payable to stockholders of record as of December 30, 2008. On December 18, 2008, our Board of Directors declared a special dividend of \$0.05 per share of common stock payable to stockholders of record as of December 30, 2008. On December 29, 2008, we paid a cash dividend of \$6.4 million and issued 105,326 shares of common stock totaling \$0.8 million under the dividend reinvestment plan. On January 29, 2009, we paid a cash dividend of \$7.6 million and issued 161,206 shares of common stock totaling \$1.0 million under the dividend reinvestment plan.

On December 30, 2008, Bank of Montreal approved a renewal of our \$50 million credit facility. The terms included a 50 basis points commitment fee, an interest rate of LIBOR +3.25% and a term of 364 days.

On April 14, 2009, our Board of Directors declared a dividend of \$0.25 per share of common stock payable to stockholders of record as of May 26, 2009. On June 25, 2009, we paid a cash dividend of \$5.6 million and issued 11,776 shares of common stock totaling \$0.1 million under the dividend reinvestment plan.

On July 21, 2009, we completed a public offering of 9,487,500 shares of common stock, which included the underwriters' full exercise of their option to purchase up to 1,237,500 shares of common stock, at a price of \$9.25 per share, raising approximately \$87.8 million in gross proceeds.

On August 3, 2009, our Board of Directors declared a dividend of \$0.25 per share of common stock payable to stockholders of record as of September 8, 2009. On September 25, 2009, we paid a cash dividend of \$7.5 million and issued 56,890 shares of common stock totaling \$0.6 million under the dividend reinvestment plan.

On September 16, 2009, we gave notice of termination to Bank of Montreal with respect to our \$50 million credit facility.

On September 25, 2009 we completed a public offering of 5,520,000 shares of common stock, which included the underwriters' full exercise of their option to purchase up to 720,000 shares of common stock, at a price of \$10.50 per share, raising approximately \$58.0 million in gross proceeds.

On November 16, 2009, we entered into a three year credit facility with Wachovia Bank, N.A., a Wells Fargo company, or Wachovia, in the amount of \$50 million with an accordion feature, which will allow for potential future expansion of the facility up to \$100 million, and will bear interest at LIBOR plus 4.00% per annum. See "— Borrowings" for a more detailed discussion of the credit facility.

We intend to continue to generate cash primarily from cash flows from operations, including interest earned from the temporary investment of cash in U.S. government securities and other high-quality debt investments that mature in one year or less, future borrowings and future offerings of securities. In the future, we may also securitize a portion of our investments in first and second lien senior loans or unsecured debt or other assets. To securitize loans, we would likely create a wholly owned subsidiary and contribute a pool of loans to the subsidiary. We would then sell interests in the subsidiary on a non-recourse basis to purchasers and we would retain all or a portion of the equity in the subsidiary. Our primary use of funds is investments in our targeted asset classes and cash distributions to holders of our common stock.

Although we expect to fund the growth of our investment portfolio through the net proceeds from future equity offerings, including our dividend reinvestment plan, and issuances of senior securities or future borrowings, to the extent permitted by the 1940 Act, we cannot assure you that our plans to raise capital will be successful. In this regard, because our common stock has traded at a price below our current net asset value per share over the last several months and we are limited in our ability to sell our common stock at a price below net asset value per share, we may be limited in our ability to raise equity capital. Our stockholders approved a proposal at a special meeting of stockholders held on June 24, 2009 that authorizes us to sell shares of our common stock below the then-current net asset value per share in one or more offerings for a period ending on the earlier of June 24, 2010 or the date of our next annual meeting of stockholders. We would need stockholder approval of a similar proposal to issue shares below net asset value per share at any time after our next annual meeting of stockholders, which we anticipate will be held in March 2010. See "Item 1A. Risk Factors — Risks Relating to Our Business and Structure — Regulations governing our operation as a business development company and RIC will affect our ability to, and the way in which we, raise additional capital and borrow for investment purposes, which may have a negative effect on our growth" and "— Because we intend to distribute between 90% and 100% of our income to our stockholders in connection with our election to be treated as a RIC, we will continue to need additional capital to finance our growth. If additional funds are unavailable or not available on favorable terms, our ability to grow will be impaired" for a discussion of the provisions of the 1940 Act that limit our ability to sell our common stock at a price below net asset value per share.

In addition, we intend to distribute between 90% and 100% of our taxable income to our stockholders in order to satisfy the requirements applicable to RICs under Subchapter M of the Code. See "Regulated Investment Company Status and Dividends" below. Consequently, we may not have the funds or the ability to fund new investments, to make additional investments in our portfolio companies, to fund our unfunded commitments to portfolio companies or to repay borrowings under our credit facility. In addition, the

illiquidity of our portfolio investments may make it difficult for us to sell these investments when desired and, if we are required to sell these investments, we may realize significantly less than their recorded value.

Also, as a business development company, we generally are required to meet a coverage ratio of total assets, less liabilities and indebtedness not represented by senior securities, to total senior securities, which include all of our borrowings and any outstanding preferred stock, of at least 200%. This requirement limits the amount that we may borrow. As of September 30, 2009, we were in compliance with this requirement. To fund growth in our investment portfolio in the future, we anticipate needing to raise additional capital from various sources, including the equity markets and the securitization or other debt-related markets, which may or may not be available on favorable terms, if at all.

Finally, in light of the conditions in the financial markets and the U.S. economy overall, we are considering other measures to help ensure adequate liquidity, including the formation of and application to license an SBIC subsidiary.

On May 19, 2009, we received a letter from the Investment Division of the SBA, that invited us to continue moving forward with the licensing of an SBIC subsidiary. Although our application to license this entity as an SBIC with the SBA is subject to the SBA approval, we remain cautiously optimistic that we will complete the licensing process. Our SBIC subsidiary will have an investment objective similar to ours and will make similar types of investments in accordance with SBIC regulations.

To the extent that we receive an SBIC license, our SBIC subsidiary will be allowed to issue SBA-guaranteed debentures, subject to the required capitalization of the SBIC subsidiary. SBA guaranteed debentures carry long-term fixed rates that are generally lower than rates on comparable bank and other debt. Under the regulations applicable to SBICs, an SBIC may have outstanding debentures guaranteed by the SBA generally in an amount up to twice its regulatory capital, which generally equates to the amount of its equity capital. The SBIC regulations currently limit the amount that our SBIC subsidiary may borrow to a maximum of \$150 million. This means that our SBIC subsidiary may access the full \$150 million maximum available if it has \$75 million in regulatory capital. However, we are not required to capitalize this subsidiary with \$75 million and may determine to capitalize it with a lesser amount. In addition, if we are able to obtain financing under the SBIC program, our SBIC subsidiary will be subject to regulation and oversight by the SBA, including requirements with respect to maintaining certain minimum financial ratios and other covenants. On July 14, 2009, we received a letter from the SBA indicating that our SBIC subsidiary's application had been approved for further processing and our SBIC subsidiary is eligible to make pre-licensing investments. During the year ended September 30, 2009, our SBIC subsidiary funded one pre-licensing investment.

In connection with the filing of our SBA license application, we will apply for exemptive relief from the SEC to permit us to exclude the debt of our SBIC subsidiary guaranteed by the SBA from our consolidated asset coverage ratio, which will enable us to fund more investments with debt capital. There can be no assurance that we will be granted an SBIC license or that, if granted, it will be granted in a timely manner, that if we are granted an SBIC license we will be able to capitalize the subsidiary to \$75 million to access the full \$150 million maximum borrowing amount available, or that we will receive the exemptive relief from the SEC.

We cannot provide any assurance that these measures will provide sufficient sources of liquidity to support our operations and growth given the unprecedented instability in the financial markets and the weak U.S. economy.

#### ***Borrowings***

On November 16, 2009, Fifth Street Funding, LLC, a wholly-owned bankruptcy remote, special purpose subsidiary ("Funding") and we, entered into a Loan and Servicing Agreement ("Agreement"), with respect to a three-year credit facility ("Facility") with Wachovia, Wells Fargo Securities, LLC, as administrative agent ("Wells Fargo"), each of the additional institutional and conduit lenders party thereto from time to time, and each of the lender agents party thereto from time to time, in the amount of \$50 million with an accordion feature, which will allow for potential future expansion of the Facility up to \$100 million. The Facility is secured by all of the assets of Funding, and all of our equity interest in Funding. The Facility bears interest at

LIBOR plus 4.00% per annum and has a maturity date of November 16, 2012. The Facility may be extended for up to two additional years upon the mutual consent of Wells Fargo and each of the lender parties thereto. We intend to use the net proceeds of the Facility to fund a portion of our loan origination activities and for general corporate purposes.

In connection with the Facility, we concurrently entered into (i) a Purchase and Sale Agreement with Funding, pursuant to which we will sell to Funding certain loan assets we have originated or acquired, or will originate or acquire and (ii) a Pledge Agreement with Wells Fargo Bank, National Association, pursuant to which we pledged all of our equity interests in Funding as security for the payment of Funding's obligations under the Agreement and other documents entered into in connection with the Facility.

The Agreement and related agreements governing the Facility required both Funding and us to, among other things (i) make representations and warranties regarding the collateral as well as each of our businesses, (ii) agree to certain indemnification obligations, and (iii) comply with various covenants, servicing procedures, limitations on acquiring and disposing of assets, reporting requirements and other customary requirements for similar credit facilities. The Facility documents also included usual and customary default provisions such as the failure to make timely payments under the Facility, a change in control of Funding, and the failure by Funding or us to materially perform under the Agreement and related agreements governing the Facility, which, if not complied with, could accelerate repayment under the Facility, thereby materially and adversely affecting our liquidity, financial condition and results of operations.

Each loan origination under the Facility is subject to the satisfaction of certain conditions. We cannot assure you that Funding will be able to borrow funds under the Facility at any particular time or at all.

We also gave notice of termination, effective September 16, 2009, to Bank of Montreal with respect to a \$50 million revolving credit facility. The revolving credit facility was scheduled to expire on December 29, 2009 and had an interest rate of LIBOR plus 3.25%.

Since our inception we have had funds available under the following agreements which we repaid or terminated prior to our election to be regulated as a business development company:

*Note Agreements.* We received loans of \$10 million on March 31, 2007 and \$5 million on March 30, 2007 from Bruce E. Toll, a former member of our Board of Directors, on each occasion for the purpose of funding our investments in portfolio companies. These note agreements accrued interest at 12% per annum. On April 3, 2007, we repaid all outstanding borrowings under these note agreements.

*Loan Agreements.* On January 15, 2008, we entered into a \$50 million secured revolving credit facility with the Bank of Montreal, at a rate of LIBOR plus 1.5%, with a one year maturity date. The secured revolving credit facility was secured by our existing investments. On December 30, 2008, Bank of Montreal renewed our \$50 million credit facility. The terms included a 50 basis points commitment fee, an interest rate of LIBOR +3.25% and a term of 364 days. On September 16, 2009, we gave notice of termination to Bank of Montreal with respect to this credit facility.

On April 2, 2007, we entered into a \$50 million loan agreement with Wachovia Bank, N.A., which was available for funding investments. The borrowings under the loan agreement accrued interest at LIBOR plus 0.75% per annum and had a maturity date in April 2008. In order to obtain such favorable rates, Mr. Toll, a former member of our Board of Directors, Mr. Tannenbaum, our president and chief executive officer, and FSMPIII GP, LLC, the general partner of our predecessor fund, each guaranteed our repayment of the \$50 million loan. We paid Mr. Toll a fee of 1% per annum of the \$50 million loan for such guarantee, which was paid quarterly or monthly at our election. Mr. Tannenbaum and FSMPIII GP received no compensation for their respective guarantees. As of November 27, 2007, we repaid and terminated this loan with Wachovia Bank, N.A.

#### ***Off-Balance Sheet Arrangements***

We may be a party to financial instruments with off-balance sheet risk in the normal course of business to meet the financial needs of our portfolio companies. As of September 30, 2009, our only off-balance sheet

arrangements consisted of \$9.8 million of unfunded commitments, which was comprised of \$7.8 million to provide debt financing to certain of our portfolio companies and \$2.0 million related to unfunded limited partnership interests. As of September 30, 2008, our only off-balance sheet arrangements consisted of \$24.7 million of unfunded commitments to provide debt financing to certain of our portfolio companies. Such commitments involve, to varying degrees, elements of credit risk in excess of the amount recognized in the balance sheet and are not reflected on our Consolidated Balance Sheets.

*Contractual Obligations*

A summary of the composition of unfunded commitments (consisting of revolving, term loans and limited partnership interests) as of September 30, 2009 and September 30, 2008 is shown in the table below:

|   | September 30,<br>2009 | September 30,<br>2008 |
|---|-----------------------|-----------------------|
| MK Network, LLC   | \$ —                  | \$ 2,000,000          |
| Rose Tarlow, Inc.   | —                     | 2,650,000             |
| Martini Park, LLC   | —                     | 11,000,000            |
| Fitness Edge, LLC   | —                     | 1,500,000             |
| Western Emulsions, Inc.   | —                     | 2,000,000             |
| Storyteller Theaters Corporation                                | 1,750,000             | 4,000,000             |
| HealthDrive Corporation   | 1,500,000             | 1,500,000             |
| IZI Medical Products, Inc.                                      | 2,500,000             | —                     |
| Trans-Trade, Inc.   | 2,000,000             | —                     |
| Riverlake Equity Partners II, LP (limited partnership interest) | 1,000,000             | —                     |
| Riverside Fund IV, LP (limited partnership interest)            | 1,000,000             | —                     |
| Total   | <u>\$ 9,750,000</u>   | <u>\$ 24,650,000</u>  |

We have entered into two contracts under which we have material future commitments, the investment advisory agreement, pursuant to which Fifth Street Management LLC has agreed to serve as our investment adviser, and the administration agreement, pursuant to which FSC, Inc. has agreed to furnish us with the facilities and administrative services necessary to conduct our day-to-day operations.

As discussed above, on November 16, 2009, we entered into a three year credit facility with Wachovia, in the amount of \$50 million with an accordion feature, which will allow for potential future expansion of the facility up to \$100 million, and will bear interest at LIBOR plus 4.00% per annum. We also gave notice of termination, effective September 16, 2009, to Bank of Montreal with respect to our existing \$50 million revolving credit facility with Bank of Montreal. The revolving credit facility with Bank of Montreal was scheduled to expire on December 29, 2009 and had an interest rate of LIBOR plus 3.25%.

*Regulated Investment Company Status and Dividends*

Effective as of January 2, 2008, Fifth Street Mezzanine Partners III, L.P. merged with and into Fifth Street Finance Corp., which has elected to be treated as a business development company under the 1940 Act. We elected, effective as of January 2, 2008, to be treated as a RIC under Subchapter M of the Code. As long as we qualify as a RIC, we will not be taxed on our investment company taxable income or realized net capital gains, to the extent that such taxable income or gains are distributed, or deemed to be distributed, to stockholders on a timely basis.

Taxable income generally differs from net income for financial reporting purposes due to temporary and permanent differences in the recognition of income and expenses, and generally excludes net unrealized appreciation or depreciation until realized. Dividends declared and paid by us in a year may differ from taxable income for that year as such dividends may include the distribution of current year taxable income or the distribution of prior year taxable income carried forward into and distributed in the current year. Distributions also may include returns of capital.

To maintain RIC tax treatment, we must, among other things, distribute, with respect to each taxable year, at least 90% of our investment company taxable income (i.e., our net ordinary income and our realized net short-term capital gains in excess of realized net long-term capital losses, if any). As a RIC, we are also subject to a federal excise tax, based on distributive requirements of our taxable income on a calendar year basis (i.e., calendar year 2009). We anticipate timely distribution of our taxable income within the tax rules; however, we may incur a U.S. federal excise tax for the calendar year 2009. We intend to make distributions to our stockholders on a quarterly basis of between 90% and 100% of our annual taxable income (which includes our taxable interest and fee income). We may retain for investment some or all of our net taxable capital gains (i.e., realized net long-term capital gains in excess of realized net short-term capital losses) and treat such amounts as deemed distributions to our stockholders. If we do this, our stockholders will be treated as if they received actual distributions of the capital gains we retained and then reinvested the net after-tax proceeds in our common stock. Our stockholders also may be eligible to claim tax credits (or, in certain circumstances, tax refunds) equal to their allocable share of the tax we paid on the capital gains deemed distributed to them. To the extent our taxable earnings for a fiscal taxable year fall below the total amount of our dividends for that fiscal year, a portion of those dividend distributions may be deemed a return of capital to our stockholders.

We may not be able to achieve operating results that will allow us to make distributions at a specific level or to increase the amount of these distributions from time to time. In addition, we may be limited in our ability to make distributions due to the asset coverage test for borrowings applicable to us as a business development company under the 1940 Act and due to provisions in our credit facility. If we do not distribute a certain percentage of our taxable income annually, we will suffer adverse tax consequences, including possible loss of our status as a RIC. We cannot assure stockholders that they will receive any distributions or distributions at a particular level.

#### ***Related Party Transactions***

We have entered into an investment advisory agreement with Fifth Street Management LLC, our investment adviser. Fifth Street Management is controlled by Leonard M. Tannenbaum, its managing member and our president and chief executive officer. Pursuant to the investment advisory agreement, payments will be equal to (a) a base management fee of 2.0% of the value of our gross assets, which includes any borrowings for investment purposes, and (b) an incentive fee based on our performance.

Pursuant to the administration agreement with FSC, Inc., FSC, Inc. will furnish us with the facilities and administrative services necessary to conduct our day-to-day operations, including equipment, clerical, bookkeeping and recordkeeping services at such facilities. In addition, FSC, Inc. will assist us in connection with the determination and publishing of our net asset value, the preparation and filing of tax returns and the printing and dissemination of reports to our stockholders. We will pay FSC, Inc. our allocable portion of overhead and other expenses incurred by it in performing its obligations under the administration agreement, including a portion of the rent and the compensation of our chief financial officer and his staff, and the staff of our chief compliance officer. Each of these contracts may be terminated by either party without penalty upon no fewer than 60 days' written notice to the other.

We have also entered into a license agreement with Fifth Street Capital LLC pursuant to which Fifth Street Capital LLC has agreed to grant us a non-exclusive, royalty-free license to use the name "Fifth Street." Fifth Street Capital LLC is controlled by Mr. Tannenbaum, its managing member. Under this agreement, we will have a right to use the "Fifth Street" name, for so long as Fifth Street Management LLC or one of its affiliates remains our investment adviser. Other than with respect to this limited license, we will have no legal right to the "Fifth Street" name.

#### ***Recent Developments***

On October 2, 2009, Storyteller Theaters Corporation drew \$250,000 on its line of credit. Prior to the draw, our unfunded commitment was \$1.75 million.

On October 8, 2009, we funded \$153,972 of our previously unfunded limited partnership interest in Riverside Fund IV, LP upon receipt of the first closing notice of the fund.

On October 16, 2009, Elephant & Castle, Inc. repaid \$3.9 million of principal outstanding under its term loan to us. The balance of the loan was assumed by Repechage Investments Limited ("RIL"), the equity sponsor's holding company. We received a first lien on the assets of RIL and a guaranty on the balance of our debt.

On October 21, 2009, we invested an additional \$6.0 million of second lien debt in Western Emulsions, Inc., an existing portfolio company, to support its growth initiatives.

On October 26, 2009, we executed a non-binding term sheet for \$41.25 million for a portion of an investment in a post-secondary education company. The proposed terms of this investment include a \$10 million revolver at Libor+950 with a Libor floor of 3% and a \$31.25 million first lien term loan at Libor+950 with a Libor floor of 3%. This is a senior secured first lien facility with a scheduled maturity of five years. This proposed investment is subject to the completion of our due diligence, approval process and documentation, and may not result in a completed investment. We may syndicate a portion of this investment.

On November 6, 2009, we executed a non-binding term sheet for \$34.0 million for an investment in a specialty chemical distributor. The proposed terms of this investment include a \$10 million revolver at 10%, a \$10 million Term Loan A at 10%, and a \$14 million Term Loan B at 12%. This is a first lien facility with a scheduled maturity of five years. This proposed investment is subject to the completion of our due diligence, approval process and documentation, and may not result in a completed investment. We may syndicate a portion of this investment.

On November 12, 2009, we declared a \$0.27 per share dividend to common stockholders of record as of December 10, 2009. The dividend is payable December 29, 2009.

On November 12, 2009, we executed a letter agreement for the potential sale of our second lien term loan to CPAC, Inc. and/or our 2,297 shares of common stock of CPAC, Inc. We received a non-refundable deposit of \$150,000 in connection with the letter agreement.

On November 16, 2009, we entered into a three-year credit facility with Wachovia in the amount of \$50 million with an accordion feature, which will allow for potential future expansion of the facility up to \$100 million, and will bear interest at a rate of LIBOR plus 4% per annum. See "— Borrowings" for a more detailed discussion of the credit facility.

On November 23, 2009, we received a cash payment in the amount of \$0.1 million, representing payment in full of all amounts due in connection with the cancellation of our loan agreement with American Hardwoods Industries Holdings, LLC on August 3, 2009.

On December 1, 2009, we executed a non-binding term sheet for \$28.75 million for an investment in a specialty food company. The proposed terms of this investment include a \$2.0 million revolver at 10%, a \$10 million Term Loan A at 10%, and a \$16.75 million Term Loan B at 12% cash and 3% PIK. This is a first lien facility with a scheduled maturity of five years. This proposed investment is subject to the completion of our due diligence, approval process and documentation, and may not result in a completed investment. We may syndicate a portion of this investment.

On December 3, 2009, we executed a non-binding term sheet for \$57.3 million for an investment in a contract manufacturer for medical device original equipment manufacturers. The proposed terms of this investment include a \$4.0 million revolver at Libor+700 with a 3% Libor floor, a \$33 million Term Loan A at Libor+700 with a 3% Libor floor, and a \$20.3 million Term Loan B at 12% cash interest and 2% PIK. This is a first lien loan facility with a scheduled maturity of five years. This proposed investment is subject to the

completion of our due diligence, approval process and documentation, and may not result in a completed investment. We may syndicate a portion of this investment.

On December 4, 2009, we executed a non-binding term sheet for \$34.0 million for an investment in a franchisor of consumer services. The proposed terms of this investment include a \$2.0 million revolver at Libor+650 with a 3% Libor floor, a \$10 million first lien Term Loan A at Libor+675 with a 3% Libor floor, and a \$22.0 million Term Loan B at 12% cash and 2% PIK. This is a first lien loan facility with a scheduled maturity of five years. This proposed investment is subject to the completion of our due diligence, approval process and documentation, and may not result in a completed investment. We may syndicate a portion of this investment.

#### **Recently Issued Accounting Standards**

See Note 2 to the Consolidated Financial Statements for a description of recent accounting pronouncements, including the expected dates of adoption and the anticipated impact on the Consolidated Financial Statements.

#### **Item 7A. Quantitative and Qualitative Disclosures about Market Risk**

We are subject to financial market risks, including changes in interest rates. Changes in interest rates may affect both our cost of funding and our interest income from portfolio investments, cash and cash equivalents and idle funds investments. Our risk management systems and procedures are designed to identify and analyze our risk, to set appropriate policies and limits and to continually monitor these risks and limits by means of reliable administrative and information systems and other policies and programs. Our investment income will be affected by changes in various interest rates, including LIBOR and prime rates, to the extent any of our debt investments include floating interest rates. The significant majority of our debt investments are made with fixed interest rates for the term of the investment. However, as of September 30, 2009, approximately 5.0% of our debt investment portfolio (at fair value) and 4.9% of our debt investment portfolio (at cost) bore interest at floating rates. As of September 30, 2009, we had not entered into any interest rate hedging arrangements. At September 30, 2009, based on our applicable levels of floating-rate debt investments, a 1.0% change in interest rates would not have a material effect on our level of interest income from debt investments.

Our investments are carried at fair value as determined in good faith by our Board of Directors in accordance with the 1940 Act (See — “Investment Valuation” under *Critical Accounting Policies*). Our valuation methodology utilizes discount rates in part in valuing our investments, and changes in those discount rates may have an impact on the valuation of our investments. Assuming no changes in our investment and capital structure, a hypothetical increase or decrease in discount rates of 100 basis points would increase or decrease our net assets resulting from operations by approximately \$7 million.



Item 8. *Consolidated Financial Statements and Supplementary Data*

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**REPORT OF INDEPENDENT REGISTERED PUBLIC ACCOUNTING FIRM**

Board of Directors and Stockholders of  
**Fifth Street Finance Corp.**

We have audited the accompanying consolidated balance sheets, including the consolidated schedule of investments, of Fifth Street Finance Corp. (a Delaware corporation and successor to Fifth Street Mezzanine Partners III, L.P.) (the "Company") as of September 30, 2009 and 2008, and the related consolidated statements of operations, changes in net assets, and cash flows and the financial highlights (included in Note 12) for the years ended September 30, 2009 and 2008, and the period February 15, 2007 (inception) through September 30, 2007. Our audits of the basic financial statements included the Schedule of Investments In and Advances to Affiliates. These financial statements, financial highlights and financial statement schedule are the responsibility of the Company's management. Our responsibility is to express an opinion on these financial statements based on our audits.

We conducted our audits in accordance with the standards of the Public Company Accounting Oversight Board (United States). Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements and financial highlights are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. Our procedures included physical inspection or confirmation of securities owned as of September 30, 2009 and 2008. We believe that our audits provide a reasonable basis for our opinion.

In our opinion, the financial statements and financial highlights referred to above present fairly, in all material respects, the financial position of Fifth Street Finance Corp. as of September 30, 2009 and 2008, and the results of its operations, changes in net assets and its cash flows and financial highlights for the years ended September 30, 2009 and 2008, and the period February 15, 2007 (inception) through September 30, 2007 in conformity with accounting principles generally accepted in the United States of America. Also, in our opinion, the related financial statement schedule, when considered in relation to the basic financial statements taken as a whole, presents fairly, in all material respects, the information set forth therein.

As discussed in Note 2 to the accompanying consolidated financial statements, effective October 1, 2008, the Company adopted ASC 820, "Fair Value Measurements and Disclosures."

We also have audited, in accordance with the standards of the Public Company Accounting Oversight Board (United States), Fifth Street Finance Corp.'s internal control over financial reporting as of September 30, 2009, based on criteria established in *Internal Control — Integrated Framework* issued by the Committee of Sponsoring Organizations of the Treadway Commission ("COSO") and our report dated December 9, 2009 expressed and unqualified opinion.

/s/ GRANT THORNTON LLP

New York, New York  
December 9, 2009

REPORT OF INDEPENDENT REGISTERED PUBLIC ACCOUNTING FIRM

Board of Directors and Shareholders  
**Fifth Street Finance Corp.**

We have audited Fifth Street Finance Corp.'s (a Delaware corporation and successor to Fifth Street Mezzanine Partners III, L.P.) (the "Company") internal control over financial reporting as of September 30, 2009, based on criteria established in *Internal Control — Integrated Framework* issued by the Committee of Sponsoring Organizations of the Treadway Commission ("COSO"). Fifth Street Capital Corp.'s management is responsible for maintaining effective internal control over financial reporting and for its assessment of the effectiveness of internal control over financial reporting, included in the accompanying Management's Report on Internal Control over Financial Reporting. Our responsibility is to express an opinion on Fifth Street Capital Corp.'s internal control over financial reporting based on our audit.

We conducted our audit in accordance with the standards of the Public Company Accounting Oversight Board (United States). Those standards require that we plan and perform the audit to obtain reasonable assurance about whether effective internal control over financial reporting was maintained in all material respects. Our audit included obtaining an understanding of internal control over financial reporting, assessing the risk that a material weakness exists, testing and evaluating the design and operating effectiveness of internal control based on the assessed risk, and performing such other procedures as we considered necessary in the circumstances. We believe that our audit provides a reasonable basis for our opinion.

A company's internal control over financial reporting is a process designed to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles. A company's internal control over financial reporting includes those policies and procedures that (1) pertain to the maintenance of records that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the company; (2) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the company are being made only in accordance with authorizations of management and directors of the company; and (3) provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use, or disposition of the company's assets that could have a material effect on the financial statements.

Because of its inherent limitations, internal control over financial reporting may not prevent or detect misstatements. Also, projections of any evaluation of effectiveness to future periods are subject to the risk that controls may become inadequate because of changes in conditions, or that the degree of compliance with the policies or procedures may deteriorate.

In our opinion, Fifth Street Capital Corp. maintained effective internal control over financial reporting in all material respects as of September 30, 2009, based on criteria established in *Internal Control — Integrated Framework* issued by COSO.

We also have audited, in accordance with the standards of the Public Company Accounting Oversight Board (United States), the accompanying consolidated balance sheets, including the consolidated schedule of investments, of Fifth Street Finance Corp. as of September 30, 2009 and 2008, and the related consolidated statements of operations, changes in net assets, and cash flows and the financial highlights (included in Note 12) for the years ended September 30, 2009 and 2008, and the period February 15, 2007 (inception) through September 30, 2007 and our report dated December 9, 2009 expressed an unqualified opinion and included explanatory paragraphs regarding the Company's adoption of ASC 820, "Fair Value Measurements and Disclosures."

/s/ GRANT THORNTON LLP

New York, New York  
December 9, 2009

Fifth Street Finance Corp.

Consolidated Balance Sheets

|  | September 30,<br>2009 | September 30,<br>2008 |
|--|-----------------------|-----------------------|
| <b>ASSETS</b>  |                       |                       |
| <b>Investments at Fair Value:</b>  |                       |                       |
| Control investments (cost 9/30/09: \$12,045,029; cost 9/30/08: \$0)  | \$ 5,691,107          | \$ —                  |
| Affiliate investments (cost 9/30/09: \$71,212,035; cost 9/30/08: \$81,820,636)   | 64,748,560            | 71,350,417            |
| Non-control/Non-affiliate investments (cost 9/30/09 \$243,975,221; cost 9/30/08 \$208,764,349)   | 229,171,470           | 202,408,737           |
| <b>Total Investments at Fair Value</b>   | <b>299,611,137</b>    | <b>273,759,154</b>    |
| Cash and cash equivalents  | 113,205,287           | 22,906,376            |
| Interest receivable  | 2,866,991             | 2,367,806             |
| Due from portfolio company   | 154,324               | 80,763                |
| Prepaid expenses and other assets  | 49,609                | 34,706                |
| <b>Total Assets</b>  | <b>\$ 415,887,348</b> | <b>\$ 299,148,805</b> |
| <b>LIABILITIES AND STOCKHOLDERS' EQUITY</b>  |                       |                       |
| <b>Liabilities:</b>  |                       |                       |
| Accounts payable, accrued expenses and other liabilities   | \$ 723,856            | \$ 567,691            |
| Base management fee payable  | 1,552,160             | 1,381,212             |
| Incentive fee payable  | 1,944,263             | 1,814,013             |
| Due to FSC, Inc.   | 703,900               | 574,102               |
| Interest payable   | —                     | 38,750                |
| Payments received in advance from portfolio companies  | 190,378               | 133,737               |
| Offering costs payable   | 216,720               | 303,461               |
| <b>Total Liabilities</b>   | <b>5,331,277</b>      | <b>4,812,966</b>      |
| <b>Stockholders' Equity:</b>   |                       |                       |
| Preferred stock, \$0.01 par value, 200,000 shares authorized, no shares issued and outstanding   | —                     | —                     |
| Common stock, \$0.01 par value, 49,800,000 shares authorized, 37,878,987 and 22,614,289 shares issued and outstanding at September 30, 2009 and September 30, 2008 | 378,790               | 226,143               |
| Additional paid-in-capital   | 439,989,597           | 300,524,155           |
| Net unrealized depreciation on investments   | (27,621,147)          | (16,825,831)          |
| Net realized gain (loss) on investments  | (14,310,713)          | 62,487                |
| Accumulated undistributed net investment income  | 12,119,544            | 10,348,885            |
| <b>Total Stockholders' Equity</b>  | <b>410,556,071</b>    | <b>294,335,839</b>    |
| <b>Total Liabilities and Stockholders' Equity</b>  | <b>\$ 415,887,348</b> | <b>\$ 299,148,805</b> |

See notes to Consolidated Financial Statements.

Fifth Street Finance Corp.

Consolidated Statements of Operations

|  | Year Ended<br>September 30,<br>2009 | Year Ended<br>September 30,<br>2008 | For the<br>Period<br>February 15, 2007<br>(Inception) through<br>September 30,<br>2007 |
|--|-------------------------------------|-------------------------------------|--|
| <b>Interest income:</b>  |                                     |                                     |  |
| Control investments  | \$ —                                | \$ —                                | \$ —   |
| Affiliate investments  | 10,632,844                          | 8,804,543                           | 2,407,709  |
| Non-control/Non-affiliate investments                                | 27,931,097                          | 16,800,945                          | 1,068,368  |
| Interest on cash and cash equivalents                                | 208,824                             | 750,605                             | —  |
| <b>Total interest income</b>   | <b>38,772,765</b>                   | <b>26,356,093</b>                   | <b>3,476,077</b>   |
| <b>PIK interest income:</b>  |                                     |                                     |  |
| Control investments  | —                                   | —                                   | —  |
| Affiliate investments  | 1,634,116                           | 1,539,934                           | 492,695  |
| Non-control/Non-affiliate investments                                | 5,821,173                           | 3,357,464                           | 96,190   |
| <b>Total PIK interest income</b>                                     | <b>7,455,289</b>                    | <b>4,897,398</b>                    | <b>588,795</b>   |
| <b>Fee income:</b>   |                                     |                                     |  |
| Control investments  | —                                   | —                                   | —  |
| Affiliate investments  | 1,101,656                           | 702,463                             | 164,222  |
| Non-control/Non-affiliate investments                                | 2,440,538                           | 1,105,576                           | 64,610   |
| <b>Total fee income</b>  | <b>3,542,194</b>                    | <b>1,808,039</b>                    | <b>228,832</b>   |
| <b>Dividend and other income:</b>                                    |                                     |                                     |  |
| Control investments  | —                                   | —                                   | —  |
| Affiliate investments  | —                                   | 26,740                              | 2,228  |
| Non-control/Non-affiliate investments                                | 22,791                              | 130,971                             | —  |
| Other income   | 35,396                              | —                                   | —  |
| <b>Total dividend and other income</b>                               | <b>58,187</b>                       | <b>157,711</b>                      | <b>2,228</b>   |
| <b>Total investment income</b>                                       | <b>49,828,435</b>                   | <b>33,219,241</b>                   | <b>4,295,932</b>   |
| <b>Expenses:</b>   |                                     |                                     |  |
| Base management fee  | 6,060,690                           | 4,258,334                           | 1,564,189  |
| Incentive fee  | 7,940,579                           | 4,117,554                           | —  |
| Professional fees  | 1,492,554                           | 1,389,541                           | 211,057  |
| Board of Directors fees  | 310,250                             | 249,000                             | —  |
| Organizational costs   | —                                   | 200,747                             | 413,101  |
| Interest expense   | 636,901                             | 917,043                             | 522,316  |
| Administrator expense  | 796,898                             | 978,387                             | —  |
| Line of credit guarantee expense                                     | —                                   | 83,333                              | 250,000  |
| Transaction fees   | —                                   | 206,726                             | 357,012  |
| General and administrative expenses                                  | 1,500,197                           | 674,360                             | 18,867   |
| Total expenses   | 18,638,069                          | 13,075,025                          | 3,336,542  |
| Base management fee waived   | (171,948)                           | —                                   | —  |
| <b>Net expenses</b>  | <b>18,466,121</b>                   | <b>13,075,025</b>                   | <b>3,336,542</b>   |
| <b>Net investment income</b>   | <b>31,362,314</b>                   | <b>20,144,216</b>                   | <b>959,390</b>   |
| <b>Unrealized appreciation (depreciation) on investments:</b>        |                                     |                                     |  |
| Control investments  | (1,792,015)                         | —                                   | —  |
| Affiliate investments  | 286,190                             | (10,570,012)                        | 99,792   |
| Non-control/Non-affiliate investments                                | (9,289,492)                         | (6,378,755)                         | 23,144   |
| <b>Total unrealized appreciation (depreciation) on investments</b>   | <b>(10,795,317)</b>                 | <b>(16,948,767)</b>                 | <b>122,936</b>   |
| <b>Realized gain (loss) on investments:</b>                          |                                     |                                     |  |
| Control investments  | —                                   | —                                   | —  |
| Affiliate investments  | (4,000,000)                         | —                                   | —  |
| Non-control/Non-affiliate investments                                | (10,373,200)                        | 62,487                              | —  |
| <b>Total realized gain (loss) on investments</b>                     | <b>(14,373,200)</b>                 | <b>62,487</b>                       | <b>—</b>   |
| <b>Net increase in net assets resulting from operations</b>          | <b>\$ 6,193,797</b>                 | <b>\$ 3,257,936</b>                 | <b>\$ 1,082,326</b>  |
| <b>Net Investment Income per common share — basic and diluted(1)</b> |                                     |                                     |  |
| Unrealized depreciation per common share                             | \$ 1.27                             | \$ 1.29                             | N/A  |
| Realized gain (loss) per common share                                | (0.44)                              | (1.09)                              | N/A  |
| <b>Earnings per common share — basic and diluted(1)</b>              | <b>\$ 0.25</b>                      | <b>\$ 0.21</b>                      | <b>N/A</b>   |
| Weighted average common shares — basic and diluted                   | 24,654,325                          | 15,557,469                          | N/A  |

(1) The earnings and net investment income per share calculations for the year ended September 30, 2008 are based on the assumption that if the number of shares issued at the time of the merger on January 2, 2008 (12,480,972 shares of common stock) had been issued at the beginning of the fiscal year on October 1, 2007, the Company's earnings and net investment income per share would have been \$0.21 and \$1.29 per share, respectively.

See notes to Consolidated Financial Statements.

Fifth Street Finance Corp.

Consolidated Statements of Changes in Net Assets

|   | Year Ended<br>September 30,<br>2009 | Year Ended<br>September 30,<br>2008 | For the Period<br>February 15, 2007<br>(Inception) through<br>September 30,<br>2007 |
|---|-------------------------------------|-------------------------------------|---|
| <b>Operations:</b>  |                                     |                                     |   |
| Net investment income   | \$ 31,362,314                       | \$ 20,144,216                       | \$ 959,390  |
| Net unrealized appreciation (depreciation) on investments         | (10,795,317)                        | (16,948,767)                        | 122,936   |
| Net realized gains (losses) on investments                        | (14,373,200)                        | 62,487                              | —   |
| Net increase in net assets resulting from operations              | <u>6,193,797</u>                    | <u>3,257,936</u>                    | <u>1,082,326</u>  |
| <b>Stockholder transactions:</b>                                  |                                     |                                     |   |
| Distributions to stockholders from net investment income          | (29,591,657)                        | (10,754,721)                        | —   |
| Net decrease in net assets from stockholder transactions          | <u>(29,591,657)</u>                 | <u>(10,754,721)</u>                 | <u>—</u>  |
| <b>Capital share transactions:</b>                                |                                     |                                     |   |
| Issuance of preferred stock                                       | —                                   | 15,000,000                          | —   |
| Issuance of common stock  | 137,625,075                         | 129,448,456                         | —   |
| Issuance of common stock under dividend reinvestment plan         | 2,455,499                           | 1,882,200                           | —   |
| Redemption of preferred stock                                     | —                                   | (15,000,000)                        | —   |
| Repurchases of common stock                                       | (462,482)                           | —                                   | —   |
| Issuance of common stock upon conversion of partnership interests | —                                   | 169,420,000                         | —   |
| Redemption of partnership interest for common stock               | —                                   | (169,420,000)                       | —   |
| Fractional shares paid to partners from conversion                | —                                   | (358)                               | —   |
| Capital contributions from partners                               | —                                   | 66,497,000                          | 105,733,369   |
| Capital withdrawals by partners                                   | —                                   | (2,810,369)                         | —   |
| Net increase in net assets from capital share transactions        | <u>139,618,092</u>                  | <u>195,016,929</u>                  | <u>105,733,369</u>  |
| <b>Total increase in net assets</b>                               | <b>116,220,232</b>                  | <b>187,520,144</b>                  | <b>106,815,695</b>  |
| <b>Net assets at beginning of period</b>                          | <u>294,335,839</u>                  | <u>106,815,695</u>                  | <u>—</u>  |
| <b>Net assets at end of period</b>                                | <b>\$ 410,556,071</b>               | <b>\$ 294,335,839</b>               | <b>\$ 106,815,695</b>   |
| <b>Net asset value per common share</b>                           | <b>\$ 10.84</b>                     | <b>\$ 13.02</b>                     | <b>N/A</b>  |
| Common shares outstanding at end of period                        | 37,878,987                          | 22,614,289                          | N/A   |

See notes to Consolidated Financial Statements.

Fifth Street Finance Corp.

Consolidated Statements of Cash Flows

|   | Year Ended<br>September 30,<br>2009 | Year Ended<br>September 30,<br>2008 | For the Period<br>February 15, 2007<br>(Inception) through<br>September 30,<br>2007 |
|---|-------------------------------------|-------------------------------------|---|
| <b>Cash flows from operating activities:</b>  |                                     |                                     |   |
| Net increase in net assets resulting from operations                                    | \$ 6,193,797                        | \$ 3,257,936                        | \$ 1,082,326  |
| Change in unrealized (appreciation) depreciation on investments                         | 10,795,317                          | 16,948,767                          | (122,936)   |
| Realized (gains) losses on investments  | 14,373,200                          | (62,487)                            | —   |
| PIK interest income, net of cash received   | (7,027,149)                         | (4,782,986)                         | (588,795)   |
| Recognition of fee income   | (3,542,194)                         | (1,808,039)                         | (228,832)   |
| Fee income received   | 3,895,559                           | 5,478,011                           | 1,795,125   |
| Accretion of original issue discount on investments                                     | (842,623)                           | (954,436)                           | (265,739)   |
| Other income  | (35,396)                            | —                                   | —   |
| <b>Changes in operating assets and liabilities:</b>                                     |                                     |                                     |   |
| Increase in interest receivable   | (499,185)                           | (1,613,183)                         | (754,623)   |
| (Increase) decrease in due from portfolio company                                       | (73,561)                            | 46,952                              | (127,715)   |
| (Increase) decrease in prepaid management fees  | —                                   | 252,586                             | (252,586)   |
| Increase in prepaid expenses and other assets   | (14,903)                            | (34,706)                            | —   |
| Increase in accounts payable, accrued expenses and other liabilities                    | 156,170                             | 150,584                             | 417,107   |
| Increase in base management fee payable   | 170,948                             | 1,381,212                           | —   |
| Increase in incentive fee payable   | 130,250                             | 1,814,013                           | —   |
| Increase in due to FSC, Inc.  | 129,798                             | 574,102                             | —   |
| Increase (decrease) in interest payable   | (38,750)                            | 28,816                              | 9,934   |
| Increase in payments received in advance from portfolio companies                       | 56,641                              | 133,737                             | —   |
| Purchase of investments   | (61,950,000)                        | (202,402,611)                       | (88,979,675)  |
| Proceeds from the sale of investments   | 144,000                             | 62,487                              | —   |
| Principal payments received on investments (scheduled repayments and revolver paydowns) | 6,951,902                           | 2,152,992                           | —   |
| Principal payments received on investments (payoffs)                                    | 11,350,000                          | —                                   | —   |
| <b>Net cash used in operating activities</b>  | <b>(19,676,179)</b>                 | <b>(179,376,253)</b>                | <b>(88,016,409)</b>   |
| <b>Cash flows from financing activities:</b>  |                                     |                                     |   |
| Dividends paid in cash  | (27,136,158)                        | (8,872,521)                         | —   |
| Repurchases of common stock   | (462,482)                           | —                                   | —   |
| Capital contributions   | —                                   | 66,497,000                          | 105,733,369   |
| Capital withdrawals   | —                                   | (2,810,369)                         | —   |
| Borrowings  | 29,500,000                          | 79,250,000                          | 86,562,983  |
| Repayments of borrowings  | (29,500,000)                        | (79,250,000)                        | (86,562,983)  |
| Proceeds from the issuance of common stock  | 138,578,307                         | 131,316,000                         | —   |
| Proceeds from the issuance of mandatorily redeemable preferred stock                    | —                                   | 15,000,000                          | —   |
| Redemption of preferred stock   | —                                   | (15,000,000)                        | —   |
| Offering costs paid   | (1,004,577)                         | (1,501,179)                         | (62,904)  |
| Redemption of partnership interests for cash  | —                                   | (358)                               | —   |
| <b>Net cash provided by financing activities</b>  | <b>109,975,090</b>                  | <b>184,628,573</b>                  | <b>105,670,465</b>  |
| <b>Net increase in cash and cash equivalents</b>  | <b>90,298,911</b>                   | <b>5,252,320</b>                    | <b>17,654,056</b>   |
| Cash and cash equivalents, beginning of period  | 22,906,376                          | 17,654,056                          | —   |
| <b>Cash and cash equivalents, end of period</b>   | <b>\$ 113,205,287</b>               | <b>\$ 22,906,376</b>                | <b>\$ 17,654,056</b>  |
| <b>Supplemental Information:</b>  |                                     |                                     |   |
| Cash paid for interest  | \$ 425,651                          | \$ 888,227                          | \$ 512,382  |
| Non-cash financing activities:  |                                     |                                     |   |
| Issuance of shares of common stock under dividend reinvestment plan                     | \$ 2,455,499                        | \$ 1,882,200                        | \$ —  |
| Reinvested shares of common stock under dividend reinvestment plan                      | \$ —                                | \$ (1,882,200)                      | \$ —  |
| Redemption of partnership interests   | \$ —                                | \$ (173,699,632)                    | \$ —  |
| Issuance of shares of common stock in exchange for partnership interests                | \$ —                                | \$ 173,699,632                      | \$ —  |

See notes to Consolidated Financial Statements.

**Fifth Street Finance Corp.**  
**Consolidated Schedule of Investments**  
**September 30, 2009**

| Portfolio Company/Type of Investment(1)(2)(5)                    | Industry                                 | Principal(8)  | Cost                 | Fair Value           |
|--|--|---------------|----------------------|----------------------|
| <b>Control Investments(3)</b>                                    |  |               |                      |                      |
| <i>Lighting by Gregory, LLC</i>                                  |  |               |                      |                      |
| First Lien Term Loan A, 9.75% due 2/28/2013                      | Housewares & Specialties                 | \$ 4,800,003  | \$ 4,728,589         | \$ 2,419,627         |
| First Lien Term Loan B, 14.5% due 2/28/2013                      |  | 7,115,649     | 6,906,440            | 3,271,480            |
| 97.38% membership interest                                       |  |               | 410,000              | —                    |
|  |  |               | <u>12,045,029</u>    | <u>5,691,107</u>     |
| <b>Total Control Investments</b>                                 |  |               | <b>\$ 12,045,029</b> | <b>\$ 5,691,107</b>  |
| <b>Affiliate Investments(4)</b>                                  |  |               |                      |                      |
| <i>O'Curran, Inc.</i>  |  |               |                      |                      |
| First Lien Term Loan A, 16.875% due 3/21/2012                    | Data Processing & Outsourced Services    | \$ 10,526,514 | \$ 10,370,246        | \$ 10,186,501        |
| First Lien Term Loan B, 16.875% due 3/21/2012                    |  | 2,765,422     | 2,722,952            | 2,919,071            |
| 1.75% Preferred Membership Interest in O'Curran Holding Co., LLC |  |               | 130,413              | 130,413              |
| 3.3% Membership Interest in O'Curran Holding Co., LLC            |  |               | 250,000              | 53,831               |
|  |  |               | <u>13,473,611</u>    | <u>13,289,816</u>    |
| <i>CPAC, Inc.(9)</i>   |  |               |                      |                      |
| Second Lien Term Loan, 17.5% due 4/13/2012                       | Household Products & Specialty Chemicals | 11,398,948    | 9,506,805            | 4,448,661            |
| Change-off of cost basis of impaired loan(12)                    |  |               | (4,000,000)          | —                    |
| 2,297 shares of Common Stock                                     |  |               | 2,297,000            | —                    |
|  |  |               | <u>7,803,805</u>     | <u>4,448,661</u>     |
| <i>Elephant &amp; Castle, Inc.</i>                               |  |               |                      |                      |
| Second Lien Term Loan, 15.5% due 4/20/2012                       | Restaurants                              | 8,030,061     | 7,553,247            | 7,311,604            |
| 7,500 shares of Series A Preferred Stock                         |  |               | 750,000              | 492,469              |
|  |  |               | <u>8,303,247</u>     | <u>7,804,073</u>     |
| <i>MK Network, LLC</i>   |  |               |                      |                      |
| First Lien Term Loan A, 13.5% due 6/1/2012                       | Healthcare technology                    | 9,500,000     | 9,220,111            | 9,033,826            |
| First Lien Term Loan B, 17.5% due 6/1/2012                       |  | 5,212,692     | 4,967,578            | 5,163,544            |
| First Lien Revolver, Prime + 1.5% (10% floor), due 6/1/2010(10)  |  | —             | —                    | —                    |
| 11,030 Membership Units(6)                                       |  |               | 771,575              | —                    |
|  |  |               | <u>14,959,264</u>    | <u>14,197,370</u>    |
| <i>Martini Park, LLC(9)</i>                                      |  |               |                      |                      |
| First Lien Term Loan, 14% due 2/20/2013                          | Restaurants                              | 4,390,798     | 3,408,351            | 2,068,303            |
| 5% membership interest   |  |               | 650,000              | —                    |
|  |  |               | <u>4,058,351</u>     | <u>2,068,303</u>     |
| <i>Caregiver Services, Inc.</i>                                  |  |               |                      |                      |
| Second Lien Term Loan A, LIBOR+6.85% (12% floor) due 2/25/2013   | Healthcare services                      | 8,570,595     | 8,092,364            | 8,225,400            |
| Second Lien Term Loan B, 16.5% due 2/25/2013                     |  | 14,242,034    | 13,440,995           | 13,508,338           |
| 1,080,399 shares of Series A Preferred Stock                     |  |               | 1,080,398            | 1,206,599            |
|  |  |               | <u>22,613,757</u>    | <u>22,940,337</u>    |
| <b>Total Affiliate Investments</b>                               |  |               | <b>\$ 71,212,035</b> | <b>\$ 64,748,560</b> |
| <b>Non-Control/Non-Affiliate Investments(7)</b>                  |  |               |                      |                      |
| <i>Best Vinyl Acquisition Corporation(9)</i>                     |  |               |                      |                      |
| Second Lien Term Loan, 12% due 3/30/2013                         | Building Products                        | \$ 7,000,000  | \$ 6,779,947         | \$ 6,138,582         |
| 25,641 Shares of Series A Preferred Stock                        |  |               | 253,846              | 20,326               |
| 25,641 Shares of Common Stock                                    |  |               | 2,564                | —                    |
|  |  |               | <u>7,036,357</u>     | <u>6,158,908</u>     |



**Fifth Street Finance Corp.**  
**Consolidated Schedule of Investments**  
**September 30, 2009**

| Portfolio Company/Type of Investment(1)(2)(5)                 | Industry                            | Principal(\$) | Cost       | Fair Value |
|---|-------------------------------------|---------------|------------|------------|
| <i>Traffic Control &amp; Safety Corporation</i>               | Construction and Engineering        |               |            |            |
| Second Lien Term Loan, 15% due 6/29/2014                      |                                     | 19,310,587    | 19,025,031 | 17,693,780 |
| 24,750 shares of Series B Preferred Stock                     |                                     |               | 247,500    | 158,512    |
| 25,000 shares of Common Stock                                 |                                     |               | 2,500      | —          |
|   |                                     |               | 19,275,031 | 17,852,292 |
| <i>Nicos Polymers &amp; Grinding Inc.(9)</i>                  | Environmental & facilities services |               |            |            |
| First Lien Term Loan A, LIBOR+5% (10% floor), due 7/17/2012   |                                     | 3,091,972     | 3,040,465  | 2,162,593  |
| First Lien Term Loan B, 13.5% due 7/17/2012                   |                                     | 5,980,128     | 5,716,250  | 3,959,643  |
| 3.32% Interest in Crowbrook Acquisition I LLC                 |                                     |               | 168,085    | —          |
|   |                                     |               | 8,924,801  | 6,122,236  |
| <i>TBA Global, LLC(9)</i>                                     | Media: Advertising                  |               |            |            |
| Second Lien Term Loan A, LIBOR+5% (10% floor), due 8/3/2010   |                                     | 2,583,805     | 2,576,304  | 2,565,305  |
| Second Lien Term Loan B, 14.5% due 8/3/2012                   |                                     | 10,797,936    | 10,419,185 | 10,371,277 |
| 53,994 Senior Preferred Shares                                |                                     |               | 215,975    | 162,621    |
| 191,977 Shares A Shares                                       |                                     |               | 191,977    | —          |
|   |                                     |               | 13,403,441 | 13,099,203 |
| <i>Fitness Edge, LLC</i>                                      | Leisure Facilities                  |               |            |            |
| First Lien Term Loan A, LIBOR+5.25% (10% floor), due 8/8/2012 |                                     | 1,750,000     | 1,740,069  | 1,753,262  |
| First Lien Term Loan B, 15% due 8/8/2012                      |                                     | 5,490,743     | 5,404,192  | 5,321,281  |
| 1,000 Common Units  |                                     |               | 42,908     | 70,354     |
|   |                                     |               | 7,187,169  | 7,144,897  |
| <i>Filet of Chicken(9)</i>                                    | Food Distributors                   |               |            |            |
| Second Lien Term Loan, 14.5% due 7/31/2012                    |                                     | 9,307,547     | 8,922,946  | 8,979,657  |
|   |                                     |               | 8,922,946  | 8,979,657  |
| <i>Boot Barn(9)</i>   | Footwear and Apparel                |               |            |            |
| Second Lien Term Loan, 14.5% due 10/3/2013                    |                                     | 22,518,091    | 22,175,818 | 22,050,462 |
| 24,706 shares of Series A Preferred Stock                     |                                     |               | 247,060    | 32,259     |
| 1,308 shares of Common Stock                                  |                                     |               | 131        | —          |
|   |                                     |               | 22,423,009 | 22,082,721 |
| <i>Premier Trailer Leasing, Inc.</i>                          | Trailer Leasing Services            |               |            |            |
| Second Lien Term Loan, 16.5% due 10/23/2012                   |                                     | 17,855,617    | 17,063,645 | 9,860,940  |
| 285 shares of Common Stock                                    |                                     |               | 1,140      | —          |
|   |                                     |               | 17,064,785 | 9,860,940  |
| <i>Pacific Press Technologies, Inc.</i>                       | Capital Goods                       |               |            |            |
| Second Lien Term Loan, 14.75% due 1/10/2013                   |                                     | 9,813,993     | 9,621,279  | 9,606,186  |
| 33,463 shares of Common Stock                                 |                                     |               | 344,513    | 160,299    |
|   |                                     |               | 9,965,792  | 9,766,485  |
| <i>Rose Tarlow, Inc.(9)</i>                                   | Home Furnishing Retail              |               |            |            |
| First Lien Term Loan, 12% due 1/25/2014                       |                                     | 10,191,188    | 10,016,956 | 8,827,182  |
| First Lien Revolver, LIBOR+4% (9% floor) due 1/25/2014(10)    |                                     | 1,550,000     | 1,538,806  | 1,509,219  |
| 0.00% membership interest in RTMH Acquisition Company(14)     |                                     |               | 1,275,000  | —          |
| 0.00% membership interest in RTMH Acquisition Company(14)     |                                     |               | 25,000     | —          |
|   |                                     |               | 12,855,762 | 10,336,401 |
| <i>Goldco, LLC</i>  | Restaurants                         |               |            |            |

**Fifth Street Finance Corp.**  
**Consolidated Schedule of Investments**  
**September 30, 2009**

| Portfolio Company/Type of Investment(1)(2)(5)              | Industry                                  | Principal(\$) | Cost                  | Fair Value            |
|--|---|---------------|-----------------------|-----------------------|
| Second Lien Term Loan, 17.5% due 1/31/2013                 |   | 8,024,147     | 7,926,647             | 7,938,639             |
| <i>Rail Acquisition Corp.</i>                              | Manufacturing -<br>Mechanical<br>Products |               | 7,926,647             | 7,938,639             |
| First Lien Term Loan, 17% due 4/1/2013                     |   | 15,668,956    | 15,416,411            | 15,081,138            |
| <i>Western Emulsions, Inc.</i>                             | Emulsions<br>Manufacturing                |               | 15,416,411            | 15,081,138            |
| Second Lien Term Loan, 15% due 6/30/2014                   |   | 11,928,600    | 11,743,630            | 12,130,945            |
| <i>Storytellers Theaters Corporation</i>                   | Entertainment -<br>Theaters               |               | 11,743,630            | 12,130,945            |
| First Lien Term Loan, 15% due 7/16/2014                    |   | 7,275,313     | 7,166,749             | 7,162,190             |
| First Lien Revolver, LIBOR+3.5% (10% floor), due 7/16/2014 |   | 250,000       | 234,167               | 223,136               |
| 1,692 shares of Common Stock                               |   |               | 169                   | —                     |
| 20,000 shares of Preferred Stock                           |   |               | 200,000               | 156,256               |
| <i>HealthDrive Corporation(9)</i>                          | Healthcare<br>facilities                  |               | 7,601,085             | 7,541,582             |
| First Lien Term Loan A, 10% due 7/17/2013                  |   | 7,800,000     | 7,574,591             | 7,731,153             |
| First Lien Term Loan B, 13% due 7/17/2013                  |   | 10,076,089    | 9,926,089             | 9,587,523             |
| First Lien Revolver, 12% due 7/17/2013                     |   | 500,000       | 485,000               | 534,693               |
| <i>idX Corporation</i>                                     | Merchandise<br>Display                    |               | 17,985,680            | 17,853,369            |
| Second Lien Term Loan, 14.5% due 7/1/2014                  |   | 13,316,247    | 13,014,576            | 13,074,682            |
| <i>Cenegenes, LLC</i>                                      | Healthcare<br>services                    |               | 13,014,576            | 13,074,682            |
| First Lien Term Loan, 17% due 10/27/2013                   |   | 10,372,069    | 10,076,277            | 10,266,770            |
| 116,237 Common Units(6)                                    |   |               | 151,108               | 513,782               |
| <i>IZI Medical Products, Inc.</i>                          | Healthcare<br>technology                  |               | 10,227,385            | 10,782,552            |
| First Lien Term Loan A, 12% due 3/31/2014                  |   | 5,600,000     | 5,504,943             | 5,547,944             |
| First Lien Term Loan B, 16% due 3/31/2014                  |   | 17,042,500    | 16,328,120            | 16,532,244            |
| First Lien Revolver, 10% due 3/31/2014(11)                 |   |               | (45,000)              | (45,000)              |
| 453,755 Preferred units of IZI Holdings, LLC               |   |               | 453,755               | 530,016               |
| <i>Trans-Trade, Inc.</i>                                   | Air freight<br>& logistics                |               | 22,241,818            | 22,565,204            |
| First Lien Term Loan, 15.5% due 9/10/2014                  |   | 11,016,042    | 10,798,229            | 10,838,952            |
| First Lien Revolver, 12% due 9/10/2014(11)                 |   |               | (39,333)              | (39,333)              |
| <i>Riverlake Equity Partners II, LP(13)</i>                | Multi-sector<br>holdings                  |               | 10,758,896            | 10,799,619            |
| 0.14% limited partnership interest                         |   |               |                       | —                     |
| <i>Riverside Fund IV, LP(13)</i>                           | Multi-sector<br>holdings                  |               |                       | —                     |
| 0.92% limited partnership interest                         |   |               |                       | —                     |
| <b>Total Non-Control/Non-Affiliate Investments</b>         |   |               | <b>\$ 243,975,221</b> | <b>\$ 229,171,470</b> |
| <b>Total Portfolio Investments</b>                         |   |               | <b>\$ 327,232,285</b> | <b>\$ 299,611,137</b> |

**Fifth Street Finance Corp.**  
**Consolidated Schedule of Investments**  
**September 30, 2009**

- (1) All debt investments are income producing. Equity is non-income producing unless otherwise noted.
- (2) See Note 3 to Consolidated Financial Statements for summary geographic location.
- (3) Control Investments are defined by the Investment Company Act of 1940 ("1940 Act") as investments in companies in which the Company owns more than 25% of the voting securities or maintains greater than 50% of the board representation.
- (4) Affiliate Investments are defined by the 1940 Act as investments in companies in which the Company owns between 5% and 25% of the voting securities.
- (5) Equity ownership may be held in shares or units of companies related to the portfolio companies.
- (6) Income producing through payment of dividends or distributions.
- (7) Non-Control/Non-Affiliate Investments are defined by the 1940 Act as investments that are neither Control Investments nor Affiliate Investments.
- (8) Principal includes accumulated PIK interest and is net of repayments.
- (9) Interest rates have been adjusted on certain term loans and revolvers. These rate adjustments are temporary in nature due to financial or payment covenant violations in the original credit agreements, or permanent in nature per loan amendment or waiver documents. The table below summarizes these rate adjustments by portfolio company:

| Portfolio Company                  | Effective date    | Cash interest                             | PIK interest              | Reason                            |
|------------------------------------|-------------------|---|---------------------------|-----------------------------------|
| CPAC, Inc.                         | November 21, 2008 | —   | + 1.0% on Term Loan       | Per waiver agreement              |
| Rose Tarlow, Inc.                  | January 1, 2009   | +0.5% on Term Loan, +<br>3.0% on Revolver | + 2.5% on Term Loan       | Tier pricing per waiver agreement |
| Martini Park, LLC                  | October 1, 2008   | —   | + 6.0% on Term Loan       | Per waiver agreement              |
| Best Vinyl Acquisition Corporation | April 1, 2008     | + 0.5% on Term Loan                       | —                         | Per loan amendment                |
| Nicos Polymers & Grinding, Inc.    | February 10, 2008 | —   | + 2.0% on Term Loan A & B | Per waiver agreement              |
| TBA Global, LLC                    | February 15, 2008 | —   | + 2.0% on Term Loan A & B | Per waiver agreement              |
| Filet of Chicken                   | January 1, 2009   | + 1.0% on Term Loan                       | —                         | Tier pricing per waiver agreement |
| Boot Barn                          | January 1, 2009   | + 1.0% on Term Loan                       | + 2.5% on Term Loan       | Tier pricing per waiver agreement |
| HealthDrive Corporation            | April 30, 2009    | + 2.0% on Term Loan A                     | —                         | Per waiver agreement              |

- (10) Revolving credit line has been suspended and is deemed unlikely to be renewed in the future.
- (11) Amounts represent unearned income related to undrawn commitments.
- (12) All or a portion of the loan is considered permanently impaired and, accordingly, the charge-off of the cost basis has been recorded as a realized loss for financial reporting purposes.
- (13) Represents unfunded limited partnership interests that were closed prior to September 30, 2009.
- (14) Represents a de minimis membership interest percentage.

See notes to Consolidated Financial Statements.

**Fifth Street Finance Corp.**  
**Consolidated Schedule of Investments**  
**September 30, 2008**

| Portfolio Company/Type of Investment(1)(2)(5)   | Industry | Principal(\$) | Cost                 | Fair Value           |
|---|----------|---------------|----------------------|----------------------|
| <b>Control Investments(3)</b>   |          |               |                      |                      |
| <b>Affiliate Investments(4)</b>   |          |               |                      |                      |
| <i>O'Curran, Inc.</i>   |          |               |                      |                      |
| Data Processing & Outsourced Services   |          |               |                      |                      |
| First Lien Term Loan A, 16.875% due 3/21/2012   |          | \$ 10,108,838 | \$ 9,888,488         | \$ 9,888,488         |
| First Lien Term Loan B, 16.875% due 3/21/2012   |          | 3,640,702     | 3,581,245            | 3,581,245            |
| 1.75% Preferred Membership Interest in O'Curran Holding Co., LLC                                  |          |               | 130,413              | 130,413              |
| 3.3% Membership Interest in O'Curran Holding Co., LLC   |          |               | 250,000              | 97,156               |
|   |          |               | 13,850,146           | 13,697,302           |
| <i>CPAC, Inc.</i>   |          |               |                      |                      |
| Household Products & Specialty Chemicals  |          |               |                      |                      |
| Second Lien Term Loan, 17.5% due 4/13/2012  |          | 10,613,769    | 9,556,805            | 3,626,497            |
| 2,297 shares of Common Stock  |          |               | 2,297,000            | —                    |
|   |          |               | 11,853,805           | 3,626,497            |
| <i>Elephant &amp; Castle, Inc.</i>  |          |               |                      |                      |
| Restaurants   |          |               |                      |                      |
| Second Lien Term Loan, 15.5% due 4/20/2012  |          | 7,809,513     | 7,145,198            | 7,145,198            |
| 7,500 shares of Series A Preferred Stock  |          |               | 750,000              | 196,386              |
|   |          |               | 7,895,198            | 7,341,584            |
| <i>MK Network, LLC</i>  |          |               |                      |                      |
| Healthcare technology   |          |               |                      |                      |
| First Lien Term Loan A, 13.5% due 6/1/2012  |          | 9,500,000     | 9,115,152            | 9,115,152            |
| First Lien Revolver, Prime + 1.5% (10% floor), due 6/1/2010 — undrawn revolver of \$2,000,000(10) |          | —             | (11,113)             | (11,113)             |
| 6,114 Membership Units(6)   |          |               | 584,795              | 760,441              |
|   |          |               | 9,688,834            | 9,864,480            |
| <i>Rose Tarlow, Inc.</i>  |          |               |                      |                      |
| Home Furnishing Retail  |          |               |                      |                      |
| First Lien Term Loan, 12% due 1/25/2014   |          | 10,000,000    | 9,796,648            | 9,796,648            |
| First Lien Revolver, LIBOR+4% (9% floor) due 1/25/2014 — undrawn revolver of \$2,650,000          |          | 350,000       | 323,333              | 323,333              |
| 6.9% membership interest in RTMH Acquisition Company  |          |               | 1,275,000            | 591,939              |
| 0.1% membership interest in RTMH Acquisition Company  |          |               | 25,000               | 11,607               |
|   |          |               | 11,419,981           | 10,723,527           |
| <i>Marini Park, LLC</i>   |          |               |                      |                      |
| Restaurants   |          |               |                      |                      |
| First Lien Term Loan, 14% due 2/20/2013   |          | 4,049,822     | 3,188,351            | 2,719,236            |
| 5% membership interest  |          |               | 650,000              | —                    |
|   |          |               | 3,838,351            | 2,719,236            |
| <i>Caregiver Services, Inc.</i>   |          |               |                      |                      |
| Healthcare services   |          |               |                      |                      |
| Second Lien Term Loan A, LIBOR+6.85% (12% floor) due 2/25/2013                                    |          | 10,000,000    | 9,381,973            | 9,381,973            |
| Second Lien Term Loan B, 16.5% due 2/25/2013  |          | 13,809,891    | 12,811,950           | 12,811,951           |
| 1,080,399 shares of Series A Preferred Stock  |          |               | 1,080,398            | 1,183,867            |
|   |          |               | 23,274,321           | 23,377,791           |
| <b>Total Affiliate Investments</b>  |          |               | <b>\$ 81,820,636</b> | <b>\$ 71,350,417</b> |

**Fifth Street Finance Corp.**  
**Consolidated Schedule of Investments**  
**September 30, 2008**

| Portfolio Company/Type of Investment(1)(2)(5)                 | Industry                            | Principal(8) | Cost         | Fair Value   |
|---|-------------------------------------|--------------|--------------|--------------|
| <b>Non-Control/Non-Affiliate Investments(7)</b>               |                                     |              |              |              |
| <i>Best Vinyl Acquisition Corporation(9)</i>                  |                                     |              |              |              |
| Second Lien Term Loan, 12% due 3/30/2013                      | Building Products                   | \$ 7,000,000 | \$ 6,716,712 | \$ 6,716,712 |
| 25,641 Shares of Series A Preferred Stock                     |                                     |              | 253,846      | 253,846      |
| 25,641 Shares of Common Stock                                 |                                     |              | 2,564        | 4,753        |
|   |                                     |              | 6,973,122    | 6,975,311    |
| <i>Traffic Control &amp; Safety Corporation</i>               |                                     |              |              |              |
| Second Lien Term Loan, 15% due 6/29/2014                      | Construction and Engineering        | 18,741,969   | 18,503,268   | 18,503,268   |
| 24,750 shares of Series B Preferred Stock                     |                                     |              | 247,500      | 179,899      |
| 25,000 shares of Common Stock                                 |                                     |              | 2,500        | —            |
|   |                                     |              | 18,753,268   | 18,683,167   |
| <i>Nicos Polymers &amp; Grinding Inc.(9)</i>                  |                                     |              |              |              |
| First Lien Term Loan A, LIBOR+5% (10% floor), due 7/17/2012   | Environmental & Facilities services | 3,216,511    | 3,192,408    | 3,192,408    |
| First Lien Term Loan B, 13.5% due 7/17/2012                   |                                     | 5,786,547    | 5,594,313    | 5,594,313    |
| 3.32% Interest in Crownbrook Acquisition I LLC                |                                     |              | 168,086      | 72,756       |
|   |                                     |              | 8,954,807    | 8,859,477    |
| <i>TBA Global, LLC(9)</i>                                     |                                     |              |              |              |
| Second Lien Term Loan A, LIBOR+5% (10% floor), due 8/3/2010   | Media: Advertising                  | 2,531,982    | 2,516,148    | 2,516,148    |
| Second Lien Term Loan B, 14.5% due 8/3/2012                   |                                     | 10,369,491   | 9,857,130    | 9,857,130    |
| 53,994 Senior Preferred Shares                                |                                     |              | 215,975      | 143,418      |
| 191,977 Shares A Shares                                       |                                     |              | 191,977      | —            |
|   |                                     |              | 12,781,230   | 12,516,696   |
| <i>Fitness Edge, LLC</i>                                      |                                     |              |              |              |
| First Lien Term Loan A, LIBOR+5.25% (10% floor), due 8/8/2012 | Leisure Facilities                  | 2,250,000    | 2,233,636    | 2,233,636    |
| First Lien Term Loan B, 15% due 8/8/2012                      |                                     | 5,353,461    | 5,206,261    | 5,206,261    |
| 1,000 Common Units  |                                     |              | 42,908       | 33,033       |
|   |                                     |              | 7,482,805    | 7,494,930    |
| <i>Filet of Chicken(9)</i>                                    |                                     |              |              |              |
| Second Lien Term Loan, 14.5% due 7/31/2012                    | Food Distributors                   | 12,516,185   | 11,994,788   | 11,994,788   |
|   |                                     |              | 11,994,788   | 11,994,788   |
| <i>Boot Barn</i>  |                                     |              |              |              |
| Second Lien Term Loan, 14.5% due 10/3/2013                    | Footwear and Apparel                | 18,095,935   | 17,788,078   | 17,788,078   |
| 24,706 shares of Series A Preferred Stock                     |                                     |              | 247,060      | 146,435      |
| 1,308 shares of Common Stock                                  |                                     |              | 131          | —            |
|   |                                     |              | 18,035,269   | 17,934,513   |
| <i>American Hardwoods Industries Holdings, LLC</i>            |                                     |              |              |              |
| Second Lien Term Loan, 15% due 10/15/2012                     | Lumber Products                     | 10,334,704   | 10,094,129   | 4,384,489    |
| 24,375 Membership Units                                       |                                     |              | 250,000      | —            |
|   |                                     |              | 10,344,129   | 4,384,489    |
| <i>Premier Trailer Leasing, Inc.</i>                          |                                     |              |              |              |
| Second Lien Term Loan, 16.5% due 10/23/2012                   | Trailer Leasing Services            | 17,277,619   | 16,985,473   | 16,985,473   |
| 285 shares of Common Stock                                    |                                     |              | 1,140        | —            |
|   |                                     |              | 16,986,613   | 16,985,473   |
| <i>Pacific Press Technologies, Inc.</i>                       |                                     |              |              |              |
| Second Lien Term Loan, 14.75% due 1/10/2013                   | Capital Goods                       | 9,544,447    | 9,294,486    | 9,294,486    |
| 33,463 shares of Common Stock                                 |                                     |              | 344,513      | 481,210      |
|   |                                     |              | 9,638,999    | 9,775,696    |

**Fifth Street Finance Corp.**  
**Consolidated Schedule of Investments**  
**September 30, 2008**

| Portfolio Company/Type of Investment(1)(2)(5)  | Industry                            | Principal(8) | Cost                  | Fair Value            |
|--|-------------------------------------|--------------|-----------------------|-----------------------|
| <i>Goldco, LLC</i>   | Restaurants                         |              |                       | —                     |
| Second Lien Term Loan, 17.5% due 1/31/2013   |                                     | 7,705,762    | 7,578,261             | 7,578,261             |
|  |                                     |              | 7,578,261             | 7,578,261             |
| <i>Lighting by Gregory, LLC</i>  | Housewares & Specialties            |              |                       | —                     |
| First Lien Term Loan A, 9.75% due 2/28/2013  |                                     | 4,500,002    | 4,420,441             | 4,420,441             |
| First Lien Term Loan B, 14.5% due 2/28/2013  |                                     | 7,010,207    | 6,888,876             | 6,888,876             |
| 1.1% membership interest   |                                     |              | 110,000               | 98,459                |
|  |                                     |              | 11,419,317            | 11,407,776            |
| <i>Rail Acquisition Corp.</i>  | Manufacturing - Mechanical Products |              |                       | —                     |
| First Lien Term Loan, 17% due 4/1/2013   |                                     | 15,800,700   | 15,494,737            | 15,494,737            |
|  |                                     |              | 15,494,737            | 15,494,737            |
| <i>Western Emulsions, Inc.</i>   | Emulsions Manufacturing             |              |                       | —                     |
| Second Lien Term Loan, 15% due 6/30/2014   |                                     | 9,661,464    | 9,523,464             | 9,523,464             |
|  |                                     |              | 9,523,464             | 9,523,464             |
| <i>Storytellers Theaters Corporation</i>   | Entertainment - Theaters            |              |                       | —                     |
| First Lien Term Loan, 15% due 7/16/2014  |                                     | 11,824,414   | 11,598,248            | 11,598,248            |
| First Lien Revolver, LIBOR+3.5% (10% floor), due 7/16/2014 — undrawn revolver of \$2,000,000(10) |                                     | —            | (17,566)              | (17,566)              |
| 1,692 shares of Common Stock   |                                     |              | 169                   | —                     |
| 20,000 shares of Preferred Stock   |                                     |              | 200,000               | 196,588               |
|  |                                     |              | 11,780,851            | 11,777,270            |
| <i>HealthDrive Corporation</i>   | Healthcare facilities               |              |                       | —                     |
| First Lien Term Loan A, 10% due 7/17/2013  |                                     | 8,000,000    | 7,923,357             | 7,923,357             |
| First Lien Term Loan B, 13% due 7/17/2013  |                                     | 10,008,333   | 9,818,333             | 9,818,333             |
| First Lien Revolver, 12% due 7/17/2013 — undrawn revolver of \$1,500,000                         |                                     | 500,000      | 481,000               | 481,000               |
|  |                                     |              | 18,222,690            | 18,222,690            |
| <i>idX Corporation</i>   | Merchandise Display                 |              |                       | —                     |
| Second Lien Term Loan, 14.5% due 7/1/2014  |                                     | 13,049,166   | 12,799,999            | 12,799,999            |
|  |                                     |              | 12,799,999            | 12,799,999            |
| <b>Total Non-Control/Non-Affiliate Investments</b>   |                                     |              | <b>\$ 208,764,349</b> | <b>\$ 202,408,737</b> |
| <b>Total Portfolio Investments</b>   |                                     |              | <b>\$ 290,584,985</b> | <b>\$ 273,759,154</b> |

- (1) All debt investments are income producing. Equity is non-income producing unless otherwise noted.
- (2) See Note 3 to Consolidated Financial Statements for summary geographic location.
- (3) Control Investments are defined by the Investment Company Act of 1940 ("1940 Act") as investments in companies in which the Company owns more than 25% of the voting securities or maintains greater than 50% of the board representation. As of September 30, 2008, the Company did not have a controlling interest in any of its investments.
- (4) Affiliate Investments are defined by the 1940 Act as investments in companies in which the Company owns between 5% and 25% of the voting securities.
- (5) Equity ownership may be held in shares or units of companies related to the portfolio companies.
- (6) Income producing through payment of dividends or distributions.
- (7) Non-Control/Non-Affiliate Investments are defined by the 1940 Act as investments that are neither Control Investments nor Affiliate Investments.
- (8) Principal includes accumulated PIK interest and is net of repayments.

**Fifth Street Finance Corp.**  
**Consolidated Schedule of Investments**  
**September 30, 2008**

(9) Rates have been adjusted on the term loans, as follows:

| <b>Portfolio Company</b>           | <b>Effective date</b> | <b>Cash interest</b> | <b>PIK interest</b>      | <b>Reason</b>        |
|------------------------------------|-----------------------|----------------------|--------------------------|----------------------|
| Best Vinyl Acquisition Corporation | April 1, 2008         | +0.5% on Term Loan   | —                        | Per loan amendment   |
| Nicos Polymers & Grinding, Inc.    | February 10, 2008     | —                    | +2.0% on Term Loan A & B | Per waiver agreement |
| TBA Global, LLC                    | February 15, 2008     | —                    | +2.0% on Term Loan A & B | Per waiver agreement |
| Filet of Chicken                   | August 1, 2008        | +1.0% on Term Loan   | +1.0% on Term Loan       | Per loan amendment   |

(10) Amounts represent unearned income related to undrawn commitments.

See notes to Consolidated Financial Statements.

## NOTES TO CONSOLIDATED FINANCIAL STATEMENTS

**Note 1. Organization**

Fifth Street Mezzanine Partners III, L.P. (the "Partnership"), a Delaware limited partnership, was organized on February 15, 2007 to primarily invest in debt securities of small and/or middle market companies. FSMPIII GP, LLC was the Partnership's general partner (the "General Partner"). The Partnership's investments were managed by Fifth Street Management LLC (the "Investment Adviser"). The General Partner and Investment Adviser were under common ownership.

Effective January 2, 2008, the Partnership merged with and into Fifth Street Finance Corp. (the "Company"), an externally managed, closed-end, non-diversified management investment company that has elected to be treated as a business development company under the Investment Company Act of 1940 (the "1940 Act"). The merger involved the exchange of shares between companies under common control. In accordance with the guidance on exchanges of shares between entities under common control, the Company's results of operations and cash flows for the year ended September 30, 2008 are presented as if the merger had occurred as of October 1, 2007. Accordingly, no adjustments were made to the carrying value of assets and liabilities (or the cost basis of investments) as a result of the merger. Fifth Street Finance Corp. is managed by the Investment Adviser. Prior to January 2, 2008, references to the Company are to the Partnership. Since January 2, 2008, references to the Company, FSC, "we" or "our" are to Fifth Street Finance Corp., unless the context otherwise requires.

The Company also has certain wholly-owned subsidiaries which hold certain portfolio investments of the Company. The subsidiaries are consolidated with the Company, and the portfolio investments held by the subsidiaries are included in the Company's consolidated financial statements. All significant intercompany balances and transactions have been eliminated.

On June 17, 2008, the Company completed an initial public offering of 10,000,000 shares of its common stock at the offering price of \$14.12 per share. On July 21, 2009, the Company completed a follow-on public offering of 9,487,500 shares of its common stock at the offering price of \$9.25 per share. On September 25, 2009, the Company completed a follow-on public offering of 5,520,000 shares of its common stock at the offering price of \$10.50 per share. The Company's shares are currently listed on the New York Stock Exchange under the symbol "FSC."

On May 19, 2009, the Company received a letter from the Investment Division of the Small Business Administration (the "SBA") that invited the Company to continue moving forward with the licensing of a small business investment company ("SBIC") subsidiary. The Company's application to license this entity as an SBIC with the SBA is subject to the SBA approval. The Company's SBIC subsidiary will be a wholly-owned subsidiary and will be able to rely on an exclusion from the definition of "investment company" under the 1940 Act, and thus will not elect to be treated as a business development company under the 1940 Act. The Company's SBIC subsidiary will have an investment objective similar to the Company's and will make similar types of investments in accordance with SBIC regulations.

**Note 2. Significant Accounting Policies*****FASB Accounting Standards Codification***

The issuance of *FASB Accounting Standards Codification*<sup>TM</sup> (the "Codification") on July 1, 2009 (effective for interim or annual reporting periods ending after September 15, 2009), changes the way that U.S. generally accepted accounting principles ("GAAP") are referenced. Beginning on that date, the Codification officially became the single source of authoritative nongovernmental GAAP; however, SEC registrants must also consider rules, regulations, and interpretive guidance issued by the SEC or its staff. The switch affects the way companies refer to GAAP in financial statements and in their accounting policies. All existing standards that were used to create the Codification became superseded. Instead, references to standards will consist solely of the number used in the Codification's structural organization. For example, it is no longer proper to refer to



FIFTH STREET FINANCE CORP.

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS — (Continued)

FASB Statement No. 157, *Fair Value Measurement*, which is now Codification Topic 820 *Fair Value Measurements and Disclosures* ("ASC 820").

Consistent with the effective date of the Codification, financial statements for periods ending after September 15, 2009, refers to the Codification structure, not pre-Codification historical GAAP.

***Basis of Presentation and Liquidity:***

The Consolidated Financial Statements of the Company have been prepared in accordance with GAAP and pursuant to the requirements for reporting on Form 10-K and Regulation S-X. The financial results of the Company's portfolio investments are not consolidated in the Company's financial statements.

The Company has evaluated all subsequent events through December 9, 2009, the date of this filing.

Although the Company expects to fund the growth of its investment portfolio through the net proceeds from the recent and future equity offerings, the Company's dividend reinvestment plan, and issuances of senior securities or future borrowings, to the extent permitted by the 1940 Act, the Company cannot assure that its plans to raise capital will be successful. In addition, the Company intends to distribute to its stockholders between 90% and 100% of its taxable income each year in order to satisfy the requirements applicable to RICs under Subchapter M of the Internal Revenue Code ("Code"). Consequently, the Company may not have the funds or the ability to fund new investments, to make additional investments in its portfolio companies, to fund its unfunded commitments to portfolio companies or to repay borrowings. In addition, the illiquidity of its portfolio investments may make it difficult for the Company to sell these investments when desired and, if the Company is required to sell these investments, we may realize significantly less than their recorded value.

***Use of Estimates:***

The preparation of financial statements in conformity with GAAP requires management to make certain estimates and assumptions affecting amounts reported in the financial statements and accompanying notes. These estimates are based on the information that is currently available to the Company and on various other assumptions that the Company believes to be reasonable under the circumstances. Actual results could differ materially from those estimates under different assumptions and conditions. The most significant estimate inherent in the preparation of the Company's consolidated financial statements is the valuation of investments and the related amounts of unrealized appreciation and depreciation.

The consolidated financial statements include portfolio investments at fair value of \$299.6 million and \$273.8 million at September 30, 2009 and September 30, 2008, respectively. The portfolio investments represent 73.0% and 93.0% of stockholders' equity at September 30, 2009 and September 30, 2008, respectively, and their fair values have been determined by the Company's Board of Directors in good faith in the absence of readily available market values. Because of the inherent uncertainty of valuation, the determined values may differ significantly from the values that would have been used had a ready market existed for the investments, and the differences could be material. The illiquidity of these portfolio investments may make it difficult for the Company to sell these investments when desired and, if the Company is required to sell these investments, it may realize significantly less than the investments' recorded value.

The Company classifies its investments in accordance with the requirements of the 1940 Act. Under the 1940 Act, "Control Investments" are defined as investments in companies in which the Company owns more than 25% of the voting securities or has rights to maintain greater than 50% of the board representation; "Affiliate Investments" are defined as investments in companies in which the Company owns between 5% and 25% of the voting securities; and "Non-Control/Non-Affiliate Investments" are defined as investments that are neither Control Investments nor Affiliate Investments.

FIFTH STREET FINANCE CORP.

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS — (Continued)

**Significant Accounting Policies:**

a) Valuation:

As described below, effective October 1, 2008, the Company adopted ASC Topic 820 *Fair Value Measurements and Disclosures* ("ASC 820"). In accordance with that standard, the Company changed its presentation for all periods presented to net unearned fees against the associated debt investments. Prior to the adoption of ASC 820 on October 1, 2008, the Company reported unearned fees as a single line item on the Consolidated Balance Sheets and Consolidated Schedules of Investments. This change in presentation had no impact on the overall net cost or fair value of the Company's investment portfolio and had no impact on the Company's financial position or results of operations.

The following table summarizes the effect of the adoption of ASC 820 on the presentation of the Company's investment portfolio in the Consolidated Financial Statements.

|   | Fair Value as<br>Reported in the<br>September 30, 2008<br>Financial Statements<br>as Filed in the<br>September 30, 2008<br>Form 10-K | Change in Presentation<br>of Unearned Fee Income<br>to Conform with<br>ASC 820 | Fair Value as Reported<br>in the September 30, 2008<br>Consolidated Financial<br>Statements as<br>Filed in the<br>September 30, 2009<br>Form 10-K |
|---|--|--|---|
| Affiliate investments                               | \$ 73,106,057  | \$ (1,755,640)   | \$ 71,350,417   |
| Non-control/Non-affiliate investments               | 205,889,362  | (3,480,625)  | 202,408,737   |
| Unearned fee income                                 | (5,236,265)  | 5,236,265  | —   |
| <b>Total investments net of unearned fee income</b> | <b>\$ 273,759,154</b>  | <b>\$ —</b>  | <b>\$ 273,759,154</b>   |

b) Fair Value Measurements:

In September 2006, the Financial Accounting Standards Board issued ASC 820, which was effective for fiscal years beginning after November 15, 2007. ASC 820 defines fair value as the price at which an asset could be exchanged in a current transaction between knowledgeable, willing parties. A liability's fair value is defined as the amount that would be paid to transfer the liability to a new obligor, not the amount that would be paid to settle the liability with the creditor. Where available, fair value is based on observable market prices or parameters or derived from such prices or parameters. Where observable prices or inputs are not available, valuation techniques are applied. These valuation techniques involve some level of management estimation and judgment, the degree of which is dependent on the price transparency for the investments or market and the investments' complexity.

Assets and liabilities recorded at fair value in the Company's Consolidated Balance Sheets are categorized based upon the level of judgment associated with the inputs used to measure their fair value. Hierarchical levels, defined by ASC 820 and directly related to the amount of subjectivity associated with the inputs to fair valuation of these assets and liabilities, are as follows:

- Level 1 — Unadjusted, quoted prices in active markets for identical assets or liabilities at the measurement date.
- Level 2 — Observable inputs other than Level 1 prices, such as quoted prices for similar assets or liabilities; quoted prices in markets that are not active; or other inputs that are observable or can be corroborated by observable market data at the measurement date for substantially the full term of the assets or liabilities.

FIFTH STREET FINANCE CORP.

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS — (Continued)

- Level 3 — Unobservable inputs that reflect management's best estimate of what market participants would use in pricing the asset or liability at the measurement date. Consideration is given to the risk inherent in the valuation technique and the risk inherent in the inputs to the model.

Realized gain or loss on the sale of investments is the difference between the proceeds received from dispositions of portfolio investments and their stated costs. Realized losses may also be recorded in connection with the Company's determination that certain investments are permanently impaired.

Interest income, adjusted for amortization of premium and accretion of original issue discount, is recorded on an accrual basis to the extent that such amounts are expected to be collected. The Company stops accruing interest on investments when it is determined that interest is no longer collectible.

Distributions of earnings from portfolio companies are recorded as dividend income when the distribution is received.

The Company has investments in debt securities which contain a payment in kind or "PIK" interest provision. PIK interest is computed at the contractual rate specified in each investment agreement and added to the principal balance of the investment and recorded as income.

Fee income consists of the monthly collateral management fees that the Company receives in connection with its debt investments and the accreted portion of the debt origination fees.

The Company capitalizes upfront loan origination fees received in connection with investments. The unearned fee income from such fees is accreted into fee income based on the effective interest method over the life of the investment. In connection with its investment, the Company sometimes receives nominal cost equity that is valued as part of the negotiation process with the particular portfolio company. When the Company receives nominal cost equity, the Company allocates its cost basis in its investment between its debt securities and its nominal cost equity at the time of origination. Any resulting discount from recording the loan is accreted into fee income over the life of the loan.

***Cash and Cash Equivalents:***

Cash and cash equivalents consist of demand deposits and highly liquid investments with maturities of three months or less, when acquired. The Company places its cash and cash equivalents with financial institutions and, at times, cash held in bank accounts may exceed the Federal Deposit Insurance Corporation insured limit.

***Offering Costs:***

Offering costs consist of fees paid to the underwriters, in addition to legal, accounting, regulatory and printing fees that are related to the Company's follow-on offerings which closed on July 21, 2009 and September 25, 2009. Accordingly, approximately \$1.0 million of offering costs (net of the underwriting fees) have been charged to capital during the year ended September 30, 2009.

***Income Taxes:***

Prior to the merger of the Partnership with and into the Company, the Partnership was treated as a partnership for federal and state income tax purposes. The Partnership generally did not record a provision for income taxes because the partners report their shares of the partnership income or loss on their income tax returns. Accordingly, the taxable income was passed through to the partners and the Partnership was not subject to an entity level tax as of December 31, 2007.

As a partnership, Fifth Street Mezzanine Partners III, LP filed a calendar year tax return for a short year initial period from February 15, 2007 through December 31, 2007. Upon the merger, Fifth Street Finance

FIFTH STREET FINANCE CORP.

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS — (Continued)

Corp., the surviving C-Corporation, made an election to be treated as a RIC under the Code and adopted a September 30 tax year end. Accordingly, the first RIC tax return has been filed for the tax year beginning January 1, 2008 and ended September 30, 2008.

As a RIC, the Company is not subject to federal income tax on the portion of its taxable income and gains distributed currently to its stockholders as a dividend. The Company anticipates distributing between 90% and 100% of its taxable income and gains, within the Subchapter M rules, and thus the Company anticipates that it will not incur any federal or state income tax at the RIC level. As a RIC, the Company is also subject to a federal excise tax based on distributive requirements of its taxable income on a calendar year basis (i.e., calendar year 2009). The Company anticipates timely distribution of its taxable income within the tax rules, however, the Company incurred a de minimis federal excise tax for calendar year 2008 and may incur a federal excise tax for the calendar year 2009.

The purpose of the Company's taxable subsidiaries is to permit the Company to hold equity investments in portfolio companies which are "pass through" entities for federal tax purposes in order to comply with the "source income" requirements contained in the RIC tax requirements. The taxable subsidiaries are not consolidated with the Company for income tax purposes and may generate income tax expense as a result of their ownership of certain portfolio investments. This income tax expense, if any, is reflected in the Company's Consolidated Statements of Operations. The Company uses the asset and liability method to account for its taxable subsidiaries' income taxes. Using this method, the Company recognizes deferred tax assets and liabilities for the estimated future tax effects attributable to temporary differences between financial reporting and tax bases of assets and liabilities. In addition, the Company recognizes deferred tax benefits associated with net operating carry forwards that it may use to offset future tax obligations. The Company measures deferred tax assets and liabilities using the enacted tax rates expected to apply to taxable income in the years in which we expect to recover or settle those temporary differences.

The Company adopted Financial Accounting Standards Board ASC Topic 740 *Accounting for Uncertainty in Income Taxes* ("ASC 740") at inception on February 15, 2007. ASC 740 provides guidance for how uncertain tax positions should be recognized, measured, presented, and disclosed in the consolidated financial statements. ASC 740 requires the evaluation of tax positions taken or expected to be taken in the course of preparing the Company's tax returns to determine whether the tax positions are "more-likely-than-not" of being sustained by the applicable tax authority. Tax positions not deemed to meet the more-likely-than-not threshold are recorded as a tax benefit or expense in the current year. Adoption of ASC 740 was applied to all open taxable years as of the effective date. The adoption of ASC 740 did not have an effect on the financial position or results of operations of the Company as there was no liability for unrecognized tax benefits and no change to the beginning capital of the Company. Management's determinations regarding ASC 740 may be subject to review and adjustment at a later date based upon factors including, but not limited to, an ongoing analysis of tax laws, regulations and interpretations thereof.

