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16 **UNITED STATES DISTRICT COURT**
17 **NORTHERN DISTRICT OF CALIFORNIA**

18 In re SUPPORTSOFT, INC. SECURITIES) Civil Action No.: C 04-5222 SI
LITIGATION) CLASS ACTION
19)
20) **PLAINTIFF'S MEMORANDUM OF LAW**
_____) **SUPPORTING THE PARTIES' JOINT**
21 This document relates to:) **MOTION FOR PRELIMINARY**
22 ALL ACTIONS) **APPROVAL OF SETTLEMENT**
23)
24) Date: July 13, 2007
Time: 9:00 am
Place: Courtroom 10
25)
Before: Honorable Susan Illston

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INTRODUCTION

The Parties to this Class Action Litigation have submitted a Joint Motion for Preliminary Approval of a Class Action Settlement (the “Motion”) for \$10.7 million on the terms set forth in the Settlement Agreement dated June 13, 2007 (the “Settlement”), which is being filed with the Court contemporaneously with the Motion. Plaintiff and Certified Class Representative Scott Roland (“Plaintiff”) submits this Memorandum of Law in Support of the Motion, and respectfully requests that the Court (1) grant preliminary approval of the Settlement; (2) direct the dissemination of notice to the members of the Class; and (3) schedule a hearing to consider whether to grant final judicial approval of the Settlement.

FACTUAL BACKGROUND

A. The Pleadings

In December of 2004, several suits were filed on behalf of a class of persons who purchased publicly-traded shares of SupportSoft securities (“Shares”): *Autumn Partners LLC. v. SupportSoft, Inc., et al.*, Case No. C-04-5222 SI; *Lane v. SupportSoft, Inc., et al.*, Case No. C - 04-5319 CRB; *Bray v. SupportSoft, Inc., et al.*, Case No. C-05-0080; CRB; *Halpren v. SupportSoft, Inc., et al.*, Case No. C-05-0283 MHP, and *Parent v. SupportSoft, Inc., et al.*, Case No. C-05-0310 PJH. By Order dated March 16, 2005, the Court consolidated all of the pending actions and, by Order dated March 21, 2005, appointed Scott Roland and Jay Young as Lead Plaintiffs. The Court also appointed the law firms now known as Labaton Sucharow & Rudoff LLP and Schatz Nobel IZard, P.C. to serve as Lead Counsel for the class, and the firm of Glancy, Binkow and Goldberg LLP to serve as Liaison Counsel.

In accordance with the Court’s Order, Lead Plaintiffs filed a Consolidated Complaint on April 20, 2005. The Consolidated Complaint alleged that SupportSoft, its then-CEO and CFO, Radha Basu and Brian Beattie (collectively, the “Defendants”), violated federal securities laws during the period from January 20, 2004 to October 1, 2004 (the “Class Period”) by making false or misleading statements about the reasons for SupportSoft’s record revenues, resulting in the artificial inflation of the price of SupportSoft common stock. The Consolidated Complaint also alleged that investors who purchased SupportSoft’s common stock during that period were

1 injured when the misleading nature of Defendant's statements was revealed and the price of the
2 stock dropped. Defendants responded to this filing by moving to dismiss the Consolidated
3 Complaint. After briefing and argument, the Court granted Defendants' motion without
4 prejudice on July 15, 2005.

5 Lead Plaintiffs filed an Amended Consolidated Complaint, followed shortly thereafter by
6 a Corrected Amended Consolidated Complaint (hereinafter, the "Complaint"), on August 23,
7 2005. Defendants filed a second motion to dismiss, which the Court denied after briefing and
8 argument on November 21, 2005. Following this ruling, Defendants filed an answer denying
9 liability, and the parties submitted a proposed scheduling order to the Court. Discovery, which
10 had been stayed up until that point by the provisions of the Private Securities Litigation Reform
11 Act (the "PSLRA"), commenced.

