

# **EXHIBIT H**

**In The Matter Of:**

***THE SCO GROUP, INC., v.  
INTERNATIONAL BUSINESS MACHINES CORPORATION***

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**DAVID P. RODGERS**

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**RODGERS, DAVID P.**



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1 that you executed standard form agreements used by AT&T  
 2 Technologies.  
 3 A. Yes. AT&T provided a document, and -- which  
 4 is the document that's here under Tab 1, and they  
 5 represented it as the form that they used routinely with  
 6 all of their customers, all of their partners, to  
 7 provide access to the source code.  
 8 Q. Did anyone from AT&T at any point ever  
 9 communicate to you that they intended to treat their  
 10 licensees for Unix System V the same way?  
 11 MR. HEISE: Objection to form.  
 12 You may answer.  
 13 THE WITNESS: I don't recall that particular  
 14 content.  
 15 MR. KAO: Q. Turning now to paragraph 7 of  
 16 your declaration, can you read paragraph 7 --  
 17 A. Yes.  
 18 Q. -- for me, please.  
 19 A. "Section 2.01 of the Software Agreement  
 20 states that Sequent's right to use includes  
 21 the right to modify such SOFTWARE PRODUCT and  
 22 to prepare derivative works based on such  
 23 SOFTWARE PRODUCT, providing that the  
 24 resulting materials are treated hereunder as  
 25 part of the original SOFTWARE PRODUCT.' I

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1 did not understand this language to give AT&T  
 2 Technologies the right to assert ownership or  
 3 control over modifications or derivative  
 4 works prepared by Sequent, except to the  
 5 extent that the licensed Unix software  
 6 product was included in such modifications or  
 7 derivative works. I would never have signed  
 8 an agreement that would grant ownership or  
 9 control to AT&T Technologies over  
 10 modifications or derivative works prepared by  
 11 Sequent to the extent those modifications or  
 12 derivative works contained no part of the  
 13 Unix software product licensed from AT&T  
 14 Technologies."  
 15 Q. Are the statements that you make in  
 16 paragraph 7 of your declaration true and accurate?  
 17 A. They are.  
 18 Q. Can you -- well, first, let's look at the  
 19 document behind Tab 1, at the software agreement.  
 20 A. Yes.  
 21 Q. Is the language that you read from in your  
 22 declaration contained in Section 2.01 of this agreement  
 23 that's attached as Tab 1?  
 24 A. Yes, it is.  
 25 Q. And can you explain to me -- well, strike

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1 that.  
 2 You state that you did not understand this  
 3 language to give AT&T Technologies the right to assert  
 4 ownership or control over modifications or derivative  
 5 works prepared by Sequent, except to the extent that the  
 6 licensed Unix software product was included in such  
 7 modifications or derivative works.  
 8 Do you see that?  
 9 MR. HEISE: Objection; form.  
 10 You may answer.  
 11 MR. KAO: Q. Do you see that in your  
 12 declaration?  
 13 A. Yes, I do see that.  
 14 Q. Can you explain to me what you mean by that?  
 15 A. It would have been foolish of me, as an  
 16 officer of a venture finance start-up company, to give  
 17 away the rights to the company's core products in  
 18 perpetuity. I mean, I certainly would not have done  
 19 that. So my understanding -- and this was confirmed in  
 20 some phone calls -- my understanding was that what AT&T  
 21 wanted to hold private was their contribution, their  
 22 source code contribution, and that that work which had  
 23 already been created by Sequent and any work that in the  
 24 future was created by Sequent, not based upon that  
 25 source code, remained the property of Sequent.

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1 Q. Did you understand Section 2.01 of the  
 2 software agreement to impose any restrictions on  
 3 Sequent's use of code that Sequent developed on its own?  
 4 A. No, I did not.  
 5 Q. Even if that code was contained in a Dynix  
 6 product that had Unix System V code in it?  
 7 MR. HEISE: Objection to form.  
 8 You may answer.  
 9 THE WITNESS: Yes. My understanding of the  
 10 license is that the Unix System V code had to be  
 11 maintained as the AT&T private property and withheld  
 12 from disclosure but, if there were other elements of the  
 13 software product created by Sequent, that those were  
 14 Sequent's to dispose of as it chose.  
 15 MR. KAO: Q. If you can turn to page 4 of  
 16 your declaration, I'll have you read paragraph 8 of your  
 17 declaration, if you could. I guess, for the court  
 18 reporter's benefit and for the jury's benefit, if you  
 19 could take your time and read it slowly.  
 20 A. Certainly.  
 21 "As I understood the Software Agreement  
 22 between Sequent and AT&T Technologies,  
 23 Sequent was free to use, copy, distribute or  
 24 disclose any modifications or derivative  
 25 works developed by Sequent, provided that it

