

## EX-99.(K)(6) 5 dex99k6.htm PARTICIPATION AGREEMENT

Exhibit (k)(6)

WM Participation Agreement

Execution Version

## PARTICIPATION AGREEMENT

PARTICIPATION AGREEMENT dated as of September 28, 2010 (together with any amendments or modifications from time to time hereto, this “Agreement”), by and between OFS Funding, LLC, a Delaware limited liability company (“Grantor”), and OFS Capital, LLC, a Delaware limited liability company (together with its successors and assigns, “Participant”). Capitalized terms used but not defined herein shall have the meaning set forth with respect thereto in the Loan and Security Agreement, dated as of September 28, 2010 (together with all amendments, modifications and supplements from time to time thereto, the “Loan Agreement”), by and among OFS Capital WM, LLC (the “Borrower”), MCF Capital Management LLC (the “Loan Manager”), Wells Fargo Securities, LLC (the “Administrative Agent”), Wells Fargo Delaware Trust Company, N.A., as trustee (the “Trustee”) and the Lenders from time to time party thereto.

## RECITALS

WHEREAS, Grantor wishes to sell to Participant, and Participant wishes to purchase from Grantor, a 100% undivided participation interest (each, a “Participation” and, collectively, the “Participations”) in each Eligible Loan (as defined in the Loan Agreement) owned by the Grantor and identified on Schedule I (the “Participated Assets”), subject to the terms and conditions set forth in the Participation Terms and Conditions attached hereto;

WHEREAS, simultaneously with the purchase of the Participations in the Participated Assets, Participant is, pursuant to the Loan Sale Agreement (as hereinafter defined), assigning all of its rights and interest in the Participations to the Borrower;

WHEREAS, simultaneously with the receipt of an effective assignment of each Participated Asset, Grantor will sell, transfer, convey and assign its entire right, title and interest in and to such Participated Asset and Transferred Rights related thereto to Participant in accordance with the terms hereof, and Participant will sell, transfer, convey and assign its entire right, title and interest in and to such Participated Asset and Transferred Rights related thereto to the Borrower pursuant to the Loan Sale Agreement, dated as of the date hereof, between Grantor and Participant (the “Loan Sale Agreement”).

NOW THEREFORE, in consideration of \$10 and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto, intending to be legally bound, hereby agree as follows:

1. As of the Closing Date, Grantor hereby sells to Participant, and Participant hereby purchases from Grantor, a Participation in each Eligible Loan identified on Schedule I, subject to the Participation Terms and Conditions (which are hereby incorporated by reference herein), together with Grantor’s interest in the Participated Assets and Transferred Rights relating thereto and Grantor and Participant hereby agree to the Participation Terms and Conditions.

2. Upon receipt by the Grantor or the Trustee of the effective assignment of any Participated Asset pursuant to Section 1.2 of the Participation Terms and Conditions, the Grantor, for value received, hereby sells, assigns, transfers and conveys (such sale, assignment, transfer and conveyance, the "Assignment") to the Participant, and the Participant hereby irrevocably purchases and assumes from the Grantor (i) all of the Grantor's right, title and interest (the "Assigned Interest") in, to and under each Participated Asset described more particularly in such assignment (the "Assigned Loans") and, without duplication, all Related Security with respect to the foregoing (collectively, the "Related Assets"), together with Grantor's right to receive and collect all interest, principal and other amounts payable under or receivable by the Grantor with respect to such Assigned Loan and Related Assets, and (ii) all related Underlying Instruments.

Upon any Assignment, the Grantor (i) shall direct the respective Obligor(s) (or the administrative or paying agent in respect of the related Participated Asset) to pay any Collections (as defined in and in accordance with the Participation Terms and Conditions) with respect thereto into the Collection Account (as defined in the Loan Agreement), and (ii) hereby instructs the Grantor's custodian to deliver, or cause to be delivered, to the Trustee all of the documents required to be so delivered under the Loan Agreement with respect to the Participated Asset so assigned.

With respect to each such Assignment, the Grantor represents and warrants as of the Assignment Date that:

(a) The Grantor is a limited liability company duly organized, validly existing and in good standing under the laws of the State of Delaware with power and authority to make, execute, deliver and perform this Agreement. The Assignment shall effect a valid sale (or distribution, as the case may be), transfer and assignment of the Assigned Interest from the Grantor to the Participant, enforceable against the Grantor and creditors of and purchasers from the Grantor. The Assignment has been duly authorized, executed and delivered by the Grantor and constitutes the legal, valid and binding obligation of the Grantor enforceable in accordance with its terms, except as enforcement of such terms may be limited by bankruptcy, reorganization, insolvency, moratorium and other laws affecting the enforcement of creditors' rights generally and general principles of equity, whether considered in a suit at law or in equity.

(b) The Grantor is the legal title holder of the Assigned Interest being assigned by it hereunder and that such Assigned Interest is free and clear of any and all liens, claims or encumbrances created by, or attaching to the property of the Grantor other than the beneficial ownership interest in the Assigned Interest which has previously been transferred to the Participant pursuant to the Participation Interest and other than any lien which was contemporaneously released with the grant of the Participation Interest hereunder.

(c) The Grantor, at the time of and after giving effect to the Assignment, is solvent and is not aware of any pending insolvency.

(d) Other than for tax purposes, Grantor will treat the transfer of such Assigned Interests to the Participant for all purposes as a sale and purchase on all of its relevant books and records.