12 **B. Class Certification, Discovery and Mediation**

13 Lead Plaintiffs filed a Motion for Class Certification on February 1, 2006. Defendants
14 sent the lead plaintiffs interrogatories and requests for documents, and followed these with
15 notices of deposition. Lead Plaintiff Roland was deposed on March 30, 2006. Due to a flare-up
16 of diabetes, Lead Plaintiff Young was unable to be deposed, and withdrew his petition to be
17 certified as a Class Representative. The parties then stipulated to Class Certification. On June 1,
18 2006, the Court certified the Class, appointed Roland as the Class Representative, and confirmed
19 Labaton Sucharow & Rudoff LLP and Schatz Nobel IZard, P.C. as Class Counsel and Glancy,
20 Binkow and Goldberg LLP as Liaison Counsel.

21 Following the entry of the order certifying the Class, a Notice of Pendency in the form
22 approved by the Court was mailed to all holders of SupportSoft common stock during the Class
23 Period. Nominees were instructed to forward the Notice of Pendency to beneficial owners. In
24 addition, a Summary Notice of Pendency, in the form approved by the Court, was published on
25 the Prime Zone business wire on July 21, 2006. The Notice of Pendency provided Class
26 Members with a description of the claims asserted in the Class Action and the opportunity to
27 request exclusion (opt-out) from the Class if they so desired. Only one class member requested
28 exclusion, explaining that he was the former treasurer and designated spokesperson for an

1 investment club that had owned 100 shares of SupportSoft stock, but that had liquidated all of its
2 holdings and been dissolved. Pursuant to the form of Notice of Pendency approved by the Court,
3 the deadline for Class Members to request exclusion was September 8, 2006. Other than the one
4 exclusion request described above, no Class Member even attempted to request exclusion.

5 Following denial of the motion to dismiss the Complaint, Class Counsel served
6 comprehensive document production requests on Defendants. The parties were unable to reach
7 agreement on the scope of permissible discovery, however, leading to Plaintiff's filing of a
8 Motion to Compel on July 21, 2006. The Court granted this motion in large part on August 17,
9 2006. Beginning in the summer of 2006, and continuing on a rolling basis until the spring of
10 2007, Defendants produced hundreds of thousands of pages of documents in response to these
11 discovery requests. Because of the volume of documents and because they were produced in
12 electronic format, Class Counsel arranged for a web hosting service and began detailed review
13 and analysis of the documents. Class counsel devoted substantial time and resources to this
14 effort.

15 The parties had an initial settlement conference on May 12, 2006. In September of 2006,
16 the parties agreed to attempt to mediate a settlement of the litigation, selecting former judge
17 Layn Phillips to serve as a mediator. The mediation was scheduled for January 9, 2007, at Judge
18 Phillips' office at Irell & Manella in Newport Beach, California. The parties submitted extensive
19 mediation statements in advance of the session in December of 2006. The mediation was
20 unsuccessful, however, and litigation continued. From February through May of 2007, Plaintiff
21 concentrated on completing their analysis of the documents that Defendants continued to
22 produce and obtaining discovery from clients of SupportSoft who either had changed existing
23 contracts with SupportSoft during the Class Period in such a way that revenue was accelerated
24 into earlier quarters, or had been engaged in negotiations with SupportSoft over similar changes.
25 Defendants also concentrated on this issue, scheduling depositions of key contacts employed by
26 their customers during the Class Period. Before these depositions were taken, the parties reached
27 an agreement in principle.
28

1 This agreement was the result of a second mediation session, held in New York on May
 2 16, 2007. Judge Phillips again served as mediator, and, as before, the parties submitted lengthy
 3 mediation statements with numerous exhibits culled from the mass of documents obtained
 4 through discovery or available publicly. The session lasted all day, involving extensive
 5 negotiations with the Defendants and two separate insurance carriers. At the end of the day, the
 6 mediator made a recommendation that the parties agree to a settlement of \$10.7 million. After
 7 final consultations with all affected parties (and with the insurance carriers), the parties agreed to
 8 this proposal. The Settlement and supporting papers were drafted and negotiated subsequent to
 9 this mediation session.

ARGUMENT

I. THE SETTLEMENT MERITS PRELIMINARY APPROVAL

12 Strong judicial policy favors settlement of class actions. *Class Plaintiffs v. City of Seattle*,
 13 955 F.2d 1268, 1276 (9th Cir. 1992); *West v. Circle K Stores, Inc.*, No. CIV. S-04-0438 WBS
 14 GGH, 2006 WL 1652598, at *1 (E.D. Cal. June 13, 2006). Settlements of complex cases such as
 15 this one greatly contribute to the efficient utilization of scarce judicial resources and achieve the
 16 speedy resolution of justice, for a “just result is often no more than an arbitrary point between
 17 competing notions of reasonableness.” *In re Corrugated Container Antitrust Litig.*, 659 F.2d
 18 1322, 1325 (5th Cir. 1981).