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1 did not copy, distribute or disclose any  
 2 portion of the licensed Unix software product  
 3 source code (except as otherwise permitted by  
 4 the licensing agreements)."  
 5 Q. Are the statements that you make in  
 6 paragraph 8 of your declaration --  
 7 A. They are.  
 8 Q. -- true and accurate?  
 9 And can you tell me what you base your  
 10 understanding of the software agreement on?  
 11 A. A combination of reading of the document and  
 12 conversations with my staff and the AT&T parties to the  
 13 agreement.  
 14 Q. And when you say "my staff," can you --  
 15 A. Principally, Roger Swanson and Bob Beck and  
 16 others.  
 17 Q. And is that the understanding you had when you  
 18 executed these agreements?  
 19 A. Yes, it is.  
 20 Q. I'll ask you to now read paragraph 9 into the  
 21 record, if you could. Take your time.  
 22 A. "It is my understanding that Sequent's  
 23 Dynix products might include some small parts  
 24 of the licensed Unix System V source code,  
 25 although I don't [sic] personally know

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1 whether it does or not. I also do not know  
 2 whether Dynix is so similar to Unix System V  
 3 that it may be" -- "may properly be viewed as  
 4 a 'derivative work' based on Unix System V,  
 5 particularly in light of the fact that Dynix  
 6 was originally created using Berkeley  
 7 Software Design" -- parenthetically --  
 8 "(BSD) Unix as a base and not AT&T  
 9 Technologies' Unix System V. In any event,  
 10 as I understood the Sequent Agreements,  
 11 Sequent was free to use, copy, distribute, or  
 12 disclose Dynix (including source code),  
 13 provided that it did not copy, distribute or  
 14 disclose any Unix System V source code that  
 15 might be contained therein (except as  
 16 otherwise permitted by the licensing  
 17 agreements)."  
 18 Q. Mr. Rodgers, are the statements that you make  
 19 in paragraph 9 of your declaration true and accurate?  
 20 A. Yes, they are.  
 21 Q. Now, in paragraph 9 you discuss the fact  
 22 that -- well, strike that.  
 23 Do you know -- do you have any personal  
 24 knowledge as to what Unix System V code is contained in  
 25 Dynix?

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1 A. I do not.  
 2 Q. Do you have any personal knowledge as to what  
 3 BSD Unix code is contained in Dynix?  
 4 A. A substantial portion, but I couldn't claim to  
 5 know what proportion.  
 6 Q. What is your understanding of what the term  
 7 "derivative work" means?  
 8 A. A derivative work is something that contains  
 9 all or part of some other piece of work.  
 10 Q. Do you have an understanding of what the term  
 11 "modifications" mean?  
 12 A. "Modifications" means either an augmentation,  
 13 meaning an additional function, or a change to  
 14 accommodate some other factor.  
 15 Q. And by "augmentation," do you mean adding --  
 16 well, how do you augment something?  
 17 MR. HEISE: Objection; form.  
 18 You may answer.  
 19 MR. KAO: Q. You could answer.  
 20 A. "Augmentation" means an additional function.  
 21 If I can use an example, based on the earlier  
 22 description, the Unix operating environment, as  
 23 conceived both by Berkeley and by AT&T, had no notion of  
 24 multiple processors and the need to preserve the content  
 25 of a cache memory system in order to improve

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1 performance. So an augmentation that exists in Dynix is  
 2 so-called processor affinity. It's the ability of a  
 3 program to say: I would like to continue running on the  
 4 processor that I was running on before so that I can  
 5 preserve those dynamic memory contents and, as a result,  
 6 operate at a higher speed.  
 7 So an augmentation that exists in Dynix is  
 8 processor affinity. It's a system call that doesn't  
 9 exist in another version of Unix, that specifically  
 10 allows for a program to get higher execution speed.  
 11 Q. And is an augmentation implemented through new  
 12 source code?  
 13 A. It's completely new source code.  
 14 Q. Now, you also mentioned, in your understanding  
 15 of the word "modification," that it could include  
 16 changes.  
 17 A. That's right.  
 18 Q. Can you explain to me what you mean by that?  
 19 A. Certainly. For example, the compilers that  
 20 were used to build the Dynix operating system are the  
 21 Berkeley-derived compilers, and there are subtle  
 22 differences in the way symbols are treated. And so it  
 23 might be necessary, if you wanted to compile, without  
 24 adding additional function, a System V source module to  
 25 make a modification that was really cosmetic or had no

