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14 UNITED STATES DISTRICT COURT  
 15 NORTHERN DISTRICT OF CALIFORNIA  
 16 SAN FRANCISCO DIVISION

17 In re SUPPORTSOFT, INC.  
 18 SECURITIES LITIGATION

) CASE NO.: C 04-5222 SI

) NOTICE OF MOTION AND  
 ) MOTION TO DISMISS THE  
 ) AMENDED CONSOLIDATED  
 ) CLASS ACTION COMPLAINT;  
 ) MEMO IN SUPPORT THEREOF

19 This Document Relates To:  
 20 ALL ACTIONS

) Date: November 18, 2005  
 ) Time: 9:00 a.m.  
 ) Dept: Courtroom 11

) Before: Honorable Susan Illston



1 CONCLUSION ..... 24

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**NOTICE OF MOTION AND MOTION TO DISMISS**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on November 18, 2005, at 9:00 a.m., or as soon thereafter as the matter may be heard, in the courtroom of the Honorable Susan Illston, United States District Court, 450 Golden Gate Ave., San Francisco, CA 94102, defendants SupportSoft, Inc. (“SupportSoft”), Radha R. Basu and Brian M. Beattie (collectively “defendants”) will and hereby do move to dismiss all claims alleged against them by plaintiffs in the Amended Consolidated Class Action Complaint (the “Amended Complaint”).

Defendants move to dismiss plaintiffs’ claims for failure to satisfy the heightened pleading standards of the Private Litigation Securities Reform Act of 1995 (the “Reform Act”) and Federal Rule of Civil Procedure 9(b) and for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). This motion is based on this Notice of Motion and Motion, the supporting Memorandum of Points and Authorities; the Declaration of Merav Avital-Magen, together with accompanying exhibits; the [Proposed] Order; all pleadings and papers filed herein; oral argument of counsel; and any other matter which may be submitted at the hearing.

**STATEMENT OF ISSUES (Civil L. R. 7-4(a)(3))**

Have plaintiffs alleged an actionable claim or satisfied the Reform Act’s heightened pleading standards for falsity and scienter where they fail to allege facts which would contradict SupportSoft’s public disclosure?

**MEMORANDUM OF POINTS AND AUTHORITIES****INTRODUCTION**

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3 Despite this Court's plain instructions, plaintiffs fail to cure the pleading deficiencies in  
4 their prior complaint. On October 4, 2004, SupportSoft disclosed that it would miss its third  
5 quarter 2004 estimate by approximately \$5 million. Plaintiffs filed suit shortly thereafter. They  
6 alleged that various statements made between January 20 and October 4, 2004 (the "Class  
7 Period") must have been false when made.

8 According to plaintiffs, although defendants repeatedly disclosed that SupportSoft was  
9 entering into an increasing number of perpetual licenses (for which SupportSoft could recognize  
10 revenue immediately), defendants allegedly failed to disclose that SupportSoft had been  
11 deliberately "pushing" customers to convert to perpetual licenses to disguise declining sales and  
12 purported "execution difficulties." This Court previously dismissed plaintiffs' claims, finding  
13 that plaintiffs failed to provide sufficient information concerning their confidential sources.  
14 Plaintiffs also failed to allege details regarding other key facts, such as when the alleged "push"  
15 to perpetual licensing began and which customers allegedly shifted to perpetual licenses as a  
16 result. The Court also found that plaintiffs failed to plead falsity in light of SupportSoft's  
17 disclosures regarding the trend toward perpetual licenses and the effect of that trend. Plaintiffs'  
18 Amended Complaint fails to supply the missing details.

19 At the outset, there is no dispute that SupportSoft consistently disclosed that it had been  
20 entering into more perpetual software licenses, rather than term licenses (where revenue is  
21 recognized ratably over the software license term). It further disclosed that the trend toward  
22 perpetual licenses resulted in a decrease of ratable license revenue during the Class Period.  
23 SupportSoft attributed the shift both to new customers electing perpetual licenses and to  
24 conversions by existing customers. SupportSoft warned that this trend would impact its near-  
25 term results, particularly if it failed to close large orders by a quarter's end. It also cautioned that  
26 the trend would lead to less predictability of its future results. Thus, SupportSoft warned of  
27 precisely what transpired in the September 2004 quarter where "several large opportunities [were  
28 not brought] to closure by the end of the quarter." None of plaintiffs' allegations contradicts

1 SupportSoft’s public disclosures. Plaintiffs merely claim that SupportSoft failed to disclose that  
2 the Company was “pushing” perpetual deals to disguise slowing sales. Plaintiffs’ claims fail for  
3 several reasons.

4 First, plaintiffs fail to plead an actionable claim in the absence of facts demonstrating that  
5 conversions to perpetual licensing arrangements were done to disguise slowing sales.  
6 Importantly, this is not an accounting case. Plaintiffs do not challenge SupportSoft’s practice of  
7 converting term to perpetual licenses or how the Company recognized revenue on those  
8 contracts. Instead, plaintiffs merely claim that the conversions were designed to hide declining  
9 sales. Yet they have no internal documents, such as sales pipeline reports or forecasts, which  
10 would reflect declining business. In fact, the notion that defendants were hiding a business  
11 decline is belied by SupportSoft’s post-Class Period financial results, which reflected increasing  
12 revenues for each of the quarters following the quarterly shortfall.

13 In the absence of facts supporting their assertion that sales were declining, plaintiffs’  
14 claim boils down to the mere allegation that defendants failed to disclose that they were  
15 “pushing” perpetual conversions – rather than what defendants did disclose, namely that  
16 customers were entering into more perpetual licensing arrangements. Yet, the securities laws  
17 impose no obligation on defendants to disclose motivations or to frame facts in a pejorative  
18 manner. Without sufficient allegations demonstrating that perpetual licenses were entered into to  
19 disguise a negative business trend, plaintiffs fail to state a claim for securities fraud.

20 Plaintiffs’ confidential sources do not supply the details necessary to save plaintiffs’  
21 claims of a cover-up to hide declining sales. With respect to plaintiffs’ initial confidential  
22 sources (Nos. 1 and 3), plaintiffs now reveal that *neither* of them worked at SupportSoft during  
23 the Class Period. Thus, neither of them was in a position to have personal knowledge of the  
24 factors contributing to the third quarter miss. At best, these sources merely substantiate what  
25 SupportSoft repeatedly disclosed – the increasing trend toward perpetual licenses. Moreover,  
26 neither source identifies a single customer who was converted to a perpetual deal so SupportSoft  
27 could conceal a chronic decline in business.

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1 Plaintiffs also introduce two new confidential sources (Nos. 4 and 5). These sources,  
2 however, only identify a total of three customers that converted to perpetual contracts. Yet they  
3 fail to indicate when their contracts were converted, why they converted, or how, or if, their  
4 conversions impacted the third quarter of 2004.