19 Approval of class action settlements normally proceeds in two stages: preliminary
 20 approval, followed by notice to the class, and then final approval. *See, e.g., West*, 2006 WL
 21 1652598, at *2. This case is now at the first stage of the process. Standards governing whether
 22 preliminary approval should be granted have “both a procedural and a substantive component.”
 23 *Young v. Polo Retail, LLC*, No. C-02-4546 VRW, 2006 WL 3050861, at *5 (N.D. Cal. Oct. 25,
 24 2006). As the *Young* court explained,

25 “[i]f the proposed settlement appears to be the product of serious,
 26 informed, non-collusive negotiations, has no obvious deficiencies,
 27 does not improperly grant preferential treatment to class
 28 representatives or segments of the class, and falls within the range
 of possible approval, then the court should direct that the notice be
 given to the class members of a formal fairness hearing”
 Manual for Complex Litigation, Second § 30.44 (1985). In

1 addition, “[t]he court may find that the settlement proposal
2 contains some merit, is within the range of reasonableness required
3 for a settlement offer, or is presumptively valid.” Newberg on
4 Class Actions § 11.25 (1992).

5 *Id.*; see also *Satchell v. Federal Express Corp.*, Nos. C03-2659 SI, C 03-2878 SI, 2007 WL
6 1114010, *4 (N.D. Cal. April 13, 2007) (granting preliminary approval after finding proposed
7 settlement was non-collusive, had no obvious defects and was within the range of possible
8 settlement approval). Applying the standards set forth above, the Settlement should be
9 preliminarily approved.

10 **A. The Settlement Is the Result of a Thorough, Rigorous and Adversarial Process**

11 This Court is familiar with the procedural history of this case – a history which clearly
12 demonstrates an arm’s-length, adversarial relationship between the parties. The suit was filed
13 two and a half years ago. The Parties litigated two comprehensive motions to dismiss, through
14 which Plaintiff was ultimately successful in demonstrating the sufficiency of the allegations in
15 the Complaint. Plaintiff also engaged in exhaustive discovery, reviewed hundreds of thousands
16 of pages of documents, briefed and filed a motion for Class Certification, engaged an expert on
17 damages and obtained a preliminary report from him, before agreeing to the Settlement.
18 Defendants also engaged a damages consultant who, perhaps not surprisingly, arrived at a very
19 different conclusion about the damages attributable to the claims alleged by Plaintiff.

20 The process of the mediations between the parties also demonstrates that the Settlement
21 was hard-fought and negotiated at arm’s length. The mediation sessions were facilitated by an
22 experienced mediator and former federal judge who has considerable knowledge and expertise in
23 the field of federal securities law. As this Court has found, “[t]he assistance of an experienced
24 mediator in the settlement process confirms that the settlement is non-collusive.” *Satchell*, 2007
25 WL 1114010 at *4; see also *In re Indep. Energy Holdings PLC*, No. 00 Civ. 6689 (SAS) 2003
26 WL 22244676, at *4 (S.D.N.Y. Sept. 29, 2003) (“the fact that the Settlement was reached after
27 exhaustive arm's-length negotiations, with the assistance of a private mediator experienced in
28 complex litigation, is further proof that it is fair and reasonable”). This presumption is
particularly apt where, as here, the ultimate settlement amount is based on the mediator’s

1 recommendation. In addition, the fact that the initial mediation session in January was
2 unsuccessful, leading to further discovery and litigation, supports the inference that the
3 Settlement is the product of arm's-length negotiations. *See, e.g., Hicks v. Stanley*, No. 01 Civ.
4 10071(RJH), 2005 WL 2757792, at *5 (S.D.N.Y. Oct. 24, 2005) (“[a] breakdown in settlement
5 negotiations can tend to display the negotiation's arms-length and non-collusive nature.”).

