

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE MIDDLE DISTRICT OF FLORIDA  
JACKSONVILLE DIVISION**

**In re:**

**TAYLOR, BEAN & WHITAKER  
MORTGAGE CORP.,  
REO SPECIALISTS, LLC, and  
HOME AMERICA MORTGAGE, INC.,**

**Debtors and Debtors in  
Possession.**

**Chapter 11**

**Case No. 3:09-bk-07047-JAF  
Case No. 3:09-bk-10022-JAF  
Case No. 3:09-bk-10023-JAF**

**Jointly Administered Under  
Case No. 3:09-bk-07047-JAF**

**MOTION TO ASSUME AGREEMENT AS AMENDED BETWEEN  
TAYLOR, BEAN & WHITAKER MORTGAGE CORP. AND FINANCIAL INDUSTRY  
COMPUTER SYSTEMS, INC.**

Taylor, Bean & Whitaker Mortgage Corp., as debtor and debtor-in-possession (“TBW” or the “Debtor”), respectfully submits this Motion to Assume Agreement as Amended Between Taylor, Bean & Whitaker Mortgage Corp. and Financial Industry Computer Systems, Inc. (the “Motion”). In support of the Motion, the Debtor shows the Court as follows:

**Jurisdiction**

1. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. § 1334. Consideration of this Motion is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue of this proceeding is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicates for the relief sought herein are Sections 365(a) and 105(a) of the Bankruptcy Code (as defined herein).

**Background**

2. On August 24, 2009 (the “Petition Date”), the Debtor filed with this Court its voluntary petition for relief under Chapter 11 of Title 11 of the United States Code.

3. The Debtor continues to manage its property as a debtor in possession pursuant to

Sections 1107(a) and 1108 of the Bankruptcy Code.

4. On September 11, 2009, the Office of the United States Trustee appointed an Official Committee of Unsecured Creditors (the “Committee”).

5. No trustee or examiner has been appointed in this case.

6. On July 21, 2011, the Court entered its Order Confirming Third Amended and Restated Joint Plan of Liquidation of the Debtors and the Official Committee of Unsecured Creditors [Dkt. No. 3420 in the Main Bankruptcy Case] (the “Confirmation Order”), which confirmed the Third Amended and Restated Joint Plan of Liquidation of the Debtors and the Official Committee of Unsecured Creditors [Dkt. No. 3240] (the “Plan”), including the terms of the Plan Supplement (as defined in the Confirmation Order) and all documents attached to the Plan Supplement [Dkt. No. 3322].

7. The Plan will likely be effective on or about August 10, 2011.

8. On March 22, 1999, TBW and Financial Industry Computer Systems, Inc. (“FICS,” together with TBW, the “Parties”) entered a Software License Agreement (together with all schedules, amendments, and addenda, the “Agreement”).

9. Pursuant to the terms of the Agreement, TBW licenses certain software programs from FICS that previously allowed TBW to conduct its mortgage servicing business and continues to provide TBW with access to its historical servicing records. TBW’s access to its historical servicing records is of critical importance to the ongoing liquidation efforts of TBW.

10. The Agreement provides that it shall remain in force until terminated. TBW may terminate the Agreement at any time.

11. The specific programs licensed by TBW (the “Licensed Programs”) are set forth in certain schedules to the Agreement titled Schedule A that have been executed by the Parties

from time to time. Further, the number of concurrent users authorized to use the Licensed Programs is set forth in certain schedules to the Agreement called Schedule I Change in Concurrent Users (“Schedule I”) that have been executed by the Parties from time to time.

12. On August 9, 2011 the Parties executed an amended Schedule I reducing the number of concurrent users of the Licensed Programs and thereby reducing the monthly fees paid by TBW to FICS (the “Amendment”). The Amendment reduces TBW’s monthly license fees from approximately \$3,986.50 to approximately \$2861.50.

13. The Agreement, together with all schedules and addenda, including the Amendment, is attached hereto as Exhibit A.

#### **Relief Requested**

14. TBW requests that this Court enter an order authorizing the assumption of the Agreement as amended by the Amendment, effective as of the date of the filing of this Motion.

#### **Basis for Relief**

15. Section 365 of the Bankruptcy Code provides, in pertinent part, that a debtor in possession, “subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.” 11 U.S.C. § 365(a).