5 Plaintiffs also rely on an alleged “admission” the CEO made during an October 20, 2004  
6 conference call with securities analysts. Plaintiffs interpret her statements as disclosing a  
7 deliberate change in SupportSoft’s business model, as well as defendants’ ability to control  
8 whether a customer entered into a term or a perpetual license. A plain reading of the statements  
9 makes clear that the CEO was merely acknowledging that the previously disclosed trend towards  
10 perpetual licensing was contrary to SupportSoft’s historical business model. She was likewise  
11 expressing her hope and intention that SupportSoft would reverse that trend and start rebuilding  
12 its ratable license revenue in the future. SupportSoft’s subsequent financial results reveal how  
13 little control SupportSoft had in shaping customers’ licensing decisions as the percentage of  
14 ratable license revenue has dropped to 5% (from 17% in the Class Period).

15 Plaintiffs also fail to allege adequately that SupportSoft had been experiencing  
16 “execution difficulties” during the Class Period. No. 2, the only confidential source whom  
17 plaintiffs allege supports this assertion, left SupportSoft in the middle of 2003. This individual  
18 could not have knowledge of the factors leading to the quarterly shortfall. He also identifies only  
19 two customers who allegedly experienced problems with SupportSoft’s software. While he  
20 claims these customers’ issues were eventually resolved, he fails to provide *any* facts  
21 demonstrating how, or even if, they contributed to the quarterly shortfall occurring over one year  
22 after his departure. In one instance, the issue was allegedly resolved in 2002 – two years *before*  
23 the quarterly shortfall at issue.

24 Since plaintiffs fail to allege falsity adequately, their scienter allegations also fail.  
25 Plaintiffs attempt to plead scienter from the accounts of confidential source Nos. 4 and 5, yet  
26 neither of these individuals supplies the “great detail” required to raise the required “strong”  
27 inference of deliberate intent (recklessness for historical statements and actual knowledge for  
28 forecasts). Neither offers any facts that would demonstrate that defendants knew software

1 license sales were declining such that the “push” to perpetual would directly impact  
2 SupportSoft’s third quarter of 2004. Plaintiffs also fail to plead scienter adequately based on  
3 defendants’ alleged stock sales, most of which were executed well before the third quarter of  
4 2004 and reflect amounts that fail to raise the required “strong” inference of fraudulent intent.

5 Accordingly, for the reasons set forth below, the Amended Complaint should be  
6 dismissed with prejudice.

## 7 SUMMARY OF ALLEGATIONS

### 8 The Parties

9 SupportSoft, Inc. (“SupportSoft”), a Delaware corporation headquartered in Redwood  
10 City, is “a leading provider of real-time service management software designed to accelerate and  
11 automate enterprise technical support, customer service and IT infrastructure management.” ¶

12 18.<sup>1</sup> Radha Basu (“Basu”) is SupportSoft’s Chairman of the Board and Chief Executive Officer.

13 ¶ 9. Brian Beattie (“Beattie”) is SupportSoft’s Chief Financial Officer and its Executive Vice  
14 President of Finance and Administration. ¶ 10.

### 15 Financial Results

16 Before the quarter ended September 30, 2004, SupportSoft enjoyed nine quarters of  
17 strong and predictable revenue growth. On October 4, 2004, SupportSoft announced that it had  
18 missed its quarterly projection. In particular, SupportSoft disclosed that it expected its third  
19 quarter revenue to be between \$11.9 and \$12.3 million, rather than \$16.7 to \$17.5 million

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21 <sup>1</sup> Unless otherwise noted, references to “¶ \_” are to the Amended Complaint, and references  
22 to “Ex. \_” are to the exhibits attached to the Merav Avital-Magen (the “Magen Decl.”) filed  
23 contemporaneously with this memorandum. This Court may consider the allegations in the  
24 Amended Complaint and any document referred to or quoted in it. *Branch v. Tunnell*, 14 F.3d  
25 449, 450 (9th Cir. 1994), *overruled on other grounds Galbraith v. County of Santa Clara*, 307  
26 F.3d 1119 (9th Cir. 2002); *Wietschner v. Monterey Pasta Co.*, 294 F. Supp. 2d 1102, 1110 (N.D.  
27 Cal. 2003). This Court may also consider any document, the authenticity of which is not  
28 contested, upon which the complaint necessarily relies. *Parrino v. FHP, Inc.*, 146 F.3d 699, 706  
(9th Cir. 1998). Moreover, in a securities case, a court may consider any document that must be  
and was publicly filed with the Securities and Exchange Commission. *Lapidus v. Hecht*, No. C  
98-3130 MMC, 2002 WL 1034042, at \*3 n.4 (N.D. Cal. May 17, 2002). The documents  
appended to the Magen Declaration fall within each of these categories. Alternatively,  
Defendants request that the Court take judicial notice of such documents, pursuant to Federal  
Rule of Evidence 201.

1 projected on July 20, 2004. ¶ 72; Ex. G. SupportSoft explained that the results were primarily  
 2 due to “the tightness of IT spending and more complex approval processes.” ¶ 72. The CEO  
 3 stated, “[d]espite closing several million dollar transactions, there were several large  
 4 opportunities which we did not bring to closure by the end of the quarter.” *Id.* Following this  
 5 announcement, the price of SupportSoft’s shares fell from \$9.62 to \$6.21 per share, or by 35.4%.  
 6 ¶ 73. Since then, SupportSoft has recovered, reporting increasing revenue for each quarter  
 7 following the miss (in *italics*):

Quarter	Revenue
September 2003	\$13.5M
December 2003	\$15.1M
March 2004	\$15.7M
June 2004	\$16.9M
<i>September 2004</i>	<i>\$12.2M</i>
December 2004	\$15.8M
March 2005	\$16.1M
June 2005	\$17M

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 13 ¶¶ 21, 23, 26, 28, 60; Exs. H-J.<sup>2</sup>

#### 14 **The Consolidated Complaint**

15 Beginning in December 2004, plaintiffs began filing lawsuits against SupportSoft. On  
 16 April 20, 2005, plaintiffs filed a Consolidated Class Action Complaint (the “Complaint”) on  
 17 behalf of a putative class of investors who purchased SupportSoft stock between January 20,  
 18 2004 and October 1, 2004 (the “Class Period”).

19 Plaintiffs alleged that SupportSoft’s earnings releases and conference call statements  
 20 were false and misleading because the Company failed to disclose that “1) its business model  
 21 was in fact not materially differentiated from other enterprise software companies; 2) its  
 22 customers were implementing additional hurdles to contract approval; and 3) the Company was  
 23 experiencing execution difficulties.” Complaint ¶ 40. To support this assertion, plaintiffs relied  
 24 on an alleged former systems architect (confidential source No. 2) who claimed that important  
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26 <sup>2</sup> *In re Netflix, Inc. Sec. Litig.*, No. C04-2978 FMS, 2005 WL 1562858, at \*5 (N.D. Cal. June  
 27 28, 2005) (taking judicial notice of all SEC filings submitted by defendants); *In re Syncor Int’l*  
 28 *Corp. Sec. Litig.*, 327 F. Supp. 2d 1149, 1156 (C.D. Cal. 2004) (stating that “the court may  
 consider public filings, including SEC filings”); *See also In re Silicon Graphics Inc. Sec. Litig.*,  
 183 F.3d 970, 986 (9th Cir. 1999).