6 **B. Class Members Should Be Given Notice and Opportunity to Be Heard**
7 **Concerning the Terms of the Settlement**

8 “[A]t this preliminary approval stage, the court need only ‘determine whether the
9 proposed settlement is within the range of possible approval.’” *West*, 2006 WL 1652598, at *11
10 (citation omitted.) This Settlement, which obligates Defendants to pay \$10.7 million, clearly is
11 within such a range, and thus merits consideration by all of the members of the Class. It is
12 difficult to compare the Settlement to the amount that the Class might have obtained if it had
13 been completely successful in establishing liability at trial, because the parties hotly debated the
14 proper methodologies for computing damages. However, the Settlement represents
15 approximately 10 percent of Plaintiff’s “best case” damages scenario, and Plaintiffs’ other
16 scenarios would result in sharply reduced recoveries. The Settlement amount substantially
17 exceeds Defendants’ damages calculation.

18 The fairness and adequacy of the Settlement is further underscored by taking into account
19 the obstacles the Class faced in ultimately succeeding on the merits, as well as the expense and
20 likely duration of the litigation. *See Churchill Village, L.L.C. v. General Electric*, 361 F.3d 566,
21 576 (9th Cir. 2004) (citing risk, expense, complexity, and likely duration of further litigation as
22 factors supporting final approval of settlement).

23 Plaintiff believes that he could establish that Defendants made statements about the
24 reasons for their record revenues during the Class Period that they knew to be misleading, based
25 on their knowledge that a significant portion of these revenues came from accelerating revenue
26 from existing contracts into quarters when it was needed. The most important mechanism used
27 to accelerate revenue was the conversion of existing “term” license contracts (licenses for
28 software use with periodic payments over a term, typically three years, after which they had to be

1 renewed) to “perpetual” license contracts where recognition of the license revenue is front-
2 loaded and no renewal is required.

3 Defendants, however, contended there was evidence to support several arguments that
4 might blunt the impact of Plaintiff’s claims in the eyes of a jury: for example, evidence that
5 Defendants disclosed a shift from term licenses to perpetual licenses. Moreover, Defendants
6 argued that there was evidence that the market was aware of the size and general content of
7 several of the key conversion deals, and was aware that SupportSoft would not have made its
8 quarterly numbers without those deals. Thus, there was a risk that a jury might not find that the
9 information which was omitted was both material and misleading. Furthermore, as noted above,
10 the parties’ damages experts differed dramatically in their views of the appropriate method for
11 calculating damages and in the resulting damage amount. Accordingly, Class Counsel
12 recognized the risk that a jury might not find liability, or, finding it, might substantially reduce
13 the amount of damages sought by the Plaintiff.

14 Regardless of who was successful at trial, there is no doubt that the case both sides would
15 have to present would be both complex and nuanced, and would include a “battle of the experts”
16 on the arcana of damages calculation, accounting methodology and securities disclosure
17 requirements. The results of the trial would almost certainly not end the litigation, as one side
18 would certainly appeal, and it is quite possible that both sides would do so in the event that the
19 jury found for the Plaintiff but substantially reduced the damages sought. Thus, although the
20 parties have already engaged in protracted litigation, in the absence of a settlement, class
21 members would have to wait substantially longer before they obtained any relief, even assuming
22 they were successful and overcame every obstacle. As one district court recently noted, “the
23 difficulty Plaintiffs would encounter in proving their claims, the substantial litigation expenses,
24 and a possible delay in recovery due to the appellate process, provide justifications for this
25 Court’s approval of the proposed Settlement.” *In re Broadwing ERISA Litig.*, No. 1:02-cv-
26 00857, 2006 WL 3831382, 39 Employee Benefits Cas. 1735, 1737 (S.D. Ohio Oct. 5, 2006).

1 **C. An Additional Opportunity to Request Exclusion Should Not Be Required**

2 The Class in the case was certified in June of 2006. At that time, Plaintiff sent out
3 notices to the Class, apprising them of the litigation and providing an opportunity to opt out of
4 the Class. The Court approved the form and content of the Notice. Plaintiff received only one
5 request for exclusion, by an informal investment group which had ceased all operations. The
6 parties are not aware of any class member that is pursuing a private action alleging the claims
7 asserted herein and would, therefore, need to opt-out in order to continue to pursue those claims.
8 It seems unlikely, therefore, that a second opt-out period would produce any significant benefit
9 for the Class. Accordingly, the parties have not provided for a second opt-out opportunity.