16. Courts evaluate a debtor’s decision to assume or reject an executory contract or unexpired lease under the “business judgment” standard. *See In re Gardinier, Inc.*, 831 F.2d 974, 976 n.2 (11th Cir. 1987); *Sharon Steel Corp. v. Nat’l Fuel Gas Distr. Corp.*, 872 F.2d 36, 40 (3d Cir. 1989); *In re Wells*, 227 B.R. 553, 564 (Bankr. M.D. Fla. 1998); *Sundial Asphalt Co. v. V.P.C. Investors Corp.*, 147 B.R. 72 (E.D.N.Y. 1992). A debtor satisfies this standard by determining that, in the debtor’s business judgment, the assumption or rejection of the subject executory contract or unexpired lease would likely benefit the estate. *See Sharon Steel*, 872 F.2d

at 39-40; *In re Bicoastal Corp.*, 125 B.R. 658, 667 (Bankr. M.D. Fla. 1991); *In re Kong*, 162 B.R. 86 (Bankr. E.D.N.Y. 1993). Absent a finding of bad faith or carelessness, courts generally will not disturb a debtor's business decision to assume or reject an executory contract or unexpired lease. *See Lubrizol Enter. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043, 1047 (4th Cir. 1985); *In re Prime Motor Inns*, 124 B.R. 378, 383 (S.D. Fla. 1991); *In re Federal Mogul Global, Inc.*, 293 B.R. 124 (D. Del. 2003); *In re III Enter., Inc. V*, 163 B.R. 453, 469 (Bankr. E.D. Pa. 1994). Thus, to the extent that sound business reasons justify the assumption of a particular unexpired executory contract, assumption should be approved by the court.

17. The Agreement is of crucial importance to TBW's liquidation efforts as TBW cannot access its historical mortgage servicing information without the Licensed Programs. TBW therefore must be allowed to assume the Agreement if it is to wind down its affairs in an orderly fashion.

18. The terms of the Amendment are fair and favorable to TBW. As TBW continues to wind down its affairs, TBW no longer requires the number of concurrent users previously authorized to use the Licensed Programs. Accordingly, the Amendment reduces the number of concurrent users of the Licensed Programs and thereby reduces by \$1,125 TBW's monthly fees owed under the Agreement.

19. Accordingly, TBW has determined that the Agreement as amended by the Amendment will be valuable to TBW's ongoing liquidation efforts.

20. TBW has met the standard required to assume an executory contract and has determined in the exercise of its sound business judgment to assume the Agreement as amended by the Amendment.

21. Accordingly, the Debtors request that the Court authorize the Debtors'

assumption of the Agreement as amended by the Amendment under Section 365(a) of the Bankruptcy Code as a sound exercise of business judgment.

**Conclusion**

**WHEREFORE** TBW respectfully requests entry of an order granting the relief requested herein and granting such other and further relief as may be just.

This 9th day of August, 2010.

/s/ Jeffrey W. Kelley  
Jeffrey W. Kelley (GA Bar No. 412296)  
[jeff.kelley@troutmansanders.com](mailto:jeff.kelley@troutmansanders.com)  
J. David Dantzler, Jr. (GA Bar No. 205125)  
[david.dantzler@troutmansanders.com](mailto:david.dantzler@troutmansanders.com)  
**TROUTMAN SANDERS LLP**  
600 Peachtree Street, Suite 5200  
Atlanta, Georgia 30308  
Telephone No: 404-885-3358  
Facsimile No.: 404-885-3995  
**SPECIAL COUNSEL FOR THE DEBTOR AND  
DEBTOR IN POSSESSION**

# Exhibit A

# FICS

Financial Industry Computer Systems, Inc.  
14285 Midway Road, Suite 200, Addison, TX 75001, (972) 458-8583, Fax (972) 385-7406

## SOFTWARE LICENSE AGREEMENT

AGREEMENT made March 22, 1999, between Financial Industry Computer Systems, Inc., a Texas corporation ("FICS"), and Taylor, Bean & Whitaker Mtg. Corp., Customer, a \_\_\_\_\_

1. **License.** Upon payment in accordance with the attached schedule(s), or subsequently approved schedules, FICS shall grant, and the Customer shall accept, nontransferable and non-exclusive license to use the FICS systems as stated in such schedule(s), including any subsequent modifications and related material in machine readable form ("licensed programs"), which are ordered from time to time by the Customer. This agreement and any of the licenses, programs, or materials to which it applies may not be assigned, sub-licensed, or otherwise transferred without prior written consent from FICS.