**Guarantees and Indemnification Agreements:**

The Company follows ASC 460 *Guarantor's Accounting and Disclosure Requirements for Guarantees, Including Indirect Guarantees of Indebtedness of Others* ("ASC 460"). ASC 460 elaborates on the disclosure requirements of a guarantor in its interim and annual financial statements about its obligations under certain guarantees that it has issued. It also requires a guarantor to recognize, at the inception of a guarantee, for those guarantees that are covered by ASC 460, the fair value of the obligation undertaken in issuing certain guarantees. The Interpretation has had no impact on the Company's consolidated financial statements.

**Recent Accounting Pronouncements**

In October 2009 the FASB issued Accounting Standards Update 2009-13, *Revenue Recognition (Topic 605) — Multiple-Deliverable Revenue Arrangements* which addresses accounting for multiple deliverable

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NOTES TO CONSOLIDATED FINANCIAL STATEMENTS — (Continued)

arrangements to enable vendors to account for products separately rather than as a combined unit. The amendments are effective prospectively for fiscal years beginning on or after June 15, 2010. The Company does not expect the adoption of this guidance to have a material impact on either its financial position or results of operations.

In September 2009 the FASB issued Accounting Standards Update 2009-12, *Fair Value Measurements and Disclosures (Topic 820) — Investments in Certain Entities That Calculate Net Asset Value per Share (or Its Equivalent)* provides guidance on estimating the fair value of an alternative investment, amending ASC 820-10. The amendment is effective for interim and annual periods ending after December 15, 2009. The Company does not expect the adoption of this guidance to have a material impact on either its financial position or results of operations.

In February 2007, the FASB issued ASC Topic 825-10 *Financial Instruments* (“ASC 825-10”), which provides companies with an option to report selected financial assets and liabilities at fair value. The objective of ASC 825-10 is to reduce both complexity in accounting for financial instruments and the volatility in earnings caused by measuring related assets and liabilities differently, and is effective as of the beginning of an entity’s first fiscal year beginning after November 15, 2007. Early adoption is permitted as of the beginning of the previous fiscal year provided that the entity makes that choice in the first 120 days of that fiscal year and also elects to apply the provisions of ASC 820. While ASC 825-10 become effective for the Company’s 2009 fiscal year, the Company did not elect the fair value measurement option for any of its financial assets or liabilities.

In December 2007, the FASB issued ASC Topic 810 *Noncontrolling Interests in Consolidated Financial* (“ASC 810”). ASC 810 establishes accounting and reporting standards for the noncontrolling interest in a subsidiary and for the deconsolidation of a subsidiary. ASC 810 requires that noncontrolling interests in subsidiaries be reported in the equity section of the controlling company’s balance sheet. It also changes the manner in which the net income of the subsidiary is reported and disclosed in the controlling company’s income statement. ASC 810 is effective for fiscal years, and interim periods within those fiscal years, beginning on or after December 15, 2008. The Company does not believe that the adoption of ASC 810 will have a material impact on either its financial position or results of operations.

Effective January 1, 2009 the Company adopted the guidance included in ASC Topic 815 *Derivatives and Hedging* (“ASC 815”), which requires additional disclosures for derivative instruments and hedging activities. The Company does not have any derivative instruments nor has it engaged in any hedging activities. ASC 815 has no impact on the Company’s financial statements.

Effective July 1, 2009 the Company adopted the provisions of ASC Topic 855 *Subsequent Events* (“ASC 855”). ASC 855 incorporates the subsequent events guidance contained in the auditing standards literature into authoritative accounting literature. It also requires entities to disclose the date through which they have evaluated subsequent events and whether the date corresponds with the release of their financial statements. See Note 2 — “Significant Accounting Policies — Basis of Presentation and Liquidity” for this new disclosure.

In June 2009, the FASB issued SFAS No. 166, “Accounting for Transfers of Financial Assets — an amendment of FASB Statement No. 140” (“SFAS 166”) (to be included in ASC 860 “Transfers and Servicing”). SFAS 166 will require more information about transfers of financial assets, eliminates the qualifying special purpose entity (QSPE) concept, changes the requirements for derecognizing financial assets and requires additional disclosures. SFAS 166 is effective for the first annual reporting period that begins after November 15, 2009. The Company does not anticipate that SFAS 166 will have a material impact on the Company’s financial statements. This statement has not yet been codified.

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NOTES TO CONSOLIDATED FINANCIAL STATEMENTS — (Continued)

**Note 3. Portfolio Investments**

At September 30, 2009, 73.0% of stockholders' equity or \$299.6 million was invested in 28 long-term portfolio investments and 27.6% of stockholders' equity or \$113.2 million was invested in cash and cash equivalents. In comparison, at September 30, 2008, 93.0% of stockholders' equity or \$273.8 million was invested in 24 long-term portfolio investments and 7.8% of stockholders' equity or \$22.9 million was invested in cash and cash equivalents. As of September 30, 2009, all of the Company's debt investments were secured by first or second priority liens on the assets of the portfolio companies. Moreover, the Company held equity investments in its portfolio companies consisting of common stock, preferred stock or limited liability company interests designed to provide the Company with an opportunity for an enhanced rate of return. These instruments generally do not produce a current return, but are held for potential investment appreciation and capital gain.

At September 30, 2009 and September 30, 2008, \$281.0 million and \$251.5 million, respectively, of the Company's portfolio debt investments at fair value were at fixed rates, which represented approximately 95% and 93%, respectively, of the Company's total portfolio of debt investments at fair value. During the year ended September 30, 2009, the Company recorded realized losses of \$14.4 million. During the year ended September 30, 2008, the Company recorded realized gains on investments of approximately \$62,000. During the years ended September 30, 2009 and 2008, the Company recorded unrealized depreciation of \$10.8 million and \$16.9 million, respectively.

The composition of the Company's investments as of September 30, 2009 and September 30, 2008 at cost and fair value was as follows:

|                                  | September 30, 2009    |                       | September 30, 2008    |                       |
|----------------------------------|-----------------------|-----------------------|-----------------------|-----------------------|
|                                  | Cost                  | Fair Value            | Cost                  | Fair Value            |
| Investments in debt securities   | \$ 317,069,667        | \$ 295,921,400        | \$ 281,264,010        | \$ 269,154,948        |
| Investments in equity securities | 10,162,618            | 3,689,737             | 9,320,975             | 4,604,206             |
| <b>Total</b>                     | <b>\$ 327,232,285</b> | <b>\$ 299,611,137</b> | <b>\$ 290,584,985</b> | <b>\$ 273,759,154</b> |

The following table presents the financial instruments carried at fair value as of September 30, 2009, by caption on the Company's Consolidated Balance Sheet for each of the three levels of hierarchy established by ASC 820.

|  | Level 1     | Level 2     | Level 3               | Total                 |
|--|-------------|-------------|-----------------------|-----------------------|
| Control investments                    | \$ —        | \$ —        | \$ 5,691,107          | \$ 5,691,107          |
| Affiliate investments                  | —           | —           | 64,748,560            | 64,748,560            |
| Non-control/Non-affiliate investments  | —           | —           | 229,171,470           | 229,171,470           |
| <b>Total investments at fair value</b> | <b>\$ —</b> | <b>\$ —</b> | <b>\$ 299,611,137</b> | <b>\$ 299,611,137</b> |

The following table provides a roll-forward in the changes in fair value from September 30, 2008 to September 30, 2009, for all investments for which the Company determines fair value using unobservable (Level 3) factors. When a determination is made to classify a financial instrument within Level 3 of the valuation hierarchy, the determination is based upon the fact that the unobservable factors are the most significant to the overall fair value measurement. However, Level 3 financial instruments typically include, in addition to the unobservable or Level 3 components, observable components (that is, components that are actively quoted and

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can be validated by external sources). Accordingly, the appreciation (depreciation) in the table below includes changes in fair value due in part to observable factors that are part of the valuation methodology.

|  | Control<br>Investments | Affiliate<br>Investments | Non-control/<br>Non-affiliate<br>Investments | Total                 |
|--|------------------------|--------------------------|--|-----------------------|
| Fair value as of September 30, 2008              | \$ —                   | \$ 71,350,417            | \$ 202,408,737                               | \$ 273,759,154        |
| Total realized losses                            | —                      | (4,000,000)              | (10,373,200)                                 | (14,373,200)          |
| Change in unrealized appreciation (depreciation) | (1,792,015)            | 286,190                  | (9,289,492)                                  | (10,795,317)          |
| Purchases, issuances, settlements and other, net | 7,483,122              | (2,888,047)              | 46,425,425                                   | 51,020,500            |
| Transfers in (out) of Level 3                    | —                      | —                        | —  | —                     |
| <b>Fair value as of September 30, 2009</b>       | <b>\$ 5,691,107</b>    | <b>\$ 64,748,560</b>     | <b>\$ 229,171,470</b>                        | <b>\$ 299,611,137</b> |

Concurrent with its adoption of ASC 820, effective October 1, 2008, the Company augmented the valuation techniques it uses to estimate the fair value of its debt investments where there is not a readily available market value (Level 3). Prior to October 1, 2008, the Company estimated the fair value of its Level 3 debt investments by first estimating the enterprise value of the portfolio company which issued the debt investment. To estimate the enterprise value of a portfolio company, the Company analyzed various factors, including the portfolio companies historical and projected financial results. Typically, private companies are valued based on multiples of EBITDA (Earning Before Interest, Taxes, Depreciation and Amortization), cash flow, net income, revenues or, in limited instances, book value.

In estimating a multiple to use for valuation purposes, the Company looked to private merger and acquisition statistics, discounted public trading multiples or industry practices. In some cases, the best valuation methodology may have been a discounted cash flow analysis based on future projections. If a portfolio company was distressed, a liquidation analysis may have provided the best indication of enterprise value.

If there was adequate enterprise value to support the repayment of the Company's debt, the fair value of the Level 3 loan or debt security normally corresponded to cost plus the amortized original issue discount unless the borrower's condition or other factors lead to a determination of fair value at a different amount.

Beginning on October 1, 2008, the Company also introduced a bond yield model to value these investments based on the present value of expected cash flows. The primary inputs into the model are market interest rates for debt with similar characteristics and an adjustment for the portfolio company's credit risk. The credit risk component of the valuation considers several factors including financial performance, business outlook, debt priority and collateral position. During the years ended September 30, 2009 and 2008 and during the period ended September 30, 2007, the Company recorded net unrealized appreciation (depreciation) of (\$10.8 million), (\$16.9 million) and \$0.1 million, respectively, on its investments. For the year ended September 30, 2009, the Company's net unrealized appreciation (depreciation) consisted of \$14.3 million of reclassifications to realized losses, offset by unrealized depreciation of (\$21.2 million) resulting from declines in EBITDA or market multiples of its portfolio companies requiring closer monitoring or performing below expectations; and approximately (\$3.9 million) of unrealized appreciation resulting from the adoption of ASC 820.

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NOTES TO CONSOLIDATED FINANCIAL STATEMENTS — (Continued)

The table below summarizes the changes in the Company's investment portfolio from September 30, 2008 to September 30, 2009.

|   | Debt                  | Equity              | Total                 |
|---|-----------------------|---------------------|-----------------------|
| Fair value at September 30, 2008        | \$ 269,154,948        | \$ 4,604,206        | \$ 273,759,154        |
| New investments                         | 60,858,356            | 1,091,644           | 61,950,000            |
| Redemptions/repayments                  | (18,445,907)          | —                   | (18,445,907)          |
| Net accrual of PIK interest income      | 7,027,149             | —                   | 7,027,149             |
| Accretion of original issue discount    | 842,623               | —                   | 842,623               |
| Recognition of unearned income          | (353,365)             | —                   | (353,365)             |
| Net unrealized depreciation             | (9,039,204)           | (1,756,113)         | (10,795,317)          |
| Net changes from unrealized to realized | (14,123,200)          | (250,000)           | (14,373,200)          |
| <b>Fair value at September 30, 2009</b> | <b>\$ 295,921,400</b> | <b>\$ 3,689,737</b> | <b>\$ 299,611,137</b> |

The Company's off-balance sheet arrangements consisted of \$9.8 million and \$24.7 million of unfunded commitments to provide debt financing to its portfolio companies or to fund limited partnership interests as of September 30, 2009 and September 30, 2008, respectively. Such commitments involve, to varying degrees, elements of credit risk in excess of the amount recognized in the balance sheet and are not reflected on the Company's Consolidated Balance Sheet.

A summary of the composition of the unfunded commitments (consisting of revolvers, term loans and limited partnership interests) as of September 30, 2009 and September 30, 2008 is shown in the table below:

|   | September 30, 2009  | September 30, 2008   |
|---|---------------------|----------------------|
| MK Network, LLC   | \$ —                | \$ 2,000,000         |
| Rose Tarlow, Inc.   | —                   | 2,650,000            |
| Martini Park, LLC   | —                   | 11,000,000           |
| Fitness Edge, LLC   | —                   | 1,500,000            |
| Western Emulsions, Inc.   | —                   | 2,000,000            |
| Storyteller Theaters Corporation                                | 1,750,000           | 4,000,000            |
| HealthDrive Corporation   | 1,500,000           | 1,500,000            |
| IZI Medical Products, Inc.                                      | 2,500,000           | —                    |
| Trans-Trade, Inc.   | 2,000,000           | —                    |
| Riverlake Equity Partners II, LP (limited partnership interest) | 1,000,000           | —                    |
| Riverside Fund IV, LP (limited partnership interest)            | 1,000,000           | —                    |
| <b>Total</b>  | <b>\$ 9,750,000</b> | <b>\$ 24,650,000</b> |



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**NOTES TO CONSOLIDATED FINANCIAL STATEMENTS — (Continued)**

Summaries of the composition of the Company's investment portfolio at cost and fair value as a percentage of total investments are shown in the following tables:

|                    | September 30, 2009    |                | September 30, 2008    |                |
|--------------------|-----------------------|----------------|-----------------------|----------------|
| <b>Cost:</b>       |                       |                |                       |                |
| First lien debt    | \$ 153,207,248        | 46.82%         | \$ 108,716,148        | 37.41%         |
| Second lien debt   | 163,862,419           | 50.08%         | 172,547,862           | 59.38%         |
| Purchased equity   | 4,170,368             | 1.27%          | 4,120,368             | 1.42%          |
| Equity grants      | 5,992,250             | 1.83%          | 5,200,607             | 1.79%          |
| Total              | <u>\$ 327,232,285</u> | <u>100.00%</u> | <u>\$ 290,584,985</u> | <u>100.00%</u> |
| <b>Fair Value:</b> |                       |                |                       |                |
| First lien debt    | \$ 142,016,942        | 47.40%         | \$ 108,247,033        | 39.54%         |
| Second lien debt   | 153,904,458           | 51.37%         | 160,907,915           | 58.78%         |
| Purchased equity   | 517,181               | 0.17%          | 2,001,213             | 0.73%          |
| Equity grants      | 3,172,556             | 1.06%          | 2,602,993             | 0.95%          |
| Total              | <u>\$ 299,611,137</u> | <u>100.00%</u> | <u>\$ 273,759,154</u> | <u>100.00%</u> |

The Company invests in portfolio companies located in the United States. The following tables show the portfolio composition by geographic region at cost and fair value as a percentage of total investments. The geographic composition is determined by the location of the corporate headquarters of the portfolio company, which may not be indicative of the primary source of the portfolio company's business.

|                    | September 30, 2009    |                | September 30, 2008    |                |
|--------------------|-----------------------|----------------|-----------------------|----------------|
| <b>Cost:</b>       |                       |                |                       |                |
| Northeast          | \$ 103,509,164        | 31.63%         | \$ 89,699,936         | 30.87%         |
| West               | 98,694,596            | 30.16%         | 81,813,016            | 28.15%         |
| Southeast          | 39,463,350            | 12.06%         | 42,847,370            | 14.75%         |
| Midwest            | 22,980,368            | 7.02%          | 22,438,998            | 7.72%          |
| Southwest          | 62,584,807            | 19.13%         | 53,785,665            | 18.51%         |
| Total              | <u>\$ 327,232,285</u> | <u>100.00%</u> | <u>\$ 290,584,985</u> | <u>100.00%</u> |
| <b>Fair Value:</b> |                       |                |                       |                |
| Northeast          | \$ 87,895,220         | 29.34%         | \$ 73,921,159         | 27.00%         |
| West               | 93,601,893            | 31.24%         | 80,530,516            | 29.42%         |
| Southeast          | 39,858,633            | 13.30%         | 42,950,840            | 15.69%         |
| Midwest            | 22,841,167            | 7.62%          | 22,575,695            | 8.25%          |
| Southwest          | 55,414,224            | 18.50%         | 53,780,944            | 19.64%         |
| Total              | <u>\$ 299,611,137</u> | <u>100.00%</u> | <u>\$ 273,759,154</u> | <u>100.00%</u> |

The composition of the Company's portfolio by industry at cost and fair value as of September 30, 2009 and September 30, 2008 were as follows:

|                       | September 30, 2009 |        | September 30, 2008 |       |
|-----------------------|--------------------|--------|--------------------|-------|
| <b>Cost:</b>          |                    |        |                    |       |
| Healthcare technology | \$ 37,201,082      | 11.37% | \$ 9,688,834       | 3.33% |
| Healthcare services   | 32,841,142         | 10.04% | 23,274,321         | 8.01% |

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**NOTES TO CONSOLIDATED FINANCIAL STATEMENTS — (Continued)**

|   | <u>September 30, 2009</u> |                | <u>September 30, 2008</u> |                |
|---|---------------------------|----------------|---------------------------|----------------|
| Footwear and apparel                    | 22,423,009                | 6.85%          | 18,035,269                | 6.21%          |
| Restaurants                             | 20,288,245                | 6.20%          | 19,311,810                | 6.65%          |
| Construction and engineering            | 19,275,031                | 5.89%          | 18,753,268                | 6.45%          |
| Healthcare facilities                   | 17,985,680                | 5.50%          | 18,222,690                | 6.27%          |
| Trailer leasing services                | 17,064,785                | 5.21%          | 16,986,613                | 5.85%          |
| Manufacturing — mechanical products     | 15,416,411                | 4.71%          | 15,494,737                | 5.33%          |
| Data processing and outsourced services | 13,473,611                | 4.12%          | 13,850,146                | 4.77%          |
| Media — Advertising                     | 13,403,441                | 4.10%          | 12,781,230                | 4.40%          |
| Merchandise display                     | 13,014,576                | 3.98%          | 12,799,999                | 4.40%          |
| Home furnishing retail                  | 12,855,762                | 3.93%          | 11,419,981                | 3.93%          |
| Housewares & specialties                | 12,045,029                | 3.68%          | 11,419,317                | 3.93%          |
| Emulsions manufacturing                 | 11,743,630                | 3.59%          | 9,523,464                 | 3.28%          |
| Air freight and logistics               | 10,758,896                | 3.29%          | —                         | 0.00%          |
| Capital goods                           | 9,965,792                 | 3.05%          | 9,638,999                 | 3.32%          |
| Environmental & facilities services     | 8,924,801                 | 2.73%          | 8,954,807                 | 3.08%          |
| Food distributors                       | 8,922,946                 | 2.73%          | 11,994,788                | 4.13%          |
| Household products/ specialty chemicals | 7,803,805                 | 2.38%          | 11,853,805                | 4.08%          |
| Entertainment — theaters                | 7,601,085                 | 2.32%          | 11,780,851                | 4.05%          |
| Leisure facilities                      | 7,187,169                 | 2.20%          | 7,482,805                 | 2.58%          |
| Building products                       | 7,036,357                 | 2.13%          | 6,973,122                 | 2.39%          |
| Lumber products                         | —                         | 0.00%          | 10,344,129                | 3.56%          |
| Total                                   | <u>\$ 327,232,285</u>     | <u>100.00%</u> | <u>\$ 290,584,985</u>     | <u>100.00%</u> |
| <b>Fair Value:</b>                      |                           |                |                           |                |
| Healthcare technology                   | \$ 36,762,574             | 12.27%         | \$ 9,864,480              | 3.60%          |
| Healthcare services                     | 33,722,889                | 11.26%         | 23,377,791                | 8.54%          |
| Footwear and apparel                    | 22,082,721                | 7.37%          | 17,934,513                | 6.55%          |
| Healthcare facilities                   | 17,853,369                | 5.96%          | 18,222,690                | 6.66%          |
| Construction and engineering            | 17,852,292                | 5.96%          | 18,683,167                | 6.82%          |
| Restaurants                             | 17,811,015                | 5.94%          | 17,639,081                | 6.44%          |
| Manufacturing — mechanical products     | 15,081,138                | 5.03%          | 15,494,737                | 5.66%          |
| Data processing and outsourced services | 13,289,816                | 4.44%          | 13,697,302                | 5.00%          |
| Media — Advertising                     | 13,099,203                | 4.37%          | 12,516,696                | 4.57%          |
| Merchandise display                     | 13,074,682                | 4.36%          | 12,799,999                | 4.68%          |
| Emulsions manufacturing                 | 12,130,945                | 4.05%          | 9,523,464                 | 3.48%          |
| Air freight and logistics               | 10,799,619                | 3.60%          | —                         | 0.00%          |
| Home furnishing retail                  | 10,336,401                | 3.45%          | 10,723,527                | 3.92%          |
| Trailer leasing services                | 9,860,940                 | 3.29%          | 16,985,473                | 6.20%          |
| Capital goods                           | 9,766,485                 | 3.26%          | 9,775,696                 | 3.57%          |
| Food distributors                       | 8,979,657                 | 3.00%          | 11,994,788                | 4.38%          |
| Entertainment — theaters                | 7,541,582                 | 2.52%          | 11,777,270                | 4.30%          |
| Leisure facilities                      | 7,144,897                 | 2.38%          | 7,494,930                 | 2.74%          |

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NOTES TO CONSOLIDATED FINANCIAL STATEMENTS — (Continued)

|   | September 30, 2009    |                | September 30, 2008    |                |
|---|-----------------------|----------------|-----------------------|----------------|
| Building products                       | 6,158,908             | 2.06%          | 6,975,311             | 2.55%          |
| Environmental & facilities services     | 6,122,236             | 2.04%          | 8,859,477             | 3.24%          |
| Housewares & specialties                | 5,691,107             | 1.90%          | 11,407,776            | 4.17%          |
| Household products/ specialty chemicals | 4,448,661             | 1.49%          | 3,626,497             | 1.33%          |
| Lumber products                         | —                     | 0.00%          | 4,384,489             | 1.60%          |
| Total                                   | <u>\$ 299,611,137</u> | <u>100.00%</u> | <u>\$ 273,759,154</u> | <u>100.00%</u> |

The Company's investments are generally in small and mid-sized companies in a variety of industries. At September 30, 2009 and September 30, 2008, the Company had no investments that were greater than 10% of the total investment portfolio at fair value. Income, consisting of interest, dividends, fees, other investment income, and realization of gains or losses on equity interests, can fluctuate upon repayment of an investment or sale of an equity interest and in any given year can be highly concentrated among several investments. For the years ended September 30, 2009 and September 30, 2008, no individual investment produced income that exceeded 10% of investment income.

**Note 4. Unearned Fee Income — Debt Origination Fees**

The Company capitalizes upfront debt origination fees received in connection with financings and the unearned income from such fees is accreted into fee income over the life of the financing. In accordance with ASC 820, the net balance is reflected as unearned income in the cost and fair value of the respective investments.

Accumulated unearned fee income activity for the years ended September 30, 2009 and 2008 was as follows:

|   | Year Ended<br>September 30, 2009 |                  | Year Ended<br>September 30, 2008 |                  |
|---|----------------------------------|------------------|----------------------------------|------------------|
| Beginning accumulated unearned fee income balance | \$                               | 5,236,265        | \$                               | 1,566,293        |
| Net fees received                                 |                                  | 3,895,559        |                                  | 5,478,011        |
| Unearned fee income recognized                    |                                  | (3,542,194)      |                                  | (1,808,039)      |
| Ending unearned fee income balance                | <u>\$</u>                        | <u>5,589,630</u> | <u>\$</u>                        | <u>5,236,265</u> |

**Note 5. Share Data and Stockholders' Equity**

Effective January 2, 2008, the Partnership merged with and into the Company. At the time of the merger, all outstanding partnership interests in the Partnership were exchanged for 12,480,972 shares of common stock of the Company. An additional 26 fractional shares were payable to the stockholders in cash.

On June 17, 2008, the Company completed an initial public offering of 10,000,000 shares of its common stock at the offering price of \$14.12 per share. The net proceeds totaled approximately \$129.5 million net of investment banking commissions of approximately \$9.9 million and offering costs of approximately \$1.8 million.

On July 21, 2009, the Company completed a follow-on public offering of 9,487,500 shares of its common stock, which included the underwriters' exercise of their over-allotment option, at the offering price of \$9.25. The net proceeds totaled approximately \$82.7 million after deducting investment banking commissions of approximately \$4.4 million and offering costs of \$0.7 million.

FIFTH STREET FINANCE CORP.

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS — (Continued)

On September 25, 2009, the Company completed a follow-on public offering of 5,520,000 shares of its common stock, which included the underwriters' exercise of their over-allotment option, at the offering price of \$10.50. The net proceeds totaled approximately \$54.9 million after deducting investment banking commissions of approximately \$2.8 million and offering costs of approximately \$0.3 million.

No dilutive instruments were outstanding and reflected in the Company's Consolidated Balance Sheet at September 30, 2009. The following table sets forth the weighted average shares outstanding for computing basic and diluted earnings per common share for the years ended September 30, 2009 and September 30, 2008.

|   | Year Ended<br>September 30,<br>2009 | Year Ended<br>September 30,<br>2008 |
|---|-------------------------------------|-------------------------------------|
| Weighted average common shares outstanding, basic and diluted | 24,654,325                          | 15,557,469                          |

On December 13, 2007, the Company adopted a dividend reinvestment plan that provides for reinvestment of its distributions on behalf of its stockholders, unless a stockholder elects to receive cash. As a result, if the Board of Directors authorizes, and the Company declares, a cash distribution, then its stockholders who have not "opted out" of the dividend reinvestment plan will have their cash distributions automatically reinvested in additional shares of common stock, rather than receiving the cash distributions. On May 1, 2008, the Company declared a dividend of \$0.30 per share to stockholders of record on May 19, 2008. On June 3, 2008, the Company paid a cash dividend of approximately \$1.9 million and issued 133,317 common shares totaling approximately \$1.9 million under the dividend reinvestment plan. On August 6, 2008, the Company declared a dividend of \$0.31 per share to stockholders of record on September 10, 2008. On September 26, 2008, the Company paid a cash dividend of \$5.1 million, and purchased and distributed a total of 196,786 shares (\$1.9 million) of its common stock under the dividend reinvestment plan. On December 9, 2008, the Company declared a dividend of \$0.32 per share to stockholders of record on December 19, 2008, and a \$0.33 per share dividend to stockholders of record on December 30, 2008. On December 18, 2008, the Company declared a special dividend of \$0.05 per share to stockholders of record on December 30, 2008. On December 29, 2008, the Company paid a cash dividend of approximately \$6.4 million and issued 105,326 common shares totaling approximately \$0.8 million under the dividend reinvestment plan. On January 29, 2009, the Company paid a cash dividend of approximately \$7.6 million and issued 161,206 common shares totaling approximately \$1.0 million under the dividend reinvestment plan. On April 14, 2009, the Company declared a dividend of \$0.25 per share to stockholders of record as of May 26, 2009. On June 25, 2009, the Company paid a cash dividend of approximately \$5.6 million and issued 11,776 common shares totaling approximately \$0.1 million under the dividend reinvestment plan. On August 3, 2009, the Company declared a dividend of \$0.25 per share to stockholders of record as of September 8, 2009. On September 25, 2009 the Company paid a cash dividend of approximately \$7.5 million and issued 56,890 common shares totaling approximately \$0.6 million under the dividend reinvestment plan.

In October 2008, the Company's Board of Directors authorized a stock repurchase program to acquire up to \$8 million of the Company's outstanding common stock. Stock repurchases under this program may be made through the open market at times and in such amounts as Company management deems appropriate. The stock repurchase program expires December 2009 and may be limited or terminated by the Board of Directors. In October 2008, the Company repurchased 78,000 shares of common stock on the open market as part of its share repurchase program.

**Note 6. Line of Credit**

On November 16, 2009, Fifth Street Funding, LLC, a wholly-owned bankruptcy remote, special purpose subsidiary ("Funding") and the Company, entered into a Loan and Servicing Agreement ("Agreement"), with respect to a three-year credit facility ("Facility") with Wachovia Bank, National Association ("Wachovia"),

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NOTES TO CONSOLIDATED FINANCIAL STATEMENTS — (Continued)

Wells Fargo Securities, LLC, as administrative agent (“Wells Fargo”), each of the additional institutional and conduit lenders party thereto from time to time, and each of the lender agents party thereto from time to time, in the amount of \$50 million with an accordion feature, which will allow for potential future expansion of the Facility up to \$100 million. The Facility is secured by all of the assets of Funding, and all of the Company’s equity interest in Funding. The Facility bears interest at LIBOR plus 4.00% per annum and has a maturity date of November 16, 2012. The Facility may be extended for up to two additional years upon the mutual consent of Wells Fargo and each of the lender parties thereto. The Company intends to use the net proceeds of the Facility to fund a portion of its loan origination activities and for general corporate purposes.

In connection with the Facility, the Company concurrently entered into (i) a Purchase and Sale Agreement with Funding, pursuant to which the Company will sell to Funding certain loan assets it has originated or acquired, or will originate or acquire and (ii) a Pledge Agreement with Wells Fargo Bank, National Association, pursuant to which the Company pledged all of its equity interests in Funding as security for the payment of Funding’s obligations under the Agreement and other documents entered into in connection with the Facility.

The Agreement and related agreements governing the Facility required both Funding and the Company to, among other things (i) make representations and warranties regarding the collateral as well as each of their businesses, (ii) agree to certain indemnification obligations, and (iii) comply with various covenants, servicing procedures, limitations on acquiring and disposing of assets, reporting requirements and other customary requirements for similar credit facilities. The Facility documents also included usual and customary default provisions such as the failure to make timely payments under the Facility, a change in control of Funding, and the failure by Funding or the Company to materially perform under the Agreement and related agreements governing the Facility, which, if not complied with, could accelerate repayment under the Facility, thereby materially and adversely affecting the Company’s liquidity, financial condition and results of operations.

Each loan origination under the Facility is subject to the satisfaction of certain conditions. The Company cannot assure you that Funding will be able to borrow funds under the Facility at any particular time or at all.

On January 15, 2008, the Company entered into a \$50 million secured revolving credit facility with the Bank of Montreal, at a rate of LIBOR plus 1.5%, with a one year maturity date. The credit facility was secured by the Company’s existing investments. On December 30, 2008, Bank of Montreal renewed the Company’s \$50 million credit facility. The terms included a 50 basis points commitment fee, an interest rate of LIBOR +3.25% and a term of 364 days. The Company gave notice of termination, effective September 16, 2009, to Bank of Montreal with respect to this revolving credit facility.

Prior to the merger of the Partnership with and into the Company, the Partnership entered into a \$50 million unsecured, revolving line of credit with Wachovia Bank, N.A. (“Loan Agreement”) which had a final maturity date of April 1, 2008. Borrowings under the Loan Agreement were at a variable interest rate of LIBOR plus 0.75% per annum. In connection with the Loan Agreement, the General Partner, a former member of the Board of Directors of Fifth Street Finance Corp. and an officer of Fifth Street Finance Corp. (collectively “guarantors”), entered into a guaranty agreement (the “Guaranty”) with the Partnership. Under the terms of the Guaranty, the guarantors agreed to guarantee the Partnership’s obligations under the Loan Agreement. In consideration for the guaranty, the Partnership was obligated to pay a former member of the Board of Directors of Fifth Street Finance Corp. a fee of \$41,667 per month so long as the Loan Agreement was in effect. For the period from October 1, 2007 to November 27, 2007, the Partnership paid \$83,333 under this Guaranty. In October 2007, the Partnership drew \$28.25 million under the Loan Agreement. These loans were paid back in full with interest in November 2007. As of November 27, 2007, the Partnership terminated the Loan Agreement and the Guaranty.

Interest expense for the years ended September 30, 2009 and 2008 and the period ended September 30, 2007, was \$636,901, \$917,043 and \$522,316, respectively.

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NOTES TO CONSOLIDATED FINANCIAL STATEMENTS — (Continued)

**Note 7. Interest and Dividend Income**

Interest income is recorded on the accrual basis to the extent that such amounts are expected to be collected. In accordance with the Company's policy, accrued interest is evaluated periodically for collectibility. The Company stops accruing interest on investments when it is determined that interest is no longer collectible. Distributions from portfolio companies are recorded as dividend income when the distribution is received.

The Company holds debt in its portfolio that contains a payment-in-kind ("PIK") interest provision. The PIK interest, which represents contractually deferred interest added to the loan balance that is generally due at the end of the loan term, is generally recorded on the accrual basis to the extent such amounts are expected to be collected. The Company generally ceases accruing PIK interest if there is insufficient value to support the accrual or if the Company does not expect the portfolio company to be able to pay all principal and interest due. The Company's decision to cease accruing PIK interest involves subjective judgments and determinations based on available information about a particular portfolio company, including whether the portfolio company is current with respect to its payment of principal and interest on its loans and debt securities; monthly and quarterly financial statements and financial projections for the portfolio company; the Company's assessment of the portfolio company's business development success, including product development, profitability and the portfolio company's overall adherence to its business plan; information obtained by the Company in connection with periodic formal update interviews with the portfolio company's management and, if appropriate, the private equity sponsor; and information about the general economic and market conditions in which the portfolio company operates. Based on this and other information, the Company determines whether to cease accruing PIK interest on a loan or debt security. The Company's determination to cease accruing PIK interest on a loan or debt security is generally made well before the Company's full write-down of such loan or debt security.

Accumulated PIK interest activity for the years ended September 30, 2009 and September 30, 2008 was as follows:

|  | September 30,<br>2009 | September 30,<br>2008 |
|--|-----------------------|-----------------------|
| PIK balance at beginning of period     | \$ 5,367,032          | \$ 588,795            |
| Gross PIK interest accrued             | 8,853,636             | 4,897,398             |
| Accumulated deferred cash interest     | 243,953               | —                     |
| PIK income reserves                    | (1,398,347)           | —                     |
| Deferred cash interest income reserves | (243,953)             | —                     |
| PIK interest received in cash          | (428,140)             | (114,412)             |
| Loan exits and other PIK adjustments   | (334,703)             | (4,749)               |
| <b>PIK balance at end of period</b>    | <b>\$ 12,059,478</b>  | <b>\$ 5,367,032</b>   |

Two investments did not pay all of their scheduled monthly cash interest payments for the period ended September 30, 2009. As of September 30, 2009, the Company had stopped accruing PIK interest and original issue discount ("OID") on five investments, including the two investments that had not paid all of their scheduled monthly cash interest payments. At September 30, 2008, no loans or debt securities were on non-accrual status.

**FIFTH STREET FINANCE CORP.**  
**NOTES TO CONSOLIDATED FINANCIAL STATEMENTS — (Continued)**

Income non-accrual amounts for the year ended September 30, 2009 were as follows:

|                      |                            |
|----------------------|----------------------------|
| Cash interest income | \$ 2,938,190               |
| PIK interest income  | 1,398,347                  |
| OID income           | 402,522                    |
| <b>Total</b>         | <b><u>\$ 4,739,059</u></b> |

**Note 8. Taxable/Tax Distributable Income and Dividend Distributions**

Taxable income differs from net increase (decrease) in net assets resulting from operations primarily due to: (1) unrealized appreciation (depreciation) on investments, as investment gains and losses are not included in taxable income until they are realized; (2) origination fees received in connection with investments in portfolio companies, which are amortized into interest income over the life of the investment for book purposes, are treated as taxable income upon receipt; (3) organizational and deferred offering costs; (4) recognition of interest income on certain loans; and (5) income or loss recognition on exited investments.

At September 30, 2009, the Company has a net loss carryforward of \$1.6 million to offset net capital gains, to the extent provided by federal tax law. The capital loss carryforward will expire in the Company's tax year ending September 30, 2017.

Listed below is a reconciliation of "net increase in net assets resulting from operations" to taxable income for the year ended September 30, 2009.

|  |                             |
|--|-----------------------------|
| Net increase in net assets resulting from operations           | \$ 6,194,000                |
| Net change in unrealized depreciation from investments         | 10,795,000                  |
| Book/tax difference due to deferred loan origination fees, net | 353,000                     |
| Book/tax difference due to organizational and offering costs   | (87,000)                    |
| Book/tax difference due to interest income on certain loans    | 3,394,000                   |
| Book/tax difference due to capital loss carryforward           | 1,645,000                   |
| Other book-tax differences                                     | (13,000)                    |
| <b>Taxable/Tax Distributable Income(1)</b>                     | <b><u>\$ 22,281,000</u></b> |

(1) The Company's taxable income for 2009 is an estimate and will not be finally determined until the Company files its tax return for the fiscal year ended September 30, 2009. Therefore, the final taxable income may be different than the estimate.

As of September 30, 2009, the components of accumulated undistributed income on a tax basis were as follows:

|  |              |
|--|--------------|
| Undistributed ordinary income, net (RIC status)                    | \$ 862,000   |
| Unrealized losses, net   | (27,621,000) |
| Accumulated partnership taxable income not subject to distribution | 6,236,000    |
| Other book-tax differences   | (9,290,000)  |

The Company uses the asset and liability method to account for its taxable subsidiaries' income taxes. Using this method, the Company recognizes deferred tax assets and liabilities for the estimated future tax effects attributable to temporary differences between financial reporting and tax bases of assets and liabilities. In addition, the Company recognizes deferred tax benefits associated with net operating carry forwards that it may use to offset future tax obligations. The Company measures deferred tax assets and liabilities using the enacted tax rates expected to apply to taxable income in the years in which it expects to recover or settle those

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NOTES TO CONSOLIDATED FINANCIAL STATEMENTS — (Continued)

temporary differences. The Company has recorded a deferred tax asset for the difference in the book and tax basis of certain equity investments and tax net operating losses held by its taxable subsidiaries of \$1.4 million. However, this amount has been fully offset by a valuation allowance of \$1.4 million, since it is more likely than not that these deferred tax assets will not be realized.

Distributions to stockholders are recorded on the declaration date. The Company is required to distribute annually to its stockholders at least 90% of its net ordinary income and net realized short-term capital gains in excess of net realized long-term capital losses for each taxable year in order to be eligible for the tax benefits allowed to a RIC under Subchapter M of the Code. The Company anticipates paying out as a dividend all or substantially all of those amounts. The amount to be paid out as a dividend is determined by the Board of Directors each quarter and is based on management's estimate of the Company's annual taxable income. Based on that, a dividend is declared and paid each quarter. The Company maintains an "opt out" dividend reimbursement plan for its stockholders.

To date, the Company's Board of Directors declared the following distributions:

| Dividend Type | Date Declared | Record Date | Payment Date | Amount |
|---------------|---------------|-------------|--------------|--------|
| Quarterly     | 5/1/2008      | 5/19/2008   | 6/3/2008     | \$0.30 |
| Quarterly     | 8/6/2008      | 9/10/2008   | 9/26/2008    | \$0.31 |
| Quarterly     | 12/9/2008     | 12/19/2008  | 12/29/2008   | \$0.32 |
| Quarterly     | 12/9/2008     | 12/30/2008  | 1/29/2009    | \$0.33 |
| Special       | 12/18/2008    | 12/30/2008  | 1/29/2009    | \$0.05 |
| Quarterly     | 4/14/2009     | 5/26/2009   | 6/25/2009    | \$0.25 |
| Quarterly     | 8/3/2009      | 9/8/2009    | 9/25/2009    | \$0.25 |

For income tax purposes, the Company estimates that these distributions will be composed entirely of ordinary income, and will be reflected as such on the Form 1099-DIV for the calendar year 2009. To date, the Company's operations have resulted in no long-term capital gains or losses. The Company anticipates declaring further distributions to its stockholders to meet the RIC distribution requirements.

**Note 9. Realized Gains or Losses from Investments and Net Change in Unrealized Appreciation or Depreciation from Investments**

Realized gains or losses are measured by the difference between the net proceeds from the sale or redemption and the cost basis of the investment without regard to unrealized appreciation or depreciation previously recognized, and includes investments written-off during the period, net of recoveries. Net change in unrealized appreciation or depreciation from investments reflects the net change in the valuation of the portfolio pursuant to the Company's valuation guidelines and the reclassification of any prior period unrealized appreciation or depreciation on exited investments.

During the year ended September 30, 2009 the Company exited its investment in American Hardwoods Industries, LLC and recorded a realized loss of \$10.4 million, and recorded a \$4.0 million realized loss on one of its portfolio company investments in connection with the determination that the investment was permanently impaired based on, among other things, analysis of changes in the portfolio company's business operations and prospects. During the year ended September 30, 2008 the Company sold its equity investment in Filet of Chicken and realized a gain of approximately \$62,000.

**Note 10. Concentration of Credit Risks**

The Company places its cash in financial institutions, and at times, such balances may be in excess of the FDIC insured limit.



**FIFTH STREET FINANCE CORP.**  
**NOTES TO CONSOLIDATED FINANCIAL STATEMENTS — (Continued)**

**Note 11. Related Party Transactions**

The Company has entered into an investment advisory agreement with the Investment Adviser. Under the investment advisory agreement, the Company pays the Investment Adviser a fee for its services under the investment advisory agreement consisting of two components—a base management fee and an incentive fee.

***Base management Fee***

The base management fee is calculated at an annual rate of 2% of the Company's gross assets, which includes any borrowings for investment purposes. The base management fee is payable quarterly in arrears, and will be calculated based on the value of the Company's gross assets at the end of each fiscal quarter, and appropriately adjusted on a pro rata basis for any equity capital raises or repurchases during such quarter. The base management fee for any partial month or quarter will be appropriately prorated.

In addition to the proration described above, for the quarter ended September 30, 2009, the Investment Adviser waived approximately \$172,000 of the base management fee on a portion of the proceeds raised in connection with the equity offerings the Company completed in 2009 and which were held in cash or cash equivalents at September 30, 2009.

Prior to the merger of the Partnership with and into the Company, which occurred on January 2, 2008, the Partnership paid the Investment Adviser a management fee (the "Management Fee"), subject to the adjustments as described in the Partnership Agreement, for investment advice equal to an annual rate of 2% of the aggregate capital commitments of all limited partners (other than affiliated limited partners) for each fiscal year (or portion thereof) provided, however, that commencing on the earlier of (1) the first day of the fiscal quarter immediately following the expiration of the commitment period, or (2) if a temporary suspension period became permanent in accordance with the Partnership Agreement, on the first day of the fiscal quarter immediately following the date of such permanent suspension, the Management Fee for each subsequent twelve month period was equal to 1.75% of the NAV of the Partnership (exclusive of the portion thereof attributable to the General Partner and the affiliated limited partners, based upon respective capital percentages).

For the years ended September 30, 2009 and 2008 and the period ended September 30, 2007, base management fees were approximately \$5.9 million, \$4.3 million and \$1.6 million, respectively.

***Incentive Fee***

The incentive fee portion of the investment advisory agreement has two parts. The first part is calculated and payable quarterly in arrears based on the Company's "Pre-Incentive Fee Net Investment Income" for the immediately preceding fiscal quarter. For this purpose, "Pre-Incentive Fee Net Investment Income" means interest income, dividend income and any other income (including any other fees (other than fees for providing managerial assistance), such as commitment, origination, structuring, diligence and consulting fees or other fees that the Company receives from portfolio companies) accrued during the fiscal quarter, minus the Company's operating expenses for the quarter (including the base management fee, expenses payable under the Company's administration agreement with FSC, Inc., and any interest expense and dividends paid on any issued and outstanding indebtedness or preferred stock, but excluding the incentive fee). Pre-Incentive Fee Net Investment Income includes, in the case of investments with a deferred interest feature (such as original issue discount, debt instruments with PIK interest and zero coupon securities), accrued income that the Company has not yet received in cash. Pre-Incentive Fee Net Investment Income does not include any realized capital gains, realized capital losses or unrealized capital appreciation or depreciation. Pre-Incentive Fee Net Investment Income, expressed as a rate of return on the value of the Company's net assets at the end of the immediately preceding fiscal quarter, will be compared to a "hurdle rate" of 2% per quarter (8% annualized), subject to a "catch-up" provision measured as of the end of each fiscal quarter. The Company's net investment income used to calculate this part of the incentive fee is also included in

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NOTES TO CONSOLIDATED FINANCIAL STATEMENTS — (Continued)

the amount of its gross assets used to calculate the 2% base management fee. The operation of the incentive fee with respect to the Company's Pre-Incentive Fee Net Investment Income for each quarter is as follows:

- no incentive fee is payable to the Investment Adviser in any fiscal quarter in which the Company's Pre-Incentive Fee Net Investment Income does not exceed the hurdle rate of 2% (the "preferred return" or "hurdle").
- 100% of the Company's Pre-Incentive Fee Net Investment Income with respect to that portion of such Pre-Incentive Fee Net Investment Income, if any, that exceeds the hurdle rate but is less than or equal to 2.5% in any fiscal quarter (10% annualized) is payable to the Investment Adviser. The Company refers to this portion of its Pre-Incentive Fee Net Investment Income (which exceeds the hurdle rate but is less than or equal to 2.5%) as the "catch-up." The "catch-up" provision is intended to provide the Investment Adviser with an incentive fee of 20% on all of the Company's Pre-Incentive Fee Net Investment Income as if a hurdle rate did not apply when the Company's Pre-Incentive Fee Net Investment Income exceeds 2.5% in any fiscal quarter.
- 20% of the amount of the Company's Pre-Incentive Fee Net Investment Income, if any, that exceeds 2.5% in any fiscal quarter (10% annualized) is payable to the Investment Adviser once the hurdle is reached and the catch-up is achieved (20% of all Pre-Incentive Fee Net Investment Income thereafter is allocated to the Investment Adviser).

The second part of the incentive fee will be determined and payable in arrears as of the end of each fiscal year (or upon termination of the investment advisory agreement, as of the termination date), commencing on September 30, 2008, and will equal 20% of the Company's realized capital gains, if any, on a cumulative basis from inception through the end of each fiscal year, computed net of all realized capital losses and unrealized capital depreciation on a cumulative basis, less the aggregate amount of any previously paid capital gain incentive fees, provided that, the incentive fee determined as of September 30, 2008 will be calculated for a period of shorter than twelve calendar months to take into account any realized capital gains computed net of all realized capital losses and unrealized capital depreciation from inception.

For the years ended September 30, 2009 and 2008, incentive fees were approximately \$7.8 million and \$4.1 million, respectively. There were no incentive fees paid for the period ended September 30, 2007.

**Transaction fees**

Prior to the merger of the Partnership with and into the Company, which occurred on January 2, 2008, the Investment Adviser received 20% of transaction origination fees. For the year ended September 30, 2008 and the period ended September 30, 2007, payments for the transaction fees paid to the Investment Adviser amounted to approximately \$0.2 million and \$0.4 million, respectively, and were expensed as incurred.

**Indemnification**

The investment advisory agreement provides that, absent willful misfeasance, bad faith or gross negligence in the performance of their respective duties or by reason of the reckless disregard of their respective duties and obligations, the Company's Investment Adviser and its officers, managers, agents, employees, controlling persons, members (or their owners) and any other person or entity affiliated with it, are entitled to indemnification from the Company for any damages, liabilities, costs and expenses (including reasonable attorneys' fees and amounts reasonably paid in settlement) arising from the rendering of the Investment Adviser's services under the investment advisory agreement or otherwise as the Company's Investment Adviser.

FIFTH STREET FINANCE CORP.

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS — (Continued)

**Administration Agreement**

The Company has also entered into an administration agreement with FSC, Inc. under which FSC, Inc. provides administrative services for the Company, including office facilities and equipment, and clerical, bookkeeping and recordkeeping services at such facilities. Under the administration agreement, FSC, Inc. also performs or oversees the performance of the Company's required administrative services, which includes being responsible for the financial records which the Company is required to maintain and preparing reports to the Company's stockholders and reports filed with the SEC. In addition, FSC, Inc. assists the Company in determining and publishing the Company's net asset value, overseeing the preparation and filing of the Company's tax returns and the printing and dissemination of reports to the Company's stockholders, and generally overseeing the payment of the Company's expenses and the performance of administrative and professional services rendered to the Company by others. For providing these services, facilities and personnel, the Company reimburses FSC, Inc. the allocable portion of overhead and other expenses incurred by FSC, Inc. in performing its obligations under the administration agreement, including rent and the Company's allocable portion of the costs of compensation and related expenses of the Company's chief financial officer and his staff, and the staff of our chief compliance officer. FSC, Inc. may also provide, on the Company's behalf, managerial assistance to the Company's portfolio companies. The administration agreement may be terminated by either party without penalty upon 60 days' written notice to the other party.

For the year ended September 30, 2009, the Company incurred administrative expenses of approximately \$1.3 million. At September 30, 2009, approximately \$704,000 was included in Due to FSC, Inc. in the Consolidated Balance Sheets.

**Note 12. Financial Highlights**

|   | Year Ended<br>September 30,<br>2009(1) | Year Ended<br>September 30,<br>2008(1)(2) | For the Period<br>February 15, 2007<br>(Inception) through<br>September 30,<br>2007(1)(3) |
|---|--|---|---|
| <i>Per Share Data(4):</i>   |  |   |   |
| Net asset value at beginning of period  | \$ 13.02                               | \$ 8.56                                   | NA  |
| Capital contributions from partners   | —                                      | 2.94                                      | NA  |
| Capital withdrawals by partners   | —                                      | (0.12)                                    | NA  |
| Dividends declared and paid   | (1.20)                                 | (0.61)                                    | NA  |
| Issuance of common stock  | (1.21)                                 | 2.11                                      | NA  |
| Repurchases of common stock   | (0.02)                                 | —   | NA  |
| Net investment income   | 1.27                                   | 0.89                                      | NA  |
| Unrealized depreciation on investments  | (0.44)                                 | (0.75)                                    | NA  |
| Realized loss on investments  | (0.58)                                 | —   | NA  |
| Net asset value at end of period  | <u>\$ 10.84</u>                        | <u>\$ 13.02</u>                           | <u>NA</u>   |
| Stockholders' equity at beginning of period   | \$ 294,335,839                         | \$ 106,815,695                            | —   |
| Stockholders' equity at end of period   | \$ 410,556,071                         | \$ 294,335,839                            | \$ 106,815,695  |
| Average stockholders' equity(5)   | \$ 291,401,218                         | \$ 205,932,850                            | \$ 30,065,414   |
| Ratio of total expenses, excluding interest and line of credit guarantee expenses, to average stockholders' equity(6) | 6.12%                                  | 5.86%                                     | 8.53%   |
| Ratio of total expenses to average stockholders' equity(6)  | 6.34%                                  | 6.35%                                     | 11.10%  |
| Ratio of net increase in net assets resulting from operations to ending stockholders' equity(6)                       | 1.51%                                  | 1.11%                                     | 1.01%   |
| Ratio of unrealized depreciation on investments to ending stockholders' equity(6)                                     | (2.63)%                                | (5.76)%                                   | 0.12%   |
| Total return to stockholders based on average stockholders' equity(6)   | 2.13%                                  | 1.58%                                     | 3.60%   |
| Weighted average outstanding debt(7)  | \$ 5,019,178                           | \$ 11,887,427                             | \$ 12,155,296   |

FIFTH STREET FINANCE CORP.

NOTES TO CONSOLIDATED FINANCIAL STATEMENTS — (Continued)

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- (1) The amounts reflected in the financial highlights above represent net assets, income and expense ratios for all stockholders.
  - (2) Per share data for the year ended September 30, 2008 presumes the issuance of the 12,480,972 common shares at October 1, 2007 which were actually issued on January 2, 2008 in connection with the merger described above.
  - (3) Per share data for the period February 15, 2007 (inception) through September 30, 2007 reflects the fact that there was no established public trading market for the Company's common stock prior to October 1, 2007.
  - (4) Based on actual shares outstanding at the end of the corresponding period or weighted average shares outstanding for the period, as appropriate.
  - (5) Calculated based upon the daily weighted average stockholders' equity for the period.
  - (6) Interim periods are not annualized.
  - (7) Calculated based upon the daily weighted average of loans payable for the period.

**Note 13. Preferred Stock**

The Company's restated certificate of incorporation had not authorized any shares of preferred stock. However, on April 4, 2008, the Company's Board of Directors approved a certificate of amendment to its restated certificate of incorporation reclassifying 200,000 shares of its common stock as shares of non-convertible, non-participating preferred stock, with a par value of \$0.01 and a liquidation preference of \$500 per share ("Series A Preferred Stock") and authorizing the issuance of up to 200,000 shares of Series A Preferred Stock. The Company's certificate of amendment was also approved by the holders of a majority of the shares of its outstanding common stock through a written consent first solicited on April 7, 2008. On April 24, 2008, the Company filed its certificate of amendment and on April 25, 2008, it sold 30,000 shares of Series A Preferred Stock to a company controlled by Bruce E. Toll, one of the Company's directors at that time. For the three months ended June 30, 2008, the Company paid dividends of approximately \$234,000 on the 30,000 shares of Series A Preferred Stock. The dividend payment is considered and included in interest expense for accounting purposes since the preferred stock has a mandatory redemption feature. On June 30, 2008, the Company redeemed 30,000 shares of Series A Preferred Stock at the mandatory redemption price of 101% of the liquidation preference or \$15,150,000. The \$150,000 is considered and included in interest expense for accounting purposes due to the stock's mandatory redemption feature. No preferred stock is currently outstanding.

**Note 14. Subsequent Events**

On October 2, 2009, Storyteller Theaters Corporation drew \$250,000 on its line of credit. Prior to the draw, the Company's unfunded commitment was \$1.75 million.

On October 8, 2009, the Company funded \$153,972 of its previously unfunded limited partnership interest in Riverside Fund IV, LP upon receipt of the first closing notice of the fund.

On October 16, 2009, Elephant & Castle, Inc. repaid \$3.9 million of principal outstanding under its term loan. The balance of the loan was assumed by Repechage Investments Limited ("RIL"), the equity sponsor's

**FIFTH STREET FINANCE CORP.**  
**NOTES TO CONSOLIDATED FINANCIAL STATEMENTS — (Continued)**

holding company. The Company received a first lien on the assets of RIL and a guaranty on the balance of its debt.

On October 21, 2009, the Company invested an additional \$6.0 million of second lien debt in Western Emulsions, Inc., an existing portfolio company, to support its growth initiatives.

On October 26, 2009, the Company executed a non-binding term sheet for \$41.25 million for its portion of an investment in a post-secondary education company. The proposed terms of this investment include a \$10 million revolver at Libor+950 with a Libor floor of 3% and a \$31.25 million first lien term loan at Libor+950 with a Libor floor of 3%. This is a senior secured first lien facility with a scheduled maturity of five years. This proposed investment is subject to the completion of the Company's due diligence, approval process and documentation, and may not result in a completed investment. The Company may syndicate a portion of this investment.

On November 6, 2009, the Company executed a non-binding term sheet for \$34.0 million for an investment in a specialty chemical distributor. The proposed terms of this investment include a \$10 million revolver at 10%, a \$10 million Term Loan A at 10%, and a \$14 million Term Loan B at 12%. This is a first lien facility with a scheduled maturity of five years. This proposed investment is subject to the completion of the Company's due diligence, approval process and documentation, and may not result in a completed investment. The Company may syndicate a portion of this investment.

On November 12, 2009, the Company declared a \$0.27 per share dividend to common stockholders of record as of December 10, 2009. The dividend is payable December 29, 2009.

On November 12, 2009, the Company executed a letter agreement for the potential sale of its second lien term loan to CPAC, Inc. and/or its 2,297 shares of common stock of CPAC, Inc. The Company received a non-refundable deposit of \$150,000 in connection with the letter agreement.

On November 16, 2009, the Company entered into a three-year credit facility with Wachovia in the amount of \$50 million with an accordion feature, which will allow for potential future expansion of the facility up to \$100 million, and will bear interest at a rate of LIBOR plus 4% per annum. See "Note 6. Line of Credit" for a more detailed discussion of the credit facility.

On November 23, 2009, the Company received a cash payment in the amount of \$0.1 million, representing payment in full of all amounts due in connection with the cancellation of the Company's loan agreement with American Hardwoods Industries Holdings, LLC on August 3, 2009.

On December 1, 2009, the Company executed a non-binding term sheet for \$28.75 million for an investment in a specialty food company. The proposed terms of this investment include a \$2.0 million revolver at 10%, a \$10 million Term Loan A at 10%, and a \$16.75 million Term Loan B at 12% cash and 3% PIK. This is a first lien facility with a scheduled maturity of five years. This proposed investment is subject to the completion of the Company's due diligence, approval process and documentation, and may not result in a completed investment. The Company may syndicate a portion of this investment.

On December 3, 2009, the Company executed a non-binding term sheet for \$57.3 million for an investment in a contract manufacturer for medical device original equipment manufacturers. The proposed terms of this investment include a \$4.0 million revolver at Libor+700 with a 3% Libor floor, a \$33 million Term Loan A at Libor+700 with a 3% Libor floor, and a \$20.3 million Term Loan B at 12% cash interest and 2% PIK. This is a first lien loan facility with a scheduled maturity of five years. This proposed investment is

**FIFTH STREET FINANCE CORP.**

**NOTES TO CONSOLIDATED FINANCIAL STATEMENTS — (Continued)**

subject to the completion of the Company's due diligence, approval process and documentation, and may not result in a completed investment. The Company may syndicate a portion of this investment.

On December 4, 2009, the Company executed a non-binding term sheet for \$34.0 million for an investment in a franchisor of consumer services. The proposed terms of this investment include a \$2.0 million revolver at Libor+650 with a 3% Libor floor, a \$10 million first lien Term Loan A at Libor+675 with a 3% Libor floor, and a \$22.0 million Term Loan B at 12% cash and 2% PIK. This is a first lien loan facility with a scheduled maturity of five years. This proposed investment is subject to the completion of the Company's due diligence, approval process and documentation, and may not result in a completed investment. The Company may syndicate a portion of this investment.

**Fifth Street Finance Corp.**  
**Schedule of Investments in and Advances to Affiliates**

| Portfolio Company/Type of Investment(1)                          | Amount of Interest, Fees or Dividends Credited in Income(2) | Fair Value at October 1, 2008 | Gross Additions(3)   | Gross Reductions(4)    | Fair Value at September 30, 2009 |
|--|---|-------------------------------|----------------------|------------------------|----------------------------------|
| <b>Control Investments</b>                                       |   |                               |                      |                        |                                  |
| <b>Lighting by Gregory, LLC</b>                                  |   |                               |                      |                        |                                  |
| First Lien Term Loan A, 9.75% due 2/28/2013                      | \$ —  | \$ —                          | \$ 3,044,732         | \$ (625,105)           | \$ 2,419,627                     |
| First Lien Term Loan B, 14.5% due 2/28/2013                      | —   | —                             | 4,138,390            | (866,910)              | 3,271,480                        |
| 97.38% membership interest                                       | —   | —                             | 300,000              | (300,000)              | —                                |
| <b>Total Control Investments</b>                                 | <b>\$ —</b>   | <b>\$ —</b>                   | <b>\$ 7,483,122</b>  | <b>\$ (1,792,015)</b>  | <b>\$ 5,691,107</b>              |
| <b>Affiliate Investments</b>                                     |   |                               |                      |                        |                                  |
| <b>O'Curran, Inc.</b>  |   |                               |                      |                        |                                  |
| First Lien Term Loan A, 16.875% due 3/21/2012                    | 1,856,153   | 9,888,488                     | 511,758              | (213,745)              | 10,186,501                       |
| First Lien Term Loan B, 16.875% due 3/21/2012                    | 573,147   | 3,581,245                     | 367,826              | (1,030,000)            | 2,919,071                        |
| 1.75% Preferred Membership Interest in O'Curran Holding Co., LLC | —   | 130,413                       | —                    | —                      | 130,413                          |
| 3.3% Membership Interest in O'Curran Holding Co., LLC            | —   | 97,156                        | —                    | (43,325)               | 53,831                           |
| <b>CPAC, Inc.</b>  |   |                               |                      |                        |                                  |
| Second Lien Term Loan, 17.5% due 4/13/2012                       | 1,318,008   | 3,626,497                     | 4,932,164            | (4,110,000)            | 4,448,661                        |
| 2,297 shares of Common Stock                                     | —   | —                             | —                    | —                      | —                                |
| <b>Elephant &amp; Castle, Inc.</b>                               |   |                               |                      |                        |                                  |
| Second Lien Term Loan, 15.5% due 4/20/2012                       | 1,472,389   | 7,145,198                     | 449,845              | (283,439)              | 7,311,604                        |
| 7,500 shares of Series A Preferred Stock                         | —   | 196,386                       | 296,083              | —                      | 492,469                          |
| <b>MK Network, LLC</b>   |   |                               |                      |                        |                                  |
| First Lien Term Loan A, 13.5% due 6/1/2012                       | 1,462,272   | 9,115,152                     | 161,959              | (243,285)              | 9,033,826                        |
| First Lien Term Loan B, 17.5% due 6/1/2012                       | 872,070   | —                             | 5,581,544            | (418,000)              | 5,163,544                        |
| First Lien Revolver, Prime + 1.5% (10% floor), due 6/1/2010      | 17,111  | (11,113)                      | 17,113               | (6,000)                | —                                |
| 11,030 Membership Units  | —   | 760,441                       | 186,780              | (947,221)              | —                                |
| <b>Rose Tarlow, Inc.</b>   |   |                               |                      |                        |                                  |
| First Lien Term Loan, 12% due 1/25/2014                          | 1,128,302   | 9,796,648                     | 177,084              | (9,973,732)            | —                                |
| First Lien Revolver, LIBOR+4% (9% floor) due 1/25/2014           | 123,460   | 323,333                       | 1,214,827            | (1,538,160)            | —                                |
| 6.9% membership interest in RTMH Acquisition Company             | —   | 591,939                       | —                    | (591,939)              | —                                |
| 0.1% membership interest in RTMH Acquisition Company             | —   | 11,607                        | —                    | (11,607)               | —                                |
| <b>Martini Park, LLC</b>   |   |                               |                      |                        |                                  |
| First Lien Term Loan, 14% due 2/20/2013                          | 475,732   | 2,719,236                     | 220,000              | (870,933)              | 2,068,303                        |
| 5% membership interest   | —   | —                             | —                    | —                      | —                                |
| <b>Caregiver Services, Inc.</b>                                  |   |                               |                      |                        |                                  |
| Second Lien Term Loan A, LIBOR+6.85% (12% floor) due 2/25/2013   | 1,263,662   | 9,381,973                     | 288,785              | (1,445,358)            | 8,225,400                        |
| Second Lien Term Loan B, 16.5% due 2/25/2013                     | 2,806,310   | 12,811,951                    | 1,101,389            | (405,002)              | 13,508,338                       |
| 1,080,399 shares of Series A Preferred Stock                     | —   | 1,183,867                     | 22,732               | —                      | 1,206,599                        |
| <b>Total Affiliate Investments</b>                               | <b>\$ 13,368,616</b>  | <b>\$ 71,350,417</b>          | <b>\$ 15,529,889</b> | <b>\$ (22,131,746)</b> | <b>\$ 64,748,560</b>             |
| <b>Total Control &amp; Affiliate Investments</b>                 | <b>\$ 13,368,616</b>  | <b>\$ 71,350,417</b>          | <b>\$ 23,013,011</b> | <b>\$ (23,923,761)</b> | <b>\$ 70,439,667</b>             |

This schedule should be read in connection with the Company's Consolidated Financial Statements, including the Schedules of Investments and Notes to the Consolidated Financial Statements.

- 
- (1) The principal amount and ownership detail as shown in the Consolidated Schedules of Investments.
  - (2) Represents the total amount of interest, fees and dividends credited to income for the portion of the year an investment was included in the Control or Non-Control/Non-Affiliate categories, respectively.
  - (3) Gross additions include increases in the cost basis of investments resulting from new portfolio investments, follow-on Investments and accrued PIK interest, and the exchange of one or more existing securities for one or more new securities. Gross additions also include net increases in unrealized appreciation or net decreases in unrealized depreciation as well as the movement of an existing portfolio company into this category or out of a different category.
  - (4) Gross reductions include decreases in the cost basis of investment resulting from principal payments or sales and exchanges of one or more existing securities for one or more new securities. Gross reductions also include net increases in unrealized depreciation or net decreases in unrealized appreciation as well as the movement of an existing portfolio company out of this category and into a different category.



**Item 9. Changes in and Disagreements with Accountants on Accounting and Financial Disclosure**

Not applicable.

**Item 9A. Controls and Procedures**

**(a) Evaluation of Disclosure Controls and Procedures**

As of September 30, 2009 (the end of the period covered by this report), management, with the participation of our Chief Executive Officer and Chief Financial Officer, evaluated the effectiveness of the design and operation of our disclosure controls and procedures (as defined in Rule 13a-15(e) and 15d-15(e) of the Securities and Exchange Act of 1934). Based on that evaluation, our management, including the Chief Executive Officer and Chief Financial Officer, concluded that, at the end of such period, our disclosure controls and procedures were effective and provided reasonable assurance that information required to be disclosed in our periodic SEC filings is recorded, processed, summarized and reported within the time periods specified in the SEC's rules and forms, and that such information is accumulated and communicated to our management, including our Chief Executive Officer and Chief Financial Officer, as appropriate, to allow timely decisions regarding required disclosure. However, in evaluating the disclosure controls and procedures, management recognized that any controls and procedures, no matter how well designed and operated can provide only reasonable assurance of achieving the desired control objectives, and management necessarily was required to apply its judgment in evaluating the cost-benefit relationship of such possible controls and procedures.

**(b) Management's Report on Internal Control Over Financial Reporting**

Management is responsible for establishing and maintaining adequate internal control over financial reporting, and for performing an assessment of the effectiveness of internal control over financial reporting as of September 30, 2009. Internal control over financial reporting is a process designed by, or under the supervision of, our principal executive and principal financial officers, or persons performing similar functions, and effected by our Board of Directors, management and other personnel, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles. Our internal control over financial reporting includes those policies and procedures that (i) pertain to the maintenance of records that in reasonable detail accurately and fairly reflect the transactions and dispositions of assets of the company; (ii) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures are being made only in accordance with authorizations; and (iii) provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use, or disposition of our assets that could have a material effect on the financial statements.

Because of its inherent limitations, internal control over financial reporting may not prevent or detect misstatements. Therefore, even those systems determined to be effective can provide only reasonable assurance with respect to financial statement preparation and presentation.

Management performed an assessment of the effectiveness of our internal control over financial reporting as of September 30, 2009 based upon the criteria set forth in Internal Control — Integrated Framework issued by the Committee of Sponsoring Organizations of the Treadway Commission ("COSO"). Based on our assessment, management determined that our internal control over financial reporting was effective as of September 30, 2009.

**(c) Attestation Report of the Independent Registered Public Accounting Firm**

Refer to the Report of the Independent Registered Public Accounting Firm contained in Item 8 "Consolidated Financial Statements and Supplementary Data" of this annual report on Form 10-K.

**(d) Changes in Internal Controls Over Financial Reporting**

Management has not identified any change in our internal control over financial reporting that occurred during the fourth fiscal quarter of 2009 that has materially affected, or is reasonably likely to materially affect, our internal control over financial reporting.

**Item 9B. Other Information**

None

**PART III**

**Item 10. Directors, Executive Officers and Corporate Governance**

**Directors**

Information regarding our Board of Directors is set forth below. We have divided the directors into two groups — independent directors and interested directors. Interested directors are “interested persons” of Fifth Street Finance Corp. as defined in Section 2(a)(19) of the 1940 Act.

The address for each director is c/o Fifth Street Finance Corp., 10 Bank Street, 12<sup>th</sup> Floor, White Plains, NY 10606.

| <u>Name</u>                  | <u>Age</u> | <u>Director Since</u> | <u>Expiration of Term</u> |
|------------------------------|------------|-----------------------|---------------------------|
| <i>Independent Directors</i> |            |                       |                           |
| Adam C. Berkman              | 42         | 2007                  | 2012                      |
| Brian S. Dunn                | 38         | 2007                  | 2011                      |
| Byron J. Haney               | 48         | 2007                  | 2011                      |
| Frank C. Meyer               | 66         | 2007                  | 2010                      |
| Douglas F. Ray               | 41         | 2007                  | 2010                      |
| <i>Interested Directors</i>  |            |                       |                           |
| Leonard M. Tannenbaum        | 38         | 2007                  | 2012                      |
| Bernard D. Berman            | 38         | 2009                  | 2012                      |

**Executive Officers**

The following persons serve as our executive officers in the following capacities:

| <u>Name</u>           | <u>Age</u> | <u>Position(s) Held</u>  |
|-----------------------|------------|--|
| Leonard M. Tannenbaum | 38         | Chief Executive Officer and President                            |
| Bernard D. Berman     | 38         | Chief Compliance Officer, Executive Vice President and Secretary |
| William H. Craig      | 53         | Chief Financial Officer  |
| Marc A. Goodman       | 52         | Chief Investment Officer   |

The address for each executive officer is c/o Fifth Street Finance Corp., 10 Bank Street, 12<sup>th</sup> Floor, White Plains, NY 10606.

**Biographical Information**

*Independent Directors*

- *Adam C. Berkman.* Mr. Berkman has been a member of our Board of Directors since December 2007. Mr. Berkman has over 20 years of experience in strategy, operations, finance and business development in the consumer products, importing and manufacturing, wholesale distribution, business services and information technology industries. Since September 2007, he has served as chief operating officer of Adrianna Papell LLC, an apparel company. From February 2006 to May 2007, Mr. Berkman served as the chief financial officer of Accessory Network LLC, and from May 2003 to January 2006, he served as the chief financial officer of Amerex Group, Inc, each of which is an apparel/accessory firm. Prior to this, from August 2001 to February 2003, he was the vice president of business development at Accruent, Inc., a leading real estate performance management software solutions company. Mr. Berkman also co-founded MyContracts, a predecessor of Accruent, Inc., and was a member of its Board of Directors from June 1999 to August 2001. Mr. Berkman is a Certified Public Accountant who began his career at Price Waterhouse, a predecessor to PricewaterhouseCoopers LLP, and earned his B.A. from Duke University and M.B.A. in finance and accounting from the NYU Stern School of Business.

- *Brian S. Dunn.* Mr. Dunn has been a member of our Board of Directors since December 2007. Mr. Dunn has over 15 years of marketing, logistical and entrepreneurial experience. He founded and turned around direct marketing divisions for several consumer-oriented companies. Since June 2006, Mr. Dunn has been the marketing director for Lipenwald, Inc., a direct marketing company that markets collectibles and mass merchandise. Prior to that, from February 2001 to June 2006, he was sole proprietor of BSD Trading/Consulting. Mr. Dunn graduated from the Wharton School of the University of Pennsylvania in 1993 with a B.S. in Economics.
- *Byron J. Haney.* Mr. Haney has been a member of our Board of Directors since December 2007. From 1994 until 2009, Mr. Haney worked for Resurgence Asset Management LLC, during which time he most recently served as managing director and chief investment officer. Mr. Haney previously served on the Board of Directors of Sterling Chemicals, Inc. and Furniture.com. Mr. Haney has more than 20 years of business experience, including having served as chief financial officer of a private retail store chain and as an auditor with Touche Ross & Co., a predecessor of Deloitte & Touche LLP. Mr. Haney earned his B.S. in Business Administration from the University of California at Berkeley and his M.B.A. from the Wharton School of the University of Pennsylvania.
- *Frank C. Meyer.* Mr. Meyer has been a member of our Board of Directors since December 2007. Mr. Meyer is a private investor who was chairman of Glenwood Capital Investments, LLC, an investment adviser specializing in hedge funds, which he founded in January of 1988 and from which he resigned in January of 2004. As of October of 2000, Glenwood has been a wholly-owned subsidiary of the Man Group, PLC, an investment adviser based in England specializing in alternative investment strategies. Since leaving Glenwood in 2004, Mr. Meyer has focused on serving as a director for various companies. During his career, Mr. Meyer has served as an outside director on a several companies, including Quality Systems, Inc. (a public company specializing in software for medical and dental professionals), Bernard Technologies, Inc. (a firm specializing in development of industrial processes using chlorine dioxide), and Centurion Trust Company of Arizona (where he served as a non-executive Chairman until its purchase by GE Financial). Currently, he is on the Board of Directors of Einstein-Noah Restaurant Group, Inc., a firm operating in the quick casual segment of the restaurant industry, and United Capital Financial Partners, Inc., a firm that converts transaction-oriented brokers into fee-based financial planners. He is also on the Board of Directors of three investment funds run by Ferox Capital Management, Limited, an investment manager based in the United Kingdom that specializes in convertible bonds. Mr. Meyer received his B.A. and M.B.A. from the University of Chicago.
- *Douglas F. Ray.* Mr. Ray has been a member of our Board of Directors since December 2007. Since August 1995, Mr. Ray has worked for Seavest Inc., a private investment and wealth management firm based in White Plains, New York. He currently serves as the president of Seavest Inc. Mr. Ray has more than 14 years experience acquiring, developing, financing and managing a diverse portfolio of real estate investments, including three healthcare properties funds. Mr. Ray previously served on the Board of Directors of Nat Nast, Inc., a luxury men's apparel company. Prior to joining Seavest, Mr. Ray worked in Washington, D.C. on the staff of U.S. Senator Arlen Specter and as a research analyst with the Republican National Committee. Mr. Ray holds a B.A. from the University of Pittsburgh.

#### **Interested Directors**

- *Leonard M. Tannenbaum, CFA.* Mr. Tannenbaum has been our president and chief executive officer since October 2007 and the chairman of our Board of Directors since December 2007. He is also the managing partner of our investment adviser. Since founding his first private investment firm in 1998, Mr. Tannenbaum has founded a number of private investment firms, including Fifth Street Capital LLC, and he has served as managing member of each firm. Prior to launching his first firm, Mr. Tannenbaum gained extensive small-company experience as an equity analyst for Merrill Lynch and a partner in a \$50 million small company hedge fund. In addition to serving on our Board of Directors, Mr. Tannenbaum currently serves on the Board of Directors of several Greenlight Capital affiliated entities (Greenlight Capital Offshore, Ltd., Greenlight Capital Offshore Qualified, Ltd., Greenlight Masters Offshore, Ltd., and Greenlight Masters Offshore I, Ltd.) and has previously served on the

Boards of Directors of five other public companies, including Einstein Noah Restaurant Group, Inc., Assisted Living Concepts, Inc., WesTower Communications, Inc., Cortech, Inc. and General Devices, Inc. Mr. Tannenbaum has also served on four audit committees and five compensation committees, of which he has acted as chairperson for one of such audit committees and four of such compensation committees. Mr. Tannenbaum graduated from the Wharton School of the University of Pennsylvania, where he received a B.S. in Economics. Subsequent to his undergraduate degree from the University of Pennsylvania, Mr. Tannenbaum received an M.B.A. in Finance from the Wharton School as part of the Submatriculation Program. He is a holder of the Chartered Financial Analyst designation and he is also a member of the Young Presidents' Organization.

- *Bernard D. Berman.* Mr. Berman has been our chief compliance officer since April 2009, and our executive vice president and secretary since October 2007. Mr. Berman is also a partner of Fifth Street Management and a partner of Fifth Street Capital LLC. Mr. Berman joined Fifth Street Capital LLC in 2004. He is responsible for the structuring of all investments, overseeing legal issues, and firm-wide risk management. Mr. Berman has 13 years of legal experience, including structuring and negotiating a variety of investment transactions. Prior to joining Fifth Street Capital LLC, he was a corporate attorney with the law firm Riemer & Braunstein LLP from 2000 — 2004. Mr. Berman graduated from Boston College Law School (cum laude). He received a B.S. in Finance from Lehigh University (with high honors).

#### **Non-Director Executive Officers**

- *William H. Craig.* Mr. Craig has been our chief financial officer since October 2007 and was our chief compliance officer from December 2007 through April 2009. Prior to joining Fifth Street, from March 2005 to October 2007, Mr. Craig was an executive vice president and chief financial officer of Vital-Signs, Inc., a medical device manufacturer that was later acquired by General Electric Company's GE Healthcare unit in October 2008. Prior to that, from January 2004 to March 2005, he worked as an interim chief financial officer and Sarbanes-Oxley consultant. From 1999 to 2004, Mr. Craig served as an executive vice president for finance and administration and chief financial officer for Matheson Trigas, Inc., a manufacturer and marketer of industrial gases and related equipment. Mr. Craig's prior experience includes stints at GE Capital, Deloitte & Touche LLP, and GMAC, as well as merchant banking. Mr. Craig has an M.B.A. from Texas A&M University and a B.A. from Wake Forest University. Mr. Craig is a Certified Public Accountant.
- *Marc A. Goodman.* Mr. Goodman has served as our chief investment officer since April 2009 and is a senior partner of Fifth Street Management and is co-head of the Investment Committee of Fifth Street Management. Mr. Goodman has over 18 years of experience advising on, restructuring, and negotiating investments. Mr. Goodman is responsible for all portfolio management. Prior to joining Fifth Street Capital LLC in 2004, from 2003 to 2004, Mr. Goodman was a partner of Triax Capital Advisors, a consulting firm that provides management and financial advisory services to distressed companies. Mr. Goodman also served as the president of Cross River Consulting, Inc. from June 1998 to January 2005. Previously, he was with the law firm of Kramer, Levin, Naftalis & Frankel LLP and the law firm of Otterbourg, Steindler, Houston & Rosen, P.C. Mr. Goodman graduated from Cardozo Law School, and has a B.A. in Economics from New York University.

#### **Section 16(a) Beneficial Ownership Reporting Compliance**

Section 16(a) of the Securities Exchange Act of 1934 requires our directors and executive officers, and persons who own 10% or more of our voting stock, to file reports of ownership and changes in ownership of our equity securities with the SEC. Directors, executive officers and 10% or more holders are required by SEC regulations to furnish us with copies of all Section 16(a) forms they file. Based solely on a review of the copies of those forms furnished to us, or written representations that no such forms were required, we believe that our directors, executive officers and 10% or more beneficial owners complied with all Section 16(a) filing requirements during the year ended September 30, 2009.

## Code of Business Conduct and Ethics

We have adopted a Code of Business Conduct and Ethics that applies to which applies to, among others, our senior officers, including our Chief Executive Officer and its Chief Financial Officer, as well as every officer, director and employee of the Company. In addition, our investment adviser has adopted a Code of Ethics applicable to all of its employees. Requests for copies of either document without charge should be sent in writing to Fifth Street Finance Corp., 10 Bank Street, 12<sup>th</sup> Floor, White Plains, NY 10606. Our Code of Business Conduct and Ethics is also available on our website at <http://ir.fifthstreetfinance.com/governance.cfm>.

If we make any substantive amendment to, or grant a waiver from, a provision of our Code of Business Conduct and Ethics, we will promptly disclose the nature of the amendment or waiver on our website at <http://ir.fifthstreetfinance.com/governance.cfm> as well as file a Form 8-K.

## Audit Committee

Our Board of Directors has an Audit Committee that is responsible for selecting, engaging and discharging our independent accountants, reviewing the plans, scope and results of the audit engagement with our independent accountants, approving professional services provided by our independent accountants (including compensation therefore), reviewing the independence of our independent accountants and reviewing the adequacy of our internal control over financial reporting. The members of the Audit Committee are Messrs. Berkman, Dunn, and Haney, each of whom is not an interested person of us for purposes of the 1940 Act and is independent for purposes of the New York Stock Exchange corporate governance listing standards. Mr. Haney serves as the chairman of the Audit Committee. Our Board of Directors has determined that Mr. Haney is independent as defined in New York Stock Exchange Rule 303A.00 and an "audit committee financial expert" as defined under SEC rules.

## Item 11. Executive Compensation

### Compensation of Directors

The following table sets forth compensation of our directors for the year ended September 30, 2009.

| Name                         | Fees Earned or Paid in Cash(1) | All Other Compensation(2) | Total    |
|------------------------------|--------------------------------|---------------------------|----------|
| <b>Interested Directors</b>  |                                |                           |          |
| Bernard D. Berman            | —                              | —                         | —        |
| Leonard M. Tannenbaum        | —                              | —                         | —        |
| <b>Independent Directors</b> |                                |                           |          |
| Adam C. Berkman              | \$50,500                       | —                         | \$50,500 |
| Brian S. Dunn                | \$56,500                       | —                         | \$56,500 |
| Byron J. Haney               | \$70,500                       | —                         | \$70,500 |
| Frank C. Meyer               | \$77,000                       | —                         | \$77,000 |
| Douglas F. Ray               | \$53,750                       | —                         | \$53,750 |
| Bruce E. Toll(3)             | \$ 2,000                       | —                         | \$ 2,000 |

- (1) For a discussion of the independent directors' compensation, see below.
- (2) We do not maintain a stock or option plan, non-equity incentive plan or pension plan for our directors.
- (3) Mr. Toll did not stand for re-election at the 2009 annual meeting and his term expired at such meeting.

For the year ended September 30, 2009, the independent directors received an annual retainer fee of \$25,000, payable once per year if the director attended at least 75% of the meetings held during the previous year, plus \$2,000 for each board meeting in which the director attended in person and \$1,000 for each board meeting in which the director participated other than in person, and reimbursement of reasonable out-of-pocket expenses incurred in connection with attending each board meeting. The independent directors also received \$1,000 for each committee meeting in which they attended in person and \$500 for each committee meeting in which they participated other than in person, in connection with each committee meeting of the Board of

Directors that they attended, plus reimbursement of reasonable out-of-pocket expenses incurred in connection with attending each committee meeting not held concurrently with a board meeting.

In addition, the Chairman of the Audit Committee received an annual retainer of \$20,000, while the Chairman of the Valuation Committee and the Chairman of the Nominating and Corporate Governance Committee each received an annual retainer of \$30,000 and \$5,000, respectively. No compensation was paid to directors who are interested persons of the Company as defined in the 1940 Act, except that we paid Mr. Toll all applicable board fees through the end of his term as director.

Effective as of October 1, 2009, the annual retainer fee received by the independent directors was increased to \$30,000, payable once per year if the director attends at least 75% of the meetings held during the previous year, and the annual retainer fee paid to the chairman of the Valuation Committee of our Board of Directors was reduced to \$20,000 from \$30,000.

#### **Compensation of Executive Officers**

None of our executive officers receive direct compensation from us. The compensation of the principals and other investment professionals of our investment adviser is paid by our investment adviser. Compensation paid to Mr. Craig, our chief financial officer, is set by our administrator, FSC, Inc., and is subject to reimbursement by us of an allocable portion of such compensation for services rendered to us. For fiscal year 2009, we reimbursed FSC, Inc. approximately \$704,000 for the allocable portion of compensation expenses incurred by FSC, Inc. Pursuant to the administration agreement with FSC, Inc., this reimbursement includes compensation to Mr. Craig for his services as chief financial officer, as well as other staff and support personnel.

#### **Compensation Committee Interlocks and Insider Participation**

The current members of the Compensation Committee are Messrs. Dunn, Meyer and Ray, each of whom is not an interested person of us for purposes of the 1940 Act and is independent for purposes of the NYSE corporate governance listing standards. Mr. Ray serves as the chairman of the Compensation Committee. None of the members of the compensation committee are current or former officers or employees of the Company. None of the members of the compensation committee has any relationship required to be disclosed under this caption under the rules of the SEC.

#### **Item 12. Security Ownership of Certain Beneficial Owners and Management and Related Stockholder Matters**

The following table sets forth information with respect to the beneficial ownership of our common stock by:

- each person known to us to beneficially own 5% or more of the outstanding shares of our common stock;
- each of our directors and each executive officers; and
- all of our directors and executive officers as a group.

Beneficial ownership is determined in accordance with the rules of the SEC and includes voting or investment power with respect to the securities. Percentage of beneficial ownership is based on 37,878,987 shares of common stock outstanding as of November 30, 2009, unless otherwise noted.

Unless otherwise indicated, to our knowledge, each stockholder listed below has sole voting and investment power with respect to the shares beneficially owned by the stockholder, and maintains an address c/o Fifth Street Finance Corp., 10 Bank Street, 12<sup>th</sup> Floor, White Plains, NY 10606.

| Name   | Number of<br>Shares Owned<br>Beneficially | Percentage   |
|--|---|--------------|
| <b>Stockholders Owning 5% or greater of the Company's Outstanding Shares</b> |   |              |
| Greenlight Entities(1)   | 2,259,492                                 | 5.97%        |
| <b>Interested Directors:</b>   |   |              |
| Leonard M. Tannenbaum(2)   | 1,326,557                                 | 3.50%        |
| Bernard D. Berman(3)   | 10,468                                    | *            |
| <b>Independent Directors:</b>  |   |              |
| Adam C. Berkman  | 1,000                                     | *            |
| Brian S. Dunn(4)   | 6,000                                     | *            |
| Byron J. Haney(4)  | 10,000                                    | *            |
| Frank C. Meyer   | 90,672                                    | *            |
| Douglas F. Ray   | 2,500                                     | *            |
| <b>Executive Officers:</b>   |   |              |
| William H. Craig(5)  | 7,505                                     | *            |
| Marc A. Goodman  | 53,207                                    | *            |
| <b>All officers and directors as a group (nine persons)</b>                  | <b>1,507,909</b>                          | <b>3.98%</b> |

\* Represents less than 1%.

- (1) Based upon information contained in the Schedule 13G/A filed by (i) Greenlight Capital, L.L.C.; (ii) Greenlight Capital, Inc.; (iii) DME Advisors, L.P.; (iv) DME Advisors GP, L.L.C. and (v) David Einhorn on February 13, 2009 (collectively, the "Greenlight Entities"). Greenlight Capital, L.L.C. ("Greenlight LLC") may be deemed the beneficial owner of 1,014,322 shares of common stock held for the account of Greenlight Capital, L.P. ("Greenlight Fund"), and Greenlight Capital Qualified, L.P. ("Greenlight Qualified"); Greenlight Capital, Inc. ("Greenlight Inc") may be deemed the beneficial owner of 1,678,857 shares of common stock held for the accounts of Greenlight Fund, Greenlight Qualified and Greenlight Capital Offshore, Ltd. ("Greenlight Offshore"). DME Advisors, L.P. ("Advisors") may be deemed the beneficial owner of 580,635 shares of common stock held for the account of the managed account for which Advisors acts as investment manager; DME Advisors GP, L.L.C. ("DME GP") may be deemed the beneficial owner of 580,635 shares of common stock held for the account of the managed account for which Advisors acts as investment manager; Mr. Einhorn may be deemed the beneficial owner of 2,259,492 shares of common stock. This number consists of: (A) an aggregate of 1,014,322 shares of common stock held for the accounts of Greenlight Fund and Greenlight Qualified, (B) 664,535 shares of common stock held for the account of Greenlight Offshore, and (C) 580,635 shares of common stock held for the managed account for which Advisors acts as investment manager. Greenlight LLC is the general partner of Greenlight Fund and Greenlight Qualified; Greenlight Inc serves as investment adviser to Greenlight Offshore. Greenlight, Inc, Greenlight L.L.C., DME Advisors and DME GP are located at 2 Grand Central Tower, 140 East 45th Street, 24th Floor, New York, New York 10017. Pursuant to Rule 13d-4, each of the Greenlight Entities disclaims all such beneficial ownership except to the extent of their pecuniary interest in any shares of common stock, if applicable.
- (2) The total number of shares reported includes: 1,316,557 shares of which Mr. Tannenbaum is the direct beneficial owner; 79,867 shares Mr. Tannenbaum holds in a margin account; 500,000 shares Mr. Tannenbaum has pledged as security to Wachovia Bank, National Association; and 10,000 shares owned by the Leonard M. & Elizabeth T. Tannenbaum Foundation, a 501(c)(3) corporation for which Mr. Tannenbaum serves as the President. With respect to the 10,000 shares held by the Leonard



M. & Elizabeth T. Tannenbaum Foundation, Mr. Tannenbaum has sole voting and investment power over all 10,000 shares, but has no pecuniary interest in, and expressly disclaims beneficial ownership of, the shares.

- (3) Includes 10,100 shares held in margin accounts.
- (4) Shares are held in a brokerage account and may be used as security on a margin basis.
- (5) Pursuant to Rule 16a-1, Mr. Craig disclaims beneficial ownership of 4,005 shares of common stock owned by his spouse.

**Item 13. *Certain Relationships and Related Transactions, and Director Independence***

We have entered into an investment advisory agreement with Fifth Street Management LLC, our investment adviser. Fifth Street Management is controlled by Leonard M. Tannenbaum, its managing member and our president and chief executive officer. Pursuant to the investment advisory agreement, payments will be equal to (a) a base management fee of 2.0% of the value of our gross assets, which includes any borrowings for investment purposes, and (b) an incentive fee based on our performance. The investment advisory agreement may be terminated by either party without penalty upon no fewer than 60 days' written notice to the other.

We have also entered into an administration agreement with FSC, Inc., which is also controlled by Mr. Tannenbaum. Pursuant to the administration agreement with FSC, Inc., FSC, Inc. will furnish us with the facilities and administrative services necessary to conduct our day-to-day operations, including equipment, clerical, bookkeeping and recordkeeping services at such facilities. In addition, FSC, Inc. will assist us in connection with the determination and publishing of our net asset value, the preparation and filing of tax returns and the printing and dissemination of reports to our stockholders. We will pay FSC, Inc. our allocable portion of overhead and other expenses incurred by it in performing its obligations under the administration agreement, including a portion of the rent and the compensation of our chief financial officer and his staff, and the staff of our chief compliance officer. The administration agreement may be terminated by either party without penalty upon no fewer than 60 days' written notice to the other.

We have also entered into a license agreement with Fifth Street Capital LLC pursuant to which Fifth Street Capital LLC has agreed to grant us a non-exclusive, royalty-free license to use the name "Fifth Street." Fifth Street Capital LLC is controlled by Mr. Tannenbaum. Under this agreement, we will have a right to use the "Fifth Street" name, for so long as Fifth Street Management LLC or one of its affiliates remains our investment adviser. Other than with respect to this limited license, we will have no legal right to the "Fifth Street" name.

**Review, Approval or Ratification of Transactions with Related Parties**

In the ordinary course of business, we enter into transactions with portfolio companies that may be considered related party transactions. In order to ensure that we do not engage in any prohibited transactions with any persons affiliated with us, we have implemented certain policies and procedures whereby our executive officers screen each of our transactions for any possible affiliations, close or remote, between the proposed portfolio investment, us, companies controlled by us and our employees and directors. We will not enter into any agreements unless and until we are satisfied that no affiliations prohibited by the 1940 Act exist or, if such affiliations exist, we have taken appropriate actions to seek board review and receive approval or exemptive relief for such transaction. Our Board reviews these procedures on an annual basis.

The Audit Committee of our Board of Directors is required to review and approve any transactions with related parties (as such term is defined in Item 404 of Regulation S-K).

In addition, our code of business conduct and ethics, which is applicable to all our all employees, officers and directors, requires that all employees, officers and directors avoid any conflict, or the appearance of a conflict, between an individual's personal interests and our interests. Our code of business conduct and ethics is available on our website.