1 customers were finding the software problematic and incapable of performing the functions  
2 promised. *Id.* ¶ 41.

3 Plaintiffs also alleged that, although SupportSoft disclosed that it was entering into both  
4 “term” licenses with revenue recognized on a monthly basis over the term of the contract, and  
5 “perpetual” licenses where all revenue was recognized immediately, it did not disclose that the  
6 SupportSoft had begun “pushing” to convert as many contracts as possible to perpetual licenses.  
7 According to plaintiffs, “conversion of contracts to the perpetual system of recognizing revenue”  
8 would move “revenue that would otherwise be spread out over several reporting periods into the  
9 current period ... at the expense of leaving less revenue to be reported in future quarters.” *Id.* ¶  
10 42. To support this assertion, plaintiffs relied on the account of an alleged former director of  
11 channel sales (confidential source No. 3) who purportedly told plaintiffs that SupportSoft began  
12 “pushing” to convert contracts prior to the third quarter of 2004. *Id.*

### 13 **Disclosure Concerning Trend Toward Perpetual Licensing**

14 Throughout the Class Period, SupportSoft had disclosed that its revenue was increasingly  
15 derived from “perpetual” licenses (recognized immediately upon software license delivery),  
16 rather than “term” licenses (recognized ratably over the term of a license). Ex. B at 25; Ex. C at  
17 13; Ex. D at 14. SupportSoft explained that this trend related to “new customers electing to  
18 purchase perpetual licenses as well as existing customers who initially licensed our software on a  
19 term license basis choosing, at or near end of the initial term, to renew their licenses under a  
20 perpetual license basis.” Ex. B at 25. SupportSoft also specifically disclosed in its SEC filings  
21 the percentage of total revenue made up of ratable license revenue, which SupportSoft made  
22 clear had declined and would continue to decline as a result of this trend.<sup>3</sup>

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25 <sup>3</sup> SupportSoft’s prediction that the trend would continue proved accurate. The percentage of  
26 its actual revenue attributable to ratable license revenue has continued to decline in 2005. For  
27 the six months ended June 30, 2005, SupportSoft’s ratable license revenue was 5% of its total  
28 license revenue. Ex. F at 17. SupportSoft also disclosed that this revenue came entirely from  
existing customers, not new customers.

SEC Filing	Actual % of Total Revenue from Ratable License Revenue	Projection of % of Total Revenue from Ratable License Revenue
10-Q 10/20/03	21% (for Q3 2003)	25% to 30% (for the next 12 months)
10-K 3/11/04	29% (for all of 2003)	25% to 30% (for the next 12 months)
10-Q 5/10/04	24% (for Q1 2004)	20% to 25% (for the rest of 2004)
10-Q 8/9/04	18% (for Q2 2004)	15% to 20% (for the rest of 2004)
10-Q 11/09/04	17% (for Q3 2004)	15% to 20% (for all of 2004)

Exs. A-E.

SupportSoft explained what this trend towards perpetual licensing meant, namely that it would have less predictable future results and that delays in closing orders could cause SupportSoft to miss its target quarterly estimates. Ex B at 25; Ex. C at 16; Ex. D at 16; Ex. E at 18. For example, SupportSoft stated:

We license our support and service automation software under perpetual and term licenses. Perpetual licenses typically result in our immediate recognition of a larger amount of revenue in the particular quarter or period in which we grant the license and deliver the product as compared with term licenses. Revenue from a term license is recognized ratably on a monthly basis over the agreement term, which is typically three years. In addition, we typically derive a significant portion of our revenue each quarter from a number of orders received in the last month of a quarter. *If we fail to close orders expected to be completed toward the end of a quarter, particularly if these orders are for perpetual licenses, which are representing an increasing percentage of our revenue, or if there is any cancellation of or delay in the closing of orders, particularly any large customer orders, our quarterly results would suffer.*

Ex. B at 30-31; Ex. C at 16; Ex. D at 16; Ex. E at 16 (emphasis added).

### **July 18, 2005 Order**

Defendants moved to dismiss the Complaint on May 20, 2005 on the grounds that, *inter alia*, plaintiffs failed to satisfy the Reform Act's pleading requirements for falsity and scienter. On July 18, 2005, this Court granted defendants' motion to dismiss.

With respect to plaintiffs' assertions that SupportSoft was experiencing problems, the Court found that plaintiffs failed to provide an adequate "description of the types of problems faced by the Company with the implementation of its software based on the testimony of

1 confidential source #2.” Order at 1. The Court also found that the Complaint failed to state  
2 “when these problems occurred and whether the problems mentioned by the source contributed  
3 to the revenue shortfall in the third quarter of 2004.” *Id.*

4 With respect to plaintiffs’ allegation that defendants were “pushing” conversions to  
5 perpetual licensing, the Court found that plaintiffs failed to provide sufficient information about  
6 Confidential Source No. 3, such as his “dates of employment, customers that the source was  
7 personally involved with, or the source’s immediate supervisor.” Order at 1. The Court also  
8 found that the Complaint failed to “state how this source would know that the Company began  
9 ‘pushing’ perpetual licenses. The complaint does not identify when the Company began  
10 ‘pushing’ perpetual licenses or which customers shifted to perpetual licenses based on the  
11 Company’s efforts.” *Id.*

12 The Court also found that dismissal was appropriate for failure to plead that the  
13 statements were false in light of SupportSoft’s disclosure that it was increasingly relying on  
14 perpetual licenses during the Class Period and that this increase could lead to less predictability  
15 in revenue on a quarterly basis. Order at 2. Finally, the Court found that plaintiffs failed to  
16 plead with sufficient particularity that the individual defendants had knowledge of the asserted  
17 allegations or “facts to find that the stock sales by the individual defendants creates an inference  
18 of scienter.” *Id.* The Court granted plaintiffs leave to amend and directed them to narrow their  
19 allegations.

### 20 **The Amended Consolidated Complaint**

21 On August 19, 2005, plaintiffs filed the Amended Complaint. Plaintiffs allege that  
22 SupportSoft’s earnings releases and conference call statements were false for the same reasons as  
23 they alleged previously. Plaintiffs also repeat their prior contentions that defendants directed  
24 employees to convert ratable contracts to perpetual contracts to make revenues appear higher in  
25 the first and second quarters at the expense of the third quarter. According to plaintiffs, but for  
26 this conversion, revenue in the first two quarters would have been flat or fallen. Plaintiffs also  
27 allege that the outlook for the third quarter should have been reduced because “business had  
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1 slowed” and “there were no ratable contracts remaining that could be converted to perpetual  
2 contracts in order to maintain the fraud.” ¶ 33.

3 As discussed below, the Amended Complaint fails to cure any of the previously identified  
4 pleading deficiencies because it fails to provide the detail necessary to satisfy the Reform Act’s  
5 pleading requirements.