2. **Term.** This agreement is effective from the date hereof and shall remain in force until terminated. Customer may terminate this Agreement at any time by notifying FICS in writing and destroying the licensed programs and material together with all copies, modifications, and merged portions in any form. FICS may terminate this agreement if Customer fails to comply with any term or condition of this Agreement and such failure continues uncured for a period of 30 days after FICS has given Customer written notice of such failure. The Customer agrees upon termination to destroy the licensed programs and material together with all copies, modifications, and merged portions in any form.

3. **Use of Programs.** This agreement authorizes the Customer to use the licensed programs on a single personal computer, local area network, or wide area network accessing a database at the installation location stated in the attached schedule(s). The number of concurrent users is governed by the system as stated in the attached schedule(s).

4. **Operations of System.** The Customer shall be exclusively responsible for the supervision, management, and control of its use of the licensed programs including but not limited to: (a) assuring proper machine configuration, program installation, audit controls, and operating methods, (b) establishing adequate backup plans, based on alternate procedures, in the event of a licensed program malfunction, and (c) implementing sufficient procedures and checkpoints to satisfy its requirements for security and accuracy of input and output as well as restart and recovery in the event of a malfunction. The Customer agrees that it will take appropriate action with its employees by agreement or otherwise, to satisfy its obligations under this agreement with respect to use, copying, modification, and protection and security of licensed programs.

5. **Training/Education.** The Customer agrees to send a minimum of one person to a regularly scheduled FICS system training course in Dallas prior to delivery of each system.

6. **Software Maintenance.** FICS agrees to correct program errors identified by the Customer and to distribute to its Customers regular enhancements and modifications to the licensed programs as industry regulators, such as FNMA, GNMA, FHLMC, and IRS, may require so long as the Customer continues to pay the monthly maintenance fee as stated in the attached schedules. Customer agrees to purchase, install, and maintain pcAnywhere™ remote access software (or similar software as FICS may specify from time to time) for use in software maintenance and customer support.

Maintenance charges will begin the first of the month following receipt of the licensed programs. Invoices for all services are due and payable upon receipt. FICS reserves the right to discontinue software maintenance and customer support if any invoices are outstanding over 30 days.

7. **FICS Coordinator.** Customer agrees to install all new versions of licensed FICS systems promptly, and to designate one employee as "FICS Coordinator," with an alternate, if desired, to communicate and coordinate with FICS's customer service on all questions, requests, and problems. Customer agrees to promptly replace the FICS Coordinator as required and to insure the proper education and training necessary.

8. **Special Contract Programming.** FICS will consider writing special programs for customers who require capabilities beyond the scope of FICS systems operations as covered in the FICS users' manuals and "help" screens. All programs developed in this manner will be covered by a separate schedule and be attached to and become a part of this Agreement. Charges for these services are stated in that schedule.

All services necessary to maintain these special programs will be billed to customer, including but not limited to: (a) program design specifications, (b) initial programming and subsequent programming necessary to keep the standard system and these special programs in operational synchronization, and (c) customer service calls, analysis and explanations.

All special programs will be maintained and recompiled as necessary at the customer's expense. Amounts will be added to monthly maintenance invoices to cover these expenses including modifications made necessary by normal systems revisions.

9. **Network Users.** Customer agrees to assign one knowledgeable employee as the "Network Coordinator," who will be responsible for diagnosing all network problems and for contacting the FICS technical support staff for assistance as required. Customer agrees to provide network, database, and operating system software and hardware in accordance with FICS recommendations and to promptly install licensed FICS systems in compliance with FICS installation instructions and manuals. Customer further agrees that FICS will not be responsible for network, database, or operating system software or operations as part of its regular maintenance fees, even though FICS may, from time to time, provide customer advice with such matters.

10. **Warranty.** FICS warrants that the licensed programs do not infringe upon or violate any third party patent, copyright or trade secret. FICS also warrants that the licensed programs conform with all published users' and training manuals.

