



July 28, 2006

The Honorable Susan Illston  
United States District Judge  
United States District Court for the  
Northern District of California  
450 Golden Gate Avenue  
San Francisco, CA 94102

**Re: *In re SupportSoft Sec. Litig.*, No. C 04-5222 SI – Discovery Issue**

Dear Judge Illston:

Defendants write in response to Plaintiffs' July 21, 2006 letter, which asks this Court to overrule three objections to Plaintiffs' Document Requests: one relating to the applicable time period and the other two relating to customer complaints and software modifications. Discovery may be limited by the Court for good cause shown "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c). Defendants respectfully request that the Court deny Plaintiffs' requests as overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

#### **Applicable Time Period (General Objection N)**

The Complaint alleges that Defendants made a series of false and misleading statements beginning on January 20, 2004 and culminating in the Company's announcement in October 2004 that its financial results for the third quarter of 2004 ("Q304") would fall short of expectations. The Class Period runs from January 20, 2004 to October 1, 2004. The core theory of Plaintiffs' case is that, to disguise an alleged decline in sales, Defendants engaged in a scheme to increase SupportSoft's current revenue by converting existing ratable software licensing arrangements to perpetual terms. The Court denied Defendants' motion to dismiss, finding that "plaintiffs['] claim that defendants' statements were misleading because they failed to disclose – and, in fact, helped affirmatively disguise – the fact that SupportSoft's business was suffering ... is sufficient to state a claim under the securities laws." *See* Order denying Motion to Dismiss at 9.

Defendants have agreed to produce documents created between January 20, 2004 to October 20, 2004, the date SupportSoft announced its Q304 results (the "Relevant Period"), as well as documents created after the Relevant Period that relate to relevant events that occurred during the Relevant Period. Towards this end, Defendants have already produced 114,904 pages, which



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includes documents from over 30 custodians, including Ms. Basu (the former CEO), Mr. Beattie (the former CFO), John Van Siclén (Sr. VP, Worldwide Field Operations), Ken Owyang (current CFO), and Jove Oakley (Mgr., Financial Planning and Analysis), and SupportSoft's Finance department. These documents relate to all aspects of the litigation and include the Company's forecasts and pipeline reports, bookings and revenue summaries, data regarding term and perpetual contracts, specific customer files, as well as email communications regarding these and other topics.

Plaintiffs now seek to extend the time period to include documents created between 2003 and as far back as 1995 for certain requests. Yet, Plaintiffs fail to cite to a single document that would suggest that there is a need to expand the Relevant Period to these prior periods. As discussed below, there is no justification for imposing the heavy burden such a massive review and production would entail absent even a proffer indicating that such production would lead to the discovery of admissible evidence. *See Surlés v. Air France*, No. 00CIV5004RMBFM, 2001 WL 815522, at \*4 (S.D.N.Y. July 19, 2001) (denying motion to compel where request "is based upon nothing more than the speculative hope that useful impeachment material will be unearthed"), *aff'd*, 2001 WL 1142231 (S.D.N.Y. Sept. 27, 2001); *United States v. Rezaq*, 156 F.R.D. 514, 521 (D.D.C. 1994) (denying motion to compel where requesting party "offers the court nothing more than speculative hopes that the evidence requested here will help defendant track down something that will help his case").

***The Core Claim in this Dispute Relates to 2004, not 2003***

Plaintiffs generally argue that the time period should be extended to at least 2003 because the allegations of the Complaint relate to that period. Plaintiffs contend that, because Ms. Basu and Mr. Beattie commented on the Company's consecutive quarters of growth during that period, Plaintiffs are entitled to documents relating to such growth. *See* Pltfs' Letter at 2. *Plaintiffs, however, are not challenging the accuracy of these statements or SupportSoft's financial results during 2003.* Nor do they explain how documents relating to quarters of undisputed growth in 2003 would be relevant to a quarterly shortfall in Q304. Furthermore, the Class Period already encompasses the two quarters preceding Q304. Consequently, any documents regarding sales trends that affected Q304 would necessarily be found in the documents *already produced*.

Notwithstanding Plaintiffs' failure to articulate any justification for going back to 2003 for all 55 of their requests, Defendants offered to produce SupportSoft's 2003 forecasting spreadsheets and its quarterly "View." SupportSoft's senior management utilized these documents in generated the internal projections and issuing public guidance. Consequently, these



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documents provide further detail behind SupportSoft's 2003 projections and results, including what business was coming in, what was expected for the year, as well as trends in bookings, revenue, and other key metrics. Although Defendants' offer was rejected, it is a reasonable compromise, at least in the first instance, to avoid the expense of sorting through massive amounts of emails and other electronic data none of which could have any relevance to the claims asserted in this case.