## 6 ARGUMENT

### 7 I. PLAINTIFFS FAIL TO ALLEGE AN ACTIONABLE CLAIM

8 Plaintiffs do not and cannot contest that, throughout the Class Period, SupportSoft  
9 disclosed that it was experiencing an increasing trend towards perpetual licensing. According to  
10 SupportSoft’s public filings, this trend resulted in the percentage of revenue from ratable  
11 licensing deals to decline from 29% in 2003 to 18% in the quarter before the September 2004  
12 miss. SupportSoft disclosed that this trend related to “new customers electing to purchase  
13 perpetual licenses as well as existing customers who initially licensed our software on a term  
14 license basis choosing, at or near end of the initial term, to renew their licenses under a perpetual  
15 license basis.” Ex. B at 25. Defendants also warned that this trend could impact near-term  
16 results, both because it necessarily meant that the failure to close large deals could impact  
17 SupportSoft’s ability to meet quarterly revenue estimates and because it affected the  
18 predictability of those future results. *Supra* at 8. Plaintiffs challenge this disclosure on the  
19 grounds that SupportSoft failed to allege that defendants were “pushing” the conversion of  
20 ratable license deals to disguise allegedly declining sales. Plaintiffs fail to state an actionable  
21 claim.

22 At the outset, plaintiffs fail to offer any facts to support this assertion that SupportSoft’s  
23 business was declining when the alleged conversions took place. Indeed, their sole support  
24 comes from confidential source No. 5, an alleged former Corporate Controller who worked at  
25 SupportSoft from February 2004 to May 2005. He claims that SupportSoft “flipped” ratable  
26 licenses to perpetual licenses in the first two quarters of 2004, which “flipping” he believes was  
27 done to disguise slowing sales. No. 5, however, offers no basis for his belief. Although he was  
28

1 allegedly the former Controller, he fails to refer to any internal documents, such as pipeline  
2 reports or corporate forecasts, which would support his contention. This omission is critical.

3 In the absence of facts supporting their assertion that sales were declining, plaintiffs'  
4 claim boils down to the mere allegation that defendants failed to disclose that they were  
5 "pushing" perpetual conversions. Yet, the securities laws impose no obligation on defendants to  
6 disclose motivations or to frame facts in a pejorative manner.<sup>4</sup>

7 Here, SupportSoft disclosed the trend towards perpetual licensing and warned of the risks  
8 this trend created with respect to its ability to achieve its forecasts in the future. Without factual  
9 support for their allegation that SupportSoft's business was declining – a fact belied by  
10 SupportSoft's post-Class Period financial results – defendants were not obligated to disclose  
11 that they were "pushing" conversions, and the challenged statements are immaterial as a matter  
12 of law.<sup>5</sup>

## 13 **II. PLAINTIFFS FAIL TO SATISFY THE REFORM ACT'S HEIGHTENED** 14 **PLEADING REQUIREMENTS FOR FALSITY**

15 The Reform Act requires plaintiffs to "specify each statement alleged to have been  
16 misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding  
17 the statement or omission is made on information and belief, the complaint shall state *with*  
18 *particularity all facts on which that belief is formed.*" 15 U.S.C. § 78u-4(b)(1) (emphasis added).  
19 The "all facts" requirement "means that a plaintiff must provide a list of all relevant  
20 circumstances in great detail." *In re Read-Rite Corp. Sec. Litig.*, 335 F.3d 843, 846 (9th Cir.

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21  
22 <sup>4</sup> See *In re American Express Co. Sec. Litig.*, No. 02 Civ. 5533 (WHP), 2004 WL 632750, at  
23 \*9 (S.D.N.Y. Mar. 31, 2004) ("where a defendant fully discloses the material facts, plaintiffs  
24 cannot predicate a Rule 10b-5 claim on the defendant's failure to disclose those facts in critical  
25 terms."); *In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 273 F. Supp. 2d 351, 378  
26 n.59 (S.D.N.Y. 2003) ("the securities laws do not require disclosure of any particular adjective  
when the overall message of caution is communicated to investors"), *aff'd*, 396 F.3d 161 (2d Cir.  
2005); *In re Tyson Foods, Inc. Sec. Litig.*, [2004 Tr. Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,847,  
at 93,957 (D. Del. June 17, 2004) ("Omission of the subjective motivations of corporate decision  
makers does not render an honest transaction fraudulent under federal law.").

27 <sup>5</sup> *In re Stone & Webster, Inc. Sec. Litig.*, 253 F. Supp. 2d 102, 126 (D. Mass. 2003) ("[w]hen  
28 issuers accurately and completely disclose their operating expenses and net losses and accurately  
(continued...)



1 2003) (quoting *Silicon Graphics*, 183 F.3d at 984).<sup>6</sup>

2 As courts have recognized, “requiring plaintiff to plead all details relating to his  
3 allegations of fraud ‘is the [Reform Act’s] single most important weapon against pleading fraud  
4 by hindsight because it forces plaintiff[ ] to reveal whether [he] base[s] [his] allegations on an  
5 inference of earlier knowledge drawn from later disclosures or from contemporaneous  
6 documents or other facts.’” *In re Copper Mountain Sec. Litig.*, 311 F. Supp. 2d 857, 866 (N.D.  
7 Cal. 2004) (quoting *In re Vantive Corp. Sec. Litig.*, 110 F. Supp. 2d 1209, 1216 (N.D. Cal.  
8 2000), *aff’d*, 283 F.3d 1079 (9th Cir. 2002)).

9 Here, plaintiffs rely almost entirely on the accounts of unnamed sources. To rely on  
10 unnamed sources, plaintiffs must describe them “with sufficient particularity to support the  
11 probability that a person in the position occupied by the source would possess the information  
12 alleged.” *Nursing Home Pension Fund, Local 144 v. Oracle Corp.*, 380 F.3d 1226, 1233 (9th  
13 Cir. 2004); *In re Northpoint Communications Group, Inc., Sec. Litig.*, 221 F. Supp. 2d 1090,  
14 1097 (N.D. Cal. 2002) (“allegations attributed to unnamed sources must be accompanied by  
15 enough particularized detail to support a reasonable conviction in the informant’s basis of  
16 knowledge”).

17 To assess reliability of witnesses, courts should consider among other things the level of  
18 detail, the corroborative nature of the allegations, and “the coherence and plausibility of the  
19 allegations.” *In re Daou Sys., Inc. Sec. Litig.*, 411 F.3d 1006, 1015 (9th Cir. 2005) (amended  
20 June 21, 2005).<sup>7</sup> A complaint should also “describe how [plaintiffs] gained the relevant  
21 information from the sources” and whether the information “was written or oral; whether it  
22 consisted of recollections or contemporaneous descriptions.” *In re Network Assoc. Sec. Litig.*,

23 \_\_\_\_\_  
24 (...continued from previous page)  
25 and completely list all of the factors for these expenses and losses, pejorative descriptions of  
26 these factors are not required.”).

26 <sup>6</sup> See also *In re Van Wagoner Funds, Inc. Sec. Litig.*, No. C 02-03383 JSW, 2004 WL  
26 2623972, at \*6 (N.D. Cal. Jul. 27, 2004); *Syncor Int’l*, 327 F. Supp. 2d at 1157.

27

28

1 No. C 99-01729 WHA, 2000 WL 33376577, at \*11 (N.D. Cal. Sept. 5, 2000). These pleading  
2 requirements are strikingly absent here.