11. **Consulting Services.** FICS agrees to provide technical support and system support services that are beyond the scope of those required for operation of FICS licensed systems as defined in the applicable users' and training manuals as distributed with each subsequent version of FICS systems. Prices and schedules must be negotiated with the appropriate FICS personnel before any work of this nature can be provided. Examples of these services are listed in the customer support and software maintenance section of the attached schedule(s).

12. **No Waiver.** Non-enforcement by FICS of any term or condition of this Agreement shall not constitute a waiver. A waiver by FICS of compliance with any term or condition of this Agreement shall not constitute a waiver of such term or condition at any other time or a waiver of any other term or condition of this Agreement.

13. **LIMITATIONS OF LIABILITY. THE FOREGOING WARRANTIES ARE IN LIEU OF ALL OTHER WARRANTIES EXPRESSED OR IMPLIED, INCLUDING BUT NOT LIMITED TO THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.**

**FICS' LIABILITY FOR DAMAGES SHALL NOT EXCEED THE CHARGES PAID BY THE CUSTOMER FOR THE PARTICULAR LICENSED PROGRAM. FICS WILL NOT BE LIABLE FOR ANY LOST PROFITS OR FOR ANY CLAIM OR DAMAGE AGAINST THE CUSTOMER BY ANY OTHER PARTY. NO ACTION, REGARDLESS OF FORM, ARISING OUT OF THE TRANSACTIONS UNDER THIS AGREEMENT MAY BE BROUGHT BY EITHER PARTY MORE THAN ONE YEAR AFTER THE CAUSE OF ACTION HAS OCCURRED, EXCEPT THAT AN ACTION FOR NONPAYMENT MAY BE BROUGHT WITHIN ONE YEAR AFTER THE DATE OF LAST PAYMENT.**

**THE CUSTOMER'S REMEDIES IN THIS AGREEMENT ARE EXCLUSIVE.**

**IN NO EVENT WILL FICS BE LIABLE FOR CONSEQUENTIAL DAMAGES EVEN IF FICS HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.**

14. **General.** If any of the provisions of this agreement are invalid under the applicable statute or rule of law, they are to that extent to be deemed omitted. This agreement shall be governed by the laws of the State of Texas.

**THE CUSTOMER ACKNOWLEDGES THAT IT HAS READ THIS AGREEMENT, INCLUDING ALL PRINTED LANGUAGE, UNDERSTANDS IT, AND AGREES TO BE BOUND BY ITS TERMS AND FURTHER AGREES THAT IT IS THE COMPLETE AND EXCLUSIVE STATEMENT OF THE AGREEMENT BETWEEN THE PARTIES, WHICH SUPERSEDES ALL PROPOSALS, ORAL OR WRITTEN, AND ALL OTHER COMMUNICATIONS BETWEEN THE PARTIES RELATING TO THE SUBJECT MATTER OF THIS AGREEMENT.**

15. Per this agreement, see attached Schedules   A  ,       ,       ,       .

Accepted For:  
Financial Industry Computer Systems, Inc.

Taylor, Bean & Whitaker Mtg. Corp.

*Dawn Gibbs* 4/26/99  
Date

*[Signature]* 4/14/99  
Date

Dawn Gibbs, President

*LEE B. FARRAS, Secretary*

(Please print name and title)

(Please print name and title)



# FICS

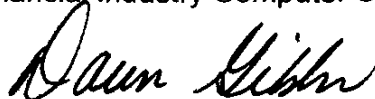
Financial Industry Computer Systems, Inc.  
14285 Midway Road, Suite 200, Addison, TX 75001, (972) 458-8583, Fax (972) 385-7406

## MICROSOFT SQL SERVER ADDENDUM

The purpose of this addendum is to emphasize certain provisions of the FICS Software License Agreement with respect to Customer's use of the Microsoft SQL Server database management system.