## Director Independence

In accordance with rules of the NYSE, the Board annually determines the independence of each director. No director is considered independent unless the Board has determined that he or she has no material relationship with us. We monitor the status of its directors and officers through the activities of our Nominating and Corporate Governance Committee and through a questionnaire to be completed by each director no less frequently than annually, with updates periodically if information provided in the most recent questionnaire has changed.

In order to evaluate the materiality of any such relationship, the Board uses the definition of director independence set forth in the NYSE Listed Company Manual. Section 303A.00 of the NYSE Listed Company Manual provides that business development companies, or BDCs, are required to comply with all of the provisions of Section 303A applicable to domestic issuers other than Sections 303A.02, the section that defines director independence. Section 303A.00 provides that a director of a BDC shall be considered to be independent if he or she is not an "interested person", as defined in Section 2(a)(19) of the 1940 Act. Section 2(a)(19) of the 1940 Act defines an "interested person" to include, among other things, any person who has, or within the last two years had, a material business or professional relationship with us.

The Board has determined that each of the directors is independent and has no relationship with the us, except as a director and stockholder of ours, with the exception of Bernard D. Berman and Leonard M. Tannenbaum. Messrs. Berman and Tannenbaum are interested persons due to their positions as officers.

### Item 14. Principal Accounting Fees and Services

The following table presents fees for professional services rendered by Grant Thornton LLP for fiscal years 2008 and 2009.

|                                | <u>2008(1)</u>    | <u>2009</u>       |
|--------------------------------|-------------------|-------------------|
| Audit Fees                     | \$ 351,020        | \$ 587,239        |
| Aggregate Non-Audit Fees:      |                   |                   |
| Audit-Related Fees             | 313,200           | 188,142           |
| Tax Fees                       | 35,070            | 55,560            |
| All Other Fees                 | 3,675             | —                 |
| Total Aggregate Non-Audit Fees | 351,945           | 243,702           |
| Total Fees                     | <u>\$ 702,965</u> | <u>\$ 830,941</u> |

(1) Certain prior year amounts have been reclassified to conform to current year presentation.

*Audit Fees.* Audit fees consist of fees billed for professional services rendered for the audit of our year-end financial statements and services that are normally provided by Grant Thornton LLP in connection with statutory and regulatory filings.

*Audit-Related Fees.* Audit-related services consist of fees billed for assurance and related services that are reasonably related to the performance of the audit or review of our financial statements and are not reported under "Audit Fees." These services include attest services that are not required by statute or regulation and consultations concerning financial accounting and reporting standards.

*Tax Fees.* Tax fees consist of fees billed for professional services for tax compliance, tax advice and tax planning. These services include assistance regarding federal, state, and local tax compliance.

*All Other Fees.* All other fees would include fees for products and services other than the services reported above.

The Audit Committee of the Board has established a pre-approval policy that describes the permitted audit, audit-related, tax, and other services to be provided by Grant Thornton LLP, the Company's independent registered public accounting firm. Pursuant to the policy, the Audit Committee pre-approves the audit and non-

audit services performed by the independent registered public accounting firm in order to assure that the provision of such service does not impair the firm's independence.

Any requests for audit, audit-related, tax, and other services that have not received general pre-approval must be submitted to the Audit Committee for specific pre-approval, irrespective of the amount, and cannot commence until such approval has been granted. Normally, pre-approval is provided at regularly scheduled meetings of the Audit Committee. However, the Audit Committee may delegate pre-approval authority to one or more of its members. The member or members to whom such authority is delegated shall report any pre-approval decisions to the Audit Committee at its next scheduled meeting. The Audit Committee does not delegate its responsibilities to pre-approve services performed by the independent registered public accounting firm to management.

#### PART IV

##### Item 15. *Exhibits and Financial Statement Schedules*

The following documents are filed or incorporated by reference as part of this Annual Report:

##### 1. Consolidated Financial Statements

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| Consolidated Balance Sheets as of September 30, 2009 and 2008  | 66          |
| Statements of Operations for the Years Ended September 30, 2009 and 2008 and the Period February 15 through September 30, 2007                         | 67          |
| Consolidated Statements of Changes in Net Assets for the Years Ended September 30, 2009 and 2008 and the Period February 15 through September 30, 2007 | 68          |
| Consolidated Statements of Cash Flows for the Years Ended September 30, 2009 and 2008 and the Period February 15 through September 30, 2007            | 69          |
| Consolidated Schedules of Investments as of September 30, 2009 and 2008  | 70          |
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##### 2. Financial Statement Schedule

The following financial statement schedule is filed herewith:

Schedule 12-14 — Investments in and advances to affiliates 101

### 3. Exhibits required to be filed by Item 601 of Regulation S-K

The following exhibits are filed as part of this report or hereby incorporated by reference to exhibits previously filed with the SEC:

- 3.1 Restated Certificate of Incorporation of the Registrant (Incorporated by reference to Exhibit 3.1 filed with Fifth Street Finance Corp.'s Form 8-A (File No. 001-33901) filed on January 2, 2008).
- 3.2 Certificate of Amendment to the Registrant's Restated Certificate of Incorporation (Incorporated by reference to Exhibit (a)(2) filed with Fifth Street Finance Corp.'s Registration Statement on Form N-2 (File No. 333-146743) filed on June 6, 2008).
- 3.3 Certificate of Correction to the Certificate of Amendment to the Registrant's Restated Certificate of Incorporation (Incorporated by reference to Exhibit (a)(3) filed with Fifth Street Finance Corp.'s Registration Statement on Form N-2 (File No. 333-146743) filed on June 6, 2008).
- 3.4 Amended and Restated By-laws of the Registrant (Incorporated by reference to Exhibit 3.2 filed with Fifth Street Finance Corp.'s Form 8-A (File No. 001-33901) filed on January 2, 2008).
- 4.1 Form of Common Stock Certificate (Incorporated by reference to Exhibit 4.1 filed with Fifth Street Finance Corp.'s Form 8-A (File No. 001-33901) filed on January 2, 2008).
- 10.1 Amended and Restated Dividend Reinvestment Plan (Incorporated by reference to Exhibit (e) filed with Fifth Street Finance Corp.'s Registration Statement on Form N-2 (File No. 333-146743) filed on June 6, 2008).
- 10.2 Form of Amended and Restated Investment Advisory Agreement by and between Registrant and Fifth Street Management LLC (Incorporated by reference to Exhibit (g) filed with Fifth Street Finance Corp.'s Registration Statement on Form N-2 (File No. 333-146743) filed on May 8, 2008).
- 10.3 Custodial Agreement (Incorporated by reference to Exhibit (j) filed with Fifth Street Finance Corp.'s Registration Statement on Form N-2 (File No. 333-146743) filed on June 6, 2008).
- 10.4 Form of Administration Agreement by and between Registrant and FSC, Inc. (Incorporated by reference to Exhibit (k)(1) filed with Fifth Street Finance Corp.'s Registration Statement on Form N-2 (File No. 333-146743) filed on May 8, 2008).
- 10.5 Form of License Agreement by and between Registrant and Fifth Street Capital LLC (Incorporated by reference to Exhibit (k)(2) filed with Fifth Street Finance Corp.'s Registration Statement on Form N-2 (File No. 333-146743) filed on May 8, 2008).
- 10.6\* Loan and Servicing Agreement among Fifth Street Funding, LLC, Registrant, Wells Fargo Securities, LLC, Wachovia Bank, National Association, and Wells Fargo Bank, National Association, dated as of November 16, 2009.
- 10.7\* Purchase and Sale Agreement by and between Registrant and Fifth Street Funding, LLC, dated as of November 16, 2009.
- 10.8\* Pledge Agreement by and between Registrant and Wells Fargo Bank, National Association, dated as of November 16, 2009.
- 21 Subsidiaries of Registrant and jurisdiction of incorporation/organizations:
  - Fifth Street Funding, LLC — Delaware
  - Fifth Street Mezzanine Partners IV, L.P. — Delaware
  - FSMP IV GP, LLC — Delaware
  - FSFC Holdings, Inc. — Delaware
  - FSF/MP Holdings, Inc. — Delaware
- 31.1\* Certification of Chief Executive Officer Pursuant to Rule 13a-14(a) under the Securities Exchange Act of 1934.
- 31.2\* Certification of Chief Financial Officer Pursuant to Rule 13a-14(a) under the Securities Exchange Act of 1934.
- 32.1\* Certification of Chief Executive Officer Pursuant to Section 906 of the Sarbanes-Oxley Act of 2002 (18 U. S. C. 1350).
- 32.2\* Certification of Chief Financial Officer Pursuant to Section 906 of the Sarbanes-Oxley Act of 2002 (18 U. S. C. 1350).

\* Filed herewith.

## SIGNATURES

Pursuant to the requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned, thereunto duly authorized.

### FIFTH STREET FINANCE CORP.

By: /s/ Leonard M. Tannenbaum  
Leonard M. Tannenbaum  
Chairman, President and Chief Executive Officer

By: /s/ William H. Craig  
William H. Craig  
Chief Financial Officer

Date: December 9, 2009

Pursuant to the requirements of the Securities Exchange Act of 1934, this report has been signed below by the following persons on behalf of the registrant and in the capacities and on the dates indicated.

| <u>Signature</u>  | <u>Title</u>  | <u>Date</u>      |
|---|---|------------------|
| <u>/s/ LEONARD M. TANNENBAUM</u><br>Leonard M. Tannenbaum | Chairman, President and Chief Executive Officer (principal executive officer) | December 9, 2009 |
| <u>/s/ WILLIAM H. CRAIG</u><br>William H. Craig           | Chief Financial Officer (principal financial officer)                         | December 9, 2009 |
| <u>/s/ BERNARD D. BERMAN</u><br>Bernard D. Berman         | Secretary, Executive Vice President and Chief Compliance Officer              | December 9, 2009 |
| <u>/s/ ADAM C. BERKMAN</u><br>Adam C. Berkman             | Director  | December 9, 2009 |
| <u>/s/ BRIAN S. DUNN</u><br>Brian S. Dunn                 | Director  | December 9, 2009 |
| <u>/s/ BYRON J. HANEY</u><br>Byron J. Haney               | Director  | December 9, 2009 |
| <u>/s/ FRANK C. MEYER</u><br>Frank C. Meyer               | Director  | December 9, 2009 |
| <u>/s/ DOUGLAS F. RAY</u><br>Douglas F. Ray               | Director  | December 9, 2009 |

## EXHIBIT INDEX

| <u>Exhibit</u> | <u>Description</u>   |
|----------------|--|
| 10.6           | Loan and Servicing Agreement among Registrant, Fifth Street Funding, LLC, Wells Fargo Securities, LLC, Wachovia Bank, National Association, and Wells Fargo Bank, National Association, dated as of November 16, 2009. |
| 10.7           | Purchase and Sale Agreement by and between Registrant and Fifth Street Funding, LLC, dated as of November 16, 2009.  |
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| 32.2           | Certification of Chief Financial Officer Pursuant to Section 906 of the Sarbanes-Oxley Act of 2002 (18 U. S. C. 1350).   |

U.S. Up to \$100,000,000

LOAN AND SERVICING AGREEMENT

Dated as of November 16, 2009

Among

FIFTH STREET FUNDING, LLC,  
as the Borrower

FIFTH STREET FINANCE CORP.,  
as the Servicer and the Transferor

WELLS FARGO SECURITIES, LLC,  
as the Administrative Agent

EACH OF THE CONDUIT LENDERS AND INSTITUTIONAL LENDERS FROM TIME TO  
TIME PARTY HERETO,  
as the Lenders

EACH OF THE LENDER AGENTS FROM TIME TO TIME PARTY HERETO,  
as the Lender Agents  
and

WELLS FARGO BANK, NATIONAL ASSOCIATION,  
as the Collateral Agent, Account Bank and Collateral Custodian

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This LOAN AND SERVICING AGREEMENT is made as of November 16, 2009, among:

- (1) FIFTH STREET FUNDING, LLC, a Delaware limited liability company (together with its successors and assigns in such capacity, the "Borrower");
- (2) FIFTH STREET FINANCE CORP, a Delaware corporation, as the Servicer (as defined herein) and the Transferor (as defined herein);
- (3) EACH OF THE CONDUIT LENDERS FROM TIME TO TIME PARTY HERETO, as a Conduit Lender;
- (4) EACH OF THE INSTITUTIONAL LENDERS FROM TIME TO TIME PARTY HERETO, as an Institutional Lender;
- (5) EACH OF THE LENDER AGENTS FROM TIME TO TIME PARTY HERETO, as a Lender Agent;
- (6) WELLS FARGO SECURITIES, LLC, as Administrative Agent ("Administrative Agent"); and
- (7) WELLS FARGO BANK, NATIONAL ASSOCIATION ("Wells Fargo"), as the Collateral Agent (together with its successors and assigns in such capacity, the "Collateral Agent"), the Account Bank (as defined herein) and the Collateral Custodian (together with its successors and assigns in such capacity, the "Collateral Custodian").

#### PRELIMINARY STATEMENT

The Lenders have agreed, on the terms and conditions set forth herein, to provide a secured revolving credit facility which shall provide for Advances under the Variable Funding Note(s) from time to time in an aggregate principal amount not to exceed the Borrowing Base. The proceeds of the Advances will be used to finance the Borrower's purchase, on a "true sale" basis, of Eligible Loan Assets from the Transferor, approved by the Administrative Agent, pursuant to the Purchase and Sale Agreement between the Borrower and the Transferor. Accordingly, the parties agree as follows:

#### ARTICLE I.

#### DEFINITIONS

##### SECTION 1.01 Certain Defined Terms.

- (a) Certain capitalized terms used throughout this Agreement are defined above or in this Section 1.01.
  - (b) As used in this Agreement and the exhibits and schedules thereto (each of which is hereby incorporated herein and made a part hereof), the following terms shall have the
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following meanings (such meanings to be equally applicable to both the singular and plural forms of the terms defined):

“1940 Act” means the Investment Company Act of 1940, as amended, and the rules and regulations promulgated thereunder.

“Account Bank” means Wells Fargo, in its capacity as the “Account Bank” pursuant to each of the Collection Account Agreement and the Unfunded Exposure Account Agreement.

“Action” has the meaning assigned to that term in Section 8.03.

“Additional Amount” has the meaning assigned to that term in Section 2.11(a).

“Adjusted Borrowing Value” means for any Loan Asset, for any date of determination, an amount equal to the lowest of: (i) the Outstanding Balance of such Loan Asset at such time, and (ii) the Assigned Value of such Loan Asset at such time multiplied by the Outstanding Balance of such Loan Asset; *provided* that the parties hereby agree that the Adjusted Borrowing Value of any Loan Asset that is no longer an Eligible Loan Asset shall be zero; *provided further* that the aggregate Adjusted Borrowing Value for all Loan Assets with respect to a single Obligor and its Affiliates shall not exceed \$15,000,000 (for the avoidance of doubt, companies owned by the same private equity sponsor shall not be considered “Affiliates” for purposes of this definition).

“Administrative Agent” means Wells Fargo Securities, LLC, in its capacity as administrative agent for the Lender Agents, together with its successors and assigns, including any successor appointed pursuant to Article IX.

“Advance” means each loan advanced by the Lenders to the Borrower on an Advance Date pursuant to Article II.

“Advance Date” means, with respect to any Advance, the date on which such Advance is made.

“Advance Date Assigned Value” means, with respect to any Loan Asset, the value (expressed as a percentage of the Outstanding Balance of such Loan Asset) equal to the lower of (i) the purchase price paid by the Borrower to acquire such Loan Asset from the Transferor (expressed exclusive of accrued interest) or (ii) the value determined by the Administrative Agent, in its sole reasonable discretion.

“Advances Outstanding” means, at any time, the sum of the principal amounts of Advances loaned to the Borrower for the initial and any subsequent borrowings pursuant to Sections 2.01 and 2.02 as of such time, reduced by the aggregate Available Collections received and distributed as repayment of principal amounts of Advances outstanding pursuant to Section 2.04 at or prior to such time and any other amounts received by the Lenders to repay the principal amounts of Advances outstanding pursuant to Section 2.18 or otherwise at or prior to such time; *provided* that the principal amounts of Advances outstanding shall not be reduced by

any Available Collections or other amounts if at any time such Available Collections or other amounts are rescinded or must be returned for any reason.

“Affected Party,” has the meaning assigned to that term in Section 2.10.

“Affiliate” when used with respect to a Person, means any other Person controlling, controlled by or under common control with such Person. For the purposes of this definition, “control,” when used with respect to any specified Person, means the power to vote 20% or more of the voting securities of such Person or to direct the management and policies of such Person, directly or indirectly, whether through the ownership of voting securities, by contract or otherwise; and the terms “controlling” and “controlled” have meanings correlative to the foregoing; *provided* that for purposes of determining whether any Loan Asset is an Eligible Loan Asset or for purposes of Section 5.01(b)(xix), the term Affiliate shall not include any Affiliate relationship which may exist solely as a result of direct or indirect ownership of, or control by, a common Financial Sponsor.

“Agented Note” means any Loan Asset (i) originated as a part of a syndicated loan transaction that has been closed (without regard to any contemporaneous or subsequent syndication of such Loan Asset) prior to such Loan Asset becoming part of the Collateral Portfolio and (ii) with respect to which, upon an assignment of the note under the Purchase and Sale Agreement to the Borrower, the Borrower, as assignee of the note, will have all of the rights but none of the obligations of the Transferor with respect to such note and the Underlying Collateral.

“Agreement” means this Loan and Servicing Agreement, as the same may be amended, restated, supplemented and/or otherwise modified from time to time hereafter.

“Applicable Law” means for any Person all existing and future laws, rules, regulations (including proposed, temporary and final income tax regulations), statutes, treaties, codes, ordinances, permits, certificates, orders, licenses of and interpretations by any Governmental Authority applicable to such Person (including, without limitation, predatory lending laws, usury laws, the Federal Truth-in-Lending Act, the Equal Credit Opportunity Act, the Fair Credit Billing Act, the Fair Credit Reporting Act, the Fair Debt Collection Practices Act, the Federal Trade Commission Act, the Magnuson-Moss Warranty Act, the Federal Reserve Board’s Regulations “B” and “Z”, the Servicemembers Civil Relief Act of 2003 and state adaptations of the National Consumer Act and of the Uniform Consumer Credit Code and all other consumer credit laws and equal credit opportunity and disclosure laws) and applicable judgments, decrees, injunctions, writs, awards or orders of any court, arbitrator or other administrative, judicial, or quasi-judicial tribunal or agency of competent jurisdiction.

“Applicable Percentage” means, for each Eligible Loan Asset, the percentage assigned by the Administrative Agent in its sole discretion on the Cut-Off Date and set forth on the Approval Notice pertaining to such Loan Asset; *provided* that such percentage shall not be less than 50% or greater than 65%.

“Applicable Spread” means 4.00% per annum; *provided* that, at any time after the occurrence of an Event of Default, the Applicable Spread shall be 5.50%.

“Approval Notice” means, with respect to any Eligible Loan Asset, the written notice, in substantially the form attached hereto as Exhibit A, evidencing the approval by the Administrative Agent, in its sole discretion, of the conveyance of such Eligible Loan Asset by the Transferor to the Borrower pursuant to the terms of the Purchase and Sale Agreement and the Loan Assignment by which the Transferor effects such conveyance.

“Asset Coverage Ratio” means the ratio, determined on a consolidated basis, without duplication, in accordance with GAAP, of (a) the fair value of the total assets of Fifth Street and its Subsidiaries as required by, and in accordance with, the 1940 Act and any orders of the Securities and Exchange Commission issued to Fifth Street, to be determined by the Board of Directors of Fifth Street and reviewed by its auditors, less all liabilities (other than Indebtedness, including Indebtedness hereunder) of Fifth Street and its Subsidiaries, to (b) the aggregate amount of Indebtedness of Fifth Street and its Subsidiaries; *provided* that the calculation of the Asset Coverage Ratio shall not include Subsidiaries that are not required to be included by the 1940 Act as affected by such orders of the Securities and Exchange Commission issued to Fifth Street, including, if set forth in any such order, any Subsidiary which is a small business investment company which is licensed by the Small Business Administration to operate under the Small Business Investment Act of 1958.

“Assigned Documents” has the meaning assigned to that term in Section 2.12.

“Assigned Value” means, with respect to each Loan Asset, as of any date of determination and expressed as a percentage of the Outstanding Balance of such Loan Asset, the Advance Date Assigned Value of such Loan Asset, subject to the following terms:

(a) If a Value Adjustment Event of the type described in clauses (ii), (iv) or (vi) of the definition thereof with respect to such Loan Asset occurs, the Assigned Value of such Loan Asset will be zero.

(b) If a Value Adjustment Event of the type described in clauses (i), (iii) or (v) of the definition thereof with respect to such Loan Asset occurs, “Assigned Value” may be amended by the Administrative Agent, in its sole discretion; *provided* that the Assigned Value of any Priced Loan Asset shall not be less than the price quoted therefor (if any) by such nationally recognized pricing service as selected by the Administrative Agent. In the event the Borrower disagrees with the Administrative Agent’s determination of the Assigned Value of a Loan Asset, the Borrower may (at its expense) retain any nationally recognized valuation firm reasonably acceptable to the Administrative Agent to value such Loan Asset and if the value determined by such firm is greater than the Administrative Agent’s determination of the Assigned Value, such firm’s valuation shall become the Assigned Value of such Loan Asset; *provided* that the Assigned Value of such Loan Asset shall be the value assigned by the Administrative Agent until such firm has determined its value. The Assigned Value of any Loan Asset may be increased at the sole discretion of the Administrative Agent upon improvement in the Net Leverage Ratio or the Interest Coverage Ratio of such Loan Asset, as the case may be, as part of a Value Adjustment Event; *provided* that such Assigned Value may not increase above the purchase price paid by the Borrower to acquire the Loan Asset from the Transferor. The Administrative Agent shall promptly notify the Servicer of any change effected by the Administrative Agent of the Assigned Value of any Loan Asset.



“Assignment of Mortgage” means an assignment of the Mortgage, notice of transfer or equivalent instrument in recordable form sufficient under the laws of the jurisdiction wherein the related mortgaged property is located to effect the assignment of the Mortgage to the Collateral Agent, which assignment, notice of transfer or equivalent instrument may be in the form of one or more blanket assignments covering the Loan Assets secured by mortgaged properties located in the same jurisdiction, if permitted by Applicable Law, substantially in the form of Exhibit B.

“Available Collections” means, (a) all cash collections and other cash proceeds with respect to any Loan Asset, including, without limitation, all Principal Collections, all Interest Collections, all proceeds of any sale or disposition with respect to such Loan Asset, cash proceeds or other funds received by the Borrower or the Servicer with respect to any Underlying Collateral (including from any guarantors), all other amounts on deposit in the Collection Account from time to time, and all proceeds of Permitted Investments with respect to the Controlled Accounts and (b) all payments received pursuant to any Hedging Agreement or Hedge Transaction; *provided that*, for the avoidance of doubt, “Available Collections” shall not include amounts on deposit in the Unfunded Exposure Account which do not represent proceeds of Permitted Investments.

“Average Life” means, as of any date of determination, the number obtained for each Loan Asset by (i) summing the products of (A) the number of actual days divided by 360 from such date of determination to the respective dates of each successive Scheduled Payment of principal of a Loan Asset and (B) the related amounts of the principal of such Scheduled Payment of principal and (ii) dividing such sum by the sum of all successive Scheduled Payment of principal of such Loan Asset.

“Bankruptcy Code” means Title 11, United States Code, 11 U.S.C. §§ 101 *et seq.*, as amended from time to time.

“Bankruptcy Event” shall be deemed to have occurred with respect to a Person if either:

(i) a case or other proceeding shall be commenced, without the application or consent of such Person, in any court, seeking the liquidation, reorganization, debt arrangement, dissolution, winding up, or composition or readjustment of debts of such Person, the appointment of a trustee, receiver, custodian, liquidator, assignee, sequestrator or the like for such Person or all or substantially all of its assets, or any similar action with respect to such Person under any law relating to bankruptcy, insolvency, reorganization, winding up or composition or adjustment of debts, and such case or proceeding shall continue undismissed, or unstayed and in effect, for a period of 60 consecutive days; or an order for relief in respect of such Person shall be entered in an involuntary case under the federal bankruptcy laws or other similar laws now or hereafter in effect; or

(ii) such Person shall commence a voluntary case or other proceeding under any Bankruptcy Laws now or hereafter in effect, or shall consent to the appointment of or taking possession by a receiver, liquidator, assignee, trustee, custodian, sequestrator (or other similar official) for such Person or all or substantially all of its assets, or shall make any general

assignment for the benefit of creditors, or shall fail to, or admit in writing its inability to, pay its debts generally as they become due, or, if a corporation or similar entity, its board of directors or members shall vote to implement any of the foregoing.

“Bankruptcy Laws” means the Bankruptcy Code and all other applicable liquidation, conservatorship, bankruptcy, moratorium, rearrangement, receivership, insolvency, reorganization, suspension of payments, or similar debtor relief laws from time to time in effect affecting the rights of creditors generally.

“Bankruptcy Proceeding” means any case, action or proceeding before any court or other Governmental Authority relating to any Bankruptcy Event.

“Base Rate” means, on any date, a fluctuating *per annum* interest rate equal to the higher of (a) the Prime Rate or (b) the Federal Funds Rate plus 1.5%.

“Borrower” has the meaning assigned to that term in the preamble hereto.

“Borrowing Base” means, as of any date of determination, an amount equal to the lesser of:

(a) (i) the aggregate sum of the products of (A) the Applicable Percentage for each Eligible Loan Asset as of such date and (B) the Adjusted Borrowing Value of such Eligible Loan Asset as of such date, plus (ii) the amount on deposit in the Principal Collection Account as of such date plus (iii) the amount on deposit in the Unfunded Exposure Account minus the Unfunded Exposure Equity Amount; or

(b) (i) the aggregate Adjusted Borrowing Value of all Eligible Loan Assets as of such date minus (ii) the Minimum Equity Amount, plus (iii) the amount on deposit in the Principal Collection Account as of such date plus (iv) the amount on deposit in the Unfunded Exposure Account minus the Unfunded Exposure Equity Amount; or

(c) the Maximum Facility Amount minus the Unfunded Exposure Amount plus amounts on deposit in the Unfunded Exposure Account;

provided that, for the avoidance of doubt, any Loan Asset which at any time is no longer an Eligible Loan Asset shall not be included in the calculation of “Borrowing Base”.

“Borrowing Base Certificate” means a certificate setting forth the calculation of the Borrowing Base as of the applicable date of determination substantially in the form of Exhibit C hereto, prepared by the Servicer.

“Borrowing Base Deficiency” means, as of any date of determination, the extent to which the aggregate Advances Outstanding on such date exceeds the Borrowing Base.

“Breakage Fee” means, for Advances which are repaid (in whole or in part) on any date other than a Payment Date, the breakage costs, if any, related to such repayment, based upon the assumption that the Lender funded its loan commitment in the London Interbank Eurodollar market and using any reasonable attribution or averaging methods which the Lender

deems appropriate and practical, it hereby being understood that the amount of any loss, costs or expense payable by the Borrower to any Lender as Breakage Fee shall be determined in the respective Lender Agent's reasonable discretion and shall be conclusive absent manifest error.

"Business Day" means a day of the year other than (i) Saturday or a Sunday or (ii) any other day on which commercial banks in New York, New York or the city in which the offices of the Collateral Agent are authorized or required by applicable law, regulation or executive order to close; *provided*, that, if any determination of a Business Day shall relate to an Advance bearing interest at LIBOR, the term "Business Day" shall also exclude any day on which banks are not open for dealings in dollar deposits in the London interbank market. For avoidance of doubt, if the offices of the Collateral Agent are authorized by applicable law, regulation or executive order to close but remain open, such day shall not be a "Business Day".

"Capital Lease Obligations" means, with respect to any entity, the obligations of such entity to pay rent or other amounts under any lease of (or other arrangement conveying the right to use) real or personal property, or a combination thereof, which obligations are required to be classified and accounted for as capital leases on a balance sheet of such entity under GAAP, and the amount of such obligations shall be the capitalized amount thereof determined in accordance with GAAP.

"Change of Control" shall be deemed to have occurred if any of the following occur:

(a) the Management Agreement shall fail to be in full force and effect; *provided* that if, pursuant to a Fifth Street Affiliate Merger Transaction, the services provided to Fifth Street under the Management Agreement have been assumed by a Fifth Street Merger Party or by Fifth Street for its own account, then the foregoing shall not be deemed a "Change of Control";

(b) the creation or imposition of any Lien on any limited liability company membership interest in the Borrower (other than pursuant to the Pledge Agreement);

(c) the failure by Fifth Street to own 100% of the limited liability company membership interests in the Borrower; or

(d) the dissolution, termination or liquidation in whole or in part, transfer or other disposition, in each case, of all or substantially all of the assets of, Fifth Street.

"Change of Tax Law" means any change in application or public announcement of an official position under or any change in or amendment to the laws (or any regulations or rulings promulgated thereunder) of any jurisdiction in which an Obligor is organized, or any political subdivision or taxing authority of any of the foregoing, affecting taxation, or any proposed change in such laws or change in the official application, enforcement or interpretation of such laws, regulations or rulings (including a holding by a court of competent jurisdiction), or any other action taken by a taxing authority or court of competent jurisdiction in the relevant jurisdiction, or the official proposal of any such action.

"Closing Date" means November 16, 2009

“Code” means the Internal Revenue Code of 1986, as amended.

“Collateral Agent” has the meaning assigned to that term in the preamble hereto.

“Collateral Agent Expenses” means the expenses set forth in the Wells Fargo Fee Letter and any other accrued and unpaid expenses (including attorneys’ fees, costs and expenses) and indemnity amounts payable by the Borrower to the Collateral Agent under the Transaction Documents.

“Collateral Agent Fees” means the fees set forth in the Wells Fargo Fee Letter, as such fee letter may be amended, restated, supplemented and/or otherwise modified from time to time.

“Collateral Agent Termination Notice” has the meaning assigned to that term in [Section 10.05](#).

“Collateral Custodian” means Wells Fargo, not in its individual capacity, but solely as collateral custodian pursuant to the terms of this Agreement.

“Collateral Custodian Expenses” means the expenses set forth in the Wells Fargo Fee Letter and any other accrued and unpaid expenses (including attorneys’ fees, costs and expenses) and indemnity amounts payable by the Borrower to the Collateral Custodian under the Transaction Documents.

“Collateral Custodian Fees” means the fees set forth in the Wells Fargo Fee Letter, as such fee letter may be amended, restated, supplemented and/or otherwise modified from time to time.

“Collateral Custodian Termination Notice” has the meaning assigned to that term in [Section 12.05](#).

“Collateral Portfolio” means all right, title, and interest (whether now owned or hereafter acquired or arising, and wherever located) of the Borrower in the property identified below in [clauses \(i\)](#) through [\(iv\)](#), and all accounts, cash and currency, chattel paper, tangible chattel paper, electronic chattel paper, copyrights, copyright licenses, equipment, fixtures, contract rights, general intangibles, instruments, certificates of deposit, certificated securities, uncertificated securities, financial assets, securities entitlements, commercial tort claims, deposit accounts, inventory, investment property, letter-of-credit rights, software, supporting obligations, accessions, or other property consisting of, arising out of, or related to any of the following (in each case excluding the Retained Interest and the Excluded Amounts):

- (i) the Loan Assets, and all monies due or to become due in payment under such Loan Assets on and after the related Cut-Off Date, including, but not limited to, all Available Collections;
- (ii) the Portfolio Assets with respect to the Loan Assets referred to in [clause \(i\)](#);

(iii) the Controlled Accounts and all Permitted Investments purchased with funds on deposit in the Controlled Accounts; and

(iv) all income and Proceeds of the foregoing.

“Collection Account” means a trust account (account number 53237100 at the Account Bank) in the name of the Borrower for the benefit of and under the sole dominion and control of the Collateral Agent for the benefit of the Secured Parties; *provided*, that the funds deposited therein (including any interest and earnings thereon) from time to time shall constitute the property and assets of the Borrower, and the Borrower shall be solely liable for any Taxes payable with respect to the Collection Account.

“Collection Account Agreement” means that certain Collection Account Agreement, dated the date of this Agreement, among the Borrower, the Servicer, the Account Bank, the Administrative Agent and the Collateral Agent, which agreement relates to the Collection Account, as such agreement may from time to time be amended, supplemented or otherwise modified in accordance with the terms thereof.

“Collection Date” means the date on which the aggregate outstanding principal amount of the Advances have been repaid in full and all Yield and Fees and all other Obligations have been paid in full, and the Borrower shall have no further right to request any additional Advances.

“Commercial Paper Notes” means, any short-term promissory notes of any Conduit Lender issued by such Conduit Lender in the commercial paper market.

“Commitment” means, with respect to each Lender, (i) prior to the end of the Reinvestment Period or for purposes of Advances made pursuant to Section 2.02(f), the dollar amount set forth opposite such Lender’s name on Annex A hereto (as such amount may be revised from time to time) or the amount set forth as such Lender’s “Commitment” on Schedule I to the Joinder Supplement relating to such Lender, as applicable and (ii) on or after the Reinvestment Period (other than for purposes of Advances made pursuant to Section 2.02(f)), such Lender’s Pro Rata Share of the aggregate Advances Outstanding.

“Commitment Increase Amount” means, in the event the aggregate Commitments are increased after the Closing Date pursuant to Section 2.22, the amount by which such increased aggregate Commitments exceed the aggregate Commitments in effect immediately prior to giving effect to such increase.

“Commitment Increase Closing Date” means, in the event the aggregate Commitments are increased after the Closing Date pursuant to Section 2.22, the date such increase shall become effective.

“Conduit Lender” means each commercial paper conduit as may from time to time become a Lender hereunder by executing and delivering a Joinder Supplement to the Administrative Agent and the Borrower as contemplated by Section 2.22(b).

“Control” means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a Person, whether through the ability to exercise voting power, by contract or otherwise.

“Controlled Accounts” means the Collection Account and the Unfunded Exposure Account.

“Cut-Off Date” means, with respect to each Loan Asset, the date such Loan Asset is Pledged hereunder.

“Delayed Draw Loan Asset” means a Loan Asset that is fully committed on the initial funding date of such Loan Asset and is required to be fully funded in one or more installments on draw dates to occur within one year of the initial funding of such Loan Asset but which, once all such installments have been made, has the characteristics of a Term Loan Asset.

“Determination Date” means the fifth Business Day after the end of each calendar month.

“Disbursement Request” means a disbursement request from the Borrower to the Administrative Agent and the Collateral Agent in the form attached hereto as Exhibit D in connection with a disbursement request from the Unfunded Exposure Account in accordance with Section 2.04(e), or a disbursement request from the Principal Collection Account in accordance with Section 2.21, as applicable.

“EBITDA” means, with respect to any period and any Loan Asset, the meaning of “EBITDA”, “Adjusted EBITDA” or any comparable definition in the Loan Agreement for each such Loan Asset (together with all add-backs and exclusions as designated in such Loan Agreement), and in any case that “EBITDA”, “Adjusted EBITDA” or such comparable definition is not defined in such Loan Agreement, an amount, for the principal obligor on such Loan Asset and any of its parents or Subsidiaries that are obligated pursuant to the Loan Agreement for such Loan Asset (determined on a consolidated basis without duplication in accordance with GAAP) equal to earnings from continuing operations for such period plus interest expense, income taxes and unallocated depreciation and amortization for such period (to the extent deducted in determining earnings from continuing operations for such period), and any other item the Borrower and the Administrative Agent mutually deem to be appropriate.

“Eligible Loan Asset” means, at any time, a Loan Asset in respect of which each of the representations and warranties contained in Section 4.02 and Schedule III hereto is true and correct.

“Environmental Laws” means any and all foreign, federal, state and local laws, statutes, ordinances, rules, regulations, permits, licenses, approvals, interpretations and orders of courts or Governmental Authorities, relating to the protection of human health or the environment, including, but not limited to, requirements pertaining to the manufacture, processing, distribution, use, treatment, storage, disposal, transportation, handling, reporting, licensing, permitting, investigation or remediation of Hazardous Materials. Environmental Laws include, without limitation, the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. § 9601 et seq.), the Hazardous Material Transportation Act (49 U.S.C. §

331 et seq.), the Resource Conservation and Recovery Act (42 U.S.C. § 6901 et seq.), the Federal Water Pollution Control Act (33 U.S.C. § 1251 et seq.), the Clean Air Act (42 U.S.C. § 7401 et seq.), the Toxic Substances Control Act (15 U.S.C. § 2601 et seq.), the Safe Drinking Water Act (42 U.S.C. § 300, et seq.), the Environmental Protection Agency's regulations relating to underground storage tanks (40 C.F.R. Parts 280 and 281), and the Occupational Safety and Health Act (29 U.S.C. § 651 et seq.), and the rules and regulations thereunder, each as amended or supplemented from time to time.

"Equity Security" means (i) any equity security or any other security that is not eligible for purchase by the Borrower as a Loan Asset, (ii) any security purchased as part of a "unit" with a Loan Asset and that itself is not eligible for purchase by the Borrower as a Loan Asset, and (iii) any obligation that, at the time of commitment to acquire such obligation, was eligible for purchase by the Borrower as a Loan Asset but that, as of any subsequent date of determination, no longer is eligible for purchase by the Borrower as a Loan Asset, for so long as such obligation fails to satisfy such requirements.

"ERISA" means the United States Employee Retirement Income Security Act of 1974, as amended from time to time.

"ERISA Affiliate" means (a) any corporation that is a member of the same controlled group of corporations (within the meaning of Section 414(b) of the Code) as the Borrower, (b) a trade or business (whether or not incorporated) under common control (within the meaning of Section 414(c) of the Code) with the Borrower, or (c) a member of the same affiliated service group (within the meaning of Section 414(m) of the Code) as the Borrower, any corporation described in clause (a) above or any trade or business described in clause (b) above.

"Eurodollar Disruption Event" means the occurrence of any of the following: (a) Wachovia shall have notified the Administrative Agent of a determination by Wachovia or any of its assignees or participants that it would be contrary to law or to the directive of any central bank or other Governmental Authority (whether or not having the force of law) to obtain United States dollars in the London interbank market to fund any Advance, (b) Wachovia shall have notified the Administrative Agent of the inability, for any reason, of Wachovia or any of its respective assignees or participants to determine LIBOR, (c) Wachovia shall have notified the Administrative Agent of a determination by Wachovia or any of its respective assignees or participants that the rate at which deposits of United States dollars are being offered to Wachovia or any of its respective assignees or participants in the London interbank market does not accurately reflect the cost to Wachovia or its assignee or participant of making, funding or maintaining any Advance or (d) Wachovia shall have notified the Administrative Agent of the inability of Wachovia or any of its respective assignees or participants to obtain United States dollars in the London interbank market to make, fund or maintain any Advance.

"Event of Default" has the meaning assigned to that term in Section 7.01.

"Excepted Persons" has the meaning assigned to that term in Section 11.13(a).

"Exchange Act" means the United States Securities Exchange Act of 1934, as amended, and the rules and regulations promulgated thereunder.

“Excluded Amounts” means (a) any amount received in the Collection Account with respect to any Loan Asset included as part of the Collateral Portfolio, which amount is attributable to the payment of any Tax, fee or other charge imposed by any Governmental Authority on such Loan Asset or on any Underlying Collateral and (b) any amount received in the Collection Account or other Controlled Account representing (i) any amount representing a reimbursement of insurance premiums, (ii) any escrows relating to Taxes, insurance and other amounts in connection with Loan Assets which are held in an escrow account for the benefit of the Obligor and the secured party pursuant to escrow arrangements under a Loan Agreement and (iii) any amount received in the Collection Account with respect to any Loan Asset retransferred or substituted for upon the occurrence of a Warranty Event or that is otherwise replaced by a Substitute Eligible Loan Asset, or that is otherwise sold or transferred by the Borrower pursuant to Section 2.07, to the extent such amount is attributable to a time after the effective date of such replacement or sale.

“Excluded Taxes” has the meaning assigned to that term in Section 2.11(a).

“Facility Maturity Date” means the earliest to occur of (i) the Stated Maturity Date, (ii) the date of the declaration, or automatic occurrence, of the Facility Maturity Date pursuant to Section 7.01, (iii) the Collection Date and (iv) the occurrence of the termination of this Agreement pursuant to Section 2.18(b) hereof.

“FDIC” means the Federal Deposit Insurance Corporation, and any successor thereto.

“Federal Funds Rate” means, for any period, a fluctuating interest *per annum* rate equal, for each day during such period, to the weighted average of the overnight federal funds rates as in Federal Reserve Board Statistical Release H.15(519) or any successor or substitute publication selected by the Administrative Agent (or, if such day is not a Business Day, for the next preceding Business Day), or, if for any reason such rate is not available on any day, the rate determined, in the sole discretion of the Administrative Agent, to be the rate at which overnight federal funds are being offered in the national federal funds market at 9:00 a.m. on such day.

“Fees” means (i) the Non-Usage Fee and (ii) the fees payable to each Lender or Lender Agent pursuant to the terms of any Lender Fee Letter.

“Fifth Street” means Fifth Street Finance Corp.

“Fifth Street Affiliate Merger Transaction” has the meaning specified in Section 5.04(a) hereof.

“Fifth Street Competitor” means any specialty finance company which derives substantially all of its revenue from lending to and providing investment in middle market companies.

“Fifth Street LIBOR Rate” means, with respect to any Loan Asset, the definition of “LIBOR Rate” or any comparable definition in the Loan Agreement for each such Loan Asset, and in any case that “LIBOR Rate” or such comparable definition is not defined in such Loan Agreement, the rate per annum appearing on Reuters Screen LIBOR01 Page (or on any



successor or substitute page of such service, or any successor to or substitute for such service, providing rate quotations comparable to those currently provided on such page of such service, as determined by the Administrative Agent from time to time for purposes of providing quotations of interest rates applicable to dollar deposits in the London interbank market) at approximately 11:00 a.m., London time for such day, provided, if such day is not a Business Day, the immediately preceding Business Day, as the rate for dollar deposits with a one-month, a two-month or a three-month maturity, as applicable, as and when determined in accordance with the applicable Loan Agreement.

“Fifth Street Merger Party” shall mean any Person that (a) is an Affiliate of Fifth Street (other than the Borrower) on the Closing Date or (b) becomes an Affiliate of Fifth Street after the Closing Date and was either (i) a newly formed Person which (x) has not entered into any merger, consolidation or acquisition prior to the applicable Fifth Street Affiliate Merger Transaction and (y) since its inception has been an Affiliate of Fifth Street or (ii) an existing Person when it became an Affiliate of Fifth Street but, immediately prior to such Fifth Street Affiliate Merger Transaction, had been an Affiliate of Fifth Street for at least two years.

“Fifth Street Prime Rate” means, with respect to any Loan Asset, the definition of “Prime Rate” or any comparable definition in the Loan Agreement for each such Loan Asset, and in any case that “Prime Rate” or such comparable definition is not defined in such Loan Agreement, the rate designated by certain reference lenders in the applicable Loan Agreement from time to time as its prime rate in the United States, such rate to change as and when the designated rate changes; *provided* that the Fifth Street Prime Rate is not intended to be lowest rate of interest charged by Fifth Street in connection with extensions of credit to debtors.

“Financial Asset” has the meaning specified in Section 8-102(a)(9) of the UCC.

“Financial Sponsor” means any Person, including any Subsidiary of such Person, whose principal business activity is acquiring, holding, and selling investments (including controlling interests) in otherwise unrelated companies that each are distinct legal entities with separate management, books and records and bank accounts, whose operations are not integrated with one another and whose financial condition and creditworthiness are independent of the other companies so owned by such Person.

“Fitch” means Fitch, Inc. or any successor thereto.

“Fixed Rate Loan Asset” means a Loan Asset other than a Floating Rate Loan Asset.

“Floating Rate Loan Asset” means a Loan Asset under which the interest rate payable by the Obligor thereof is based on the Fifth Street Prime Rate or Fifth Street LIBOR Rate, plus some specified interest percentage in addition thereto, and which provides that such interest rate will reset immediately upon any change in the related Fifth Street Prime Rate or Fifth Street LIBOR Rate.

“GAAP” means generally accepted accounting principles as in effect from time to time in the United States.

“Governmental Authority” means, with respect to any Person, any nation or government, any state or other political subdivision thereof, any central bank (or similar monetary or regulatory authority) thereof, any body or entity exercising executive, legislative, judicial, regulatory or administrative functions of or pertaining to government and any court or arbitrator having jurisdiction over such Person.

“Hazardous Materials” means all materials subject to any Environmental Law, including, without limitation, materials listed in 49 C.F.R. § 172.010, materials defined as hazardous pursuant to § 101(14) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, flammable, explosive or radioactive materials, hazardous or toxic wastes or substances, lead-based materials, petroleum or petroleum distillates or asbestos or material containing asbestos, polychlorinated biphenyls, radon gas, urea formaldehyde and any substances classified as being “in inventory”, “usable work in process” or similar classification that would, if classified as unusable, be included in the foregoing definition.

“Hedge Breakage Costs” means, for any Hedge Transaction, any amount payable by the Borrower for the early termination of that Hedge Transaction or any portion thereof.

“Hedge Collateral” has the meaning assigned to that term in Section 5.09(b).

“Hedge Counterparty” means any entity, approved in writing by the Administrative Agent (in its sole discretion), which has entered into a Hedging Agreement in connection with this Agreement.

“Hedge Transaction” means each interest rate swap transaction, interest rate cap transaction, interest rate floor transaction or other derivative transaction approved in writing by the Administrative Agent, between the Borrower and a Hedge Counterparty that is entered into pursuant to Section 5.09(a) and is governed by a Hedging Agreement.

“Hedging Agreement” means each agreement between the Borrower and a Hedge Counterparty that governs one or more Hedge Transactions entered into by the Borrower and such Hedge Counterparty pursuant to Section 5.09(a), which agreement shall consist of a “Master Agreement” in a form published by the International Swaps and Derivatives Association, Inc., together with a “Schedule” and each “Confirmation” thereunder confirming the specific terms of each such Hedge Transaction; *provided* that the “Schedule” and the form of each “Confirmation” to any Hedging Agreement shall be subject to the written approval of the Administrative Agent, in its sole discretion.

“Improvement Date” means, with respect to any Loan Asset, any date upon which the Assigned Value of such Loan Asset is revised pursuant to clause (b) of the definition of “Assigned Value” due to an improvement in the Interest Coverage Ratio or Net Leverage Ratio.

“Indebtedness” means:

(i) with respect to any Obligor under any Loan Asset, for the purposes of the definition of the Interest Coverage Ratio and the Net Leverage Ratio, the meaning of “Indebtedness” or any comparable definition in the Loan Agreement for each such Loan Asset, and in any case that “Indebtedness” or such comparable definition is not defined in such Loan

Agreement, without duplication, (a) all obligations of such entity for borrowed money or with respect to deposits or advances of any kind, (b) all obligations of such entity evidenced by bonds, debentures, notes or similar instruments, (c) all obligations of such entity under conditional sale or other title retention agreements relating to property acquired by such entity, (d) all obligations of such entity in respect of the deferred purchase price of property or services (excluding current accounts payable incurred in the ordinary course of business), (e) all indebtedness of others secured by (or for which the holder of such indebtedness has an existing right, contingent or otherwise, to be secured by) any Lien on property owned or acquired by such entity, whether or not the indebtedness secured thereby has been assumed, (f) all guarantees by such entity of indebtedness of others, (g) all Capital Lease Obligations of such entity, (h) all obligations, contingent or otherwise, of such entity as an account party in respect of letters of credit and letters of guaranty and (i) all obligations, contingent or otherwise, of such entity in respect of bankers' acceptances; and

(ii) for all other purposes, with respect to any Person at any date, (a) all indebtedness of such Person for borrowed money or for the deferred purchase price of property or services (other than current liabilities incurred in the ordinary course of business and payable in accordance with customary trade practices) or that is evidenced by a note, bond, debenture or similar instrument or other evidence of indebtedness customary for indebtedness of that type, (b) all obligations of such Person under leases that have been or should be, in accordance with GAAP, recorded as capital leases, (c) all obligations of such Person in respect of acceptances issued or created for the account of such Person, (d) all liabilities secured by any Lien on any property owned by such Person even though such Person has not assumed or otherwise become liable for the payment thereof, (e) all indebtedness, obligations or liabilities of that Person in respect of derivatives, and (f) all obligations under direct or indirect guaranties in respect of obligations (contingent or otherwise) to purchase or otherwise acquire, or to otherwise assure a creditor against loss in respect of, indebtedness or obligations of others of the kind referred to in clauses (a) through (g) of this clause (ii).

"Indemnified Amounts" has the meaning assigned to that term in Section 8.01.

"Indemnified Party" has the meaning assigned to that term in Section 8.01.

"Indemnifying Party" has the meaning assigned to that term in Section 8.03.

"Independent Director" means a natural person who, (A) for the five-year period prior to his or her appointment as Independent Director, has not been, and during the continuation of his or her service as Independent Director is not: (i) an employee, director, stockholder, member, manager, partner or officer of the Borrower or any of their respective Affiliates (other than his or her service as an Independent Director of the Borrower or other Affiliates that are structured to be "bankruptcy remote"); (ii) a customer or supplier of the Borrower or any of their Affiliates (other than his or her service as an Independent Director of the Borrower); or (iii) any member of the immediate family of a person described in (i) or (ii), and (B) has, (i) prior experience as an Independent Director for a corporation or limited liability company whose charter documents required the unanimous consent of all Independent Directors thereof before such corporation or limited liability company could consent to the institution of bankruptcy or insolvency proceedings against it or could file a petition seeking relief under any

applicable federal or state law relating to bankruptcy and (ii) at least three years of employment experience with one or more entities that provide, in the ordinary course of their respective businesses, advisory, management or placement services to issuers of securitization or structured finance instruments, agreements or securities. The initial Independent Director of the Borrower set forth in the Borrower's operating agreement as of the Closing Date is hereby approved by the Administrative Agent.

"Indorsement" has the meaning specified in Section 8-102(a)(11) of the UCC, and "Indorsed" has a corresponding meaning.

"Initial Advance" means the first Advance made pursuant to Article II.

"Initial Payment Date" means the 15th day of January (or if such day is not a Business Day, the next succeeding Business Day).

"Initial Reinvestment Period Extension" has the meaning assigned to that term in Section 2.19(b).

"Initial Stated Maturity Extension" has the meaning assigned to that term in Section 2.19(a).

"Institutional Lender" means (i) Wachovia and (ii) each financial institution other than a Conduit Lender which may from time to time become a Lender hereunder by executing and delivering a Joinder Supplement to the Administrative Agent and the Borrower as contemplated by Section 2.22(b).

"Instrument" has the meaning specified in Section 9-102(a)(47) of the UCC.

"Insurance Policy," means, with respect to any Loan Asset, an insurance policy covering liability and physical damage to, or loss of, the Underlying Collateral.

"Insurance Proceeds" means any amounts received on or with respect to a Loan Asset under any Insurance Policy or with respect to any condemnation proceeding or award in lieu of condemnation, other than (i) any such amount received which is required to be used to restore, improve or repair the related real estate or required to be paid to the Obligor under the Loan Agreement or (ii) prior to an Event of Default hereunder and with prior notice to the Administrative Agent, any such amount for which the Borrower has elected, in its reasonable business discretion, to be used to restore, improve or repair the related real estate or otherwise to be paid to the Obligor under the Loan Agreement.

"Interest" means, with respect to any period and any Loan Asset, for the Obligor on such Loan Asset and any of its parents or Subsidiaries that are obligated under the Loan Agreement for such Loan Asset (determined on a consolidated basis without duplication in accordance with GAAP), the meaning of "Interest" or any comparable definition in the Loan Agreement for each such Loan Asset and in any case that "Interest" or such comparable definition is not defined in such Loan Agreement, all interest in respect of Indebtedness (including the interest component of any payments in respect of Capital Lease Obligations) accrued or capitalized during such period (whether or not actually paid during such period).

“Interest Collection Account” means a sub-account (account number 53237102 at the Account Bank) of the Collection Account into which Interest Collections shall be segregated.

“Interest Collections” means, (i) with respect to any Loan Asset, all payments and collections attributable to interest on such Loan Asset, including, without limitation, all scheduled payments of interest and payments of interest relating to principal prepayments, all guaranty payments attributable to interest and proceeds of any liquidations, sales, dispositions or securitizations attributable to interest on such Loan Asset and (ii) amendment fees, late fees, waiver fees, prepayment fees or other amounts received in respect of Loan Assets.

“Interest Coverage Ratio” means, with respect to any Loan Asset for any Relevant Test Period, the meaning of “Interest Coverage Ratio” or any comparable definition in the Loan Agreement for each such Loan Asset, and in any case that “Interest Coverage Ratio” or such comparable definition is not defined in such Loan Agreement, the ratio of (a) EBITDA to (b) Interest.

“Joinder Supplement” means an agreement among the Borrower, a Lender, its Lender Agent and the Administrative Agent in the form of Exhibit E to this Agreement (appropriately completed) delivered in connection with a Person becoming a Lender hereunder after the Closing Date.

“Lender” means any Institutional Lender or Conduit Lender, and/or any other Person to whom an Institutional Lender or Conduit Lender assigns any part of its rights and obligations under this Agreement and the other Transaction Documents in accordance with the terms of Section 11.04.

“Lender Agent” means, with respect to (i) Wachovia, Wachovia; (ii) each Conduit Lender which may from time to time become party hereto, the Person designated as the “Lender Agent” with respect to such Conduit Lender in the applicable Joinder Supplement and (iii) each Institutional Lender which may from time to time become a party hereto, each shall be deemed to be its own Lender Agent, and, in each case, each of their respective successors and assigns.

“Lender Fee Letter” means each fee letter agreement that shall be entered into by and among the Borrower, the Servicer, the applicable Lender and its related Lender Agent in connection with the transactions contemplated by this Agreement, as amended, modified, waived, supplemented, restated or replaced from time to time.

“LIBOR” means, for any day during the Remittance Period, with respect to any Advance (or portion thereof) (a) the rate per annum appearing on Reuters Screen LIBOR01 Page (or any successor or substitute page) as the London interbank offered rate for deposits in dollars at approximately 11:00 a.m., London time, for such day, provided, if such day is not a Business Day, the immediately preceding Business Day, for a one-month maturity; and (b) if no rate specified in clause (a) of this definition so appears on Reuters Screen LIBOR01 Page (or any successor or substitute page), the interest rate per annum at which dollar deposits of \$5,000,000 and for a one-month maturity are offered by the principal London office of Wachovia in immediately available funds in the London interbank market at approximately 11:00 a.m., London time, for such day.

“Lien” means any mortgage or deed of trust, pledge, hypothecation, collateral assignment, deposit arrangement, encumbrance, lien (statutory or other), charge, claim, preference, priority or other security interest or preferential arrangement in the nature of a security interest of any kind or nature whatsoever (including any conditional sale, lease or other title retention agreement, sale subject to a repurchase obligation, any easement, right of way or other encumbrance on title to real property, and any financing lease having substantially the same economic effect as any of the foregoing) or the filing of or agreement to give any financing statement perfecting a security interest under the UCC or comparable law of any jurisdiction.

“Lien Release Dividend” has the meaning assigned to that term in Section 2.07(g).

“Lien Release Dividend Date” means the date specified by the Borrower, which date may be any Business Day, provided written notice is given in accordance with Section 2.07(g).

“Liquidity Agreement” means any agreement entered into in connection with this Agreement pursuant to which a Liquidity Bank agrees to make purchases from or advances to, or purchase assets from, any Conduit Lender in order to provide liquidity support for such Conduit Lender’s Advances hereunder.

“Liquidity Bank” means the Person or Persons who provide liquidity support to any Conduit Lender pursuant to a Liquidity Agreement in connection with the issuance by such Conduit Lender of Commercial Paper Notes.

“Loan Agreement” means the loan agreement, credit agreement or other agreement pursuant to which a Loan Asset has been issued or created and each other agreement that governs the terms of or secures the obligations represented by such Loan Asset or of which the holders of such Loan Asset are the beneficiaries.

“Loan Asset” means any loan originated or acquired by the Transferor in the ordinary course of its business, which loan includes, without limitation, (i) the Required Loan Documents and Loan Asset File, and (ii) all right, title and interest of the Transferor in and to the loan and any Underlying Collateral, but excluding, in each case, the Retained Interest and Excluded Amounts and which loan was acquired by the Borrower from the Transferor under the Purchase and Sale Agreement and owned by the Borrower on the initial Advance Date (as set forth on the Loan Asset Schedule delivered on the initial Advance Date) or acquired by the Borrower from the Transferor under the Purchase and Sale Agreement after the initial Advance Date pursuant to the delivery of a Loan Assignment and listed on Schedule I to the Loan Assignment.

“Loan Asset Checklist” means an electronic or hard copy, as applicable, of a checklist delivered by or on behalf of the Borrower to the Collateral Custodian, for each Loan Asset, of all Required Loan Documents to be included within the respective Loan Asset File, which shall specify whether such document is an original or a copy.

“Loan Asset File” means, with respect to each Loan Asset, a file containing (a) each of the documents and items as set forth on the Loan Asset Checklist with respect to such

Loan Asset and (b) duly executed originals (to the extent required by the Servicing Standard) and copies of any other Records relating to such Loan Assets and Portfolio Assets pertaining thereto.

“Loan Asset Register” has the meaning assigned to that term in Section 5.03(l).

“Loan Asset Schedule” means the schedule of Loan Agreements evidencing Loan Assets delivered by the Borrower to the Collateral Custodian and the Administrative Agent. Each such schedule shall set forth, as to any Eligible Loan Asset to be Pledged hereunder, the applicable information specified on Schedule V, which shall also be provided to the Collateral Custodian in electronic format acceptable to the Collateral Custodian.

“Loan Assignment” has the meaning set forth in the Purchase and Sale Agreement.

“Make-Whole Premium” means an amount, payable *pro rata* to each Lender Agent (for the account of the applicable Lender), equal to (i) to the extent the Agreement is terminated and the Make-Whole Premium is required to be paid pursuant to Section 2.18(b) on or prior to the date which is one year following the Closing Date, 3.00% of the Maximum Facility Amount and (ii) to the extent the Agreement is terminated and the Make-Whole Premium is required to be paid pursuant to Section 2.18(b) on or prior to the date which is 90 days prior to the date which is two years following the Closing Date but after the first anniversary of the Closing Date, 1.00% of the Maximum Facility Amount; *provided that*, in the foregoing clauses (i) and (ii), the Make-Whole Premium shall be calculated without giving effect to the proviso in the definition of “Maximum Facility Amount”.

“Management Agreement” means the Amended and Restated Investment Advisory Agreement, dated as of April 30, 2008, between Fifth Street and Fifth Street Management LLC.

“Margin Stock” means “margin stock” as such term is defined in Regulation T, U or X of the Federal Reserve Board.

“Material Adverse Effect” means, with respect to any event or circumstance, a material adverse effect on (a) the business, condition (financial or otherwise), operations, performance or properties of the Transferor, the Servicer or the Borrower, (b) the validity, enforceability or collectability of this Agreement or any other Transaction Document or the validity, enforceability or collectability of the Loan Assets generally or any material portion of the Loan Assets, (c) the rights and remedies of the Collateral Agent, the Collateral Custodian, the Account Bank, the Administrative Agent, any Lender, any Lender Agent and the Secured Parties with respect to matters arising under this Agreement or any other Transaction Document, (d) the ability of each of the Borrower and the Servicer, to perform their respective obligations under this Agreement or any other Transaction Document, or (e) the status, existence, perfection, priority or enforceability of the Collateral Agent’s, the Administrative Agent’s or the other Secured Parties’ lien on the Collateral Portfolio.

“Material Modification” means any amendment or waiver of, or modification or supplement to, a Loan Agreement governing a Loan Asset executed or effected on or after the

Cut-Off Date for such Loan Asset (or, solely in the case of clause (d)(ii)(y), a change to any loan senior to a Loan Asset) which:

(a) reduces or forgives any or all of the principal amount due under such Loan Asset;

(b) (i) delays or extends the maturity date for such Loan Asset or (ii) delays or extends the required or scheduled amortization in any way that increases the Average Life of such Loan Asset by 0.50 years or more; *provided* that the Average Life of such Loan Asset may be increased by not more than 20% from its Average Life on the related Cut-Off Date if the Net Leverage Ratio of such Loan Asset is not more than 85% of the maximum established in the Net Leverage Ratio covenant of such Loan Asset;

(c) waives one or more interest payments, permits any interest due in cash to be deferred or capitalized and added to the principal amount of such Loan Asset (other than any deferral or capitalization already allowed by the terms of the Loan Agreement of any PIK Loan Asset), or reduces the spread or coupon with respect to such Loan Asset;

(d) (i) in the case of a first lien loan, contractually or structurally subordinates such Loan Asset by operation of a priority of payments, turnover provisions, the transfer of assets in order to limit recourse to the related Obligor or the granting of Liens (other than Permitted Liens) on any of the Underlying Collateral securing such Loan Asset or (ii) in the case of a second lien loan, (x) contractually or structurally subordinates such Loan Asset to any obligation (other than the first lien loan which existed at the Cut-Off Date for such Loan Asset) by operation of a priority of payments, turnover provisions, the transfer of assets in order to limit recourse to the related Obligor or the granting of Liens (other than Permitted Liens) on any of the Underlying Collateral securing such Loan Asset or (y) the commitment amount of any loan senior to such second lien loan is increased;

(e) substitutes, alters or releases the Underlying Collateral securing such Loan Asset and each such substitution, alteration or release, as determined in the sole discretion of the Administrative Agent, materially and adversely affects the value of such Loan Asset; or

(f) amends, waives, forbears, supplements or otherwise modifies (i) the meaning of "Net Leverage Ratio", "Interest Coverage Ratio" or "Permitted Liens" or any respective comparable definitions in the Loan Agreement for such Loan Asset or (ii) any term or provision of such Loan Agreement referenced in or utilized in the calculation of the "Net Leverage Ratio", "Interest Coverage Ratio" or "Permitted Liens" or any respective comparable definitions for such Loan Asset, in either case in a manner that, in the reasonable judgment of the Administrative Agent, is materially adverse to the Secured Parties.

"Maximum Facility Amount" means the aggregate Commitments as then in effect, which amount shall not exceed \$100,000,000; *provided* that at all times after the Reinvestment Period, the Maximum Facility Amount shall mean the aggregate Advances Outstanding at such time.

"Minimum Equity Amount" means \$100,000,000.



“Moody’s” means Moody’s Investors Service, Inc. (or its successors in interest).

“Mortgage” means the mortgage, deed of trust or other instrument creating a Lien on an interest in real property securing a Loan Asset, including the assignment of leases and rents related thereto.

“Multiemployer Plan” means a “multiemployer plan” as defined in Section 4001(a)(3) of ERISA to which the Borrower or any ERISA Affiliate contributed or had any obligation to contribute on behalf of its employees at any time during the current year or the preceding five years

“Net Leverage Ratio” means, with respect to any Loan Asset for any Relevant Test Period, the meaning of “Net Leverage Ratio” or any comparable definition in the Loan Agreement for each such Loan Asset, and in any case that “Net Leverage Ratio” or such comparable definition is not defined in such Loan Agreement, the ratio of (a) Indebtedness minus Unrestricted Cash to (b) EBITDA.

“Non-Usage Fee” has the meaning assigned to that term in Section 2.09(a).

“Non-Usage Fee Rate” has the meaning assigned to that term in Section 2.09(a).

“Noteless Loan Asset” means a Loan Asset with respect to which the Loan Agreements (i) do not require the Obligor to execute and deliver a promissory note to evidence the indebtedness created under such Loan Asset or (ii) require any holder of the indebtedness created under such Loan Asset to affirmatively request a promissory note from the related Obligor.

“Notice and Request for Consent” has the meaning assigned to that term in Section 2.07(g)(i).

“Notice of Borrowing” means an irrevocable written notice of borrowing from the Borrower to the Administrative Agent and each Lender Agent in the form attached hereto as Exhibit F.

“Notice of Reduction” means a notice of a reduction of the Advances Outstanding pursuant to Section 2.18, in the form attached hereto as Exhibit G.

“Obligations” means all present and future indebtedness and other liabilities and obligations (howsoever created, arising or evidenced, whether direct or indirect, absolute or contingent, or due or to become due) of the Borrower to the Lenders, the Lender Agents, the Administrative Agent, the Account Bank, any Hedge Counterparty, the Collateral Agent or the Collateral Custodian arising under this Agreement and/or any other Transaction Document and shall include, without limitation, all liability for principal of and interest on the Advances, Hedge Breakage Costs, Breakage Fees, indemnifications and other amounts due or to become due by the Borrower to the Lenders, the Lender Agents, the Administrative Agent, the Collateral Agent, the Hedge Counterparty, the Collateral Custodian and the Account Bank under this Agreement and/or any other Transaction Document, including, without limitation, any amounts payable under any Hedging Agreement (including, without limitation, payments in respect of the

termination of any such Hedging Agreement), any Lender Fee Letter, any Make-Whole Premium and costs and expenses payable by the Borrower to the Lenders, the Lender Agents, the Administrative Agent, the Account Bank, the Collateral Agent or the Collateral Custodian, including attorneys' fees, costs and expenses, including without limitation, interest, fees and other obligations that accrue after the commencement of an insolvency proceeding (in each case whether or not allowed as a claim in such insolvency proceeding).

“Obligor” means, collectively, each Person obligated to make payments under a Loan Agreement, including any guarantor thereof.

“Officer's Certificate” means a certificate signed by the president, the secretary, an assistant secretary, the chief financial officer or any vice president, as an authorized officer, of any Person.

“Opinion of Counsel” means a written opinion of counsel, which opinion and counsel are acceptable to the Administrative Agent in its sole discretion.

“Outstanding Balance” means the principal balance of a Loan Asset, expressed exclusive of PIK Interest and accrued interest; *provided* that amortization payments on a Loan Asset shall first be applied to PIK Interest when determining the Outstanding Balance of such Loan Asset. For the avoidance of doubt, the Outstanding Balance with respect to a Revolving Loan Asset or a Delayed Draw Loan Asset shall be equal to the funded amount of such Revolving Loan Asset or Delayed Draw Loan Asset.

“Payment Date” means the 15<sup>th</sup> day of each calendar month or, if such day is not a Business Day, the next succeeding Business Day, commencing on the 15<sup>th</sup> day of January; *provided*, that the final Payment Date shall occur on the Collection Date.

“Payment Duties” has the meaning assigned to that term in Section 10.02(b)(ii).

“Pension Plan” has the meaning assigned to that term in Section 4.01(x).

“Permitted Assignee” means any lender which (i) is not a Fifth Street Competitor and (ii) has a long-term unsecured debt rating of not less than “A3” from Moody's and not less than “A” from S&P.

“Permitted Investments” means any of (i) Wells Fargo Advantage Money Market Funds — Government Money Market Fund, or (ii) Wells Fargo Money Market Deposit Account.

“Permitted Liens” means any of the following as to which no enforcement, collection, execution, levy or foreclosure proceeding shall have been commenced (a) Liens for state, municipal or other local Taxes if such Taxes shall not at the time be due and payable or if a Person shall currently be contesting the validity thereof in good faith by appropriate proceedings and with respect to which reserves in accordance with GAAP have been provided on the books of such Person, (b) Liens imposed by law, such as materialmen's, warehousemen's, mechanics', carriers', workmen's and repairmen's Liens and other similar Liens, arising by operation of law in the ordinary course of business for sums that are not overdue or are being contested in good faith and (c) Liens granted pursuant to or by the Transaction Documents.

“Person” means an individual, partnership, corporation (including a statutory or business trust), limited liability company, joint stock company, trust, unincorporated association, sole proprietorship, joint venture, government (or any agency or political subdivision thereof) or other entity.

“PIK Interest” means interest accrued on a Loan Asset that is added to the principal amount of such Loan Asset instead of being paid as interest as it accrues.

“PIK Loan Asset” means a Loan Asset which provides for a portion of the interest that accrues thereon to be added to the principal amount of such Loan Asset for some period of the time prior to such Loan Asset requiring the current cash payment of such previously capitalized interest, which cash payment shall be treated as an Interest Collection at the time it is received.

“Pledge” means the pledge of any Eligible Loan Asset or other Portfolio Asset pursuant to Article II.

“Pledge Agreement” means that certain Pledge Agreement, dated as of the Closing Date, between the Transferor, as pledgor, and the Collateral Agent, as pledgee, as such Pledge Agreement may from time to time be amended, restated, supplemented or otherwise modified from time to time in accordance with the terms thereof.

“Portfolio Assets” means all Loan Assets owned by the Borrower, together with all proceeds thereof and other assets or property related thereto, including all right, title and interest of the Borrower in and to:

- (a) any amounts on deposit in any cash reserve, collection, custody or lockbox accounts securing the Loan Assets;
- (b) all rights with respect to the Loan Assets to which the Transferor is entitled as lender under the applicable Loan Agreement;
- (c) the Controlled Accounts, together with all cash and investments in each of the foregoing other than amounts earned on investments therein;
- (d) any Underlying Collateral securing a Loan Asset and all Recoveries related thereto, all payments paid in respect thereof and all monies due, to become due and paid in respect thereof accruing after the applicable Cut-Off Date and all liquidation proceeds;
- (e) all Required Loan Documents, the Loan Asset Files related to any Loan Asset, any Records, and the documents, agreements, and instruments included in the Loan Asset Files or Records;
- (f) all Insurance Policies with respect to any Loan Asset;
- (g) all Liens, guaranties, indemnities, warranties, letters of credit, accounts, bank accounts and property subject thereto from time to time purporting to secure or support

payment of any Loan Asset, together with all UCC financing statements, mortgages or similar filings signed or authorized by an Obligor relating thereto;

(h) the Purchase and Sale Agreement (including, without limitation, rights of recovery of the Borrower against the Transferor) and the assignment to the Collateral Agent, for the benefit of the Secured Parties, of all UCC financing statements filed by the Borrower against the Transferor under or in connection with the Purchase and Sale Agreement;

(i) any Hedging Agreement and all payments from time to time due thereunder;

(j) all records (including computer records) with respect to the foregoing; and

(k) all collections, income, payments, proceeds and other benefits of each of the foregoing.

“Priced Loan Asset” means any Loan Asset that has an observable quote from LoanX Mark-It Partners or Loan Pricing Corporation, or from another pricing service selected by the Administrative Agent in its sole discretion.

“Prime Rate” means the rate announced by Wachovia from time to time as its prime rate in the United States, such rate to change as and when such designated rate changes. The Prime Rate is not intended to be the lowest rate of interest charged by Wachovia or any other specified financial institution in connection with extensions of credit to debtors.

“Principal Collection Account” means a sub-account (account number 53237103 at the Account Bank) of the Collection Account into which Principal Collections shall be segregated.

“Principal Collections” means (i) any amounts deposited by the Borrower in accordance with Section 2.06(a)(i) or Section 2.07(c)(i), (ii) with respect to any Loan Asset, all amounts received which are not Interest Collections, including, without limitation, all Recoveries, all Insurance Proceeds, all scheduled payments of principal and principal prepayments and all guaranty payments and proceeds of any liquidations, sales, dispositions or securitizations, in each case, attributable to the principal of such Loan Asset and (iii) all payments received pursuant to any Hedging Agreement or Hedge Transaction. For the avoidance of doubt, “Principal Collections” shall not include amounts on deposit in the Unfunded Exposure Account.

“Pro Rata Share” means, with respect to each Lender, the percentage obtained by dividing the Commitment of such Lender (as determined under clause (i) of the definition of “Commitment”), by the aggregate Commitments of all the Lenders (as determined under clause (i) of the definition of “Commitment”).

“Proceeds” means, with respect to any Collateral Portfolio, all property that is receivable or received when such Collateral Portfolio is collected, sold, liquidated, foreclosed, exchanged, or otherwise disposed of, whether such disposition is voluntary or involuntary, and includes all rights to payment with respect to any insurance relating to such Collateral Portfolio.

“Prohibited Transferee” means any hedge fund, any so-called vulture fund or loan-to-own fund, any distressed debt fund or any other fund that is similar to any of the foregoing.

“Purchase and Sale Agreement” means that certain Purchase and Sale Agreement, dated as of the date hereof, between the Transferor, as the seller, and the Borrower, as the purchaser, as amended, modified, waived, supplemented, restated or replaced from time to time.

“Records” means all documents relating to the Loan Assets, including books, records and other information executed in connection with the origination or acquisition of the Collateral Portfolio or maintained with respect to the Collateral Portfolio and the related Obligors that the Borrower, the Transferor or the Servicer have generated, in which the Borrower or the Transferor have acquired an interest pursuant to the Purchase and Sale Agreement or in which the Borrower or the Transferor have otherwise obtained an interest.

“Recoveries” means, as of the time any Underlying Collateral with respect to any Loan Asset subject to clauses (ii) or (iv) of the definition of “Value Adjustment Event”, as applicable, is sold, discarded or abandoned (after a determination by the Servicer that such Underlying Collateral has little or no remaining value) or otherwise determined to be fully liquidated by the Servicer in accordance with the Servicing Standard, the proceeds from the sale of the Underlying Collateral, the proceeds of any related Insurance Policy, any other recoveries with respect to such Loan Asset, as applicable, the Underlying Collateral, and amounts representing late fees and penalties, net of any amounts received that are required under such Loan Asset, as applicable, to be refunded to the related Obligor.

“Register” has the meaning assigned to that term in Section 2.14.

“Reinvestment Period” shall mean the date commencing on the Closing Date and ending on the day preceding the earlier of (i) November 16, 2011 (or such later date as is agreed to in writing by the Borrower, the Servicer, the Administrative Agent and the Lenders pursuant to Section 2.19(b)), (ii) the occurrence of an Event of Default (past any applicable notice or cure period provided in the definition thereof) and (iii) the date of any voluntary termination by the Borrower pursuant to Section 2.18(b).

“Release Date” has the meaning set forth in Section 2.07(c).

“Relevant Test Period” means, with respect to any Loan Asset, the relevant test period for the calculation of Net Leverage Ratio or Interest Coverage Ratio, as applicable, for such Loan Asset in the Loan Agreements or, if no such period is provided for therein, for Obligors delivering monthly financing statements, each period of the last 12 consecutive reported calendar months, and for Obligors delivering quarterly financing statements, each period of the last four consecutive reported fiscal quarters of the principal Obligor on such Loan Asset; *provided* that with respect to any Loan Asset for which the relevant test period is not provided for in the Loan Agreement, if an Obligor is a newly-formed entity as to which 12 consecutive calendar months have not yet elapsed, “Relevant Test Period” shall initially include the period from the date of formation of such Obligor to the end of the twelfth calendar month or fourth fiscal quarter (as the case may be) from the date of formation, and shall subsequently

include each period of the last 12 consecutive reported calendar months or four consecutive reported fiscal quarters (as the case may be) of such Obligor.

“Remittance Period” means, (i) as to the Initial Payment Date, the period beginning on the Closing Date and ending on, and including, the Determination Date immediately preceding such Payment Date and (ii) as to any subsequent Payment Date, the period beginning on the first day after the most recently ended Remittance Period and ending on, and including, the Determination Date immediately preceding such Payment Date, or, with respect to the final Remittance Period, the Collection Date.

“Replacement Servicer” has the meaning assigned to that term in Section 6.01(c).

“Reporting Date” means the date that is two Business Days prior to the Payment Date of each calendar month, commencing December, 2009.

“Required Lenders” means (i) Wachovia (as a Lender hereunder) and its successors and assigns and (ii) the Lenders representing an aggregate of at least 51% of the aggregate Commitments of the Lenders then in effect.

“Required Loan Documents” means, for each Loan Asset, originals (except as otherwise indicated) of the following documents or instruments, all as specified on the related Loan Asset Checklist:

(a) (i) other than in the case of a Noteless Loan Asset, the original or, if accompanied by an original “lost note” affidavit and indemnity, a copy of, the underlying promissory note, endorsed by the Borrower or the prior holder of record either in blank or to the Collateral Agent (and evidencing an unbroken chain of endorsements from each prior holder thereof evidenced in the chain of endorsements either in blank or to the Collateral Agent), with any endorsement to the Collateral Agent to be in the following form: “Wells Fargo Bank, National Association, as Collateral Agent for the Secured Parties”, and (ii) in the case of a Noteless Loan Asset (x) a copy of each transfer document or instrument relating to such Noteless Loan Asset evidencing the assignment of such Noteless Loan Asset to the Transferor and from the Transferor to the Borrower and from the Borrower either to the Collateral Agent or in blank, and (y) a copy of the Loan Asset Register with respect to such Noteless Loan Asset, as described in Section 5.03(l)(ii);

(b) originals or copies of each of the following, to the extent applicable to the related Loan Asset; any related loan agreement, credit agreement, note purchase agreement, security agreement (if separate from any Mortgage), sale and servicing agreement, acquisition agreement, subordination agreement, intercreditor agreement or similar instruments, guarantee, Insurance Policy, assumption or substitution agreement or similar material operative document, in each case together with any amendment or modification thereto, as set forth on the Loan Asset Checklist;

(c) if any Loan Asset is secured by a Mortgage, in each case as set forth in the Loan Asset Checklist:

(i) either (i) the original Mortgage, the original assignment of leases and rents, if any, and the originals of all intervening assignments, if any, of the Mortgage and assignments of leases and rents with evidence of recording thereon, (ii) copies thereof certified by the Servicer, by closing counsel or by a title company or escrow company to be true and complete copies thereof where the originals have been transmitted for recording until such time as the originals are returned by the public recording office; *provided* that, solely for purposes of the Review Criteria, the Collateral Custodian shall have no duty to ascertain whether any certification set forth in this subsection (c)(ii) has been received, other than a certification which has been clearly delineated as being provided by the Servicer or (iii) copies certified by the public recording offices where such documents were recorded to be true and complete copies thereof in those instances where the public recording offices retain the original or where the original recorded documents are lost; and

(ii) other than with respect to any Agented Note, to the extent the Borrower is the sole lender under the Loan Agreement, an Assignment of Mortgage and of any other material recorded security documents (including any assignment of leases and rents) in recordable form, executed by the Borrower or the prior holder of record, in blank or to the Collateral Agent (and evidencing an unbroken chain of assignments from the prior holder of record to the Collateral Agent), with any assignment to the Collateral Agent to be in the following form: "Wells Fargo Bank, National Association, as Collateral Agent for the Secured Parties";

(d) with respect to any Loan Asset originated by the Transferor and with respect to which the Transferor acts as administrative agent (or in a comparable capacity), either (i) copies of the UCC-1 Financing Statements, if any, and any related continuation statements, each showing the Obligor as debtor and the Collateral Agent as total assignee or showing the Obligor, as debtor and the Transferor as secured party and each with evidence of filing thereon, or (ii) copies of any such financing statements certified by the Servicer to be true and complete copies thereof in instances where the original financing statements have been sent to the appropriate public filing office for filing, in each case as set forth in the Loan Asset Checklist.

"Required Reports" means, collectively, the Servicing Report required pursuant to Section 6.08(b), the Servicer's Certificate required pursuant to Section 6.08(c), the financial statements of the Servicer required pursuant to Section 6.08(d), the tax returns of the Borrower and the Servicer required pursuant to Section 6.08(e), the financial statements and valuation reports of each Obligor required pursuant to Section 6.08(f), the annual statements as to compliance required pursuant to Section 6.09, and the annual independent public accountant's report required pursuant to Section 6.10.

"Responsible Officer" means, with respect to any Person, any duly authorized officer of such Person with direct responsibility for the administration of this Agreement and also, with respect to a particular matter, any other duly authorized officer of such Person to whom such matter is referred because of such officer's knowledge of and familiarity with the particular subject.

“Restricted Junior Payment” means (i) any dividend or other distribution, direct or indirect, on account of any class of membership interests of the Borrower now or hereafter outstanding, except a dividend paid solely in interests of that class of membership interests or in any junior class of membership interests of the Borrower; (ii) any redemption, retirement, sinking fund or similar payment, purchase or other acquisition for value, direct or indirect, of any class of membership interests of the Borrower now or hereafter outstanding, (iii) any payment made to redeem, purchase, repurchase or retire, or to obtain the surrender of, any outstanding warrants, options or other rights to acquire membership interests of the Borrower now or hereafter outstanding, and (iv) any payment of management fees by the Borrower. For the avoidance of doubt, (x) payments and reimbursements due to the Servicer in accordance with this Agreement or any other Transaction Document do not constitute Restricted Junior Payments, and (y) distributions by the Borrower to holders of its membership interests of Loan Assets or of cash or other proceeds relating thereto which have been substituted by the Borrower in accordance with this Agreement shall not constitute Restricted Junior Payments.

“Retained Interest” means, with respect to any Agented Note that is transferred to the Borrower, (i) all of the obligations, if any, of the agent(s) under the documentation evidencing such Agented Note and (ii) the applicable portion of the interests, rights and obligations under the documentation evidencing such Agented Note that relate to such portion(s) of the indebtedness that is owned by another lender.

“Review Criteria” has the meaning assigned to that term in [Section 12.02\(b\)\(i\)](#).

“Revolving Loan Asset” means a Loan Asset that is a line of credit or contains an unfunded commitment arising from an extension of credit by the Transferor to an Obligor, pursuant to the terms of which amounts borrowed may be repaid and subsequently reborrowed.

“S&P” means Standard & Poor’s Ratings Group, a division of The McGraw-Hill Companies, Inc. (or its successors in interest).

“Same-Day Advance” means any Advance made on the same day such Advance is requested, in accordance with the second sentence of [Section 2.02\(b\)](#).

“Scheduled Payment” means each scheduled payment of principal and/or interest required to be made by an Obligor on the related Loan Asset, as adjusted pursuant to the terms of the related Loan Agreement.

“Second Reinvestment Period Extension” has the meaning assigned to that term in [Section 2.19\(b\)](#).

“Second Stated Maturity Extension” has the meaning assigned to that term in [Section 2.19\(a\)](#).

“Secured Party” means each of the Administrative Agent, each Lender (together with its successors and assigns), each Lender Agent, each Affected Party, each Indemnified Party, the Collateral Custodian, the Collateral Agent, the Account Bank and each Hedge Counterparty.



“Securities Act” means the U.S. Securities Act of 1933, as amended, and the rules and regulations promulgated thereunder.

“Servicer” means at any time the Person then authorized, pursuant to Section 6.01 to service, administer, and collect on the Loan Assets and exercise rights and remedies in respect of the same.

“Servicer Pension Plan” has the meaning set forth in Section 4.03(p).

“Servicer Termination Event” means the occurrence of any one or more of the following events:

(a) any failure by the Servicer to make any payment, transfer or deposit into the Collection Account (including, without limitation, with respect to bifurcation and remittance of Interest Collections and Principal Collections) or the Unfunded Exposure Account, as required by this Agreement or any Transaction Document which continues unremedied for a period of two Business Days;

(b) any failure on the part of the Servicer duly to (i) observe or perform in any material respect any other covenants or agreements of the Servicer set forth in this Agreement or the other Transaction Documents to which the Servicer is a party (including, without limitation, any delegation of the Servicer’s duties that is not permitted by Section 6.01 of this Agreement) or (ii) comply in any material respect with the Servicing Standard regarding the servicing of the Collateral Portfolio and in each case the same continues unremedied for a period of 30 days (if such failure can be remedied) after the earlier to occur of (x) the date on which written notice of such failure requiring the same to be remedied shall have been given to the Servicer by the Administrative Agent or the Collateral Agent (at the direction of the Administrative Agent) and (y) the date on which a Responsible Officer of the Servicer acquires knowledge thereof;

(c) the failure of the Servicer to make any payment when due (after giving effect to any related grace period) under one or more agreements for borrowed money to which it is a party in an aggregate amount in excess of United States \$1,000,000, individually or in the aggregate, or the occurrence of any event or condition that has resulted in the acceleration of such amount of recourse debt whether or not waived;

(d) a Bankruptcy Event shall occur with respect to the Servicer;

(e) Fifth Street shall assign its rights or obligations as “Servicer” hereunder to any Person without the consent of each Lender Agent and the Administrative Agent (as required in the last sentence of Section 11.04(a));

(f) at the end of any fiscal quarter, Fifth Street fails to maintain the Asset Coverage Ratio at greater than or equal to 2:1;

(g) Fifth Street permits Shareholders’ Equity (as reflected in its 10Q or 10K without any deductions) at the last day of any of its fiscal quarter to be less than \$200,000,000 plus 75% of the net proceeds of the sale of equity interests by Fifth Street after the Closing Date;

(h) any change in the management of the Servicer (whether by resignation, termination, disability, death or lack of day-to-day management) relating to (x) Leonard Tannenbaum or (y) any two of Marc Goodman, Bernard Berman and Ivelin Dimitrov failing to provide active and material participation in the Servicer's or Transferor's daily activities including, but not limited to, general management, underwriting, and the credit approval process and credit monitoring activities, and such persons are not replaced with other individuals reasonably acceptable to the Administrative Agent within 30 days of such event;

(i) any failure by the Servicer to deliver (i) any required Servicing Report on or before the date occurring two Business Days after the date such report is required to be made or given, as the case may be or (ii) any other Required Reports hereunder on or before the date occurring five Business Days after the date such report is required to be made or given, as the case may be, in each case under the terms of this Agreement;

(j) any representation, warranty or certification made by the Servicer in any Transaction Document or in any certificate delivered pursuant to any Transaction Document shall prove to have been incorrect in any material respect when made and continues to be unremedied for a period of 30 days after the earlier to occur of (i) the date on which written notice of such incorrectness requiring the same to be remedied shall have been given to the Servicer by the Administrative Agent or the Collateral Agent (at the direction of the Administrative Agent) and (ii) the date on which a Responsible Officer of the Servicer acquires knowledge thereof;

(k) any financial or other information reasonably requested by the Administrative Agent, a Lender Agent or the Collateral Agent is not provided as requested within a reasonable amount of time following such request;

(l) the rendering against the Servicer of one or more final judgments, decrees or orders for the payment of money in excess of United States \$1,000,000, individually or in the aggregate, and the continuance of such judgment, decree or order unsatisfied and in effect for any period of more than 30 consecutive days without a stay of execution;

(m) any change in the control of the Servicer that takes the form of either a merger or consolidation that does not comply with the provisions of Section 5.04(a) of this Agreement;

(n) the occurrence of an Event of Default (past any applicable notice or cure period provided in the definition thereof);

(o) Fifth Street makes a capital contribution to an Affiliate other than the Borrower and after accounting for such capital contribution, Fifth Street's Shareholders' Equity (*provided* that equity in Affiliates other than the Borrower will not be included in this calculation) is not greater than \$250,000,000; or

(p) any other event which has caused, or which may cause, a Material Adverse Effect on the assets, liabilities, financial condition, business or operations of the Servicer or the ability of the Servicer to meet its obligations under the Transaction Documents to which it is a party.

“Servicer Termination Notice” has the meaning assigned to that term in Section 6.01(b).

“Servicer’s Certificate” has the meaning assigned to that term in Section 6.08(c).

“Servicing Fees” means the fee payable to the Servicer on each Payment Date in arrears in respect of each Remittance Period, which fee shall be equal to the product of (i) 0.50%, (ii) the arithmetic mean of the aggregate Outstanding Balance of all Eligible Loan Assets on the first day and on the last day of the related Remittance Period and (iii) the actual number of days in such Remittance Period divided by 360; *provided that* the rate set forth in clause (i) hereof may be increased up to 0.75% at the discretion of the Administrative Agent in the event that a successor Servicer is appointed pursuant to Section 6.01(c).

“Servicing File” means, for each Loan Asset, (a) copies of each of the Required Loan Documents and (b) any other portion of the Loan Asset File which is not part of the Required Loan Documents.

“Servicing Report” has the meaning assigned to that term in Section 6.08(b).

“Servicing Standard” means, with respect to any Loan Assets included in the Collateral Portfolio, to service and administer such Loan Assets on behalf of the Secured Parties in accordance with Applicable Law, the terms of this Agreement, the Loan Agreements, all customary and usual servicing practices for loans like the Loan Assets and, to the extent consistent with the foregoing, (a)(i) if the Servicer is the originator or an Affiliate thereof, the higher of: (A) the customary and usual servicing practices that a prudent loan investor or lender would use in servicing loans like the Loan Assets for its own account, and (B) the same care, skill, prudence and diligence with which the Servicer services and administers loans for its own account or for the account of others, and (ii) if the Servicer is not the originator or an Affiliate thereof, the same care, skill, prudence and diligence with which the Servicer services and administers loans for its own account or for the account of others; (b) with a view to maximize the value of the Loan Assets; and (c) without regard to: (i) the Servicer’s obligations to incur servicing and administrative expenses with respect to a Loan Asset, (ii) the Servicer’s right to receive compensation for its services hereunder or with respect to any particular transaction, (iii) the ownership by the Servicer or any Affiliate thereof of any Loan Assets, or (iv) the ownership, servicing or management for others by the Servicer of any other loans or property by the Servicer.

“Shareholders’ Equity” means, at any date, the amount determined on a consolidated basis, without duplication, in accordance with GAAP, of shareholders equity for the Servicer at such date.

“Solvent” means, as to any Person at any time, having a state of affairs such that all of the following conditions are met: (a) the fair value of the property of such Person is greater than the amount of such Person’s liabilities (including disputed, contingent and unliquidated liabilities) as such value is established and liabilities evaluated for purposes of Section 101(32) of the Bankruptcy Code; (b) the present fair saleable value of the property of such Person in an orderly liquidation of such Person is not less than the amount that will be

required to pay the probable liability of such Person on its debts and other liabilities as they become absolute and matured; (c) such Person is able to realize upon its property and pay its debts and other liabilities (including disputed, contingent and unliquidated liabilities) as they mature in the normal course of business; (d) such Person does not intend to, and does not believe that it will, incur debts or liabilities beyond such Person's ability to pay as such debts and liabilities mature; and (e) such Person is not engaged in a business or a transaction, and does not propose to engage in a business or a transaction, for which such Person's property assets would constitute unreasonably small capital.

"Spread Differential" means, for any date of determination, the (a) weighted average fixed rate cash coupon of the Fixed Rate Loan Assets included in the Collateral Portfolio on such date minus (b) the Yield Rate for such date.

"State" means one of the fifty states of the United States or the District of Columbia.

"Stated Maturity Date" means November 16, 2012 or such later date as is agreed to in writing by the Borrower, the Servicer, the Administrative Agent and the Lenders pursuant to Section 2.19(a).

"Subsidiary" means with respect to a person, a corporation, partnership or other entity of which shares of stock or other ownership interests having ordinary voting power (other than stock or such other ownership interests having such power only by reason of the happening of a contingency) to elect a majority of the board of directors or other managers of such corporation, partnership or other entity are at the time owned, or the management of which is otherwise controlled, directly or indirectly through one or more intermediaries, or both, by such person.

"Substitute Eligible Loan Asset" means each Eligible Loan Asset Pledged by the Borrower to the Collateral Agent, on behalf of the Secured Parties, pursuant to Section 2.07(a) or Section 2.07(c)(ii).

"Taxes" means any present or future taxes, levies, imposts, duties, charges, assessments or fees of any nature (including interest, penalties, and additions thereto) that are imposed by any Governmental Authority.

"Term Loan Asset" means a Loan Asset that is a term loan that has been fully funded and does not contain any unfunded commitment on the part of the Transferor arising from an extension of credit by the Transferor to an Obligor.

"Transaction Documents" means this Agreement, the Variable Funding Note(s), any Hedging Agreement, any Joinder Supplement, the Purchase and Sale Agreement, the Collection Account Agreement, the Unfunded Exposure Account Agreement, the Wells Fargo Fee Letter, each Lender Fee Letter, the Pledge Agreement and each document, instrument or agreement related to any of the foregoing.

"Transferee Letter" has the meaning assigned to that term in Section 11.04(a).

“Transferor” means Fifth Street, in its capacity as the transferor hereunder and as the seller under the Purchase and Sale Agreement, together with its successors and assigns in such capacity.