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1 embodying or containing Unix System V, that it was  
 2 subject at least to this confidentiality restriction  
 3 that we've been discussing?  
 4 A. Those portions --  
 5 MR. KAO: Objection to form.  
 6 THE WITNESS: -- which were derived from  
 7 System V, yes.  
 8 MR. HEISE: Q. And we've already discussed  
 9 about how you would, at least according to you, go about  
 10 and identify those, quote, portions of Dynix.  
 11 A. Yes.  
 12 Q. Why is it that you believe it only restricts  
 13 those portions as opposed to Dynix/ptx?  
 14 A. Because in my interpretation, the restrictions  
 15 apply to those things which are owned by AT&T and do not  
 16 apply to those things which are owned by Sequent.  
 17 Q. And according to the way that you're  
 18 interpreting this, only if you found actual System V  
 19 source code, that's the only thing that could not be --  
 20 that had to be treated confidentially?  
 21 A. Essentially. We've talked earlier about the  
 22 methods and procedures issue as well.  
 23 Q. We're going to get to that, but I'm trying to  
 24 just follow the format of your --  
 25 A. Yeah.

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1 Q. Okay. When you state that you don't know  
 2 whether Dynix is a derivative work based on Unix  
 3 System V, what's preventing you from being able to make  
 4 that determination?  
 5 A. And you're now saying Dynix or Dynix/ptx?  
 6 Q. Well, I'm going to -- I'll clarify it as  
 7 Dynix/ptx.  
 8 A. Okay.  
 9 Q. And I guess what I should do -- I'll let you  
 10 answer the question as to Dynix/ptx; then I'll ask you  
 11 another question.  
 12 A. Okay. Dynix/ptx is almost certainly a  
 13 derivative work of Unix System V.  
 14 Q. In paragraph 8 of your declaration, sir, you  
 15 start the sentence with "As I understood the Software  
 16 Agreement between Sequent and AT&T Technologies . . . ,"  
 17 and then you continue on. I just want to focus on your  
 18 first part there of --  
 19 A. Yes.  
 20 Q. -- "as I understood . . . ."  
 21 Is that from your reading of the agreement  
 22 only, or is that from some other sources?  
 23 A. It relies upon my conversations with the AT&T  
 24 individuals.  
 25 Q. In paragraph 9 is when you first used the word

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1 "Dynix." So I know you talked about this a little bit  
 2 earlier, so I just want to see if I can make sure the  
 3 record's clear.  
 4 Dynix starts out, and then after Unix System V  
 5 is licensed, Dynix/ptx is created, but at the same time,  
 6 they're both being sold. And eventually, does Dynix  
 7 cease or does it just -- what happens?  
 8 MR. KAO: Objection to form.  
 9 THE WITNESS: Both products continue on.  
 10 Ultimately, the marketplace for Dynix/ptx was larger  
 11 than the marketplace for Dynix for Sequent.  
 12 MR. HEISE: Q. Given that statement, that the  
 13 Dynix/ptx became the larger marketplace, did there come  
 14 a point in time when Dynix just stopped being worked on  
 15 or sold and that it was strictly Dynix/ptx?  
 16 MR. KAO: Objection to form.  
 17 THE WITNESS: I don't know that from own  
 18 knowledge. I can't speculate. I don't know.  
 19 MR. HEISE: Q. In terms of just trying to  
 20 give us a broad view of Dynix and Dynix/ptx, when  
 21 Dynix/ptx is where the marketplace was going for the  
 22 high-end business computing, what is the relative ratio  
 23 between how much of Sequent was devoted to Dynix/ptx  
 24 versus its former product of Dynix?  
 25 MR. KAO: Objection to form.

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1 THE WITNESS: Certainly within development,  
 2 the bulk of the resources would have been working on  
 3 Dynix/ptx because it was under development.  
 4 MR. HEISE: Q. Right.  
 5 A. And Dynix itself would have been getting, of  
 6 course, bug fixes and customer support attention from  
 7 development and probably enhancement. As I've  
 8 previously described, the hardware platform evolved over  
 9 time. So with each new hardware platform, then Dynix  
 10 would get revisited to test it, make it compatible, take  
 11 advantage of any new hardware.  
 12 Q. Would it be fair to say that more than  
 13 50 percent of the company's revenues, expenses,  
 14 resources, and the like were devoted to Dynix/ptx once  
 15 that was the product line that was being developed by --  
 16 MR. KAO: Objection.  
 17 MR. HEISE: Q. -- Sequent?  
 18 MR. KAO: Excuse me. Objection to form.  
 19 THE WITNESS: After some period of time, I  
 20 would say yes to revenues. Expenses, I would say no to.  
 21 SG&A was always bigger. And so it depends.  
 22 MR. HEISE: Q. Okay. That's a fair response.  
 23 But I think you've made clear Dynix/ptx was on the  
 24 upswing and Dynix without the ptx was on the downswing.  
 25 Is that --