### ***Going Back to Prior Periods for Non-Core Claims Is Unreasonable***

Plaintiffs also fail to provide any justification for production of documents for periods prior to 2003.

#### **Customer Complaints or Product Problems (Request Nos. 1 and 3)**

Although not espoused as a core theory of the case, Plaintiff's Complaint also contained one allegation relating to product problems. To wit, a confidential witness (a Systems Architect at SupportSoft from 2000 through mid-2003) alleged generally that customers were dissatisfied with SupportSoft's product and that SupportSoft had to modify its core code for two of them. Complaint ¶ 35. Defendants have already agreed to produce documents exchanged among senior management reflecting any product issues/problems that may have led to cancelled contracts, lost sales, or would otherwise have impacted SupportSoft's Class Period financial results, although *Defendants do not believe that any such documents exist*.

Plaintiffs now request production of documents relating to alleged product problems going back to 2002. *Id.* Plaintiffs fail to justify the burden and expense of such a production – which would require a review of every customer file, database entry, and email for every document relating to any customer complaint or product problem, no matter how immaterial – given that none of these problems could have had a bearing on SupportSoft's missed forecast for Q304. *See Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1072 (9th Cir. 2004) (“District courts need not condone the use of discovery to engage in ‘fishing expeditions’”).

Notwithstanding, Defendants offered to produce pre-Class Period records from SupportSoft's customer complaint database for each of the four customers identified in the Complaint. Plaintiffs rejected the offer. Defendants subsequently offered to produce the pre-Class Period records from its customer complaint database for a reasonable list of customers identified by Plaintiffs. Defendants agreed that, if Plaintiffs found evidence of significant



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product issues, the parties could revisit the scope of Defendants' production. Plaintiffs rejected that offer, as well. Defendants submit that their offer(s) reflect a reasonable compromise and would save dramatically the time and expense of having to comb through documents that cannot possibly have information leading to the discovery of admissible evidence.

### **Documents relating to the "mix" between ratable and perpetual licenses**

Plaintiffs allege that SupportSoft moved from a "blended" business model, with both term and perpetual licenses, to one that relied almost exclusively on perpetual licenses. Complaint ¶¶ 24, 33. Defendants do not dispute that the license mix shifted appreciably toward perpetual licenses, as disclosed in SupportSoft's SEC filings throughout the Class Period. Defendants have agreed to and are producing documents from the Relevant Period that refer to the "blended" model.

Plaintiffs now contend that they are entitled to any documents created since 1995 that refer to a "blended" revenue model. The burden of searching every document created during the nine years preceding the Class Period for any reference to a "blended" revenue model is plainly excessive and unnecessary. There is no dispute that SupportSoft regularly informed the market of the mix between term and perpetual contracts. Mr. Beattie's reference to the shift in the mix (to less term and more perpetual licenses) can be traced through the Company's publicly available filings with the SEC. *See* Order denying Motion to Dismiss at 9 (citing SEC filings for 2004 and 2005, noting that "defendants repeatedly disclosed that an increasing percentage of their revenue was coming from perpetual licenses"). Plaintiffs fail to articulate any reason for needing supplementary pre-Class Period documents. Consequently, any additional production of documents relating to the mix between term and perpetual should be denied.

### **Stock data**

Plaintiffs ask for documents regarding the individual defendants' stock sales from 2001. Defendants indicated their willingness to produce the data but, as evidenced in the publicly available Forms 4 and 5 filed with the SEC, neither Ms. Basu nor Mr. Beattie sold any stock prior to the Class Period. Accordingly, the issue is moot.

### **Conclusion**

Defendants' objections are valid and should be sustained. Plaintiffs' efforts to dramatically expand the relevant time period and to obtain sweeping discovery regarding alleged complaints and product issues are overbroad and unduly burdensome, and are not reasonably



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calculated to lead to the discovery of admissible evidence. Accordingly, Defendants respectfully ask that Plaintiffs' request be denied. In the alternative, Defendants respectfully request that the Court order production limited to Defendants' offers, as articulated above, absent Plaintiffs' proffer of evidence suggesting further production would be warranted.

Respectfully,

Dated: July 28, 2006

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