“UCC” means the Uniform Commercial Code as from time to time in effect in the specified jurisdiction.

“Underlying Collateral” means, with respect to a Loan Asset, any property or other assets designated and pledged or mortgaged as collateral to secure repayment of such Loan Asset, as applicable, including, without limitation, mortgaged property and/or a pledge of the stock, membership or other ownership interests in the related Obligor and all proceeds from any sale or other disposition of such property or other assets.

“Unfunded Exposure Account” means a trust account (account number 53237101 at the Account Bank) in the name of the Borrower and under the sole dominion and control of the Collateral Agent for the benefit of the Secured Parties; *provided*, that the funds deposited therein (including any interest and earnings thereon) from time to time shall constitute the property and assets of the Borrower and the Borrower shall be solely liable for any Taxes payable with respect to the Unfunded Exposure Account.

“Unfunded Exposure Account Agreement” means that certain Unfunded Exposure Account Agreement, dated the date of this Agreement, among the Borrower, the Servicer, the Account Bank, the Administrative Agent, and the Collateral Agent, which agreement relates to the Unfunded Exposure Account, as such agreement may from time to time be amended, supplemented or otherwise modified in accordance with the terms thereof.

“Unfunded Exposure Amount” means, as of any date of determination, an amount equal to the aggregate amount of all unfunded commitments associated with Loan Assets owned by the Borrower.

“Unfunded Exposure Amount Shortfall” has the meaning assigned to that term in Section 2.02(f).

“Unfunded Exposure Equity Amount” means, on any date of determination, an amount equal to:

(i) for each Loan Asset which has any unfunded commitments, the aggregate sum of the products of (a) the Unfunded Exposure Amount for each such Loan Asset multiplied by (b) the difference of (x) 100% minus (y) the Applicable Percentage for each such Loan Asset;

plus

(ii) for each Loan Asset which has any unfunded commitments, the aggregate sum of the products of (a) (x) 100% minus the Assigned Value for each such Loan Asset multiplied by (y) the Unfunded Exposure Amount of each such Loan Asset; multiplied by (b) the Applicable Percentage for each such Loan Asset.

“United States” means the United States of America.

“Unmatured Event of Default” means any event that, if it continues uncured, will, with lapse of time, notice or lapse of time and notice, constitute an Event of Default.

“Unrestricted Cash” the meaning of “Unrestricted Cash” or any comparable definition in the Loan Agreements for each Loan Asset, and in any case that “Unrestricted Cash” or such comparable definition is not defined in such Loan Agreement, all cash available for use for general corporate purposes and not held in any reserve account or legally or contractually restricted for any particular purposes or subject to any lien (other than blanket liens permitted under or granted in accordance with such Loan Agreement).

“Unused Portion” has the meaning assigned to that term in Section 2.09(a).

“Value Adjustment Event” means, with respect to any Loan Asset, the occurrence of any one or more of the following events after the related Cut-Off Date:

(i) (x) The Interest Coverage Ratio for any Relevant Test Period with respect to such Loan Asset is less than 90% of the Interest Coverage Ratio with respect to such Loan Asset as calculated on (A) the applicable Cut-Off Date (if no Improvement Date has occurred) or (B) the most recent Improvement Date (if an Improvement Date has occurred) or (y) the Net Leverage Ratio for any Relevant Test Period of the related Obligor with respect to such Loan Asset is more than 0.50x higher than such Net Leverage Ratio as calculated on (A) the applicable Cut-Off Date (if no Improvement Date has occurred) or (B) the most recent Improvement Date (if an Improvement Date has occurred);

(ii) an Obligor payment default under any Loan Asset (after giving effect to any grace and/or cure period set forth in the Loan Agreement, but not to exceed five days);

(iii) any other Obligor default under any Loan Asset for which the Borrower (or agent or required lenders pursuant to the Loan Agreement, as applicable) has elected to exercise any of its rights and remedies under the applicable Loan Agreement in case of the default thereunder (including, but not limited to, acceleration of the debt);

(iv) a Bankruptcy Event with respect to the related Obligor;

(v) the occurrence of a Material Modification (in accordance with clauses (b)-(f) of the definition thereof) with respect to such Loan Asset; or

(vi) the occurrence of a Material Modification (in accordance with clause (a) of the definition thereof) with respect to such Loan Asset.

“Variable Funding Note” has the meaning assigned to such term in Section 2.01(a).

“Wachovia” means Wachovia Bank, National Association, a national banking association, in its individual capacity, and its successors and assigns.

“Warranty Event” means, as to any Loan Asset, the discovery that as of the related Cut-Off Date for such Loan Asset there existed a breach of any representation or

warranty relating to such Loan Asset (other than any representation or warranty that the Loan Asset satisfies the criteria of the definition of Eligible Loan Asset) and the failure of the Borrower to cure such breach, or cause the same to be cured, within 10 days after the earlier to occur of the Borrower's receipt of notice thereof from the Administrative Agent or the Borrower becoming aware thereof; *provided* that, any Loan Asset approved by the Administrative Agent in accordance with Section 11 of Schedule III on the applicable Cut-Off Date shall not be a Warranty Loan Asset due to the failure of such Loan Asset to satisfy the requirements of Section 11 of Schedule III on any date thereafter.

“Warranty Loan Asset” means any Loan Asset that fails to satisfy any criteria of the definition of Eligible Loan Asset as of the Cut-Off Date for such Loan Asset or a Loan Asset with respect to which a Warranty Event has occurred.

“Wells Fargo” has the meaning assigned to that term in the preamble hereto.

“Wells Fargo Fee Letter” means the Wells Fargo Fee Letter, dated as of the date hereof, between the Collateral Agent, the Collateral Custodian, the Account Bank, the Borrower and the Administrative Agent, as such letter may be amended, modified, supplemented, restated or replaced from time to time.

“Yield” means with respect to any Remittance Period, the sum for each day in such Remittance Period determined in accordance with the following formula:

$$\frac{YR \times L}{D}$$

- where: YR = the Yield Rate applicable on such day;
- L = the Advances Outstanding on such day; and
- D = 360 or, to the extent the Yield Rate is the Base Rate, 365 or 366 days, as applicable;

*provided* that (i) no provision of this Agreement shall require the payment or permit the collection of Yield in excess of the maximum permitted by Applicable Law and (ii) Yield shall not be considered paid by any distribution if at any time such distribution is later required to be rescinded by any Lender to the Borrower or any other Person for any reason including, without limitation, such distribution becoming void or otherwise avoidable under any statutory provision or common law or equitable action, including, without limitation, any provision of the Bankruptcy Code.

“Yield Rate” means, as of any date of determination, an interest rate *per annum* equal to LIBOR for such date plus the Applicable Spread; *provided* that if Wachovia shall have notified the Administrative Agent that a Eurodollar Disruption Event has occurred, the Yield Rate shall be equal to the Base Rate plus the Applicable Spread until such Lender Agent shall have notified the Administrative Agent that such Eurodollar Disruption Event has ceased, at which time the Yield Rate shall again be equal to LIBOR for such date plus the Applicable Spread.

SECTION 1.02 Other Terms. All accounting terms used but not specifically defined herein shall be construed in accordance with GAAP. All terms used in Article 9 of the UCC in the State of New York, and used but not specifically defined herein, are used herein as defined in such Article 9.

SECTION 1.03 Computation of Time Periods. Unless otherwise stated in this Agreement, in the computation of a period of time from a specified date to a later specified date, the word "from" means "from and including" and the words "to" and "until" each mean "to but excluding."

SECTION 1.04 Interpretation.

In each Transaction Document, unless a contrary intention appears:

- (a) the singular number includes the plural number and vice versa;
- (b) reference to any Person includes such Person's successors and assigns but, if applicable, only if such successors and assigns are permitted by the Transaction Documents;
- (c) reference to any gender includes each other gender;
- (d) reference to day or days without further qualification means calendar days;
- (e) reference to any time means New York, New York time;
- (f) reference to the words "include", "includes" and "including" shall be deemed to be followed by the phrase "without limitation";

(g) reference to any agreement (including any Transaction Document), document or instrument means such agreement, document or instrument as amended, modified, waived, supplemented, restated or replaced and in effect from time to time in accordance with the terms thereof and, if applicable, the terms of the other Transaction Documents, and reference to any promissory note includes any promissory note that is an extension or renewal thereof or a substitute or replacement therefor; and

(h) reference to any Applicable Law means such Applicable Law as amended, modified, codified, replaced or reenacted, in whole or in part, and in effect from time to time, including rules and regulations promulgated thereunder and reference to any Section or other provision of any Applicable Law means that provision of such Applicable Law from time to time in effect and constituting the substantive amendment, modification, codification, replacement or reenactment of such Section or other provision.

ARTICLE II.

THE FACILITY

SECTION 2.01 Variable Funding Note and Advances.



(a) Variable Funding Note. The Borrower has heretofore delivered or shall, on the date hereof (and on the terms and subject to the conditions hereinafter set forth), deliver, to each Lender Agent, at the address set forth on the signature pages of this Agreement, and on the effective date of any Joinder Supplement, to each additional Lender Agent, at the address set forth in the applicable Joinder Supplement, a duly executed variable funding note (the "Variable Funding Note"), in substantially the form of Exhibit I, in an aggregate face amount equal to the applicable Lender's Commitment as of the Closing Date or the effective date of any Joinder Supplement, as applicable, and otherwise duly completed. Interest shall accrue on the Variable Funding Note, and the Variable Funding Note shall be payable, as described herein.

(b) Advances. On the terms and conditions hereinafter set forth, from time to time from the Closing Date until the end of the Reinvestment Period, the Lenders shall make Advances under the Variable Funding Notes, secured by the Collateral Portfolio, (x) to the Borrower for the purpose of purchasing Eligible Loan Assets or (y) to the Unfunded Exposure Account in an amount up to the Unfunded Exposure Amount. Other than pursuant to Section 2.02(f), under no circumstances shall any Lender be required to make any Advance if after giving effect to such Advance and the addition to the Collateral Portfolio of the Eligible Loan Assets being acquired by the Borrower using the proceeds of such Advance, (i) an Event of Default has occurred or would result therefrom or an Unmatured Event of Default exists or would result therefrom or (ii) the aggregate Advances Outstanding would exceed the Borrowing Base. Notwithstanding anything to the contrary herein (other than pursuant to Section 2.02(f)), no Lender shall be obligated to provide the Borrower (or to the Unfunded Exposure Account, if applicable) with aggregate funds in connection with an Advance that would exceed the least of (x) such Lender's unused Commitment then in effect and (y) the aggregate unused Commitments then in effect.

(c) Notations on Variable Funding Note. Each Lender Agent is hereby authorized to enter on a schedule attached to the Variable Funding Note with respect to each Conduit Lender and each Institutional Lender a notation (which may be computer generated) with respect to each Advance under the Variable Funding Note made by the applicable Lender of: (i) the date and principal amount thereof, and (ii) each repayment of principal thereof, and any such recordation shall constitute prima facie evidence of the accuracy of the information so recorded. The failure of any Lender Agent to make any such notation on the schedule attached to any Variable Funding Note shall not limit or otherwise affect the obligation of the Borrower to repay the Advances in accordance with their respective terms as set forth herein.

#### SECTION 2.02 Procedure for Advances.

(a) During the Reinvestment Period, the Lenders will make Advances on any Business Day at the request of the Borrower, subject to and in accordance with the terms and conditions of Sections 2.01 and 2.02 and subject to the provisions of Article III hereof.

(b) Each Advance shall be made on at least one Business Day's irrevocable written notice (other than in the case of a Same-Day Advance) from the Borrower to the Administrative Agent and each Lender Agent, with a copy to the Collateral Agent and the Collateral Custodian, in the form of a Notice of Borrowing; *provided* that such Notice of Borrowing shall be deemed to have been received by the Administrative Agent and each Lender

Agent on a Business Day if delivered no later than 5:00 p.m. on such Business Day and if not delivered by such time, shall be deemed to have been received on the following Business Day. For each Same-Day Advance, the Borrower shall deliver an irrevocable written notice in the form of a Notice of Borrowing to the Administrative Agent and each Lender Agent, with a copy to the Collateral Agent and the Collateral Custodian no later than 2:00 p.m. on the proposed date of such Same-Day Advance; *provided* that, the amount of any such Same-Day Advance shall not exceed \$20,000,000. The Borrower or the Servicer shall post all Loan Agreements and other loan documents and information with respect to each proposed Eligible Loan Asset, if any, to an IntraLinks (or other replacement) website to which the Administrative Agent and each Lender Agent has access. Each Notice of Borrowing shall include a duly completed Borrowing Base Certificate (updated to the date such Advance is requested and giving *pro forma* effect to the Advance requested and the use of the proceeds thereof), and shall specify:

- (i) the aggregate amount of such Advance, which amount shall not cause the Advances Outstanding to exceed the Borrowing Base; *provided* that, except with respect to an Advance pursuant to Section 2.02(f), the amount of such Advance must be at least equal to \$500,000;
- (ii) the proposed date of such Advance;
- (iii) a representation that all conditions precedent for an Advance described in Article III hereof have been satisfied;
- (iv) the amount of cash that will be funded by the Transferor into the Unfunded Exposure Account in connection with any Revolving Loan Asset or Delayed Draw Loan Asset funded by such Advance, if applicable; and
- (v) whether such Advance should be remitted to the Borrower or the Unfunded Exposure Account.

On the date of each Advance, upon satisfaction of the applicable conditions set forth in Article III, each Lender shall, in accordance with instructions received by the Borrower, either (i) make available to the Borrower, in same day funds, an amount equal to such Lender's Pro Rata Share of such Advance, by payment into the account which the Borrower has designated in writing or (ii) remit in same day funds an amount equal to such Lender's Pro Rata Share of such Advance into the Unfunded Exposure Account, as applicable; *provided* that, with respect to an Advance funded pursuant to Section 2.02(f), each Lender shall remit the Advance equal to such Lender's Pro Rata Share of the Unfunded Exposure Amount Shortfall in same day funds to the Unfunded Exposure Account.

(c) The Advances shall bear interest at the Yield Rate.

(d) Subject to Section 2.18 and the other terms, conditions, provisions and limitations set forth herein (including, without limitation, the payment of the Make-Whole Premium, as applicable), the Borrower may borrow, repay or prepay and reborrow Advances without any penalty, fee or premium on and after the Closing Date and prior to the end of the Reinvestment Period.

(e) A determination by Wachovia of the existence of any Eurodollar Disruption Event (any such determination to be communicated to the Borrower by written notice from the Administrative Agent promptly after the Administrative Agent learns of such event), or of the effect of any Eurodollar Disruption Event on its making or maintaining Advances at LIBOR, shall be conclusive absent manifest error.

(f) Notwithstanding anything to the contrary herein (including, without limitation, the occurrence of an Event of Default or the existence of an Unmatured Event of Default or a Borrowing Base Deficiency), if, upon the occurrence of an Event of Default or on the last day of the Reinvestment Period, the amount on deposit in the Unfunded Exposure Account is less than the aggregate Unfunded Exposure Amount, the Borrower shall request an Advance in the amount of such shortfall (the "Unfunded Exposure Amount Shortfall"). Following receipt of a Notice of Borrowing (which shall specify the account details of the Unfunded Exposure Account where the funds will be made available), each Lender shall fund such Unfunded Exposure Amount Shortfall in accordance with Section 2.02(b), notwithstanding anything to the contrary herein (including, without limitation, the Borrower's failure to satisfy any of the conditions precedent set forth in Section 3.02). For the avoidance of doubt, the Borrower shall not be required to fund the Unfunded Exposure Account unless and until the occurrence of an Event of Default or the last day of the Reinvestment Period.

(g) The obligation of each Conduit Lender and each Institutional Lender to remit its Pro Rata Share of any Advance shall be several from that of each other Lender and the failure of any Conduit Lender or Institutional Lender to so make such amount available to the Borrower shall not relieve any other Lender of its obligation hereunder.

SECTION 2.03 Determination of Yield. Each applicable Lender Agent shall determine the Yield for its portion of the Advances (including unpaid Yield related thereto, if any, due and payable on a prior Payment Date) to be paid by the Borrower on each Payment Date for the related Remittance Period and shall advise the Servicer thereof on the third Business Day prior to such Payment Date.

SECTION 2.04 Remittance Procedures. The Servicer, as agent for the Administrative Agent and the Lender Agents, shall instruct the Collateral Agent and, if the Servicer fails to do so, the Administrative Agent may instruct the Collateral Agent, to apply funds on deposit in the Controlled Accounts as described in this Section 2.04; *provided* that, at any time after delivery of Notice of Exclusive Control (as defined in the Collection Account Agreement), the Administrative Agent shall instruct the Collateral Agent to apply funds on deposit in the Controlled Accounts as described in this Section 2.04.

(a) Payment Date Transfers During Reinvestment Period and Absent an Event of Default. During the Reinvestment Period, so long as no Event of Default has occurred and, in any case, prior to the declaration, or automatic occurrence, of the Facility Maturity Date, the Collateral Agent shall (as directed pursuant to the first paragraph of this Section 2.04) transfer collected funds held by the Account Bank in the Collection Account, in accordance with the Servicing Report, to the following Persons in the following amounts, calculated as of the Determination Date, and priority:

(i) *pari passu* to (a) the Collateral Agent, in payment in full of all accrued Collateral Agent Fees and Collateral Agent Expenses, (b) the Collateral Custodian in payment in full of all accrued Collateral Custodian Fees and Collateral Custodian Expenses and (c) the Account Bank in payment in full of all accrued fees and expenses due under the Wells Fargo Fee Letter; *provided* that amounts payable with respect to Collateral Agent Expenses, Collateral Custodian Expenses and the Account Bank pursuant to this clause (i) (and Section 2.04(b)(i), (c)(i) and (d)(i), if applicable) shall not, collectively, exceed \$170,000 per annum;

(ii) to the Servicer, in payment in full of all accrued Servicing Fees;

(iii) to the Hedge Counterparty, any amounts (other than any Hedge Breakage Costs) owing to that Hedge Counterparty under its Hedging Agreement in respect of any Hedge Transaction(s);

(iv) *pro rata*, in accordance with the amounts due under this clause, to each Lender Agent, for the account of the applicable Lender, all Yield and the Non-Usage Fee that is accrued and unpaid as of the last day of the related Remittance Period;

(v) *pro rata*, to each Lender Agent (for the account of the applicable Lender) and the Administrative Agent, all accrued and unpaid fees, expenses (including attorneys' fees, costs and expenses) and indemnity amounts payable by the Borrower to the Administrative Agent, any Lender Agent or any Lender under the Transaction Documents;

(vi) to pay the Advances Outstanding to the extent required to satisfy any outstanding Borrowing Base Deficiency;

(vii) at the discretion of the Servicer, to fund the Unfunded Exposure Account (in an amount up to the Unfunded Exposure Amount);

(viii) *pari passu* to (a) the Collateral Agent, in payment in full of all accrued Collateral Agent Expenses to the extent not previously paid, (b) the Collateral Custodian in payment in full of all accrued Collateral Custodian Expenses to the extent not previously paid, and (c) the Account Bank in payment in full of all accrued expenses to the extent not previously paid;

(ix) to pay the Advances Outstanding, together with any applicable Make-Whole Premium, in connection with any complete refinancing or termination of this Agreement in accordance with Section 2.18(b);

(x) to the Hedge Counterparty, any Hedge Breakage Costs owing to the Hedge Counterparty under its Hedging Agreement;

(xi) to pay any other amounts due (other than with respect to the repayment of Advances) under this Agreement and the other Transaction Documents (including any indemnity amounts due from the Borrower hereunder and thereunder not previously paid pursuant to Section 2.04(a)(v));

(xii) to the Servicer, in respect of all reasonable expenses (except allocated overhead) incurred in connection with the performance of its duties hereunder; and

(xiii) to the Borrower, any remaining amounts.

(b) Interest Payments after the Reinvestment Period but Prior to an Event of Default. After the Reinvestment Period but prior to the occurrence of an Event of Default or the Facility Maturity Date, the Collateral Agent shall (as directed pursuant to the first paragraph of this Section 2.04) transfer Interest Collections held by the Account Bank in the Collection Account, in accordance with the Servicing Report, to the following Persons in the following amounts, calculated as of the Determination Date, and priority:

(i) *pari passu* to (a) the Collateral Agent, in payment in full of all accrued Collateral Agent Fees and Collateral Agent Expenses, (b) the Collateral Custodian in payment in full of all accrued Collateral Custodian Fees and Collateral Custodian Expenses and (c) the Account Bank in payment in full of all accrued fees and expenses due under the Wells Fargo Fee Letter; *provided* that amounts payable with respect to Collateral Agent Expenses, Collateral Custodian Expenses and the Account Bank pursuant to this clause (i) (and Section 2.04(a)(i), (c)(i) and (d)(i), if applicable) shall not, collectively, exceed \$170,000 per annum;

(ii) to the Servicer, in payment in full of all accrued Servicing Fees;

(iii) to the Hedge Counterparty, any amounts (other than any Hedge Breakage Costs) owing to that Hedge Counterparty under its Hedging Agreement in respect of any Hedge Transaction(s);

(iv) *pro rata*, in accordance with the amounts due under this clause, to each Lender Agent, for the account of the applicable Lender, all Yield and the Non-Usage Fee that is accrued and unpaid as of the last day of the related Remittance Period;

(v) *pro rata*, to each Lender Agent (for the account of the applicable Lender) and the Administrative Agent, as applicable, all accrued and unpaid fees, expenses (including attorneys' fees, costs and expenses) and indemnity amounts payable by the Borrower to the Administrative Agent, any Lender Agent or any Lender under the Transaction Documents;

(vi) to pay the Advances Outstanding to the extent required to satisfy any outstanding Borrowing Base Deficiency;

(vii) *pari passu* to (a) the Collateral Agent, in payment in full of all accrued Collateral Agent Expenses to the extent not previously paid, (b) the Collateral Custodian in payment in full of all accrued Collateral Custodian Expenses to the extent not previously paid, and (c) the Account Bank in payment in full of all accrued expenses to the extent not previously paid;

- (viii) to pay the Advances Outstanding, together with any applicable Make-Whole Premium, in connection with any complete refinancing or termination of this Agreement in accordance with Section 2.18(b);
- (ix) to the Hedge Counterparty, any Hedge Breakage Costs owing to the Hedge Counterparty under its Hedging Agreement;
- (x) to pay any other amounts due (other than with respect to the repayment of Advances) under this Agreement and the other Transaction Documents (including any indemnity amounts due from the Borrower hereunder and thereunder not previously paid pursuant to Section 2.04(b)(v));
- (xi) to the Servicer, in respect of all reasonable expenses (except allocated overhead) incurred in connection with the performance of its duties hereunder; and
- (xii) to the Borrower, any remaining amounts.

(c) Principal Payments after the Reinvestment Period but Prior to an Event of Default. After the Reinvestment Period but prior to an Event of Default or the Facility Maturity Date, the Collateral Agent shall (as directed pursuant to the first paragraph of this Section 2.04) transfer Principal Collections held by the Account Bank in the Collection Account, in accordance with the Servicing Report, to the following Persons in the following amounts, calculated as of the Determination Date, and priority:

- (i) to pay amounts due under Section 2.04(b)(i) through (vi), to the extent not paid thereunder;
- (ii) to the Unfunded Exposure Account in an amount necessary to cause the amount on deposit in the Unfunded Exposure Account to equal the Unfunded Exposure Amount;
- (iii) to pay the Advances Outstanding, including any applicable Make-Whole Premium, until paid in full;
- (iv) *pari passu* to (a) the Collateral Agent, in payment in full of all accrued Collateral Agent Expenses to the extent not previously paid, (b) the Collateral Custodian in payment in full of all accrued Collateral Custodian Expenses to the extent not previously paid, and (c) the Account Bank in payment in full of all accrued expenses to the extent not previously paid;
- (v) to the Hedge Counterparty, any Hedge Breakage Costs owing to the Hedge Counterparty under its Hedging Agreement, to the extent not paid pursuant to Section 2.04(b)(ix);
- (vi) to pay any other amounts due under this Agreement and the other Transaction Documents (including any indemnity amounts due from the Borrower hereunder and thereunder not previously paid pursuant to Section 2.04(b)(v));

(vii) to the Servicer, in respect of all reasonable expenses (except allocated overhead) incurred in connection with the performance of its duties hereunder; and

(viii) to the Borrower, any remaining amounts.

(d) Payment Date Transfers Upon the Occurrence of an Event of Default. If an Event of Default has occurred or, in any case, after the declaration, or automatic occurrence, of the Facility Maturity Date, the Collateral Agent shall (as directed pursuant to the first paragraph of this Section 2.04) transfer collected funds held by the Account Bank in the Collection Account, in accordance with the Servicing Report, to the following Persons in the following amounts, calculated as of the Determination Date, and priority:

(i) *pari passu* to (a) the Collateral Agent, in payment in full of all accrued Collateral Agent Fees and Collateral Agent Expenses, (b) the Collateral Custodian in payment in full of all accrued Collateral Custodian Fees and Collateral Custodian Expenses and (c) the Account Bank in payment in full of all accrued fees and expenses due under the Wells Fargo Fee Letter; *provided* that amounts payable with respect to Collateral Agent Expenses, Collateral Custodian Expenses and the Account Bank pursuant to this clause (i) (and Section 2.04(a)(i), (b)(i) and (c)(i), if applicable) shall not, collectively, exceed \$170,000 per annum;

(ii) to the Servicer, in payment in full of all accrued Servicing Fees;

(iii) to the Hedge Counterparty, any amounts (other than any Hedge Breakage Costs) owing to that Hedge Counterparty under its Hedging Agreement in respect of any Hedge Transaction(s);

(iv) *pro rata*, in accordance with the amounts due under this clause, to each Lender Agent, for the account of the applicable Lender, all Yield and the Non-Usage Fee that is accrued and unpaid as of the last day of the related Remittance Period;

(v) *pro rata*, to each Lender Agent (for the account of the applicable Lender) and the Administrative Agent, as applicable, all accrued and unpaid fees, expenses (including attorneys' fees, costs and expenses) and indemnity amounts payable by the Borrower to the Administrative Agent, any Lender Agent or any Lender under the Transaction Documents;

(vi) to the Unfunded Exposure Account in an amount necessary to cause the amount on deposit in the Unfunded Exposure Account to equal the Unfunded Exposure Amount;

(vii) to pay the Advances Outstanding, including any applicable Make-Whole Premium, until paid in full;

(viii) *pari passu* to (a) the Collateral Agent, in payment in full of all accrued Collateral Agent Expenses to the extent not previously paid, (b) the Collateral Custodian in payment in full of all accrued Collateral Custodian Expenses to the extent

not previously paid, and (c) the Account Bank in payment in full of all accrued expenses to the extent not previously paid;

(ix) to the Hedge Counterparty, any Hedge Breakage Costs owing to the Hedge Counterparty under its Hedging Agreement;

(x) to pay any other amounts due under this Agreement and the other Transaction Documents (including any indemnity amounts due from the Borrower hereunder and thereunder not previously paid pursuant to Section 2.04(d)(v));

(xi) to the Servicer, in respect of all reasonable expenses (except allocated overhead) incurred in connection with the performance of its duties hereunder; and

(xii) to the Borrower, any remaining amounts.

(e) Unfunded Exposure Account. Funds on deposit in the Unfunded Exposure Account as of any date of determination may be withdrawn to fund draw requests of the relevant Obligor under any Revolving Loan Asset or Delayed Draw Loan Asset; *provided* that, until an Event of Default has occurred, the amount withdrawn to fund such draw request shall not create any Borrowing Base Deficiency. Any such draw request made by an Obligor, along with wiring instructions for the applicable Obligor, shall be forwarded by the Borrower or the Servicer to the Collateral Agent (with a copy to the Administrative Agent and each Lender Agent) in the form of a Disbursement Request, and the Collateral Agent shall instruct the Account Bank to fund such draw request in accordance with the Disbursement Request. At any time, the Servicer (or, after delivery of Notice of Exclusive Control (as such term is defined in the Unfunded Exposure Account Agreement), the Administrative Agent) may cause any amounts on deposit in the Unfunded Exposure Account which exceed the Unfunded Exposure Amount as of any date of determination to be deposited into the Principal Collection Account as Principal Collections.

(f) Insufficiency of Funds. For the sake of clarity, the parties hereby agree that if the funds on deposit in the Collection Account are insufficient to pay any amounts due and payable on a Payment Date or otherwise, the Borrower shall nevertheless remain responsible for, and shall pay when due, all amounts payable under this Agreement and the other Transaction Documents in accordance with the terms of this Agreement and the other Transaction Documents.

SECTION 2.05 Instructions to the Collateral Agent and the Account Bank. All instructions and directions given to the Collateral Agent or the Account Bank by the Servicer, the Borrower or the Administrative Agent pursuant to Section 2.04 shall be in writing (including instructions and directions transmitted to the Collateral Agent or the Account Bank by telecopy or e-mail), and such written instructions and directions shall be delivered with a written certification that such instructions and directions are in compliance with the provisions of Section 2.04. The Servicer and the Borrower shall immediately transmit to the Administrative Agent by telecopy or e-mail a copy of all instructions and directions given to the Collateral Agent or the Account Bank by such party pursuant to Section 2.04. The Administrative Agent shall promptly transmit to the Servicer and the Borrower by telecopy or e-mail a copy of all



instructions and directions given to the Collateral Agent or the Account Bank by the Administrative Agent, pursuant to Section 2.04. If either the Administrative Agent or Collateral Agent disagrees with the computation of any amounts to be paid or deposited by the Borrower or the Servicer under Section 2.04 or otherwise pursuant to this Agreement, or upon their respective instructions, it shall so notify the Borrower, the Servicer and the Collateral Agent in writing and in reasonable detail to identify the specific disagreement. If such disagreement cannot be resolved within two Business Days, the determination of the Administrative Agent as to such amounts shall be conclusive and binding on the parties hereto absent manifest error. In the event the Collateral Agent or the Account Bank receives instructions from the Servicer or the Borrower which conflict with any instructions received by the Administrative Agent, the Collateral Agent or the Account Bank, as applicable, shall rely on and follow the instructions given by the Administrative Agent.

SECTION 2.06 Borrowing Base Deficiency Payments.

(a) In addition to any other obligation of the Borrower to cure any Borrowing Base Deficiency pursuant to the terms of this Agreement, if, on any day prior to the Collection Date, any Borrowing Base Deficiency exists, then the Borrower shall, within three Business Days from the date of such Borrowing Base Deficiency, eliminate such Borrowing Base Deficiency in its entirety by effecting one or more (or any combination thereof) of the following actions in order to eliminate such Borrowing Base Deficiency as of such date of determination: (i) deposit cash in United States dollars into the Principal Collection Account, (ii) repay Advances (together with any Breakage Fees, Hedge Breakage Costs and all accrued and unpaid costs and expenses of the Administrative Agent, the Lender Agents and the Lenders, in each case in respect of the amount so prepaid), and/or (iii) subject to the approval of the Administrative Agent, in its sole discretion, Pledge additional Eligible Loan Assets; *provided*, that if the Borrower requests to Pledge another Eligible Loan Asset within one Business Day of such Borrowing Base Deficiency and the Administrative Agent does not either reject such Loan Asset or approve such Loan Asset within one Business Day of the Borrower's request to Pledge such Loan Asset, then the Administrative Agent may, in its sole discretion, elect in writing to extend the three Business Day grace period set forth in this Section 2.06 for up to seven Business Days.

(b) No later than 2:00 p.m. on the Business Day prior to the proposed repayment of Advances or Pledge of additional Eligible Loan Assets pursuant to Section 2.06(a), the Borrower (or the Servicer on its behalf) shall deliver (i) to the Administrative Agent (with a copy to the Collateral Agent and the Collateral Custodian), notice of such repayment or Pledge and a duly completed Borrowing Base Certificate, updated to the date such repayment or Pledge is being made and giving pro forma effect to such repayment or Pledge, and (ii) to the Administrative Agent, if applicable, a description of any Eligible Loan Asset and each Obligor of such Eligible Loan Asset to be Pledged and added to the updated Loan Asset Schedule. Any notice pertaining to any repayment or any Pledge pursuant to this Section 2.06 shall be irrevocable.

SECTION 2.07 Substitution and Sale of Loan Assets; Affiliate Transactions.

(a) Substitutions. The Borrower may, with the consent of the Administrative Agent in its sole discretion, replace any Loan Asset as a Loan Asset so long as (i) no event has

occurred, or would result from such substitution, which constitutes an Event of Default and no event has occurred and is continuing, or would result from such substitution, which constitutes an Unmatured Event of Default or a Borrowing Base Deficiency and (ii) simultaneously therewith, the Borrower Pledges (in accordance with all of the terms and provisions contained herein) a Substitute Eligible Loan Asset.

(b) Discretionary Sales. The Borrower shall be permitted to sell Loan Assets to Persons other than the Transferor or its Affiliates from time to time; *provided* that (i) the proceeds of such sale shall be deposited into the Collection Account to be disbursed in accordance with Section 2.04 hereof, (ii) no event has occurred, or would result from such sale, which constitutes an Event of Default and no event has occurred and is continuing, or would result from such sale, which constitutes an Unmatured Event of Default or a Borrowing Base Deficiency; and (iii) the prior written consent of the Administrative Agent shall be required if such Loan Asset is sold for an amount which is less than the Adjusted Borrowing Value.

(c) Repurchase or Substitution of Warranty Loan Assets. If on any day a Loan Asset is (or becomes) a Warranty Loan Asset, no later than 10 Business Days following the earlier of knowledge by the Borrower of such Loan Asset becoming a Warranty Loan Asset or receipt by the Borrower from the Administrative Agent or the Servicer of written notice thereof, the Borrower shall either:

(i) make a deposit to the Collection Account (for allocation pursuant to Section 2.04) in immediately available funds in an amount equal to (x) the Advance Date Assigned Value multiplied by the Outstanding Balance of such Loan Asset, (y) all Hedge Breakage Costs arising as a result thereof and owed to the relevant Hedge Counterparty for any termination of one or more Hedge Transactions, in whole or in part, as required by the terms of any Hedging Agreement and (z) any expenses or fees with respect to such Loan Asset and costs and damages incurred by the Administrative Agent or by any Lender in connection with any violation by such Loan Asset of any predatory or abusive lending law which is an Applicable Law (a notification regarding the amount of such expenses or fees to be provided by the Administrative Agent to the Borrower); *provided* that the Administrative Agent shall have the right to determine whether the amount so deposited is sufficient to satisfy the foregoing requirements; or

(ii) with the prior written consent of the Administrative Agent, in its sole discretion, substitute for such Warranty Loan Asset a Substitute Eligible Loan Asset.

Upon confirmation of the deposit of the amounts set forth in Section 2.07(c)(i) into the Collection Account or the delivery by the Borrower of a Substitute Eligible Loan Asset for each Warranty Loan Asset (the date of such confirmation or delivery, the "Release Date"), such Warranty Loan Asset and related Portfolio Assets shall be removed from the Collateral Portfolio and, as applicable, the Substitute Eligible Loan Asset and related Portfolio Assets shall be included in the Collateral Portfolio. On the Release Date of each Warranty Loan Asset, the Collateral Agent, for the benefit of the Secured Parties, shall automatically and without further action be deemed to release to the Borrower, without recourse, representation or warranty, all the right, title and interest and any Lien of the Collateral Agent, for the benefit of the Secured Parties

in, to and under the Warranty Loan Asset and any related Portfolio Assets and all future monies due or to become due with respect thereto.

(d) Conditions to Sales, Substitutions and Repurchases. Any sales, substitutions or repurchases effected pursuant to Sections 2.07(a), (b), or (c) shall be subject to the satisfaction of the following conditions (as certified in writing to the Administrative Agent and Collateral Agent by the Borrower):

- (i) the Borrower shall deliver a Borrowing Base Certificate to the Administrative Agent in connection with such sale, substitution or repurchase;
  - (ii) the Borrower shall deliver a list of all Loan Assets to be sold, substituted, repurchased;
  - (iii) no selection procedures adverse to the interests of the Administrative Agent, the Lender Agents or the Lenders were utilized by the Borrower in the selection of the Loan Assets to be sold, repurchased or substituted;
  - (iv) the Borrower shall give one Business Day's notice of such sale, substitution or repurchase;
  - (v) the Borrower shall notify the Administrative Agent of any amount to be deposited into the Collection Account in connection with any sale, substitution or repurchase;
  - (vi) the representations and warranties contained in Sections 4.01, 4.02 and 4.03 hereof shall continue to be correct in all respects, except to the extent relating to an earlier date;
  - (vii) any repayment of Advances Outstanding in connection with any sale, substitution or repurchase of Loan Assets hereunder shall comply with the requirements set forth in Section 2.18;
  - (viii) the Borrower and the Servicer (on behalf of the Borrower) shall agree to pay the legal fees and expenses of the Administrative Agent, each Lender, each Lender Agent, Collateral Agent and the Collateral Custodian in connection with any such sale, substitution or repurchase (including, but not limited to, expenses incurred in connection with the release of the Lien of the Collateral Agent on behalf of the Secured Parties and any other party having an interest in the Loan Asset in connection with such sale, substitution or repurchase); and
  - (ix) the Borrower shall pay any Hedge Breakage Costs arising as a result of such sale, substitution or repurchase and owed to the relevant Hedge Counterparty for any termination of one or more Hedge Transactions, in whole or in part, if applicable, as required by the terms of any Hedging Agreement.
- (e) Affiliate Transactions. Notwithstanding anything to the contrary set forth herein or in any other Transaction Document, the Transferor (or an Affiliate thereof) shall not

reacquire from the Borrower and the Borrower shall not transfer to the Transferor or to Affiliates of the Transferor, and none of the Transferor nor any Affiliates thereof will have a right or ability to purchase, the Loan Assets without the prior written consent of the Administrative Agent, except in the case of a Lien Release Dividend or repurchases of Loan Assets by the Transferor pursuant to Section 6.1 of the Purchase and Sale Agreement or substitutions of Loan Assets pursuant to Section 6.2 of the Purchase and Sale Agreement.

(f) Limitations on Sales and Substitutions. The Outstanding Balance of all Loan Assets (other than Warranty Loan Assets) sold pursuant to Section 2.07(b), substituted pursuant to Section 2.07(a) or released pursuant to a Lien Release Dividend during the 12-month period immediately preceding the proposed date of sale or substitution (or such lesser number of months as shall have elapsed as of such date) does not exceed 10% of the highest aggregate Outstanding Balance of any month during such 12-month period (or such lesser number of months as shall have elapsed as of such date).

(g) Lien Release Dividend. Notwithstanding any provision contained in this Agreement to the contrary, provided no Event of Default has occurred and no Unmatured Event of Default exists, on a Lien Release Dividend Date, the Borrower may dividend to the Transferor Loan Assets that were sold by the Transferor to the Borrower, or portions thereof (each, a "Lien Release Dividend"), subject to the following terms and conditions, as certified by the Borrower and the Transferor to the Administrative Agent (with a copy to the Collateral Agent and the Collateral Custodian):

(i) The Borrower and the Transferor shall have given the Administrative Agent, with a copy to the Collateral Agent and the Collateral Custodian, at least five Business Days prior written notice requesting that the Administrative Agent consent to the effectuation of a Lien Release Dividend, in the form of Exhibit J hereto (a "Notice and Request for Consent"), which consent shall be given in the sole and absolute discretion of the Administrative Agent; *provided that*, if the Administrative Agent shall not have responded to the Notice and Request for Consent by 11:00 a.m. on the day that is one Business Day prior to the proposed Lien Release Dividend Date, the Administrative Agent shall be deemed not to have given its consent;

(ii) On any Lien Release Dividend Date, no more than four Lien Release Dividends shall have been made during the 12-month period immediately preceding the proposed Lien Release Dividend Date;

(iii) After giving effect to the Lien Release Dividend on the Lien Release Dividend Date, (A) no Borrowing Base Deficiency, Event of Default or Unmatured Event of Default shall exist, (B) the representations and warranties contained in Sections 4.01, 4.02 and 4.03 hereof shall continue to be correct in all material respects, except to the extent relating to an earlier date, (C) the eligibility of any Loan Asset remaining as part of the Collateral Portfolio after the Lien Release Dividend will be redetermined as of the Lien Release Dividend Date, (D) no claim shall have been asserted or proceeding commenced challenging the enforceability or validity of any of the Required Loan Documents and (E) there shall have been no material adverse change as to the Servicer or the Borrower;

(iv) Such Lien Release Dividend must be in compliance with Applicable Law and may not (A) be made with the intent to hinder, delay or defraud any creditor of the Borrower or (B) leave the Borrower, immediately after giving effect to the Lien Release Dividend, (x) insolvent, (y) with insufficient funds to pay its obligations as and when they become due or (z) with inadequate capital for its present and anticipated business and transactions;

(v) On or prior to the Lien Release Dividend Date, the Borrower shall have (A) delivered to the Administrative Agent, with a copy to the Collateral Agent and the Collateral Custodian, a list specifying all Loan Assets or portions thereof to be transferred pursuant to such Lien Release Dividend and the Administrative Agent shall have approved the same in its sole discretion and (B) obtained all authorizations, consents and approvals required to effectuate the Lien Release Dividend;

(vi) A portion of a Loan Asset may be transferred pursuant to a Lien Release Dividend *provided that* (A) such transfer does not have an adverse effect on the portion of such Loan Asset remaining as a part of the Collateral Portfolio, any other aspect of the Collateral Portfolio, the Lenders, the Lender Agents, the Administrative Agent or any other Secured Party and (B) a new promissory note (other than with respect to a Noteless Loan Asset) for the portion of the Loan Asset remaining as a part of the Collateral Portfolio has been executed, and the original thereof has been endorsed to the Collateral Agent and delivered to the Collateral Custodian;

(vii) Each Loan Asset, or portion thereof, as applicable, shall be transferred at a value equal to the Outstanding Balance thereof, exclusive of any accrued and unpaid interest or PIK Interest thereon;

(viii) The Borrower shall deliver a Borrowing Base Certificate (including a calculation of the Borrowing Base after giving effect to such Lien Release Dividend) to the Administrative Agent;

(ix) The Borrower shall have paid in full an aggregate amount equal to the sum of all amounts due and owing to the Administrative Agent, the Lenders, the Lender Agents, the Collateral Agent or the Collateral Custodian, as applicable, under this Agreement and the other Transaction Documents, to the extent accrued to such date (including, without limitation, Breakage Fees) with respect to the Loan Assets to be transferred pursuant to such Lien Release Dividend and incurred in connection with the transfer of such Loan Assets pursuant to such Lien Release Dividend; and

(x) The Borrower and the Servicer (on behalf of the Borrower) shall pay the reasonable legal fees and expenses of the Administrative Agent, the Lenders, the Lender Agents, the Collateral Agent and the Collateral Custodian in connection with any Lien Release Dividend (including, but not limited to, expenses incurred in connection with the release of the Lien of the Collateral Agent, on behalf of the Secured Parties, and any other party having an interest in the Loan Assets in connection with such Lien Release Dividend).

SECTION 2.08 Payments and Computations, Etc.

(a) All amounts to be paid or deposited by the Borrower or the Servicer hereunder shall be paid or deposited in accordance with the terms hereof no later than 5:00 p.m. on the day when due in lawful money of the United States in immediately available funds to the Collection Account or such other account as is designated by the Administrative Agent. The Borrower or the Servicer, as applicable, shall, to the extent permitted by law, pay to the Secured Parties interest on all amounts not paid or deposited when due to any of the Secured Parties hereunder at 4.0% per annum above the Base Rate (other than with respect to any advances outstanding, which shall accrue at the Yield Rate), payable on demand, from the date of such nonpayment until such amount is paid in full (as well after as before judgment); *provided*, that such interest rate shall not at any time exceed the maximum rate permitted by Applicable Law. Any Obligation hereunder shall not be reduced by any distribution of any portion of Available Collections if at any time such distribution is rescinded or required to be returned by any Lender to the Borrower or any other Person for any reason. All computations of interest and all computations of Yield and other fees hereunder shall be made on the basis of a year of 360 days for the actual number of days (including the first but excluding the last day) elapsed, other than calculations with respect to the Base Rate, which shall be based on a year consisting of 365 or 366 days, as applicable.

(b) Whenever any payment hereunder shall be stated to be due on a day other than a Business Day, such payment shall be made on the next succeeding Business Day, and such extension of time shall in such case be included in the computation of payment of Yield or any fee payable hereunder, as the case may be.

(c) If any Advance requested by the Borrower and approved by the Lender Agents and the Administrative Agent pursuant to Section 2.02 is not for any reason whatsoever, except as a result of the gross negligence or willful misconduct of, or failure to fund such Advance on the part of, the Lenders, the Administrative Agent or an Affiliate thereof, made or effectuated, as the case may be, on the date specified therefor, the Borrower shall indemnify such Lender against any loss, cost or expense incurred by such Lender related thereto (other than any such loss, cost or expense solely due to the gross negligence or willful misconduct or failure to fund such Advance on the part of the Lenders, the Administrative Agent or an Affiliate thereof), including, without limitation, any loss (including cost of funds and reasonable out-of-pocket expenses), cost or expense incurred by reason of the liquidation or reemployment of deposits or other funds acquired by such Lender to fund Advances or maintain the Advances. Any such Lender shall provide to the Borrower documentation setting forth the amounts of any loss, cost or expense referred to in the previous sentence, such documentation to be conclusive absent manifest error.

SECTION 2.09 Non-Usage Fee.

(a) The Borrower shall pay, in accordance with Section 2.04, *pro rata* to each Lender (either directly or through the applicable Lender Agent), a non-usage fee (the "Non-Usage Fee") payable in arrears for each Remittance Period, equal to the sum of the products for each day during such Remittance Period of (i) one divided by 360, (ii) the applicable Non-Usage Fee Rate (as defined below), and (iii) the aggregate Commitments minus the Advances

Outstanding on such day (such amount, the “Unused Portion”). The Non-Usage Fee Rate (the “Non-Usage Fee Rate”) shall be (except as set forth pursuant to [Section 2.09\(b\)](#) below), (i) during the first six months following the Closing Date, 0.50% for any Unused Portion of the aggregate Commitments and (ii) thereafter, (x) 0.50% on any Unused Portion up to or equal to an amount equal to 20% of the aggregate Commitments and (y) 2.50% on any Unused Portion in excess of such amount equal to 20% of the aggregate Commitments.

(b) In the event of any Commitment Increase Closing Date, from such Commitment Increase Closing Date until the date which is six months after such Commitment Increase Closing Date, the Non-Usage Fee Rate shall be (i) 0.50% on any Unused Portion up to or equal to (x) the Commitment Increase Amount plus (y) an amount equal to 20% of the aggregate Commitments which existed prior to giving effect to such Commitment Increase Amount and (ii) 2.50% on any Unused Portion in excess of the amount obtained by summing [subclauses \(x\)](#) and (y) of the foregoing [clause \(i\)](#). From and after the date which is six months after such Commitment Increase Closing Date, the Non-Usage Fee Rate shall equal (i) 0.50% on any Unused Portion up to or equal to an amount equal to 20% of the aggregate Commitments and (ii) 2.50% on any Unused Portion in excess of such amount equal to 20% of the aggregate Commitments.

**SECTION 2.10 [Increased Costs: Capital Adequacy.](#)**

(a) If, due to either (i) the introduction of or any change following the date hereof (including, without limitation, any change by way of imposition or increase of reserve requirements) in or in the interpretation, administration or application following the date hereof of any Applicable Law (including, without limitation, any law or regulation resulting in any interest payments paid to any Lender under this Agreement being subject to any Tax, except for Taxes on the overall net income of such Lender), in each case whether foreign or domestic or (ii) the compliance with any guideline or request following the date hereof from any central bank or other Governmental Authority (whether or not having the force of law), there shall be any increase in the cost to the Administrative Agent, any Lender, any Lender Agent, any Liquidity Bank or any Affiliate, participant, successor or assign thereof (each of which shall be an “Affected Party”) of agreeing to make or making, funding or maintaining any Advance (or any reduction of the amount of any payment (whether of principal, interest, fee, compensation or otherwise) to any Affected Party hereunder), as the case may be, or there shall be any reduction in the amount of any sum received or receivable by an Affected Party under this Agreement, under any other Transaction Document or any Liquidity Agreement, the Borrower shall, from time to time, after written demand by the Administrative Agent (which demand shall be accompanied by a statement setting forth in reasonable detail the basis for such demand), on behalf of such Affected Party, pay to the Administrative Agent, on behalf of such Affected Party, additional amounts sufficient to compensate such Affected Party for such increased costs or reduced payments within 10 days after such demand; *provided*, that the amounts payable under this [Section 2.10](#) shall be without duplication of amounts payable under [Section 2.11](#) and shall not include any Excluded Taxes.

(b) If either (i) the introduction of or any change following the date hereof in or in the interpretation, administration or application following the date hereof of any law, guideline, rule or regulation, directive or request or (ii) the compliance by any Affected Party

with any law, guideline, rule, regulation, directive or request following the date hereof, from any central bank, any Governmental Authority or agency, including, without limitation, compliance by an Affected Party with any request or directive regarding capital adequacy, has or would have the effect of reducing the rate of return on the capital of any Affected Party, as a consequence of its obligations hereunder or any related document or arising in connection herewith or therewith to a level below that which any such Affected Party could have achieved but for such introduction, change or compliance (taking into consideration the policies of such Affected Party with respect to capital adequacy), by an amount deemed by such Affected Party to be material, then, from time to time, after demand by such Affected Party (which demand shall be accompanied by a statement setting forth in reasonable detail the basis for such demand), the Borrower shall pay the Administrative Agent on behalf of such Affected Party such additional amounts as will compensate such Affected Party for such reduction. For the avoidance of doubt, any increase in cost and/or reduction in Yield with respect to any Affected Party caused by regulatory capital allocation adjustments due to FAS 166, 167 and subsequent statements and interpretations shall constitute a circumstance on which such Affected Party may base a claim for reimbursement under this Section 2.10.

(c) If as a result of any event or circumstance similar to those described in clause (a) or (b) of this Section 2.10, any Affected Party is required to compensate a bank or other financial institution providing liquidity support, credit enhancement or other similar support to such Affected Party in connection with this Agreement or the funding or maintenance of Advances hereunder, then within ten days after demand by such Affected Party, the Borrower shall pay to such Affected Party such additional amount or amounts as may be necessary to reimburse such Affected Party for any amounts payable or paid by it.

(d) In determining any amount provided for in this Section 2.10, the Affected Party may use any reasonable averaging and attribution methods. The Administrative Agent, on behalf of any Affected Party making a claim under this Section 2.10, shall submit to the Borrower a certificate setting forth in reasonable detail the basis for and the computations of such additional or increased costs, which certificate shall be conclusive absent manifest error.

(e) Failure or delay on the part of any Affected Party to demand compensation pursuant to this Section 2.10 shall not constitute a waiver of such Affected Party's right to demand or receive such compensation.

(f) If at any time the Borrower shall be liable for the payment of any additional amounts in accordance with this Section 2.10, then the Borrower shall have the option to terminate this Agreement (in accordance with the provisions of Section 2.18(b)) but without the payment of any Make-Whole Premium); *provided* that such option to terminate shall in no event relieve the Borrower of paying any amounts owing pursuant to this Section 2.10 in accordance with the terms hereof.

#### SECTION 2.11 Taxes.

(a) All payments made by an Obligor in respect of a Loan Asset and all payments made by the Borrower or made by the Servicer on behalf of the Borrower under this Agreement will be made free and clear of and without deduction or withholding for or on



account of any Taxes. If any Taxes are required to be withheld from any amounts payable to any Indemnified Party, then the amount payable to such Person will be increased (the amount of such increase, the "Additional Amount") such that every net payment made under this Agreement after withholding for or on account of any Taxes (including, without limitation, any Taxes on such increase) is not less than the amount that would have been paid had no such deduction or withholding been made. The foregoing obligation to pay Additional Amounts with respect to payments required to be made by the Borrower or Servicer under this Agreement will not, however, apply with respect to Taxes imposed on or measured by net income or franchise Taxes imposed on any Indemnified Party by a taxing jurisdiction in which any such Person is organized, conducts business or is paying Taxes (as the case may be) ("Excluded Taxes").

(b) The Borrower will indemnify, from funds available to it pursuant to [Section 2.04](#) (and to the extent the funds available for indemnification provided by the Borrower is insufficient the Servicer, on behalf of the Borrower, will indemnify) each Indemnified Party for the full amount of Taxes payable by such Person in respect of Additional Amounts and any liability (including penalties, interest and expenses) arising therefrom or with respect thereto. All payments in respect of this indemnification shall be made within 10 days from the date a written invoice therefor is delivered to the Borrower.

(c) Within 30 days after the date of any payment by the Borrower or by the Servicer on behalf of the Borrower of any Taxes, the Borrower or the Servicer, as applicable, will furnish to the Administrative Agent and the Lender Agents at the applicable address set forth on this Agreement, appropriate evidence of payment thereof.

(d) If any assignee of a Lender is not created or organized under the laws of the United States or a political subdivision thereof, such Lender shall deliver to the Borrower, with a copy to the Administrative Agent, (i) within 15 days after becoming an assignee hereunder, two (or such other number as may from time to time be prescribed by Applicable Law) duly completed copies of IRS Form W-8BEN or Form W-8ECI (or any successor forms or other certificates or statements that may be required from time to time by the relevant United States taxing authorities or Applicable Law), as appropriate, to permit the Borrower to make payments hereunder for the account of such Lender without deduction or withholding of United States federal income or similar Taxes and (ii) upon the obsolescence of or after the occurrence of any event requiring a change in, any form or certificate previously delivered pursuant to this [Section 2.11\(d\)](#), copies (in such numbers as may from time to time be prescribed by Applicable Law or regulations) of such additional, amended or successor forms, certificates or statements as may be required under Applicable Law to permit the Borrower or the Servicer to make payments hereunder for the account of such Lender without deduction or withholding of United States federal income or similar Taxes.

(e) If, in connection with an agreement or other document providing liquidity support, credit enhancement or other similar support to any Lender in connection with this Agreement or the funding or maintenance of Advances hereunder, such Lender is required to compensate a bank or other financial institution in respect of Taxes under circumstances similar to those described in this [Section 2.11](#), then, within 10 days after demand by each applicable Lender, the Servicer shall pay (or to the extent the Servicer does not make such payment the

Borrower shall pay) to such Lender such additional amount or amounts as may be necessary to reimburse such Lender for any amounts paid by them.

Without prejudice to the survival of any other agreement of the Borrower and the Servicer hereunder, the agreements and obligations of the Borrower and the Servicer contained in this Section 2.11 shall survive the termination of this Agreement.

(f) If at any time the Borrower shall be liable for the payment of any additional amounts in accordance with this Section 2.11, then the Borrower shall have the option to terminate this Agreement (in accordance with the provisions of Section 2.18(b)) but without the payment of any Make-Whole Premium); *provided* that such option to terminate shall in no event relieve the Borrower of paying any amounts owing pursuant to this Section 2.11 in accordance with the terms hereof.

**SECTION 2.12 Collateral Assignment of Agreements.** The Borrower hereby collaterally assigns to the Collateral Agent, for the benefit of the Secured Parties, all of the Borrower's right and title to and interest in, to and under (but not any obligations under) the Purchase and Sale Agreement (and any UCC financing statements filed under or in connection therewith), any Hedging Agreement, the Loan Agreements related to each Loan Asset, all other agreements, documents and instruments evidencing, securing or guarantying any Loan Asset and all other agreements, documents and instruments related to any of the foregoing but excluding any Excluded Amounts or Retained Interest (the "Assigned Documents"). In furtherance and not in limitation of the foregoing, the Borrower hereby collaterally assigns to the Collateral Agent, for the benefit of the Secured Parties, its right to indemnification under Article IX of the Purchase and Sale Agreement. The Borrower confirms that until the Collection Date the Collateral Agent (at the direction of the Administrative Agent) on behalf of the Secured Parties shall have the sole right to enforce the Borrower's rights and remedies under the Purchase and Sale Agreement and any UCC financing statements filed under or in connection therewith for the benefit of the Secured Parties. The parties hereto agree that such collateral assignment to the Collateral Agent, for the benefit of the Secured Parties, shall terminate upon the Collection Date.

**SECTION 2.13 Grant of a Security Interest.** To secure the prompt, complete and indefeasible payment in full when due, whether by lapse of time, acceleration or otherwise, of the Obligations and the performance by the Borrower of all of the covenants and obligations to be performed by it pursuant to this Agreement and each other Transaction Document, whether now or hereafter existing, due or to become due, direct or indirect, or absolute or contingent, the Borrower hereby (a) collaterally assigns and pledges to the Collateral Agent, on behalf of the Secured Parties, and (b) grants a security interest to the Collateral Agent, on behalf of the Secured Parties, in all of the Borrower's right, title and interest in, to and under (but none of the obligations under) all of the Collateral Portfolio (including any Hedging Agreements), whether now existing or hereafter arising or acquired by the Borrower, and wherever the same may be located. For the avoidance of doubt, the Collateral Portfolio shall not include any Excluded Amounts, and the Borrower does not hereby assign, pledge or grant a security interest in any such amounts. Anything herein to the contrary notwithstanding, (a) the Borrower shall remain liable under the Collateral Portfolio to the extent set forth therein to perform all of its duties and obligations thereunder to the same extent as if this Agreement had not been executed, (b) the exercise by the Collateral Agent, for the benefit of the Secured Parties, of any of its rights in the

Collateral Portfolio shall not release the Borrower from any of its duties or obligations under the Collateral Portfolio, and (c) none of the Administrative Agent, the Collateral Agent, any Lender (nor its successors and assigns), any Lender Agent, any Liquidity Bank nor any Secured Party shall have any obligations or liability under the Collateral Portfolio by reason of this Agreement, nor shall the Administrative Agent, the Collateral Agent, any Lender (nor its successors and assigns), any Lender Agent, any Liquidity Bank nor any Secured Party be obligated to perform any of the obligations or duties of the Borrower thereunder or to take any action to collect or enforce any claim for payment assigned hereunder.

SECTION 2.14 Evidence of Debt. The Administrative Agent shall maintain, solely for this purpose as the agent of the Borrower, at its address referred to in Section 11.02 a copy of each assignment and acceptance agreement and participation agreement delivered to and accepted by it and a register for the recordation of the names and addresses and interests of the Lenders (the "Register"). The entries in the Register shall be conclusive and binding for all purposes, absent manifest error, and the Borrower, the Administrative Agent, each Lender and each Lender Agent shall treat each person whose name is recorded in the Register as a Lender under this Agreement for all purposes of this Agreement. The Register shall be available for inspection by the Borrower or any Lender Agent at any reasonable time and from time to time upon reasonable prior notice.

SECTION 2.15 Survival of Representations and Warranties. It is understood and agreed that the representations and warranties set forth in Sections 4.01, 4.02 and 4.03 are made and are true and correct on the date of this Agreement and on each Cut-Off Date unless such representations and warranties are made as of a specific date.

SECTION 2.16 Release of Loan Assets.

(a) The Borrower may obtain the release of (i) any Loan Asset (and the related Portfolio Assets pertaining thereto) released pursuant to a Lien Release Dividend or sold or substituted in accordance with the applicable provisions of Section 2.07 and any Portfolio Assets pertaining to such Loan Asset and (ii) any Collateral Portfolio that expires by its terms and all amounts in respect thereof have been paid in full by the related Obligor and deposited in the Collection Account. The Collateral Agent, for the benefit of the Secured Parties, shall at the sole expense of the Servicer and at the direction of the Administrative Agent, execute such documents and instruments of release as may be prepared by the Servicer on behalf of the Borrower, give notice of such release to the Collateral Custodian (in the form of Exhibit N) (unless the Collateral Custodian and Collateral Agent are the same Person) and take other such actions as shall reasonably be requested by the Borrower to effect such release of the Lien created pursuant to this Agreement. Upon receiving such notification by the Collateral Agent as described in the immediately preceding sentence, if applicable, the Collateral Custodian shall deliver the Required Loan Documents to the Borrower.

(b) Promptly after the Collection Date has occurred, each Lender and the Administrative Agent, in accordance with their respective interests, shall release to the Borrower, for no consideration but at the sole expense of the Borrower, their respective remaining interests in the Portfolio Assets, free and clear of any Lien resulting solely from an act by the Collateral

Agent, any Lender or the Administrative Agent but without any other representation or warranty, express or implied, by or recourse against any Lender or the Administrative Agent.

SECTION 2.17 Treatment of Amounts Received by the Borrower. Amounts received by the Borrower pursuant to Section 2.07 on account of Loan Assets shall be treated as payments of Principal Collections or Interest Collections, as applicable, on Loan Assets hereunder.

SECTION 2.18 Prepayment; Termination.

(a) Except as expressly permitted or required herein, including, without limitation, any repayment necessary to cure a Borrowing Base Deficiency, Advances may only be prepaid in whole or in part at the option of the Borrower at any time by delivering a Notice of Reduction (which notice shall include a Borrowing Base Certificate) to the Administrative Agent, the Collateral Agent, the Lender Agents and the Hedge Counterparty at least one Business Day prior to such reduction for prepayments of \$25,000,000 or less and three Business Days for all other prepayments. Upon any prepayment, the Borrower shall also pay in full any Hedge Breakage Costs, Breakage Fees (solely to the extent such prepayment occurs on any day other than a Payment Date) and other accrued and unpaid costs and expenses of Administrative Agent, Lender Agents and Lenders related to such prepayment; *provided* that no reduction in Advances Outstanding shall be given effect unless (i) sufficient funds have been remitted to pay all such amounts in full, as determined by the Administrative Agent, in its sole discretion, (ii) the Borrower has complied with the terms of any Hedging Agreement requiring that one or more Hedge Transactions be terminated in whole or in part as the result of any such reduction of the Advances Outstanding, and has paid in full all Hedge Breakage Costs owing to the relevant Hedge Counterparty for any such termination and (iii) no event has occurred or would result from such prepayment which would constitute an Event of Default or an Unmatured Event of Default. The Administrative Agent shall apply amounts received from the Borrower pursuant to this Section 2.18(a) to the payment of any Hedge Breakage Costs, to the payment of any Breakage Fees and to the *pro rata* reduction of the Advances Outstanding. Any notice relating to any repayment pursuant to this Section 2.18(a) shall be irrevocable.

(b) The Borrower may, at its option, terminate this Agreement and the other Transaction Documents upon three Business Days' prior written notice to the Administrative Agent, the Lender Agents and any Hedge Counterparty and upon payment in full of all outstanding Advances, all accrued and unpaid Yield, any Breakage Fees, Hedge Breakage Costs, all accrued and unpaid costs and expenses of the Administrative Agent, Lender Agents and Lenders, payment of the Make-Whole Premium *pro rata* to each Lender Agent (for the account of the applicable Lender) and payment of all other Obligations (other than unmatured contingent indemnification obligations); *provided, further* that no Make-Whole Premium shall be due and payable so long as (i) this Agreement is terminated at least six months after the Closing Date and (ii) the aggregate Commitments (calculated pursuant to clause (i) of the definition thereof) at the time of termination is less than \$100,000,000. Any termination of this Agreement shall be subject to Section 11.05.

(c) The Borrower hereby acknowledges and agrees that the Make-Whole Premium constitutes additional consideration for the Lenders to enter into this Agreement.

SECTION 2.19 Extension of Stated Maturity Date and Reinvestment Period.

(a) The Borrower may, within 60 days but not less than 45 days prior to the Stated Maturity Date, make a request to the Lenders to extend the date set forth in the definition of "Stated Maturity Date" for an additional period of one year. The Stated Maturity Date may be extended by one year by mutual agreement among the Administrative Agent, each of the Lenders, the Borrower and the Servicer (such extension, the "Initial Stated Maturity Extension"). Following such Initial Stated Maturity Extension, the Borrower may, within 60 days but not less than 45 days prior to the Stated Maturity Date (as revised by the Initial Stated Maturity Extension), make a request to the Lenders to extend the date set forth in the definition of "Stated Maturity Date" (as revised by the Initial Stated Maturity Extension) for an additional period of one year. The Stated Maturity Date (as revised by the Initial Stated Maturity Extension) may be extended by one year upon the mutual agreement among the Administrative Agent, each of the Lenders, the Borrower and the Servicer (such extension, the "Second Stated Maturity Extension"). The effectiveness of either the Initial Stated Maturity Extension or the Second Stated Maturity Extension shall be conditioned upon the payment of any fees set forth in any Lender Fee Letter which shall be payable upon such extension. The Borrower confirms that any of the Lenders or the Administrative Agent, in their sole and absolute discretion, without regard to the value or performance of the Loan Assets or any other factor, may elect not to extend the Stated Maturity Date.

(b) The Borrower may, within 60 days but not less than 45 days prior to the date set forth in clause (i) of the definition of "Reinvestment Period", make a request to the Lenders to extend the date set forth in clause (i) of the definition of "Reinvestment Period" for an additional period of one year. Such date may be extended by one year by mutual agreement among the Administrative Agent, each of the Lenders, the Borrower and the Servicer (such extension, the "Initial Reinvestment Period Extension"). Following such Initial Reinvestment Period Extension, the Borrower may, within 60 days but not less than 45 days prior to the date set forth in clause (i) of the definition of "Reinvestment Period" (as revised by the Initial Reinvestment Period Extension), make a request to the Lenders to extend the date set forth in clause (i) of the definition of "Reinvestment Period" (as revised by the Initial Reinvestment Period Extension) for an additional period of one year. Such date may be extended by one year upon the mutual agreement among the Administrative Agent, each of the Lenders, the Borrower and the Servicer (such extension, the "Second Reinvestment Period Extension"). The Borrower confirms that any of the Lenders or the Administrative Agent, in their sole and absolute discretion, without regard to the value or performance of the Loan Assets or any other factor, may elect not to extend the date set forth in clause (i) of the definition of "Reinvestment Period".

SECTION 2.20 Collections and Allocations.

(a) The Servicer shall promptly identify any collections received as being on account of Interest Collections, Principal Collections or other Available Collections and shall transfer, or cause to be transferred, all Available Collections received directly by it to the Collection Account by the close of business on the Business Day after such Collections are received. Upon the transfer of Available Collections to the Collection Account, the Servicer shall segregate Principal Collections and Interest Collections and transfer the same to the Principal Collection Account and the Interest Collection Account, respectively. The Servicer

shall further include a statement as to the amount of Principal Collections and Interest Collections on deposit in the Principal Collection Account and the Interest Collection Account on each Reporting Date in the Servicing Report delivered pursuant to Section 6.08(b).

(b) On the Cut-Off Date with respect to any Loan Asset, the Servicer will deposit into the Collection Account all Available Collections received in respect of Eligible Loan Assets being transferred to and included as part of the Collateral Portfolio on such date.

(c) With the prior written consent of the Administrative Agent (a copy of which will be provided by the Servicer to the Collateral Agent), the Servicer may withdraw from the Collection Account any deposits thereto constituting Excluded Amounts if the Servicer has, prior to such withdrawal and consent, delivered to the Administrative Agent and each Lender Agent a report setting forth the calculation of such Excluded Amounts in form and substance satisfactory to the Administrative Agent and each Lender Agent in its sole discretion.

(d) Prior to Notice of Exclusive Control (as defined in the Collection Account Agreement or Unfunded Exposure Account Agreement, as applicable), the Servicer shall, pursuant to written instruction (which may be in the form of standing instructions), direct the Collateral Agent to invest, or cause the investment of, funds on deposit in the Controlled Accounts in Permitted Investments, from the date of this Agreement until the Collection Date. Absent any such written instruction, such funds shall not be invested. A Permitted Investment acquired with funds deposited in any Controlled Account shall mature not later than the Business Day immediately preceding any Payment Date, and shall not be sold or disposed of prior to its maturity. All such Permitted Investments shall be registered in the name of the Account Bank or its nominee for the benefit of the Administrative Agent or Collateral Agent, and otherwise comply with assumptions of the legal opinions of Rutan & Tucker, LLP and Sutherland Asbill & Brennan LLP dated the Closing Date and delivered in connection with this Agreement; *provided* that compliance shall be the responsibility of the Borrower and the Servicer and not the Collateral Agent and Account Bank. All income and gain realized from any such investment, as well as any interest earned on deposits in any Controlled Account shall be distributed in accordance with the provisions of Article II hereof. The Borrower shall deposit in the Collection Account or the Unfunded Exposure Account, as the case may be (with respect to investments made hereunder of funds held therein), an amount equal to the amount of any actual loss incurred, in respect of any such investment, immediately upon realization of such loss. None of the Account Bank, the Collateral Agent, the Administrative Agent, any Lender Agent or any Lender shall be liable for the amount of any loss incurred, in respect of any investment, or lack of investment, of funds held in any Controlled Account, other than with respect to fraud or their own gross negligence or willful misconduct. The parties hereto acknowledge that the Collateral Agent or any of its Affiliates may receive compensation with respect to the Permitted Investments.

(e) Until the Collection Date, neither the Borrower nor the Servicer shall have any rights of direction or withdrawal, with respect to amounts held in any Controlled Account, except to the extent explicitly set forth in Section 2.04 or Section 2.21.

SECTION 2.21 Reinvestment of Principal Collections.

On the terms and conditions hereinafter set forth as certified in writing to the Collateral Agent, the Lender Agents and Administrative Agent, prior to the end of the Reinvestment Period, the Servicer may, to the extent of any Principal Collections on deposit in the Principal Collection Account:

(a) withdraw such funds for the purpose of reinvesting in additional Eligible Loan Assets to be Pledged hereunder; *provided* that the following conditions are satisfied:

(i) all conditions precedent set forth in Section 3.04 have been satisfied;

(ii) no Event of Default has occurred, or would result from such withdrawal and reinvestment, and no Unmatured Event of Default or Borrowing Base Deficiency exists or would result from such withdrawal and reinvestment;

(iii) the representations and warranties contained in Sections 4.01, 4.02 and 4.03 hereof shall continue to be correct in all respects, except to the extent relating to an earlier date;

(iv) the Servicer provides same day written notice to the Administrative Agent and the Collateral Agent by facsimile or email (to be received no later than 1:00 p.m. on such day) of the request to withdraw Principal Collections and the amount of such request;

(v) the notice required in clause (iv) above shall be accompanied by a Disbursement Request and a Borrowing Base Certificate, each executed by the Borrower and a Responsible Officer of the Servicer; and

(vi) the Collateral Agent provides to the Administrative Agent by facsimile (to be received no later than 1:30 p.m. on that same day) a statement reflecting the total amount on deposit as of the opening of business on such day in the Principal Collection Account; or

(b) withdraw such funds for the purpose of making payments in respect of the Advances Outstanding at such time in accordance with and subject to the terms of Section 2.18.

Upon the satisfaction of the applicable conditions set forth in this Section 2.21 (as certified by the Borrower to the Collateral Agent and the Administrative Agent), the Collateral Agent will release funds from the Principal Collection Account to the Servicer in an amount not to exceed the lesser of (A) the amount requested by the Servicer and (B) the amount on deposit in the Principal Collection Account on such day.

**SECTION 2.22 Increase of Commitment; Maximum Facility Amount.**

(a) At any time during the Reinvestment Period, provided that no Event of Default has occurred and no Unmatured Event of Default exists, the Commitment for any Lender may be increased in connection with a corresponding increase in the Maximum Facility Amount with the prior written consent of the Borrower, the Administrative Agent and the Lender Agent

for such Lender; *provided* that, following such Commitment increase, the Maximum Facility Amount shall not exceed \$100,000,000. Prior to the effectiveness of any such increase, the Borrower shall execute and deliver to the applicable Lender Agent a revised Variable Funding Note in an aggregate face amount equal to the revised Commitment. The Borrower confirms that the Lender Agent, in its sole and absolute discretion, without regard to the value or performance of the Loan Assets or any other factor, may elect not to increase its Commitment. Upon such increase, Annex A hereto shall be deemed to be revised to reflect such increase in such Lender's Commitment.

(b) The Borrower may, with the written consent of the Administrative Agent, add additional Persons as Lenders. Each additional Lender and its applicable Lender Agent shall become a party hereto by executing and delivering to the Administrative Agent and the Borrower a Joinder Supplement and a Transferee Letter.

### ARTICLE III.

#### CONDITIONS PRECEDENT

##### SECTION 3.01 Conditions Precedent to Effectiveness.

(a) This Agreement shall be effective upon satisfaction of the conditions precedent that:

(i) all reasonable up-front expenses and fees (including legal fees, any fees required under any Lender Fee Letter and the Wells Fargo Fee Letter) that are invoiced at or prior to the Closing Date shall have been paid in full and all other acts and conditions (including, without limitation, the obtaining of any necessary consents and regulatory approvals and the making of any required filings, recordings or registrations) required to be done and performed and to have happened prior to the execution, delivery and performance of this Agreement and all related Transaction Documents and to constitute the same legal, valid and binding obligations, enforceable in accordance with their respective terms, shall have been done and performed and shall have happened in due and strict compliance with all Applicable Law;

(ii) in the reasonable judgment of the Administrative Agent and each Lender Agent, there not having been any change in Applicable Law which adversely affects any Lender's or the Administrative Agent's entering into the transactions contemplated by the Transaction Documents or any Material Adverse Effect or material disruption after September 10, 2009 in the financial, banking or commercial loan or capital markets generally;

(iii) any and all information submitted to each Lender, Lender Agent and the Administrative Agent by the Borrower, the Transferor or the Servicer or any of their Affiliates is true, accurate, complete in all material respects and not misleading in any material respect;

(iv) each Lender Agent shall have received, all documentation and other information requested by such Lender Agent in its sole discretion and/or required



by regulatory authorities with respect to the Borrower, the Transferor and the Servicer under applicable “know your customer” and anti-money laundering rules and regulations, including, without limitation, the USA PATRIOT Act, all in form and substance reasonably satisfactory to each Lender Agent;

(v) the Administrative Agent shall have received on or before the date of such effectiveness the items listed in Schedule I hereto, each in form and substance satisfactory to the Administrative Agent and each Lender Agent;

(vi) since September 10, 2009, no material adverse change on the business, assets, financial conditions or performance of the Servicer and its subsidiaries, including the Borrower, on a consolidated basis, or any material portion of the initial proposed Eligible Loan Assets has occurred;

(vii) the results of Administrative Agent’s financial, legal, tax and accounting due diligence relating to the Transferor, the Borrower, the Servicer, the Eligible Loan Assets and the transactions contemplated hereunder are satisfactory to Administrative Agent; and

(viii) each applicable Lender Agent shall have received a duly executed copy of its Variable Funding Note, in a principal amount equal to the Commitment of the related Lender.

(b) By its execution and delivery of this Agreement, each of the Borrower and the Servicer hereby certifies that each of the conditions precedent to the effectiveness of this Agreement set forth in this Section 3.01 have been satisfied; *provided*, that with respect to conditions precedent that expressly require the consent or approval of the Administrative Agent or another party (other than the Borrower or the Servicer), the foregoing certification is only to the knowledge of the Borrower and the Servicer, as applicable, with respect to such consents or approvals.

SECTION 3.02 Conditions Precedent to All Advances. Each Advance (including the Initial Advance, except as explicitly set forth below) to the Borrower from the Lenders shall be subject to the further conditions precedent that:

(a) On the Advance Date of such Advance, the following statements shall be true and correct, and the Borrower by accepting any amount of such Advance shall be deemed to have certified that:

(i) the Servicer (on behalf of the Borrower) shall have delivered to the Administrative Agent and each Lender Agent (with a copy to the Collateral Custodian and the Collateral Agent) no later than 5:00 p.m. on the date that is one Business Day prior to the related Advance Date (or, in the case of a Same-Day Advance, no later than 2:00 p.m. on the date of such Advance): (A) a Notice of Borrowing, (B) a Borrowing Base Certificate, (C) a Loan Asset Schedule and (D) except with respect to an Advance under Section 2.02(f), a Loan Assignment in the form of Exhibit A to the Purchase and Sale Agreement (including Schedule I thereto) and containing such additional information as may be reasonably requested by the Administrative Agent;

(ii) except with respect to an Advance under Section 2.02(f), the Borrower shall have delivered to the Collateral Custodian (with a copy to the Administrative Agent), no later than 2:00 p.m. one Business Day prior to the related Advance Date, a faxed or e-mailed copy of the duly executed original promissory notes of the Loan Assets (and, in the case of any Noteless Loan Asset, a fully executed assignment agreement) and if any Loan Assets are closed in escrow, a certificate (in the form of Exhibit K) from the closing attorneys of such Loan Assets certifying the possession of the Required Loan Documents; *provided* that, notwithstanding the foregoing, the Borrower shall cause the Loan Asset Checklist and the Required Loan Documents to be in the possession of the Collateral Custodian within five Business Days of any related Advance Date as to any Loan Assets;

(iii) the representations and warranties contained in Sections 4.01, 4.02 and 4.03 are true and correct in all respects, and (except with respect to an Advance required by Section 2.02(f)) there exists no breach of any covenant contained in Sections 5.01, 5.02, 5.03 and 5.04 before and after giving effect to the Advance to take place on such Advance Date and to the application of proceeds therefrom, on and as of such day as though made on and as of such date (other than any representation and warranty that is made as of a specific date);

(iv) on and as of such Advance Date, after giving effect to such Advance and the addition to the Collateral Portfolio of the Eligible Loan Assets being acquired by the Borrower using the proceeds of such Advance (except with respect to an Advance required by Section 2.02(f)), the Advances Outstanding does not exceed the Borrowing Base;

(v) no Event of Default has occurred, or would result from such Advance, and no Unmatured Event of Default or Borrowing Base Deficiency exists or would result from such Advance;

(vi) no event has occurred and is continuing, or would result from such Advance, which constitutes a Servicer Termination Event or any event which, if it continues uncured, will, with notice or lapse of time, constitute a Servicer Termination Event;

(vii) since the Closing Date, no material adverse change has occurred in the ability of the Servicer, Transferor or the Borrower to perform its obligations under any Transaction Document;

(viii) no Liens exist in respect of Taxes which are prior to the lien of the Collateral Agent on the Eligible Loan Assets to be Pledged on such Advance Date; and

(ix) all terms and conditions of the Purchase and Sale Agreement required to be satisfied in connection with the assignment of each Eligible Loan Asset being Pledged hereunder on such Advance Date (and the Portfolio Assets related thereto), including, without limitation, the perfection of the Borrower's interests therein, shall have been satisfied in full, and all filings (including, without limitation, UCC filings) required

to be made by any Person and all actions required to be taken or performed by any Person in any jurisdiction to give the Collateral Agent, for the benefit of the Secured Parties, a first priority perfected security interest (subject only to Permitted Liens) in such Eligible Loan Assets and the Portfolio Assets related thereto and the proceeds thereof shall have been made, taken or performed.

(b) The Administrative Agent shall have approved in its sole and absolute discretion each of the Eligible Loan Assets identified in the applicable Loan Asset Schedule for inclusion in the Collateral Portfolio on the applicable Advance Date.

(c) No Applicable Law shall prohibit, and no order, judgment or decree of any federal, state or local court or governmental body, agency or instrumentality shall prohibit or enjoin, the making of such Advances by any Lender or the proposed Pledge of Eligible Loan Assets in accordance with the provisions hereof.

(d) Except with respect to an Advance required by Section 2.02(f), the proposed Advance Date shall take place during the Reinvestment Period and the Facility Maturity Date has not yet occurred.

(e) The Borrower shall have paid all fees then required to be paid, including all fees required hereunder and under the applicable Lender Fee Letters and the Wells Fargo Fee Letter and shall have reimbursed the Lenders, the Administrative Agent, each Lender Agent, the Collateral Custodian, the Account Bank and the Collateral Agent for all fees, costs and expenses of closing the transactions contemplated hereunder and under the other Transaction Documents, including the reasonable attorney fees and any other legal and document preparation costs incurred by the Lenders, the Administrative Agent and each Lender Agent.

The failure of the Borrower to satisfy any of the foregoing conditions precedent in respect of any Advance shall give rise to a right of the Administrative Agent and the applicable Lender Agent, which right may be exercised at any time on the demand of the applicable Lender Agent, to rescind the related Advance and direct the Borrower to pay to the applicable Lender Agent for the benefit of the applicable Lender an amount equal to the Advances made during any such time that any of the foregoing conditions precedent were not satisfied.

SECTION 3.03 Advances Do Not Constitute a Waiver. No Advance made hereunder shall constitute a waiver of any condition to any Lender's obligation to make such an advance unless such waiver is in writing and executed by such Lender.

SECTION 3.04 Conditions to Pledges of Loan Assets. Each Pledge of an additional Eligible Loan Asset pursuant to Section 2.06, a Substitute Eligible Loan Asset pursuant to Section 2.07(a) or (c), an additional Eligible Loan Asset pursuant to Section 2.21 or any other Pledge of a Loan Asset hereunder shall be subject to the further conditions precedent that (as certified to the Collateral Agent by the Borrower):

(a) the Servicer (on behalf of the Borrower) shall have delivered to the Administrative Agent and each Lender Agent (with a copy to the Collateral Custodian and the Collateral Agent) no later than 5:00 p.m. on the date that is one Business Day prior to the related Cut-Off Date: (A) a Borrowing Base Certificate, (B) a Loan Asset Schedule and (C) a Loan

Assignment in the form of Exhibit A to the Purchase and Sale Agreement (including Schedule I thereto) and containing such additional information as may be reasonably requested by the Administrative Agent;

(b) the Borrower shall have delivered to the Collateral Custodian (with a copy to the Administrative Agent), no later than 2:00 p.m. one Business Day prior to the related Cut-Off Date, a faxed or e-mailed copy of the duly executed original promissory notes of the Loan Assets (and, in the case of any Noteless Loan Asset, a fully executed assignment agreement) and if any Loan Assets are closed in escrow, a certificate (in the form of Exhibit K) from the closing attorneys of such Loan Assets certifying the possession of the Required Loan Documents; *provided* that, notwithstanding the foregoing, the Borrower shall cause the Loan Asset Checklist and the Required Loan Documents to be in the possession of the Collateral Custodian within five Business Days of any related Cut-Off Date as to any Loan Assets;

(c) no Liens exist in respect of Taxes which are prior to the lien of the Collateral Agent on the Eligible Loan Assets to be Pledged on such Cut-Off Date;

(d) all terms and conditions of the Purchase and Sale Agreement required to be satisfied in connection with the assignment of each Eligible Loan Asset being Pledged hereunder on such Cut-Off Date (and the Portfolio Assets related thereto), including, without limitation, the perfection of the Borrower's interests therein, shall have been satisfied in full, and all filings (including, without limitation, UCC filings) required to be made by any Person and all actions required to be taken or performed by any Person in any jurisdiction to give the Collateral Agent, for the benefit of the Secured Parties, a first priority perfected security interest (subject only to Permitted Liens) in such Eligible Loan Assets and the Portfolio Assets related thereto and the proceeds thereof shall have been made, taken or performed;

(e) the Administrative Agent shall have approved in its sole and absolute discretion each of the Eligible Loan Assets identified in the applicable Loan Asset Schedule for inclusion in the Collateral Portfolio on the applicable Cut-Off Date;

(f) no Event of Default has occurred, or would result from such Pledge, and no Unmatured Event of Default exists, or would result from such Pledge (other than, with respect to any Pledge of an Eligible Loan Asset necessary to cure a Borrowing Base Deficiency in accordance with Section 2.06, an Unmatured Event of Default arising solely pursuant to such Borrowing Base Deficiency); and

(g) the representations and warranties contained in Sections 4.01, 4.02 and 4.03 are true and correct in all respects, and there exists no breach of any covenant contained in Sections 5.01, 5.02, 5.03 and 5.04 before and after giving effect to the Pledge to take place on such Cut-Off Date, on and as of such day as though made on and as of such date (other than any representation and warranty that is made as of a specific date).

ARTICLE IV.

REPRESENTATIONS AND WARRANTIES

SECTION 4.01 Representations and Warranties of the Borrower. The Borrower hereby represents and warrants, as of the Closing Date, as of each applicable Cut-Off Date, as of each applicable Advance Date, as of each Reporting Date and as of each other date provided under this Agreement or the other Transaction Documents on which such representations and warranties are required to be (or deemed to be) made (unless a specific date is specified below):

(a) Organization, Good Standing and Due Qualification. The Borrower is a limited liability company duly organized, validly existing and in good standing under the laws of Delaware and has the power and all licenses necessary to own its assets and to transact the business in which it is engaged and is duly qualified and in good standing under the laws of each jurisdiction where the transaction of such business or its ownership of the Loan Assets and the Collateral Portfolio requires such qualification.

(b) Power and Authority; Due Authorization; Execution and Delivery. The Borrower has the power, authority and legal right to make, deliver and perform this Agreement and each of the Transaction Documents to which it is a party and all of the transactions contemplated hereby and thereby, and has taken all necessary action to authorize the execution, delivery and performance of this Agreement and each of the Transaction Documents to which it is a party, and to grant to the Collateral Agent, for the benefit of the Secured Parties, a first priority perfected security interest in the Collateral Portfolio on the terms and conditions of this Agreement, subject only to Permitted Liens.

(c) Binding Obligation. This Agreement and each of the Transaction Documents to which the Borrower is a party constitutes the legal, valid and binding obligation of the Borrower, enforceable against it in accordance with their respective terms, except as the enforceability hereof and thereof may be limited by Bankruptcy Laws and by general principles of equity (whether such enforceability is considered in a proceeding in equity or at law).

(d) All Consents Required. No consent of any other party and no consent, license, approval or authorization of, or registration or declaration with, any Governmental Authority, bureau or agency is required in connection with the execution, delivery or performance by the Borrower of this Agreement or any Transaction Document to which it is a party or the validity or enforceability of this Agreement or any such Transaction Document or the Loan Assets or the transfer of an ownership interest or security interest in such Loan Assets, other than such as have been met or obtained and are in full force and effect.

(e) No Violation. The execution, delivery and performance of this Agreement and all other agreements and instruments executed and delivered or to be executed and delivered pursuant hereto or thereto in connection with the Pledge of the Collateral Portfolio will not (i) create any Lien on the Collateral Portfolio other than Permitted Liens or (ii) violate any Applicable Law or the certificate of formation or limited liability company agreement of the Borrower or (iii) violate any contract or other agreement to which the Borrower is a party or by which the Borrower or any property or assets of the Borrower may be bound.

(f) No Proceedings. There is no litigation or administrative proceeding or investigation pending or, to the knowledge of the Borrower, threatened against the Borrower or any properties of the Borrower, before any Governmental Authority (i) asserting the invalidity of this Agreement or any other Transaction Document to which the Borrower is a party, (ii) seeking to prevent the consummation of any of the transactions contemplated by this Agreement or any other Transaction Document to which the Borrower is a party or (iii) seeking any determination or ruling that could reasonably be expected to have a Material Adverse Effect.

(g) Selection Procedures. In selecting the Loan Assets to be Pledged pursuant to this Agreement, no selection procedures were employed which are intended to be adverse to the interests of the Lenders.

(h) Bulk Sales. The grant of the security interest in the Collateral Portfolio by the Borrower to the Collateral Agent, for the benefit of the Secured Parties, pursuant to this Agreement, is in the ordinary course of business for the Borrower and is not subject to the bulk transfer or any similar statutory provisions in effect in any applicable jurisdiction.

(i) Pledge of Collateral Portfolio. Except as otherwise expressly permitted by the terms of this Agreement, no item of Collateral Portfolio has been sold, transferred, assigned or pledged by the Borrower to any Person, other than as contemplated by Article II and the Pledge of such Collateral Portfolio to the Collateral Agent, for the benefit of the Secured Parties, pursuant to the terms of this Agreement.

(j) Indebtedness. The Borrower has no Indebtedness or other indebtedness, secured or unsecured, direct or contingent (including guaranteeing any obligation), other than (i) Indebtedness incurred under the terms of the Transaction Documents and (ii) Indebtedness incurred pursuant to certain ordinary business expenses arising pursuant to the transactions contemplated by this Agreement and the other Transaction Documents.

(k) Sole Purpose. The Borrower has been formed solely for the purpose of engaging in transactions of the types contemplated by this Agreement, and has not engaged in any business activity other than the negotiation, execution and to the extent applicable, performance of this Agreement and the transactions contemplated by the Transaction Documents.

(l) No Injunctions. No injunction, writ, restraining order or other order of any nature adversely affects the Borrower's performance of its obligations under this Agreement or any Transaction Document to which the Borrower is a party.

(m) Taxes. The Borrower has filed or caused to be filed (on a consolidated basis or otherwise) on a timely basis all tax returns (including, without limitation, all foreign, federal, state, local and other tax returns) required to be filed by it, is not liable for Taxes payable by any other Person and has paid or made adequate provisions for the payment of all Taxes, assessments and other governmental charges due and payable from the Borrower except for those Taxes being contested in good faith by appropriate proceedings and in respect of which it has established proper reserves on its books. No Tax lien or similar adverse claim has been filed, and no claim is being asserted, with respect to any such Tax, assessment or other governmental

charge. Any Taxes, fees and other governmental charges due and payable by the Borrower, as applicable, in connection with the execution and delivery of this Agreement and the other Transaction Documents and the transactions contemplated hereby or thereby have been paid or shall have been paid if and when due.

(n) Location. The Borrower's location (within the meaning of Article 9 of the UCC) is Delaware. The chief executive office of the Borrower (and the location of the Borrower's records regarding the Collateral Portfolio (other than those delivered to the Collateral Custodian)) is located at the address set forth under its name on the signature pages hereto (or at such other address as shall be designated by such party in a written notice to the other parties hereto).

(o) Tradenames. Except as permitted hereunder, the Borrower's legal name is as set forth in this Agreement. Except as permitted hereunder, the Borrower has not changed its name since its formation; does not have tradenames, fictitious names, assumed names or "doing business as" names other than as disclosed on Schedule II hereto (as such schedule may be updated from time to time by the Administrative Agent upon receipt of a notice delivered to the Administrative Agent pursuant to Section 5.02(f)); the Borrower's only jurisdiction of formation is Delaware, and, except as permitted hereunder, the Borrower has not changed its jurisdiction of formation.

(p) Solvency. The Borrower is not the subject of any Bankruptcy Proceedings or Bankruptcy Event. The Borrower is Solvent, and the transactions under this Agreement and any other Transaction Document to which the Borrower is a party do not and will not render the Borrower not Solvent. The Borrower is paying its debts as they become due (subject to any applicable grace period); and the Borrower, after giving effect to the transactions contemplated hereby, will have adequate capital to conduct its business.

(q) No Subsidiaries. The Borrower has no Subsidiaries.

(r) Value Given. The Borrower has given fair consideration and reasonably equivalent value to the Transferor in exchange for the purchase of the Loan Assets (or any number of them) from the Transferor pursuant to the Purchase and Sale Agreement. No such transfer has been made for or on account of an antecedent debt owed by the Borrower to the Transferor and no such transfer is or may be voidable or subject to avoidance under any section of the Bankruptcy Code.

(s) Reports Accurate. All Servicer's Certificates, Servicing Reports, Notices of Borrowing, Borrowing Base Certificates and other written or electronic information, exhibits, financial statements, documents, books, records or reports furnished by the Servicer to the Administrative Agent, the Collateral Agent, the Lenders, the Lender Agents, or the Collateral Custodian in connection with this Agreement are, as of their date, accurate, true and correct and no such document or certificate omits to state a material fact or any fact necessary to make the statements contained therein not misleading; *provided* that, solely with respect to written or electronic information furnished by the Servicer which was provided to the Servicer from an Obligor with respect to a Loan Asset, such information need only be accurate, true and correct to the knowledge of the Servicer; *provided, further*, that the foregoing proviso shall not apply to

any information presented in a Servicer's Certificate, Servicing Report, Notice of Borrowing or Borrowing Base Certificate.