- A. Database Management Systems.** The Windows 95® versions of the FICS systems are currently compatible with two database management systems: Sybase SQL Anywhere® and Microsoft SQL Server™. FICS generally recommends that Customers utilize Sybase SQL Anywhere. Implementation and operation of the Sybase SQL Anywhere database management system is much simpler and provides most FICS customers with a very high level of performance. Customers licensing Sybase SQL Anywhere from FICS receive the additional benefit of FICS having tested the systems on the exact version of the database administration software which Customer will be provided. By choosing to use Microsoft SQL Server, Customer will forego the ease of use and version control provided when Sybase SQL Anywhere is licensed from FICS.
- B. Database Administrator.** FICS strongly recommends that Customer, having chosen to use Microsoft SQL Server, employ a Certified Microsoft Database Administrator and that such an individual be continually employed. Successful installation and implementation of Microsoft SQL Server software often depends on such an individual.
- C. Software Maintenance.** The FICS Software License Agreement provides that the FICS monthly Customer Support and Maintenance Fee DOES NOT include assistance and/or diagnosis for database software not licensed from FICS. FICS does not license Microsoft SQL Server, thus excluding it from FICS support and maintenance. Such support may be available from FICS on a consulting basis, for which there is an hourly or daily fee charged to Customer.
- D. Terms.** If any provision of this addendum conflicts with the FICS Software License Agreement, the terms of the FICS Software License Agreement shall prevail. If any provision of this addendum is held to be unenforceable, such provision shall be limited, modified, or severed as necessary to eliminate its unenforceability, and all other provisions shall remain unaffected.

Accepted For:  
Financial Industry Computer Systems, Inc.

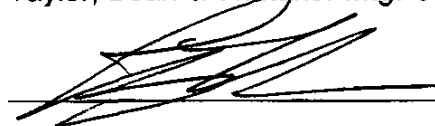


4/26/99  
Date

Dawn Gibbs, President

(Please print name and title)

Taylor, Bean & Whitaker Mtg. Corp.



4/14/99  
Date

LEE B. FARIKAS, Secretary

(Please print name and title)

# FICS

Financial Industry Computer Systems, Inc.  
 14285 Midway Road, Suite 200, Addison, TX 75001, (972) 458-8583, Fax (972) 385-7406

## SCHEDULE A

DATE: March 22, 1999

INSTALLATION LOCATION: Taylor, Bean & Whitaker Mtg. Corp.  
 (Street Address)

101 NE 2nd Street

Ocala, FL 34470

Licensed Programs	Number of Concurrent Users	Number of Systems	Software License Fee	Monthly Customer Support & Software Maintenance
<u>Mortgage Servicer</u>	<u>6</u>	<u></u>	<u>\$24,000</u>	<u>\$290</u>
<u>Mortgage Accountant</u>	<u>1</u>	<u></u>	<u>5,000</u>	<u>40</u>
<u></u>	<u></u>	<u></u>	<u></u>	<u></u>
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TOTAL:			\$29,000	\$330

DOWN PAYMENT (25%) DUE WITH AGREEMENT: \$7,250

BALANCE DUE: \$21,750

Balance Due shall be paid at the time of software delivery. The monthly Customer Support and Software Maintenance fee provides telephone and communications access service through Hayes compatible modems and remote access software to FICS Customer Service personnel who will assist the customer in interpreting and understanding the operations and functions of the licensed systems. This monthly maintenance fee DOES NOT include assistance and/or diagnosis in the following areas (these services are provided in accordance with section 11 of the Software License Agreement):

1. Network or operating system software.
2. Hardware problems.
3. Multiple installed file servers and/or hard disks.
4. Database software not licensed from FICS.
5. Wide area networks, routers, gateways, and/or bridges.
6. User installed menus and/or interface programs.
7. Loss of data or data integrity due to use of non-FICS software.

Accepted For:  
 Financial Industry Computer Systems, Inc.

Dawn Gibbs 4/26/99  
 Date

Dawn Gibbs, President  
 (Please print name and title)

Taylor, Bean & Whitaker Mtg. Corp.

LEE B. FARIAS 4/14/99  
 Date

LEE B. FARIAS, Secretary  
 (Please print name and title)



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# FICS

Financial Industry Computer Systems, Inc.  
 14285 Midway Road, Suite 200, Addison, TX 75001, (972) 458-8583, Fax:(972) 385-7406.