3 **A. Plaintiffs Fail To Allege Facts To Support Their Assertion That Defendants**  
4 **Were “Pushing” Perpetual Licenses To Disguise Slowing Sales**

5 The bulk of plaintiffs’ Amended Complaint is devoted to their unremarkable allegation  
6 that defendants were deliberately directing the conversion of licenses to the perpetual model so  
7 that SupportSoft could recognize revenue immediately. ¶¶ 33, 37-45, 48-53, 58-61. The Court  
8 found plaintiffs’ original confidential source allegations lacking because they failed to allege  
9 “dates of employment, customers that the source was personally involved with, or the source’s  
10 immediate supervisor,” as well as “how this source would know that the Company began  
11 ‘pushing’ perpetual licenses.” The Court also found plaintiffs failed to “identify when the  
12 Company began ‘pushing’ perpetual licenses or which customers shifted to perpetual licenses  
13 based on the Company’s efforts.” Order at 1.

14 Plaintiffs now attempt to support their allegation regarding defendants’ “pushing”  
15 conversions with not only confidential source Nos. 1 and 3, but also two new confidential  
16 sources. Yet, the Amended Complaint fails to supply the required specificity to cure the prior  
17 pleading deficiencies.

18 **1. Confidential Source No. 1**

19 Originally, plaintiffs alleged that confidential source No. 1 was a former sales executive  
20 who told them only that Ms. Basu and Mr. Beattie “kept a close watch on sales, participated in  
21 frequent meetings at which sales were analyzed, and participated in all aspects of the Company  
22 and all management decisions.” Complaint ¶ 11.

23 In the Amended Complaint, plaintiffs now elaborate that No. 1 was the former Senior  
24 Vice President of Worldwide Sales from March 2001 through the middle of 2003. In addition to  
25

26 (...continued from previous page)

27 <sup>7</sup> See also *In re Portal Software, Inc. Sec. Litig.*, No. C-03-5138 VRW, 2005 WL 1910923, at  
28 \*8 (N.D. Cal. Aug. 10, 2005); cf. *In re Cabletron Sys., Inc.*, 311 F.3d 11, 29 (1st Cir. 2002)  
(court must evaluate the “coherence and plausibility of the allegations”).

1 claiming that the individual defendants “worked with him on sales,” No. 1 claims that both  
2 defendants determined which deals would be taken on a perpetual basis. According to this  
3 individual, during the time he worked at SupportSoft, 95% of the deals were ratable, and  
4 SupportSoft might take one or two deals on a perpetual basis per quarter. ¶ 37.

5 No. 1 does not allege any information that was not publicly disclosed since SupportSoft  
6 made clear in its SEC filings that it was experiencing a trend toward perpetual licensing. *Supra*  
7 at 7-8. Further, since No. 1 left SupportSoft’s employ over one year prior to the September 2004  
8 shortfall, he could not have personal knowledge of the reasons for the miss.<sup>8</sup>

## 9 2. Confidential Source No. 3

10 Confidential source No. 3 was allegedly the former director of channel sales. Originally,  
11 plaintiffs alleged that No. 3 told them that “prior to the third quarter of 2004, SupportSoft had  
12 begun pushing to convert as many contracts as possible to the immediate revenue method.”  
13 Complaint ¶ 42. In the Amended Complaint, plaintiffs now reveal No. 3’s dates of employment:  
14 July 1998 to December 2000 and from the summer of 2002 through October 2003. ¶ 38. Thus,  
15 like No. 1, confidential source No. 3 left SupportSoft’s employ one year prior to the quarterly  
16 shortfall. Although plaintiffs now name No. 3’s immediate supervisors, none of them was Ms.  
17 Basu or Mr. Beattie. *Id.*

18 No. 3 alleges that SupportSoft originally had only a term business model but that “over  
19 time that changed and more and more contracts were designated as perpetual in order to meet the  
20 projected numbers that SupportSoft had given to Wall Street analysts.” ¶ 38. Plaintiffs,  
21 however, fail to allege any basis for No. 3’s assertion. Contrary to this Court’s Order, plaintiffs  
22 fail to identify any customers with which No. 3 was involved or which shifted to perpetual  
23 licenses based on the SupportSoft’s alleged efforts. Nor does No. 3 explain how he would know  
24 that the company was designating more perpetual licenses to meet quarterly estimates.

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26 <sup>8</sup> See *In re Vertex Pharm. Inc., Sec. Litig.*, 357 F. Supp. 2d 343, 353 (D. Mass. 2005)  
27 (allegations insufficient in part where “[m]ost significantly, none of the CWs claims to have  
28 personal knowledge of the most important facts they allege. Only CW1 worked at Vertex during  
(continued...)

1                                   **3. Confidential Source No. 4**

2           Confidential source No. 4 is an alleged former Sales Director and Director of Business  
3 Development from 1999 to April 2004. Plaintiffs allege that, although No. 4 did not report  
4 directly to Ms. Basu or Mr. Beattie, he had direct contact with them and “took direction from  
5 them on converting ratable contracts to perpetual contracts when [they] wanted to make revenues  
6 appear higher.” ¶ 40. No. 4 alleges that he was involved in all large transactions and “very  
7 familiar with all sales.” *Id.*

8           No. 4 claims that, beginning in 2002 and continuing through the first two quarters of  
9 2004, the individual defendants would tell him to select ratable contracts from a “pool” and offer  
10 the customers incentives to convert their contracts to perpetual licenses when SupportSoft was in  
11 danger of not meeting its number. ¶¶ 42, 48-49. According to No. 4, this practice occurred “at  
12 least once or twice a quarter.” ¶ 43. No. 4 alleged that the individual defendants “recognized  
13 that this method of current booking of future revenue was a break from past practice and that  
14 they were ‘eating’ their booked contracts for current quarterly gain and, thereby, eroding their  
15 future income stream, but hoped that the shortfall could be replenished with new contracts so that  
16 it would not be disclosed.” *Id.*

17           No. 4, however, identifies only two customers by name (J.C. Penney and IBM), and  
18 alleges that those customers were “convinced to convert their ratable contracts to perpetual  
19 contracts” during his tenure. ¶ 45. No. 4 does not provide any dates for these alleged  
20 conversions. Since No. 4 was employed at SupportSoft since April 1999, these contracts could  
21 have been entered into substantially before the Class Period. No. 4 also fails to allege the  
22 amounts of these contracts or any facts demonstrating that their alleged conversion allowed  
23 SupportSoft to achieve its quarterly targets.<sup>9</sup>

24 \_\_\_\_\_  
25           (...continued from previous page)  
26 the entire duration of the Class Period. CW2 arrived at Vertex after the Class Period, and CW3,  
27 CW4, and CW5 were at Vertex only during the latter half of the Class Period.”)

27           <sup>9</sup> See *Portal*, 2005 WL 1910923, at \*11 (witness who was employed for only two months of  
28 class period “fails to identify any of ‘Portal’s large telecommunications customers’ for whom  
customer service applications were no longer required”); *In re Northpoint Communications*

(continued...)