(t) Exchange Act Compliance: Regulations T, U and X. None of the transactions contemplated herein or in the other Transaction Documents (including, without limitation, the use of proceeds from the sale of the Collateral Portfolio) will violate or result in a violation of Section 7 of the Exchange Act, or any regulations issued pursuant thereto, including, without limitation, Regulations T, U and X of the Board of Governors of the Federal Reserve System, 12 C.F.R., Chapter II. The Borrower does not own or intend to carry or purchase, and no proceeds from the Advances will be used to carry or purchase, any "margin stock" within the meaning of Regulation U or to extend "purpose credit" within the meaning of Regulation U.

(u) No Adverse Agreements. There are no agreements in effect adversely affecting the rights of the Borrower to make, or cause to be made, the grant of the security interest in the Collateral Portfolio contemplated by Section 2.13.

(v) Event of Default/Unmatured Event of Default. No event has occurred which constitutes an Event of Default, and no event has occurred and is continuing which constitutes an Unmatured Event of Default (other than any Event of Default or Unmatured Event of Default which has previously been disclosed to the Administrative Agent as such).

(w) Servicing Standard. Each of the Loan Assets was underwritten or acquired and is being serviced in conformance with the standard underwriting, credit, collection, operating and reporting procedures and systems of the Servicer or the Transferor.

(x) ERISA. The present value of all benefits vested under each "employee pension benefit plan," as such term is defined in Section 3 of ERISA, that is, or at any time during the preceding six years was, maintained by the Borrower or any ERISA Affiliate of the Borrower, or open to participation by employees of the Borrower or of any ERISA Affiliate of the Borrower, as from time to time in effect (each, a "Pension Plan"), does not exceed the value of the assets of the Pension Plan allocable to such vested benefits (based on the value of such assets as of the last annual valuation date). No prohibited transactions, failure to meet the minimum funding standard set forth in Section 302(a) of ERISA and Section 412(a) of the Code (with respect to any Pension Plan other than a Multiemployer Plan), withdrawals or reportable events have occurred with respect to any Pension Plan that, in the aggregate, could subject the Borrower to any material tax, penalty or other liability. No notice of intent to terminate a Pension Plan has been filed, nor has any Pension Plan been terminated under Section 4041(f) of ERISA, nor has the Pension Benefit Guaranty Corporation instituted proceedings to terminate, or appoint a trustee to administer a Pension Plan and no event has occurred or condition exists that might constitute grounds under Section 4042 of ERISA for the termination of, or the appointment of a trustee to administer, any Pension Plan.

(y) Allocation of Charges. There is not any agreement or understanding between the Servicer and the Borrower (other than as expressly set forth herein or as consented to by the Administrative Agent), providing for the allocation or sharing of obligations to make payments or otherwise in respect of any taxes, fees, assessments or other governmental charges;



provided that it is understood and acknowledged that the Borrower will be consolidated with the Servicer for tax purposes.

(z) Broker-Dealer. The Borrower is not a broker-dealer or subject to the Securities Investor Protection Act of 1970, as amended.

(aa) Instructions to Obligors. The Collection Account is the only account to which Obligors have been instructed by the Borrower, or the Servicer on the Borrower's behalf, to send Principal Collections and Interest Collections on the Collateral Portfolio. The Borrower has not granted any Person other than the Collateral Agent, on behalf of the Secured Parties, an interest in the Collection Account.

(bb) Purchase and Sale Agreement. The Purchase and Sale Agreement and the Loan Assignment contemplated therein are the only agreements pursuant to which the Borrower acquires the Collateral Portfolio.

(cc) Investment Company Act. The Borrower is not required to register as an "investment company" under the provisions of the 1940 Act.

(dd) Compliance with Law. The Borrower has complied in all respects with all Applicable Law to which it may be subject, and no item of the Collateral Portfolio contravenes any Applicable Law (including, without limitation, all applicable predatory and abusive lending laws, laws, rules and regulations relating to licensing, truth in lending, fair credit billing, fair credit reporting, equal credit opportunity, fair debt collection practices and privacy).

(ee) Collections. The Borrower acknowledges that all Available Collections received by it or its Affiliates with respect to the Collateral Portfolio Pledged hereunder are held and shall be held in trust for the benefit of the Collateral Agent, on behalf of the Secured Parties until deposited into the Collection Account within one Business Day after receipt as required herein.

(ff) Set-Off, etc. No Loan Asset has been compromised, adjusted, extended, satisfied, subordinated, rescinded, set-off or modified by the Borrower, the Transferor or the Obligor thereof, and no Collateral Portfolio is subject to compromise, adjustment, extension, satisfaction, subordination, rescission, set-off, counterclaim, defense, abatement, suspension, deferment, deduction, reduction, termination or modification, whether arising out of transactions concerning the Collateral Portfolio or otherwise, by the Borrower, the Transferor or the Obligor with respect thereto, except, in each case, for amendments, extensions and modifications, if any, to such Collateral Portfolio otherwise permitted pursuant to Section 6.04(a) of this Agreement and in accordance with the Servicing Standard.

(gg) Full Payment. As of the applicable Cut-Off Date thereof, the Borrower has no knowledge of any fact which should lead it to expect that any Loan Asset will not be paid in full.

(hh) Environmental. With respect to each item of Underlying Collateral as of the applicable Cut-Off Date for the Loan Asset related to such Underlying Collateral, to the actual knowledge of a Responsible Officer of the Borrower: (a) the related Obligor's operations

comply in all respects with all applicable Environmental Laws; (b) none of the related Obligor's operations is the subject of a federal or state investigation evaluating whether any remedial action, involving expenditures, is needed to respond to a release of any Hazardous Materials into the environment; and (c) the related Obligor does not have any material contingent liability in connection with any release of any Hazardous Materials into the environment. As of the applicable Cut-Off Date for the Loan Asset related to such Underlying Collateral, none of the Borrower, the Transferor nor the Servicer has received any written or verbal notice of, or inquiry from any Governmental Authority regarding, any violation, alleged violation, non-compliance, liability or potential liability regarding environmental matters or compliance with Environmental Laws with regard to any of the Underlying Collateral, nor does any such Person have knowledge or reason to believe that any such notice will be received or is being threatened.

(ii) USA PATRIOT Act. Neither the Borrower nor any Affiliate of the Borrower is (i) a country, territory, organization, person or entity named on an Office of Foreign Asset Control (OFAC) list; (ii) a Person that resides or has a place of business in a country or territory named on such lists or which is designated as a "Non-Cooperative Jurisdiction" by the Financial Action Task Force on Money Laundering, or whose subscription funds are transferred from or through such a jurisdiction; (iii) a "Foreign Shell Bank" within the meaning of the USA PATRIOT Act, *i.e.*, a foreign bank that does not have a physical presence in any country and that is not affiliated with a bank that has a physical presence and an acceptable level of regulation and supervision; or (iv) a person or entity that resides in or is organized under the laws of a jurisdiction designated by the United States Secretary of the Treasury under Sections 311 or 312 of the USA PATRIOT Act as warranting special measures due to money laundering concerns.

(jj) Confirmation from Transferor. The Borrower has received in writing from the Transferor confirmation that the Transferor will not cause the Borrower to file a voluntary bankruptcy petition under the Bankruptcy Code.

(kk) Accuracy of Representations and Warranties. Each representation or warranty by the Borrower contained herein or in any certificate or other document furnished by the Borrower pursuant hereto or in connection herewith is true and correct in all respects.

(ll) Reaffirmation of Representations and Warranties. On each day that any Advance is made hereunder, the Borrower shall be deemed to have certified that all representations and warranties described in Section 4.01 and Section 4.02 are correct on and as of such day as though made on and as of such day, except for any such representations or warranties which are made as of a specific date.

(mm) Security Interest.

(i) This Agreement creates a valid and continuing security interest (as defined in the applicable UCC) in the Collateral Portfolio in favor of the Collateral Agent, on behalf of the Secured Parties, which security interest is prior to all other Liens (except for Permitted Liens), and is enforceable as such against creditors of and purchasers from the Borrower;

(ii) the Collateral Portfolio is comprised of “instruments”, “security entitlements”, “general intangibles”, “tangible chattel paper”, “accounts”, “certificated securities”, “uncertificated securities”, “securities accounts”, “deposit accounts”, “supporting obligations” or “insurance” (each as defined in the applicable UCC), real property and/or such other category of collateral under the applicable UCC as to which the Borrower has complied with its obligations under this Section 4.01(mm);

(iii) with respect to Collateral Portfolio that constitute “security entitlements”:

a. all of such security entitlements have been credited to one of the Controlled Accounts and the securities intermediary for each Controlled Account has agreed to treat all assets credited to such Controlled Account as “financial assets” within the meaning of the applicable UCC;

b. the Borrower has taken all steps necessary to cause the securities intermediary to identify in its records the Borrower, for the benefit of the Secured Parties, as the Person having a security entitlement against the securities intermediary in each of the Controlled Accounts; and

c. the Controlled Accounts are not in the name of any Person other than the Borrower, subject to the lien of the Collateral Agent, for the benefit of the Secured Parties. The securities intermediary of any Controlled Account which is a “securities account” under the UCC has agreed to comply with the entitlement orders and instructions of the Borrower, the Servicer and the Collateral Agent (acting at the direction of the Administrative Agent) in accordance with the Transaction Documents, including causing cash to be invested in Permitted Investments; *provided* that, upon the delivery of a Notice of Exclusive Control (as defined under the Collection Account Agreement or Unfunded Exposure Account Agreement, as applicable) by the Collateral Agent (acting at the direction of the Administrative Agent), the securities intermediary has agreed to only follow the entitlement orders and instructions of the Collateral Agent, on behalf of the Secured Parties, including with respect to the investment of cash in Permitted Investments.

(iv) all Controlled Accounts constitute “securities accounts” or “deposit accounts” as defined in the applicable UCC;

(v) with respect to any Controlled Account which constitutes a “deposit account” as defined in the applicable UCC, the Borrower, the Account Bank and the Collateral Agent, on behalf of the Secured Parties, have entered into an account control agreement which permits the Collateral Agent on behalf of the Secured Parties to direct disposition of the funds in such deposit account;

(vi) the Borrower owns and has good and marketable title to (or with respect to assets securing any Loan Assets, a valid security interest in) the Collateral Portfolio free and clear of any Lien (other than Permitted Liens) of any Person;

(vii) the Borrower has received all consents and approvals required by the terms of any Loan Asset to the granting of a security interest in the Loan Assets hereunder to the Collateral Agent, on behalf of the Secured Parties;

(viii) the Borrower has caused the filing of all appropriate financing statements in the proper filing office in the appropriate jurisdictions under Applicable Law in order to perfect the security interest in the Collateral Portfolio and that portion of the Loan Assets in which a security interest may be perfected by filing granted to the Collateral Agent, on behalf of the Secured Parties, under this Agreement; *provided* that filings in respect of real property shall not be required;

(ix) other than as expressly permitted by the terms of this Agreement and the security interest granted to the Collateral Agent, on behalf of the Secured Parties, pursuant to this Agreement, the Borrower has not pledged, assigned, sold, granted a security interest in or otherwise conveyed any of the Collateral Portfolio. The Borrower has not authorized the filing of and is not aware of any financing statements against the Borrower that include a description of collateral covering the Collateral Portfolio other than any financing statement (A) relating to the security interests granted to the Borrower under the Purchase and Sale Agreement, or (B) that has been terminated and/or fully and validly assigned to the Collateral Agent on or prior to the date hereof. The Borrower is not aware of the filing of any judgment or Tax lien filings against the Borrower;

(x) all original executed copies of each underlying promissory note or copies of each Loan Asset Register, as applicable, that constitute or evidence each Loan Asset has been, or subject to the delivery requirements contained herein, will be delivered to the Collateral Custodian;

(xi) other than in the case of Noteless Loan Assets, the Borrower has received, or subject to the delivery requirements contained herein will receive, a written acknowledgment from the Collateral Custodian that the Collateral Custodian, as the bailee of the Collateral Agent, is holding the underlying promissory notes that constitute or evidence the Loan Assets solely on behalf of and for the Collateral Agent, for the benefit of the Secured Parties; *provided* that the acknowledgement of the Collateral Custodian set forth in Section 12.11 may serve as such acknowledgement;

(xii) none of the underlying promissory notes, or Loan Asset Registers, as applicable, that constitute or evidence the Loan Assets has any marks or notations indicating that they have been pledged, assigned or otherwise conveyed to any Person other than the Collateral Agent, on behalf of the Secured Parties;

(xiii) with respect to any Collateral Portfolio that constitutes a "certificated security," such certificated security has been delivered to the Collateral Custodian, on behalf of the Secured Parties and, if in registered form, has been specially Indorsed to the Collateral Agent, for the benefit of the Secured Parties, or in blank by an effective Indorsement or has been registered in the name of the Collateral Agent, for the benefit of the Secured Parties, upon original issue or registration of transfer by the Borrower of such certificated security; and

(xiv) with respect to any Collateral Portfolio that constitutes an “uncertificated security”, that the Borrower shall cause the issuer of such uncertificated security to register the Collateral Agent, on behalf of the Secured Parties, as the registered owner of such uncertificated security.

SECTION 4.02 Representations and Warranties of the Borrower Relating to the Agreement and the Collateral Portfolio. The Borrower hereby represents and warrants, as of the Closing Date, as of each applicable Cut-Off Date, as of each applicable Advance Date, as of each Reporting Date and any date which Loan Assets are Pledged hereunder and as of each other date provided under this Agreement or the other Transaction Documents on which such representations and warranties are required to be (or deemed to be) made:

(a) Valid Transfer and Security Interest. This Agreement constitutes a grant of a security interest in all of the Collateral Portfolio to the Collateral Agent, for the benefit of the Secured Parties, which upon the delivery of the Required Loan Documents to the Collateral Custodian, the crediting of Loan Assets to the Controlled Accounts and the filing of the financing statements, shall be a valid and first priority perfected security interest in the Loan Assets forming a part of the Collateral Portfolio and in that portion of the Loan Assets in which a security interest may be perfected by filing subject only to Permitted Liens. Neither the Borrower nor any Person claiming through or under Borrower shall have any claim to or interest in the Controlled Accounts and, if this Agreement constitutes the grant of a security interest in such property, except for the interest of the Borrower in such property as a debtor for purposes of the UCC.

(b) Eligibility of Collateral Portfolio. (i) The Loan Asset Schedule and the information contained in each Notice of Borrowing, is an accurate and complete listing of all the Loan Assets contained in the Collateral Portfolio as of the related Cut-Off Date and the information contained therein with respect to the identity of such item of Collateral Portfolio and the amounts owing thereunder is true and correct as of the related Cut-Off Date, (ii) each Loan Asset designated on any Borrowing Base Certificate as an Eligible Loan Asset and each Loan Asset included as an Eligible Loan Asset in any calculation of Borrowing Base or Borrowing Base Deficiency is an Eligible Loan Asset and (iii) with respect to each item of Collateral Portfolio, all consents, licenses, approvals or authorizations of or registrations or declarations of any Governmental Authority or any Person required to be obtained, effected or given by the Borrower in connection with the transfer of a security interest in each item of Collateral Portfolio to the Collateral Agent, for the benefit of the Secured Parties, have been duly obtained, effected or given and are in full force and effect.

(c) No Fraud. Each Loan Asset was originated without any fraud or misrepresentation by the Transferor or, to the best of the Borrower’s knowledge, on the part of the Obligor.

SECTION 4.03 Representations and Warranties of the Servicer. The Servicer hereby represents and warrants, as of the Closing Date, as of each applicable Cut-Off Date, as of each applicable Advance Date, as of each Reporting Date and as of each other date provided under this Agreement or the other Transaction Documents on which such representations and warranties are required to be (or deemed to be) made:

(a) **Organization and Good Standing.** The Servicer has been duly organized and is validly existing as a corporation in good standing under the laws of the State of Delaware (except as such jurisdiction is changed as permitted hereunder), with all requisite corporate power and authority to own or lease its properties and to conduct its business as such business is presently conducted and to enter into and perform its obligations pursuant to this Agreement.

(b) **Due Qualification.** The Servicer is duly qualified to do business as a corporation and is in good standing as a corporation, and has obtained all necessary licenses and approvals in all jurisdictions in which the ownership or lease of its property and or the conduct of its business requires such qualification, licenses or approvals.

(c) **Power and Authority; Due Authorization; Execution and Delivery.** The Servicer (i) has all necessary power, authority and legal right to (a) execute and deliver this Agreement and the other Transaction Documents to which it is a party, (b) carry out the terms of the Transaction Documents to which it is a party, and (ii) has duly authorized by all necessary corporate action the execution, delivery and performance of this Agreement and the other Transaction Documents to which it is a party. This Agreement and each other Transaction Document to which the Servicer is a party have been duly executed and delivered by the Servicer.

(d) **Binding Obligation.** This Agreement and each other Transaction Document to which the Servicer is a party constitutes a legal, valid and binding obligation of the Servicer enforceable against the Servicer in accordance with its respective terms, except as such enforceability may be limited by Bankruptcy Laws and general principles of equity (whether considered in a suit at law or in equity).

(e) **No Violation.** The consummation of the transactions contemplated by this Agreement and the other Transaction Documents to which it is a party and the fulfillment of the terms hereof and thereof will not (i) conflict with, result in any breach of any of the terms and provisions of, or constitute (with or without notice or lapse of time or both) a default under, the Servicer's articles of incorporation or by-laws or any contractual obligation of the Servicer, (ii) result in the creation or imposition of any Lien upon any of the Servicer's properties pursuant to the terms of any such contractual obligation, other than this Agreement, or (iii) violate any Applicable Law.

(f) **No Proceedings.** There is no litigation, proceeding or investigation pending or, to the knowledge of the Servicer, threatened against the Servicer, before any Governmental Authority (i) asserting the invalidity of this Agreement or any other Transaction Document to which the Servicer is a party, (ii) seeking to prevent the consummation of any of the transactions contemplated by this Agreement or any other Transaction Document to which the Servicer is a party or (iii) seeking any determination or ruling that could reasonably be expected to have a Material Adverse Effect.

(g) **All Consents Required.** All approvals, authorizations, consents, orders, licenses or other actions of any Person or of any Governmental Authority (if any) required for the due execution, delivery and performance by the Servicer of this Agreement and any other Transaction Document to which the Servicer is a party have been obtained.

(h) Reports Accurate. No Borrowing Base Certificate, information, exhibit, financial statement, document, book, record or report furnished by the Servicer to the Administrative Agent, the Collateral Agent, the Lenders, the Lender Agents, or the Collateral Custodian in connection with this Agreement is inaccurate in any respect as of the date it is dated, and no such document contains any material misstatement of fact or omits to state a material fact or any fact necessary to make the statements contained therein not misleading; *provided* that, solely with respect to written or electronic information furnished by the Servicer which was provided to the Servicer from an Obligor with respect to a Loan Asset, such information need only be accurate, true and correct to the knowledge of the Servicer; *provided, further*, that the foregoing proviso shall not apply to any information presented in a Servicer's Certificate, Servicing Report, Notice of Borrowing or Borrowing Base Certificate.

(i) Servicing Standard. The Servicer has complied in all respects with the Servicing Standard with regard to the servicing of the Loan Assets.

(j) Collections. The Servicer acknowledges that all Available Collections received by it or its Affiliates with respect to the Collateral Portfolio transferred or Pledged hereunder are held and shall be held in trust for the benefit of the Secured Parties until deposited into the Collection Account within one Business Day from receipt as required herein.

(k) Bulk Sales. The execution, delivery and performance of this Agreement do not require compliance with any "bulk sales" act or similar law by the Servicer.

(l) Solvency. The Servicer is not the subject of any Bankruptcy Proceedings or Bankruptcy Event. The transactions under this Agreement and any other Transaction Document to which the Servicer is a party do not and will not render the Servicer not Solvent.

(m) Taxes. The Servicer has filed or caused to be filed all tax returns that are required to be filed by it (subject to any extensions to file properly obtained by the same). The Servicer has paid or made adequate provisions for the payment of all Taxes and all assessments made against it or any of its property (other than any amount of Tax the validity of which is currently being contested in good faith by appropriate proceedings and with respect to which reserves in accordance with GAAP have been provided on the books of the Servicer), and no Tax lien has been filed and no claim is being asserted, with respect to any such Tax, assessment or other charge.

(n) Exchange Act Compliance; Regulations T, U and X. None of the transactions contemplated herein or the other Transaction Documents (including, without limitation, the use of the Proceeds from the sale of the Collateral Portfolio) will violate or result in a violation of Section 7 of the Exchange Act, or any regulations issued pursuant thereto, including, without limitation, Regulations T, U and X of the Board of Governors of the Federal Reserve System, 12 C.F.R., Chapter II.

(o) Security Interest. The Servicer will take all steps necessary to ensure that the Borrower has granted a security interest (as defined in the UCC) to the Collateral Agent, for the benefit of the Secured Parties, in the Collateral Portfolio, which is enforceable in accordance with Applicable Law upon execution and delivery of this Agreement. Upon the filing of UCC-1

financing statements naming the Collateral Agent as secured party and the Borrower as debtor, the Collateral Agent, for the benefit of the Secured Parties, shall have a valid and first priority perfected security interest in the Loan Assets and that portion of the Collateral Portfolio in which a security interest may be perfected by filing (except for any Permitted Liens). All filings (including, without limitation, such UCC filings) as are necessary for the perfection of the Secured Parties' security interest in the Loan Assets and that portion of the Collateral Portfolio in which a security interest may be perfected by filing have been (or prior to the applicable Advance will be) made.

(p) ERISA. The present value of all benefits vested under each "employee pension benefit plan", as such term is defined in Section 3 of ERISA, that is, or at any time during the preceding six years was, maintained by the Servicer or any ERISA Affiliate of the Servicer, or open to participation by employees of the Servicer or of any ERISA Affiliate of the Servicer, as from time to time in effect (each, a "Servicer Pension Plan") does not exceed the value of the assets of the Servicer Pension Plan allocable to such vested benefits (based on the value of such assets as of the last annual valuation date). No prohibited transactions, failure to meet the minimum funding standard set forth in Section 302(a) of ERISA and Section 412(a) of the Code (with respect to any Servicer Pension Plan other than a Multiemployer Plan), withdrawals or reportable events have occurred with respect to any Servicer Pension Plan that, in the aggregate, could subject the Servicer to any material tax, penalty or other liability. No notice of intent to terminate a Servicer Pension Plan has been filed, nor has any Servicer Pension Plan been terminated under Section 4041(f) of ERISA, nor has the Pension Benefit Guaranty Corporation instituted proceedings to terminate, or appoint a trustee to administer, a Servicer Pension Plan and no event has occurred or condition exists that might constitute grounds under Section 4042 of ERISA for the termination of, or the appointment of a trustee to administer, any Servicer Pension Plan.

(q) USA PATRIOT Act. Neither the Servicer nor any Affiliate of the Servicer is (i) a country, territory, organization, person or entity named on an OFAC list; (ii) a Person that resides or has a place of business in a country or territory named on such lists or which is designated as a "Non-Cooperative Jurisdiction" by the Financial Action Task Force on Money Laundering, or whose subscription funds are transferred from or through such a jurisdiction; (iii) a "Foreign Shell Bank" within the meaning of the USA PATRIOT Act, *i.e.*, a foreign bank that does not have a physical presence in any country and that is not affiliated with a bank that has a physical presence and an acceptable level of regulation and supervision; or (iv) a person or entity that resides in or is organized under the laws of a jurisdiction designated by the United States Secretary of the Treasury under Sections 311 or 312 of the USA PATRIOT Act as warranting special measures due to money laundering concerns.

(r) Environmental. With respect to each item of Underlying Collateral, to the actual knowledge of a Responsible Officer of the Servicer: (a) the related Obligor's operations comply in all material respects with all applicable Environmental Laws; (b) none of the related Obligor's operations is the subject of a Federal or state investigation evaluating whether any remedial action, involving expenditures, is needed to respond to a release of any Hazardous Materials into the environment; and (c) the related Obligor does not have any material contingent liability in connection with any release of any Hazardous Materials into the environment. The Servicer has not received any written or verbal notice of, or inquiry from any Governmental



Authority regarding, any violation, alleged violation, non-compliance, liability or potential liability regarding environmental matters or compliance with Environmental Laws with regard to any of the Underlying Collateral, nor does the Servicer, have knowledge or reason to believe that any such notice will be received or is being threatened.

(s) No Injunctions. No injunction, writ, restraining order or other order of any nature adversely affects the Servicer's performance of its obligations under this Agreement or any Transaction Document to which the Servicer is a party.

(t) Instructions to Obligors. The Collection Account is the only account to which Obligor has been instructed by the Servicer on the Borrower's behalf to send Principal Collections and Interest Collections on the Collateral Portfolio.

(u) Allocation of Charges. There is not any agreement or understanding between the Servicer and the Borrower (other than as expressly set forth herein or as consented to by the Administrative Agent), providing for the allocation or sharing of obligations to make payments or otherwise in respect of any taxes, fees, assessments or other governmental charges; *provided* that it is understood and acknowledged that the Borrower will be consolidated with the Servicer for tax purposes.

(v) Servicer Termination Event. No event has occurred which constitutes a Servicer Termination Event (other than any Servicer Termination Event which has previously been disclosed to the Administrative Agent as such).

(w) Broker-Dealer. The Servicer is not a broker-dealer or subject to the Securities Investor Protection Act of 1970, as amended.

(x) Compliance with Applicable Law. The Servicer has complied in all respects with all Applicable Law to which it may be subject, and no item in the Collateral Portfolio contravenes in any respect any Applicable Law.

SECTION 4.04 Representations and Warranties of the Collateral Agent. The Collateral Agent in its individual capacity and as Collateral Agent represents and warrants as follows:

(a) Organization; Power and Authority. It is a duly organized and validly existing national banking association in good standing under the laws of the United States. It has full corporate power, authority and legal right to execute, deliver and perform its obligations as Collateral Agent under this Agreement.

(b) Due Authorization. The execution and delivery of this Agreement and the consummation of the transactions provided for herein have been duly authorized by all necessary association action on its part, either in its individual capacity or as Collateral Agent, as the case may be.

(c) No Conflict. The execution and delivery of this Agreement, the performance of the transactions contemplated hereby and the fulfillment of the terms hereof will not conflict with, result in any breach of its articles of incorporation or bylaws or any of the

terms and provisions of, or constitute (with or without notice or lapse of time or both) a default under any indenture, contract, agreement, mortgage, deed of trust, or other instrument to which the Collateral Agent is a party or by which it or any of its property is bound.

(d) No Violation. The execution and delivery of this Agreement, the performance of the transactions contemplated hereby and the fulfillment of the terms hereof will not conflict with or violate, in any respect, any Applicable Law.

(e) All Consents Required. All approvals, authorizations, consents, orders or other actions of any Person or Governmental Authority applicable to the Collateral Agent, required in connection with the execution and delivery of this Agreement, the performance by the Collateral Agent of the transactions contemplated hereby and the fulfillment by the Collateral Agent of the terms hereof have been obtained.

(f) Validity, Etc. The Agreement constitutes the legal, valid and binding obligation of the Collateral Agent, enforceable against the Collateral Agent in accordance with its terms, except as such enforceability may be limited by applicable Bankruptcy Laws and general principles of equity (whether considered in a suit at law or in equity).

SECTION 4.05 Representations and Warranties of each Lender. Each Lender hereby individually represents and warrants, as to itself, that it is (a) either a Qualified Institutional Buyer under Rule 144A of the Securities Act or an institutional "Accredited Investor" as defined in Rule (1)-501(a)(1)-(3) or (7) under the Securities Act and (b) a "qualified purchaser" under the 1940 Act.

SECTION 4.06 Representations and Warranties of the Collateral Custodian. The Collateral Custodian in its individual capacity and as Collateral Custodian represents and warrants as follows:

(a) Organization, Power and Authority. It is a duly organized and validly existing national banking association in good standing under the laws of the United States. It has full corporate power, authority and legal right to execute, deliver and perform its obligations as Collateral Custodian under this Agreement.

(b) Due Authorization. The execution and delivery of this Agreement and the consummation of the transactions provided for herein have been duly authorized by all necessary association action on its part, either in its individual capacity or as Collateral Custodian, as the case may be.

(c) No Conflict. The execution and delivery of this Agreement, the performance of the transactions contemplated hereby and the fulfillment of the terms hereof will not conflict with, result in any breach of its articles of incorporation or bylaws or any of the terms and provisions of, or constitute (with or without notice or lapse of time or both) a default under any indenture, contract, agreement, mortgage, deed of trust, or other instrument to which the Collateral Custodian is a party or by which it or any of its property is bound.

(d) No Violation. The execution and delivery of this Agreement, the performance of the transactions contemplated hereby and the fulfillment of the terms hereof will not conflict with or violate, in any respect, any Applicable Law.

(e) All Consents Required. All approvals, authorizations, consents, orders or other actions of any Person or Governmental Authority applicable to the Collateral Custodian, required in connection with the execution and delivery of this Agreement, the performance by the Collateral Custodian of the transactions contemplated hereby and the fulfillment by the Collateral Custodian of the terms hereof have been obtained.

(f) Validity, Etc. The Agreement constitutes the legal, valid and binding obligation of the Collateral Custodian, enforceable against the Collateral Custodian in accordance with its terms, except as such enforceability may be limited by applicable Bankruptcy Laws and general principles of equity (whether considered in a suit at law or in equity).

#### ARTICLE V.

#### GENERAL COVENANTS

##### SECTION 5.01 Affirmative Covenants of the Borrower.

From the Closing Date until the Collection Date:

(a) Organizational Procedures and Scope of Business. The Borrower will observe all organizational procedures required by its certificate of formation, limited liability company agreement and the laws of its jurisdiction of formation. Without limiting the foregoing, the Borrower will limit the scope of its business to: (i) the acquisition of Eligible Loan Assets and the ownership and management of the Portfolio Assets and the related assets in the Collateral Portfolio; (ii) the sale, transfer or other disposition of Loan Assets as and when permitted under the Transaction Documents; (iii) entering into and performing under the Transaction Documents; (iv) consenting or withholding consent as to proposed amendments, waivers and other modifications of the Loan Agreements to the extent not in conflict with the terms of this Agreement or any other Transaction Document; (v) exercising any rights (including but not limited to voting rights and rights arising in connection with a Bankruptcy Event with respect to an Obligor or the consensual or non-judicial restructuring of the debt or equity of an Obligor) or remedies in connection with the Loan Assets and participating in the committees (official or otherwise) or other groups formed by creditors of an Obligor to the extent not in conflict with the terms of this Agreement or any other Transaction Document; and (vi) to engage in any activity and to exercise any powers permitted to limited liability companies under the laws of the State of Delaware that are related to the foregoing and necessary, convenient or advisable to accomplish the foregoing.

(b) Special Purpose Entity Requirements. The Borrower will at all times: (i) maintain at least one Independent Director; (ii) maintain its own separate books and records and bank accounts; (iii) hold itself out to the public and all other Persons as a legal entity separate from the Transferor and any other Person (although, in connection with certain

advertising and marketing, the Borrower may be identified as a Subsidiary of Fifth Street); (iv) have a Board of Directors separate from that of the Transferor and any other Person; (v) file its own tax returns, if any, as may be required under Applicable Law, to the extent (1) not part of a consolidated group filing a consolidated return or returns or (2) not treated as a division for tax purposes of another taxpayer, and pay any Taxes so required to be paid under Applicable Law in accordance with the terms of this Agreement; (vi) except as contemplated by the Transaction Documents, not commingle its assets with assets of any other Person; (vii) conduct its business in its own name and strictly comply with all organizational formalities to maintain its separate existence (although, in connection with certain advertising and marketing, the Borrower may be identified as a Subsidiary of Fifth Street); (viii) maintain separate financial statements, except to the extent that the Borrower's financial and operating results are consolidated with those of Fifth Street in consolidated financial statements; (ix) pay its own liabilities only out of its own funds; (x) maintain an arm's-length relationship with its Affiliates and the Transferor; (xi) pay the salaries of its own employees, if any; (xii) not hold out its credit or assets as being available to satisfy the obligations of others; (xiii) allocate fairly and reasonably any overhead for shared office space; (xiv) use separate stationery, invoices and checks (although, in connection with certain advertising and marketing, the Borrower may be identified as a Subsidiary of Fifth Street); (xv) except as expressly permitted by this Agreement, not pledge its assets as security for the obligations of any other Person; (xvi) correct any known misunderstanding regarding its separate identity; (xvii) maintain adequate capital in light of its contemplated business purpose, transactions and liabilities and pay its operating expenses and liabilities from its own assets; (xviii) cause its Board of Directors to meet at least annually or act pursuant to written consent and keep minutes of such meetings and actions and observe in all respects all other Delaware limited liability company formalities; (xix) not acquire the obligations or any securities of its Affiliates; and (xx) cause the directors, officers, agents and other representatives of the Borrower to act at all times with respect to the Borrower consistently and in furtherance of the foregoing and in the best interests of the Borrower. Where necessary, the Borrower will obtain proper authorization from its members for limited liability company action.

(c) Preservation of Company Existence. The Borrower will maintain its limited liability company existence in good standing under the laws of its jurisdiction of formation and will promptly obtain and thereafter maintain qualifications to do business as a foreign limited liability company in any other state in which it does business and in which it is required to so qualify under Applicable Law.

(d) Compliance with Legal Opinions. The Borrower shall take all other actions necessary to maintain the accuracy of the factual assumptions set forth in the legal opinions of Rutan & Tucker, LLP, as special counsel to the Borrower, issued in connection with the Purchase and Sale Agreement and relating to the issues of substantive consolidation and true sale of the Loan Assets.

(e) Deposit of Collections. The Borrower shall promptly (but in no event later than one Business Day after receipt) deposit or cause to be deposited into the Collection Account any and all Available Collections received by the Borrower, the Servicer or any of their Affiliates.

(f) Disclosure of Purchase Price. The Borrower shall disclose to the Administrative Agent and the Lender Agents the purchase price for each Loan Asset proposed to be transferred to the Borrower pursuant to the terms of the Purchase and Sale Agreement.

(g) Obligor Defaults and Bankruptcy Events. The Borrower shall give, or shall cause the Servicer to give, notice to the Administrative Agent and the Lender Agents within two Business Days of the Borrower's, the Transferor's or the Servicer's actual knowledge of the occurrence of any default by an Obligor under any Loan Asset or any Bankruptcy Event with respect to any Obligor under any Loan Asset.

(h) Required Loan Documents. The Borrower shall deliver to the Collateral Custodian a hard copy of the Required Loan Documents and the Loan Asset Checklist pertaining to each Loan Asset within five Business Days of the Cut-Off Date pertaining to such Loan Asset.

(i) Taxes. The Borrower will file or cause to be filed its tax returns and pay any and all Taxes imposed on it or its property as required by the Transaction Documents (except as contemplated in Section 4.01(m)).

(j) Notice of Event of Default. The Borrower shall notify the Administrative Agent and each Lender Agent of the occurrence of any Event of Default under this Agreement promptly upon obtaining actual knowledge of such event. In addition, no later than two Business Days following the Borrower's knowledge or notice of the occurrence of any Event of Default or Unmatured Event of Default, the Borrower will provide to the Administrative Agent and each Lender Agent a written statement of a Responsible Officer of the Borrower setting forth the details of such event and the action that the Borrower proposes to take with respect thereto.

(k) Notice of Material Events. The Borrower shall promptly notify the Administrative Agent and each Lender Agent of any event or other circumstance that is reasonably likely to have a Material Adverse Effect.

(l) Notice of Income Tax Liability. The Borrower shall furnish to the Administrative Agent and each Lender Agent telephonic or facsimile notice within 10 Business Days (confirmed in writing within five Business Days thereafter) of the receipt of revenue agent reports or other written proposals, determinations or assessments of the Internal Revenue Service or any other taxing authority which propose, determine or otherwise set forth positive adjustments (i) to the Tax liability of Fifth Street or any "affiliated group" (within the meaning of Section 1504(a)(1) of the Code) of which Fifth Street is a member in an amount equal to or greater than \$1,000,000 in the aggregate, or (ii) to the Tax liability of the Borrower itself in an amount equal to or greater than \$500,000 in the aggregate. Any such notice shall specify the nature of the items giving rise to such adjustments and the amounts thereof.

(m) Notice of Auditors' Management Letters. The Borrower shall promptly notify the Administrative Agent and each Lender Agent after the receipt of any auditors' management letters received by the Borrower or by its accountants.

(n) Notice of Breaches of Representations and Warranties under this Agreement. The Borrower shall promptly notify the Administrative Agent and each Lender Agent if any representation or warranty set forth in Section 4.01 or Section 4.02 was incorrect at

the time it was given or deemed to have been given and at the same time deliver to the Collateral Agent, the Administrative Agent and the Lender Agents a written notice setting forth in reasonable detail the nature of such facts and circumstances. In particular, but without limiting the foregoing, the Borrower shall notify the Administrative Agent and each Lender Agent in the manner set forth in the preceding sentence before any Cut-Off Date of any facts or circumstances within the knowledge of the Borrower which would render any of the said representations and warranties untrue at the date when such representations and warranties were made or deemed to have been made.

(o) Notice of Breaches of Representations and Warranties under the Purchase and Sale Agreement. The Borrower confirms and agrees that the Borrower will, upon receipt of notice or discovery thereof, promptly send to the Administrative Agent, each Lender Agent and the Collateral Agent a notice of (i) any breach of any representation, warranty, agreement or covenant under the Purchase and Sale Agreement or (ii) any event or occurrence that, upon notice, or upon the passage of time or both, would constitute such a breach.

(p) Notice of Proceedings. The Borrower shall notify the Administrative Agent and each Lender Agent, as soon as possible and in any event within three Business Days, after the Borrower receives notice or obtains knowledge thereof, of any settlement of, material judgment (including a material judgment with respect to the liability phase of a bifurcated trial) in or commencement of any material labor controversy, material litigation, material action, material suit or material proceeding before any court or governmental department, commission, board, bureau, agency or instrumentality, domestic or foreign, affecting the Collateral Portfolio, the Transaction Documents, the Collateral Agent's, for the benefit of the Secured Parties, interest in the Collateral Portfolio, or the Borrower, the Servicer or the Transferor or any of their Affiliates. For purposes of this Section 5.01(p), (i) any settlement, judgment, labor controversy, litigation, action, suit or proceeding affecting the Collateral Portfolio, the Transaction Documents, the Collateral Agent's, for the benefit of the Secured Parties, interest in the Collateral Portfolio, or the Borrower in excess of \$500,000 shall be deemed to be material and (ii) any settlement, judgment, labor controversy, litigation, action, suit or proceeding affecting the Servicer or the Transferor or any of their Affiliates (other than the Borrower) in excess of \$1,000,000 shall be deemed to be material.

(q) Notice of ERISA Reportable Events. The Borrower shall promptly notify the Administrative Agent and each Lender Agent after receiving notice of any "reportable event" (as defined in Title IV of ERISA, other than an event for which the reporting requirements have been waived by regulations) with respect to the Borrower (or any ERISA Affiliate thereof), and provide them with a copy of such notice.

(r) Notice of Accounting Changes. As soon as possible and in any event within three Business Days after the effective date thereof, the Borrower will provide to the Administrative Agent and each Lender Agent notice of any change in the accounting policies of the Borrower.

(s) Additional Documents. The Borrower shall provide the Administrative Agent and each Lender Agent with copies of such documents as the Administrative Agent or any

Lender Agent may reasonably request evidencing the truthfulness of the representations set forth in this Agreement.

(t) Protection of Security Interest. With respect to the Collateral Portfolio acquired by the Borrower, the Borrower will (i) acquire such Collateral Portfolio pursuant to and in accordance with the terms of the Purchase and Sale Agreement, (ii) (at the expense of the Servicer, on behalf of the Borrower) take all action necessary to perfect, protect and more fully evidence the Borrower's ownership of such Collateral Portfolio free and clear of any Lien other than the Lien created hereunder and Permitted Liens, including, without limitation, (a) with respect to the Loan Assets and that portion of the Collateral Portfolio in which a security interest may be perfected by filing, filing and maintaining (at the expense of the Servicer, on behalf of the Borrower), effective financing statements against the Transferor in all necessary or appropriate filing offices, (including any amendments thereto or assignments thereof) and filing continuation statements, amendments or assignments with respect thereto in such filing offices, (including any amendments thereto or assignments thereof) and (b) executing or causing to be executed such other instruments or notices as may be necessary or appropriate, (iii) (at the expense of the Servicer, on behalf of the Borrower) take all action necessary to cause a valid, subsisting and enforceable first priority perfected security interest, subject only to Permitted Liens, to exist in favor of the Collateral Agent (for the benefit of the Secured Parties) in the Borrower's interests in all of the Collateral Portfolio being Pledged hereunder including the filing of a UCC financing statement in the applicable jurisdiction adequately describing the Collateral Portfolio (which may include an "all asset" filing), and naming the Borrower as debtor and the Collateral Agent as the secured party, and filing continuation statements, amendments or assignments with respect thereto in such filing offices, (including any amendments thereto or assignments thereof), (iv) permit the Administrative Agent or any Lender Agent or their respective agents or representatives to visit the offices of the Borrower during normal office hours and upon reasonable advance notice examine and make copies of all documents, books, records and other information concerning the Collateral Portfolio and discuss matters related thereto with any of the officers or employees of the Borrower having knowledge of such matters, and (v) take all additional action that the Administrative Agent, any Lender Agent or the Collateral Agent may reasonably request to perfect, protect and more fully evidence the respective first priority perfected security interests of the parties to this Agreement in the Collateral Portfolio, or to enable the Administrative Agent or the Collateral Agent to exercise or enforce any of their respective rights hereunder.

(u) Liens. The Borrower will promptly notify the Administrative Agent and the Lender Agents of the existence of any Lien on the Collateral Portfolio (other than Permitted Liens) and the Borrower shall defend the right, title and interest of the Collateral Agent, for the benefit of the Secured Parties, in, to and under the Collateral Portfolio against all claims of third parties.

(v) Other Documents. At any time from time to time upon prior written request of the Administrative Agent or any Lender Agent, at the sole expense of the Borrower, the Borrower will promptly and duly execute and deliver such further instruments and documents and take such further actions as the Administrative Agent or any Lender Agent may reasonably request for the purposes of obtaining or preserving the full benefits of this Agreement including the first priority security interest (subject only to Permitted Liens) granted hereunder

and of the rights and powers herein granted (including, among other things, authorizing the filing of such UCC financing statements as the Administrative Agent may request).

(w) Compliance with Law. The Borrower shall at all times comply in all respects with all Applicable Law applicable to Borrower or any of its assets (including, without limitation, Environmental Laws, and all federal securities laws), and Borrower shall do or cause to be done all things necessary to preserve and maintain in full force and effect its legal existence, and all licenses material to its business.

(x) Proper Records. The Borrower shall at all times keep proper books of records and accounts in which full, true and correct entries shall be made of its transactions in accordance with GAAP and set aside on its books from its earnings for each fiscal year all such proper reserves in accordance with GAAP.

(y) Satisfaction of Obligations. The Borrower shall pay, discharge or otherwise satisfy at or before maturity or before they become delinquent, as the case may be, all its obligations of whatever nature, except where the amount or validity thereof is currently being contested in good faith by appropriate proceedings and reserves with respect thereto have been provided on the books of the Borrower.

(z) Performance of Covenants. The Borrower shall observe, perform and satisfy all the material terms, provisions, covenants and conditions required to be observed, performed or satisfied by it, and shall pay when due all costs, fees and expenses required to be paid by it, under the Transaction Documents. The Borrower shall pay and discharge all Taxes, levies, liens and other charges on it or its assets and on the Collateral Portfolio that, in each case, in any manner would create any lien or charge upon the Collateral Portfolio, except for any such Taxes as are being appropriately contested in good faith by appropriate proceedings diligently conducted and with respect to which adequate reserves have been provided in accordance with GAAP.

(aa) Tax Treatment. The Borrower, the Transferor and the Lenders shall treat the Advances advanced hereunder as indebtedness of the Borrower (or, so long as the Borrower is treated as a disregarded entity for U.S. federal income tax purposes, as indebtedness of the entity of which it is considered to be a part) for U.S. federal income tax purposes and to file any and all tax forms in a manner consistent therewith.

(bb) Maintenance of Records. The Borrower will maintain records with respect to the Collateral Portfolio and the conduct and operation of its business with no less a degree of prudence than if the Collateral Portfolio were held by the Borrower for its own account and will furnish the Administrative Agent and each Lender Agent, upon the reasonable request by the Administrative Agent and each Lender Agent, information with respect to the Collateral Portfolio and the conduct and operation of its business.

(cc) Obligor Notification Forms. The Borrower shall furnish the Collateral Agent and the Administrative Agent with an appropriate power of attorney to send (at the Administrative Agent's discretion on the Collateral Agent's behalf, after the occurrence of an Event of Default) Obligor notification forms to give notice to the Obligors of the Collateral



Agent's interest in the Collateral Portfolio and the obligation to make payments as directed by the Administrative Agent on the Collateral Agent's behalf.

(dd) Officer's Certificate. On each anniversary of the date of this Agreement, the Borrower shall deliver an Officer's Certificate, in form and substance acceptable to the Lender Agents and the Administrative Agent, providing (i) a certification, based upon a review and summary of UCC search results, that there is no other interest in the Collateral Portfolio perfected by filing of a UCC financing statement other than in favor of the Collateral Agent and (ii) a certification, based upon a review and summary of tax and judgment lien searches satisfactory to the Administrative Agent, that there is no other interest in the Collateral Portfolio based on any tax or judgment lien.

(ee) Continuation Statements. The Borrower shall, not earlier than six months and not later than three months prior to the fifth anniversary of the date of filing of the financing statement referred to in Schedule I hereto or any other financing statement filed pursuant to this Agreement or in connection with any Advance hereunder, unless the Collection Date shall have occurred:

(i) authorize and deliver and file or cause to be filed an appropriate continuation statement with respect to such financing statement; and

(ii) deliver or cause to be delivered to the Collateral Agent, the Administrative Agent and the Lender Agents an opinion of the counsel for the Borrower, in form and substance reasonably satisfactory to the Administrative Agent, confirming and updating the opinion delivered pursuant to Schedule I with respect to perfection and otherwise to the effect that the security interest hereunder continues to be an enforceable and perfected security interest, subject to no other Liens of record except as provided herein or otherwise permitted hereunder, which opinion may contain usual and customary assumptions, limitations and exceptions.

(ff) Disregarded Entity. The Borrower will be disregarded as an entity separate from its owner pursuant to Treasury Regulation Section 301.7701-3(b), and neither the Borrower nor any other Person on its behalf shall make an election to be treated as other than an entity disregarded from its owner under Treasury Regulation Section 301.7701-3(c).

SECTION 5.02 Negative Covenants of the Borrower.

From the Closing Date until the Collection Date:

(a) Special Purpose Entity Requirements. Except as otherwise permitted by this Agreement, the Borrower shall not (i) guarantee any obligation of any Person, including any Affiliate; (ii) engage, directly or indirectly, in any business, other than the actions required or permitted to be performed under the Transaction Documents; (iii) incur, create or assume any Indebtedness, other than Indebtedness incurred under the Transaction Documents or under any Hedging Agreement pursuant to Section 5.09(a); (iv) make or permit to remain outstanding any loan or advance to, or own or acquire any stock or securities of, any Person, except that the Borrower may invest in those Loan Assets and other investments permitted under the Transaction Documents and may make any advance required or expressly permitted to be made

pursuant to any provisions of the Transaction Documents and permit the same to remain outstanding in accordance with such provisions; (v) become insolvent or fail to pay its debts and liabilities from its assets when due; (vi) create, form or otherwise acquire any Subsidiaries or (vii) release, sell, transfer, convey or assign any Loan Asset unless in accordance with the Transaction Documents.

(b) **Requirements for Material Actions.** The Borrower shall not fail to provide (and at all times the Borrower's organizational documents shall reflect) that the unanimous consent of all members (including the consent of the Independent Director(s)) is required for the Borrower to (i) dissolve or liquidate, in whole or part, or institute proceedings to be adjudicated bankrupt or insolvent, (ii) institute or consent to the institution of bankruptcy or insolvency proceedings against it, (iii) file a petition seeking or consent to reorganization or relief under any applicable federal or state law relating to bankruptcy or insolvency, (iv) seek or consent to the appointment of a receiver, liquidator, assignee, trustee, sequestrator, custodian or any similar official for the Borrower, (v) make any assignment for the benefit of the Borrower's creditors, (vi) admit in writing its inability to pay its debts generally as they become due, or (vii) take any action in furtherance of any of the foregoing.

(c) **Protection of Title.** The Borrower shall not take any action which would directly or indirectly impair or adversely affect Borrower's title to the Collateral Portfolio.

(d) **Transfer Limitations.** The Borrower shall not transfer, assign, convey, grant, bargain, sell, set over, deliver or otherwise dispose of, or pledge or hypothecate, directly or indirectly, any interest in the Collateral Portfolio to any person other than the Collateral Agent for the benefit of the Secured Parties, or engage in financing transactions or similar transactions with respect to the Collateral Portfolio with any person other than the Administrative Agent and the Lenders, in each case, except as otherwise expressly permitted by the terms of this Agreement.

(e) **Liens.** The Borrower shall not create, incur or permit to exist any lien, encumbrance or security interest in or on any of the Collateral Portfolio subject to the security interest granted by the Borrower pursuant to this Agreement, other than Permitted Liens.

(f) **Organizational Documents.** The Borrower shall not modify or terminate any of the organizational or operational documents of the Borrower without the prior written consent of the Administrative Agent.

(g) **[Reserved].**

(h) **Merger, Acquisitions, Sales, etc.** The Borrower shall not change its organizational structure, enter into any transaction of merger or consolidation or amalgamation, or asset sale (other than pursuant to [Section 2.07](#)), or liquidate, wind up or dissolve itself (or suffer any liquidation, winding up or dissolution) without the prior written consent of the Administrative Agent.

(i) **Use of Proceeds.** The Borrower shall not use the proceeds of any Advance other than (x) to finance the purchase by the Borrower from the Transferor on a "true sale" basis, of Collateral Portfolio pursuant to the terms of the Purchase and Sale Agreement or (y) to fund

the Unfunded Exposure Account in order to establish reserves for unfunded commitments of Revolving Loan Assets and Delayed Draw Loan Assets included in the Collateral Portfolio.

(j) Limited Assets. The Borrower shall not hold or own any assets that are not part of the Collateral Portfolio.

(k) Tax Treatment. The Borrower shall not elect to be treated as a corporation for U.S. federal income tax purposes and shall take all reasonable steps necessary to avoid being treated as a corporation for U. S. federal income tax purposes.

(l) Extension or Amendment of Collateral Portfolio. The Borrower will not, except as otherwise permitted in Section 6.04(a) of this Agreement and in accordance with the Servicing Standard, extend, amend or otherwise modify the terms of any Loan Asset (including the Underlying Collateral).

(m) Purchase and Sale Agreement. The Borrower will not amend, modify, waive or terminate any provision of the Purchase and Sale Agreement without the prior written consent of the Administrative Agent.

(n) Restricted Junior Payments. The Borrower shall not make any Restricted Junior Payment, except that, so long as no Event of Default or Unmatured Event of Default has occurred or would result therefrom, the Borrower may declare and make distributions to its member on its membership interests.

(o) ERISA Matters. The Borrower will not (a) engage, and will exercise its best efforts not to permit any ERISA Affiliate to engage, in any prohibited transaction (within the meaning of ERISA Section 406(a) or (b) or Code Section 4975) for which an exemption is not available or has not previously been obtained from the United States Department of Labor, (b) fail to meet the minimum funding standard set forth in Section 302(a) of ERISA and Section 412(a) of the Code with respect to any Pension Plan other than a Multiemployer Plan, (c) fail to make any payments to a Multiemployer Plan that the Borrower or any ERISA Affiliate may be required to make under the agreement relating to such Multiemployer Plan or any law pertaining thereto, (d) terminate any Pension Plan so as to result, directly or indirectly in any liability to the Borrower, or (e) permit to exist any occurrence of any reportable event described in Title IV of ERISA with respect to any Pension Plan, other than an event for which reporting requirements have been waived by regulations.

(p) Instructions to Obligors. The Borrower will not make any change, or permit the Servicer to make any change, in its instructions to Obligors regarding payments to be made with respect to the Collateral Portfolio to the Collection Account, unless the Administrative Agent has consented to such change.

(q) Taxable Mortgage Pool Matters. The sum of the Outstanding Balances of all Loan Assets owned by the Borrower and that are principally secured by an interest in real property (within the meaning of Treasury Regulation Section 301.7701(i)-1(d)(3)) shall not at any time exceed 35% of the aggregate Outstanding Balance of all Loan Assets.

(r) Change of Jurisdiction, Location, Names or Location of Loan Asset Files. The Borrower shall not change the jurisdiction of its formation, make any change to its corporate name or use any tradenames, fictitious names, assumed names, "doing business as" names or other names (other than those listed on Schedule II hereto, as such schedule may be revised from time to time to reflect name changes and name usage permitted under the terms of this Section 5.02(t) after compliance with all terms and conditions of this Section 5.02(t) related thereto) unless, prior to the effective date of any such change in the jurisdiction of its formation, name change or use, the Borrower receives prior written consent from the Administrative Agent of such change and delivers to the Administrative Agent such financing statements as the Administrative Agent may request to reflect such name change or use, together with such Opinions of Counsel and other documents and instruments as the Administrative Agent may request in connection therewith. The Borrower will not change the location of its chief executive office unless prior to the effective date of any such change of location, the Borrower notifies the Administrative Agent of such change of location in writing. The Borrower will not move, or consent to the Collateral Custodian or the Servicer moving, the Loan Asset Files from the location thereof on the Closing Date, unless the Administrative Agent shall consent to such move in writing and the Servicer shall provide the Administrative Agent with such Opinions of Counsel and other documents and instruments as the Administrative Agent may request in connection therewith.

(s) Allocation of Charges. There will not be any agreement or understanding between the Servicer and the Borrower (other than as expressly set forth herein or as consented to by the Administrative Agent), providing for the allocation or sharing of obligations to make payments or otherwise in respect of any Taxes, fees, assessments or other governmental charges; *provided* that it is understood and acknowledged that the Borrower will be consolidated with the Servicer for tax purposes.

SECTION 5.03 Affirmative Covenants of the Servicer.

From the Closing Date until the Collection Date:

(a) Compliance with Law. The Servicer will comply in all respects with all Applicable Law, including those with respect to servicing the Collateral Portfolio or any part thereof.

(b) Preservation of Company Existence. The Servicer will preserve and maintain its corporate existence, rights, franchises and privileges in the jurisdiction of its formation, and qualify and remain qualified in good standing as a corporation in each jurisdiction where the failure to preserve and maintain such existence, rights, franchises, privileges and qualification could reasonably be expected to have a Material Adverse Effect.

(c) Obligations and Compliance with Collateral Portfolio. The Servicer will duly fulfill and comply with all obligations on the part of the Borrower to be fulfilled or complied with under or in connection with the administration of each item of Collateral Portfolio and will do nothing to impair the rights of the Collateral Agent, for the benefit of the Secured Parties, or of the Secured Parties in, to and under the Collateral Portfolio. It is understood and agreed that the Servicer does not hereby assume any obligations of the Borrower in respect of

any Advances or assume any responsibility for the performance by the Borrower of any of its obligations hereunder or under any other agreement executed in connection herewith that would be inconsistent with the limited recourse undertaking of the Servicer, in its capacity as seller, under Section 2.1(e) of the Purchase and Sale Agreement.

(d) Keeping of Records and Books of Account.

(i) The Servicer will maintain and implement administrative and operating procedures (including, without limitation, an ability to recreate records evidencing Collateral Portfolio in the event of the destruction of the originals thereof), and keep and maintain all documents, books, records and other information reasonably necessary or advisable for the collection of all Collateral Portfolio and the identification of the Collateral Portfolio.

(ii) The Servicer shall permit the Administrative Agent, each Lender Agent or their respective agents or representatives, to visit the offices of the Servicer during normal office hours and upon reasonable advance notice and examine and make copies of all documents, books, records and other information concerning the Collateral Portfolio and the Servicer's servicing thereof and discuss matters related thereto with any of the officers or employees of the Servicer having knowledge of such matters.

(iii) The Servicer will on or prior to the date hereof, mark its master data processing records and other books and records relating to the Collateral Portfolio with a legend, acceptable to the Administrative Agent describing (i) the sale of the Collateral Portfolio from the Transferor to the Borrower and (ii) the Pledge from the Borrower to the Collateral Agent, for the benefit of the Secured Parties.

(e) Preservation of Security Interest. The Servicer (at its own expense, on behalf of the Borrower) will file such financing and continuation statements and any other documents that may be required by any law or regulation of any Governmental Authority to preserve and protect fully the first priority perfected security interest of the Collateral Agent, for the benefit of the Secured Parties, in, to and under the Loan Assets and that portion of the Collateral Portfolio in which a security interest may be perfected by filing.

(f) [Reserved].

(g) Events of Default. The Servicer will provide the Administrative Agent and each Lender Agent (with a copy to the Collateral Agent) with immediate written notice of the occurrence of each Event of Default and each Unmatured Event of Default of which the Servicer has knowledge or has received notice. In addition, no later than two Business Days following the Servicer's knowledge or notice of the occurrence of any Event of Default or Unmatured Event of Default, the Servicer will provide to the Collateral Agent, the Administrative Agent and each Lender Agent a written statement of the chief financial officer or chief accounting officer of the Servicer setting forth the details of such event and the action that the Servicer proposes to take with respect thereto.

(h) Taxes. The Servicer will file its tax returns and pay any and all Taxes imposed on it or its property as required under the Transaction Documents (except as contemplated by Section 4.03(m)).

(i) Other. The Servicer will promptly furnish to the Collateral Agent, the Administrative Agent and each Lender Agent such other information, documents, records or reports respecting the Collateral Portfolio or the condition or operations, financial or otherwise, of the Borrower or the Servicer as the Collateral Agent, any Lender Agent or the Administrative Agent may from time to time reasonably request in order to protect the interests of the Administrative Agent, the Lender Agents, the Collateral Agent or Secured Parties under or as contemplated by this Agreement.

(j) Proceedings Related to the Borrower, the Transferor and the Servicer and the Transaction Documents. The Servicer shall notify the Administrative Agent and each Lender Agent as soon as possible and in any event within three Business Days after any executive officer of the Servicer receives notice or obtains knowledge thereof of any settlement of, judgment (including a judgment with respect to the liability phase of a bifurcated trial) in or commencement of any labor controversy, litigation, action, suit or proceeding before any court or governmental department, commission, board, bureau, agency or instrumentality, domestic or foreign, that could reasonably be expected to have a Material Adverse Effect on the Borrower, the Transferor or the Servicer (or any of their Affiliates) or the Transaction Documents. For purposes of this Section 5.03(j), (i) any settlement, judgment, labor controversy, litigation, action, suit or proceeding affecting the Transaction Documents or the Borrower in excess of \$500,000 shall be deemed to be expected to have such a Material Adverse Effect and (ii) any settlement, judgment, labor controversy, litigation, action, suit or proceeding affecting the Servicer or the Transferor or any of their Affiliates (other than the Borrower) in excess of \$1,000,000 shall be deemed to be expected to have such a Material Adverse Effect.

(k) Deposit of Collections. The Servicer shall promptly (but in no event later than one Business Day after receipt) deposit or cause to be deposited into the Collection Account any and all Available Collections received by the Borrower, the Servicer or any of their Affiliates.

(l) Loan Asset Register.

(i) The Servicer shall maintain, or cause to be maintained, with respect to each Noteless Loan Asset a register (which may be in physical or electronic form and readily identifiable as the loan asset register) (each, a "Loan Asset Register") in which it will record, or cause to be recorded, (v) the amount of such Noteless Loan Asset, (w) the amount of any principal or interest due and payable or to become due and payable from the Obligor thereunder, (x) the amount of any sum in respect of such Noteless Loan Asset received from the Obligor, (y) the date of origination of such Noteless Loan Asset and (z) the maturity date of such Noteless Loan Asset.

(ii) At any time a Noteless Loan Asset is included as part of the Collateral Portfolio pursuant to this Agreement, the Servicer shall deliver to the Administrative Agent, the Collateral Agent and the Collateral Custodian a copy of the

related Loan Asset Register, together with a certificate of a Responsible Officer of the Servicer (in the form of Exhibit R) certifying to the accuracy of such Loan Asset Register as of the applicable Cut-Off Date.

(m) Special Purpose Entity Requirements. The Servicer shall take such actions as are necessary to cause the Borrower to be in compliance with the special purpose entity requirements set forth in Sections 5.01(a) and (b) and 5.02(a) and (b).

(n) Accounting Changes. As soon as possible and in any event within three Business Days after the effective date thereof, the Servicer will provide to the Administrative Agent and the Lender Agents notice of any change in the accounting policies of the Servicer.

(o) Proceedings Related to the Collateral Portfolio. The Servicer shall notify the Administrative Agent and each Lender Agent as soon as possible and in any event within three Business Days after any Responsible Officer of the Servicer receives notice or has actual knowledge of any settlement of, judgment (including a judgment with respect to the liability phase of a bifurcated trial) in or commencement of any labor controversy, litigation, action, suit or proceeding before any court or governmental department, commission, board, bureau, agency or instrumentality, domestic or foreign, that could reasonably be expected to have a Material Adverse Effect on the interests of the Collateral Agent or the Secured Parties in, to and under the Collateral Portfolio. For purposes of this Section 5.03(o), any settlement, judgment, labor controversy, litigation, action, suit or proceeding affecting the Collateral Portfolio or the Collateral Agent's or the Secured Parties' interest in the Collateral Portfolio in excess of \$1,000,000 or more shall be deemed to be expected to have such a Material Adverse Effect.

(p) Compliance with Legal Opinions. The Servicer shall take all other actions necessary to maintain the accuracy of the factual assumptions set forth in the legal opinions of Rutan & Tucker, LLP, as special counsel to the Servicer, issued in connection with the Transaction Documents and relating to the issues of substantive consolidation and true sale of the Loan Assets.

(q) Instructions to Agents and Obligors. The Servicer shall direct, or shall cause the Transferor to direct, any agent or administrative agent for any Loan Asset to remit all payments and collections with respect to such Loan Asset, and, if applicable, to direct the Obligor with respect to such Loan Asset to remit all such payments and collections with respect to such Loan Asset directly to the Collection Account. The Borrower and the Servicer shall take commercially reasonable steps to ensure, and shall cause the Transferor to take commercially reasonable steps to ensure, that only funds constituting payments and collections relating to Loan Assets shall be deposited into the Collection Account.

(r) Capacity as Servicer. The Servicer will ensure that, at all times when it is dealing with or in connection with the Loan Assets in its capacity as Servicer, it holds itself out as Servicer, and not in any other capacity.

(s) Notice of Breaches of Representations and Warranties under the Purchase and Sale Agreement. The Servicer confirms and agrees that the Servicer will, upon receipt of notice or discovery thereof, promptly send to the Administrative Agent, each Lender Agent and

the Collateral Agent a notice of (i) any breach of any representation, warranty, agreement or covenant under the Purchase and Sale Agreement or (ii) any event or occurrence that, upon notice, or upon the passage of time or both, would constitute such a breach, in each case, promptly upon learning thereof.

(t) Audits. Prior to the Closing Date and periodically thereafter at the discretion of the Administrative Agent and each Lender Agent, the Servicer shall allow the Administrative Agent and each Lender Agent (during normal office hours and upon advance notice) to review the Servicer's collection and administration of the Collateral Portfolio in order to assess compliance by the Servicer with the Servicing Standard, as well as with the Transaction Documents and to conduct an audit of the Collateral Portfolio and Required Loan Documents in conjunction with such a review. Such review shall be reasonable in scope and shall be completed in a reasonable period of time.

(u) Notice of Breaches of Representations and Warranties under this Agreement. The Servicer shall promptly notify the Administrative Agent and the Lender Agents if any representation or warranty set forth in Section 4.03 was incorrect at the time it was given or deemed to have been given and at the same time deliver to the Collateral Agent, the Administrative Agent and the Lender Agents a written notice setting forth in reasonable detail the nature of such facts and circumstances. In particular, but without limiting the foregoing, the Servicer shall notify the Administrative Agent and the Lender Agents in the manner set forth in the preceding sentence before any Cut-Off Date of any facts or circumstances within the knowledge of the Servicer which would render any of the said representations and warranties untrue at the date when such representations and warranties were made or deemed to have been made.

(v) Insurance Policies. The Servicer has caused, and will cause, to be performed any and all acts reasonably required to be performed to preserve the rights and remedies of the Collateral Agent and the Secured Parties in any Insurance Policies applicable to Loan Assets (to the extent the Servicer or an Affiliate of the Servicer is the agent or servicer under the applicable Loan Agreement) including, without limitation, in each case, any necessary notifications of insurers, assignments of policies or interests therein, and establishments of co-insured, joint loss payee and mortgagee rights in favor of the Collateral Agent and the Secured Parties; *provided* that, unless the Borrower is the sole lender under such Loan Agreement, the Servicer shall only take such actions that are customarily taken by or on behalf of a lender in a syndicated loan facility to preserve the rights of such lender.

(w) Disregarded Entity. The Servicer shall cause the Borrower to be disregarded as an entity separate from its owner pursuant to Treasury Regulation Section 301.7701-3(b) and shall cause that neither the Borrower nor any other Person on its behalf shall make an election to be treated as other than an entity disregarded from its owner under Treasury Regulation Section 301.7701-3(c).

SECTION 5.04 Negative Covenants of the Servicer.

From the Closing Date until the Collection Date:



(a) Mergers, Acquisition, Sales, etc. The Servicer will not consolidate with or merge into any other Person or convey or transfer its properties and assets substantially as an entirety to any Person, unless the Servicer is the surviving entity and unless:

(i) the Servicer has delivered to the Administrative Agent and each Lender Agent an Officer's Certificate and an Opinion of Counsel each stating that any such consolidation, merger, conveyance or transfer and any supplemental agreement executed in connection therewith comply with this Section 5.04 and that all conditions precedent herein provided for relating to such transaction have been complied with and, in the case of the Opinion of Counsel, that such supplemental agreement is legal, valid and binding with respect to the Servicer and such other matters as the Administrative Agent may reasonably request;

(ii) the Servicer shall have delivered notice of such consolidation, merger, conveyance or transfer to the Administrative Agent and each Lender Agent;

(iii) after giving effect thereto, no Event of Default or Servicer Termination Event or event that with notice or lapse of time would constitute either an Event of Default or a Servicer Termination Event shall have occurred; and

(iv) the Administrative Agent shall have consented in writing to such consolidation, merger, conveyance or transfer.

Notwithstanding the foregoing or anything to the contrary contained in this Agreement, from time to time, without the consent or approval of the Administrative Agent or any Secured Party or the satisfaction of any of the conditions set forth in clauses (i), (iii) or (iv) above, the Servicer may consolidate or merge with any Fifth Street Merger Party, and/or any Fifth Street Merger Party may convey or transfer its properties and assets substantially as an entirety to the Servicer (any such transaction, a "Fifth Street Affiliate Merger Transaction"); *provided* that, in each case, the Servicer is the surviving entity in any such transaction or transactions; *provided, further*, that the Servicer shall, upon the request of the Administrative Agent, deliver an Opinion of Counsel that this Agreement and any supplemental agreement executed in connection therewith is legal, valid and binding with respect to the Servicer after the consummation of such Fifth Street Affiliate Merger Transaction.

(b) Change of Name or Location of Loan Asset Files. The Servicer shall not (x) change its name, move the location of its principal place of business and chief executive office, change the offices where it keeps records concerning the Collateral Portfolio from the address set forth under its name on the signature pages hereto, or change the jurisdiction of its formation, or (y) move, or consent to the Collateral Custodian moving, the Required Loan Documents and Loan Asset Files from the location thereof on the initial Advance Date, unless the Administrative Agent shall consent of such move in writing and the Servicer shall provide the Administrative Agent with such Opinions of Counsel and other documents and instruments as the Administrative Agent may request in connection therewith and has taken all actions required under the UCC of each relevant jurisdiction in order to continue the first priority perfected security interest of the Collateral Agent, for the benefit of the Secured Parties, in the Collateral Portfolio.

(c) Change in Payment Instructions to Obligors. The Servicer will not make any change in its instructions to Obligors regarding payments to be made with respect to the Collateral Portfolio to the Collection Account, unless the Administrative Agent has consented to such change.

(d) Extension or Amendment of Loan Assets. The Servicer will not, except as otherwise permitted in Section 6.04(a), extend, amend or otherwise modify the terms of any Loan Asset (including the Underlying Collateral).

(e) Taxable Mortgage Pool Matters. The Servicer will manage the portfolio and advise the Borrower with respect to purchases from the Transferor so as to not at any time allow the sum of the Outstanding Balances of all Loan Assets owned by the Borrower and that are principally secured by an interest in real property (within the meaning of Treasury Regulation Section 301.7701(i)-1(d)(3)) to exceed 35% of the aggregate Outstanding Balance of all Loan Assets.

(f) Allocation of Charges. There will not be any agreement or understanding between the Servicer and the Borrower (other than as expressly set forth herein or as consented to by the Administrative Agent), providing for the allocation or sharing of obligations to make payments or otherwise in respect of any Taxes, fees, assessments or other governmental charges; *provided* that it is understood and acknowledged that the Borrower will be consolidated with the Servicer for tax purposes.

SECTION 5.05 Affirmative Covenants of the Collateral Agent.

From the Closing Date until the Collection Date:

(a) Compliance with Law. The Collateral Agent will comply in all material respects with all Applicable Law.

(b) Preservation of Existence. The Collateral Agent will preserve and maintain its existence, rights, franchises and privileges in the jurisdiction of its formation and qualify and remain qualified in good standing in each jurisdiction where failure to preserve and maintain such existence, rights, franchises, privileges and qualification could reasonably be expected to have a Material Adverse Effect.

SECTION 5.06 Negative Covenants of the Collateral Agent.

From the Closing Date until the Collection Date, the Collateral Agent will not make any changes to the Collateral Agent Fees without the prior written approval of the Administrative Agent.

SECTION 5.07 Affirmative Covenants of the Collateral Custodian.

From the Closing Date until the Collection Date:

(a) Compliance with Law. The Collateral Custodian will comply in all material respects with all Applicable Law.

(b) Preservation of Existence. The Collateral Custodian will preserve and maintain its existence, rights, franchises and privileges in the jurisdiction of its formation and qualify and remain qualified in good standing in each jurisdiction where failure to preserve and maintain such existence, rights, franchises, privileges and qualification could reasonably be expected to have a Material Adverse Effect.

(c) Location of Required Loan Documents. Subject to Article XII of this Agreement, the Required Loan Documents shall remain at all times in the possession of the Collateral Custodian at the address set forth under its name on the signature pages hereto unless notice of a different address is given in accordance with the terms hereof or unless the Administrative Agent agrees to allow certain Required Loan Documents to be released to the Servicer on a temporary basis in accordance with the terms hereof, except as such Required Loan Documents may be released pursuant to the terms of this Agreement.

SECTION 5.08 Negative Covenants of the Collateral Custodian.

From the Closing Date until the Collection Date:

(a) Required Loan Documents. The Collateral Custodian will not dispose of any documents constituting the Required Loan Documents in any manner that is inconsistent with the performance of its obligations as the Collateral Custodian pursuant to this Agreement and will not dispose of any Collateral Portfolio except as contemplated by this Agreement.

(b) No Changes in Collateral Custodian Fees. The Collateral Custodian will not make any changes to the Collateral Custodian Fees without the prior written approval of the Administrative Agent.

SECTION 5.09 Covenants of the Borrower Relating to Hedging of Loan Assets.

(a) At any time prior to an Event of Default, the Borrower may enter into Hedge Agreements for certain Fixed Rate Loan Assets with a Hedge Counterparty with the prior consent of the Administrative Agent. After an Event of Default or at any time after the Spread Differential has fallen below 6.00%, the Administrative Agent may, at its sole discretion, direct the Borrower to enter into Hedge Transactions for certain Fixed Rate Loan Assets.

(b) As additional security hereunder, the Borrower hereby assigns to the Collateral Agent, for the benefit of the Secured Parties, all right, title and interest of the Borrower (but none of the obligations) in each Hedging Agreement, each Hedge Transaction, and all present and future amounts payable by a Hedge Counterparty to the Borrower under or in connection with the respective Hedging Agreement and Hedge Transaction(s) with that Hedge Counterparty ("Hedge Collateral"), and grants a security interest to the Collateral Agent, for the benefit of the Secured Parties, in the Hedge Collateral. The Borrower acknowledges that as a result of such assignment the Borrower may not, without the prior written consent of the Administrative Agent and the Collateral Agent, exercise any rights under any Hedging Agreement or Hedge Transaction, except for the Borrower's right under any Hedging Agreement to enter into Hedge Transactions in order to meet the Borrower's obligations under Section 5.09(a) hereof. Nothing herein shall have the effect of releasing the Borrower from any of its obligations under any Hedging Agreement or any Hedge Transaction, nor be construed as

requiring the consent of the Administrative Agent, the Lenders, the Lender Agents, the Collateral Agent or any Secured Party for the performance by the Borrower of any such obligations.

(c) The Borrower shall, promptly upon execution thereof, provide to the Administrative Agent and the Collateral Agent a copy of any Hedging Agreement entered into in connection with this Agreement.

ARTICLE VI.

ADMINISTRATION AND SERVICING OF CONTRACTS

SECTION 6.01 Appointment and Designation of the Servicer.

(a) Initial Servicer. The Borrower, each Lender Agent and the Administrative Agent hereby appoint Fifth Street, pursuant to the terms and conditions of this Agreement, as Servicer, with the authority to service, administer and exercise rights and remedies, on behalf of the Borrower, in respect of the Collateral Portfolio. Until the Administrative Agent gives Fifth Street a Servicer Termination Notice, Fifth Street hereby accepts such appointment and agrees to perform the duties and responsibilities of the Servicer pursuant to the terms hereof. The Servicer and the Borrower hereby acknowledge that the Administrative Agent and the Secured Parties are third party beneficiaries of the obligations undertaken by the Servicer hereunder.

(b) Servicer Termination Notice. The Borrower, the Servicer, each Lender Agent, and the Administrative Agent hereby agree that, upon the occurrence of a Servicer Termination Event, the Administrative Agent, by written notice to the Servicer (with a copy to the Collateral Agent) (a "Servicer Termination Notice"), may terminate all of the rights, obligations, power and authority of the Servicer under this Agreement. On and after the receipt by the Servicer of a Servicer Termination Notice pursuant to this Section 6.01(b), the Servicer shall continue to perform all servicing functions under this Agreement until the date specified in the Servicer Termination Notice or otherwise specified by the Administrative Agent in writing or, if no such date is specified in such Servicer Termination Notice or otherwise specified by the Administrative Agent, until a date mutually agreed upon by the Servicer and the Administrative Agent and shall be entitled to receive, to the extent of funds available therefor pursuant to Section 2.04, the Servicing Fees therefor until such date. After such date, the Servicer agrees that it will terminate its activities as Servicer hereunder in a manner that the Administrative Agent believes will facilitate the transition of the performance of such activities to a successor Servicer, and the successor Servicer shall assume each and all of the Servicer's obligations to service and administer the Collateral Portfolio, on the terms and subject to the conditions herein set forth, and the Servicer shall use its best efforts to assist the successor Servicer in assuming such obligations.

(c) Appointment of Replacement Servicer. At any time following the delivery of a Servicer Termination Notice, the Administrative Agent may, at its discretion, (i) appoint Wachovia (or an Affiliate thereof) as Servicer under this Agreement and, in such case, all authority, power, rights and obligations of the Servicer shall pass to and be vested in Wachovia (or an Affiliate thereof) or (ii) appoint a new Servicer (the "Replacement Servicer"), which appointment shall take effect upon the Replacement Servicer accepting such appointment

by a written assumption in a form satisfactory to the Administrative Agent in its sole discretion. In the event that Wachovia (or an Affiliate thereof) or a Replacement Servicer has not accepted its appointment at the time when the Servicer ceases to act as Servicer, the Administrative Agent shall petition a court of competent jurisdiction to appoint any established financial institution, having a net worth of not less than United States \$50,000,000 and whose regular business includes the servicing of Collateral Portfolio, as the Replacement Servicer hereunder.

(d) Liabilities and Obligations of Replacement Servicer. Upon its appointment, Wachovia (or an Affiliate thereof) or the Replacement Servicer, as applicable, shall be the successor in all respects to the Servicer with respect to servicing functions under this Agreement and shall be subject to all the responsibilities, duties and liabilities relating thereto placed on the Servicer by the terms and provisions hereof, and all references in this Agreement to the Servicer shall be deemed to refer to Wachovia (or an Affiliate thereof) or the Replacement Servicer, as applicable; *provided*, that Wachovia (or an Affiliate thereof) or Replacement Servicer, as applicable, shall have (i) no liability with respect to any action performed by the terminated Servicer prior to the date that Wachovia (or an Affiliate thereof) or Replacement Servicer, as applicable, becomes the successor to the Servicer or any claim of a third party based on any alleged action or inaction of the terminated Servicer, (ii) no obligation to perform any advancing obligations, if any, of the Servicer unless it elects to in its sole discretion, (iii) no obligation to pay any Taxes required to be paid by the Servicer (*provided* that Wachovia (or an Affiliate thereof) or Replacement Servicer, as applicable, shall pay any income Taxes for which it is liable), (iv) no obligation to pay any of the fees and expenses of any other party to the transactions contemplated hereby, and (v) no liability or obligation with respect to any Servicer indemnification obligations of any prior Servicer, including the original Servicer. The indemnification obligations of Wachovia (or an Affiliate thereof) or the Replacement Servicer, as applicable, upon becoming a Replacement Servicer, are expressly limited to those arising on account of its failure to act in good faith and with reasonable care under the circumstances. In addition, Wachovia (or an Affiliate thereof) or Replacement Servicer, as applicable, shall have no liability relating to the representations and warranties of the Servicer contained in Section 4.03.

(e) Authority and Power. All authority and power granted to the Servicer under this Agreement shall automatically cease and terminate upon termination of this Agreement and shall pass to and be vested in the Borrower and, without limitation, the Borrower is hereby authorized and empowered to execute and deliver, on behalf of the Servicer, as attorney-in-fact or otherwise, all documents and other instruments, and to do and accomplish all other acts or things necessary or appropriate to effect the purposes of such transfer of servicing rights. The Servicer agrees to cooperate with the Borrower in effecting the termination of the responsibilities and rights of the Servicer to conduct servicing of the Collateral Portfolio.

(f) Subcontracts. The Servicer may, with the prior written consent of the Administrative Agent, subcontract with any other Person for servicing, administering or collecting the Collateral Portfolio; *provided*, that (i) the Servicer shall select any such Person with reasonable care and shall be solely responsible for the fees and expenses payable to any such Person, (ii) the Servicer shall not be relieved of, and shall remain liable for, the performance of the duties and obligations of the Servicer pursuant to the terms hereof without regard to any subcontracting arrangement and (iii) any such subcontract shall be terminable upon

the occurrence of a Servicer Termination Event. The Administrative Agent hereby acknowledges that the Servicer has engaged Fifth Street Management LLC in accordance with terms of the Management Agreement, a copy of which has been previously delivered to the Administrative Agent.

(g) Waiver. The Borrower acknowledges that the Administrative Agent or any of its Affiliates may act as the Collateral Agent and/or the Servicer, and the Borrower waives any and all claims against the Administrative Agent, each Lender Agent or any of their respective Affiliates, the Collateral Agent and the Servicer (other than claims relating to such party's gross negligence or willful misconduct) relating in any way to the custodial or collateral administration functions having been performed by the Administrative Agent or any of its Affiliates in accordance with the terms and provisions (including the standard of care) set forth in the Transaction Documents.

SECTION 6.02 Duties of the Servicer.

(a) Duties. The Servicer shall take or cause to be taken all such actions as may be necessary or advisable to service, administer and collect on the Collateral Portfolio from time to time, all in accordance with Applicable Law and the Servicing Standard. Prior to the occurrence of a Servicer Termination Event, but subject to the terms of this Agreement (including, without limitation, Section 6.04), the Servicer has the sole and exclusive authority to make any and all decisions with respect to the Collateral Portfolio and take or refrain from taking any and all actions with respect to the Collateral Portfolio. Without limiting the foregoing, the duties of the Servicer shall include the following:

(i) supervising the Collateral Portfolio, including communicating with Obligor, executing amendments, providing consents and waivers, enforcing and collecting on the Collateral Portfolio and otherwise managing the Collateral Portfolio on behalf of the Borrower;

(ii) maintaining all necessary servicing records with respect to the Collateral Portfolio and providing such reports to the Administrative Agent and each Lender Agent (with a copy to the Collateral Agent and the Collateral Custodian) in respect of the servicing of the Collateral Portfolio (including information relating to its performance under this Agreement) as may be required hereunder or as the Administrative Agent or any Lender Agent may reasonably request;

(iii) maintaining and implementing administrative and operating procedures (including, without limitation, an ability to recreate servicing records evidencing the Collateral Portfolio in the event of the destruction of the originals thereof) and keeping and maintaining all documents, books, records and other information reasonably necessary or advisable for the collection of the Collateral Portfolio;

(iv) promptly delivering to the Administrative Agent, each Lender Agent, the Collateral Agent or the Collateral Custodian, from time to time, such information and servicing records (including information relating to its performance

under this Agreement) as the Administrative Agent, each Lender Agent, Collateral Custodian or the Collateral Agent may from time to time reasonably request;

(v) identifying each Loan Asset clearly and unambiguously in its servicing records to reflect that such Loan Asset is owned by the Borrower and that the Borrower is Pledging a security interest therein to the Secured Parties pursuant to this Agreement;

(vi) notifying the Administrative Agent and each Lender Agent of any material action, suit, proceeding, dispute, offset, deduction, defense or counterclaim (1) that is or is threatened to be asserted by an Obligor with respect to any Loan Asset (or portion thereof) of which it has knowledge or has received notice; or (2) that could reasonably be expected to have a Material Adverse Effect;

(vii) using its best efforts to maintain the perfected security interest of the Collateral Agent, for the benefit of the Secured Parties, in the Collateral Portfolio;

(viii) maintaining the Loan Asset File with respect to Loan Assets included as part of the Collateral Portfolio; *provided* that, so long as the Servicer is in possession of any Required Loan Documents, the Servicer will hold such Required Loan Documents in a fireproof safe or fireproof file cabinet;

(ix) directing the Collateral Agent to make payments pursuant to the terms of the Servicing Report in accordance with Section 2.04;

(x) directing the sale or substitution of Collateral Portfolio in accordance with Section 2.07;

(xi) providing assistance to the Borrower with respect to the purchase and sale of and payment for the Loan Assets;

(xii) instructing the Obligors and the administrative agents on the Loan Assets to make payments directly into the Collection Account established and maintained with the Collateral Agent;

(xiii) delivering the Loan Asset Files and the Loan Asset Schedule to the Collateral Custodian; and

(xiv) complying with such other duties and responsibilities as may be required of the Servicer by this Agreement.

It is acknowledged and agreed that in circumstances in which a Person other than the Borrower, the Transferor (so long as the Transferor is also the Servicer) or the Servicer acts as lead agent with respect to any Loan Asset, the Servicer shall perform its servicing duties hereunder only to the extent a lender under the related loan syndication Loan Agreements has the right to do so. Notwithstanding anything to the contrary contained herein, it is acknowledged and agreed that the performance by the Servicer of its duties hereunder shall be limited insofar as such performance would conflict with or result in a breach of any of the express terms of the

related Loan Agreements; *provided* that the Servicer shall (a) provide prompt written notice to the Administrative Agent upon becoming aware of such conflict or breach, (b) have determined that there is no other commercially reasonable performance that it could render consistent with the express terms of the Loan Agreements which would result in all or a portion of the servicing duties being performed in accordance with this Agreement, and (c) undertake all commercially reasonable efforts to mitigate the effects of such non-performance including performing as much of the servicing duties as possible and performing such other commercially reasonable and/or similar duties consistent with the terms of the Loan Agreements.

(b) Notwithstanding anything to the contrary contained herein, the exercise by the Administrative Agent, the Collateral Agent, each Lender Agent and the Secured Parties of their rights hereunder shall not release the Servicer, the Transferor or the Borrower from any of their duties or responsibilities with respect to the Collateral Portfolio. The Secured Parties, the Administrative Agent, each Lender Agent and the Collateral Agent shall not have any obligation or liability with respect to any Collateral Portfolio, nor shall any of them be obligated to perform any of the obligations of the Servicer hereunder.

(c) Any payment by an Obligor in respect of any indebtedness owed by it to the Transferor or the Borrower shall, except as otherwise specified by such Obligor or otherwise required by contract or law and unless otherwise instructed by the Administrative Agent, be applied as a collection of a payment by such Obligor (starting with the oldest such outstanding payment due) to the extent of any amounts then due and payable thereunder before being applied to any other receivable or other obligation of such Obligor.

SECTION 6.03 Authorization of the Servicer.

(a) Each of the Borrower, the Administrative Agent, each Lender Agent, each Lender and the Hedge Counterparty hereby authorizes the Servicer (including any successor thereto) to take any and all reasonable steps in its name and on its behalf necessary or desirable in the determination of the Servicer and not inconsistent with the sale of the Collateral Portfolio by the Transferor to the Borrower under the Purchase and Sale Agreement and, thereafter, the Pledge by the Borrower to the Collateral Agent on behalf of the Secured Parties hereunder, to collect all amounts due under any and all Collateral Portfolio, including, without limitation, endorsing any of their names on checks and other instruments representing Interest Collections and Principal Collections, executing and delivering any and all instruments of satisfaction or cancellation, or of partial or full release or discharge, and all other comparable instruments, with respect to the Collateral Portfolio and, after the delinquency of any Collateral Portfolio and to the extent permitted under and in compliance with Applicable Law, to commence proceedings with respect to enforcing payment thereof, to the same extent as the Transferor could have done if it had continued to own such Collateral Portfolio. The Transferor, the Borrower and the Collateral Agent on behalf of the Secured Parties shall furnish the Servicer (and any successors thereto) with any powers of attorney and other documents necessary or appropriate to enable the Servicer to carry out its servicing and administrative duties hereunder, and shall cooperate with the Servicer to the fullest extent in order to ensure the collectability of the Collateral Portfolio. In no event shall the Servicer be entitled to make the Secured Parties, the Administrative Agent, the Collateral Agent, any Lender, any Lender Agent or any Hedge Counterparty a party to any litigation without such party's express prior written consent, or to make the Borrower a party to



any litigation (other than any routine foreclosure or similar collection procedure) without the Administrative Agent's and each Lender Agent's consent.

(b) After the declaration of the Facility Maturity Date, at the direction of the Administrative Agent, the Servicer shall take such action as the Administrative Agent may deem necessary or advisable to enforce collection of the Collateral Portfolio; *provided*, that the Administrative Agent may, at any time that an Event of Default has occurred, notify any Obligor with respect to any Collateral Portfolio of the assignment of such Collateral Portfolio to the Collateral Agent on behalf of the Secured Parties and direct that payments of all amounts due or to become due be made directly to the Administrative Agent or any servicer, collection agent or account designated by the Administrative Agent and, upon such notification and at the expense of the Borrower, the Administrative Agent may enforce collection of any such Collateral Portfolio, and adjust, settle or compromise the amount or payment thereof.

SECTION 6.04 Collection of Payments; Accounts.

(a) Collection Efforts, Modification of Collateral Portfolio. The Servicer will use its commercially reasonable efforts and judgment to collect or cause to be collected, all payments called for under the terms and provisions of the Loan Assets included in the Collateral Portfolio as and when the same become due, all in accordance with the Servicing Standard. The Servicer may not waive, modify or otherwise vary any provision of an item of Collateral Portfolio in a manner that would impair the collectability of the Collateral Portfolio or in any manner contrary to the Servicing Standard.

(b) Acceleration. If consistent with the Servicing Standard, the Servicer shall accelerate or vote to accelerate, as applicable, the maturity of all or any Scheduled Payments and other amounts due under any Loan Asset promptly after such Loan Asset becomes defaulted.

(c) Taxes and other Amounts. The Servicer will use its best efforts to collect all payments with respect to amounts due for Taxes, assessments and insurance premiums relating to each Loan Asset to the extent required to be paid to the Borrower for such application under the applicable Loan Agreement and remit such amounts to the appropriate Governmental Authority or insurer as required by the Loan Agreements.

(d) Payments to Collection Account. On or before the applicable Cut-Off Date, the Servicer shall have instructed all Obligors to make all payments in respect of the Collateral Portfolio directly to the Collection Account; *provided* that the Servicer is not required to so instruct any Obligor which is solely a guarantor or other surety (or an Obligor that is not designated as the "lead borrower" or another such similar term) unless and until the Servicer calls on the related guaranty or secondary obligation.

(e) Controlled Accounts. Each of the parties hereto hereby agrees that (i) each Controlled Account is intended to be a "securities account" or "deposit account" within the meaning of the UCC and (ii) except as otherwise expressly provided herein and in the Collection Account Agreement or Unfunded Exposure Account Agreement, as applicable, prior to the delivery of a Notice of Exclusive Control (as defined in the Collection Account Agreement or Unfunded Exposure Account Agreement, as applicable), the Borrower, the Servicer and the

Collateral Agent (acting at the direction of the Administrative Agent) shall be entitled to exercise the rights that comprise each Financial Asset held in each Controlled Account which is a securities account and have the right to direct the disposition of funds in any Controlled Account which is a deposit account; *provided* that after the delivery of a Notice of Exclusive Control (as defined in the Collection Account Agreement or Unfunded Exposure Account Agreement, as applicable), such rights shall be exclusively held by the Collateral Agent (acting at the direction of the Administrative Agent). Each of the parties hereto hereby agrees to cause the securities intermediary that holds any money or other property for the Borrower in a Controlled Account that is a securities account to agree with the parties hereto that (A) the cash and other property (subject to Section 6.04(f) below with respect to any property other than investment property, as defined in Section 9-102(a)(49) of the UCC) is to be treated as a Financial Asset under Article 8 of the UCC and (B) regardless of any provision in any other agreement, for purposes of the UCC, with respect to the Controlled Accounts, New York shall be deemed to be the Account Bank's jurisdiction (within the meaning of Section 9-304 of the UCC) and the securities intermediary's jurisdiction (within the meaning of Section 8-110 of the UCC). All securities or other property underlying any Financial Assets credited to the Controlled Accounts in the form of securities or instruments shall be registered in the name of the Account Bank or if in the name of the Borrower or the Collateral Agent, Indorsed to the Account Bank, Indorsed in blank, or credited to another securities account maintained in the name of the Account Bank, and in no case will any Financial Asset credited to the Controlled Accounts be registered in the name of the Borrower, payable to the order of the Borrower or specially Indorsed to the Borrower, except to the extent the foregoing have been specially Indorsed to the Account Bank or Indorsed in blank.

(f) Loan Agreements. Notwithstanding any term hereof (or any term of the UCC that might otherwise be construed to be applicable to a "securities intermediary" as defined in the UCC) to the contrary, none of the Collateral Agent, the Collateral Custodian nor any securities intermediary shall be under any duty or obligation in connection with the acquisition by the Borrower, or the grant by the Borrower to the Collateral Agent, of any Loan Asset in the nature of a loan or a participation in a loan to examine or evaluate the sufficiency of the documents or instruments delivered to it by or on behalf of the Borrower under the related Loan Agreements, or otherwise to examine the Loan Agreements, in order to determine or compel compliance with any applicable requirements of or restrictions on transfer (including without limitation any necessary consents). The Collateral Custodian shall hold any Instrument delivered to it evidencing any Loan Asset granted to the Collateral Agent hereunder as custodial agent for the Collateral Agent in accordance with the terms of this Agreement.