## SCHEDULE I ADDITIONAL CONCURRENT USERS

DATE: October 12, 2006

INSTALLATION LOCATION: Taylor, Bean & Whitaker Mtg. Corp.  
 (Street Address) 101 NE 2nd Street  
Ocala, FL 34470

Licensed Programs	Additional Licensed Number of Concurrent Users	Software License Fee	Additional Monthly Support & Software Maintenance
<u>Commercial Servicer</u>	<u>Fifteen (from ten to twenty-five)</u>	<u>\$75,000</u>	<u>\$750</u>
<u>Pricing Concession</u>		<u>(52,500)</u>	<u>(525)</u>
TOTAL:		\$22,500	\$225

This Schedule I is attached to and incorporated thereby in the License Agreement and is subject to all terms and conditions of the License Agreement.

The Monthly Customer Support and Software Maintenance fee DOES NOT include assistance and/or diagnosis in the following areas: network or operating system software; hardware problems; multiple installed file servers and/or hard disks; wide area networks, routers, gateways, and/or bridges; loss of data or data integrity due to use of non-FICS software; and database software not licensed from FICS. These services are provided in accordance with section 10, Consulting Services, of the License Agreement.

Accepted For:  
 Financial Industry Computer Systems, Inc.

Taylor, Bean & Whitaker Mtg. Corp.

Dawn Gibbs  
 Signature

10/16/06  
 Date

Nathan Sands  
 Signature

10/13/06  
 Date

Dawn Gibbs, President/CEO  
 (Please print name and title)

Nathan Sands, VP  
 (Please print name and title)



**Financial Industry Computer Systems, Inc.**  
 14285 Midway Road, Suite 200, Addison, TX 75001 (P) 972-458-8583 (F) 972-458-0863

**SCHEDULE I  
 CHANGE IN CONCURRENT USERS**

DATE: April 20, 2010  
 INSTALLATION LOCATION (Street Address) 1417 N. Magnolia Avenue  
Ocala, FL 34475

Licensed Programs	Number of Concurrent Users	Software License Fee	Additional Monthly Support & Software Maintenance
<u>Mortgage Servicer</u>	<u>-Two hundred twenty-five (from three hundred to seventy-five)</u>	<u>No Charge</u>	<u>(\$3,375)</u>
TOTAL DUE at time of software delivery:		No Charge	(\$3,375)

Additional Comments:

This Schedule I is attached to and incorporated into the Software License Agreement and is subject to all terms and conditions of the Software License Agreement. Prices are valid for ninety (90) days from the date written above.

Accepted For:  
 Financial Industry Computer Systems, Inc.

Taylor, Bean & Whitaker Mtg. Corp.

Susan Graham 4/27/10  
 Signature Date

[Signature] 4/21/10  
 Signature Date

Susan Graham, President  
 (Please print name and title)

Robb Young Dir. Vendor Management  
 (Please print name and title)

# FICS<sup>®</sup>

## Financial Industry Computer Systems, Inc.

14285 Midway Road, Suite 200, Addison, TX 75001 (P) 972-458-8583 (F) 972-456-0863

### SCHEDULE I CHANGE IN CONCURRENT USERS

DATE: August 9, 2011

INSTALLATION LOCATION  
(Street Address) 4901 Vineland Road, Suite 120

Orlando, FL 32811

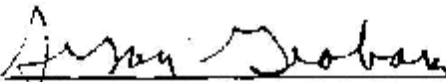
Licensed Programs	Number of Concurrent Users	Software License Fee	Additional Monthly Support & Software Maintenance
<u>Mortgage Servicer</u>	<u>-Fifty-Five (From Seventy-Five To Twenty)</u>	<u>                    </u>	<u>(\$825)</u>
<u>Commercial Servicer</u>	<u>-Twenty (From Twenty-Five To Five)</u>	<u>                    </u>	<u>(300)</u>
<b>TOTAL DUE at time of software delivery:</b>			<b>(\$1,125)</b>


Additional Comments:

This Schedule I is attached to and incorporated into the Software License Agreement and is subject to all terms and conditions of the Software License Agreement. Prices are valid for thirty (30) days from the date written above.

Accepted For:  
Financial Industry Computer Systems Inc.

Taylor, Bean & Whitaker Mtg. Corp.

 8/9/11  
Signature Date

 8/9/11  
Signature Date

Susan Graham, President/COO  
(Please print name and title)

Neil Luria, Chief Restructuring Officer  
(Please print name and title)