1                                   **4. Confidential Source No. 5**

2                   Confidential source No. 5 is an alleged former Corporate Controller who worked at  
3 SupportSoft from February 2004 to May 2005. ¶ 50. No. 5 claims to have been involved in “deal  
4 development and accounting for contract changes.” He reported to the Director of Finance, Joe  
5 McCarthy and, beginning in April 2004, he reported directly to Mr. Beattie. *Id.*

6                   According to No. 5, SupportSoft converted contracts to perpetual licenses throughout  
7 2003 but “rapidly flipped the bulk of [its] ratable contracts” in the first two quarters of 2004. *Id.*  
8 He alleges that Ms. Basu and Mr. Beattie “were aware that sales had been slowing during the  
9 first two quarters of 2004 and directed that the SupportSoft staff get ratable contract customers to  
10 convert,” knowing that flipping would “decrease future revenue and earnings.” ¶ 51. No. 5 also  
11 alleges that, by the end of the second quarter of 2004, “there was little in the way of ratable  
12 revenue left to recognize, and, since new business had slowed, there was not enough revenue to  
13 meet the third quarter target.” ¶ 52.

14                   No. 5, however, names only *one* customer that allegedly converted to a perpetual license  
15 during his tenure (Computer Science). ¶ 52. Plaintiffs do not allege the amount of this contract  
16 or any facts that would establish that its alleged conversion allowed SupportSoft to meet its  
17 earnings targets. No. 5 fails to provide any factual basis for his allegations that business was  
18 slowing or that the individual defendants were aware that sales had been slowing. He does not  
19 provide any detail regarding SupportSoft’s pipeline for the third quarter of 2004 or refer to any  
20  
21

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22                   (...continued from previous page)  
23 *Group, Inc. Sec. Litig.*, 184 F. Supp. 2d 991, 1000 (N.D. Cal. 2001) (allegation that “PSN  
24 constantly stalled and disputed their bills” is insufficient; “But at what time did they refuse?  
25 Which bills did they refuse to pay? How does the witness know?”). *See also Network Assoc.*,  
26 2000 WL 33376577, at \*13 (merely listing names of acquired companies, dates of acquisitions  
27 and asserting that defendants did not properly disclose acquisitions based on pooling method are  
28 insufficient); *In re Peritus Software Servs., Inc. Sec. Litig.*, 52 F. Supp. 2d 211, 222 n.3 & 226 (D.  
Mass. 1999) (dismissing notwithstanding restatement; allegation that defendants “‘back-dated  
several contracts signed in January 1998, including a contract with Zale Corporation’ fails to  
satisfy the requirement that ‘the particular times, dates, places, or other details’” be alleged)  
(citation omitted).

1 internal documents that would demonstrate that sales were declining.<sup>10</sup> Given that SupportSoft  
2 reported increasing revenue in subsequent quarters, his assertion that business was slowing – and  
3 that defendants “pushed” conversions because they knew this alleged slowing would impact the  
4 third quarter of 2004 – is not remotely plausible.

### 5 5. Defendants’ Alleged Admissions

6 In addition to their confidential sources, plaintiffs attempt to support their allegations  
7 with an alleged admission by Ms. Basu during the October 20, 2004 conference call discussing  
8 the third quarter financial results. ¶¶ 54-57. Plaintiffs allege that Ms. Basu admitted that  
9 SupportSoft’s business model had changed. They also allege that Ms. Basu admitted that  
10 defendants had the ability to determine whether a contract would be characterized as term or  
11 perpetual. A review of Ms. Basu’s actual statements establishes that plaintiffs have  
12 mischaracterized what was said. Their interpretation cannot supply the factual basis required for  
13 pleading securities fraud.

14 In particular, after discussing several factors which she believed contributed to the  
15 quarterly shortfall, Ms. Basu stated:

16 Then we look at things that were developing over the year that we  
17 got caught on or manifested itself in Q3 strongly. We have been  
18 moving from a turn [sic – should be “term”] to a perpetual model.  
19 Some of it is because existing customers renewed their term  
20 licenses, especially the ones that were particularly happy with us,  
21 renewed them on a perpetual basis and have contributed to this.  
22 However, at a business model level, this goes against the  
23 fundamentals of the company going back five years when we  
24 pioneered the term “License Model” in the very early stages in –  
25 of the company, and emphasize the criticality of the models for  
26 carry forward for overall business visibility. This company has to  
27 get back to at least 50% of our business coming from the term  
28 model. We cannot have term licenses revenue go up and down.  
Now is the time to start rebuilding our term license revenue, the  
visibility, the backlog, everything that until Q3 was very strong  
going forward.

¶ 54.

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<sup>10</sup> *Cf. Portal*, 2005 WL 1910923, at \*11 (witness’s allegation that defendant recognized \$5 million prematurely “is unconnected to identified customers or dates, much less a specific  
(continued...)”)

1 According to plaintiffs, by making this statement, Ms. Basu admitted that SupportSoft's  
2 statement in its Form 10-Q that the shift from term to perpetual contracts was the result of  
3 customers' choosing to enter into perpetual licenses was false. They contend that she was  
4 effectively stating that the shift was the result of a change in SupportSoft's business model. A  
5 plain reading, however, belies this interpretation as Ms. Basu was merely acknowledging the  
6 existence of the previously disclosed trend, as well as its previously disclosed impact on  
7 SupportSoft's visibility into future results.

8 Plaintiffs also allege that Ms. Basu's statements suggested that the shift related to new  
9 customers, rather than disclosing that SupportSoft was asking existing customers to convert. ¶  
10 56. Yet, SupportSoft's own disclosure disposes of this contention since it stated that the shift  
11 was a result of *both* new customers and existing customers. Ex. B at 25 (disclosing that the  
12 decline in ratable licenses was related to "new customer electing to purchase perpetual licenses  
13 as well as existing customers who initially licensed our software on a term license basis  
14 choosing, at or near end of the initial term, to renew their licenses under a perpetual license  
15 basis.").

16 In sum, plaintiffs' interpretation of Ms. Basu's after-the-fact statements is no substitute  
17 for particularized factual allegations which would support a claim for securities fraud.<sup>11</sup>

18 **B. Plaintiffs Fail To Allege Facts To Support Their Assertion That SupportSoft**  
19 **Was Experiencing Execution Difficulties**

20 Plaintiffs allege that statements regarding SupportSoft's market and technology  
21 leadership and "crisp execution" were false because SupportSoft was experiencing "execution  
22  
23

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24 (...continued from previous page)  
25 quarterly report against which to assess its materiality").

26 <sup>11</sup> *In re Advanta, Corp.*, [1998 Tr. Binder] Fed. Sec. L. Rep. (CCH) ¶ 90,243, at 91,062 (E.D.  
27 Pa. July 9, 1998) ("Advanta's after the fact statements recognizing the causes of its first quarter  
28 losses do not constitute a basis for charging defendants with prior knowledge. Courts have  
uniformly rejected such attempts to plead fraud by hindsight..."), *aff'd*, 180 F.3d 525 (3d Cir.  
1999).