(g) Adjustments. If (i) the Servicer makes a deposit into the Collection Account in respect of a Interest Collection or Principal Collection of a Loan Asset and such Interest Collection or Principal Collection was received by the Servicer in the form of a check that is not honored for any reason or (ii) the Servicer makes a mistake with respect to the amount of any Interest Collection or Principal Collection and deposits an amount that is less than or more than the actual amount of such Interest Collection or Principal Collection, the Servicer shall appropriately adjust the amount subsequently deposited into the Collection Account to reflect such dishonored check or mistake. Any Scheduled Payment in respect of which a dishonored check is received shall be deemed not to have been paid.

SECTION 6.05 Realization Upon Loan Assets. The Servicer will use reasonable efforts consistent with the Servicing Standard to foreclose upon or repossess, as applicable, or otherwise comparably convert the ownership of any Underlying Collateral relating to a defaulted Loan Asset as to which no satisfactory arrangements can be made for collection of delinquent payments. The Servicer will comply with the Servicing Standard and Applicable Law in realizing upon such Underlying Collateral, and employ practices and procedures including reasonable efforts consistent with the Servicing Standard to enforce all obligations of Obligors foreclosing upon, repossessing and causing the sale of such Underlying Collateral at public or private sale in circumstances other than those described in the preceding sentence. Without limiting the generality of the foregoing, unless the Administrative Agent has specifically given instruction to the contrary, the Servicer may cause the sale of any such Underlying Collateral to the Servicer or its Affiliates for a purchase price equal to the then fair value thereof, any such sale to be evidenced by a certificate of a Responsible Officer of the Servicer delivered to the Administrative Agent setting forth the Loan Asset, the Underlying Collateral, the sale price of the Underlying Collateral and certifying that such sale price is the fair value of such Underlying Collateral. In any case in which any such Underlying Collateral has suffered damage, the Servicer will not expend funds in connection with any repair or toward the foreclosure or repossession of such Underlying Collateral unless it reasonably determines that such repair and/or foreclosure or repossession will increase the Recoveries by an amount greater than the amount of such expenses. The Servicer will remit to the Collection Account the Recoveries received in connection with the sale or disposition of Underlying Collateral relating to a defaulted Loan Asset.

SECTION 6.06 Servicing Compensation. As compensation for its activities hereunder and reimbursement for its expenses, the Servicer shall be entitled to be paid the Servicing Fees and reimbursed its reasonable out-of-pocket expenses as provided in Section 2.04.

SECTION 6.07 Payment of Certain Expenses by Servicer. The Servicer will be required to pay all expenses incurred by it in connection with its activities under this Agreement, including fees and disbursements of its independent accountants, Taxes imposed on the Servicer, expenses incurred by the Servicer in connection with payments and reports pursuant to this Agreement, and all other fees and expenses not expressly stated under this Agreement for the account of the Borrower. The Servicer will be required to pay all reasonable fees and expenses owing to any bank or trust company in connection with the maintenance of the Controlled Accounts. The Servicer may be reimbursed for any reasonable out-of-pocket expenses incurred hereunder (including out-of-pocket expenses paid by the Servicer on behalf of the Borrower), subject to the availability of funds pursuant to Section 2.04; provided, that, to the extent funds are not available for such reimbursement, the Servicer shall be required to pay such expenses for its own account and shall not be entitled to any payment therefor other than the Servicing Fees.

SECTION 6.08 Reports to the Administrative Agent; Account Statements; Servicing Information.

(a) Notice of Borrowing. On each Advance Date and on each reduction of Advances Outstanding pursuant to Section 2.18, the Borrower (and the Servicer on its behalf) will provide a Notice of Borrowing or a Notice of Reduction, as applicable, and a Borrowing

Base Certificate, each updated as of such date, to the Administrative Agent and each Lender Agent (with a copy to the Collateral Agent).

(b) Servicing Report. On each Reporting Date and each Advance Date, the Servicer will provide to the Borrower, each Lender Agent, the Administrative Agent, the Collateral Agent and any Liquidity Bank, a monthly statement including (i) a Borrowing Base Certificate calculated as of the most recent Determination Date, (ii) a summary prepared with respect to each Obligor and with respect to each Loan Asset for such Obligor prepared as of the most recent Determination Date that will be required to set forth only (x) calculations of the Net Leverage Ratio and the Interest Coverage Ratio for each such Loan Asset for the most recently ended Relevant Test Period for each such Loan Asset and (y) whether or not each such Loan Asset shall have become subject to an amendment, restatement, supplement, waiver or other modification and whether such amendment, restatement, supplement, waiver or other modification is a Material Modification and (iii) amounts to be remitted pursuant to Section 2.04 to the applicable parties (which shall include any applicable wiring instructions of the parties receiving payment) (such monthly statement, a "Servicing Report"), with respect to related calendar month signed by a Responsible Officer of the Servicer and the Borrower and substantially in the form of Exhibit L.

(c) Servicer's Certificate. Together with each Servicing Report, the Servicer shall submit to the Administrative Agent, each Lender Agent, the Collateral Agent and any Liquidity Bank a certificate substantially in the form of Exhibit M (a "Servicer's Certificate"), signed by a Responsible Officer of the Servicer, which shall include a certification by such Responsible Officer that no Event of Default or Unmatured Event of Default has occurred.

(d) Financial Statements. The Servicer will submit to the Administrative Agent, each Lender Agent, any Liquidity Bank and the Collateral Agent, (i) within 60 days after the end of each of its first three fiscal quarters (excluding the fiscal quarter ending on the date specified in clause (ii)), commencing December 31, 2009, consolidated unaudited financial statements of the Servicer for the most recent fiscal quarter, and (ii) within 90 days after the end of each fiscal year, commencing with the fiscal year ended September 30, 2009, consolidated audited financial statements of the Servicer, audited by a firm of nationally recognized independent public accountants, as of the end of such fiscal year.

(e) Tax Returns. Upon demand by the Administrative Agent, each Lender Agent or any Liquidity Bank, the Servicer shall deliver, copies of all federal, state and local tax returns and reports filed by the Borrower, the Transferor and the Servicer, or in which the Borrower, the Transferor or Servicer was included on a consolidated or combined basis (excluding sales, use and similar Taxes).

(f) Obligor Financial Statements; Valuation Reports; Other Reports. The Servicer will deliver to the Administrative Agent, the Lender Agents and the Collateral Agent, with respect to each Obligor, (i) to the extent received by the Borrower and/or the Servicer pursuant to the Loan Agreement, the complete financial reporting package with respect to such Obligor and with respect to each Loan Asset for such Obligor provided to the Borrower and/or the Servicer either monthly or quarterly, as the case may be, by such Obligor, which delivery shall be made within 10 days after Servicer's or Borrower's receipt thereof, and (ii) asset and

portfolio level monitoring reports prepared by the Servicer with respect to the Loan Assets, which delivery shall be made within 60 days of the end of each calendar month. The Servicer will promptly deliver to the Administrative Agent and any Lender Agent, upon reasonable request and to the extent received by the Borrower and/or the Servicer, all other documents and information required to be delivered by the Obligors to the Borrower with respect to any Loan Asset included in the Collateral Portfolio.

(g) Amendments to Loan Assets. The Servicer will deliver to the Administrative Agent, the Lender Agents and the Collateral Custodian a copy of any amendment, restatement, supplement, waiver or other modification to the Loan Agreement of any Loan Asset (along with any internal documents prepared by the Servicer and provided to its investment committee in connection with such amendment, restatement, supplement, waiver or other modification) within 10 Business Days of the effectiveness of such amendment, restatement, supplement, waiver or other modification.

(h) Website Access to Information. Notwithstanding anything to the contrary contained herein, information required to be delivered or submitted to any Secured Party pursuant to Section 5.03(i) and this Article VI shall be deemed to have been delivered on the date on which such information is posted on a DebtX (or other replacement) website to which the Administrative Agent and Lender Agents have access or upon receipt of such information through e-mail or another delivery method acceptable to the Administrative Agent.

SECTION 6.09 Annual Statement as to Compliance. The Servicer will provide to the Administrative Agent, each Lender Agent and the Collateral Agent within 90 days following the end of each fiscal year of the Servicer, commencing with the fiscal year ending on September 30, 2009, a fiscal report signed by a Responsible Officer of the Servicer certifying that (a) a review of the activities of the Servicer, and the Servicer's performance pursuant to this Agreement, for the fiscal period ending on the last day of such fiscal year has been made under such Person's supervision and (b) the Servicer has performed or has caused to be performed in all material respects all of its obligations under this Agreement throughout such year and no Servicer Termination Event has occurred.

SECTION 6.10 Annual Independent Public Accountant's Servicing Reports. The Servicer will cause a firm of nationally recognized independent public accountants (who may also render other services to the Servicer) to furnish to the Administrative Agent, each Lender Agent and the Collateral Agent within 90 days following the end of each fiscal year of the Servicer, commencing with the fiscal year ending on September 30, 2009, a report covering such fiscal year to the effect that such accountants have applied certain agreed-upon procedures (a copy of which procedures are attached hereto as Schedule IV, it being understood that the Servicer and the Administrative Agent will provide an updated Schedule IV reflecting any further amendments to such Schedule IV prior to the issuance of the first such agreed-upon procedures report, a copy of which shall replace the then existing Schedule IV) to certain documents and records relating to the Collateral Portfolio under any Transaction Document, compared the information contained in the Servicing Reports and the Servicer's Certificates delivered during the period covered by such report with such documents and records and that no matters came to the attention of such accountants that caused them to believe that such servicing was not conducted in compliance with this Article VI, except for such exceptions as such

accountants shall believe to be immaterial and such other exceptions as shall be set forth in such statement.

SECTION 6.11 The Servicer Not to Resign. The Servicer shall not resign from the obligations and duties hereby imposed on it except upon the Servicer's determination that (i) the performance of its duties hereunder is or becomes impermissible under Applicable Law and (ii) there is no reasonable action that the Servicer could take to make the performance of its duties hereunder permissible under Applicable Law. Any such determination permitting the resignation of the Servicer shall be evidenced as to clause (i), above by an Opinion of Counsel to such effect delivered to the Administrative Agent and each Lender Agent. No such resignation shall become effective until a Replacement Servicer shall have assumed the responsibilities and obligations of the Servicer in accordance with Section 6.02.

#### ARTICLE VII.

#### EVENTS OF DEFAULT

SECTION 7.01 Events of Default. If any of the following events (each, an "Event of Default") shall occur:

(a) the Borrower, Servicer or the Transferor defaults in making any payment required to be made under one or more agreements for borrowed money to which it is a party in an aggregate principal amount in excess of (x) \$500,000 for the Borrower or (y) \$1,000,000 for the Transferor or Servicer and any such failure continues unremedied for two Business Days and such default is not cured within the applicable cure period, if any, provided for under such agreement; or

(b) any failure on the part of the Borrower or the Transferor duly to observe or perform in any material respect any other covenants or agreements of the Borrower or the Transferor set forth in this Agreement or the other Transaction Documents to which the Borrower or the Transferor is a party and the same continues unremedied for a period of 30 days (if such failure can be remedied) after the earlier to occur of (i) the date on which written notice of such failure requiring the same to be remedied shall have been given to the Borrower or the Transferor by the Administrative Agent or Collateral Agent and (ii) the date on which the Borrower or the Transferor acquires knowledge thereof; or

(c) the occurrence of a Bankruptcy Event relating to the Transferor or the Borrower; or

(d) the occurrence of a Servicer Termination Event (provided that Fifth Street or an Affiliate is the Servicer) past any applicable notice or cure period provided in the definition thereof; or

(e) (1) the rendering of one or more final judgments, decrees or orders by a court or arbitrator of competent jurisdiction for the payment of money in excess individually or in the aggregate of \$1,000,000, against the Transferor, or \$500,000, against the Borrower and the Transferor or the Borrower, as applicable, shall not have either (i) discharged or provided for the discharge of any such judgment, decree or order in accordance with its terms or (ii) perfected a

timely appeal of such judgment, decree or order and caused the execution of same to be stayed during the pendency of the appeal or (2) the Transferor or the Borrower shall have made payments of amounts in excess of \$1,000,000 (in the case of the Transferor) or \$500,000 (in the case of the Borrower), in the settlement of any litigation, claim or dispute (excluding payments made from insurance proceeds); or

(f) the Borrower shall fail to qualify as a bankruptcy-remote entity based upon customary criteria such that reputable counsel could no longer render a substantive nonconsolidation opinion with respect to the Borrower and the Transferor; or

(g) (1) any Transaction Document, or any lien or security interest granted thereunder, shall (except in accordance with its terms), in whole or in part, terminate, cease to be effective or cease to be the legally valid, binding and enforceable obligation of the Borrower, the Transferor, or the Servicer,

(2) the Borrower, the Transferor or the Servicer or any other party shall, directly or indirectly, contest in any manner the effectiveness, validity, binding nature or enforceability of any Transaction Document or any lien or security interest thereunder, or

(3) any security interest securing any obligation under any Transaction Document shall, in whole or in part, cease to be a first priority perfected security interest except as otherwise expressly permitted to be released in accordance with the applicable Transaction Document; or

(h) the Advances Outstanding on any day exceeds the Borrowing Base and has not been remedied within three Business Days in accordance with Section 2.06; *provided* that, during the period of time that such event remains unremedied, any payments required to be made by the Servicer on a Payment Date shall be made under Section 2.04(d); or

(i) failure on the part of the Borrower, the Transferor or the Servicer to make any payment or deposit (including, without limitation, with respect to bifurcation and remittance of Interest Collections and Principal Collections or any other payment or deposit required to be made by the terms of the Transaction Documents, including, without limitation, to any Secured Party, Affected Party or Indemnified Party) required by the terms of any Transaction Document (other than Section 2.06) within two Business Days of the day such payment or deposit is required to be made; or

(j) the Borrower shall become required to register as an "investment company" within the meaning of the 1940 Act or the arrangements contemplated by the Transaction Documents shall require registration as an "investment company" within the meaning of the 1940 Act; or

(k) the Internal Revenue Service shall file notice of a lien pursuant to Section 6323 of the Code with regard to any assets of the Borrower or the Transferor and such lien shall not have been released within five Business Days, or the Pension Benefit Guaranty Corporation shall file notice of a lien pursuant to Section 4068 of ERISA with regard to any of

the assets of the Borrower or the Transferor and such lien shall not have been released within five Business Days; or

(l) any Change of Control shall occur; or

(m) any representation, warranty or certification made by the Borrower or the Transferor in any Transaction Document or in any certificate delivered pursuant to any Transaction Document shall prove to have been incorrect when made in any material respect, and continues to be unremedied for a period of 30 days after the earlier to occur of (i) the date on which written notice of such incorrectness requiring the same to be remedied shall have been given to the Borrower or the Transferor by the Administrative Agent or the Collateral Agent (which shall be given at the direction of the Administrative Agent) and (ii) the date on which a Responsible Officer of the Borrower or the Transferor acquires knowledge thereof; or

(n) failure to pay, on the Facility Maturity Date, the outstanding principal of all outstanding Advances, if any, and all Yield and all Fees accrued and unpaid thereon together with all other Obligations, including, but not limited to, any Make-Whole Premium; or

(o) an event has occurred which constitutes an Event of Default under and pursuant to the terms of the Pledge Agreement (past any applicable notice and/or cure period provided therein); or

(p) without limiting the generality of Section 7.01(j) above, failure of the Borrower to pay Yield within two Business Days of any Payment Date or within two Business Days of when otherwise due; or

(q) the Borrower ceases to have a valid, perfected ownership interest in all of the Collateral Portfolio; or

(r) the Transferor fails to transfer to the Borrower the applicable Loan Assets and the related Portfolio Assets on an Advance Date (*provided* that the Lenders shall have funded the related Advance) unless the related Advance is repaid in full with accrued and unpaid Yield thereon within five Business Days;

(s) the Borrower makes any assignment or attempted assignment of their respective rights or obligations under this Agreement or any other Transaction Document without first obtaining the specific written consent of each of the Lenders and the Administrative Agent, which consent may be withheld by any Lender or the Administrative Agent in the exercise of its sole and absolute discretion;

(t) the Borrower, the Servicer or the Transferor fails to observe or perform any covenant, agreement or obligation with respect to the management and distribution of funds received with respect to the Collateral Portfolio, and such failure is not cured within three Business Days; or

(u) (i) failure of the Borrower to maintain at least one Independent Director, (ii) the removal of any Independent Director of the Borrower without "cause" (as such term is defined in the organizational document of the Borrower) or without giving prior written notice to



the Administrative Agent and the Lender Agents, each as required in the organizational documents of the Borrower or (iii) an Independent Director of the Borrower which is not provided by CSC or a nationally recognized service reasonably acceptable to the Administrative Agent shall be appointed without the consent of the Administrative Agent;

then the Administrative Agent or all of the Lenders, may, by notice to the Borrower, declare the Facility Maturity Date to have occurred; *provided*, that, in the case of any event described in Section 7.01(c) above, the Facility Maturity Date shall be deemed to have occurred automatically upon the occurrence of such event. Upon any such declaration or automatic occurrence, (i) the Borrower shall cease purchasing Loan Assets from the Transferor under the Purchase and Sale Agreement, (ii) the Administrative Agent or all of the Lenders may declare the Variable Funding Notes to be immediately due and payable in full (without presentment, demand, protest or notice of any kind all of which are hereby waived by the Borrower) and any other Obligations to be immediately due and payable, and (iii) all proceeds and distributions in respect of the Portfolio Assets shall be distributed by the Collateral Agent (at the direction of the Administrative Agent) as described in Section 2.04(d) (*provided* that the Borrower shall in any event remain liable to pay such Advances and all such amounts and Obligations immediately in accordance with Section 2.04(f) hereof). In addition, upon any such declaration or upon any such automatic occurrence, the Collateral Agent, on behalf of the Secured Parties and at the direction of the Administrative Agent, shall have, in addition to all other rights and remedies under this Agreement or otherwise, all other rights and remedies provided under the UCC of the applicable jurisdiction and other Applicable Law, which rights shall be cumulative. Without limiting any obligation of the Servicer hereunder, the Borrower confirms and agrees that the Collateral Agent, on behalf of the Secured Parties and at the direction of the Administrative Agent, (or any designee thereof, including, without limitation, the Servicer), following an Event of Default, shall, at its option, have the sole right to enforce the Borrower's rights and remedies under each Assigned Document, but without any obligation on the part of the Administrative Agent, the Lenders, the Lender Agents or any of their respective Affiliates to perform any of the obligations of the Borrower under any such Assigned Document. If any Event of Default shall have occurred, the Yield Rate shall be increased pursuant to the increase set forth in the definition of "Applicable Spread", effective as of the date of the occurrence of such Event of Default, and shall apply after the occurrence of such Event of Default.

SECTION 7.02 Additional Remedies of the Administrative Agent.

(a) If, (i) upon the Administrative Agent's or the Lenders' declaration that the Advances made to the Borrower hereunder are immediately due and payable pursuant to Section 7.01 upon the occurrence of an Event of Default, or (ii) on the Facility Maturity Date, the aggregate outstanding principal amount of the Advances, all accrued and unpaid Fees and Yield and any other Obligations are not immediately paid in full, then the Collateral Agent (acting as directed by the Administrative Agent) or the Administrative Agent, in addition to all other rights specified hereunder, shall have the right, in its own name and as agent for the Lenders and Lender Agents, to immediately sell (at the Servicer's expense) in a commercially reasonable manner, in a recognized market (if one exists) at such price or prices as the Administrative Agent may reasonably deem satisfactory, any or all of the Collateral Portfolio and apply the proceeds thereof to the Obligations; *provided*, that notwithstanding anything to the contrary herein or in

any other Transaction Document, in the case of the declaration of the Facility Maturity Date that arises solely pursuant to a change in Applicable Law which creates an Event of Default pursuant to Section 7.01(f), the Collateral Agent and the Administrative Agent (as applicable) may not order the assembly or liquidation of the Collateral Portfolio, or take any action or exercise any power of attorney furnished hereunder in connection with such assembly or liquidation, until on or after the earlier of (x) the date that is 90 days after the Administrative Agent provides written notice to the Borrower of such declaration of the Facility Maturity Date as a result of Section 7.01(f) or (y) the occurrence of an Event of Default for any other reason other than pursuant to Section 7.01(f).

(b) The parties recognize that it may not be possible to sell all of the Collateral Portfolio on a particular Business Day, or in a transaction with the same purchaser, or in the same manner because the market for the assets constituting the Collateral Portfolio may not be liquid. Accordingly, the Administrative Agent may elect, in its sole discretion, the time and manner of liquidating any of the Collateral Portfolio, and nothing contained herein shall obligate the Administrative Agent to liquidate any of the Collateral Portfolio on the date the Administrative Agent or all of the Lender Agents declares the Advances made to the Borrower hereunder to be immediately due and payable pursuant to Section 7.01 or to liquidate all of the Collateral Portfolio in the same manner or on the same Business Day.

(c) If the Collateral Agent (acting as directed by the Administrative Agent) or the Administrative Agent proposes to sell the Collateral Portfolio or any part thereof in one or more parcels at a public or private sale, at the request of the Collateral Agent or the Administrative Agent, as applicable, the Borrower and the Servicer shall make available to (i) the Administrative Agent, on a timely basis, all information (including any information that the Borrower and the Servicer is required by law or contract to be kept confidential) relating to the Collateral Portfolio subject to sale, including, without limitation, copies of any disclosure documents, contracts, financial statements of the applicable Obligors, covenant certificates and any other materials requested by the Administrative Agent, and (ii) each prospective bidder, on a timely basis, all reasonable information relating to the Collateral Portfolio subject to sale, including, without limitation, copies of any disclosure documents, contracts, financial statements of the applicable Obligors, covenant certificates and any other materials reasonably requested by each such bidder.

(d) Each of the Borrower and the Servicer agrees, to the full extent that it may lawfully so agree, that neither it nor anyone claiming through or under it will set up, claim or seek to take advantage of any appraisement, valuation, stay, extension or redemption law now or hereafter in force in any locality where any Collateral Portfolio may be situated in order to prevent, hinder or delay the enforcement or foreclosure of this Agreement, or the absolute sale of any of the Collateral Portfolio or any part thereof, or the final and absolute putting into possession thereof, immediately after such sale, of the purchasers thereof, and each of the Borrower and the Servicer, for itself and all who may at any time claim through or under it, hereby waives, to the full extent that it may be lawful so to do, the benefit of all such laws, and any and all right to have any of the properties or assets constituting the Collateral Portfolio marshaled upon any such sale, and agrees that the Collateral Agent, or the Administrative Agent on its behalf, or any court having jurisdiction to foreclose the security interests granted in this

Agreement may sell the Collateral Portfolio as an entirety or in such parcels as the Collateral Agent (acting at the direction of the Administrative Agent) or such court may determine.

(e) Any amounts received from any sale or liquidation of the Collateral Portfolio pursuant to this Section 7.02 in excess of the Obligations will be applied by the Collateral Agent (as directed by the Administrative Agent) in accordance with the provisions of Section 2.04(d), or as a court of competent jurisdiction may otherwise direct.

(f) The Administrative Agent, the Lender Agents and the Lenders shall have, in addition to all the rights and remedies provided herein and provided by applicable federal, state, foreign, and local laws (including, without limitation, the rights and remedies of a secured party under the UCC of any applicable state, to the extent that the UCC is applicable, and the right to offset any mutual debt and claim), all rights and remedies available to the Lenders at law, in equity or under any other agreement between any Lender and the Borrower.

(g) Except as otherwise expressly provided in this Agreement, no remedy provided for by this Agreement shall be exclusive of any other remedy, each and every remedy shall be cumulative and in addition to any other remedy, and no delay or omission to exercise any right or remedy shall impair any such right or remedy or shall be deemed to be a waiver of any Event of Default.

(h) Each of the Borrower and the Servicer hereby irrevocably appoints each of the Collateral Agent and the Administrative Agent its true and lawful attorney (with full power of substitution) in its name, place and stead and at its expense, in connection with the enforcement of the rights and remedies provided for in this Agreement, including without limitation the following powers: (a) to give any necessary receipts or acquittance for amounts collected or received hereunder, (b) to make all necessary transfers of the Collateral Portfolio in connection with any such sale or other disposition made pursuant hereto, (c) to execute and deliver for value all necessary or appropriate bills of sale, assignments and other instruments in connection with any such sale or other disposition, the Borrower and the Servicer hereby ratifying and confirming all that such attorney (or any substitute) shall lawfully do hereunder and pursuant hereto, and (d) to sign any agreements, orders or other documents in connection with or pursuant to any Transaction Document or Hedging Agreement. Nevertheless, if so requested by the Collateral Agent or the Administrative Agent, the Borrower shall ratify and confirm any such sale or other disposition by executing and delivering to the Collateral Agent or the Administrative Agent or all proper bills of sale, assignments, releases and other instruments as may be designated in any such request.

ARTICLE VIII.  
INDEMNIFICATION

SECTION 8.01 Indemnities by the Borrower.

(a) Without limiting any other rights which the Affected Parties, the Secured Parties, the Administrative Agent, the Lenders, the Lender Agents, the Collateral Agent, the Account Bank, the Collateral Custodian or any of their respective Affiliates may have hereunder

or under Applicable Law, the Borrower hereby agrees to indemnify the Affected Parties, the Secured Parties, Administrative Agent, the Lenders, the Lender Agents, the Collateral Agent, the Account Bank, the Collateral Custodian and each of their respective Affiliates, assigns, officers, directors, employees and agents (each, an "Indemnified Party," for purposes of this Article VIII) from and against any and all damages, losses, claims, liabilities and related costs and expenses, including attorneys' fees and disbursements (all of the foregoing being collectively referred to as "Indemnified Amounts"), awarded against or actually incurred by such Indemnified Party arising out of or as a result of this Agreement or in respect of any of the Collateral Portfolio, excluding, however, Indemnified Amounts to the extent resulting solely from (a) gross negligence, bad faith or willful misconduct on the part of an Indemnified Party or (b) Loan Assets which are uncollectible due to the Obligor's financial inability to pay. Without limiting the foregoing, the Borrower shall indemnify each Indemnified Party for Indemnified Amounts relating to or resulting from any of the following (to the extent not resulting from the conditions set forth in (a) or (b) above):

(i) any Loan Asset treated as or represented by the Borrower to be an Eligible Loan Asset which is not at the applicable time an Eligible Loan Asset, or the purchase by any party or origination of any Loan Asset which violates Applicable Law;

(ii) reliance on any representation or warranty made or deemed made by the Borrower, the Servicer (if Fifth Street or one of its Affiliates is the Servicer) or any of their respective officers under or in connection with this Agreement or any Transaction Document, which shall have been false or incorrect in any respect when made or deemed made or delivered;

(iii) the failure by the Borrower or the Servicer (if Fifth Street or one of its Affiliates is the Servicer) to comply with any term, provision or covenant contained in this Agreement or any agreement executed in connection with this Agreement, or with any Applicable Law with respect to any item of Collateral Portfolio, or the nonconformity of any item of Collateral Portfolio with any such Applicable Law;

(iv) the failure to vest and maintain vested in the Collateral Agent, for the benefit of the Secured Parties, a first priority perfected security interest in the Collateral Portfolio, free and clear of any Lien other than Permitted Liens, whether existing at the time of the related Advance or at any time thereafter;

(v) on each Business Day prior to the Collection Date, the occurrence of a Borrowing Base Deficiency and the same continues unremedied for three Business Days;

(vi) the failure to file, or any delay in filing, financing statements, continuation statements or other similar instruments or documents under the UCC of any applicable jurisdiction or other Applicable Law with respect to any Loan Assets included in the Collateral Portfolio or the other Portfolio Assets related thereto, whether at the time of any Advance or at any subsequent time;

(vii) any dispute, claim, offset or defense (other than the discharge in bankruptcy of an Obligor) to the payment of any Loan Asset included in the Collateral Portfolio (including, without limitation, a defense based on such Loan Asset (or the Loan Agreement evidencing such Loan Asset) not being a legal, valid and binding obligation of such Obligor enforceable against it in accordance with its terms), or any other claim resulting from the sale of the merchandise or services related to such Collateral Portfolio or the furnishing or failure to furnish such merchandise or services;

(viii) any failure of the Borrower or the Servicer (if Fifth Street or one of its Affiliates is the Servicer) to perform its duties or obligations in accordance with the provisions of the Transaction Documents to which it is a party or any failure by Fifth Street, the Borrower or any Affiliate thereof to perform its respective duties under any Collateral Portfolio;

(ix) any inability to obtain any judgment in, or utilize the court or other adjudication system of, any state in which an Obligor may be located as a result of the failure of the Borrower or the Transferor to qualify to do business or file any notice or business activity report or any similar report;

(x) any action taken by the Borrower or the Servicer in the enforcement or collection of the Collateral Portfolio which results in any claim, suit or action of any kind pertaining to the Collateral Portfolio or which reduces or impairs the rights of the Administrative Agent, Lender Agent or Lender with respect to any Loan Asset or the value of any such Loan Asset;

(xi) any products liability claim or personal injury or property damage suit or other similar or related claim or action of whatever sort arising out of or in connection with the Underlying Collateral or services that are the subject of any Collateral Portfolio;

(xii) any claim, suit or action of any kind arising out of or in connection with Environmental Laws relating to the Borrower or the Collateral Portfolio, including any vicarious liability;

(xiii) the failure by the Borrower to pay when due any Taxes for which the Borrower is liable, including, without limitation, sales, excise or personal property Taxes payable in connection with the Collateral Portfolio;

(xiv) any repayment by the Administrative Agent, the Lender Agents, the Lenders or a Secured Party of any amount previously distributed in payment of Advances or payment of Yield or Fees or any other amount due hereunder or under any Hedging Agreement, in each case which amount the Administrative Agent, the Lender Agents, the Lenders or a Secured Party believes in good faith is required to be repaid;

(xv) the commingling by the Borrower or the Servicer of payments and collections required to be remitted to the Collection Account or the Unfunded Exposure Account with other funds;

(xvi) any investigation, litigation or proceeding related to this Agreement (or the Transaction Documents), or the use of proceeds of Advances or the Collateral Portfolio, or the administration of the Loan Assets by the Borrower or the Servicer (unless such administration is carried out by Wachovia or any of its Affiliates in the capacity of the Servicer, if applicable);

(xvii) any failure by the Borrower to give reasonably equivalent value to Transferor in consideration for the transfer by the Transferor to the Borrower of any item of Collateral Portfolio or any attempt by any Person to void or otherwise avoid any such transfer under any statutory provision or common law or equitable action, including, without limitation, any provision of the Bankruptcy Code;

(xviii) the use of the proceeds of any Advance in a manner other than as provided in this Agreement and the Transaction Documents;

(xix) any failure of the Borrower, the Servicer or any of their respective agents or representatives to remit to the Collection Account within one Business Day of receipt, payments and collections with respect to the Collateral Portfolio remitted to the Borrower, the Servicer or any such agent or representative (other than such a failure on the part of Wachovia or any of its Affiliates in the capacity of Servicer, if applicable); and/or

(xx) the failure by the Borrower to comply with any of the covenants relating to the Hedging Agreement in accordance with the Transaction Documents.

(b) Any amounts subject to the indemnification provisions of this Section 8.01 shall be paid by the Borrower to the Administrative Agent on behalf of the applicable Indemnified Party within two Business Days following the Administrative Agent's written demand therefor on behalf of the applicable Indemnified Party (and the Administrative Agent shall pay such amounts to the applicable Indemnified Party promptly after the receipt by the Administrative Agent of such amounts). The Administrative Agent, on behalf of any Indemnified Party making a request for indemnification under this Section 8.01, shall submit to the Borrower a certificate setting forth in reasonable detail the basis for and the computations of the Indemnified Amounts with respect to which such indemnification is requested, which certificate shall be conclusive absent demonstrable error.

(c) If for any reason the indemnification provided above in this Section 8.01 is unavailable to the Indemnified Party or is insufficient to hold an Indemnified Party harmless in respect of any losses, claims, damages or liabilities, then the Borrower or the Servicer, as the case may be, shall contribute to the amount paid or payable by such Indemnified Party as a result of such losses, claims, damages or liabilities in such proportion as is appropriate to reflect not only the relative benefits received by such Indemnified Party on the one hand and the Borrower or the Servicer, as the case may be, on the other hand but also the relative fault of such Indemnified Party as well as any other relevant equitable considerations.

(d) If the Borrower has made any payments in respect of Indemnified Amounts to the Administrative Agent on behalf of an Indemnified Party pursuant to this Section

8.01 and such Indemnified Party thereafter collects any of such amounts from others, such Indemnified Party will promptly repay such amounts collected to the Borrower, without interest.

(e) The obligations of the Borrower under this Section 8.01 shall survive the resignation or removal of the Administrative Agent, the Lenders, the Lender Agents, the Servicer, the Collateral Agent, the Account Bank or the Collateral Custodian and the termination of this Agreement.

SECTION 8.02 Indemnities by Servicer.

(a) Without limiting any other rights which any Indemnified Party may have hereunder or under Applicable Law, the Servicer hereby agrees to indemnify each Indemnified Party from and against any and all Indemnified Amounts, awarded against or incurred by any Indemnified Party as a consequence of any of the following, excluding, however, Indemnified Amounts to the extent resulting from gross negligence, bad faith or willful misconduct on the part of any Indemnified Party claiming indemnification hereunder:

(i) the inclusion, in any computations made by it in connection with any Borrowing Base Certificate or other report prepared by it hereunder, of any Loan Assets which were not Eligible Loan Assets as of the date of any such computation;

(ii) reliance on any representation or warranty made or deemed made by the Servicer or any of its officers under or in connection with this Agreement or any other Transaction Document, any Servicing Report, Servicer's Certificate or any other information or report delivered by or on behalf of the Servicer pursuant hereto, which shall have been false, incorrect or misleading in any respect when made or deemed made or delivered;

(iii) the failure by the Servicer to comply with (A) any term, provision or covenant contained in this Agreement or any other Transaction Document, or any other agreement executed in connection with this Agreement, or (B) any Applicable Law applicable to it with respect to any Portfolio Assets;

(iv) any litigation, proceedings or investigation against the Servicer;

(v) any action or inaction by the Servicer that causes the Collateral Agent, for the benefit of the Secured Parties, not to have a first priority perfected security interest in the Collateral Portfolio, free and clear of any Lien other than Permitted Liens, whether existing at the time of the related Advance or any time thereafter;

(vi) the commingling by the Servicer of payments and collections required to be remitted to the Collection Account or the Unfunded Exposure Account with other funds;

(vii) any failure of the Servicer or any of its agents or representatives (including, without limitation, agents, representatives and employees of such Servicer acting pursuant to authority granted under Section 6.01 hereof) to remit to Collection

Account, payments and collections with respect to Loan Assets remitted to the Servicer or any such agent or representative within one Business Day of receipt;

(viii) the failure by the Servicer to perform any of its duties or obligations in accordance with the provisions of this Agreement or any other Transaction Document or errors or omissions related to such duties;

(ix) the failure by the Servicer to comply with any of the covenants relating to the Hedging Agreement in accordance with the Transaction Documents;

(x) failure or delay in assisting a successor Servicer in assuming each and all of the Servicer's obligations to service and administer the Collateral Portfolio, or failure or delay in complying with instructions from the Administrative Agent with respect thereto; and/or

(xi) any of the events or facts giving rise to a breach of any of the Servicer's representations, warranties, agreements and/or covenants set forth in Article IV, Article V or Article VI or this Agreement.

(b) Any Indemnified Amounts shall be paid by the Servicer to the Administrative Agent, for the benefit of the applicable Indemnified Party, within two Business Days following receipt by the Servicer of the Administrative Agent's written demand therefor (and the Administrative Agent shall pay such amounts to the applicable Indemnified Party promptly after the receipt by the Administrative Agent of such amounts).

(c) If the Servicer has made any indemnity payments to the Administrative Agent, on behalf of an Indemnified Party pursuant to this Section 8.02 and such Indemnified Party thereafter collects any of such amounts from others, such Indemnified Party will promptly repay such amounts collected to the Servicer, without interest.

(d) The Servicer shall have no liability for making indemnification hereunder to the extent any such indemnification constitutes recourse for uncollectible or uncollected Loan Assets.

(e) The obligations of the Servicer under this Section 8.02 shall survive the resignation or removal of the Administrative Agent, the Lenders, the Lender Agents, the Collateral Agent, the Account Bank or the Collateral Custodian and the termination of this Agreement.

(f) Any indemnification pursuant to this Section 8.02 shall not be payable from the Collateral Portfolio.

Each applicable Indemnified Party shall deliver to the Indemnifying Party under Section 8.01 and Section 8.02, within a reasonable time after such Indemnified Party's receipt thereof, copies of all notices and documents (including court papers) received by such Indemnified Party relating to the claim giving rise to the Indemnified Amounts.



SECTION 8.03 Legal Proceedings. In the event an Indemnified Party becomes involved in any action, claim, or legal, governmental or administrative proceeding (an "Action") for which it seeks indemnification hereunder, the Indemnified Party shall promptly notify the other party or parties against whom it seeks indemnification (the "Indemnifying Party") in writing of the nature and particulars of the Action; *provided* that its failure to do so shall not relieve the Indemnifying Party of its obligations hereunder except to the extent such failure has a material adverse effect on the Indemnifying Party. Upon written notice to the Indemnified Party acknowledging in writing that the indemnification provided hereunder applies to the Indemnified Party in connection with the Action (subject to the exclusion in the first sentence of Section 8.01, the first sentence of Section 8.02 or Section 8.02(d), as applicable), the Indemnifying Party may assume the defense of the Action at its expense with counsel reasonably acceptable to the Indemnified Party. The Indemnified Party shall have the right to retain separate counsel in connection with the Action, and the Indemnifying Party shall not be liable for the legal fees and expenses of the Indemnified Party after the Indemnifying Party has done so; *provided* that if the Indemnified Party determines in good faith that there may be a conflict between the positions of the Indemnified Party and the Indemnifying Party in connection with the Action, or that the Indemnifying Party is not conducting the defense of the Action in a manner reasonably protective of the interests of the Indemnified Party, the reasonable legal fees and expenses of the Indemnified Party shall be paid by the Indemnifying Party; *provided, further*, that the Indemnifying Party shall not, in connection with any one Action or separate but substantially similar or related Actions in the same jurisdiction arising out of the same general allegations or circumstances, be liable for the fees or expenses of more than one separate firm of attorneys (and any required local counsel) for such Indemnified Party, which firm (and local counsel, if any) shall be designated in writing to the Indemnifying Party by the Indemnified Party. If the Indemnifying Party elects to assume the defense of the Action, it shall have full control over the conduct of such defense; *provided* that the Indemnifying Party and its counsel shall, as reasonably requested by the Indemnified Party or its counsel, consult with and keep them informed with respect to the conduct of such defense. The Indemnifying Party shall not settle an Action without the prior written approval of the Indemnified Party unless such settlement provides for the full and unconditional release of the Indemnified Party from all liability in connection with the Action. The Indemnified Party shall reasonably cooperate with the Indemnifying Party in connection with the defense of the Action.

SECTION 8.04 After-Tax Basis. Indemnification under Section 8.01 and 8.02 shall be in an amount necessary to make the Indemnified Party whole after taking into account any Tax consequences to the Indemnified Party of the receipt of the indemnity provided hereunder, including the effect of such Tax or refund on the amount of Tax measured by net income or profits that is or was payable by the Indemnified Party.

#### ARTICLE IX.

##### THE ADMINISTRATIVE AGENT AND LENDER AGENTS

###### SECTION 9.01 The Administrative Agent.

(a) Appointment. Each Lender Agent and each Secured Party hereby appoints and authorizes the Administrative Agent as its agent hereunder and hereby further authorizes the

Administrative Agent to appoint additional agents to act on its behalf and for the benefit of each Lender Agent and each Secured Party. Each Lender Agent and each Secured Party further authorizes the Administrative Agent to take such action as agent on its behalf and to exercise such powers under this Agreement and the other Transaction Documents as are delegated to the Administrative Agent by the terms hereof and thereof, together with such powers as are reasonably incidental thereto. Notwithstanding any provision to the contrary contained elsewhere in this Agreement or in any other Transaction Document, the Administrative Agent shall not have any duties or responsibilities, except those expressly set forth in this Agreement, nor shall the Administrative Agent have or be deemed to have any fiduciary relationship with any Lender or Lender Agent, and no implied covenants, functions, responsibilities, duties, obligations or liabilities shall be read into this Agreement or any other Transaction Document or otherwise exist against the Administrative Agent. Without limiting the generality of the foregoing sentence, the use of the term "agent" in this Agreement with reference to the Administrative Agent is not intended to connote any fiduciary or other implied (or express) obligations arising under agency doctrine of any Applicable Law. Instead, such term is used merely as a matter of market custom, and is intended to create or reflect only an administrative relationship between independent contracting parties.

(b) Delegation of Duties. The Administrative Agent may execute any of its duties under this Agreement or any other Transaction Document by or through agents, employees or attorneys in fact and shall be entitled to advice of counsel concerning all matters pertaining to such duties. The Administrative Agent shall not be responsible for the negligence or misconduct of any agent or attorney in fact that it selects with reasonable care.

(c) Administrative Agent's Reliance, Etc. Neither the Administrative Agent nor any of its directors, officers, agents or employees shall be liable for any action taken or omitted to be taken by it or them as Administrative Agent under or in connection with this Agreement or any of the other Transaction Documents, except for its or their own gross negligence or willful misconduct. Each Lender, Lender Agent and each Secured Party hereby waives any and all claims against the Administrative Agent or any of its Affiliates for any action taken or omitted to be taken by the Administrative Agent or any of its Affiliates under or in connection with this Agreement or any of the other Transaction Documents, except for its or their own gross negligence or willful misconduct. Without limiting the foregoing, the Administrative Agent: (i) may consult with legal counsel (including counsel for the Borrower or the Transferor), independent public accountants and other experts selected by it and shall not be liable for any action taken or omitted to be taken in good faith by it in accordance with the advice of such counsel, accountants or experts; (ii) makes no warranty or representation and shall not be responsible for any statements, warranties or representations made in or in connection with this Agreement; (iii) shall not have any duty to ascertain or to inquire as to the performance or observance of any of the terms, covenants or conditions of this Agreement or any of the other Transaction Documents on the part of the Borrower, the Transferor, or the Servicer or to inspect the property (including the books and records) of the Borrower, the Transferor, or the Servicer; (iv) shall not be responsible for the due execution, legality, validity, enforceability, genuineness, sufficiency or value of this Agreement, any of the other Transaction Documents or any other instrument or document furnished pursuant hereto or thereto; and (v) shall incur no liability under or in respect of this Agreement or any of the other Transaction Documents by acting upon any notice (including notice by telephone), consent, certificate or other instrument or writing

(which may be by facsimile) believed by it to be genuine and signed or sent by the proper party or parties.

(d) Actions by Administrative Agent. The Administrative Agent shall be fully justified in failing or refusing to take any action under this Agreement or any other Transaction Document unless it shall first receive such advice or concurrence of the Lender Agents as it deems appropriate and, if it so requests, it shall first be indemnified to its satisfaction by the Lenders and Lender Agents against any and all liability and expense which may be incurred by it by reason of taking or continuing to take any such action. The Administrative Agent shall in all cases be fully protected in acting, or in refraining from acting, under this Agreement or any other Transaction Document in accordance with a request or consent of the Lender Agents; *provided*, that, notwithstanding anything to the contrary herein, the Administrative Agent shall not be required to take any action hereunder if the taking of such action, in the reasonable determination of the Administrative Agent, shall be in violation of any Applicable Law or contrary to any provision of this Agreement or shall expose the Administrative Agent to liability hereunder or otherwise. In the event the Administrative Agent requests the consent of a Lender Agent pursuant to the foregoing provisions and the Administrative Agent does not receive a consent (either positive or negative) from such Person within ten Business Days of such Person's receipt of such request, then such Lender or Lender Agent shall be deemed to have declined to consent to the relevant action.

(e) Notice of Event of Default, Unmatured Event of Default or Servicer Termination Event. The Administrative Agent shall not be deemed to have knowledge or notice of the occurrence of an Event of Default, Unmatured Event of Default or Servicer Termination Event, unless the Administrative Agent has received written notice from a Lender, Lender Agent, the Borrower or the Servicer referring to this Agreement, describing such Event of Default, Unmatured Event of Default or Servicer Termination Event and stating that such notice is a "Notice of Event of Default," "Notice of Unmatured Event of Default" or "Notice of Servicer Termination Event," as applicable. The Agent shall (subject to Section 9.01(c)) take such action with respect to such Event of Default, Unmatured Event of Default or Servicer Termination Event as may be requested by the Lender Agents acting jointly or as the Administrative Agent shall deem advisable or in the best interest of the Lender Agents.

(f) Credit Decision with Respect to the Administrative Agent. Each Lender Agent and each Secured Party acknowledges that none of the Administrative Agent or any of its Affiliates has made any representation or warranty to it, and that no act by the Administrative Agent hereinafter taken, including any consent to and acceptance of any assignment or review of the affairs of the Borrower, the Servicer, the Transferor or any of their respective Affiliates or review or approval of any of the Collateral Portfolio, shall be deemed to constitute any representation or warranty by any of the Administrative Agent or its Affiliates to any Lender Agent as to any matter, including whether the Administrative Agent has disclosed material information in its possession. Each Lender Agent and each Secured Party acknowledges that it has, independently and without reliance upon the Administrative Agent, or any of the Administrative Agent's Affiliates, and based upon such documents and information as it has deemed appropriate, made its own evaluation and decision to enter into this Agreement and the other Transaction Documents to which it is a party. Each Lender Agent and each Secured Party also acknowledges that it will, independently and without reliance upon the Administrative

Agent, or any of the Administrative Agent's Affiliates, and based on such documents and information as it shall deem appropriate at the time, continue to make its own decisions in taking or not taking action under this Agreement and the other Transaction Documents to which it is a party. Each Lender Agent and each Secured Party hereby agrees that the Administrative Agent shall not have any duty or responsibility to provide any Lender Agent with any credit or other information concerning the business, prospects, operations, property, financial and other condition or creditworthiness of the Borrower, the Servicer, the Transferor or their respective Affiliates which may come into the possession of the Administrative Agent or any of its Affiliates.

(g) Indemnification of the Administrative Agent. Each Lender Agent agrees to indemnify the Administrative Agent (to the extent not reimbursed by the Borrower or the Servicer), ratably in accordance with the Pro Rata Share of its related Lender, from and against any and all liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses or disbursements of any kind or nature whatsoever which may be imposed on, incurred by, or asserted against the Administrative Agent in any way relating to or arising out of this Agreement or any of the other Transaction Documents, or any action taken or omitted by the Administrative Agent hereunder or thereunder; *provided* that the Lender Agents shall not be liable for any portion of such liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses or disbursements resulting from the Administrative Agent's gross negligence or willful misconduct; *provided, further*, that no action taken in accordance with the directions of the Lender Agents shall be deemed to constitute gross negligence or willful misconduct for purposes of this Article IX. Without limitation of the foregoing, each Lender Agent agrees to reimburse the Administrative Agent, ratably in accordance with the Pro Rata Share of its related Lender, promptly upon demand for any out-of-pocket expenses (including counsel fees) incurred by the Administrative Agent in connection with the administration, modification, amendment or enforcement (whether through negotiations, legal proceedings or otherwise) of, or legal advice in respect of rights or responsibilities under, this Agreement and the other Transaction Documents, to the extent that such expenses are incurred in the interests of or otherwise in respect of the Lender Agents or Lenders hereunder and/or thereunder and to the extent that the Administrative Agent is not reimbursed for such expenses by the Borrower or the Servicer.

(h) Successor Administrative Agent. The Administrative Agent may resign at any time, effective upon the appointment and acceptance of a successor Administrative Agent as provided below, by giving at least five days' written notice thereof to each Lender Agent and the Borrower and may be removed at any time with cause by the Lender Agents and the Borrower acting jointly. Upon any such resignation or removal, the Lender Agents acting jointly shall appoint a successor Administrative Agent. Each Lender Agent agrees that it shall not unreasonably withhold or delay its approval of the appointment of a successor Administrative Agent. If no such successor Administrative Agent shall have been so appointed, and shall have accepted such appointment, within 30 days after the retiring Administrative Agent's giving of notice of resignation or the removal of the retiring Administrative Agent, then the retiring Administrative Agent may, on behalf of the Secured Parties, appoint a successor Administrative Agent which successor Administrative Agent shall be either (i) a commercial bank organized under the laws of the United States or of any state thereof and have a combined capital and surplus of at least \$50,000,000 or (ii) an Affiliate of such a bank. Upon the acceptance of any

appointment as Administrative Agent hereunder by a successor Administrative Agent, such successor Administrative Agent shall thereupon succeed to and become vested with all the rights, powers, privileges and duties of the retiring Administrative Agent, and the retiring Administrative Agent shall be discharged from its duties and obligations under this Agreement. After any retiring Administrative Agent's resignation or removal hereunder as Administrative Agent, the provisions of this Article IX shall continue to inure to its benefit as to any actions taken or omitted to be taken by it while it was Administrative Agent under this Agreement.

(i) Payments by the Administrative Agent. Unless specifically allocated to a specific Lender Agent pursuant to the terms of this Agreement, all amounts received by the Administrative Agent on behalf of the Lender Agents shall be paid by the Administrative Agent to the Lender Agents in accordance with their related Lender's respective Pro Rata Shares in the applicable Advances Outstanding, or if there are no Advances Outstanding in accordance with their related Lender's most recent Commitments, on the Business Day received by the Administrative Agent, unless such amounts are received after 12:00 noon on such Business Day, in which case the Administrative Agent shall use its reasonable efforts to pay such amounts to each Lender Agent on such Business Day, but, in any event, shall pay such amounts to such Lender Agent not later than the following Business Day.

SECTION 9.02 The Lender Agents.

(a) Authorization and Action. Each Lender, respectively, hereby designates and appoints its applicable Lender Agent to act as its agent hereunder and under each other Transaction Document, and authorizes such Lender Agent to take such actions as agent on its behalf and to exercise such powers as are delegated to such Lender Agent by the terms of this Agreement and the other Transaction Documents, together with such powers as are reasonably incidental thereto. No Lender Agent shall have any duties or responsibilities, except those expressly set forth herein or in any other Transaction Document, or any fiduciary relationship with its related Lender, and no implied covenants, functions, responsibilities, duties, obligations or liabilities on the part of such Lender Agent shall be read into this Agreement or any other Transaction Document or otherwise exist for such Lender Agent. In performing its functions and duties hereunder and under the other Transaction Documents, each Lender Agent shall act solely as agent for its related Lender and does not assume nor shall be deemed to have assumed any obligation or relationship of trust or agency with or for the Borrower or the Servicer or any of the Borrower's or the Servicer's successors or assigns. No Lender Agent shall be required to take any action that exposes such Lender Agent to personal liability or that is contrary to this Agreement, any other Transaction Document or Applicable Law. The appointment and authority of each Lender Agent hereunder shall terminate upon the indefeasible payment in full of all Obligations. Each Lender Agent hereby authorizes the Administrative Agent to file any UCC financing statement deemed necessary by the Administrative Agent on behalf of such Lender Agent (the terms of which shall be binding on such Lender Agent).

(b) Delegation of Duties. Each Lender Agent may execute any of its duties under this Agreement and each other Transaction Document by or through agents or attorneys-in-fact and shall be entitled to advice of counsel concerning all matters pertaining to such duties. No Lender Agent shall be responsible for the negligence or misconduct of any agents or attorneys-in-fact selected by it with reasonable care.

(c) Exculpatory Provisions. Neither any Lender Agent nor any of its directors, officers, agents or employees shall be (i) liable for any action lawfully taken or omitted to be taken by it or them under or in connection with this Agreement or any other Transaction Document (except for its, their or such Person's own gross negligence or willful misconduct), or (ii) responsible in any manner to its related Lender for any recitals, statements, representations or warranties made by the Borrower or the Servicer contained in Article IV, any other Transaction Document or any certificate, report, statement or other document referred to or provided for in, or received under or in connection with, this Agreement or any other Transaction Document, or for the value, validity, effectiveness, genuineness, enforceability or sufficiency of this Agreement, any other Transaction Document or any other document furnished in connection herewith or therewith, or for any failure of the Borrower or the Servicer to perform its obligations hereunder or thereunder, or for the satisfaction of any condition specified in this Agreement, or for the perfection, priority, condition, value or sufficiency of any collateral pledged in connection herewith. No Lender Agent shall be under any obligation to its related Lender to ascertain or to inquire as to the observance or performance of any of the agreements or covenants contained in, or conditions of, this Agreement or any other Transaction Document, or to inspect the properties, books or records of the Borrower or the Servicer. No Lender Agent shall be deemed to have knowledge of any Event of Default or Unmatured Event of Default unless such Lender Agent has received notice from the Borrower or its related Lender.

(d) Reliance by Lender Agent. Each Lender Agent shall in all cases be entitled to rely, and shall be fully protected in relying, upon any document or conversation believed by it to be genuine and correct and to have been signed, sent or made by the proper Person or Persons and upon advice and statements of legal counsel (including, without limitation, counsel to the Borrower), independent accountants and other experts selected by such Lender Agent. Each Lender Agent shall in all cases be fully justified in failing or refusing to take any action under this Agreement or any other Transaction Document unless it shall first receive such advice or concurrence of its related Lender as it deems appropriate and it shall first be indemnified to its satisfaction by its related Lender; *provided that*, unless and until such Lender Agent shall have received such advice, such Lender Agent may take or refrain from taking any action, as the Lender Agent shall deem advisable and in the best interests of its related Lender. Each Lender Agent shall in all cases be fully protected in acting, or in refraining from acting, in accordance with a request of its related Lender, and such request and any action taken or failure to act pursuant thereto shall be binding upon its related Lender.

(e) Non-Reliance on Lender Agent. Each Lender expressly acknowledges that neither its related Lender Agent, nor any of its officers, directors, employees, agents, attorneys-in-fact or affiliates has made any representations or warranties to it and that no act by such Lender Agent hereafter taken, including, without limitation, any review of the affairs of the Borrower or the Servicer, shall be deemed to constitute any representation or warranty by such Lender Agent. Each Lender represents and warrants to its related Lender Agent that it has and will, independently and without reliance upon its related Lender Agent, and based on such documents and information as it has deemed appropriate, made its own appraisal of and investigation into the business, operations, property, prospects, financial and other conditions and creditworthiness of the Borrower and made its own decision to enter into this Agreement, the other Transaction Documents and all other documents related hereto or thereto.

(f) Lender Agents are in their Respective Individual Capacities. Each Lender Agent and its Affiliates may make loans to, accept deposits from and generally engage in any kind of business with the Borrower or any Affiliate of the Borrower as though such Lender Agent were not a Lender Agent hereunder. With respect to Advances pursuant to this Agreement, each Lender Agent shall have the same rights and powers under this Agreement in its individual capacity as any Lender and may exercise the same as though it were not a Lender Agent, and the terms "Lender," and "Lenders," shall include the Lender Agent in its individual capacity.

(g) Successor Lender Agent. Each Lender Agent may, upon five days' notice to the Borrower and its related Lender, and such Lender Agent will, upon the direction of its related Lender resign as the Lender Agent for such Lender. If any Lender Agent shall resign, then its related Lender during such five day period shall appoint a successor agent. If for any reason no successor agent is appointed by such Lender during such five day period, then effective upon the termination of such five day period, and the Borrower shall make all payments in respect of the Obligations due to such Lender directly to such Lender, and for all purposes shall deal directly with such Lender. After any retiring Lender Agent's resignation hereunder as a Lender Agent, the provisions of Articles VIII and IX shall inure to its benefit with respect to any actions taken or omitted to be taken by it while it was a Lender Agent under this Agreement.

#### ARTICLE X.

#### COLLATERAL AGENT

##### SECTION 10.01 Designation of Collateral Agent.

(a) Initial Collateral Agent. Each of the Borrower, the Lender Agents and the Administrative Agent hereby designate and appoint the Collateral Agent to act as its agent for the purposes of perfection of a security interest in the Collateral Portfolio and hereby authorizes the Collateral Agent to take such actions on its behalf and on behalf of each of the Secured Parties and to exercise such powers and perform such duties as are expressly granted to the Collateral Agent by this Agreement. The Collateral Agent hereby accepts such agency appointment to act as Collateral Agent pursuant to the terms of this Agreement, until its resignation or removal as Collateral Agent pursuant to the terms hereof.

(b) Successor Collateral Agent. Upon the Collateral Agent's receipt of a Collateral Agent Termination Notice from the Administrative Agent of the designation of a successor Collateral Agent pursuant to the provisions of Section 10.05, the Collateral Agent agrees that it will terminate its activities as Collateral Agent hereunder.

(c) Secured Party. The Administrative Agent, the Lender Agents and the Lenders hereby appoint Wells Fargo, in its capacity as Collateral Agent hereunder, as their agent for the purposes of perfection of a security interest in the Collateral Portfolio. Wells Fargo, in its capacity as Collateral Agent hereunder, hereby accepts such appointment and agrees to perform the duties set forth in Section 10.02(b).

##### SECTION 10.02 Duties of Collateral Agent.

(a) Appointment. The Borrower, the Lender Agents and the Administrative Agent each hereby appoints Wells Fargo to act as Collateral Agent, for the benefit of the Secured Parties. The Collateral Agent hereby accepts such appointment and agrees to perform the duties and obligations with respect thereto set forth herein.

(b) Duties. On or before the initial Advance Date, and until its removal pursuant to Section 10.05, the Collateral Agent shall perform, on behalf of the Secured Parties, the following duties and obligations:

(i) The Collateral Agent shall calculate amounts to be remitted pursuant to Section 2.04 to the applicable parties and notify the Servicer and the Administrative Agent in the event of any discrepancy between the Collateral Agent's calculations and the Servicing Report (such dispute to be resolved in accordance with Section 2.05);

(ii) The Collateral Agent shall make payments pursuant to the terms of the Servicing Report or as otherwise directed in accordance with Sections 2.04 or 2.05 (the "Payment Duties").

(iii) The Collateral Agent shall provide to the Servicer a copy of all written notices and communications identified as being sent to it in connection with the Loan Assets and the other Collateral Portfolio held hereunder which it receives from the related Obligor, participating bank and/or agent bank. In no instance shall the Collateral Agent be under any duty or obligation to take any action on behalf of the Servicer in respect of the exercise of any voting or consent rights, or similar actions, unless it receives specific written instructions from the Servicer, prior to the occurrence of an Event of Default or the Administrative Agent, after the occurrence of Event of Default, in which event the Collateral Agent shall vote, consent or take such other action in accordance with such instructions.

(c) (i) The Administrative Agent, each Lender Agent and each Secured Party further authorizes the Collateral Agent to take such action as agent on its behalf and to exercise such powers under this Agreement and the other Transaction Documents as are expressly delegated to the Collateral Agent by the terms hereof and thereof, together with such powers as are reasonably incidental thereto. In furtherance, and without limiting the generality of the foregoing, each Secured Party hereby appoints the Collateral Agent (acting at the direction of the Administrative Agent) as its agent to execute and deliver all further instruments and documents, and take all further action that the Administrative Agent deems necessary or desirable in order to perfect, protect or more fully evidence the security interests granted by the Borrower hereunder, or to enable any of them to exercise or enforce any of their respective rights hereunder, including, without limitation, the execution by the Collateral Agent as secured party/assignee of such financing or continuation statements, or amendments thereto or assignments thereof, relative to all or any of the Loan Assets now existing or hereafter arising, and such other instruments or notices, as may be necessary or appropriate for the purposes stated hereinabove. Nothing in this Section 10.02(c) shall be deemed to relieve the Borrower or the Servicer of their respective obligations to protect the interest of the Collateral Agent



(for the benefit of the Secured Parties) in the Collateral Portfolio, including to file financing and continuation statements in respect of the Collateral Portfolio in accordance with [Section 5.01\(t\)](#).

(ii) The Administrative Agent may direct the Collateral Agent to take any such incidental action hereunder. With respect to other actions which are incidental to the actions specifically delegated to the Collateral Agent hereunder, the Collateral Agent shall not be required to take any such incidental action hereunder, but shall be required to act or to refrain from acting (and shall be fully protected in acting or refraining from acting) upon the direction of the Administrative Agent; *provided* that the Collateral Agent shall not be required to take any action hereunder at the request of the Administrative Agent, any Secured Party or otherwise if the taking of such action, in the reasonable determination of the Collateral Agent, (x) shall be in violation of any Applicable Law or contrary to any provisions of this Agreement or (y) shall expose the Collateral Agent to liability hereunder or otherwise (unless it has received indemnity which it reasonably deems to be satisfactory with respect thereto). In the event the Collateral Agent requests the consent of the Administrative Agent and the Collateral Agent does not receive a consent (either positive or negative) from the Administrative Agent within 10 Business Days of its receipt of such request, then the Administrative Agent shall be deemed to have declined to consent to the relevant action.

(iii) Except as expressly provided herein, the Collateral Agent shall not be under any duty or obligation to take any affirmative action to exercise or enforce any power, right or remedy available to it under this Agreement (x) unless and until (and to the extent) expressly so directed by the Administrative Agent or (y) prior to the Facility Maturity Date (and upon such occurrence, the Collateral Agent shall act in accordance with the written instructions of the Administrative Agent pursuant to clause (x)). The Collateral Agent shall not be liable for any action taken, suffered or omitted by it in accordance with the request or direction of any Secured Party, to the extent that this Agreement provides such Secured Party the right to so direct the Collateral Agent, or the Administrative Agent. The Collateral Agent shall not be deemed to have notice or knowledge of any matter hereunder, including an Event of Default, unless a Responsible Officer of the Collateral Agent has knowledge of such matter or written notice thereof is received by the Collateral Agent.

(d) If, in performing its duties under this Agreement, the Collateral Agent is required to decide between alternative courses of action, the Collateral Agent may request written instructions from the Administrative Agent as to the course of action desired by it. If the Collateral Agent does not receive such instructions within two Business Days after it has requested them, the Collateral Agent may, but shall be under no duty to, take or refrain from taking any such courses of action. The Collateral Agent shall act in accordance with instructions received after such two Business Day period except to the extent it has already, in good faith, taken or committed itself to take, action inconsistent with such instructions. The Collateral Agent shall be entitled to rely on the advice of legal counsel and independent accountants in performing its duties hereunder and shall be deemed to have acted in good faith if it acts in accordance with such advice.

(e) Concurrently herewith, the Administrative Agent directs the Collateral Agent and the Collateral Agent is authorized to enter into the Pledge Agreement, Collection Account Agreement and Unfunded Exposure Account Agreement. For the avoidance of doubt, all of the Collateral Agent's rights, protections and immunities provided herein shall apply to the Collateral Agent for any actions taken or omitted to be taken under the Pledge Agreement, Collection Account Agreement and Unfunded Exposure Account Agreement in such capacity.

**SECTION 10.03 Merger or Consolidation.**

Any Person (i) into which the Collateral Agent may be merged or consolidated, (ii) that may result from any merger or consolidation to which the Collateral Agent shall be a party, or (iii) that may succeed to the properties and assets of the Collateral Agent substantially as a whole, which Person in any of the foregoing cases executes an agreement of assumption to perform every obligation of the Collateral Agent hereunder, shall be the successor to the Collateral Agent under this Agreement without further act of any of the parties to this Agreement.

**SECTION 10.04 Collateral Agent Compensation.**

As compensation for its Collateral Agent activities hereunder, the Collateral Agent shall be entitled to the Collateral Agent Fees and Collateral Agent Expenses from the Borrower as set forth in the Wells Fargo Fee Letter, payable to the extent of funds available therefor pursuant to the provisions of Section 2.04. The Collateral Agent's entitlement to receive the Collateral Agent Fees shall cease on the earlier to occur of: (i) its removal as Collateral Agent pursuant to Section 10.05 or (ii) the termination of this Agreement.

**SECTION 10.05 Collateral Agent Removal.**

The Collateral Agent may be removed, with or without cause, by the Administrative Agent by notice given in writing to the Collateral Agent (the "Collateral Agent Termination Notice"); *provided*, notwithstanding its receipt of a Collateral Agent Termination Notice, the Collateral Agent shall continue to act in such capacity until a successor Collateral Agent has been appointed and has agreed to act as Collateral Agent hereunder; *provided* that the Collateral Agent shall continue to receive compensation of its fees and expenses in accordance with Section 10.04 above while so serving as the Collateral Agent prior to a successor Collateral Agent being appointed.

**SECTION 10.06 Limitation on Liability.**

(a) The Collateral Agent may conclusively rely on and shall be fully protected in acting upon any certificate, instrument, opinion, notice, letter, telegram or other document delivered to it and that in good faith it reasonably believes to be genuine and that has been signed by the proper party or parties. The Collateral Agent may rely conclusively on and shall be fully protected in acting upon (a) the written instructions of any designated officer of the Administrative Agent or (b) the verbal instructions of the Administrative Agent.

(b) The Collateral Agent may consult counsel satisfactory to it and the advice or opinion of such counsel shall be full and complete authorization and protection in respect of

any action taken, suffered or omitted by it hereunder in good faith and in accordance with the advice or opinion of such counsel.

(c) The Collateral Agent shall not be liable for any error of judgment, or for any act done or step taken or omitted by it, in good faith, or for any mistakes of fact or law, or for anything that it may do or refrain from doing in connection herewith except in the case of its willful misconduct or grossly negligent performance or omission of its duties.

(d) The Collateral Agent makes no warranty or representation and shall have no responsibility (except as expressly set forth in this Agreement) as to the content, enforceability, completeness, validity, sufficiency, value, genuineness, ownership or transferability of the Collateral Portfolio, and will not be required to and will not make any representations as to the validity or value (except as expressly set forth in this Agreement) of any of the Collateral Portfolio. The Collateral Agent shall not be obligated to take any legal action hereunder that might in its judgment involve any expense or liability unless it has been furnished with an indemnity reasonably satisfactory to it.

(e) The Collateral Agent shall have no duties or responsibilities except such duties and responsibilities as are specifically set forth in this Agreement and no covenants or obligations shall be implied in this Agreement against the Collateral Agent. Notwithstanding any provision to the contrary elsewhere in the Transaction Documents, the Collateral Agent shall not have any fiduciary relationship with any party hereto or any Secured Party in its capacity as such, and no implied covenants, functions, obligations or responsibilities shall be read into this Agreement, the other Transaction Documents or otherwise exist against the Collateral Agent. Without limiting the generality of the foregoing, it is hereby expressly agreed and stipulated by the other parties hereto that the Collateral Agent shall not be required to exercise any discretion hereunder and shall have no investment or management responsibility.

(f) The Collateral Agent shall not be required to expend or risk its own funds in the performance of its duties hereunder.

(g) It is expressly agreed and acknowledged that the Collateral Agent is not guaranteeing performance of or assuming any liability for the obligations of the other parties hereto or any parties to the Collateral Portfolio.

(h) Subject in all cases to the last sentence of Section 2.05, in case any reasonable question arises as to its duties hereunder, the Collateral Agent may, prior to the occurrence of an Event of Default or the Facility Maturity Date, request instructions from the Servicer and may, after the occurrence of an Event of Default or the Facility Maturity Date, request instructions from the Administrative Agent, and shall be entitled at all times to refrain from taking any action unless it has received instructions from the Servicer or the Administrative Agent, as applicable. The Collateral Agent shall in all events have no liability, risk or cost for any action taken pursuant to and in compliance with the instruction of the Administrative Agent. In no event shall the Collateral Agent be liable for special, indirect or consequential loss or damage of any kind whatsoever (including but not limited to lost profits), even if the Collateral Agent has been advised of the likelihood of such loss or damage and regardless of the form of action.

(i) The Collateral Agent shall not be liable for the acts or omissions of the Collateral Custodian under this Agreement and shall not be required to monitor the performance of the Collateral Custodian. Notwithstanding anything herein to the contrary, the Collateral Agent shall have no duty to perform any of the duties of the Collateral Custodian under this Agreement.

SECTION 10.07 Collateral Agent Resignation.

The Collateral Agent may resign at any time by giving not less than 90 days written notice thereof to the Administrative Agent and with the consent of the Administrative Agent, which consent shall not be unreasonably withheld. Upon receiving such notice of resignation, the Administrative Agent shall promptly appoint a successor collateral agent or collateral agents by written instrument, in duplicate, executed by the Administrative Agent, one copy of which shall be delivered to the Collateral Agent so resigning and one copy to the successor collateral agent or collateral agents, together with a copy to the Borrower, Servicer and Collateral Custodian. If no successor collateral agent shall have been appointed and an instrument of acceptance by a successor Collateral Agent shall not have been delivered to the Collateral Agent within 45 days after the giving of such notice of resignation, the resigning Collateral Agent may petition any court of competent jurisdiction for the appointment of a successor Collateral Agent. Notwithstanding anything herein to the contrary, the Collateral Agent may not resign prior to a successor Collateral Agent being appointed.

ARTICLE XI.

MISCELLANEOUS

SECTION 11.01 Amendments and Waivers.

(a) (i) No amendment or modification of any provision of this Agreement shall be effective without the written agreement of the Borrower, the Servicer, the Required Lenders, the Administrative Agent and, solely if such amendment or modification would adversely affect the rights and obligations of the Collateral Agent, the Account Bank or the Collateral Custodian, the written agreement of the Collateral Agent, the Account Bank or the Collateral Custodian, as applicable; (ii) no termination or waiver of any provision of this Agreement or consent to any departure therefrom by the Borrower or the Servicer shall be effective without the written concurrence of the Administrative Agent and the Required Lenders and (iii) no amendment, waiver or modification adversely affecting the rights or obligations of any Hedge Counterparty shall be effective without the written agreement of such Person. Any waiver or consent shall be effective only in the specific instance and for the specific purpose for which given.

(b) Notwithstanding the provisions of Section 11.01(a), the written consent of all of the Lenders shall be required for any amendment, modification or waiver (i) reducing any outstanding Advances, or the Yield thereon, (ii) postponing any date for any payment of any Advance, or the Yield thereon, (iii) modifying the provisions of this Section 11.01, (iv) modifying the provisions of Section 2.22 or (v) extending the Stated Maturity Date or clause (i) of the definition of "Reinvestment Period".

SECTION 11.02 Notices, Etc. All notices and other communications hereunder shall, unless otherwise stated herein, be in writing (which shall include facsimile communication and communication by e-mail) and faxed, e-mailed or delivered, to each party hereto, at its address set forth under its name on the signature pages hereto or at such other address as shall be designated by such party in a written notice to the other parties hereto. Notices and communications by facsimile and e-mail shall be effective when sent (and shall be followed by hard copy sent by regular mail), and notices and communications sent by other means shall be effective when received.

SECTION 11.03 No Waiver; Remedies. No failure on the part of the Administrative Agent, the Collateral Agent, any Lender or any Lender Agent to exercise, and no delay in exercising, any right hereunder shall operate as a waiver thereof; nor shall any single or partial exercise of any right hereunder preclude any other or further exercise thereof or the exercise of any other right. The remedies herein provided are cumulative and not exclusive of any remedies provided by law.

SECTION 11.04 Binding Effect; Assignability; Multiple Lenders.

(a) This Agreement shall be binding upon and inure to the benefit of the Borrower, the Servicer, the Administrative Agent, each Lender, the Lender Agents, the Collateral Agent, the Account Bank, the Collateral Custodian and their respective successors and permitted assigns. Each Lender and their respective successors and assigns may assign, or grant a security interest or sell a participation interest in, (i) this Agreement and such Lender's rights and obligations hereunder and interest herein in whole or in part (including by way of the sale of participation interests therein) and/or (ii) any Advance (or portion thereof) or any Variable Funding Note (or any portion thereof) to any Person other than the Borrower or an Affiliate thereof; *provided* that, (x) unless the Borrower shall otherwise consent, a Lender may only assign, grant a security interest or sell a participation in, its rights and obligations hereunder to an Affiliate or a Permitted Assignee who is not a Prohibited Transferee, (y) after an Event of Default has occurred, a Lender may assign its rights and obligations hereunder to any Person and (z) any Conduit Lender shall not need prior consent to at any time assign, or grant a security interest or sell a participation interest in, any Advance (or portion thereof) to a Liquidity Bank or any commercial paper conduit sponsored by a Liquidity Bank or an Affiliate of its related Lender Agent. Any such assignee shall execute and deliver to the Servicer, the Borrower and the Administrative Agent a fully-executed Transferee Letter substantially in the form of Exhibit Q hereto (a "Transferee Letter") and a fully-executed Joinder Supplement. The parties to any such assignment, grant or sale of a participation interest shall execute and deliver to the related Lender Agent for its acceptance and recording in its books and records, such agreement or document as may be satisfactory to such parties and the applicable Lender Agent. None of the Borrower, the Transferor or the Servicer may assign, or permit any Lien to exist upon, any of its rights or obligations hereunder or under any Transaction Document or any interest herein or in any Transaction Document without the prior written consent of each Lender Agent and the Administrative Agent.

(b) Notwithstanding any other provision of this Section 11.04, any Lender may at any time pledge or grant a security interest in all or any portion of its rights (including, without limitation, rights to payment of principal and interest) under this Agreement to secure

obligations of such Lender to a Federal Reserve Bank, without notice to or consent of the Borrower or the Administrative Agent; *provided* that no such pledge or grant of a security interest shall release such Lender from any of its obligations hereunder, or substitute any such pledgee or grantee for such Lender as a party hereto.

(c) Each Hedge Counterparty, each Affected Party and each Indemnified Party shall be an express third party beneficiary of this Agreement.

SECTION 11.05 Term of This Agreement. This Agreement, including, without limitation, the Borrower's representations and covenants set forth in Articles IV and V and the Servicer's representations, covenants and duties set forth in Articles IV, V and VI, shall remain in full force and effect until the Collection Date; *provided* that the rights and remedies with respect to any breach of any representation and warranty made or deemed made by the Borrower or the Servicer pursuant to Articles III and IV and the indemnification and payment provisions of Article VIII, IX and Article XI and the provisions of Section 2.10, Section 2.11, Section 11.07, Section 11.08 and Section 11.09 shall be continuing and shall survive any termination of this Agreement.

SECTION 11.06 GOVERNING LAW; JURY WAIVER. THIS AGREEMENT SHALL, IN ACCORDANCE WITH SECTION 5-1401 OF THE GENERAL OBLIGATIONS LAW OF THE STATE OF NEW YORK, BE GOVERNED BY THE LAWS OF THE STATE OF NEW YORK. EACH OF THE PARTIES HERETO WAIVES, TO THE FULLEST EXTENT PERMITTED BY LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION ARISING DIRECTLY OR INDIRECTLY OUT OF, UNDER OR IN CONNECTION WITH THIS AGREEMENT OR ANY OF THE TRANSACTIONS CONTEMPLATED HEREUNDER.

SECTION 11.07 Costs, Expenses and Taxes.

(a) In addition to the rights of indemnification granted to the Collateral Agent, the Account Bank, the Administrative Agent, the Lenders, the Lender Agents, the Collateral Custodian and their respective Affiliates under Section 8.01 and Section 8.02 hereof, each of the Borrower, the Servicer and the Transferor agrees to pay on demand all out-of-pocket costs and expenses of the Administrative Agent, the Lenders, the Lender Agents, the Collateral Agent, the Account Bank and the Collateral Custodian incurred in connection with the preparation, execution, delivery, administration (including periodic auditing), syndication, renewal, amendment or modification of, any waiver or consent issued in connection with, this Agreement, the Transaction Documents and the other documents to be delivered hereunder or in connection herewith, including, without limitation, the fees and out-of-pocket expenses of counsel for the Administrative Agent, the Lenders, the Lender Agents, the Collateral Agent, the Account Bank and the Collateral Custodian with respect thereto and with respect to advising the Administrative Agent, the Lenders, the Lender Agents, the Collateral Agent, the Account Bank and the Collateral Custodian as to their respective rights and remedies under this Agreement and the other documents to be delivered hereunder or in connection herewith, and all out-of-pocket costs and expenses, if any (including counsel fees and expenses), incurred by the Administrative Agent, the Lenders, the Lender Agents, the Collateral Agent, the Account Bank or the Collateral Custodian in connection with the enforcement or potential enforcement of this Agreement or any

Transaction Document by such Person and the other documents to be delivered hereunder or in connection herewith.

(b) The Borrower, the Servicer and the Transferor shall pay on demand any and all stamp, sales, excise and other Taxes and fees payable or determined to be payable to any Governmental Authority in connection with the execution, delivery, filing and recording of this Agreement, the other Transaction Documents or any other document providing liquidity support, credit enhancement or other similar support to the Lenders in connection with this Agreement or the funding or maintenance of Advances hereunder.

(c) The Servicer and the Transferor shall pay on demand all other out-of-pocket costs, expenses and Taxes (excluding Taxes imposed on or measured by net income) incurred by the Administrative Agent, the Lenders, the Lender Agents, the Collateral Agent, the Collateral Custodian and the Account Bank, including, without limitation, all costs and expenses incurred by the Administrative Agent, the Lender Agents and the Lenders in connection with periodic audits of the Borrower's, the Transferor's or the Servicer's books and records.

**SECTION 11.08 No Proceedings.**

(a) Each of the parties hereto (other than the Administrative Agent with the consent of the Lender Agents) and each Hedge Counterparty (by accepting the benefits of this Agreement) agree that it will not institute against, or join any other Person in instituting against, the Borrower any proceedings of the type referred to in the definition of Bankruptcy Event so long as there shall not have elapsed one year and one day (or such longer preference period as shall then be in effect) since the Collection Date.

(b) Each of the parties hereto (other than any Conduit Lender) and each Hedge Counterparty (by accepting the benefits of this Agreement) hereby agrees that it will not institute against, or join any other Person in instituting against, any Conduit Lender, the Administrative Agent, or any Liquidity Banks any Bankruptcy Proceeding so long as any commercial paper issued by such Conduit Lender shall be outstanding and there shall not have elapsed one year and one day (or such longer preference period as shall then be in effect) since the last day on which any such commercial paper shall have been outstanding.

**SECTION 11.09 Recourse Against Certain Parties.**

(a) No recourse under or with respect to any obligation, covenant or agreement (including, without limitation, the payment of any fees or any other obligations) of the Administrative Agent, the Lenders, the Lender Agents or any Secured Party as contained in this Agreement or any other agreement, instrument or document entered into by the Administrative Agent, the Lenders, the Lender Agents or any Secured Party pursuant hereto or in connection herewith shall be had against any administrator of the Administrative Agent, the Lenders, the Lender Agents or any Secured Party or any incorporator, affiliate, stockholder, officer, employee or director of the Administrative Agent, the Lenders, the Lender Agents or any Secured Party or of any such administrator, as such, by the enforcement of any assessment or by any legal or equitable proceeding, by virtue of any statute or otherwise; it being expressly agreed and understood that the agreements of each party hereto contained in this Agreement and all of the

other agreements, instruments and documents entered into by the Administrative Agent, the Lenders, the Lender Agents or any Secured Party pursuant hereto or in connection herewith are, in each case, solely the corporate obligations of such party (and nothing in this Section 11.09 shall be construed to diminish in any way such corporate obligations of such party), and that no personal liability whatsoever shall attach to or be incurred by any administrator of the Administrative Agent, the Lenders, the Lender Agents or any Secured Party or any incorporator, stockholder, affiliate, officer, employee or director of the Lenders, the Lender Agents or the Administrative Agent or of any such administrator, as such, or any of them, under or by reason of any of the obligations, covenants or agreements of the Administrative Agent, the Lenders, the Lender Agents or any Secured Party contained in this Agreement or in any other such instruments, documents or agreements, or are implied therefrom, and that any and all personal liability of every such administrator of the Administrative Agent, the Lenders, the Lender Agents or any Secured Party and each incorporator, stockholder, affiliate, officer, employee or director of the Administrative Agent, the Lenders, the Lender Agents or any Secured Party or of any such administrator, or any of them, for breaches by the Administrative Agent, the Lenders, the Lender Agents or any Secured Party of any such obligations, covenants or agreements, which liability may arise either at common law or in equity, by statute or constitution, or otherwise, is hereby expressly waived as a condition of and in consideration for the execution of this Agreement.

(b) Notwithstanding any contrary provision set forth herein, no claim may be made by the Borrower, the Transferor or the Servicer or any other Person against the Administrative Agent, the Lenders, the Lender Agents or any Secured Party or their respective Affiliates, directors, officers, employees, attorneys or agents for any special, indirect, consequential or punitive damages in respect to any claim for breach of contract or any other theory of liability arising out of or related to the transactions contemplated by this Agreement, or any act, omission or event occurring in connection therewith; and the Borrower, the Transferor and the Servicer each hereby waives, releases, and agrees not to sue upon any claim for any such damages, whether or not accrued and whether or not known or suspected.

(c) No obligation or liability to any Obligor under any of the Loan Assets is intended to be assumed by the Administrative Agent, the Lenders, the Lender Agents or any Secured Party under or as a result of this Agreement and the transactions contemplated hereby.

(d) Notwithstanding anything in this Agreement to the contrary, no Conduit Lender shall have any obligation to pay any amount required to be paid by it hereunder in excess of any amount available to such Conduit Lender after paying or making provision for the payment of its Commercial Paper Notes. All payment obligations of each Conduit Lender hereunder are contingent on the availability of funds in excess of the amounts necessary to pay its Commercial Paper Notes; and each of the other parties hereto agrees that it will not have a claim under Section 101(5) of the Bankruptcy Code if and to the extent that any such payment obligation owed to it by a Conduit Lender exceeds the amount available to such Conduit Lender to pay such amount after paying or making provision for the payment of its Commercial Paper Notes.

(e) The provisions of this Section 11.09 shall survive the termination of this Agreement.



SECTION 11.10 Execution in Counterparts; Severability; Integration. This Agreement may be executed in any number of counterparts and by different parties hereto in separate counterparts, each of which when so executed shall be deemed to be an original and all of which when taken together shall constitute one and the same agreement. Delivery of an executed counterpart of a signature page to this Agreement by e-mail in portable document format (.pdf) or facsimile shall be effective as delivery of a manually executed counterpart of this Agreement. In the event that any provision in or obligation under this Agreement shall be invalid, illegal or unenforceable in any jurisdiction, the validity, legality and enforceability of the remaining provisions or obligations, or of such provision or obligation in any other jurisdiction, shall not in any way be affected or impaired thereby. This Agreement and any agreements or letters (including fee letters) executed in connection herewith contains the final and complete integration of all prior expressions by the parties hereto with respect to the subject matter hereof and shall constitute the entire agreement among the parties hereto with respect to the subject matter hereof, superseding all prior oral or written understandings other than any fee letter delivered by the Servicer to the Administrative Agent and the Lender Agents.

SECTION 11.11 Consent to Jurisdiction; Service of Process.

(a) Each party hereto hereby irrevocably submits to the non-exclusive jurisdiction of any New York State or Federal court sitting in New York City in any action or proceeding arising out of or relating to the Transaction Documents, and each party hereto hereby irrevocably agrees that all claims in respect of such action or proceeding may be heard and determined in such New York State court or, to the extent permitted by law, in such Federal court. The parties hereto hereby irrevocably waive, to the fullest extent they may effectively do so, the defense of an inconvenient forum to the maintenance of such action or proceeding. The parties hereto agree that a final judgment in any such 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) Each of the Borrower and the Servicer agrees that service of process may be effected by mailing a copy thereof by registered or certified mail, postage prepaid, to the Borrower or the Servicer, as applicable, at its address specified in Section 11.02 or at such other address as the Administrative Agent shall have been notified in accordance herewith. Nothing in this Section 11.11 shall affect the right of the Lenders, the Lender Agents or the Administrative Agent to serve legal process in any other manner permitted by law.

SECTION 11.12 Characterization of Conveyances Pursuant to the Purchase and Sale Agreement.

(a) It is the express intent of the parties hereto that the conveyance of the Eligible Loan Assets by the Transferor to the Borrower as contemplated by the Purchase and Sale Agreement be, and be treated for all purposes (other than accounting purposes and subject to the tax characterization of the Borrower and the Advances described in Section 5.01(aa) and Section 5.02(k) hereof) as, a sale by the Transferor of such Eligible Loan Assets. It is, further, not the intention of the parties that such conveyance be deemed a pledge of the Eligible Loan Assets by the Transferor to the Borrower to secure a debt or other obligation of the Transferor. However, in the event that, notwithstanding the intent of the parties, the Eligible Loan Assets are

held to continue to be property of the Transferor, then the parties hereto agree that: (i) the Purchase and Sale Agreement shall also be deemed to be a security agreement under Applicable Law; (ii) as set forth in the Purchase and Sale Agreement, the transfer of the Eligible Loan Assets provided for in the Purchase and Sale Agreement shall be deemed to be a grant by the Transferor to the Borrower of a first priority security interest (subject only to Permitted Liens) in all of the Transferor's right, title and interest in and to the Eligible Loan Assets and all amounts payable to the holders of the Eligible Loan Assets in accordance with the terms thereof and all proceeds of the conversion, voluntary or involuntary, of the foregoing into cash, instruments, securities or other property, including, without limitation, all amounts from time to time held or invested in the Controlled Accounts, whether in the form of cash, instruments, securities or other property; (iii) the possession by the Borrower (or the Collateral Custodian on its behalf) of Loan Assets and such other items of property as constitute instruments, money, negotiable documents or chattel paper shall be, subject to clause (iv), for purposes of perfecting the security interest pursuant to the UCC; and (iv) acknowledgements from Persons holding such property shall be deemed acknowledgements from custodians, bailees or agents (as applicable) of the Borrower for the purpose of perfecting such security interest under Applicable Law. The parties further agree that any assignment of the interest of the Borrower pursuant to any provision hereof shall also be deemed to be an assignment of any security interest created pursuant to the terms of the Purchase and Sale Agreement. The Borrower shall, to the extent consistent with this Agreement and the other Transaction Documents, take such actions as may be necessary to ensure that, if the Purchase and Sale Agreement was deemed to create a security interest in the Eligible Loan Assets, such security interest would be deemed to be a perfected security interest of first priority (subject only to Permitted Liens) under Applicable Law and will be maintained as such throughout the term of this Agreement.

(b) It is the intention of each of the parties hereto that the Eligible Loan Assets conveyed by the Transferor to the Borrower pursuant to the Purchase and Sale Agreement shall constitute assets owned by the Borrower and shall not be part of the Transferor's estate in the event of the filing of a bankruptcy petition by or against the Transferor under any bankruptcy or similar law.

(c) The Borrower agrees to treat, and shall cause the Transferor to treat, for all purposes (other than accounting purposes and subject to the tax characterization of the Borrower and the Advances described in Section 5.01(aa) and Section 5.02(k) hereof), the transactions effected by the Purchase and Sale Agreement as sales of assets to the Borrower. The Borrower and the Servicer each hereby agree to cause the Transferor to reflect in the Transferor's financial records and to include a note in the publicly filed annual and quarterly financial statements of Fifth Street indicating that: (i) assets related to transactions (including transactions pursuant to the Transaction Documents) that do not meet SFAS 140 requirements for accounting sale treatment are reflected in the consolidated balance sheet of Fifth Street, as finance receivables pledged and non-recourse, secured borrowings and (ii) those assets are owned by a special purpose entity that is consolidated in the financial statements of Fifth Street, and the creditors of that special purpose entity have received ownership and/or security interests in such assets and such assets are not intended to be available to the creditors of sellers (or any affiliate of the sellers) of such assets to that special purpose entity.

SECTION 11.13 Confidentiality.

(a) Each of the Administrative Agent, the Lenders, the Lender Agents, the Servicer, the Collateral Agent, the Borrower, the Account Bank, the Transferor and the Collateral Custodian shall maintain and shall cause each of its employees and officers to maintain the confidentiality of the Agreement and all information with respect to the other parties, including all information regarding the business of the Borrower and the Servicer hereto and their respective businesses obtained by it or them in connection with the structuring, negotiating and execution of the transactions contemplated herein, except that each such party and its officers and employees may (i) disclose such information to its external accountants, investigators, auditors, attorneys or other agents, including any valuation firm engaged by such party in connection with any due diligence or comparable activities with respect to the transactions and Loan Assets contemplated herein and the agents of such Persons (“Excepted Persons”); *provided* that each Excepted Person shall, as a condition to any such disclosure, agree for the benefit of the Administrative Agent, the Lenders, the Lender Agents, the Servicer, the Collateral Agent, the Borrower, the Account Bank, the Transferor and the Collateral Custodian that such information shall be used solely in connection with such Excepted Person’s evaluation of, or relationship with, the Borrower and its affiliates, (ii) disclose the existence of the Agreement, but not the financial terms thereof, (iii) disclose such information as is required by Applicable Law and (iv) disclose the Agreement and such information in any suit, action, proceeding or investigation (whether in law or in equity or pursuant to arbitration) involving any of the Transaction Documents for the purpose of defending itself, reducing its liability, or protecting or exercising any of its claims, rights, remedies, or interests under or in connection with any of the Transaction Documents. Notwithstanding the foregoing provisions of this Section 11.13(a), the Servicer may, subject to Applicable Law and the terms of any Loan Agreements, make available copies of the documents in the Servicing Files and such other documents it holds in its capacity as Servicer pursuant to the terms of this Agreement, to any of its creditors. It is understood that the financial terms that may not be disclosed except in compliance with this Section 11.13(a) include, without limitation, all fees and other pricing terms, and all Events of Default, Servicer Termination Events, and priority of payment provisions.

(b) Anything herein to the contrary notwithstanding, the Borrower and the Servicer each hereby consents to the disclosure of any nonpublic information with respect to it (i) to the Administrative Agent, the Lenders, the Lender Agents, the Account Bank, the Collateral Agent or the Collateral Custodian by each other, (ii) by the Administrative Agent, the Lenders, the Lender Agents, the Account Bank, the Collateral Agent and the Collateral Custodian to any prospective or actual assignee or participant of any of them provided such Person agrees to hold such information confidential, or (iii) by the Administrative Agent, the Lenders, the Lender Agents, the Account Bank, the Collateral Agent and the Collateral Custodian to any commercial paper dealer or provider of a surety, guaranty or credit or liquidity enhancement to any Lender or any Person providing financing to, or holding equity interests in, any Conduit Lender, as applicable, and to any officers, directors, employees, outside accountants and attorneys of any of the foregoing, provided each such Person is informed of the confidential nature of such information. In addition, the Lenders, the Lender Agents, the Administrative Agent, the Collateral Agent, the Account Bank and the Collateral Custodian may disclose any such nonpublic information as required pursuant to any law, rule, regulation, direction, request or order of any judicial, administrative or regulatory authority or proceedings (whether or not having the force or effect of law).

(c) Notwithstanding anything herein to the contrary, the foregoing shall not be construed to prohibit (i) disclosure of any and all information that is or becomes publicly known; (ii) disclosure of any and all information (a) if required to do so by any applicable statute, law, rule or regulation, (b) to any government agency or regulatory body having or claiming authority to regulate or oversee any respects of the Lenders', the Lender Agents', the Administrative Agent's, the Collateral Agent's, the Account Bank's or the Collateral Custodian's business or that of their affiliates, (c) pursuant to any subpoena, civil investigative demand or similar demand or request of any court, regulatory authority, arbitrator or arbitration to which the Administrative Agent, any Lender, any Lender Agent, the Collateral Agent, the Collateral Custodian or the Account Bank or an officer, director, employer, shareholder or affiliate of any of the foregoing is a party, (d) in any preliminary or final offering circular, registration statement or contract or other document approved in advance by the Borrower, the Servicer or the Transferor or (e) to any affiliate, independent or internal auditor, agent, employee or attorney of the Collateral Agent or the Collateral Custodian having a need to know the same, *provided* that the disclosing party advises such recipient of the confidential nature of the information being disclosed; or (iii) any other disclosure authorized by the Borrower, Servicer or the Transferor.