10 Federal Rule 23(e)(3) provides, “in an action previously certified as a class action under
11 Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to
12 request exclusion to individual class members” However, as the *Enron* court noted,

13 the use of “may” in the Rule and the accompanying Advisory
14 Committee note (“The decision whether to approve a settlement
15 that does not allow a new opportunity to elect exclusion is
16 confided to the court's discretion”) make clear that rejection
17 of a settlement that does not provide a last opportunity to opt out is
18 not mandated.

19 *In re Enron Corp. Sec., Derivative and “ERISA” Litig.*, No. H-0103624, 2006 WL 1663737, at
20 *1 n.2 (S.D.Tex.. June 14, 2006).

21 Where, as here, a proposed settlement is negotiated at arm’s length after substantial
22 litigation, and is fair, adequate and reasonable, a second opt-out period is not required by either
23 Rule 23(e)(3) or due process. *See, e.g., In re Lloyd's Am. Trust Fund Litig.*, No. 96 Civ. 1262
24 RWS, 2002 WL 31663577, at *12 (S.D.N.Y. Nov. 26, 2002) (“Due process requires only that
25 Class Members have notice of the proposed settlement and an opportunity to be heard at a
26 fairness hearing. If the proposed settlement is fair, adequate and reasonable, due process does
27 not afford Class Members a second opportunity to opt out.”) (Citations omitted.) *See also In re*
28 *Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 518 n.18 (E.D.N.Y. 2003)
 (“[Objectors] requested that Class members be given a second opportunity [under the new Rule
 23(e)(3), which had taken effect eighteen days prior to the court's decision] to opt out of the

1 Class now that the Settlements' terms are known. Because I have approved these Settlements as
2 fair, however, due process does not afford Class members a second opportunity to opt out.”
3 (Citation omitted).

4 **II. THE PROPOSED SETTLEMENT NOTICE SATISFIES RULES 23(d) and (e)**
5 **AND DUE PROCESS REQUIREMENTS**

6 Class Counsel propose that mailed and published notice be given in the form of the
7 Notice and Summary Notice, attached as Exhibits A-1 and A-3 to the proposed Preliminary
8 Approval Order. Notice to the Class in the form and in the manner set forth in the proposed
9 Preliminary Approval Order will fulfill any requirements of due process that may apply, comply
10 with the Federal Rules of Civil Procedure, and alert and inform Class Members of the Settlement
11 and their opportunity to appear and be heard at the Fairness Hearing.

12 Notice must be “reasonably calculated, under all the circumstances, to apprise interested
13 parties of the pendency of the action and afford them an opportunity to present their objections.”
14 *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (citations omitted);
15 *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1352 (9th Cir. 1980). Plaintiff here
16 proposes to give interested parties notice in two ways: by first-class mail, addressed to all class
17 members who can reasonably be identified and located, and by publication notice in *Investors*
18 *Business Daily* and on a business wire service.

19 The form and substance of the notice are also sufficient. “Notice is satisfactory if it
20 ‘generally describes the terms of the settlement in sufficient detail to alert those with adverse
21 viewpoints to investigate and to come forward and be heard.’” *Churchill Village*, 361 F.3d at 575
22 (quoting *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d at 1352). The proposed forms of Class
23 Notice describe in plain English the terms and operation of the Settlement, the considerations
24 that caused Lead Counsel to conclude that the Settlement is fair and adequate, the maximum
25 counsel fees and expenses that may be sought, the procedure for objecting to the Settlement and
26 the date and place of the Fairness Hearing. The notices will, when mailed and published as
27 suggested, fairly apprise Class Members of the Settlement and their options with respect thereto,
28 and fully satisfy any other due process requirements.

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CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that the Court (1) grant preliminary approval of the Settlement; (2) direct the dissemination of notice to the members of the Class; and (3) set a date by which any objections must be filed, and schedule a hearing to consider whether to grant final judicial approval of the Settlement.

Dated: June 27, 2007

/s/ Mark P. Kindall

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