1 difficulties.” ¶ 35.<sup>12</sup> To support this assertion, plaintiffs once again rely on confidential source  
2 No. 2, the alleged former systems architect who claimed that customers were finding  
3 SupportSoft’s software problematic and incapable of performing the promised functions.  
4 Plaintiffs’ new allegations fail to meet the Reform Act’s pleading requirements.

5 Plaintiffs initially failed to allege confidential source No. 2’s dates of employment. Thus,  
6 it was not clear when he was employed at SupportSoft or when any of the alleged issues he  
7 identified occurred. The Court also found plaintiffs’ original allegations lacked an adequate  
8 “description of the types of problems faced by the Company with the implementation of its  
9 software,” as well as allegations regarding “when these problems occurred and whether the  
10 problems mentioned by the source contributed to the revenue shortfall in the third quarter of  
11 2004.” Order at 1. Not only do plaintiffs fail to cure these deficiencies, but also their Amended  
12 Complaint establishes that confidential source No. 2 is unreliable.

13 Plaintiffs now admit that confidential source No. 2 was employed at SupportSoft from  
14 2000 through the middle of 2003. ¶ 35. Thus, he left SupportSoft’s employ *over one year*  
15 *before* the quarterly shortfall occurred. Confidential source No. 2 could not have had personal  
16 knowledge of the reasons for the shortfall. Indeed, plaintiffs do not even attempt to link his  
17 allegations to the miss.

18 Plaintiffs mention one additional customer name (San Diego County), which allegedly  
19 complained that the software was not keeping track of the customer’s assets as promised.  
20 According to confidential source No. 2, he “had to try to alter the core code of the software to try  
21 to get it to perform the promised functions.” ¶ 35. He does not allege when this complaint was  
22 lodged, when the issue was resolved, or whether the alleged problem impacted SupportSoft’s  
23 financial results during the Class Period.<sup>13</sup>

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24  
25 <sup>12</sup> Plaintiffs also allege that SupportSoft’s statements were false when made because “1) its  
26 business model was in fact not materially differentiated from other enterprise software  
27 companies; [and] 2) its customers were implementing additional hurdles to contract approval.”  
The Amended Complaint, however, contains no allegations to support these assertions.

28 <sup>13</sup> See *Ronconi v. Larkin*, 253 F.3d 423, 434 (9th Cir. 2001) (“A company could experience . . .  
. ‘difficult problems’ and still have increasing revenues. . . . Plaintiffs’ complaint was required  
(continued...)”)



1 With respect to one previously identified customer (Chase Manhattan), confidential  
2 source No. 2 now alleges that SupportSoft represented its software could be deployed remotely  
3 and installed for 30,000 customers over the Internet. He allegedly had to “spend hundreds of  
4 hours during the latter part of 2002 trying to change the software’s core programming because  
5 the product could not perform that function.” ¶ 35. Nowhere do plaintiffs explain how problems  
6 experienced in late 2002 could have impacted financial results issued two years later. No. 2 does  
7 not add any detail with respect to the other two customers previously identified.<sup>14</sup>

8 In sum, plaintiffs fail to allege with the requisite particularity that any of SupportSoft’s  
9 revenue results or their projections – were false when made.

### 10 **III. PLAINTIFFS FAIL TO SATISFY THE REFORM ACT’S HEIGHTENED** 11 **PLEADING REQUIREMENTS FOR SCIENTER**

12 The Reform Act requires plaintiffs to “state with particularity facts giving rise to a strong  
13 inference that the defendant acted with the required state of mind.” 15 U.S.C. § 78u-4(b)(2).  
14 With respect to defendants’ statements of historical fact, plaintiffs are required to plead facts  
15 raising a strong inference that defendants knew, or were deliberately reckless in not knowing,  
16 that the statements were false or misleading.<sup>15</sup> With respect to defendants’ forward-looking  
17  
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19

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20 (...continued from previous page)  
21 to allege specific facts that show how these ‘problems’ and ‘difficulties’ translated into  
22 decreasing revenues.”); *In re Juniper Networks, Inc. Sec. Litig.*, Nos. 3:02-CV-01221, C 02-0749  
23 SI, 2004 WL 547607, at \*3 (N.D. Cal. Mar. 11, 2004) (allegations of false forecasts insufficient  
24 where plaintiffs failed to “plead specific facts demonstrating how the problems being  
25 experienced translated into the need for Juniper to alter or reduce its publicly issued  
26 projections”); *see also Ronconi*, 253 F.3d at 432 (complaint failed to state what alleged  
27 “significant” or “difficult” problems were, what kind of inefficiencies existed, or how they  
28 showed that two companies were not consolidated).

<sup>14</sup> Plaintiffs also allege that Confidential Source No. 4 corroborates Confidential Source No.  
2’s assertions. This individual’s account is, however, equally conclusory, amounting only to the  
allegation that, when customers complained, SupportSoft would send technical people out to fix  
the problem. ¶ 47.

<sup>15</sup> *Ronconi*, 253 F.3d at 430-31; *Syncor Int’l*, 327 F. Supp. 2d at 1167; *Silicon Graphics*, 183  
F.3d at 983-84.

1 statements, especially SupportSoft's revenue projections for the third quarter of 2004, plaintiffs  
2 must plead that defendants actually knew that the projections were inaccurate when made.<sup>16</sup>

3 The Ninth Circuit has explained that an inference of scienter is not "strong" if the court  
4 can draw an equally reasonable inference of innocence from the same set of facts. *Gompper v.*  
5 *VISX, Inc.*, 298 F.3d 893, 897 (9th Cir. 2002). Because falsity and scienter "are generally  
6 strongly inferred from the same set of facts," the two requirements "may be combined into a  
7 unitary inquiry under the [Reform Act]." *In re Vantive Corp. Sec. Litig.*, 283 F.3d 1079, 1091  
8 (9th Cir. 2002).<sup>17</sup>

9 **A. Plaintiffs' Confidential Sources Do Not Raise A Strong Inference**

10 Here, plaintiffs attempt to plead scienter from the accounts of confidential source Nos. 4  
11 and 5. Yet, neither of these individuals supplies the "great detail" required to raise the required  
12 "strong" inference of deliberate intent.

13 No. 4 claims that defendants directed him to select customer contracts that could be  
14 converted from a "pool" of existing contracts and then offer the customers unspecified incentives  
15 to convert these contracts to perpetual licenses. No. 4 claims that defendants "recognized that  
16 this method of current booking of future revenue was a break from past practice and that they  
17 were 'eating' their booked contracts for current quarterly gain and, thereby, eroding their future  
18 income stream, but hoped the shortfall could be replenished with new contracts so that it would  
19 not be disclosed." ¶¶ 42-43. No. 5 claims that defendants rapidly "flipped" all remaining term  
20 licenses to perpetual in the first two quarters of 2004. He alleges that they "were aware that sales  
21 had been slowing during the first two quarters of 2004 and directed that the SupportSoft staff get  
22

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23  
24 <sup>16</sup> *Wietschner*, 294 F. Supp. 2d at 1115 ("For forward looking statements, the required state  
25 of mind is actual knowledge that the statement was false or misleading."); *Copper Mountain*, 311  
F. Supp. 2d at 867; *See also Portal*, 2005 WL 1910923, at \*13-14.