**SECTION 11.14 Non-Confidentiality of Tax Treatment.**

All parties hereto agree that each of them and each of their employees, representatives, and other agents may disclose to any and all Persons, without limitation of any kind, the tax treatment and tax structure of the transaction and all materials of any kind (including, without limitation, opinions or other tax analyses) that are provided to any of them relating to such tax treatment and tax structure. "Tax treatment" and "tax structure" shall have the same meaning as such terms have for purposes of Treasury Regulation Section 1.6011-4; *provided* that with respect to any document or similar item that in either case contains information concerning the tax treatment or tax structure of the transaction as well as other information, the provisions of this Section 11.14 shall only apply to such portions of the document or similar item that relate to the tax treatment or tax structure of the transactions contemplated hereby.

**SECTION 11.15 Waiver of Set Off.**

Each of the parties hereto hereby waives any right of setoff it may have or to which it may be entitled under this Agreement from time to time against the Administrative Agent, the Lenders, the Lender Agents or their respective assets.

**SECTION 11.16 Headings and Exhibits.**

The headings herein are for purposes of references only and shall not otherwise affect the meaning or interpretation of any provision hereof. The schedules and exhibits attached hereto and referred to herein shall constitute a part of this Agreement and are incorporated into this Agreement for all purposes.

**SECTION 11.17 Ratable Payments.**

If any Lender, whether by setoff or otherwise, shall obtain any payment (whether voluntary, involuntary, through the exercise of any right of setoff, or otherwise) on account of

Advances owing to it (other than pursuant to Breakage Fees, Section 2.10 or Section 2.11) in excess of its ratable share of payments on account of the Advances obtained by all the Lenders, such Lender shall forthwith purchase from the other Lenders such participations in the Advances owing to them as shall be necessary to cause such purchasing Lender to share the excess payment ratably with each of them; *provided*, that, if all or any portion of such excess payment is thereafter recovered from such purchasing Lender, such purchase from each Lender shall be rescinded and such Lender shall repay to the purchasing Lender the purchase price to the extent of such recovery together with an amount equal to such Lender's ratable share (according to the proportion of (i) the amount of such Lender's required repayment to (ii) the total amount so recovered from the purchasing Lender) of any interest or other amount paid or payable by the purchasing Lender in respect of the total amount so recovered.

SECTION 11.18 Failure of Borrower or Servicer to Perform Certain Obligations.

If the Borrower or the Servicer, as applicable, fails to perform any of its agreements or obligations under Section 5.01(t), Section 5.02(r) or Section 5.03(e), the Administrative Agent may (but shall not be required to) itself perform, or cause performance of, such agreement or obligation, and the expenses of the Administrative Agent incurred in connection therewith shall be payable by the Borrower or the Servicer (on behalf of the Borrower), as applicable, upon the Administrative Agent's demand therefor.

SECTION 11.19 Power of Attorney. The Borrower irrevocably authorizes the Administrative Agent and appoints the Administrative Agent as its attorney-in-fact to act on behalf of the Borrower (i) to file financing statements necessary or desirable in the Administrative Agent's sole discretion to perfect and to maintain the perfection and priority of the interest of the Secured Parties in the Collateral Portfolio and (ii) to file a carbon, photographic or other reproduction of this Agreement or any financing statement with respect to the Collateral Portfolio as a financing statement in such offices as the Administrative Agent in its sole discretion deems necessary or desirable to perfect and to maintain the perfection and priority of the interests of the Secured Parties in the Collateral Portfolio. This appointment is coupled with an interest and is irrevocable.

SECTION 11.20 Delivery of Termination Statements, Releases, etc. Upon payment in full of all of the Obligations (other than unmatured contingent indemnification obligations) and the termination of this Agreement, the Administrative Agent and the Collateral Agent shall deliver to the Borrower termination statements, reconveyances, releases and other documents necessary or appropriate to evidence the termination of the Pledge and other Liens securing the Obligations, all at the expense of the Borrower.

ARTICLE XII.

COLLATERAL CUSTODIAN

SECTION 12.01 Designation of Collateral Custodian.

(a) Initial Collateral Custodian. The role of Collateral Custodian with respect to the Required Loan Documents shall be conducted by the Person designated as Collateral

Custodian hereunder from time to time in accordance with this Section 12.01. Each of the Borrower, the Lender Agents and the Administrative Agent hereby designate and appoint the Collateral Custodian to act as its agent and hereby authorizes the Collateral Custodian to take such actions on its behalf and to exercise such powers and perform such duties as are expressly granted to the Collateral Custodian by this Agreement. The Collateral Custodian hereby accepts such agency appointment to act as Collateral Custodian pursuant to the terms of this Agreement, until its resignation or removal as Collateral Custodian pursuant to the terms hereof.

(b) Successor Collateral Custodian. Upon the Collateral Custodian's receipt of a Collateral Custodian Termination Notice from the Administrative Agent of the designation of a successor Collateral Custodian pursuant to the provisions of Section 12.05, the Collateral Custodian agrees that it will terminate its activities as Collateral Custodian hereunder.

SECTION 12.02 Duties of Collateral Custodian.

(a) Appointment. The Borrower, the Lender Agents and the Administrative Agent each hereby appoints Wells Fargo to act as Collateral Custodian, for the benefit of the Secured Parties. The Collateral Custodian hereby accepts such appointment and agrees to perform the duties and obligations with respect thereto set forth herein.

(b) Duties. From the Closing Date until its removal pursuant to Section 12.05, the Collateral Custodian shall perform, on behalf of the Secured Parties, the following duties and obligations:

(i) The Collateral Custodian shall take and retain custody of the Required Loan Documents delivered by the Borrower pursuant to Section 3.02(a) and Section 3.04(b) hereof in accordance with the terms and conditions of this Agreement, all for the benefit of the Secured Parties. Within five Business Days of its receipt of any Required Loan Documents, the related Loan Asset Schedule and a hard copy of the Loan Asset Checklist, the Collateral Custodian shall review the Required Loan Documents to confirm that (A) such Required Loan Documents have been executed (either an original or a copy, as indicated on the Loan Asset Checklist) and have no mutilated pages, (B) filed stamped copies of the UCC and other filings (required by the Required Loan Documents) are included, (C) if listed on the Loan Asset Checklist, a copy of an Insurance Policy with respect to any real or personal property constituting the Underlying Collateral is included, and (D) the related original balance (based on a comparison to the note or assignment agreement, as applicable), Loan Asset number and Obligor name, as applicable, with respect to such Loan Asset is referenced on the related Loan Asset Schedule (such items (A) through (D) collectively, the "Review Criteria"). In order to facilitate the foregoing review by the Collateral Custodian, in connection with each delivery of Required Loan Documents hereunder to the Collateral Custodian, the Servicer shall provide to the Collateral Custodian a hard copy (which may be preceded by an electronic copy, as applicable) of the related Loan Asset Checklist which contains the Loan Asset information with respect to the Required Loan Documents being delivered, identification number and the name of the Obligor with respect to such Loan Asset. Notwithstanding anything herein to the contrary, the Collateral Custodian's obligation to review the Required Loan Documents shall be limited to reviewing such Required Loan

Documents based on the information provided on the Loan Asset Checklist. If, at the conclusion of such review, the Collateral Custodian shall determine that (i) the original balance of the Loan Asset with respect to which it has received Required Loan Documents is less than as set forth on the Loan Asset Schedule, the Collateral Custodian shall notify the Administrative Agent and the Servicer of such discrepancy within one Business Day, or (ii) any Review Criteria is not satisfied, the Collateral Custodian shall within one Business Day notify the Servicer of such determination and provide the Servicer with a list of the non-complying Loan Assets and the applicable Review Criteria that they fail to satisfy. The Servicer shall have five Business Days after notice or knowledge thereof to correct any non-compliance with any Review Criteria. In addition, if requested in writing (in the form of Exhibit N) by the Servicer and approved by the Administrative Agent within 10 Business Days of the Collateral Custodian's delivery of such report, the Collateral Custodian shall return any Loan Asset which fails to satisfy a Review Criteria to the Borrower. Other than the foregoing, the Collateral Custodian shall not have any responsibility for reviewing any Required Loan Documents. Notwithstanding anything to the contrary contained herein, the Collateral Custodian shall have no duty or obligation with respect to any Loan Asset checklist delivered to it in electronic form.

(ii) In taking and retaining custody of the Required Loan Documents, the Collateral Custodian shall be deemed to be acting as the agent of the Secured Parties; *provided* that the Collateral Custodian makes no representations as to the existence, perfection or priority of any Lien on the Required Loan Documents or the instruments therein; and *provided, further*, that, the Collateral Custodian's duties shall be limited to those expressly contemplated herein.

(iii) All Required Loan Documents shall be kept in fire resistant vaults, rooms or cabinets at the locations specified on the address of the Collateral Custodian on the signature pages attached hereto, or at such other office as shall be specified to the Administrative Agent and the Servicer by the Collateral Custodian in a written notice delivered at least 30 days prior to such change. All Required Loan Documents shall be placed together with an appropriate identifying label and maintained in such a manner so as to permit retrieval and access. The Collateral Custodian shall segregate the Required Loan Documents on its inventory system and will not commingle the physical Required Loan Documents with any other files of the Collateral Custodian other than those, if any, relating to Fifth Street and its Affiliates and subsidiaries; *provided, however*, the Collateral Custodian shall segregate any commingled files upon written request of the Administrative Agent and the Borrower.

(iv) On the 12<sup>th</sup> calendar day of every month (or if such day is not a Business Day, the next succeeding Business Day), the Collateral Custodian shall provide a written report to the Administrative Agent and the Servicer (in a form mutually agreeable to the Administrative Agent and the Collateral Custodian) identifying each Loan Asset for which it holds Required Loan Documents and the applicable Review Criteria that any Loan Asset fails to satisfy.

(v) Notwithstanding any provision to the contrary elsewhere in the Transaction Documents, the Collateral Custodian shall not have any fiduciary relationship with any party hereto or any Secured Party in its capacity as such, and no implied covenants, functions, obligations or responsibilities shall be read into this Agreement, the other Transaction Documents or otherwise exist against the Collateral Custodian. Without limiting the generality of the foregoing, it is hereby expressly agreed and stipulated by the other parties hereto that the Collateral Custodian shall not be required to exercise any discretion hereunder and shall have no investment or management responsibility.

(c) (i) The Collateral Custodian agrees to cooperate with the Administrative Agent and the Collateral Agent and deliver any Required Loan Documents to the Collateral Agent or Administrative Agent (pursuant to a written request in the form of Exhibit N), as applicable, as requested in order to take any action that the Administrative Agent deems necessary or desirable in order to perfect, protect or more fully evidence the security interests granted by the Borrower hereunder, or to enable any of them to exercise or enforce any of their respective rights hereunder, including any rights arising with respect to Article VII. In the event the Collateral Custodian receives instructions from the Collateral Agent, the Servicer or the Borrower which conflict with any instructions received by the Administrative Agent, the Collateral Custodian shall rely on and follow the instructions given by the Administrative Agent.

(ii) The Administrative Agent may direct the Collateral Custodian to take any such incidental action hereunder. With respect to other actions which are incidental to the actions specifically delegated to the Collateral Custodian hereunder, the Collateral Custodian shall not be required to take any such incidental action hereunder, but shall be required to act or to refrain from acting (and shall be fully protected in acting or refraining from acting) upon the direction of the Administrative Agent; *provided* that the Collateral Custodian shall not be required to take any action hereunder at the request of the Administrative Agent, any Secured Party or otherwise if the taking of such action, in the reasonable determination of the Collateral Custodian, (x) shall be in violation of any Applicable Law or contrary to any provisions of this Agreement or (y) shall expose the Collateral Custodian to liability hereunder or otherwise (unless it has received indemnity which it reasonably deems to be satisfactory with respect thereto). In the event the Collateral Custodian requests the consent of the Administrative Agent and the Collateral Custodian does not receive a consent (either positive or negative) from the Administrative Agent within 10 Business Days of its receipt of such request, then the Administrative Agent shall be deemed to have declined to consent to the relevant action.

(iii) The Collateral Custodian shall not be liable for any action taken, suffered or omitted by it in accordance with the request or direction of any Secured Party, to the extent that this Agreement provides such Secured Party the right to so direct the Collateral Custodian, or the Administrative Agent. The Collateral Custodian shall not be deemed to have notice or knowledge of any matter hereunder, including an Event of Default, unless a Responsible Officer of the Collateral Custodian has knowledge of such matter or written notice thereof is received by the Collateral Custodian.



SECTION 12.03 Merger or Consolidation.

Any Person (i) into which the Collateral Custodian may be merged or consolidated, (ii) that may result from any merger or consolidation to which the Collateral Custodian shall be a party, or (iii) that may succeed to the properties and assets of the Collateral Custodian substantially as a whole, which Person in any of the foregoing cases executes an agreement of assumption to perform every obligation of the Collateral Custodian hereunder, shall be the successor to the Collateral Custodian under this Agreement without further act of any of the parties to this Agreement.

SECTION 12.04 Collateral Custodian Compensation.

As compensation for its Collateral Custodian activities hereunder, the Collateral Custodian shall be entitled to the Collateral Custodian Fees from the Borrower as set forth in the Wells Fargo Fee Letter, payable pursuant to the extent of funds available therefor pursuant to the provisions of Section 2.04. The Collateral Custodian's entitlement to receive the Collateral Custodian Fees shall cease on the earlier to occur of: (i) its removal as Collateral Custodian pursuant to Section 12.05, (ii) its resignation as Collateral Custodian pursuant to Section 12.07 of this Agreement or (iii) the termination of this Agreement.

SECTION 12.05 Collateral Custodian Removal.

The Collateral Custodian may be removed, with or without cause, by the Administrative Agent by notice given in writing to the Collateral Custodian (the "Collateral Custodian Termination Notice"); *provided*, notwithstanding its receipt of a Collateral Custodian Termination Notice, the Collateral Custodian shall continue to act in such capacity until a successor Collateral Custodian has been appointed and has agreed to act as Collateral Custodian hereunder.

SECTION 12.06 Limitation on Liability.

(a) The Collateral Custodian may conclusively rely on and shall be fully protected in acting upon any certificate, instrument, opinion, notice, letter, telegram or other document delivered to it and that in good faith it reasonably believes to be genuine and that has been signed by the proper party or parties. The Collateral Custodian may rely conclusively on and shall be fully protected in acting upon (a) the written instructions of any designated officer of the Administrative Agent or (b) the verbal instructions of the Administrative Agent.

(b) The Collateral Custodian may consult counsel satisfactory to it and the advice or opinion of such counsel shall be full and complete authorization and protection in respect of any action taken, suffered or omitted by it hereunder in good faith and in accordance with the advice or opinion of such counsel.

(c) The Collateral Custodian shall not be liable for any error of judgment, or for any act done or step taken or omitted by it, in good faith, or for any mistakes of fact or law, or for anything that it may do or refrain from doing in connection herewith except in the case of its willful misconduct or grossly negligent performance or omission of its duties.

(d) The Collateral Custodian makes no warranty or representation and shall have no responsibility (except as expressly set forth in this Agreement) as to the content, enforceability, completeness, validity, sufficiency, value, genuineness, ownership or transferability of the Collateral Portfolio, and will not be required to and will not make any representations as to the validity or value (except as expressly set forth in this Agreement) of any of the Collateral Portfolio. The Collateral Custodian shall not be obligated to take any legal action hereunder that might in its judgment involve any expense or liability unless it has been furnished with an indemnity reasonably satisfactory to it.

(e) The Collateral Custodian shall have no duties or responsibilities except such duties and responsibilities as are specifically set forth in this Agreement and no covenants or obligations shall be implied in this Agreement against the Collateral Custodian.

(f) The Collateral Custodian shall not be required to expend or risk its own funds in the performance of its duties hereunder.

(g) It is expressly agreed and acknowledged that the Collateral Custodian is not guaranteeing performance of or assuming any liability for the obligations of the other parties hereto or any parties to the Collateral Portfolio.

(h) Subject in all cases to the last sentence of Section 12.02(c)(i), in case any reasonable question arises as to its duties hereunder, the Collateral Custodian may, prior to the occurrence of an Event of Default or the Facility Maturity Date, request instructions from the Servicer and may, after the occurrence of an Event of Default or the Facility Maturity Date, request instructions from the Administrative Agent, and shall be entitled at all times to refrain from taking any action unless it has received instructions from the Servicer or the Administrative Agent, as applicable. The Collateral Custodian shall in all events have no liability, risk or cost for any action taken pursuant to and in compliance with the instruction of the Administrative Agent. In no event shall the Collateral Custodian be liable for special, indirect or consequential loss or damage of any kind whatsoever (including but not limited to lost profits), even if the Collateral Custodian has been advised of the likelihood of such loss or damage and regardless of the form of action.

#### SECTION 12.07 Collateral Custodian Resignation.

Collateral Custodian may resign and be discharged from its duties or obligations hereunder, not earlier than 90 days after delivery to the Administrative Agent of written notice of such resignation specifying a date when such resignation shall take effect. Upon the effective date of such resignation, or if the Administrative Agent gives Collateral Custodian written notice of an earlier termination hereof, Collateral Custodian shall (i) be reimbursed for any costs and expenses Collateral Custodian shall incur in connection with the termination of its duties under this Agreement and (ii) deliver all of the Required Loan Documents in the possession of Collateral Custodian to the Administrative Agent or to such Person as the Administrative Agent may designate to Collateral Custodian in writing upon the receipt of a request in the form of Exhibit N; *provided* that the Borrower shall consent to any successor Collateral Custodian appointed by the Administrative Agent (such consent not to be unreasonably withheld).

Notwithstanding anything herein to the contrary, the Collateral Custodian may not resign prior to a successor Collateral Custodian being appointed.

**SECTION 12.08 Release of Documents.**

(a) Release for Servicing. From time to time and as appropriate for the enforcement or servicing of any of the Collateral Portfolio, the Collateral Custodian is hereby authorized (unless and until such authorization is revoked by the Administrative Agent), upon written receipt from the Servicer of a request for release of documents and receipt in the form annexed hereto as Exhibit N, to release to the Servicer within two Business Days of receipt of such request, the related Required Loan Documents or the documents set forth in such request and receipt to the Servicer. All documents so released to the Servicer shall be held by the Servicer in trust for the benefit of the Collateral Agent, on behalf of the Secured Parties in accordance with the terms of this Agreement. The Servicer shall return to the Collateral Custodian the Required Loan Documents or other such documents (i) promptly upon the request of the Administrative Agent, or (ii) when the Servicer's need therefor in connection with such foreclosure or servicing no longer exists, unless the Loan Asset shall be liquidated, in which case, the Servicer shall deliver an additional request for release of documents to the Collateral Custodian and receipt certifying such liquidation from the Servicer to the Collateral Agent, all in the form annexed hereto as Exhibit N.

(b) Limitation on Release. The foregoing provision with respect to the release to the Servicer of the Required Loan Documents and documents by the Collateral Custodian upon request by the Servicer shall be operative only to the extent that the Administrative Agent has consented to such release. Promptly after delivery to the Collateral Custodian of any request for release of documents, the Servicer shall provide notice of the same to the Administrative Agent. Any additional Required Loan Documents or documents requested to be released by the Servicer may be released only upon written authorization of the Administrative Agent. The limitations of this paragraph shall not apply to the release of Required Loan Documents to the Servicer pursuant to the immediately succeeding subsection.

(c) Release for Payment. Upon receipt by the Collateral Custodian of the Servicer's request for release of documents and receipt in the form annexed hereto as Exhibit N (which certification shall include a statement to the effect that all amounts received in connection with such payment or repurchase have been credited to the Collection Account as provided in this Agreement), the Collateral Custodian shall promptly release the related Required Loan Documents to the Servicer.

**SECTION 12.09 Return of Required Loan Documents.**

The Borrower may, with the prior written consent of the Administrative Agent (such consent not to be unreasonably withheld), require that the Collateral Custodian return each Required Loan Document (a) delivered to the Collateral Custodian in error or (b) released from the Lien of the Collateral Agent hereunder pursuant to Section 2.16, in each case by submitting to the Collateral Custodian and the Administrative Agent a written request in the form of Exhibit N hereto (signed by both the Borrower and the Administrative Agent) specifying the Collateral Portfolio to be so returned and reciting that the conditions to such release have been met (and

specifying the Section or Sections of this Agreement being relied upon for such release). The Collateral Custodian shall upon its receipt of each such request for return executed by the Borrower and the Administrative Agent promptly, but in any event within five Business Days, return the Required Loan Documents so requested to the Borrower.

**SECTION 12.10 Access to Certain Documentation and Information Regarding the Collateral Portfolio; Audits of Servicer.**

The Collateral Custodian shall provide to the Administrative Agent and each Lender Agent access to the Required Loan Documents and all other documentation regarding the Collateral Portfolio including in such cases where the Administrative Agent and each Lender Agent is required in connection with the enforcement of the rights or interests of the Secured Parties, or by applicable statutes or regulations, to review such documentation, such access being afforded without charge but only (i) upon two Business Days prior written request, (ii) during normal business hours and (iii) subject to the Servicer's and the Collateral Custodian's normal security and confidentiality procedures. Prior to the Closing Date and periodically thereafter at the discretion of the Administrative Agent and each Lender Agent, the Administrative Agent and each Lender Agent may review the Servicer's collection and administration of the Collateral Portfolio in order to assess compliance by the Servicer with the Servicing Standard, as well as with this Agreement and may conduct an audit of the Collateral Portfolio, and Required Loan Documents in conjunction with such a review. Such review shall be (subject to Section 5.03(d)(ii)) reasonable in scope and shall be completed in a reasonable period of time. Without limiting the foregoing provisions of this Section 12.10, from time to time on request of the Administrative Agent, the Collateral Custodian shall permit certified public accountants or other auditors acceptable to the Administrative Agent to conduct, at the expense of the Servicer (on behalf of the Borrower), a review of the Required Loan Documents and all other documentation regarding the Collateral Portfolio.

**SECTION 12.11 Bailment.**

The Collateral Custodian agrees that, with respect to any Required Loan Documents at any time or times in its possession or held in its name, the Collateral Custodian shall be the agent and bailee of the Collateral Agent, for the benefit of the Secured Parties, for purposes of perfecting (to the extent not otherwise perfected) the Collateral Agent's security interest in the Collateral Portfolio and for the purpose of ensuring that such security interest is entitled to first priority status under the UCC.

**[Signature pages to follow.]**

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their respective officers thereunto duly authorized, as of the date first above written.

THE BORROWER:

**FIFTH STREET FUNDING, LLC**

By: \_\_\_\_\_  
Name:  
Title:

Fifth Street Funding, LLC  
10 Bank Street, 12th Floor  
White Plains, NY 10606  
Attention: Bernard D. Berman  
Facsimile: (914) 328-4214  
Phone: (914) 286-6800

[SIGNATURES CONTINUE ON THE FOLLOWING PAGE]

Fifth Street Funding, LLC  
Loan and Servicing Agreement

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THE SERVICER:

**FIFTH STREET FINANCE CORP.**

By: \_\_\_\_\_  
Name:  
Title:

Fifth Street Finance Corp.  
10 Bank Street, 12th Floor  
White Plains, NY 10606  
Attention: Bernard D. Berman  
Facsimile: (914) 328-4214  
Phone: (914) 286-6800

[SIGNATURES CONTINUE ON THE FOLLOWING PAGE]

Fifth Street Funding, LLC  
Loan and Servicing Agreement

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THE TRANSFEROR:

**FIFTH STREET FINANCE CORP.**

By: \_\_\_\_\_  
Name:  
Title:

Fifth Street Finance Corp.  
10 Bank Street, 12th Floor  
White Plains, NY 10606  
Attention: Bernard D. Berman  
Facsimile: (914) 328-4214  
Phone: (914) 286-6800

[SIGNATURES CONTINUE ON THE FOLLOWING PAGE]

Fifth Street Funding, LLC  
Loan and Servicing Agreement

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THE ADMINISTRATIVE AGENT:

**WELLS FARGO SECURITIES, LLC**

By: \_\_\_\_\_  
Name:  
Title:

Wells Fargo Securities, LLC  
One Wachovia Center, Mail Code: NC0600  
Charlotte, North Carolina 28288  
Attention: Kevin Sunday  
Facsimile No.: (704) 715-0067  
Confirmation No: (704) 374-6230

Fifth Street Funding, LLC  
Loan and Servicing Agreement

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INSTITUTIONAL LENDER:

**WACHOVIA BANK, NATIONAL  
ASSOCIATION**

By: \_\_\_\_\_  
Name:  
Title:

Wachovia Bank, National Association  
One Wachovia Center, Mail Code: NC0600  
Charlotte, North Carolina 28288  
Attention: Kevin Sunday  
Facsimile No.: (704) 715-0067  
Confirmation No: (704) 374-6230

[SIGNATURES CONTINUE ON THE FOLLOWING PAGE]

Fifth Street Funding, LLC  
Loan and Servicing Agreement

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THE COLLATERAL AGENT:

**WELLS FARGO BANK, NATIONAL  
ASSOCIATION**

By: \_\_\_\_\_  
Name:  
Title:

Wells Fargo Bank, National Association  
9062 Old Annapolis Rd.  
Columbia, Maryland 21045  
Attn: CDO Trust Services—Fifth Street  
Funding, LLC  
Fax: (281) 667-3933  
Phone: (410) 884-2000

[SIGNATURES CONTINUE ON THE FOLLOWING PAGE]

Fifth Street Funding, LLC  
Loan and Servicing Agreement

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THE ACCOUNT BANK:

**WELLS FARGO BANK, NATIONAL  
ASSOCIATION**

By: \_\_\_\_\_  
Name:  
Title:

Wells Fargo Bank, National Association  
9062 Old Annapolis Rd.  
Columbia, Maryland 21045  
Attn: CDO Trust Services—Fifth Street  
Funding, LLC  
Fax: (281) 667-3933  
Phone: (410) 884-2000

[SIGNATURES CONTINUE ON THE FOLLOWING PAGE]

Fifth Street Funding, LLC  
Loan and Servicing Agreement

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THE COLLATERAL CUSTODIAN:

**WELLS FARGO BANK, NATIONAL  
ASSOCIATION**

By: \_\_\_\_\_  
Name:  
Title:

Wells Fargo Bank, National Association  
ABS Custody Vault  
1055 10th Avenue SE  
MAC N9401-011  
Minneapolis, MN 55414  
Attention: Corporate Trust Services — Asset-  
Backed Securities Vault  
Phone: (612) 667-8058  
Fax: (612) 667-1080

With a copy to:

Wells Fargo Bank, National Association  
Sixth Street and Marquette Avenue  
MAC N9311-161  
Minneapolis, MN 55479  
Attention: Corporate Trust Services — Asset-  
Backed Administration  
Phone: (612) 667-8058  
Fax: (612) 667-3464

With a copy to:

Wells Fargo Bank, National Association  
9062 Old Annapolis Rd.  
Columbia, Maryland 21045  
Attn: CDO Trust Services—Fifth Street Funding, LLC  
Fax: (281) 667-3933  
Phone: (410) 884-2000

Fifth Street Funding, LLC  
Loan and Servicing Agreement

PURCHASE AND SALE AGREEMENT

by and between

FIFTH STREET FUNDING, LLC,

as the Purchaser

and

FIFTH STREET FINANCE CORP.,

as the Seller

Dated as of November 16, 2009

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**PURCHASE AND SALE AGREEMENT**

THIS PURCHASE AND SALE AGREEMENT, dated as of November 16, 2009, by and between FIFTH STREET FINANCE CORP., a Delaware corporation, as the seller (the "Seller") and FIFTH STREET FUNDING, LLC, a Delaware limited liability company, as the purchaser (the "Purchaser").

**WITNESSETH:**

WHEREAS, the Purchaser has agreed to Purchase (as hereinafter defined) from the Seller from time to time, and the Seller has agreed to Sell (as hereinafter defined) to the Purchaser from time to time, certain Loan Assets and Portfolio Assets related thereto on the terms set forth herein;

WHEREAS, it is contemplated that the Loan Assets and Portfolio Assets Purchased hereunder may be Pledged by the Purchaser pursuant to the Loan and Servicing Agreement (as defined herein) and the related Transaction Documents, to the Collateral Agent, for the benefit of the Secured Parties; and

WHEREAS, the Seller agrees that all representations, warranties, covenants and agreements made by the Seller herein with respect to the Sale Portfolio shall also be for the benefit of any Secured Party.

NOW, THEREFORE, in consideration of the premises and the mutual agreements hereinafter contained, and for other good and valuable consideration, the receipt of which is hereby acknowledged, the Purchaser and the Seller, intending to be legally bound, hereby agree as follows:

ARTICLE I.

DEFINITIONS

Section 1.1. General. The specific terms defined in this Article include the plural as well as the singular. Words herein importing a gender include the other gender. References herein to "writing" include printing, typing, lithography and other means of reproducing words in visible form. References to agreements and other contractual instruments include all subsequent amendments thereto or changes therein entered into in accordance with their respective terms and not prohibited by this Agreement or the Loan and Servicing Agreement (as hereinafter defined). References herein to Persons include their successors and assigns permitted hereunder or under the Loan and Servicing Agreement. The terms "include" or "including" mean "include without limitation" or "including without limitation". The words "herein", "hereof" and "hereunder" and other words of similar import refer to this Agreement as a whole and not to any particular Article, Section or other subdivision, and Article, Section, Schedule and Exhibit references, unless otherwise specified, refer to Articles and Sections of and Schedules and Exhibits to this Agreement. References to any Applicable Law means such Applicable Law as amended, modified, codified, replaced or reenacted, in whole or in part, and in effect from time to time, including rules and regulations promulgated thereunder, and reference to any Section or other provision of any Applicable Law means that provision of such Applicable Law

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from time to time in effect and constituting the substantive amendment, modification, codification, replacement or reenactment of such Section or other provision. Capitalized terms used herein but not defined herein shall have the respective meanings assigned to such terms in the Loan and Servicing Agreement, *provided* that, if, within such definition in the Loan and Servicing Agreement a further term is used which is defined herein, then such further term shall have the meaning given to such further term herein.

Section 1.2. Specific Terms. Whenever used in this Agreement, the following words and phrases, unless the context otherwise requires, shall have the following meanings:

“Agreement” means this Purchase and Sale Agreement, as the same may be amended, restated, waived, supplemented and/or otherwise modified from time to time hereafter.

“Available Collections” means all cash collections and other cash proceeds with respect to any Loan Asset, including, without limitation, all Principal Collections, all Interest Collections, all proceeds of any sale or disposition with respect to such Loan Asset, cash proceeds or other funds received by the Seller or the Servicer with respect to any Underlying Collateral (including from any guarantors).

“Early Termination” has the meaning specified in Section 8.1.

“Facility Financing Statements” has the meaning specified in Section 3.1(iv).

“Indemnified Amounts” has the meaning specified in Section 9.1(a).

“Indemnified Party” has the meaning specified in Section 9.1(a).

“Loan and Servicing Agreement” means that certain Loan and Servicing Agreement, dated as of the Closing Date, by and among the Purchaser, as the Borrower, the Seller, as the Servicer and the Transferor, Wells Fargo Securities, LLC, as the Administrative Agent, each of the Conduit Lenders and Institutional Lenders from time to time party thereto, each of the Lender Agents from time to time party thereto and Wells Fargo Bank, National Association, as the Collateral Agent, as the Account Bank and as the Collateral Custodian, as such may be amended, restated, supplemented or otherwise modified from time to time pursuant to the terms thereof.

“Loan Asset” means any loan listed on Schedule I hereto, as the same may be amended, supplemented, restated or replaced from time to time, and all accounts, payment intangibles, instruments and other property related to the foregoing.

“Loan Assignment” means a Loan Assignment executed by the Seller, substantially in the form of Exhibit A attached hereto.

“Non-Consolidation/True Sale Opinion” has the meaning specified in Section 4.1(jj).

“Pension Plan” has the meaning specified in Section 4.1(t).

“Portfolio Assets” means all Loan Assets owned by the Seller, together with all proceeds thereof and other assets or property related thereto, including all right, title and interest of the Seller in and to:

(a) any amounts on deposit in any cash reserve, collection, custody or lockbox accounts securing the Loan Assets;

(b) all rights with respect to the Loan Assets to which the Seller is entitled as lender under the applicable Loan Agreement;

(c) any Underlying Collateral securing a Loan Asset and all Recoveries related thereto, all payments paid in respect thereof and all monies due, to become due and paid in respect thereof accruing after the applicable Cut-Off Date and all liquidation proceeds;

(d) all Required Loan Documents, the Loan Asset Files related to any Loan Asset, any Records, and the documents, agreements, and instruments included in the Loan Asset Files or Records;

(e) all Insurance Policies with respect to any Loan Asset;

(f) all Liens, guaranties, indemnities, warranties, letters of credit, accounts, bank accounts and property subject thereto from time to time purporting to secure or support payment of any Loan Asset, together with all UCC financing statements, mortgages or similar filings signed or authorized by an Obligor relating thereto;

(g) all records (including computer records) with respect to the foregoing; and

(h) all collections, income, payments, proceeds and other benefits of each of the foregoing.

“Purchase” means a purchase by the Purchaser of an Eligible Loan Asset and the related Portfolio Assets from the Seller pursuant to Article II.

“Purchase Date” has the meaning specified in Section 2.1(b).

“Purchase Price” has the meaning specified in Section 2.2.

“Purchaser” has the meaning specified in the Preamble.

“Purchaser Restricted Junior Payment” means (i) any dividend or other distribution, direct or indirect, on account of any class of membership interests of the Purchaser now or hereafter outstanding, except a dividend paid solely in interests of that class of membership interests or in any junior class of membership interests of the Purchaser; (ii) any redemption, retirement, sinking fund or similar payment, purchase or other acquisition for value, direct or indirect, of any class of membership interests of the Purchaser now or hereafter outstanding, (iii) any payment made to redeem, purchase, repurchase or retire, or to obtain the surrender of, any outstanding warrants, options or other rights to acquire membership interests of the Purchaser now or hereafter outstanding, and (iv) any payment of management fees by the

Purchaser. For the avoidance of doubt, (x) payments and reimbursements due to the Servicer in accordance with the Transaction Documents do not constitute Purchaser Restricted Junior Payments, and (y) distributions by the Purchaser to holders of its membership interests of Loan Assets or of cash or other proceeds relating thereto which have been substituted by the Purchaser in accordance with the Loan and Servicing Agreement shall not constitute Purchaser Restricted Junior Payments.

“Replaced Loan Asset” has the meaning specified in Section 6.2(b)(i).

“Repurchase Price” means, with respect to a Loan Asset to be repurchased pursuant to Article VI hereof, (i) the greater of (a) an amount equal to the Purchase Price less all Principal Collections received in respect of such Loan Asset from the Purchase Date to the date of repurchase hereunder and (b) an amount equal to the Advance Date Assigned Value multiplied by the Outstanding Balance of such Loan Asset, plus (ii) all Hedge Breakage Costs arising as a result thereof and owed to the relevant Hedge Counterparty for any termination of one or more Hedge Transactions, in whole or in part, as required by the terms of any Hedging Agreement plus any expenses or fees with respect to such Loan Asset and costs and damages incurred by the Administrative Agent or by any Lender in connection with any violation by such Loan Asset of any predatory or abusive lending law which is an Applicable Law.

“Sale” and “Sell” have the meanings specified in Section 2.1(a), and the term “Sold” shall have the corresponding meaning.

“Sale Portfolio” means all right, title, and interest (whether now owned or hereafter acquired or arising, and wherever located) of the Seller in the property identified below in clauses (i) through (iii) and all accounts, cash and currency, chattel paper, tangible chattel paper, electronic chattel paper, copyrights, copyright licenses, equipment, fixtures, contract rights, general intangibles, instruments, certificates of deposit, certificated securities, uncertificated securities, financial assets, securities entitlements, commercial tort claims, deposit accounts, inventory, investment property, letter-of-credit rights, software, supporting obligations, accessions, or other property consisting of, arising out of, or related to any of the following (in each case excluding the Retained Interest and the Excluded Amounts):

- (i) the Loan Assets, and all monies due or to become due in payment under such Loan Assets on and after the related Cut-Off Date, including, but not limited to, all Available Collections;
- (ii) the Portfolio Assets with respect to the Loan Assets referred to in clause (i); and
- (iii) all income and Proceeds of the foregoing.

“Schedule I” means the schedule of all Sale Portfolio that is Sold by the Seller to the Purchaser on a Purchase Date, as supplemented on any subsequent Purchase Date by the “Schedule I” attached to the applicable Loan Assignment, and incorporated herein by reference, as such schedule may be supplemented and amended from time to time pursuant to the terms hereof, which schedule shall, together with all supplements and amendments thereto, be included in and made part of the Loan Asset Schedule attached to the Loan and Servicing Agreement.

“SEC” has the meaning specified in Section 5.2(p)(i).

“Seller Purchase Event” means with respect to any Loan Asset, the occurrence of a breach of the Seller’s representations and warranties under Section 4.2 on the Cut-Off Date for such Loan Asset.

“Seller Termination Event” has the meaning specified in Section 8.1(a).

“Substitute Eligible Loan Asset” has the meaning specified in Section 6.2(a).

“Substitution” has the meaning specified in Section 6.2(a).

“Transfer Taxes” means any tax, fee or governmental charge payable by the Purchaser, the Seller or any other Person to any federal, state or local government arising from or otherwise related to the Sale of any Loan Asset, the related Underlying Collateral (if any) and/or any other related Portfolio Assets from the Seller to the Purchaser under this Agreement (excluding taxes measured by net income).

Section 1.3. Other Terms. All accounting terms used but not specifically defined herein shall be construed in accordance with GAAP. All terms used in Article 9 of the UCC in the State of New York, and used but not specifically defined herein, are used herein as defined in such Article 9.

Section 1.4. Computation of Time Periods. Unless otherwise stated in this Agreement, in the computation of a period of time from a specified date to later specified date, the word “from” means “from and including” and the words “to” and “until” each mean “to but excluding”. Reference to days or days without further qualification means calendar days. Reference to any time means New York, New York time.

Section 1.5. Certain References. All references to the Outstanding Balance of a Loan Asset as of a Purchase Date shall refer to the close of business on such day.

## ARTICLE II.

### SALE AND PURCHASE OF THE ELIGIBLE LOAN ASSETS AND OTHER PORTFOLIO ASSETS

#### Section 2.1. Sale and Purchase of the Eligible Loan Assets and the Other Portfolio Assets.

(a) Subject to the terms and conditions of this Agreement (including the conditions to Purchase set forth in Article III), on and after the Closing Date, the Seller hereby agrees to (i) sell, transfer and otherwise convey (collectively, “Sell” and any such sale, transfer and/or other conveyance, a “Sale”), from time to time, to the Purchaser, without recourse (except to the extent specifically provided herein), and the Purchaser hereby agrees to purchase, all right, title and interest of the Seller (whether now owned or hereafter acquired or arising, and wherever located) in and to certain Sale Portfolio designated by the Seller and (ii) transfer, or cause the deposit into, the Collection Account of all Available Collections received by the Seller on

account of any Sale Portfolio hereunder on and after the Purchase Date with respect to such Sale Portfolio, in each case, within one Business Day of the receipt thereof. The Seller hereby acknowledges that each Sale to the Purchaser hereunder is absolute and irrevocable, without reservation or retention of any interest whatsoever by the Seller.

(b) The Seller shall on or prior to any Business Day prior to a Seller Termination Event (each a "Purchase Date") execute and deliver to the Purchaser a proposed Loan Assignment identifying the Sale Portfolio to be Sold by the Seller to the Purchaser on such Purchase Date. From and after such Purchase Date, the Sale Portfolio listed on Schedule I to the related Loan Assignment shall be deemed to be listed on Schedule I hereto and constitute part of the Sale Portfolio hereunder.

(c) On or before any Purchase Date with respect to the Sale Portfolio to be acquired by the Purchaser on such date, the Seller shall provide the Purchaser with an Officer's Certificate, in the form of Exhibit B hereto, signed by a duly authorized Responsible Officer certifying, as of such Purchase Date, to each of the items in Section 4.2.

(d) On and after each Purchase Date hereunder and upon payment of the Purchase Price therefor, the Purchaser shall own the Sale Portfolio Sold by the Seller to the Purchaser on such Purchase Date, and the Seller shall not take any action inconsistent with such ownership and shall not claim any ownership interest in such Sale Portfolio.

(e) Except as specifically provided in this Agreement, the Sale and Purchase of the Sale Portfolio under this Agreement shall be without recourse to the Seller; it being understood that the Seller shall be liable to the Purchaser for all representations, warranties, covenants and indemnities made by the Seller pursuant to the terms of this Agreement, all of which obligations are limited so as not to constitute recourse to the Seller for the credit risk of the Obligors.

(f) Neither the Purchaser nor any assignee of the Purchaser (including the Secured Parties) shall have any obligation or liability to any Obligor or client of the Seller (including any obligation to perform any obligation of the Seller, including with respect to any other related agreements) in respect of the Sale Portfolio (other than with respect to funding obligations to Obligors pursuant to the terms of the applicable Loan Agreement for Revolving Loan Assets and Delayed Draw Loan Assets, as applicable, which shall solely be an obligation of the Purchaser and not any of the Secured Parties). No such obligation or liability is intended to be assumed by the Purchaser or any assignee of the Purchaser (including the Secured Parties) and any such assumption is expressly disclaimed. Without limiting the generality of the foregoing, the Sale of the Sale Portfolio by the Seller to the Purchaser pursuant to this Agreement does not constitute and is not intended to result in a creation or assumption by the Purchaser or any assignee of the Purchaser (including the Secured Parties), of any obligation of the Seller, as lead agent, collateral agent or paying agent under any Agent Note.

(g) In connection with each Purchase of Sale Portfolio hereunder, the Seller shall cause to be delivered to the Collateral Custodian (with a copy to the Administrative Agent), no later than 2:00 p.m. one Business Day prior to the related Purchase Date, a faxed or e-mailed copy of the duly executed original promissory notes of the Loan Assets (and, in the case of any

Noteless Loan Asset, a fully executed assignment agreement) and if any Loan Assets are closed in escrow, a certificate (in the form of Exhibit K to the Loan and Servicing Agreement) from the closing attorneys of such Loan Assets certifying the possession of the Required Loan Documents; *provided* that, notwithstanding the foregoing, the Seller shall cause the Loan Asset Checklist and the Required Loan Documents to be in the possession of the Collateral Custodian within five Business Days after the related Purchase Date.

(h) In accordance with the Loan and Servicing Agreement, certain documents relating to Sale Portfolio shall be delivered to and held in trust by the Collateral Custodian for the benefit of the Purchaser and its assignees, and the Purchaser hereby instructs the Seller to cause such documents to be delivered to the Collateral Custodian. Such delivery to the Collateral Custodian of such documents and the possession thereof by the Collateral Custodian is at the will of the Purchaser and its assignees and in a custodial capacity for their benefit only.

(i) The Seller shall provide all information, and any other reasonable assistance, to the Servicer, the Collateral Custodian and the Collateral Agent necessary for the Servicer, the Collateral Custodian and the Collateral Agent, as applicable, to conduct the management, administration and collection of the Sale Portfolio Purchased hereunder in accordance with the terms of the Loan and Servicing Agreement.

(j) In connection with the Purchase by the Purchaser of Sale Portfolio as contemplated by this Agreement, the Seller further agrees that it shall, at its own expense, indicate clearly and unambiguously in its computer files on or prior to each Purchase Date, and its financial statements, that such Sale Portfolio has been purchased by the Purchaser in accordance with this Agreement.

(k) The Seller further agrees to deliver to the Purchaser on or before each Purchase Date a computer file containing a true, complete and correct list of all Loan Assets to be Sold hereunder on such Purchase Date, identified by Obligor's name and Outstanding Balance as of the related Cut-Off Date. Such file or list shall be marked as Schedule I to the applicable Loan Assignment and shall be delivered to the Purchaser as confidential and proprietary, and is hereby incorporated into and made a part of Schedule I to this Agreement, as such Schedule I may be supplemented and amended from time to time.

(l) The Seller shall, at all times, continue to fulfill its obligations under, and in strict conformance with, the terms of all Loan Agreements (other than with respect to funding obligations to Obligor in connection with Revolving Loan Assets and Delayed Draw Loan Assets, as applicable) related to any Sale Portfolio purchased hereunder, including without limitation any obligations pertaining to any Retained Interest.

(m) The Seller and the Purchaser each acknowledge with respect to itself that the representations and warranties of the Seller in Sections 4.1 and 4.2 hereof and of the Purchaser in Section 4.3 hereof, and the covenants and agreements of the Seller herein, including without limitation, in Article V and Article VI hereof, will run to and be for the benefit of the Purchaser and the Collateral Agent (on behalf of the Secured Parties) and the Collateral Agent (on behalf of the Secured Parties) may enforce directly (without joinder of the Purchaser when enforcing against the Seller), the obligations of the Seller or the Purchaser, as applicable, with

respect to breaches of such representations, warranties, covenants and all other obligations as set forth in this Agreement.

Section 2.2. Purchase Price.

The purchase price for each item of Sale Portfolio Sold to the Purchaser hereunder (the "Purchase Price") shall be in a dollar amount equal to the fair market value of such Loan Asset as determined from time to time by the Seller and the Purchaser. Each of the Purchaser and the Seller hereby agree that the fair market value of each Loan Asset Sold hereunder as of the related Purchase Date shall not be less than the Advance Date Assigned Value thereof multiplied by the Outstanding Balance of such Loan Asset on the related Purchase Date.

Section 2.3. Payment of Purchase Price.

- (a) The Purchase Price for any Sale Portfolio Sold by the Seller to the Purchaser on any Purchase Date shall be paid in a combination of: (i) immediately available funds; and (ii) if the Purchaser does not have sufficient funds to pay the full amount of the Purchase Price (after taking into account the proceeds the Purchaser expects to receive pursuant to the Advances under the Loan and Servicing Agreement), by means of a capital contribution by the Seller to the Purchaser.
- (b) The portion of such Purchase Price to be paid in immediately available funds shall be paid by wire transfer on the applicable Purchase Date to an account designated by the Seller on or before such Purchase Date or by means of proper accounting entries being entered upon the accounts and records of the Seller and the Purchaser on the applicable Purchase Date.
- (c) In connection with each delivery of a Loan Assignment, the Seller hereunder shall be deemed to have certified, with respect to the Sale Portfolio to be Sold by it on such day, that its representations and warranties contained in Sections 4.1 and 4.2 are true and correct in all respects on and as of such day, with the same effect as though made on and as of such day (other than any representation or warranty that is made as of a specific date), that no Event of Default has occurred or would result therefrom and no Unmatured Event of Default exists or would result therefrom.
- (d) Upon the payment of the Purchase Price for any Purchase, title to the Sale Portfolio included in such Purchase shall vest in the Purchaser, whether or not the conditions precedent to such Purchase and the other covenants and agreements contained herein were in fact satisfied; *provided* that the Purchaser shall not be deemed to have waived any claim it may have under this Agreement for the failure by the Seller in fact to satisfy any such condition precedent, covenant or agreement.

Section 2.4. Nature of the Sales.

(a) It is the express intent of the parties hereto that the Sale of the Sale Portfolio by the Seller to the Purchaser hereunder be, and be treated for all purposes (other than tax and accounting purposes) as an absolute sale by the Seller (free and clear of any Lien, security interest, charge or encumbrance other than Permitted Liens) of such Sale Portfolio. It is, further, not the intention of the parties that such Sale be deemed a pledge of the Sale Portfolio by the Seller to the Purchaser to secure a debt or other obligation of the Seller. However, in the event that, notwithstanding the intent of the parties, the Sale Portfolio is held to continue to be property of the Seller, then the parties hereto agree that: (i) this Agreement shall also be deemed to be, and hereby is, a "security agreement" within the meaning of Article 9 of the UCC; (ii) the transfer of the Sale Portfolio provided for in this Agreement shall be deemed to be a grant by the Seller to the Purchaser of a first priority security interest (subject only to Permitted Liens) in all of the Seller's right, title and interest in and to the Sale Portfolio and all amounts payable to the holders of the Sale Portfolio in accordance with the terms thereof and all proceeds of the conversion, voluntary or involuntary, of the foregoing into cash, instruments, securities or other property, including, without limitation, all amounts from time to time held or invested in the Controlled Accounts, whether in the form of cash, instruments, securities or other property, to secure the prompt and complete payment of a loan deemed to have been made in an amount equal to the aggregate Purchase Price of the Sale Portfolio together with all of the other obligations of the Seller hereunder; (iii) the possession by the Purchaser (or the Collateral Custodian on behalf of the Collateral Agent, for the benefit of the Secured Parties) of Sale Portfolio and such other items of property as constitute instruments, money, negotiable documents or chattel paper shall be, subject to clause (iv), for purposes of perfecting the security interest pursuant to the UCC; and (iv) acknowledgements from Persons holding such property shall be deemed acknowledgements from custodians, bailees or agents (as applicable) of the Purchaser for the purpose of perfecting such security interest under Applicable Law. The parties further agree in such event that any assignment of the interest of the Purchaser pursuant to any provision hereof shall also be deemed to be an assignment of any security interest created pursuant to the terms of this Agreement. The Purchaser shall, to the extent consistent with this Agreement and the other Transaction Documents, take such actions as may be necessary to ensure that, if this Agreement were deemed to create a security interest in the Sale Portfolio, such security interest would be deemed to be a perfected security interest of first priority (subject only to Permitted Liens) under Applicable Law and will be maintained as such throughout the term of this Agreement. The Purchaser shall have, in addition to the rights and remedies which it may have under this Agreement, all other rights and remedies provided to a secured creditor under the UCC and other Applicable Law, which rights and remedies shall be cumulative.

(b) It is the intention of each of the parties hereto that the Sale Portfolio Sold by the Seller to the Purchaser pursuant to this Agreement shall constitute assets owned by the Purchaser and shall not be part of the Seller's estate in the event of the filing of a bankruptcy petition by or against the Seller under any bankruptcy or similar law.

(c) The Purchaser agrees to treat, and shall cause the Seller to treat, for all purposes (other than tax and accounting purposes), the transactions effected by this Agreement as sales of assets to the Purchaser. The Seller agrees to reflect in the Seller's financial records and to include a note in the publicly filed annual and quarterly financial statements of Fifth Street



indicating that: (i) assets related to transactions (including transactions pursuant to the Transaction Documents) that do not meet SFAS 140 requirements for accounting sale treatment are reflected in the consolidated balance sheet of Fifth Street as finance receivables pledged and non-recourse, secured borrowings and (ii) those assets are owned by a special purpose entity that is consolidated in the financial statements of Fifth Street, and the creditors of that special purpose entity have received ownership and/or security interests in such assets and such assets are not intended to be available to the creditors of sellers (or any affiliate of the sellers) of such assets to that special purpose entity.

### ARTICLE III.

#### CONDITIONS OF SALE AND PURCHASE

Section 3.1. Conditions Precedent to Effectiveness. This Agreement shall be effective upon the satisfaction of the conditions precedent that the Purchaser shall have received on or before the Closing Date, in form and substance satisfactory to the Purchaser, all of the following:

(i) a copy of this Agreement duly executed by each of the parties hereto;

(ii) a certificate of the Secretary or Assistant Secretary of the Seller, dated the Closing Date, certifying (A) the names and true signatures of the incumbent officers of the Seller authorized to sign on behalf of the Seller this Agreement, the Loan Assignments and all other documents to be executed by the Seller hereunder or in connection herewith (on which certificate the Purchaser and its assignees may conclusively rely until such time as the Purchaser and such assignees shall receive from the Seller, a revised certificate meeting the requirements of this Section 3.1(ii)), (B) that the copy of the certificate of incorporation of the Seller is a complete and correct copy and that such certificate of incorporation has not been amended, modified or supplemented and is in full force and effect, (C) that the copy of the by-laws of the Seller are a complete and correct copy, and that such by-laws have not been amended, modified or supplemented and are in full force and effect, and (D) the resolutions of the board of directors of the Seller approving and authorizing the execution, delivery and performance by the Seller of this Agreement, the Loan Assignments and all other documents to be executed by the Seller hereunder or in connection herewith;

(iii) a good standing certificate, dated as of a recent date for the Seller, issued by the Secretary of State of the Seller's State of incorporation;

(iv) filed, original copies of proper financing statements (the "Facility Financing Statements") describing the Sale Portfolio, and naming the Seller as the "Debtor/Seller", the Purchaser as "Secured Party/Buyer" and the Collateral Agent, for the benefit of the Secured Parties, as "Total Assignee", or other similar instruments or documents, in form and substance sufficient for filing under the UCC or any comparable law of any and all jurisdictions as may be necessary to perfect the Purchaser's ownership interest in all Sale Portfolio;

(v) copies of properly authorized termination statements or statements of release (on Form UCC-3) or other similar instruments or documents, if any, in form and substance sufficient for filing under the UCC or any comparable law of any and all jurisdictions as may be necessary to release all security interests and similar rights of any Person in the Sale Portfolio previously granted by the Seller;

(vi) copies of tax and judgment lien searches in all jurisdictions reasonably requested by the Purchaser or its assignees and requests for information (or a similar UCC search report certified by a party acceptable to the Purchaser and its assigns), dated a date reasonably near to the Closing Date, and with respect to such requests for information or UCC searches, listing all effective financing statements which name the Seller (under its present name and any previous name) as debtor and which are filed in the State of Delaware, together with copies of such financing statements (none of which shall cover any Sale Portfolio);

(vii) all instruments in connection with the transactions contemplated by this Agreement shall be satisfactory in form and substance to the Purchaser, each Lender Agent and the Administrative Agent, and the Purchaser, each Lender Agent and the Administrative Agent shall have received from the Seller copies of all documents (including, without limitation, records of corporate proceedings, approvals and opinions) relevant to the transactions herein contemplated as the Purchaser, each Lender Agent and the Administrative Agent may have requested;

(viii) any necessary third party consents to the closing of the transactions contemplated hereby, in form and substance satisfactory to the Purchaser;

(ix) the Seller shall have paid all fees then required to be paid by it on the Closing Date; and

(x) one or more favorable Opinions of Counsel from counsel to the Seller with respect to the perfection and enforceability of the security interest hereunder and such other matters as the Purchaser or any assignee thereof may reasonably request.

Section 3.2. Conditions Precedent to All Purchases. The Purchase to take place on the initial Purchase Date and each Purchase to take place on a subsequent Purchase Date hereunder shall be subject to the further conditions precedent that:

(a) The following statements shall be true:

(i) The representations and warranties of the Seller contained in Sections 4.1 and 4.2 shall be true and correct on and as of such Purchase Date in all respects, before and after giving effect to the Purchase to take place on such Purchase Date and to the application of proceeds therefrom, as though made on and as of such date (other than any representation and warranty that is made as of a specific date);

(ii) The Seller is in compliance in all respects with each of its covenants and other agreements set forth herein;

(iii) No Seller Termination Event (or event which, with the passage of time or the giving of notice, or both, would constitute a Seller Termination Event) shall have occurred or would result from such Purchase;

(iv) The Facility Maturity Date has not yet occurred; and

(v) No Applicable Law shall prohibit or enjoin, and no order, judgment or decree of any federal, state or local court or governmental body, agency or instrumentality shall prohibit or enjoin, the making of any such Purchase by the Purchaser in accordance with the provisions hereof.

(b) The Purchaser shall have received a duly executed and completed Loan Assignment along with a Schedule I that is true, accurate and complete in all respects as of the related Cut-Off Date.

(c) The Seller shall have delivered to the Collateral Custodian on behalf of the Purchaser and any assignee thereof each item required to be contained in the Required Loan Documents and the Loan Asset Checklist of any of the Eligible Loan Assets or Portfolio Assets related thereto being acquired by the Purchaser within five Business Days of the related Purchase Date.

(d) The Seller shall have taken all steps necessary under all Applicable Law in order to Sell to the Purchaser the Sale Portfolio being Purchased on such Purchase Date and, upon the Sale of such Sale Portfolio from the Seller to the Purchaser pursuant to the terms hereof, the Purchaser will have acquired good and marketable title to and a valid and perfected ownership interest in such Sale Portfolio, free and clear of any Lien, security interest, charge or encumbrance (other than Permitted Liens); *provided* that if such item of Sale Portfolio contains a restriction of transferability, the applicable Loan Agreement provides that any consents necessary for future assignments shall not be unreasonably withheld by the applicable Obligor and/or agent, and the rights to enforce rights and remedies in respect of the same under the applicable Loan Agreement inure to the benefit of the holder of such Loan Asset (subject to the rights of any applicable agent or other lenders).

(e) The Seller shall have received a copy of an Approval Notice executed by the Administrative Agent evidencing the approval of the Administrative Agent, in its sole and absolute discretion of the Sale to the Purchaser of the Eligible Loan Assets identified on Schedule I to the applicable Loan Assignment on the applicable Purchase Date.

#### ARTICLE IV.

##### REPRESENTATIONS AND WARRANTIES

Section 4.1. Representations and Warranties of the Seller. The Seller makes the following representations and warranties, on which the Purchaser relies in acquiring the Sale Portfolio Purchased hereunder and each of the Secured Parties relies upon in entering into the Loan and Servicing Agreement. As of each Purchase Date and each Reporting Date (unless a specific date is specified below), the Seller represents and warrants to the Purchaser for the benefit of the Purchaser and each of its successors and assigns that:

(a) Organization and Good Standing. The Seller has been duly organized and is validly existing as a corporation in good standing under the laws of the State of Delaware (subject to Section 5.1(f)), with all requisite corporate power and authority to own or lease its properties and to conduct its business as such business is presently conducted, and had at all relevant times, and now has, all necessary power, authority and legal right to acquire and own the Sale Portfolio and to Sell such Sale Portfolio to the Purchaser hereunder.

(b) Due Qualification. The Seller is duly qualified to do business and has obtained all necessary licenses and approvals, in all jurisdictions in which the ownership or lease of its property or the conduct of its business requires such qualification, licenses and/or approvals.

(c) Power and Authority; Due Authorization; Execution and Delivery. The Seller (i) has all necessary corporate power, authority and legal right to (a) execute and deliver this Agreement, each Loan Assignment and the other Transaction Documents to which it is a party and (b) carry out the terms of this Agreement, each Loan Assignment and the other Transaction Documents to which it is a party and (ii) has duly authorized by all necessary corporate action the execution, delivery and performance of this Agreement, each Loan Assignment and the other Transaction Documents to which it is a party and the sale and assignment of an ownership interest in the Sale Portfolio on the terms and conditions herein provided. This Agreement, each Loan Assignment and each other Transaction Document to which the Seller is a party have been duly executed and delivered by the Seller.

(d) Valid Conveyance; Binding Obligations. This Agreement, each Loan Assignment and the Transaction Documents to which the Seller is party have been and, in the case of each Loan Assignment delivered after the Closing Date, will be, duly executed and delivered by the Seller, and this Agreement, together with the applicable Loan Assignment in each case, shall effect valid Sales of Sale Portfolio, enforceable against the Seller and creditors of and purchasers from the Seller, and this Agreement, each Loan Assignment and such Transaction Documents shall constitute legal, valid and binding obligations of the Seller enforceable against the Seller in accordance with their respective terms, except as enforceability may be limited by Bankruptcy Laws and general principles of equity (whether such enforceability is considered in a proceeding in equity or at law).

(e) No Violation. The execution, delivery and performance of this Agreement, each Loan Assignment and all other agreements and instruments executed and delivered or to be executed and delivered by the Seller pursuant hereto or thereto in connection with the Sale of the Sale Portfolio will not (i) conflict with, result in any breach of any of the terms and provisions of, or constitute (with or without notice or lapse of time or both) a default under, the Seller's certificate of incorporation or by-laws or any contractual obligation of the Seller, (ii) result in the creation or imposition of any Lien (other than Permitted Liens) upon any of the Seller's properties pursuant to the terms of any such contractual obligation, other than this Agreement, or (iii) violate any Applicable Law.

(f) No Proceedings. There is no litigation, proceeding or investigation pending or, to the knowledge of the Seller, threatened against the Seller, before any Governmental Authority (i) asserting the invalidity of this Agreement, any Loan Assignment or

any other Transaction Document to which the Seller is a party, (ii) seeking to prevent the consummation of any of the transactions contemplated by this Agreement, any Loan Assignment or any other Transaction Document to which the Seller is a party or (iii) seeking any determination or ruling that could reasonably be expected to have a Material Adverse Effect.

(g) No Consents. The Seller is not required to obtain the consent or approval of any other party or any consent, license, approval or authorization, or registration or declaration with, any Governmental Authority, bureau or agency in connection with the execution, delivery, performance, validity or enforceability of this Agreement or any Loan Assignment, except those which have been obtained.

(h) State of Organization, Etc. Except as permitted hereunder, the Seller's legal name is as set forth in this Agreement. Except as permitted hereunder, the Seller has not changed its name since its incorporation; does not have tradenames, fictitious names, assumed names or "doing business as" names. Except as permitted hereunder, the chief executive office of the Seller (and the location of the Seller's records regarding the Sale Portfolio (other than those delivered to the Collateral Custodian)) is at the address of the Seller set forth on the signature pages hereto. The Seller's only jurisdiction of incorporation is Delaware, and, except as permitted hereunder, the Seller has not changed its jurisdiction of incorporation.

(i) Bulk Sales. The execution, delivery and performance of this Agreement and the transactions contemplated hereby do not require compliance with any "bulk sales" act or similar law by the Seller.

(j) Solvency. The Seller is not the subject of any Bankruptcy Proceedings or Bankruptcy Event. The Seller is Solvent and will not become insolvent after giving effect to the transactions contemplated by this Agreement and the other Transaction Documents. The Seller after giving effect to the transactions contemplated by this Agreement and the other Transaction Documents, will have an adequate amount of capital to conduct its business in the foreseeable future.

(k) Selection Procedures. No procedures believed by the Seller to be adverse to the interests of the Purchaser were utilized by the Seller in identifying and/or selecting the Eligible Loan Assets included in the Sale Portfolio.

(l) Compliance with Laws. The Seller has complied in all respects with all Applicable Law to which it may be subject, and no item of Sale Portfolio contravenes any Applicable Law.

(m) Taxes. The Seller has filed or caused to be filed all tax returns that are required to be filed by it (subject to any extensions to file properly obtained by the same). The Seller has paid or made adequate provisions for the payment of all Taxes and all assessments made against it or any of its property (other than any amount of Tax the validity of which is currently being contested in good faith by appropriate proceedings and with respect to which reserves in accordance with GAAP have been provided on the books of the Seller), and no tax lien has been filed and, to the Seller's knowledge, no claim is being asserted, with respect to any such Tax, assessment or other charge.

(n) Exchange Act Compliance; Regulations T, U and X. None of the transactions contemplated herein or in the other Transaction Documents (including, without limitation, the use of the proceeds from the Sale of the Sale Portfolio) will violate or result in a violation of Section 7 of the Exchange Act, or any regulations issued pursuant thereto, including, without limitation, Regulations T, U and X of the Board of Governors of the Federal Reserve System, 12 C.F.R., Chapter II. The Seller does not own or intend to carry or purchase, and no proceeds from the Sale of the Sale Portfolio will be used to carry or purchase, any Margin Stock or to extend "purpose credit" within the meaning of Regulation U.

(o) Loan Assignments. Each Loan Assignment is accurate in all respects.

(p) No Liens, Etc. The Sale Portfolio to be acquired by Purchaser hereunder is owned by the Seller free and clear of any Lien, security interest, charge or encumbrance (subject only to Permitted Liens), and the Seller has the full right, corporate power and lawful authority to Sell the same and interests therein and, upon the Sale thereof hereunder, the Purchaser will have acquired good and marketable title to and a valid and perfected ownership interest in such Sale Portfolio, free and clear of any Lien, security interest, charge or encumbrance (subject only to Permitted Liens); *provided* that if such item of Sale Portfolio contains a restriction of transferability, the applicable Loan Agreement provides that any consents necessary for future assignments shall not be unreasonably withheld by the applicable Obligor and/or agent, and the rights to enforce rights and remedies in respect of the same under the applicable Loan Agreement inure to the benefit of the holder of such Loan Asset (subject to the rights of any applicable agent or other lenders). No effective financing statement reflecting the Seller or the Seller's predecessor in interest, as a "Debtor", or other instrument similar in effect covering all or any part of any Sale Portfolio Purchased hereunder is on file in any recording office, except such as may have been filed in favor of the Collateral Agent as "Secured Party" or "Assignee", in each case, for the benefit of the Secured Parties pursuant to the Loan and Servicing Agreement.

(q) Information True and Correct. All information heretofore furnished by or on behalf of the Seller to the Purchaser or any assignee thereof in connection with this Agreement or any transaction contemplated hereby is true and complete and does not omit to state a material fact necessary to make the statements contained therein, in light of the circumstances under which they were made, not misleading; *provided* that, solely with respect to written or electronic information furnished by or on behalf of the Seller which was provided to the Seller from an Obligor with respect to a Loan Asset, such information need only be accurate, true and correct to the knowledge of the Seller; *provided, further*, that the foregoing proviso shall not apply to any information presented in a Servicer's Certificate, Servicing Report, Notice of Borrowing or Borrowing Base Certificate.

(r) ERISA Compliance. The present value of all benefits vested under each "employee pension benefit plan", as such term is defined in Section 3 of ERISA, that is, or at any time during the preceding six years was, maintained by the Seller or any ERISA Affiliate of the Seller, or open to participation by employees of the Seller or of any ERISA Affiliate of the Seller, as from time to time in effect (each, a "Pension Plan") does not exceed the value of the assets of the Pension Plan allocable to such vested benefits (based on the value of such assets as of the last annual valuation date). No prohibited transactions, failure to meet the minimum

funding standard set forth in Section 302(a) of ERISA and Section 412(a) of the Code (with respect to any Pension Plan other than a Multiemployer Plan), withdrawals or reportable events have occurred with respect to any Pension Plan that, in the aggregate, could subject the Seller to any material Tax, penalty or other liability. No notice of intent to terminate a Pension Plan has been filed, nor has any Pension Plan been terminated under Section 4041(f) of ERISA, nor has the Pension Benefit Guaranty Corporation instituted proceedings to terminate, or appoint a trustee to administer, a Pension Plan and no event has occurred or condition exists that might constitute grounds under Section 4042 of ERISA for the termination of, or the appointment of a trustee to administer, any Pension Plan.

(s) Investment Company Status. The Seller is an "investment company" that has elected to be regulated as a "business development company" within the meaning of the 1940 Act. The Seller conducts its business and other activities in compliance in all respects with the applicable provisions of the 1940 Act and any applicable rules, regulations or orders issued by the SEC thereunder.

(t) Intent of The Seller. The Seller has not sold, contributed, transferred, assigned or otherwise conveyed any interest in any Sale Portfolio to the Purchaser with any intent to hinder, delay or defraud any of the Seller's creditors.

(u) Value Given. The Seller has received reasonably equivalent value from the Purchaser in exchange for the Sale of such Sale Portfolio Sold hereunder. No such Sale has been made for or on account of an antecedent debt owed by the Seller and no such transfer is or may be voidable or subject to avoidance under any section of the Bankruptcy Code.

(v) Accounting. Other than for tax and consolidated accounting purposes, the Seller will not account for or treat (whether in financial statements or otherwise) the transactions contemplated hereby in any manner other than as a sale of the Sale Portfolio by the Seller to the Purchaser.

(w) No Broker-Dealers. The Seller is not a broker-dealer or subject to the Securities Investor Protection Act of 1970, as amended.

(x) Special Purpose Entity. The Purchaser is an entity with assets and liabilities separate and distinct from those of the Seller and any Affiliates thereof, and the Seller hereby acknowledges that the Administrative Agent, the Lenders, the Lender Agents, the Collateral Agent, the Collateral Custodian and the other Secured Parties are entering into the transactions contemplated by the Loan and Servicing Agreement in reliance upon the Purchaser's identity as a legal entity that is separate from the Seller and from each other Affiliate of the Seller. Therefore, from and after the date of execution and delivery of this Agreement, the Seller shall take all reasonable steps, including, without limitation, all steps that the Administrative Agent and the Collateral Agent may from time to time request, to maintain the Purchaser's identity as a separate legal entity and to make it manifest to third parties that the Purchaser is an entity with assets and liabilities distinct from those of the Seller and each other Affiliate thereof and not just a division of the Seller or any such other Affiliate (other than for tax purposes). Without limiting the generality of the foregoing and in addition to the other covenants set forth herein, the Seller shall take all reasonable steps to ensure that the Purchaser has not and will not

take, refrain from taking, or fail to take (as applicable) any action described in Section 9(j) of its limited liability company operating agreement and Sections 5.01(a), 5.01(b), 5.02(a) and 5.02(b) of the Loan and Servicing Agreement.

(y) Sale Agreement. This Agreement and the Loan Assignments contemplated herein are the only agreements or arrangements pursuant to which the Seller Sells the Sale Portfolio Sold by it to the Purchaser.

(z) Security Interest.

(i) This Agreement creates a valid and continuing security interest (as defined in the applicable UCC) in the Sale Portfolio in favor of the Purchaser, which security interest is prior to all other Liens (except for Permitted Liens), and is enforceable as such against creditors of and purchasers from the Seller;

(ii) the Loan Assets, along with the related Loan Asset Files, constitute either a "general intangible," an "instrument," an "account," "securities entitlement," "tangible chattel paper", "certificated security," "uncertificated security," "supporting obligation," or "insurance" (each as defined in the applicable UCC), real property and/or such other category of collateral under the applicable UCC as to which the Seller has complied with its obligations under this Section 4.1(z).

(iii) the Seller owns and has good and marketable title to (or with respect to assets securing any Loan Assets, a valid security interest in) the Sale Portfolio Sold by it to the Purchaser hereunder on such Purchase Date, free and clear of any Lien (other than Permitted Liens) of any Person;

(iv) the Seller has received all consents and approvals required by the terms of any Loan Asset, to the Sale thereof and the granting of a security interest in the Loan Assets hereunder to the Purchaser;

(v) the Seller has caused the filing of all appropriate financing statements in the proper filing office in the appropriate jurisdictions under Applicable Law in order to perfect the security interest in that portion of the Sale Portfolio in which a security interest may be perfected by filing granted hereunder to the Purchaser; *provided* that filings in respect of real property shall not be required;

(vi) other than (i) as expressly permitted by the terms of this Agreement and the Loan and Servicing Agreement and (ii) the security interest granted to the Purchaser and the Collateral Agent, on behalf of the Secured Parties, the Seller has not pledged, assigned, sold, granted a security interest in or otherwise conveyed any of the Sale Portfolio. The Seller has not authorized the filing of and is not aware of any financing statements against the Seller that include a description of collateral covering the Sale Portfolio other than any financing statement (A) relating to the security interest granted to the Purchaser under this Agreement, or (B) that has been terminated and/or fully and validly assigned to the Collateral Agent on or prior to the date hereof. The Seller is not aware of the filing of any judgment or tax lien filings against the Seller;



(vii) all original executed copies of each underlying promissory note or copies of each Loan Asset Register, as applicable, that constitute or evidence each Loan Asset have been, or subject to the delivery requirements contained herein, will be delivered to the Collateral Custodian;

(viii) other than in the case of Noteless Loan Assets, the Seller has received, or subject to the delivery requirements herein will receive, a written acknowledgment from the Collateral Custodian that the Collateral Custodian, as the bailee of the Collateral Agent, is holding the underlying promissory notes that constitute or evidence the Loan Assets solely on behalf of and for the Collateral Agent, for the benefit of the Secured Parties; *provided* that the acknowledgement of the Collateral Custodian set forth in Section 12.11 of the Loan and Servicing Agreement may serve as such acknowledgement;

(ix) none of the underlying promissory notes or Loan Asset Registers, as applicable, that constitute or evidence the Loan Assets has any marks or notations indicating that they have been pledged, assigned or otherwise conveyed to any Person other than the Collateral Agent, on behalf of the Secured Parties;

(x) with respect to any Sale Portfolio that constitutes a "certificated security", such certificated security has been delivered to the Collateral Custodian, on behalf of the Secured Parties and, if in registered form, has been specifically Indorsed to the Collateral Agent, for the benefit of the Secured Parties, or in blank by an effective Indorsement or has been registered in the name of the Collateral Agent, for the benefit of the Secured Parties, upon original issue or registration or transfer by the Purchaser of such certificated security; and

(xi) with respect to any Sale Portfolio that constitutes an "uncertificated security", that the Seller shall cause the issuer of such uncertificated security to register the Collateral Agent, on behalf of the Secured Parties, as the registered owner of such uncertificated security.

(aa) Notice to Agents and Obligors. The Seller has directed any agent, administrative agent or Obligor for any Loan Asset to remit all payments and collections with respect to such Loan Asset directly to the Collection Account.

(bb) Collections. The Collection Account is the only account to which Obligors have been instructed to send Interest Collections and Principal Collections on the Sale Portfolio Sold by the Seller. The Seller acknowledges that all Interest Collections and Principal Collections received by it or its Affiliates with respect to the Sale Portfolio Purchased by the Purchaser as contemplated by this Agreement are held and shall be held in trust for the benefit of the Purchaser (or its assignees) until deposited into the Collection Account as required by the Loan and Servicing Agreement.

(cc) Set-Off, Etc. No Sale Portfolio has been compromised, adjusted, extended, satisfied, subordinated, rescinded, set-off or modified by the Seller or the Obligor thereof, and no Sale Portfolio is subject to compromise, adjustment, extension, satisfaction,

subordination, rescission, set-off, counterclaim, defense, abatement, suspension, deferment, deduction, reduction, termination or modification, whether arising out of transactions concerning the Sale Portfolio or otherwise, by the Seller or the Obligor with respect thereto, except for amendments, extensions or modifications to such Sale Portfolio otherwise permitted under Section 6.04(a) of the Loan and Servicing Agreement and in accordance with the Servicing Standard.

(dd) Full Payment. As of the related Purchase Date thereof, the Seller has no knowledge of any fact which should lead it to expect that any Sale Portfolio will not be paid in full.

(ee) Ownership of the Purchaser. The Seller owns, directly or indirectly, 100% of the membership interests of the Purchaser, free and clear of any Lien (other than liens pursuant to the Pledge Agreement). Such membership interests are validly issued, fully paid and non-assessable, and there are no options, warrants or other rights to acquire membership interests of the Purchaser.

(ff) Confirmation from the Seller. The Seller has provided written confirmation to the Purchaser that the Seller will not cause the Purchaser to file a voluntary petition under the Bankruptcy Code.

(gg) Environmental. With respect to each item of Underlying Collateral as of the Cut-Off Date for the Loan Asset related to such Underlying Collateral, to the actual knowledge of a Responsible Officer of the Seller (a) the related Obligor's operations comply in all material respects with all applicable Environmental Laws; (b) none of the related Obligor's operations is the subject of a Federal or state investigation evaluating whether any remedial action, involving expenditures, is needed to respond to a release of any Hazardous Materials into the environment; and (c) the related Obligor does not have any material contingent liability in connection with any release of any Hazardous Materials into the environment. As of the Cut-Off Date for the Loan Asset related to such Underlying Collateral, the Seller has not received any written or verbal notice of, or inquiry from any Governmental Authority regarding, any violation, alleged violation, non-compliance, liability or potential liability regarding environmental matters or compliance with Environmental Laws with regard to any of the Underlying Collateral, nor does the Seller have knowledge or reason to believe that any such notice will be received or is being threatened.

(hh) USA PATRIOT Act. Neither the Seller nor any Affiliate of the Seller is (i) a country, territory, organization, person or entity named on an Office of Foreign Asset Control (OFAC) list, (ii) a Person that resides or has a place of business in a country or territory named on such lists or which is designated as a "Non-Cooperative Jurisdiction" by the Financial Action Task Force on Money Laundering, or whose subscription funds are transferred from or through such a jurisdiction; (iii) a "Foreign Shell Bank" within the meaning of the USA PATRIOT Act, i.e., a foreign bank that does not have a physical presence in any country and that is not affiliated with a bank that has a physical presence and an acceptable level of regulation and supervision; or (iv) a person or entity that resides in or is organized under the laws of a jurisdiction designated by the United States Secretary of the Treasury under Sections 311 or 312 of the USA PATRIOT Act as warranting special measures due to money laundering concerns.

(ii) Covenants; Seller Termination Event. All covenants, agreements and undertakings of the Seller hereunder have been fully performed. No event has occurred which constitutes a Seller Termination Event and no event has occurred and is continuing which, with the passage of time or the giving of notice, or both would constitute a Seller Termination Event (other than any Seller Termination Event which has previously been disclosed to the Administrative Agent as such).

(jj) Opinion. The statements of fact in the section heading "Assumptions" in the non-consolidation and true sale opinion (the "Non-Consolidation/True Sale Opinion") of Rutan & Tucker, LLP, dated as of the date hereof are true and correct in all respects.

(kk) Accuracy of Representations and Warranties. Each representation or warranty by the Seller contained (i) herein or (ii) in any certificate or other document furnished by the Seller to the Purchaser or the Administrative Agent in writing pursuant hereto or in connection herewith is, as of its date, true and correct in all respects.

(ll) Representations and Warranties for Benefit of the Purchaser's Assignees. The Seller hereby makes each representation and warranty contained in this Agreement and the other Transaction Documents to which it is a party and that have been executed and delivered on or prior to such Purchase Date to, and for the benefit of the Purchaser (and its assignees), the Administrative Agent, the Lenders, the Lender Agents, the Collateral Agent, the Collateral Custodian and the other Secured Parties as if the same were set forth in full herein.

It is understood and agreed that the representations and warranties provided in this Section 4.1 shall survive (x) the Sale of the Sale Portfolio to the Purchaser and (y) and the grant of a first priority perfected security interest in, to and under the Sale Portfolio pursuant to the Loan and Servicing Agreement by the Purchaser. Upon discovery by the Seller or the Purchaser of a breach of any of the foregoing representations and warranties, the party discovering such breach shall give prompt written notice thereof to the other and to the Administrative Agent and each Lender Agent immediately upon obtaining knowledge of such breach.

Section 4.2. Representations and Warranties of the Seller Relating to the Agreement and the Sale Portfolio. The Seller makes the following representations and warranties, on which the Purchaser relies in acquiring the Sale Portfolio Purchased hereunder and each of the Secured Parties relies upon in entering into the Loan and Servicing Agreement. As of each Purchase Date and each Reporting Date, the Seller represents and warrants to the Purchaser for the benefit of the Purchaser and each of its successors and assigns that:

(a) Binding Obligation, Valid Transfer and Security Interest. This Agreement, together with the Loan Assignments, constitutes a valid transfer to the Purchaser of all right, title and interest in, to and under all Sale Portfolio, free and clear of any Lien of any Person claiming through or under the Seller or its Affiliates, except for Permitted Liens. If the conveyances contemplated by this Agreement are determined to be a transfer for security, then this Agreement constitutes a grant of a security interest in all Sale Portfolio to the Purchaser which upon the delivery of the Required Loan Documents and the filing of the financing statements shall be a first priority perfected security interest in all Sale Portfolio, subject only to Permitted Liens. Neither the Seller nor any Person claiming through or under the Seller shall

have any claim to or interest in the Controlled Accounts; *provided* if this Agreement constitutes only a grant of a security interest in such property, then the Seller shall have the rights in such property as a debtor for purposes of the UCC.

(b) Eligibility of Sale Portfolio. (i) Schedule I is an accurate and complete listing of all the Sale Portfolio as of the related Cut-Off Date and the information contained therein with respect to the identity of such Sale Portfolio and the amounts owing thereunder is true and correct as of the related Cut-Off Date, (ii) each item of the Sale Portfolio Purchased by the Purchaser hereunder is an Eligible Loan Asset, and (iii) with respect to each item of the Sale Portfolio all consents, licenses, approvals or authorizations of or registrations or declarations of any Governmental Authority or any Person required to be obtained, effected or given by the Seller in connection with the transfer of an ownership interest or security interest in each item of Sale Portfolio to the Purchaser have been duly obtained, effected or given and are in full force and effect.

(c) No Fraud. Each Eligible Loan Asset was originated without any fraud or misrepresentation by the Seller or, to the best of the Seller's knowledge, on the part of the Obligor.

It is understood and agreed that the representations and warranties provided in this Section 4.2 shall survive (x) the Sale of the Sale Portfolio to the Purchaser, (y) the grant of a first priority perfected security interest in, to and under the Sale Portfolio pursuant to the Loan and Servicing Agreement by the Purchaser and (z) the termination of this Agreement and the Loan and Servicing Agreement. Upon discovery by the Seller or the Purchaser of a breach of any of the foregoing representations and warranties, the party discovering such breach shall give prompt written notice thereof to the other and to the Administrative Agent and each Lender Agent immediately upon obtaining knowledge of such breach.

Section 4.3. Representations and Warranties of the Purchaser. The Purchaser makes the following representations and warranties, on which the Seller relies in selling the Sale Portfolio Sold hereunder and each of the Secured Parties relies upon in entering into the Loan and Servicing Agreement. As of each Purchase Date and each Reporting Date, the Purchaser represents and warrants to the Seller for the benefit of the Seller and each of its successors and assigns that:

(a) Organization and Good Standing. The Purchaser has been duly organized and is validly existing and in good standing as a limited liability company under the laws of the State of Delaware or such other jurisdiction as permitted under the terms of the Transaction Documents, with the power and authority to own or lease its properties and to conduct its business as such properties are currently owned and such business is currently conducted, and had at all relevant times, and has, all necessary power, authority and legal right to acquire and own the Sale Portfolio.

(b) Due Qualification. The Purchaser is duly qualified to do business and has obtained all necessary licenses and approvals in all jurisdictions in which the ownership or lease of its property or the conduct of its business requires such qualification, licenses and/or approvals.

(c) Power and Authority; Due Authorization; Execution and Delivery. The Purchaser (i) has all necessary limited liability company power, authority and legal right to (a) execute and deliver this Agreement and the other Transaction Documents to which it is a party and (b) carry out the terms of this Agreement and the other Transaction Documents to which it is a party and (ii) has duly authorized by all necessary limited liability company action the execution, delivery and performance of this Agreement and the other Transaction Documents to which it is a party and the Purchase of the Sale Portfolio on the terms and conditions herein provided. This Agreement and each other Transaction Document to which the Purchaser is a party have been duly executed and delivered by the Purchaser.

(d) No Consent Required. The Purchaser is not required to obtain the consent of any other Person, or any consent, license, approval or authorization or registration or declaration with, any Governmental Authority, bureau or agency in connection with the execution, delivery or performance of this Agreement, each Loan Assignment and the Transaction Documents to which it is a party, except for such as have been obtained, effected or made.

(e) Binding Obligation. This Agreement and each other Transaction Document to which the Purchaser is a party constitutes a legal, valid and binding obligation of the Purchaser, enforceable against the Purchaser in accordance with its respective terms, subject, as to enforceability, to applicable Bankruptcy Laws and general principles of equity (whether such enforceability is considered in a proceeding in equity or at law).

(f) No Violation. The consummation of the transactions contemplated by this Agreement, each Loan Assignment and the other Transaction Documents to which it is a party and the fulfillment of the terms hereof and thereof will not (i) conflict with, result in any breach of any of the terms and provisions of, or constitute (with or without notice or lapse of time or both) a default under, the Purchaser's certificate of formation, operating agreement or any contractual obligation of the Purchaser, (ii) result in the creation or imposition of any Lien (other than Permitted Liens) upon any of the Purchaser's properties pursuant to the terms of any such contractual obligation, other than this Agreement, or (iii) violate any Applicable Law.

(g) Value Given. The Purchaser has given reasonably equivalent value to the Seller in exchange for the Sale of such Sale Portfolio, which amount the Purchaser hereby agrees is the fair market value of such Sale Portfolio. No such Sale has been made for or on account of an antecedent debt owed by the Seller and no such transfer is or may be voidable or subject to avoidance under any section of the Bankruptcy Code.

(h) No Proceedings. There is no litigation, proceeding or investigation pending or, to the knowledge of the Purchaser, threatened against the Purchaser, before any Governmental Authority (i) asserting the invalidity of this Agreement, any Loan Assignment or any other Transaction Document to which the Purchaser is a party, (ii) seeking to prevent the consummation of any of the transactions contemplated by this Agreement, any Loan Assignment or any other Transaction Document to which the Purchaser is a party or (iii) seeking any determination or ruling that could reasonably be expected to have a Material Adverse Effect.

- (i) Sale Agreement. This Agreement and the Loan Assignments contemplated herein are the only agreements or arrangements pursuant to which the Purchaser Purchases the Sale Portfolio Sold to it by the Seller.
- (j) Investment Company Act. The Purchaser is not required to register as an “investment company” under the provisions of the 1940 Act.
- (k) Compliance with Law. The Purchaser has complied in all respects with all Applicable Law to which it may be subject, and no item of Sale Portfolio contravenes any Applicable Law.
- (l) Opinions. The statements of fact in the section heading “Assumptions” in the Non-Consolidation/True Sale Opinion are true and correct in all respects.

ARTICLE V.

COVENANTS OF THE SELLER

Section 5.1. Protection of Title of the Purchaser.

(a) On or prior to the Closing Date, the Seller shall have filed or caused to be filed UCC-1 financing statements, naming the Seller as “Debtor/Seller”, naming the Purchaser as “Secured Party/Buyer”, and naming the Collateral Agent, for the benefit of the Secured Parties, as “Total Assignee”, and describing the Sale Portfolio to be acquired by the Purchaser, with the office of the Secretary of State of the state of the jurisdiction of organization of the Seller. From time to time thereafter, the Seller shall file such financing statements and cause to be filed such continuation statements, all in such manner and in such places as may be required by law (or deemed desirable by the Purchaser or any assignee thereof) to fully perfect, preserve, maintain and protect the ownership interest of the Purchaser under this Agreement and the security interest of the Collateral Agent for the benefit of the Secured Parties under the Loan and Servicing Agreement, in the Sale Portfolio acquired by the Purchaser hereunder, as the case may be, and in the proceeds thereof. The Seller shall deliver (or cause to be delivered) to the Purchaser, the Collateral Agent, the Collateral Custodian, the Servicer, the Lenders, the Lender Agents and the Administrative Agent file-stamped copies of, or filing receipts for, any document filed as provided above, as soon as available following such filing. The Seller agrees that it will from time to time, at its expense, take all actions, that the Purchaser, the Collateral Agent or the Administrative Agent may reasonably request in order to perfect, protect or more fully evidence the Purchases hereunder and the security and/or interest granted in the Sale Portfolio, or to enable the Purchaser, the Collateral Agent, the Administrative Agent or the Secured Parties to exercise and enforce their rights and remedies hereunder or under any Transaction Document.

(b) On or prior to each Purchase Date hereunder, the Seller shall take all steps necessary under all Applicable Law in order to Sell to the Purchaser the Sale Portfolio being acquired by the Purchaser on such Purchase Date to the Purchaser so that, upon the Sale of such Sale Portfolio from the Seller to the Purchaser pursuant to the terms hereof on such Purchase Date, the Purchaser will have acquired good and marketable title to and a valid and perfected ownership interest in such Sale Portfolio, free and clear of any Lien, security interest, charge or

encumbrance or restrictions on transferability (subject only to Permitted Liens). On or prior to each Purchase Date hereunder, the Seller shall take all steps required under Applicable Law in order for the Purchaser to grant to the Collateral Agent, for the benefit of the Secured Parties, a first priority perfected security interest (subject only to Permitted Liens) in the Sale Portfolio being Purchased by the Purchaser on such Purchase Date and, from time to time thereafter, the Seller shall take all such actions as may be required by Applicable Law to fully preserve, maintain and protect the Purchaser's ownership interest in, and the Collateral Agent's first priority perfected security interest in (subject only to Permitted Liens), the Sale Portfolio which have been acquired by the Purchaser hereunder.

(c) The Seller shall direct any agent or administrative agent for any Sale Portfolio originated or acquired by the Seller to remit all payments and collections with respect to such Sale Portfolio and direct the Obligor with respect to such Sale Portfolio to remit all such payments and collections directly to the Collection Account. The Seller will not make any change, or permit the Servicer to make any change, in its instructions to Obligors regarding payments to be made to the Seller or the Servicer or payments to be made to the Collection Account, unless the Purchaser and the Administrative Agent have consented to such change. The Seller shall ensure that only funds constituting payments and collections relating to Sale Portfolio shall be deposited into the Collection Account. In the event any payments relating to any Sale Portfolio are remitted directly to the Seller or any Affiliate of the Seller, the Seller will remit (or will cause all such payments to be remitted) directly to the Collection Account within one Business Day following receipt thereof, and, at all times prior to such remittance, the Seller will itself hold or, if applicable, will cause such payments to be held in trust for the exclusive benefit of the Purchaser and its assignees. Until so deposited, all such Interest Collections and Principal Collections shall be held in trust for the Purchaser or its assignees by the Seller.

(d) At any time after the occurrence an Event of Default, the Purchaser, the Collateral Agent or the Administrative Agent may direct the Seller or the Servicer to notify the Obligors, at Seller's expense, of the Purchaser's (or its assigns) or the Secured Parties' interest in the Sale Portfolio under this Agreement and may direct that payments of all amounts due or that become due under any or all of the Sale Portfolio be made directly to the Purchaser (or its assigns), the Collateral Agent or the Administrative Agent.

(e) The Seller shall, not earlier than six months and not later than three months prior to the fifth anniversary of the date of filing of the financing statement referred to in [Section 3.1](#) or any other financing statement filed pursuant to this Agreement or in connection with any Purchase hereunder, unless the Collection Date shall have occurred:

(i) file or cause to be filed an appropriate continuation statement with respect to such financing statement; and

(ii) deliver or cause to be delivered to the Purchaser, the Collateral Agent, the Administrative Agent and each Lender Agent an opinion of the counsel for Seller, in form and substance reasonably satisfactory to the Purchaser, the Collateral Agent and the Administrative Agent, confirming and updating the opinion delivered pursuant to [Section 3.1](#) with respect to perfection and otherwise to the effect that the security interest hereunder continues to be an enforceable and perfected security interest,

subject to no other Liens of record except as provided herein or otherwise permitted hereunder, which opinion may contain usual and customary assumptions, limitations and exceptions.

(f) The Seller shall not (x) make any change to its corporate name or use any tradenames, fictitious names, assumed names, "doing business as" names or other names, move the location of its principal place of business and chief executive office, change the offices where it keeps records concerning the Sale Portfolio from the address set forth under its name on the signature pages hereto, or change the jurisdiction of its incorporation, or (y) move, or consent to the Collateral Custodian moving, the Required Loan Documents and Loan Asset Files from the location required under the Transaction Documents, unless, in each case, the Seller shall provide the Administrative Agent with such Opinions of Counsel and other documents and instruments as the Administrative Agent may request in connection therewith and has taken all actions required under the UCC of each relevant jurisdiction in order to continue the first priority perfected security interest of the Purchaser in the Sale Portfolio.

(g) The Seller shall at all times maintain each office from which it services Sale Portfolio and its principal executive office within the United States of America.

(h) The Seller shall mark its master data processing records so that, from and after the time of Sale under this Agreement of Sale Portfolio to the Purchaser and the grant of a security interest in such Sale Portfolio by the Purchaser to the Collateral Agent for the benefit of the Secured Parties under the Loan and Servicing Agreement, the Seller's master data processing records (including archives) that refer to such Sale Portfolio shall indicate clearly that such Sale Portfolio has been Purchased by the Purchaser hereunder and Pledged by the Purchaser to the Collateral Agent, on behalf of the Secured Parties, under the Loan and Servicing Agreement. Indication of the Collateral Agent's security interest for the benefit of the Secured Parties in the Sale Portfolio shall be deleted from or modified on the Seller's computer systems when, and only when, such Sale Portfolio shall be (i) paid off by the related Obligor, (ii) purchased or substituted by the Seller in accordance with Section 6.1 or 6.2 hereof or (iii) released by the Collateral Agent pursuant to Section 2.16 of the Loan and Servicing Agreement.

(i) If the Seller fails to perform any of its obligations hereunder, the Purchaser, the Collateral Agent or the Administrative Agent may (but shall not be required to) perform, or cause performance of, such obligation; and the Purchaser's, the Collateral Agent's or the Administrative Agent's costs and expenses incurred in connection therewith shall be payable by the Seller as provided in Section 9.1. The Seller irrevocably authorizes the Purchaser, the Collateral Agent or the Administrative Agent at any time and from time to time at the Purchaser's, the Collateral Agent's or the Administrative Agent's sole discretion and appoints the Purchaser, the Collateral Agent and the Administrative Agent as its attorney-in-fact pursuant to a Power of Attorney substantially in the form of Exhibit C to act on behalf of the Seller (i) to file financing statements on behalf of the Seller, as debtor, necessary or desirable in the Purchaser's, the Collateral Agent's or the Administrative Agent's sole discretion to perfect and to maintain the perfection and priority of the interest of the Purchaser or the Collateral Agent in the Sale Portfolio and (ii) to file a carbon, photographic or other reproduction of this Agreement or any financing statement with respect to the Sale Portfolio as a financing statement in such offices as the Purchaser, the Collateral Agent or the Administrative Agent in their sole discretion



deem necessary or desirable to perfect and to maintain the perfection and priority of the interests of the Purchaser or the Collateral Agent in the Sale Portfolio. This appointment is coupled with an interest and is irrevocable.

Section 5.2. Affirmative Covenants of the Seller.

From the date hereof until the Collection Date:

(a) Compliance with Law. The Seller will comply in all respects with all Applicable Law, including those applicable to the Seller as a result of its interest in the Sale Portfolio or any part thereof.

(b) Preservation of Company Existence. The Seller will preserve and maintain its corporate existence, rights, franchises and privileges in the jurisdiction of its incorporation, and qualify and remain qualified in good standing as a corporation in each jurisdiction where the failure to preserve and maintain such existence, rights, franchises, privileges and qualification could reasonably be expected to have a Material Adverse Effect.

(c) Performance and Compliance with Sale Portfolio. The Seller will, at its expense, timely and fully perform and comply in all respects with all provisions, covenants and other promises required to be observed by it under the Sale Portfolio and all other agreements related to such Sale Portfolio.

(d) Keeping of Records and Books of Account. The Seller will maintain and implement administrative and operating procedures (including, without limitation, an ability to recreate records evidencing the Sale Portfolio in the event of the destruction of the originals thereof), and keep and maintain all documents, books, records and other information reasonably necessary or advisable for the collection of all or any portion of the Sale Portfolio.

(e) Separate Identity. The Seller acknowledges that the Administrative Agent, the Collateral Agent, the Collateral Custodian, the Lenders, the Lender Agents and the other Secured Parties are entering into the transactions contemplated by this Agreement, the Loan and Servicing Agreement and the other Transaction Documents in reliance upon the Purchaser's identity as a legal entity that is separate from the Seller and each other Affiliate of the Seller. Therefore, from and after the date of execution and delivery of this Agreement, the Seller will take all reasonable steps including, without limitation, all steps that the Administrative Agent or the Collateral Agent may from time to time request to maintain the Purchaser's identity as a legal entity that is separate from the Seller and each other Affiliate of the Seller and to make it manifest to third parties that the Purchaser is an entity with assets and liabilities distinct from those of the Seller and each other Affiliate thereof (other than for tax purposes) and not just a division of the Seller or any such other Affiliate. Without limiting the generality of the foregoing and in addition to the other covenants set forth herein, the Seller agrees that:

(i) the Seller will take all other actions necessary on its part to ensure that the Purchaser is at all times in compliance with the criteria and the restrictions set forth in Section 9(j) of the limited liability company operating agreement of the

Purchaser and Sections 5.01(a), 5.01(b), 5.02(a) and 5.02(b) of the Loan and Servicing Agreement;

(ii) the Seller shall maintain corporate records and books of account separate from those of the Purchaser;

(iii) the annual financial statements of the Seller shall disclose the effects of the Seller's transactions in accordance with GAAP and the annual financial statements of the Seller shall not reflect in any way that the assets of the Purchaser, including, without limitation, the Sale Portfolio, could be available to pay creditors of the Seller or any other Affiliate of the Seller;

(iv) the resolutions, agreements and other instruments underlying the transactions described in this Agreement shall be continuously maintained by the Seller as official records;

(v) the Seller shall maintain an arm's-length relationship with the Purchaser and will not hold itself out as being liable for the debts of the Purchaser;

(vi) the Seller shall keep its assets and its liabilities wholly separate from those of the Purchaser;

(vii) the Seller will avoid the appearance, and promptly correct any known misperception of any of the Seller's creditors, that the assets of the Purchaser are available to pay the obligations and debts of the Seller; and

(viii) to the extent that the Seller services the Loan Assets and performs other services on the Purchaser's behalf, the Seller will clearly identify itself as an agent of the Purchaser in the performance of such duties.

(f) Taxes. The Seller will file or cause to be filed its tax returns and pay any and all Taxes imposed on it or its property as required by the Transaction Documents (except as contemplated in Section 4.1(m)).

(g) Cooperation with Requests for Information or Documents. The Seller will cooperate fully with all reasonable requests of the Purchaser and its assigns regarding the provision of any information or documents, necessary or desirable, including the provision of such information or documents in electronic or machine-readable format, to allow each of the Purchaser and its assignees to carry out their responsibilities under the Transaction Documents.

(h) Payment, Performance and Discharge of Obligations. The Seller will pay, perform and discharge all of its obligations and liabilities, including, without limitation, all Taxes, assessments and governmental charges upon its income and properties, when due, unless and only to the extent that such obligations, liabilities, Taxes, assessments and governmental charges shall be contested in good faith and by appropriate proceedings and that, to the extent required by GAAP, proper and adequate book reserves relating thereto are established by the Seller and then only to the extent that a bond is filed in cases where the filing of a bond is necessary to avoid the creation of a Lien against any of its properties.

(i) Notices.

(i) Income Tax Liability. The Seller will furnish telephonic or facsimile notice to the Purchaser, the Collateral Agent, the Administrative Agent and each Lender Agent within 10 Business Days (confirmed in writing within five Business Days thereafter) of the receipt of revenue agent reports or other written proposals, determinations or assessments of the Internal Revenue Service or any other taxing authority which propose, determine or otherwise set forth positive adjustments (i) to the Tax liability of the Seller or any "affiliated group" (within the meaning of Section 1504(a)(1) of the Code) of which the Seller is a member in an amount equal to or greater than \$1,000,000 in the aggregate, or (ii) to the Tax liability of the Purchaser in an amount equal to or greater than \$500,000 in the aggregate. Any such notice shall specify the nature of the items giving rise to such adjustments and the amounts thereof.

(ii) Auditors' Management Letters. Promptly after the receipt thereof, the Seller will provide the Purchaser, the Collateral Agent, the Administrative Agent and each Lender Agent with any auditors' management letters that are received by the Seller or by its accountants.

(iii) Representations and Covenants. Promptly, upon receipt of notice or discovery thereof, the Seller will furnish notice to the Purchaser, the Collateral Agent, the Administrative Agent and each Lender Agent (i) if any representation or warranty set forth in Section 4.1 or Section 4.2 was incorrect at the time it was given or deemed to have been given or (ii) of the breach of any covenant under Section 5.1, Section 5.2 or Section 5.3 and at the same time deliver to the Purchaser, the Collateral Agent, the Administrative Agent and each Lender Agent a written notice setting forth in reasonable detail the nature of such facts and circumstances. In particular, but without limiting the foregoing, the Seller shall notify the Purchaser, the Collateral Agent, the Administrative Agent and each Lender Agent in the manner set forth in the preceding sentence before any Purchase Date of any facts or circumstances within the knowledge of the Seller which would render any of the said representations and warranties untrue at the date when such representations and warranties were made or deemed to have been made.

(iv) ERISA. Promptly after receiving notice of any "reportable event" (as defined in Title IV of ERISA, other than an event for which the reporting requirements have been waived by regulations) with respect to the Seller (or any ERISA Affiliate thereof), the Seller will provide a copy of such notice to the Purchaser, the Collateral Agent, the Administrative Agent and each Lender Agent.

(v) Proceedings. As soon as possible and in any event within three Business Days, after the Seller receives notice or obtains knowledge thereof, the Seller will provide the Purchaser, the Collateral Agent, the Administrative Agent and each Lender Agent with notice of any settlement of, material judgment (including a material judgment with respect to the liability phase of a bifurcated trial) in or commencement of any material labor controversy, material litigation, material action, material suit or material proceeding before any court or governmental department, commission, board, bureau, agency or instrumentality, domestic or foreign, affecting the Sale Portfolio, the

Transaction Documents, the Collateral Agent's, for the benefit of the Secured Parties, interest in the Sale Portfolio, or the Purchaser, the Servicer, the Seller or the Transferor or any of their Affiliates. For purposes of this Section 5.2(i), (i) any settlement, judgment, labor controversy, litigation, action, suit or proceeding affecting the Sale Portfolio, the Transaction Documents, the Collateral Agent's, for the benefit of the Secured Parties, interest in the Sale Portfolio, or the Purchaser in excess of \$500,000 shall be deemed to be material and (ii) any settlement, judgment, labor controversy, litigation, action, suit or proceeding affecting the Seller or any of its Affiliates (other than the Purchaser) in excess of \$1,000,000 shall be deemed to be material.

(vi) Material Events. The Seller will, promptly upon becoming aware thereof, notify the Purchaser, the Collateral Agent, the Administrative Agent and each Lender Agent of any event or other circumstance that is reasonably likely to have a Material Adverse Effect.

(vii) Events of Default. The Seller will provide the Purchaser, the Collateral Agent, the Administrative Agent and each Lender Agent with immediate written notice of the occurrence of each Event of Default and each Unmatured Event of Default of which the Seller has knowledge or has received notice. In addition, no later than two Business Days following the Seller's knowledge or notice of the occurrence of any Event of Default or Unmatured Event of Default, the Seller will provide to the Purchaser, the Collateral Agent, the Administrative Agent and each Lender Agent a written statement of a Responsible Officer of the Seller setting forth the details of such event and the action that the Seller proposes to take with respect thereto.

(viii) Seller Termination Event and Seller Purchase Event. The Seller will provide the Purchaser, the Collateral Agent, the Administrative Agent and each Lender Agent with immediate written notice of the occurrence of each Seller Termination Event and each Seller Purchase Event of which the Seller has knowledge or has received notice.

(j) Other. The Seller will furnish to the Purchaser, the Collateral Agent, the Administrative Agent and each Lender Agent promptly, from time to time such other information, documents, records or reports respecting the Sale Portfolio or the condition or operations, financial or otherwise, of the Seller as the Purchaser, the Collateral Agent, the Administrative Agent and each Lender Agent may from time to time reasonably request in order to protect the interests of the Purchaser, the Administrative Agent, the Collateral Agent, the Lenders, the Lender Agents or the Secured Parties under or as contemplated by this Agreement and the other Transaction Documents.

(k) Costs and Expenses. The Seller shall pay all reasonable, documented costs and disbursements in connection with the performance of its obligations hereunder.

(l) Annual Certificates. On each anniversary of the Closing Date, the Seller shall deliver an Officer's Certificate, in form and substance acceptable to the Purchaser, the Administrative Agent and each Lender Agent, providing (i) a certification, based upon a review and summary of UCC search results reasonably satisfactory to the Purchaser and the

Administrative Agent, that there is no other interest in the Sale Portfolio perfected by filing of a UCC financing statement other than in favor of the Purchaser and the Collateral Agent pursuant to the terms of the Transaction Documents and (ii) a certification, based upon a review and summary of tax and judgment lien searches satisfactory to the Purchaser and the Administrative Agent, that there is no other interest in the Sale Portfolio based on any tax or judgment lien.

(m) Opinion. The Seller will comply in all respects with any requirements for future action set forth in the section heading "Assumptions" in the Non-Consolidation/True Sale Opinion, with respect to the Transaction Documents.

(n) Copies of Other Information. The Seller will deliver to the Purchaser, the Collateral Agent, the Administrative Agent and each Lender Agent:

(i) promptly, but in any event within ten Business Days after the filing thereof, a copy of (a) each report or other filing made by the Seller or any of its Affiliates with the Securities and Exchange Commission (the "SEC") and required by the SEC to be delivered to the shareholders of the Seller or any such Affiliate, and (b) each report and final registration statement of the Seller or any Affiliate filed with the SEC; and

(ii) promptly, from time to time, such other information, documents, records or reports respecting the Sale Portfolio or the conditions or operations, financial or otherwise, of the Seller (including, without limitation, reports and notices relating to the Seller's actions under and compliance with ERISA and the 1940 Act) as the Purchaser, the Collateral Agent, the Administrative Agent or each Lender Agent may from time to time request in order to perform their obligations hereunder or under any other Transaction Document or to protect the interests of the Purchaser under or as contemplated by this Agreement and the other Transaction Documents.

(o) Disregarded Entity. The Seller shall cause the Purchaser to be disregarded as an entity separate from its owner pursuant to Treasury Regulation Section 301.7701-3(b) and shall cause that neither the Purchaser nor any other Person on its behalf shall make an election to be treated as other than an entity disregarded from its owner under Treasury Regulation Section 301.7701-3(c).

Section 5.3. Negative Covenants of the Seller.

From the date hereof until the Collection Date:

(a) Sale Portfolio Not to be Evidenced by Instruments. The Seller will take no action to cause any Sale Portfolio that is not, as of the related Purchase Date, as the case may be, evidenced by an instrument, to be so evidenced except in connection with the enforcement or collection of such Sale Portfolio.

(b) Security Interests. Except as otherwise permitted herein and in the Loan and Servicing Agreement, the Seller will not sell, pledge, assign or transfer to any other Person, or grant, create, incur, assume or suffer to exist any Lien on any Sale Portfolio Sold by the Seller to the Purchaser hereunder, whether now existing or hereafter transferred hereunder, or any interest, therein, and the Seller will not sell, pledge, assign or suffer to exist any Lien (except for

Permitted Liens) on its interest in the Sale Portfolio Sold by the Seller to the Purchaser hereunder. The Seller will promptly notify the Purchaser, the Collateral Agent, each Lender Agent and the Administrative Agent of the existence of any Lien on any Sale Portfolio and the Seller shall defend the right, title and interest of the Purchaser and the Collateral Agent, on behalf of the Secured Parties, in, to and under the Sale Portfolio against all claims of third parties; *provided*, that nothing in this [Section 5.3\(b\)](#) shall prevent or be deemed to prohibit the Seller from suffering to exist Permitted Liens upon any of the Sale Portfolio.

(c) Mergers, Acquisitions, Sales, Etc. The Seller will not consolidate with or merge into any other Person or convey or transfer its properties and assets substantially as an entirety to any Person, or sell or assign with or without recourse any Sale Portfolio or any interest therein (other than in the ordinary course of business or as permitted pursuant to this Agreement or the Transaction Documents).

(d) Transfer of Purchaser Membership Interests. The Seller shall not transfer, pledge, participate or otherwise encumber its membership interests in the Purchaser without the prior written consent of the Administrative Agent and the delivery of an acceptable (in the Administrative Agent's reasonable discretion) non-consolidation opinion (except pursuant to the terms of the Pledge Agreement).

(e) Restricted Payments. The Seller shall not cause or permit the Purchaser to make any Purchaser Restricted Junior Payment except that, so long as no Event of Default has occurred or would result therefrom and no Unmatured Event of Default has occurred and is continuing or would result therefrom, the Purchaser may declare and make distributions to its member on its membership interests.

(f) Accounting of Purchases. Other than for tax and consolidated accounting purposes, the Seller will not account for or treat (whether in financial statements or otherwise) the transactions contemplated hereby in any manner other than as a sale of the Loan Assets to the Purchaser.

(g) ERISA Matters. The Seller will not (a) engage, and will exercise its best efforts not to permit any ERISA Affiliate to engage, in any prohibited transaction (within the meaning of ERISA Section 406(a) or (b) or Code Section 4975) for which an exemption is not available or has not previously been obtained from the United States Department of Labor, (b) fail to meet the minimum funding standard set forth in Section 302(a) of ERISA and Section 412(a) of the Code with respect to any Pension Plan other than a Multiemployer Plan, (c) fail to make any payments to a Multiemployer Plan that the Seller or any ERISA Affiliate may be required to make under the agreement relating to such Multiemployer Plan or any law pertaining thereto, (d) terminate any Pension Plan so as to result, directly or indirectly, in any liability to the Seller, or (e) permit to exist any occurrence of any reportable event described in Title IV of ERISA with respect to any Pension Plan other than an event for which the reporting requirements have been waived by regulations.

(h) Extension or Amendment of Sale Portfolio. The Seller will not, except as otherwise permitted in Section 6.04(a) of the Loan and Servicing Agreement, extend, amend or otherwise modify, or permit the Servicer to extend, amend or otherwise modify, the terms of any Sale Portfolio.

(i) Limitation on Financing Activities. The Seller shall not, directly or indirectly, advance or loan to the Purchaser any funds pursuant to any financial accommodation. For the avoidance of doubt, this clause (i) shall not prohibit the Seller from contributing Loan Assets to the Purchaser as contemplated herein or providing cash equity contributions to the Purchaser.

(j) Organizational Documents. The Seller will not cause or permit the Purchaser to amend, modify, waive or terminate any provision of the Purchaser's operating agreement without the prior written consent of the Administrative Agent.

#### ARTICLE VI.

##### REPURCHASES AND SUBSTITUTION BY THE SELLER

Section 6.1. Repurchase of Loan Assets. In the event of the occurrence of a Seller Purchase Event, the Seller will within 10 Business Days of the discovery by or notice (from any Person) to the Seller of the Seller Purchase Event, (i) purchase each Loan Asset hereunder which is affected by or related to such Seller Purchase Event from the Purchaser, and the Seller shall pay to the Purchaser (by means of a deposit to the Collection Account) the Repurchase Price of such Loan Asset as of the date of the purchase thereof from the Purchaser or (ii) with the consent of the Administrative Agent and subject to the satisfaction of the conditions in Section 6.2, substitute for such Loan Asset, a Substitute Eligible Loan Asset. It is understood and agreed that the obligation of the Seller to purchase the Loan Assets or substitute a Substitute Eligible Loan Asset for the Loan Assets which are affected by or related to such Seller Purchase Event is not intended to, and shall not, constitute a guaranty of the collectability or payment of any Loan Asset which is not collected, not paid or uncollectible on account of the insolvency, bankruptcy or financial inability to pay of the related Obligor. Upon deposit in the Collection Account of the Repurchase Price for any Loan Asset purchased by the Seller, the Purchaser shall, automatically and without further action be deemed to transfer, assign and set over to the Seller, without recourse, representation or warranty of any kind, except as to the absence of Liens, charges or encumbrances created by or arising solely as a result of actions of the Purchaser or the Collateral Agent, all the right, title and interest of the Purchaser, in, to and under such Loan Asset and all future monies due or to become due with respect thereto, the Underlying Collateral, all Proceeds of such Loan Asset and Recoveries and Insurance Proceeds relating thereto, all rights to security for such Loan Asset and all Proceeds and products of the foregoing. The Purchaser shall (and shall request the Collateral Agent to), at the sole expense of the Seller, execute such documents and instruments of transfer as may be prepared by the Seller and take such other actions as may be reasonably requested by the Seller in order to effect the transfer of such Loan Asset pursuant to this Section 6.1. Such Sale shall be a sale outright, and not for security.

Section 6.2. Substitution of Loan Assets.

(a) The Seller shall have the right, but not the obligation, subject to the prior written consent of the Administrative Agent and the Purchaser, in their sole discretion, to substitute one or more Eligible Loan Assets (“Substitute Eligible Loan Asset”) for a Loan Asset (each such act, a “Substitution”).

(b) The Substitution shall not occur unless the following conditions are satisfied as of the date of such Substitution:

(i) the Seller has recommended to the Purchaser and the Administrative Agent (with a copy to the Collateral Agent and the Collateral Custodian) in writing that the Loan Asset to be replaced should be replaced (each, a “Replaced Loan Asset”);

(ii) no event has occurred, or would result from such Substitution, which constitutes an Event of Default and no event has occurred and is continuing, or would result from such Substitution, which constitutes an Unmatured Event of Default or a Borrowing Base Deficiency;

(iii) each Substitute Eligible Loan Asset is an Eligible Loan Asset on the date of Substitution;

(iv) solely in the case of Substitutions pursuant to this Section 6.2 undertaken because a Seller Purchase Event has occurred, the sum of the Advance Date Assigned Value multiplied by the Outstanding Balances of such Substitute Eligible Loan Assets shall be equal or greater than the sum of the Advance Date Assigned Value of the Replaced Loan Assets multiplied by the Outstanding Balance thereof;

(v) all representations and warranties contained in Sections 4.1 and 4.2 shall be true and correct in all respects as of the date of Substitution (other than any representation and warranty that is made as of a specific date);

(vi) no selection procedures adverse to the interests of the Purchaser, the Administrative Agent, the Lenders, the Lender Agents or the other Secured Parties were utilized by the Seller in the selection of the Loan Asset to be replaced by the Substitute Eligible Loan Asset;

(vii) the Outstanding Balance of all Loan Assets (other than Warranty Loan Assets), sold pursuant to Section 2.07(b) of the Loan and Servicing Agreement, substituted pursuant to this Section 6.2 or released pursuant to Section 2.07(g) of the Loan and Servicing Agreement for dividend from the Purchaser to the Seller during the 12-month period (or such lesser number of months as shall have elapsed as of such date) immediately preceding the proposed date of Substitution does not exceed 10% of the highest aggregate Outstanding Balance of any month during such 12-month period (or such lesser number of months as shall have elapsed as of such date);



(viii) each Loan Asset that is replaced pursuant to the terms of this Section 6.2 shall be substituted only with another Eligible Loan Asset that meets the foregoing conditions;

(ix) all terms, provisions, representations, warranties and covenants hereunder with respect to Loan Assets that have been Sold by the Seller to the Purchaser hereunder shall apply equally to Substitute Eligible Loan Assets; and

(x) the Seller shall deliver to the Purchaser on the date of such Substitution a certificate of a Responsible Officer certifying that each of the foregoing is true and correct as of such date.

(c) In addition, in connection with such Substitution, the Seller shall deliver or cause to be delivered to the Collateral Custodian the related Required Loan Documents. On the date any such Substitution is completed, the Purchaser shall, automatically and without further action, release and shall transfer to the Seller, free and clear of any Lien created pursuant to this Agreement, all of the right, title and interest of the Purchaser in, to and under such Replaced Loan Asset, and the Purchaser shall be deemed to represent and warrant that it has the company authority and has taken all necessary company action to accomplish such transfer, but without any other representation and warranty, express or implied.

Section 6.3. Repurchase Limitations. The Seller and the Purchaser agree that the Seller and any Affiliate of the Seller may repurchase any Sale Portfolio only from the Purchaser in the case of a repurchase or Substitution of any Sale Portfolio pursuant to Sections 6.1 or 6.2.

#### ARTICLE VII.

#### ADDITIONAL RIGHTS AND OBLIGATIONS IN RESPECT OF THE SALE PORTFOLIO

##### Section 7.1. Rights of the Purchaser.

(a) After the occurrence or declaration of the Facility Maturity Date, the Seller hereby authorizes the Purchaser, the Servicer, the Collateral Agent and the Administrative Agent and/or their respective designees or assignees to take any and all steps in Seller's name and on behalf of the Seller that the Purchaser, the Servicer, the Collateral Agent or the Administrative Agent and/or their respective designees or assignees determine are necessary or appropriate to collect all amounts due under any and all Sale Portfolio and to enforce or protect the Purchaser's, the Collateral Agent's and the Administrative Agent's rights under this Agreement, including endorsing the name of the Seller on checks and other instruments representing Interest Collections and Principal Collections and enforcing such Sale Portfolio.

(b) Except as set forth in Sections 6.1 and 6.2 with respect to the repurchase or Substitution of certain Loan Assets, the Purchaser shall have no obligation to account for, replace, substitute or return any Sale Portfolio to the Seller. The Purchaser shall have no obligation to account for or to return Interest Collections or Principal Collections, or any interest or other finance charge collected pursuant thereto, to the Seller, irrespective of whether such

Interest Collections and Principal Collections and charges are in excess of the Purchase Price for such Sale Portfolio.

(c) The Purchaser shall have the right to further assign, transfer, deliver, hypothecate, subdivide or otherwise deal with the Sale Portfolio and all of the Purchaser's right, title and interest in, to and under this Agreement, pursuant to the Loan and Servicing Agreement.

(d) The Purchaser shall have the sole right to retain any gains or profits created by buying, selling or holding the Sale Portfolio and shall have the sole risk of and responsibility for losses or damages created by such buying, selling or holding.

Section 7.2. Rights With Respect to Loan Asset Files.

At any time when a Servicer other than Fifth Street Finance Corp. has been designated pursuant to Article VI of the Loan and Servicing Agreement, the Seller shall, at the Purchaser's, the Collateral Agent's, the Collateral Custodian's or the Administrative Agent's request, assemble all of the Loan Asset Files which evidence the Sale Portfolio originated by the Seller, or which are otherwise necessary or desirable to collect such Sale Portfolio, and make the same available to the Purchaser, the Collateral Agent, the Collateral Custodian or the Administrative Agent at a place selected by the Purchaser, the Collateral Agent, the Collateral Custodian, the Administrative Agent or their designee.

Section 7.3. Notice to Collateral Agent, Administrative Agent and each Lender Agent.

The Seller agrees that, concurrently with its delivery to the Purchaser, copies of all notices, reports, documents and other information required to be delivered by the Seller to the Purchaser hereunder shall be delivered by the Seller to the Collateral Agent, the Administrative Agent and each Lender Agent.

ARTICLE VIII.

SELLER TERMINATION EVENTS

Section 8.1. Seller Termination Events.

(a) If any of the following events (each a "Seller Termination Event") shall have occurred:

(i) the Seller shall fail to pay (A) any amount due pursuant to Section 6.1 in accordance with the provisions thereof or (B) any other amount required to be paid by the Seller hereunder within two Business Days of the date when due; or

(ii) the Seller shall fail to observe or perform any covenant or agreement in any material respect applicable to it contained herein (other than as specified in paragraph (i) of this Section 8.1); and such failure shall continue unremedied for a period of 30 days (if such failure can be remedied) after the earlier to occur of (i) the date on which written notice of such failure requiring the same to be remedied shall have been given to the Seller by the Administrative Agent, the Collateral Agent (at the

direction of the Administrative Agent) or the Purchaser and (ii) the date on which the Seller acquires knowledge thereof; or

(iii) any representation, warranty or certification made by the Seller in this Agreement or in any statement, record, certificate, financial statement or other document delivered pursuant to this Agreement shall prove to have been incorrect when made or deemed made in any material respect and shall not have been corrected within 30 Days after the earlier to occur of (i) the date on which written notice of such incorrectness requiring the same to be remedied shall have been given to the Seller by the Administrative Agent, the Collateral Agent (at the direction of the Administrative Agent) or the Purchaser and (ii) the date on which a Responsible Officer of the Seller acquires knowledge thereof; *provided* that a Seller Termination Event shall not be deemed to have occurred under this paragraph (iii) based upon a Seller Purchase Event if the Seller shall have complied with the provisions of Section 6.1 in respect thereof; or

(iv) (A) a court having jurisdiction in the premises shall enter a decree or order for relief in respect of the Seller in an involuntary case under the Bankruptcy Code or any other Bankruptcy Laws, which decree or order is not stayed or any other similar relief shall be granted under any applicable federal or state law now or hereafter in effect and shall not be stayed; (B) (1) any involuntary case is commenced against the Seller under any Bankruptcy Law now or hereafter in effect, a decree or order of a court having jurisdiction in the premises for the appointment of a receiver, liquidator, sequestrator, trustee, custodian or other officer having similar powers over the Seller, or over all or a substantial part of the property of the Seller, shall have been entered, an interim receiver, trustee or other custodian of the Seller for all or a substantial part of the property of the Seller is involuntarily appointed, a warrant of attachment, execution or similar process is issued against any substantial part of the property of the Seller, and (2) any event referred to in clause (B)(1) above continues for 60 days unless dismissed, bonded or disclosed; (C) the Seller shall at its request have a decree or an order for relief entered with respect to it or commence a voluntary case under any Bankruptcy Law now or hereafter in effect, or shall consent to the entry of a decree or an order for relief in an involuntary case, or to the conversion of an involuntary case to a voluntary case, under any such Bankruptcy Law, consent to the appointment of or taking possession by a receiver, trustee or other custodian for all or a substantial part of its property; (D) the making by the Seller of any general assignment for the benefit of creditors; (E) the inability or failure of the Seller generally to pay its debts as such debts become due; or (F) the board of directors of the Seller authorizes action to approve any of the foregoing; or

(v) the occurrence of (A) an Event of Default set forth in Section 7.01 of the Loan and Servicing Agreement (past any applicable notice or cure period provided in the definition thereof) or (B) the Facility Maturity Date; or

(vi) the Seller has been terminated as Servicer following a Servicer Termination Event with respect to the Servicer under the Loan and Servicing Agreement; or

(vii) a notice of Lien shall have been filed by the Pension Benefit Guaranty Corporation against the Seller under Section 430(k) of the Code or Section 303(k) of ERISA for a failure to make a required installment or other payment to a plan to which Section 430(k) of the Code or Section 303(k) of ERISA applies unless there shall have been delivered to the Administrative Agent and each Lender Agent proof of release of such Lien; or

(viii) any Lien in an amount equal to or greater than \$1,000,000 has been asserted against or imposed on, any real or personal property of the Seller pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9607(1), or any equivalent or comparable state law, relating to or arising from the costs of, response to, or investigation, remediation or monitoring of, any environmental contamination resulting from the current or past operations of the Seller; or

(ix) a Federal tax notice of Lien, in an amount equal to or greater than \$1,000,000, shall have been filed against the Seller unless there shall have been delivered to the Administrative Agent and each Lender Agent proof of release of such Lien;

then, (A) in the case of any Seller Termination Event described in paragraph (iv), (v)(A), (vi), (vii), (viii) or (ix) above, the obligation of the Purchaser to Purchase Sale Portfolio from the Seller shall thereupon automatically terminate without further notice of any kind, which is hereby waived by the Seller, (B) in the case of any Seller Termination Event described in paragraph (v)(B) above, the obligation of the Purchaser to Purchase Sale Portfolio from the Seller shall thereupon terminate without notice of any kind, which is hereby waived by the Seller unless both the Purchaser and the Seller agree in writing that such event shall not trigger an Early Termination (as hereinafter defined) hereunder, and (C) in the case of any other Seller Termination Event, so long as such Seller Termination Event shall be continuing, the Purchaser or the Administrative Agent may terminate its obligation to Purchase Sale Portfolio from the Seller by written notice to the Seller (any termination pursuant to clause (A), (B) or (C) of this Article VIII is herein called an "Early Termination"); *provided*, that, in the event of any involuntary petition or proceeding as described in paragraphs (iv)(A) and (iv)(B) above, the Purchaser shall not Purchase Sale Portfolio from the Seller unless such involuntary petition or proceeding is dismissed, bonded or discharged within 60 days of the filing of such petition or the commencement of such proceeding.

#### Section 8.2. Survival of Certain Provisions.

Notwithstanding any provision contained herein to the contrary, the Seller's and the Purchaser's representations, covenants and obligations set forth in Articles IV, V, VI, and VII, as applicable, create and constitute the continuing obligation of the parties hereto in accordance with its terms, and shall remain in full force and effect until the Collection Date; *provided*, that the rights and remedies with respect to any breach of any representation and warranty made or deemed made by the Seller pursuant to Articles III and IV and the provisions of Sections 6.1 and 6.2, the rights and obligations under Article VII, the indemnification provisions of Article IX and the provisions of Sections 5.1, 10.2, 10.8, 10.9, 10.10, 10.12, 10.13, 10.14 and 10.17 shall be continuing and shall survive any termination of this Agreement.

ARTICLE IX.  
INDEMNIFICATION.

Section 9.1. Indemnification by the Seller.

(a) Without limiting any other rights which the Purchaser, any assignee of the Purchaser or any such Persons' respective shareholders, officers, employees, agents, or Affiliates (each, an "Indemnified Party") may have hereunder or under Applicable Law, the Seller hereby agrees to indemnify any Indemnified Party from and against any and all costs, expenses, losses, damages, claims, and liabilities, including attorneys' fees and disbursements (all of the foregoing, being collectively referred to as, "Indemnified Amounts"), awarded against or incurred by such Indemnified Party or other non-monetary damages of any such Indemnified Party or any of them arising out of or as a result of this Agreement excluding, however, (a) any such amounts resulting solely from any gross negligence, bad faith or willful misconduct on the part of the applicable Indemnified Party or (b) Loan Assets that are uncollectible due to the Obligor's financial inability to pay. Without limiting the foregoing, the Seller shall indemnify each Indemnified Party for Indemnified Amounts relating to or resulting from any of the following (to the extent not resulting from the conditions set forth in (a) or (b) above):

- (i) any Person's use, ownership or operation of any Underlying Collateral to the extent that such use, ownership or operation took place prior to the Purchase Date with respect to the related Sale Portfolio;
- (ii) any action taken by the Seller, other than in accordance with this Agreement, in respect of any portion of the Sale Portfolio;

(iii) any Taxes (other than Taxes based upon the net or gross income of an Indemnified Party and Taxes that would constitute Excluded Amounts) that may at any time be asserted against any Indemnified Party with respect to the transactions contemplated in this Agreement, including, without limitation, any sales, gross receipts, general corporation, tangible or intangible personal property, privilege, stamp or license Taxes and costs and expenses in defending against the same, arising by reason of the acts to be performed by the Seller under this Agreement and imposed against such Indemnified Party. Without limiting the foregoing, in the event that the Purchaser, the Collateral Agent, the Collateral Custodian, the Account Bank, the Servicer, any Lender, any Lender Agent or the Administrative Agent receives actual notice of any Transfer Taxes arising out of the Sale of any Sale Portfolio from the Seller to the Purchaser under this Agreement, on written demand by such party, or upon the Seller otherwise being given notice thereof, the Seller shall pay, and otherwise indemnify and hold the Purchaser, the Collateral Agent, the Collateral Custodian, the Account Bank, the Servicer, each Lender, each Lender Agent and the Administrative Agent harmless, on an after-tax basis, from and against any and all such Transfer Taxes (it being understood that the Purchaser, the Collateral Agent, the Collateral Custodian, the Account Bank, the Servicer, the Lenders, the Lender Agents and the Administrative Agent shall have no contractual obligation to pay such Transfer Taxes);

(iv) the failure by the Seller to pay when due any Taxes due by the Seller for which the Seller is liable, including without limitation, sales, excise or personal property Taxes payable in connection with the Sale Portfolio;

(v) the gross negligence, willful misconduct or bad faith of the Seller in the performance of its duties under this Agreement or by reason of reckless disregard of the Seller's obligations and duties under this Agreement;

(vi) any failure of the Seller to perform its duties or obligations in accordance with the provisions of this Agreement or any of the other Transaction Documents to which it is a party or any failure by the Seller or any Affiliate thereof to perform its respective duties under any Sale Portfolio;

(vii) the failure of any Sale Portfolio to comply with all requirements of Applicable Law as of its Purchase Date;

(viii) the failure by the Seller to comply with all requirements of Section 6.1 hereof;

(ix) the failure by the Seller to comply with any term, provision or covenant contained in this Agreement or any agreement executed in connection with this Agreement, any Transaction Document or with any Applicable Law;

(x) any representation or warranty made or deemed made by the Seller, or any of its officers, under or in connection with this Agreement or any other Transaction Document, which shall have been false, incorrect or misleading in any respect when made or deemed made or delivered;

(xi) the failure to vest and maintain vested in the Purchaser an undivided ownership interest in the Sale Portfolio, together with all Interest Collections and Principal Collections, free and clear of any Lien (other than Permitted Liens) whether existing at the time of any Purchase or at any time thereafter;

(xii) the failure to file, or any delay in filing, financing statements, continuation statements or other similar instruments or documents under the UCC of any applicable jurisdiction or other Applicable Law with respect to any Sale Portfolio, whether at the time of any Purchase or at any subsequent time;

(xiii) any dispute, claim, offset or defense (other than the discharge in bankruptcy of the Obligor) of the Obligor to the payment with respect to any Sale Portfolio (including, without limitation, a defense based on the Sale Portfolio not being a legal, valid and binding obligation of such Obligor enforceable against it in accordance with its terms);

(xiv) any inability to obtain any judgment in, or utilize the court or other adjudication system of, any state in which an Obligor may be located as a result of the failure of the Seller to qualify to do business or file any notice or business activity report or any similar report;

(xv) any action taken by the Seller in the enforcement or collection of any Sale Portfolio which results in any claim, suit or action of any kind pertaining to the Sale Portfolio or which reduces or impairs the rights of the Purchaser with respect to any Loan Asset or the value of any such Loan Asset;

(xvi) any claim, suit or action of any kind arising out of or in connection with Environmental Laws relating to the Seller or the Sale Portfolio including any vicarious liability;

(xvii) the commingling of Interest Collections and Principal Collections on the Sale Portfolio at any time with other funds of the Seller;

(xviii) any investigation, litigation or proceeding related to this Agreement or the use of proceeds by the Seller or the security interest in the Sale Portfolio granted hereunder;

(xix) any failure by the Purchaser to give reasonably equivalent value to the Seller in consideration for the transfer by the Seller to the Purchaser of any item of the Sale Portfolio or any attempt by any Person to void or otherwise avoid any such transfer under any statutory provision or common law or equitable action, including, without limitation, any provision of the Bankruptcy Code;

(xx) the failure of the Seller or any of its agents or representatives to remit to the Purchaser Interest Collections and Principal Collections on the Sale Portfolio remitted to the Seller or any such agent or representative as provided in this Agreement; or

(xxi) failure or delay in assisting a successor Servicer in assuming each and all of the Servicer's obligations to service and administer the Collateral Portfolio in accordance with the Loan and Servicing Agreement, or failure or delay in complying with instructions from the Administrative Agent with respect thereto.

(b) Any amounts subject to the indemnification provisions of this Section 9.1 shall be paid by the Seller to the Indemnified Party within two Business Days following such Person's demand therefor.

(c) If for any reason the indemnification provided above in this Section 9.1 is unavailable to the Indemnified Party or is insufficient to hold an Indemnified Party harmless, then the Seller shall contribute to the amount paid or payable by such Indemnified Party as a result of such loss, claim, damage or liability in such proportion as is appropriate to reflect not only the relative benefits received by such Indemnified Party, on the one hand, and the Seller as the case may be, on the other hand, but also the relative fault of such Indemnified Party as well as any other relevant equitable considerations.

(d) Indemnification under this Section 9.1 shall be in an amount necessary to make the Indemnified Party whole after taking into account any tax consequences to the Indemnified Party of the receipt of the indemnity provided hereunder, including the effect of

such Tax or refund on the amount of Tax measured by net income or profits that is or was payable by the Indemnified Party.

(e) The obligations of the Seller under this Section 9.1 shall survive the termination of this Agreement.

Section 9.2. Assignment of Indemnities.

The Seller acknowledges that, pursuant to the Loan and Servicing Agreement, the Purchaser shall assign its rights of indemnity hereunder to the Collateral Agent, on behalf of the Secured Parties. Upon such assignment, (a) the Collateral Agent, on behalf of the Secured Parties, shall have all rights of the Purchaser hereunder and may in turn assign such rights, and (b) the obligations of the Seller under this Article IX shall inure to the Collateral Agent, on behalf of the Secured Parties. The Seller agrees that, upon such assignment, the Collateral Agent, on behalf of the Secured Parties, may enforce directly, without joinder of the Purchaser, the indemnities set forth in this Article IX.

ARTICLE X.

MISCELLANEOUS

Section 10.1. Liability of the Seller. The Seller shall be liable in accordance herewith only to the extent of the obligations in this Agreement specifically undertaken by the Seller and with respect to its representations and warranties expressly set forth hereunder.

Section 10.2. Limitation on Liability. Except with respect to any claim arising solely out of the willful misconduct or gross negligence of the Lenders, the Lender Agents, the Collateral Agent, the Collateral Custodian, the Administrative Agent or any other Secured Party, no claim may be made by the Seller or any other Person against the Lenders, the Lender Agents, the Collateral Agent, the Collateral Custodian, the Administrative Agent or any other Secured Party or their respective Affiliates, directors, officers, employees, attorneys or agents for any special, indirect, consequential or punitive damages in respect of any claim for breach of contract or any other theory of liability arising out of or related to the transactions contemplated by this Agreement, or any act, omission or event occurring in connection therewith; and the Seller hereby waives, releases and agrees not to sue upon any claim for any such damages, whether or not accrued and whether or not known or suspected to exist in its favor.

Section 10.3. Amendments; Limited Agency. Except as provided in this Section 10.3, no amendment, waiver or other modification of any provision of this Agreement shall be effective unless signed by the Purchaser and the Seller and consented to in writing by the Administrative Agent, the Collateral Agent and the Required Lenders. The Purchaser shall provide not less than ten Business Days' prior written notice of any such amendment to the Administrative Agent, the Collateral Agent, each Lender and each Lender Agent.

Section 10.4. Waivers; Cumulative Remedies. No failure or delay on the part of the Purchaser (or any assignee thereof) or the Seller, in exercising any power, right, privilege or remedy under this Agreement shall operate as a waiver thereof, nor shall any single or partial exercise of any such power, right, privilege or remedy preclude any other or future exercise



thereof or the exercise of any other power, right, privilege or remedy. The powers, rights, privileges and remedies herein provided are cumulative and not exhaustive of any powers, rights, privileges and remedies provided by law. Any waiver of this Agreement shall be effective only in the specific instance and for the specific purpose for which it is given.

Section 10.5. Notices. All demands, notices and other communications hereunder shall, unless otherwise stated herein, be in writing (which shall include facsimile communication and communication by e-mail in portable document format (.pdf)) and faxed, e-mailed or delivered, to each party hereto, at its address set forth under its name on the signature pages hereto or at such other address as shall be designated by such party in a written notice to the other parties hereto. Notices and communications by facsimile and e-mail shall be effective when sent (and shall be followed by hard copy sent by regular mail), and notices and communications sent by other means shall be effective when received.

Section 10.6. Merger and Integration. Except as specifically stated otherwise herein, this Agreement, the Loan and Servicing Agreement and the other Transaction Documents set forth the entire understanding of the parties relating to the subject matter hereof, and all prior understandings, written or oral, are superseded by this Agreement, the Loan and Servicing Agreement and the Transaction Documents. This Agreement may not be modified, amended, waived or supplemented except as provided herein.

Section 10.7. Severability of Provisions. If any one or more of the covenants, provisions or terms of this Agreement shall be for any reason whatsoever held invalid, then such covenants, provisions or terms shall be deemed severable from the remaining covenants, provisions or terms of this Agreement and shall in no way affect the validity or enforceability of the other provisions of this Agreement.

Section 10.8. GOVERNING LAW; JURY WAIVER. THIS AGREEMENT SHALL, IN ACCORDANCE WITH SECTION 5-1401 OF THE GENERAL OBLIGATIONS LAW OF THE STATE OF NEW YORK, BE GOVERNED BY THE LAWS OF THE STATE OF NEW YORK. EACH OF THE PARTIES HERETO WAIVES, TO THE FULLEST EXTENT PERMITTED BY LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION ARISING DIRECTLY OR INDIRECTLY OUT OF, UNDER OR IN CONNECTION WITH THIS AGREEMENT OR ANY OF THE TRANSACTIONS CONTEMPLATED HEREUNDER.

Section 10.9. Consent to Jurisdiction; Service of Process.

(a) Each party hereto hereby irrevocably submits to the non-exclusive jurisdiction of any New York State or Federal court sitting in New York City in any action or proceeding arising out of or relating to this Agreement, and each party hereto hereby irrevocably agrees that all claims in respect of such action or proceeding may be heard and determined in such New York State court or, to the extent permitted by law, in such Federal court. The parties hereto hereby irrevocably waive, to the fullest extent they may effectively do so, the defense of an inconvenient forum to the maintenance of such action or proceeding. The parties hereto agree that a final judgment in any such 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) Each of the Seller and the Purchaser agrees that service of process may be effected by mailing a copy thereof by registered or certified mail, postage prepaid, to the Seller or the Purchaser, as applicable, at its address specified in Section 10.5. Nothing in this Section 10.9 shall affect the right of the Seller or the Purchaser to serve legal process in any other manner permitted by law.

Section 10.10. Costs, Expenses and Taxes.

(a) In addition to the rights of indemnification granted to the Purchaser and its Affiliates and officers, directors, employees and agents thereof under Article IX hereof, the Seller agrees to pay on demand all out-of-pocket costs and expenses of the Purchaser or its assignees incurred in connection with the preparation, execution, delivery, enforcement, administration (including periodic auditing), renewal, amendment or modification of, any waiver or consent issued in connection with, this Agreement and the other documents to be delivered hereunder or in connection herewith, including, without limitation, the fees and out-of-pocket expenses of counsel with respect thereto and with respect to advising the Purchaser or its assignees as to its rights and remedies under this Agreement and the other documents to be delivered hereunder or in connection herewith, and all out-of-pocket costs and expenses, if any (including counsel fees and expenses), incurred by the Purchaser or its assignees in connection with the enforcement of this Agreement and the other documents to be delivered hereunder or in connection herewith.

(b) The Seller shall pay on demand any and all stamp, sales, excise and other Taxes and fees payable or determined to be payable to any Governmental Authority in connection with the execution, delivery, filing and recording of this Agreement and the other documents to be delivered hereunder.

(c) The Seller shall pay on demand all other out-of-pocket costs, expenses and Taxes (excluding Taxes imposed on or measured by net income) incurred by the Purchaser or its assignees in connection with the execution, delivery, filing and recording of this Agreement and the other documents to be delivered hereunder, including, without limitation, all costs and expenses incurred by the Purchaser or its assignees in connection with periodic audits of the Seller's books and records.

Section 10.11. Counterparts. For the purpose of facilitating the execution of this Agreement and for other purposes, this Agreement may be executed simultaneously in any number of counterparts, each of which counterparts shall be deemed to be an original, and all of which counterparts shall constitute but one and the same instrument. Delivery of an executed counterpart of a signature page to this Agreement by facsimile or e-mail in portable document format (.pdf) shall be effective as delivery of a manually executed counterpart of this Agreement.

Section 10.12. Bankruptcy Non-Petition and Limited Recourse; Claims. The Seller hereby agrees that it will not institute against, or join any other Person in instituting against, the Purchaser any Bankruptcy Proceeding so long as there shall not have elapsed one year and one day (or such longer preference period as shall then be in effect) since the Collection Date. The Seller hereby acknowledges that (i) the Purchaser has no assets other than the Sale Portfolio, (ii) the Purchaser shall, immediately upon Purchase hereunder, grant a security interest in the Sale

Portfolio to the Collateral Agent, on behalf of the Secured Parties, pursuant to the Loan and Servicing Agreement, and (iii) Available Collections generated by the Sale Portfolio will be applied to payment of the Purchaser's obligations under the Loan and Servicing Agreement. In addition, the Seller shall have no recourse for any amounts payable or any other obligations arising under this Agreement against any officer, member, director, employee, partner, Affiliate or security holder of the Purchaser or any of its successors or assigns.

Section 10.13. Binding Effect; Assignability.

(a) This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns.

(b) Notwithstanding anything to the contrary contained herein, this Agreement may not be assigned by the Purchaser or the Seller except as permitted by this Section 10.13 or the Loan and Servicing Agreement. Simultaneously with the execution and delivery of this Agreement, the Purchaser will assign all of its right, title and interest in this Agreement to the Collateral Agent, for the benefit of the Secured Parties, to which assignment the Seller hereby expressly consents. Upon assignment, the Seller agrees to perform its obligations hereunder for the benefit of the Collateral Agent, for the benefit of the Secured Parties, under the Loan and Servicing Agreement and the Collateral Agent, in such capacity, shall be a third party beneficiary hereof. Upon such assignment, the Collateral Agent, for the benefit of the Secured Parties, under the Loan and Servicing Agreement may enforce the provisions of this Agreement, exercise the rights of the Purchaser and enforce the obligations of the Seller hereunder without joinder of the Purchaser.

(c) The Administrative Agent, each Lender Agent, each Lender, the Collateral Custodian, the Collateral Agent and the other Secured Parties shall be third-party beneficiaries of this Agreement.

Section 10.14. Waiver of Setoff.

(a) The Seller's obligations under this Agreement shall not be affected by any right of setoff, counterclaim, recoupment, defense or other right the Seller might have against the Purchaser, the Administrative Agent, the Lenders, the Lender Agents, the Collateral Agent, the Collateral Custodian, the other Secured Parties or any assignee of such Persons, all of which rights are hereby waived by the Seller.

(b) The Purchaser shall have the right to set-off against the Seller any amounts to which the Seller may be entitled hereunder and to apply such amounts to any claims the Purchaser may have against the Seller from time to time under this Agreement. Upon any such set-off, the Purchaser shall give notice of the amount thereof and the reasons therefor to the Seller.

Section 10.15. Headings and Exhibits. The headings herein are for purposes of references only and shall not otherwise affect the meaning or interpretation of any provision hereof. The schedules and exhibits attached hereto and referred to herein shall constitute a part of this Agreement and are incorporated into this Agreement for all purposes.

Section 10.16. Rights of Inspection. The Purchaser, the Administrative Agent, each Lender Agent and their respective representatives and assigns may conduct at any reasonable time, with reasonable notice, and from time to time, and the Seller will fully cooperate with, a reasonable number of field examinations and audits of the inventory, the Loan Assets and business affairs of the Seller each calendar year. Each such inspection shall be at the sole expense of the Seller. The Purchaser and its representatives and successors and assigns acknowledge that in exercising the rights and privileges conferred in this Section 10.16, it or its representatives or assigns may, from time to time, obtain knowledge of information, practices, books, correspondence and records of a confidential nature and in which the Seller has a proprietary interest. The Purchaser and its representatives and successors and assigns each agree that (i) it shall retain in strict confidence and shall use its reasonable efforts to ensure that its representatives retain in strict confidence and will not disclose without the prior written consent of the Seller any or all of such information, practices, books, correspondence and records furnished to them and (ii) that it will not, and will use its reasonable efforts to ensure that its representatives and assigns will not, make any use whatsoever (other than for the purposes contemplated by this Agreement) of any of such information, practices, books, correspondence and records without the prior written consent of the Seller, unless such information is generally available to the public or is required by law to be disclosed.

Section 10.17. Subordination. After giving effect to any payment relating to any indebtedness, obligation or claim the Seller may from time to time hold or otherwise have against the Purchaser or any assets or properties of the Purchaser, whether arising hereunder or otherwise existing, the Borrowing Base at such time must exceed the Obligations owed by the Purchaser to the Secured Parties under the Loan and Servicing Agreement. The Seller hereby agrees that at any time during which the condition set forth in the preceding sentence shall not be satisfied, the Seller shall be subordinate in right of payment to the prior payment of any indebtedness or obligation of the Purchaser owing to each Lender, each Lender Agent, the Collateral Agent, the Collateral Custodian, the Administrative Agent or any other Secured Party under the Loan and Servicing Agreement.

Section 10.18. Confidentiality. Each of the parties hereto hereby agrees with the confidentiality provisions set forth in Sections 11.13 and 11.14 of the Loan and Servicing Agreement.

[Signature pages to follow.]

IN WITNESS WHEREOF, the parties have caused this Agreement to be duly executed by their respective officers as of the day and year first above written.

**FIFTH STREET FUNDING, LLC,**  
as the Purchaser

By: \_\_\_\_\_  
Name:  
Title:

Fifth Street Funding, LLC  
10 Bank Street, 12th Floor  
White Plains, NY 10606  
Attention: Bernard D. Berman  
Facsimile: (914) 328-4214  
Phone: (914) 286-6800

Fifth Street Funding, LLC  
Purchase and Sale Agreement

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**FIFTH STREET FINANCE CORP.,**  
as the Seller

By: \_\_\_\_\_  
Name:  
Title:

Fifth Street Finance Corp.  
10 Bank Street, 12th Floor  
White Plains, NY 10606  
Attention: Bernard D. Berman  
Facsimile: (914) 328-4214  
Phone: (914) 286-6800

Fifth Street Funding, LLC  
Purchase and Sale Agreement

PLEDGE AGREEMENT

PLEDGE AGREEMENT dated as of November 16, 2009 (this "Agreement"), by and between FIFTH STREET FINANCE CORP., a Delaware corporation (the "Pledgor") and WELLS FARGO BANK, NATIONAL ASSOCIATION ("Wells Fargo"), as collateral agent (in such capacity, the "Collateral Agent"), on behalf of the Secured Parties.

WHEREAS, Fifth Street Funding, LLC, a Delaware limited liability company, as borrower (the "Borrower"), Fifth Street Finance Corp., as servicer (in such capacity, the "Servicer") and transferor, Wells Fargo Securities, LLC, as the administrative agent (in such capacity, the "Administrative Agent"), each of the Conduit Lenders and Institutional Lenders from time to time party thereto (the "Lenders"), each of the Lender Agents from time to time party thereto, Wells Fargo as the Collateral Agent, as the Account Bank and as the Collateral Custodian, are parties to that certain Loan and Servicing Agreement dated as of November 16, 2009 (as the same may be amended, supplemented, restated or otherwise modified from time to time in accordance with the terms hereof, the "Loan and Servicing Agreement"). Capitalized terms used herein and not otherwise defined herein shall have the meanings attributed thereto in the Loan and Servicing Agreement.

WHEREAS, the Lenders have agreed to make Advances and certain other financial accommodations to the Borrower pursuant to, and subject to the terms and conditions of, the Loan and Servicing Agreement. The obligation of the Lenders to make Advances and certain other financial accommodations under the Loan and Servicing Agreement is conditioned on the execution and delivery by the Pledgor of this Agreement securing the full and punctual payment and performance of (a) the principal of and interest on the Advances, when and as due, whether at maturity, by acceleration, or otherwise (including, without limitation, all interest thereon, whether accruing prior or subsequent to the commencement of a bankruptcy or similar proceeding involving the Pledgor as a debtor and whether or not such interest is an allowed claim in any such proceeding) and (b) all other Obligations of the Borrower (the foregoing collectively being herein referred to as the "Secured Obligations").

WHEREAS, the Pledgor is the owner of all of the membership interests of the Borrower and will receive substantial benefits from the Advances and other financial accommodations made available to the Borrower under the Loan and Servicing Agreement.

NOW, THEREFORE, in consideration of the premises and mutual covenants herein contained and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. Pledge and Collateral Assignment. As collateral security for the prompt and complete payment, performance and observance of all present and future Secured Obligations, the Pledgor hereby pledges and collaterally assigns to the Collateral Agent for the benefit of the Secured Parties, and grants to the Collateral Agent for the benefit of the Secured Parties, a lien on and security interest in the collateral of the Pledgor described in Section 2 hereof (collectively, the "Pledged Collateral").

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2. Description of Pledged Collateral. (a) The Pledged Collateral is described as follows and on any separate schedules at any time furnished by the Pledgor to the Collateral Agent (which schedules are hereby deemed part of this Agreement):

(i) all right, title and interest of the Pledgor, whether now existing or hereafter acquired, in (a) the membership interests of the Borrower (the "Membership Interests") as set forth on Schedule I and (b) the Limited Liability Company Agreement of the Borrower (as the same may be amended, supplemented, restated or otherwise modified from time to time in accordance with the terms hereof, the "LLC Agreement") under which the Membership Interests exist;

(ii) all right, title and interest of the Pledgor in and to all present and future payments, proceeds, dividends, distributions, instruments, compensation, property, assets, interests and rights in connection with or related to the Membership Interests or the LLC Agreement and all monies due or to become due and payable to the Pledgor in connection with or related to any of the foregoing or otherwise paid, issued or distributed from time to time in respect of or in exchange therefor, and any certificate, instrument or other document evidencing or representing the same (including, without limitation, all proceeds of dissolution or liquidation); and

(iii) all proceeds (as defined in the UCC as in effect from time to time in the State of New York (the "NY UCC")) of every kind and nature, including proceeds of proceeds, of any and all of the foregoing (including, without limitation, proceeds which constitute property of the type described above and to the extent not otherwise included, all cash proceeds thereof).

(b) The Pledgor and the Borrower each acknowledge that, in conjunction with the exercise of its remedies following the occurrence of an Event of Default, the Collateral Agent (acting at the direction of the Administrative Agent) may exercise all rights granted to the Pledgor under the LLC Agreement without the consent of the Pledgor subject to and in accordance with the terms of Sections 7 and 9 hereof.

3. Delivery of Certificates, Instruments, Etc.; Pledgor Remains Liable.

(a) The Pledgor shall deliver to the Collateral Agent:

(i) any and all original certificates, instruments and other documents at any time evidencing or representing the Pledged Collateral to the extent available; and

(ii) any and all original certificates, instruments or other documents at any time evidencing or representing the Pledged Collateral not delivered on the date hereof within two Business Days after the Pledgor's receipt thereof. Each delivery of Pledged Collateral shall be accompanied by a schedule showing a description of the collateral theretofor and then being pledged hereunder, which schedule shall be attached hereto as Schedule I and made a part hereof. Each schedule so delivered shall supersede any prior schedules so delivered.



(b) The Pledgor represents and warrants that none of the Membership Interests constitute a “security” within the meaning of the NY UCC and covenants that it will not suffer or permit any Membership Interest to constitute a “security” within the meaning of the NY UCC.

(c) Notwithstanding the foregoing, if any of the Pledged Collateral at any time constitutes a “certificated security” or “instrument” (in each case as defined in the NY UCC), such item shall be in bearer form or, if in registered form, shall be issued in the name of the Collateral Agent or endorsed to the Collateral Agent or accompanied by undated blank interest powers, note powers, endorsements or other necessary instruments of transfer, registration or assignment, duly executed in blank and in form and substance satisfactory to the Collateral Agent.

(d) Notwithstanding the foregoing, if any of the Pledged Collateral at any time constitutes “uncertificated securities” within the meaning of the NY UCC, the Pledgor will promptly notify the Collateral Agent, the Borrower and the Servicer thereof and the Pledgor will promptly take and cause to be taken, and will cause the issuer to take, all actions required under Articles 8 and 9 of the NY UCC and any other applicable law, to enable the Collateral Agent to acquire “control” (within the meaning of such term under Section 8-106 (or its successor provision) of the NY UCC) of such uncertificated securities and as may be otherwise necessary or deemed appropriate by the Administrative Agent to perfect the security interest of the Collateral Agent therein.

(e) Anything herein to the contrary notwithstanding, (i) the Pledgor shall remain liable under the contracts and agreements included in the Pledged Collateral to the extent set forth therein to perform all of its duties and obligations thereunder to the same extent as if this Agreement had not been executed, (ii) the exercise by the Collateral Agent of any of the rights hereunder shall not release the Pledgor from any of its duties or obligations under the contracts and agreements included in the Pledged Collateral, except to the extent that such duties and obligations may have been terminated by reason of a sale, transfer or other disposition of such Pledged Collateral as provided in Section 13 hereof and (iii) the Collateral Agent shall not have any obligation or liability under the contracts and agreements included in the Pledged Collateral by reason of this Agreement, nor shall the Collateral Agent be obligated to perform any of the obligations or duties of the Pledgor thereunder or to take any action to collect or enforce any claim for payment assigned hereunder.

4. Additional Collateral. Subject to Sections 7 and 8 hereof, in case any distribution payable in additional Pledged Collateral shall be declared with respect to any of the Pledged Collateral, or any fractions thereof shall be issued pursuant to any transaction involving any of the Pledged Collateral, or any interests or obligations shall be distributed upon or with respect to any of the Pledged Collateral, in each case pursuant to a recapitalization or reclassification of the Membership Interests, or pursuant to the dissolution, liquidation (in whole or in part), bankruptcy or reorganization of the Borrower, or to the merger or consolidation of such entity with or into another entity, the interests or obligations so distributed shall be delivered to the Collateral Agent promptly, and in any event within three Business Days after receipt thereof, to be held by the Collateral Agent as additional collateral hereunder subject to the terms of this Agreement, and all of the same shall constitute Pledged Collateral for all purposes hereof.

5. Representations, Warranties and Covenants of the Pledgor. The Pledgor hereby represents, warrants and covenants that:

- (a) Pledged Collateral. Set forth on Schedule I hereto is a list and description of all of the Pledged Collateral complete and accurate as of the date hereof and as of each date such Schedule I is supplemental or otherwise updated pursuant to the terms hereof, and the Pledgor is the sole holder of record and the sole beneficial owner of such Pledged Collateral free and clear of any Lien thereon, except Permitted Liens.
- (b) Chief Executive Office; Records; Etc. As of the date hereof, the address of the chief executive office and principal place of business of the Pledgor, and the location of the books and records relating to the Pledged Collateral, are set forth below its signature hereto, and the Pledgor will not change said address or location, other than in accordance with the provisions of the Transaction Documents, or change its name or its jurisdiction of incorporation, formation or organization, as applicable, unless it has provided the Collateral Agent with such Opinions of Counsel and other documents and instruments as the Collateral Agent or the Administrative Agent may request in connection therewith.
- (c) Sale or Other Disposition of Pledged Collateral. Except as otherwise expressly permitted under Section 8 hereof, the Pledgor will not assign (by operation of law or otherwise), sell, lease, transfer, pledge or grant a security interest in or otherwise dispose of or abandon, nor will it suffer or permit any of the same to occur with respect to any Pledged Collateral. The inclusion of "proceeds" of the Pledged Collateral under the security interest granted herein shall not be deemed a consent by the Collateral Agent to any sale or other disposition of any Pledged Collateral.
- (d) Percentage of Outstanding Equity. The Membership Interests constitute, and until the indefeasible payment and performance in full of the Secured Obligations (other than Obligations that survive the termination of the Loan and Servicing Agreement) will continue to constitute, 100% of the membership interests of the Borrower.
- (e) No Options or Similar Rights. None of the Membership Interests or other Pledged Collateral is subject to any options to purchase or similar rights of any Person.
- (f) Required Consents. Except as may be required in connection with any disposition of any portion of the Pledged Collateral by laws affecting the offering and sale of securities generally, no consent of any Person and no license, permit, approval or authorization of, exemption by, notice or report to, or registration, filing (other than the filing of financing statements under the UCC in order to perfect a security interest in that portion of the Pledged Collateral constituting general intangibles) or declaration with any governmental instrumentality is required in connection with (i) the execution, delivery or performance by, or enforceability against, the Pledgor of this Agreement, (ii) the perfection or maintenance of the security interest created hereby (including the first priority nature of such security interest) or (iii) the exercise by the Collateral Agent of the voting or other rights provided for in this Agreement.

(g) Nature of Security Interest. Upon the delivery of control agreements to the Collateral Agent, with respect to any Pledged Collateral that constitutes deposit accounts, electronic chattel paper, investment property or letter-of-credit rights, the Collateral Agent on behalf of the Secured Parties shall have control as defined in Sections 9-104, 9-105, 9-106, or 9-107 of the UCC. With respect to all Pledged Collateral not covered by the preceding sentence, upon the filing of appropriate financing statements in the office of the Secretary of State of the State of Delaware by the Pledgor, the Collateral Agent shall have a valid and perfected first priority, security interest in such Pledged Collateral in favor of the Collateral Agent, on behalf of the Secured Parties, securing the prompt and complete payment, performance and observance of the Secured Obligations.

(h) No Modification of Certain Agreements; Certain Notices. The Pledgor will not, without the prior written consent of the Administrative Agent (a copy of such consent shall be provided to the Collateral Agent), (i) modify, amend or alter in any respect the terms and conditions of any agreement included in the Pledged Collateral (including, without limitation, the LLC Agreement) nor forgive any indebtedness evidenced by any Pledged Collateral, or (ii) execute any document or instrument or, without limitation of Section 7 hereof, take any other action of any kind which may, in the reasonable judgment of the Administrative Agent, result in impairing the value of the Pledged Collateral.

(i) Further Assurances. The Pledgor will, at its sole cost and expense, perform all acts and execute all documents requested by the Administrative Agent from time to time to evidence, perfect, maintain or enforce the Collateral Agent's first priority security interest granted herein or otherwise in furtherance of the provisions of this Agreement. The Pledgor authorizes the Collateral Agent (acting at the direction of the Administrative Agent) to execute any documents in the Pledgor's name as necessary to evidence, perfect, maintain or enforce the Collateral Agent's first priority security interest granted herein or otherwise in furtherance of the provisions of this Agreement. The Pledgor, to the extent not properly filed by the Pledgor, authorizes the Collateral Agent (acting at the direction of the Administrative Agent) to file such financing statements in any appropriate filing office to evidence, perfect, maintain or enforce the Collateral Agent's first priority security interest granted herein or otherwise in furtherance of the provisions of this Agreement. Nothing herein shall be construed to imply an obligation or duty on the Collateral Agent to monitor or maintain the perfection or priority of such security interest.

6. Agreement of the Borrower. The Borrower hereby agrees to be bound by the terms of this Agreement relating to the Pledged Collateral issued by it and will comply with such terms insofar as such terms are applicable to it. The Borrower hereby consents (to the extent required by the LLC Agreement) to the pledge by the Pledgor pursuant to the terms of this Agreement of the Membership Interests and, subject in each case to compliance with the terms of this Agreement, to any transfer of Membership Interests pursuant to the terms of this Agreement and in conjunction with the exercise of its remedies following the occurrence of an Event of Default, to the substitution of the Collateral Agent or its nominee as a substituted member of the Borrower with all the rights, powers and duties of a member of the Borrower.

7. Voting Rights Prior to Default. Except as otherwise provided in Section 9 hereof, the Pledgor shall be entitled to exercise in a manner consistent with the terms of this Agreement, the voting, consent and similar rights with respect to the Membership Interests, and for that purpose the Collateral Agent shall (if any Membership Interests shall be registered in the name of the Collateral Agent or its nominee) execute or cause to be executed from time to time, at the expense of the Pledgor, such proxies or other instruments in favor of the Pledgor or its nominee, in such form and for such purposes as shall be reasonably required by the Pledgor and shall be specified in a written request therefor, to enable it to exercise such voting power with respect to such Membership Interests; *provided*, that no vote shall be cast, consent given, rights exercised or other action taken by the Pledgor that, in the Administrative Agent's judgment, would reasonably be expected to have an adverse effect on any of the Membership Interests or result in a breach of this Agreement or the Transaction Documents.

8. Distributions. So long as no Event of Default has occurred, subject to Section 5.02(n) of the Loan and Servicing Agreement, the Pledgor shall be entitled to receive, retain for its own account and transfer any and all payments, proceeds, dividends, distributions, monies, compensation, property, assets, instruments or rights paid, issued or distributed from time to time in respect of the Pledged Collateral free and clear of the liens pursuant to this Agreement. All payments, proceeds, dividends, distributions, monies, property, assets, instruments or rights which are received by the Pledgor in violation of the preceding sentence shall be forthwith paid over to the Collateral Agent, on behalf of the Secured Parties in the same form as so received (with any necessary endorsement) and the Pledgor shall provide written notification to the Administrative Agent of such violation and payment.

9. Voting Rights After an Event of Default. Upon the occurrence of an Event of Default and notice by the Collateral Agent (acting as directed by the Administrative Agent) to the Pledgor (which notice shall not be required in the event of an Event of Default due to a Bankruptcy Event of the Pledgor) all rights of the Pledgor to exercise or refrain from exercising the voting, managerial and other consensual rights which it would otherwise be entitled to exercise pursuant to Section 7 hereof shall cease, and thereupon the Collateral Agent (acting as directed by the Administrative Agent) shall be entitled to exercise all voting power and other rights, powers and privileges with respect to the Membership Interests.

10. Application of Cash Received. Any cash received by the Collateral Agent pursuant to the provisions of this Agreement shall be applied to the payment of the Secured Obligations as provided in Section 14 hereof. Nothing contained herein shall be construed as requiring the Collateral Agent to take any action in connection with the sale or other disposition of any Pledged Collateral at any time.

11. Expenses. The Pledgor will, upon demand, pay the Collateral Agent and the Administrative Agent, as applicable, for any and all reasonable out-of-pocket costs, sums, and expenses which the Collateral Agent or the Administrative Agent, as applicable, may pay or incur pursuant to the provisions of this Agreement or in enforcing the Secured Obligations or the security interest granted hereunder, including, but not limited to, all filing or recording fees, court costs, collection charges, travel expenses, computer fees, telephone fees, duplicating fees and reasonable attorneys' fees and expenses. Such expenses shall include, without limitation, any such costs paid or incurred by the Collateral Agent or the Administrative Agent, as

applicable, in connection with any waivers, amendments, modifications, extensions, renewals or renegotiations.

12. Events of Default. Each of the following events shall constitute an "Event of Default" under this Agreement:

- (a) the Pledgor fails to make any payment when due hereunder and such failure continues unremedied for two Business Days; or
- (b) the Pledgor fails to make any payment when due in one or more agreements for borrowed money (other than as specified in clause (a) of this Section 12) in an aggregate principal amount in excess of \$1,000,000 and such failure continues unremedied for two Business Days and such default is not cured within the applicable cure period, if any, provided for under such agreement; or
- (c) the Pledgor fails to observe or perform in any material respect any covenants or agreements set forth in this Agreement, and, if such failure is susceptible to cure and is not a failure with respect to a covenant or agreement to which an express cure period is already applicable, such failure continues unremedied for a period of 30 days after the Pledgor has actual knowledge thereof or receives written notice of such failure from the Administrative Agent, the Collateral Agent (at the direction of the Administrative Agent) or any other Person;
- (d) any representation, warranty or certification made by the Pledgor in this Agreement shall prove to have been incorrect when made in any material respect and, to the extent susceptible to cure, continues unremedied for a period of 30 days after the Pledgor has knowledge thereof or receives written notice of such failure from the Administrative Agent, the Collateral Agent (at the direction of the Administrative Agent) or any other Person; or
- (e) the occurrence of any Bankruptcy Event in respect of the Pledgor or the Borrower; or
- (f) either (i) any provision of this Agreement or any security interest created hereunder shall terminate in whole or in part or cease to be effective or the legally valid, binding and enforceable obligation of the Pledgor, or (ii) the Pledgor or the Borrower contests such effectiveness; or
- (g) the Collateral Agent, on behalf of the Secured Parties, ceases to have a valid, perfected first priority security interest in all of the Pledged Collateral except as otherwise permitted to be released in accordance with this Agreement; or
- (h) an "Event of Default" (past any applicable notice or cure period provided in the definition thereof) under and as defined in the Loan and Servicing Agreement shall have occurred.

13. Remedies.

(a) Following the occurrence of an Event of Default or, in any case, the declaration of the Facility Maturity Date, the Collateral Agent (acting as directed by the Administrative Agent) or the Administrative Agent may exercise in respect of any of the Pledged Collateral, in addition to other rights and remedies provided for herein or otherwise available to it, all the rights and remedies of a secured party on default under the NY UCC at that time (whether or not applicable to the affected Pledged Collateral) and may also, without obligation to resort to other security, at any time and from time to time sell, resell, assign and deliver, in its sole discretion, all or any of the Pledged Collateral, in one or more parcels at the same or different times, and all right, title and interest, claim and demand therein and right of redemption thereof, on any securities exchange on which any Pledged Collateral may be listed, or at public or private sale, for cash, upon credit or for future delivery, and in connection therewith the Collateral Agent (acting as directed by the Administrative Agent) or the Administrative Agent may grant options. To the fullest extent permitted by applicable law, the Pledgor hereby waives and releases any and all equity and right of redemption with respect to the Pledged Collateral.

(b) If any of the Pledged Collateral is sold by the Collateral Agent (acting at the direction of the Administrative Agent) or the Administrative Agent upon credit or for future delivery, the Collateral Agent and the Administrative Agent, as applicable, shall not be liable for the failure of the purchaser to purchase or pay for the same and, in the event of any such failure, the Collateral Agent (acting at the direction of the Administrative Agent) or the Administrative Agent may resell such Pledged Collateral. In no event shall the Pledgor be credited with any part of the proceeds of sale of any Pledged Collateral until cash payment thereof has actually been received by the Collateral Agent.

(c) The Collateral Agent (acting at the direction of the Administrative Agent) or the Administrative Agent may purchase any Pledged Collateral at any public sale and, if any Pledged Collateral is of a type customarily sold in a recognized market or is of the type which is the subject of widely distributed standard price quotations, the Collateral Agent (acting at the direction of the Administrative Agent) or the Administrative Agent may purchase such Pledged Collateral at a private sale, free from any right of redemption, which is hereby waived and released to the extent permitted by applicable law, and in each case may make payment therefor by any means, including, without limitation, by release or discharge of Secured Obligations in lieu of cash payment.

(d) No demand, advertisement or notice, all of which are hereby expressly waived, shall be required in connection with any sale or other disposition of any part of the Pledged Collateral which threatens to decline rapidly in value or which is of a type customarily sold on a recognized market; otherwise the Collateral Agent (acting at the direction of the Administrative Agent) or the Administrative Agent shall give the Pledgor at least 10 days' prior notice of the time and place of any public sale and of the time after which any private sale or other disposition is to be made, which notice the Pledgor agrees is reasonable, all other demands, advertisements and notices being hereby waived.

(e) The Collateral Agent (acting at the direction of the Administrative Agent) and the Administrative Agent shall not be obligated to make any sale of Pledged Collateral if either party shall determine not to do so, regardless of the fact that notice of sale may have been given. The Collateral Agent (acting at the direction of the Administrative Agent) or the Administrative Agent may, without notice or publication, adjourn any public or private sale or cause the same to be adjourned from time to time by announcement at the time and place fixed for sale, and such sale may, without further notice, be made at the time and place to which the same was so adjourned.

(f) The remedies provided herein in favor of the Collateral Agent and the Administrative Agent shall not be deemed to be exclusive, but shall be cumulative, and shall be in addition to all other remedies in favor of the Collateral Agent and the Administrative Agent existing at law or in equity.

14. Application of Proceeds of Sale. After the occurrence of an Event of Default, all proceeds of any sale of Pledged Collateral, as well as all Pledged Collateral consisting of cash, shall be applied by the Collateral Agent as follows:

FIRST, to the Collateral Agent, on behalf of the Secured Parties, for the payment of all unpaid reasonable costs and expenses incurred by the Administrative Agent or the Collateral Agent in connection with such collection or sale or otherwise in connection with this Agreement or with respect to any of the Secured Obligations, including, but not limited to, all court costs and the reasonable fees and expenses of its agents and legal counsel and any other reasonable costs or expenses incurred in connection with the exercise of any right or remedy hereunder or with respect to any of the Secured Obligations;

SECOND, to the Collateral Agent, on behalf of the Secured Parties, for the payment in full of all remaining Secured Obligations, which shall be distributed pursuant to Section 2.04(d) of the Loan and Servicing Agreement (provided that such amounts shall not be duplicative of the amounts previously paid to the Collateral Agent and the Administrative Agent in accordance with the preceding clause of this Section 14); and

THIRD, to the Pledgor, its successors and assigns, or as a court of competent jurisdiction may otherwise direct.

15. Collateral Agent Appointed Attorney-in-Fact.

(a) To effectuate the terms and provisions hereof, the Pledgor hereby appoints (effective upon the occurrence of any Event of Default) the Collateral Agent as its attorney-in-fact for the purpose of carrying out the provisions of this Agreement and taking any action and executing any instrument which the Collateral Agent may deem necessary or advisable to accomplish the purposes hereof. Without limiting the generality of the foregoing, the Collateral Agent shall, following the occurrence of an Event of Default, have the right and power to:

(i) receive, endorse and collect all checks and other orders for the payment of money made payable to the Pledgor representing any interest or other distribution or amount payable in respect of the Pledged Collateral or any part thereof and to give full discharge for the same; and

(ii) execute endorsements, assignments or other instruments of conveyance or transfer with respect to all or any of the Pledged Collateral and to exercise all rights and privileges of (or on behalf of) the owner of any Pledged Collateral, including, without limitation, all voting rights with respect to the Membership Interests.

(b) All acts done under the foregoing authorization are hereby ratified and approved by the Pledgor, and neither the Collateral Agent nor any designee or agent thereof shall be liable for any acts of commission or omission, for any error of judgment or for any mistake of fact or law, absent willful misconduct or gross negligence as determined in a final judgment by a court of competent jurisdiction.

(c) This power of attorney, being coupled with an interest, is irrevocable until the indefeasible payment and performance in full of the Secured Obligations (other than Obligations that survive the termination of the Loan and Servicing Agreement).

**16. Collateral Agent's Duties.**

(a) Except for treatment of the Pledged Collateral in its possession and the accounting for moneys actually received by it hereunder, in each case pursuant to the terms hereof, the Collateral Agent and the Administrative Agent, as applicable, shall have no duty as to any Pledged Collateral or as to the taking of any necessary steps to preserve rights against prior parties or any other rights pertaining to the Pledged Collateral. The Collateral Agent and the Administrative Agent, as applicable, shall not be liable to the Pledgor (i) for any loss or damage sustained by the Pledgor, or (ii) for any loss, damage, depreciation or other diminution in the value of any of the Pledged Collateral that may occur as a result of or in connection with or that is in any way related to any exercise by the Collateral Agent (acting at the direction of the Administrative Agent) or the Administrative Agent of any right or remedy under this Agreement, any failure to demand, collect or realize upon any of the Pledged Collateral or any delay in doing so, or any other act or failure to act on the part of the Collateral Agent (acting at the direction of the Administrative Agent) or the Administrative Agent, except to the extent that the same is caused by its own gross negligence or willful misconduct (as determined in a final judgment by a court of competent jurisdiction).

(b) The Pledgor hereby releases the Collateral Agent (in its capacity as Collateral Agent hereunder) and the Administrative Agent from any claims, causes of action and demands at any time arising out of or with respect to this Agreement, the Pledged Collateral and/or any actions taken or omitted to be taken by the Collateral Agent (acting at the direction of the Administrative Agent) or the Administrative Agent with respect thereto (except such claims, causes of action and demands arising from the gross negligence or willful misconduct of the Collateral Agent or the Administrative Agent as determined in a final judgment by a court of competent jurisdiction) and the Pledgor hereby agrees to hold the Collateral Agent and the Administrative Agent harmless from and with respect to any and all such claims, causes of action and demands (except such claims, causes of action and demands arising from the gross negligence or willful misconduct of the Collateral Agent or the Administrative Agent, as applicable, as determined in a final judgment by a court of competent jurisdiction).



17. Rights and Remedies Not Waived. The Collateral Agent's prior recourse to any Pledged Collateral shall not constitute a condition of any demand, suit or proceeding for payment or collection of the Secured Obligations. No act, omission or delay by the Collateral Agent shall constitute a waiver of its rights and remedies hereunder or otherwise. No single or partial waiver by the Collateral Agent of any default hereunder or right or remedy which it may have shall operate as a waiver of any other default, right or remedy or of the same default, right or remedy on a future occasion.

18. Collateral Agent May Perform. If the Pledgor fails to perform any agreement contained herein, the Collateral Agent (acting at the direction of the Administrative Agent) may itself perform, or cause performance of, such agreement, and the expenses of the Collateral Agent incurred in connection therewith shall be payable by the Pledgor pursuant to the terms of Section 11 hereof.

19. Consent to Jurisdiction; Service of Process; Setoff.

(a) Each party hereto hereby irrevocably submits to the non-exclusive jurisdiction of any New York State or Federal court sitting in New York City in any action or proceeding arising out of or relating to this Agreement, and each party hereto hereby irrevocably agrees that all claims in respect of such action or proceeding may be heard and determined in such New York State court or, to the extent permitted by law, in such Federal court. The parties hereto hereby irrevocably waive, to the fullest extent they may effectively do so, the defense of an inconvenient forum to the maintenance of such action or proceeding. The parties hereto agree that a final judgment in any such 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. Each of the parties hereto agrees that service of process may be effected by mailing a copy thereof by registered or certified mail, postage prepaid, to the Pledgor or the Collateral Agent, as applicable, at its address specified in Section 21 or at such other address as the Collateral Agent shall have been notified in accordance herewith. Nothing in this Section 19 shall affect the right of the Pledgor or the Collateral Agent to serve legal process in any other manner permitted by law.

(b) Notwithstanding any contrary provision set forth herein, no claim may be made by the Pledgor or any other Person against the Collateral Agent or the Administrative Agent or their respective Affiliates, directors, officers, employees, attorneys or agents for any special, indirect, consequential or punitive damages in respect to any claim for breach of contract or any other theory of liability arising out of or related to the transactions contemplated by this Agreement, or any act, omission or event occurring in connection therewith; and the Pledgor hereby waives, releases, and agrees not to sue upon any claim for any such damages, whether or not accrued and whether or not known or suspected.

(c) The Pledgor agrees that this Paragraph 19 is a specific and material aspect of this Agreement and acknowledges that the Collateral Agent and the Administrative Agent would not enter into the Loan and Servicing Agreement if this Paragraph 19 was not part of this Agreement.

20. Admissibility of Agreement. The Pledgor agrees that any copy of this Agreement signed by the Pledgor and transmitted by telecopier or by electronic mail in portable document format (.pdf) for delivery to the Collateral Agent shall be admissible in evidence as the original itself in any judicial or administrative proceeding, whether or not the original is in existence.

21. Address for Notices. All notices and other communications hereunder, unless otherwise stated herein, shall be in writing (which shall include facsimile communication and communication by e-mail in portable document format (.pdf)) and faxed, e-mailed or delivered, to each party hereto, at its address set forth under its name on the signature pages hereto or at such other address as shall be designated by such party in a written notice to the other parties hereto. Notices and communications by facsimile and e-mail shall be effective when sent (and shall be followed by hard copy sent by regular mail), and notices and communications sent by other means shall be effective when received.

22. Terms. All terms defined in the NY UCC and used herein shall have the meanings as defined in the NY UCC, unless otherwise defined herein or in the Loan and Servicing Agreement or the context otherwise requires.

23. Amendments and Waivers. No provision hereof shall be modified, altered, waived or limited except by written instrument expressly referring to this Agreement and to such provision, and executed by the party to be charged.

24. Continuing Security Interest; Assignments. This Agreement shall create a continuing security interest in the Pledged Collateral and shall (a) remain in full force and effect until the indefeasible payment and performance in full of the Secured Obligations (other than Obligations that survive the termination of the Loan and Servicing Agreement), (b) be binding upon and inure to the benefit of, and be enforceable by, the Pledgor and its successors and assigns and (c) be binding upon and inure to the benefit of, and be enforceable by, the Collateral Agent and its successors, transferees and assigns. Upon the occurrence of an event described in clause (a) of the preceding sentence, the security interest granted hereby shall terminate and all rights to the Pledged Collateral shall revert to the Pledgor. Upon any such termination, the Collateral Agent will, at Pledgor's expense, execute and deliver to the Pledgor such documents as the Pledgor shall reasonably request to evidence such termination and will assign, transfer and deliver to the Pledgor, without recourse and without representation or warranty, such of the Pledged Collateral as may then be in possession of the Collateral Agent.

25. Counterparts. This Agreement may be executed by the parties hereto individually or in any combination, in one or more counterparts; which counterparts may be in the form of facsimile or electronic imaging, each of which shall be an original and all of which shall together constitute one and the same agreement.

26. Captions; Separability. The captions of the various sections and paragraphs of this Agreement have been inserted only for the purposes of convenience; such captions are not a part of this Agreement and shall not be deemed in any manner to modify, explain, enlarge or restrict any of the provisions of this Agreement.

27. Security Interest Absolute. All rights of the Collateral Agent and security interests hereunder, and all of the obligations of the Pledgor hereunder, shall be absolute and unconditional, irrespective of:

(i) any lack of validity or enforceability of any Secured Obligation or any agreement or instrument relating thereto;

(ii) any change in the time, manner or place of payment of, or in any other term of, all or any of the Secured Obligations, or any other amendment or waiver of or any consent to any departure from any agreement or instrument relating thereto;

(iii) any exchange, release or non-perfection of any other collateral, or any release or amendment or waiver of or consent to departure from any guaranty, relating to any of the Secured Obligations; or

(iv) any other circumstance which might otherwise constitute a defense available to, or a discharge of, the Pledgor or a third party grantor of a security interest, lien or other encumbrance.

28. GOVERNING LAW; JURY WAIVER. THIS AGREEMENT SHALL, IN ACCORDANCE WITH SECTION 5-1401 OF THE GENERAL OBLIGATIONS LAW OF THE STATE OF NEW YORK, BE GOVERNED BY THE LAWS OF THE STATE OF NEW YORK. EACH OF THE PARTIES HERETO WAIVES, TO THE FULLEST EXTENT PERMITTED BY LAW, ANY RIGHT IT MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY LITIGATION ARISING DIRECTLY OR INDIRECTLY OUT OF, UNDER OR IN CONNECTION WITH THIS AGREEMENT OR ANY OF THE TRANSACTIONS CONTEMPLATED HEREUNDER.

29. Schedules. The Collateral Agent is authorized to annex hereto any schedules referred to herein.

30. Severability. The illegality or unenforceability of any provision of this Agreement, any Secured Obligation, any agreement or instrument relating thereto or any instrument or agreement required hereunder shall not in any way affect or impair the legality or enforceability of the remaining provisions of this Agreement, the Secured Obligations, any agreement or instrument relating thereto or any instrument or agreement required hereunder.

31. Acknowledgment of Receipt. The Pledgor acknowledges receipt of a copy of this Agreement.

32. Tax Characterization. The Pledgor shall cause the Borrower not to elect to be treated as a corporation for U.S. federal income tax purposes and to take all reasonable steps necessary to avoid being treated as a corporation for U.S. federal income tax purposes. The Pledgor shall, and shall cause the Borrower to, treat the Advances advanced under the Loan and Servicing Agreement as indebtedness of the Borrower (or, so long as the Borrower is treated as a disregarded entity for U.S. federal income tax purposes, as indebtedness of the entity of which it is considered to be a part) for U.S. federal income tax purposes and to file or cause to be filed any and all tax forms in a manner consistent therewith.

33. Confidentiality. Each party hereto agrees to maintain, and to cause each of its Affiliates to maintain, the confidentiality of the terms and conditions of the Transaction Documents and the transactions contemplated hereby and thereby and the identity of the parties thereto and any other Persons otherwise participating in such transactions, except as may be requested or required by law, rule, regulation, regulatory authority or self-regulatory authority or pursuant to other legal process or to officers, directors, employees, agents and advisors of such party, or to legal counsel to such party and any of their Affiliates and except as otherwise permitted under Section 11.13 of the Loan and Servicing Agreement.

[Remainder of page intentionally left blank]

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

**FIFTH STREET FINANCE CORP.**, as Pledgor

By: \_\_\_\_\_  
Name:  
Title:

Address:  
Fifth Street Finance Corp.  
10 Bank Street, 12th Floor  
White Plains, NY 10606  
Attention: Bernard D. Berman  
Facsimile: (914) 328-4214  
Phone: (914) 286-6800

Fifth Street Funding, LLC  
Pledge Agreement

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**WELLS FARGO BANK, NATIONAL ASSOCIATION**, as Collateral Agent

By: \_\_\_\_\_  
Name:  
Title:

Address:

Wells Fargo Bank, National Association  
9062 Old Annapolis Rd.  
Columbia, Maryland 21045  
Attn: CDO Trust Services—Fifth Street Funding, LLC  
Facsimile: (281) 667-3933  
Phone: (410) 884-2000

Fifth Street Funding, LLC  
Pledge Agreement

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Agreed and accepted as of the date first written above:

**FIFTH STREET FUNDING, LLC**, as Borrower

By: \_\_\_\_\_  
Name:  
Title:

Fifth Street Funding, LLC  
10 Bank Street, 12th Floor  
White Plains, NY 10606  
Attention: Bernard D. Berman  
Facsimile: (914) 328-4214  
Phone: (914) 286-6800

Fifth Street Funding, LLC  
Pledge Agreement

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Agreed and accepted as of the date first written above:

**WELLS FARGO SECURITIES, LLC,**  
as Administrative Agent

By: \_\_\_\_\_  
Name:  
Title:

Address:  
Wells Fargo Securities, LLC  
One Wachovia Center, Mail Code: NC0600  
Charlotte, North Carolina 28289  
Attention: Kevin Sunday  
Facsimile No: (704) 715-0067  
Confirmation No.: (704) 374-6230

Fifth Street Funding, LLC  
Pledge Agreement

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SCHEDULE I  
to Pledge Agreement  
Pledged Collateral

PLEDGOR: FIFTH STREET FINANCE CORP.

Description of Membership Interests

Membership Interest Issuer

FIFTH STREET FUNDING, LLC

Type of Interests

Membership

Percentage of Outstanding Interests

100%

**CERTIFICATION PURSUANT TO  
RULE 13a-14(a) and 15d-14(a) UNDER THE SECURITIES EXCHANGE ACT OF 1934,  
AS AMENDED**

I, Leonard M. Tannenbaum, Chief Executive Officer of Fifth Street Finance Corp., certify that:

1. I have reviewed this annual report on Form 10-K for the year ended September 30, 2009 of Fifth Street Finance Corp.;
2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;
3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;
4. The registrant's other certifying officer and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:
  - (a) Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;
  - (b) Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles.
  - (c) Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and
  - (d) Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and
5. The registrant's other certifying officer and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's board of directors (or persons performing the equivalent functions):
  - (a) All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and
  - (b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

By: /s/ Leonard M. Tannenbaum  
Leonard M. Tannenbaum  
Chairman, President and Chief Executive Officer

Dated this 9th day of December, 2009.

**CERTIFICATION PURSUANT TO  
RULE 13a-14(a) and 15d-14(a) UNDER THE SECURITIES EXCHANGE ACT OF 1934,  
AS AMENDED**

I, William H. Craig, Chief Financial Officer of Fifth Street Finance Corp., certify that:

1. I have reviewed this annual report on Form 10-K for the year ended September 30, 2009 of Fifth Street Finance Corp.;
2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;
3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;
4. The registrant's other certifying officer and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:
  - (a) Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;
  - (b) Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles.
  - (c) Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and
  - (d) Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and
5. The registrant's other certifying officer and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's board of directors (or persons performing the equivalent functions):
  - (a) All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and
  - (b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

By: /s/ William H. Craig  
William H. Craig  
Chief Financial Officer

Dated this 9th day of December, 2009.

**Certification of Chief Executive Officer**  
**Pursuant to**  
**Section 906 of the Sarbanes-Oxley Act of 2002 (18 U.S.C. 1350)**

In connection with the annual report on Form 10-K for the year ended September 30, 2009 (the "Report") of Fifth Street Finance Corp. (the "Registrant"), as filed with the Securities and Exchange Commission on the date hereof, I, Leonard M. Tannenbaum, the Chief Executive Officer of the Registrant, hereby certify, to the best of my knowledge, that:

- (1) The Report fully complies with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934, as amended; and
- (2) The information contained in the Report fairly presents, in all material respects, the financial condition and results of operations of the Registrant.

/s/ Leonard M. Tannenbaum

Name: Leonard M. Tannenbaum

Date: December 9, 2009

**Certification of Chief Financial Officer**  
**Pursuant to**  
**Section 906 of the Sarbanes-Oxley Act of 2002 (18 U.S.C. 1350)**

In connection with the annual report on Form 10-K for the year ended September 30, 2009 (the "Report") of Fifth Street Finance Corp. (the "Registrant"), as filed with the Securities and Exchange Commission on the date hereof, I, William H. Craig, the Chief Financial Officer of the Registrant, hereby certify, to the best of my knowledge, that:

- (1) The Report fully complies with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934, as amended; and
- (2) The information contained in the Report fairly presents, in all material respects, the financial condition and results of operations of the Registrant.

/s/ William H. Craig

Name: William H. Craig

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Date: December 9, 2009