26 <sup>17</sup> Since a predicate for liability under Section 20(a) is a finding of primary liability under  
27 Section 10(b) of the "controlled person," the absence of a viable Section 10(b) claim against  
28 SupportSoft defeats plaintiffs' Section 20(a) claim. *Lipton v. Pathogenesis Corp.*, 284 F.3d 1027,  
1035 n.15 (9th Cir. 2002); *Heliotrope Gen., Inc. v. Ford Motor Co.*, 189 F.3d 971, 978 (9th Cir.  
1999).

1 ratable contract customers to convert,” knowing that flipping would “decrease future revenue  
2 and earnings.” ¶ 51.

3 Neither No. 4 nor No. 5 offers any facts that would demonstrate that defendants  
4 deliberately forced customers to convert their licenses to perpetual licenses. Nor do they offer  
5 any facts demonstrating that defendants actually knew, or were reckless in not knowing, that  
6 software license sales were declining such that the “push” to perpetual would directly impact  
7 SupportSoft’s third quarter of 2004.

8 **B. Plaintiffs’ Stock Sales Allegations Do Not Raise A Strong Inference**

9 Plaintiffs also fail to tie any of the alleged stock sales, most of which were executed well  
10 before the third quarter of 2004, to the alleged fraud. Thus, the stock sales fail to raise a strong  
11 inference of deliberate intent.

12 While plaintiffs allege the timing and amount of the sales (¶¶ 25, 27, 30-32, 65), they  
13 again fail to allege the percentage of shares sold or any information regarding defendants Mr.  
14 Beattie or Ms. Basu’s trading history. As such, the allegations do not give rise to a strong  
15 inference of scienter.<sup>18</sup>

16 Plaintiffs’ failure to include an analysis of Ms. Basu’s and Mr. Beattie’s stock sales is not  
17 surprising. First, the timing of the sales was not suspicious. While plaintiffs claim that  
18 defendants sold shares only after earnings announcements (¶¶ 25, 27, 30, 31), courts routinely  
19 hold that there is nothing suspicious about this practice.<sup>19</sup> Moreover, the bulk of the sales were  
20 well before SupportSoft issued its guidance for the third quarter of 2004 and during a period  
21 when SupportSoft’s stock price was declining. Ex. P. This fact weighs heavily against any  
22  
23  
24

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25 <sup>18</sup> *Copper Mountain*, 311 F. Supp. 2d at 874 (“because [] complaint does not contain detailed  
26 information concerning [defendants’] trading practices before the class period, any allegations of  
scienter based on such sales are weak.”).

27 <sup>19</sup> *See, e.g. Vantive*, 110 F. Supp. 2d at 1219 (finding sales not suspicious where “virtually all  
28 the shares were sold *after* an earnings announcement”).

1 theory that SupportSoft issued false guidance to inflate the stock so the insiders could sell off  
2 their shares at a profit.<sup>20</sup>

3 Second, the amount of sales was not suspicious. Over the course of the Class Period, Ms.  
4 Basu sold only 14.9% of her holdings, and Mr. Beattie sold only 31.2% of his holdings. Exs. K-  
5 O; Magen Decl., ¶¶ 16,19; ¶¶ 25, 27, 30, 31. These percentages are not suspicious and do not  
6 create a strong inference of scienter.<sup>21</sup> Moreover, the percentages drop significantly if the Class  
7 Period began on July 20, 2004 – the date when SupportSoft first issued its third quarter guidance  
8 – instead of January 20, 2004. Numerous courts have recognized plaintiffs’ tactic of  
9 unnecessarily lengthening class periods to sweep in as many stock sales as possible.<sup>22</sup> If the  
10 Class Period here began on July 20, 2004, Ms. Basu’s stock sales would have only amounted to  
11 5.8% of her holdings, and Mr. Beattie’s, only 14.6%. Exs. K-O; Magen Decl., ¶¶ 17, 20; ¶¶ 25,  
12 27, 30, 31. Such sales cannot support a strong inference of scienter as a matter of law. *Silicon*  
13 *Graphics*, 183 F.3d at 987.

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20  
21 <sup>20</sup> *Copper Mountain*, 311 F. Supp. 2d at 874-75 (stock sales not suspicious where bulk of sales took place early in the class period and were not calculated to maximize the stock’s value).

22 <sup>21</sup> See, e.g., *Copper Mountain*, 311 F. Supp. 2d at 875-76 (sales of 21% and 50% “are not  
23 enough to make the trading activity suspicious”); *In re ESS Tech., Inc. Sec. Litig.*, No. C-02-  
24 04497 RMW, 2004 WL 3030058, at \*10-11 (N.D. Cal. Dec. 1, 2004) (sales of 29% and 22% did  
25 not support strong inference of scienter); *Vantive*, 110 F. Supp. 2d at 1219-20 (aggregate sales of  
26 38% of holdings not suspicious, nor were individual sales as high as 74% of holdings); *Silicon*  
27 *Graphics*, 183 F.3d at 987 (sales as high as 43.6% and 75.3% not suspicious).

28 <sup>22</sup> See, e.g., *Vantive*, 283 F.3d at 1092 (noting plaintiffs’ selection of long class period “is not  
because the allegations found elsewhere in the complaint support an inference of fraud  
throughout the class period, but because lengthening the class period has allowed the plaintiffs to  
sweep as many stock sales into their totals as possible, thereby making the stock sales appear  
more suspicious than they would be with a shorter class period.”); *In re Keyspan Corp. Sec.*  
*Litig.*, No. 01 CV 5852 (ARR), 2003 WL 1702279, at \*20 (E.D.N.Y. Mar. 21, 2003) (same).

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**CONCLUSION**

Plaintiffs’ claim is essentially that defendants should have disclosed that they were “pushing” customers to convert to perpetual licenses, rather than what they did disclose, namely that customers were entering into more perpetual licensing arrangements. The securities laws, however, do not require defendants to use plaintiffs' choice of descriptive language. The laws only require the disclosure of material facts. Absent particularized allegations demonstrating that defendants failed to disclose material facts concerning SupportSoft's business, the Amended Complaint fails to state a claim. For each of the foregoing reasons, defendants respectfully request that plaintiffs’ Amended Complaint be dismissed with prejudice.

Dated: September 23, 2005

WILSON SONSINI GOODRICH & ROSATI  
Professional Corporation

By: /s/Boris Feldman  
Boris Feldman

Attorneys for Defendants SupportSoft, Inc.,  
Radha R. Basu, and Brian M. Beattie

I, Peri Nielsen, am the ECF User whose identification and password are being used to file this Notice of Motion and Motion to Dismiss the Amended Consolidated Class Action Complaint; Memo in Support Thereof. In compliance with General Order 45.X.B, I hereby attest that Boris Feldman has concurred in this filing.

Dated: September 23, 2005

WILSON SONSINI GOODRICH & ROSATI  
Professional Corporation

By: /s/ Peri Nielsen  
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