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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

THE SCO GROUP, INC., Plaintiff/Counterclaim-Defendant, -against- INTERNATIONAL BUSINESS MACHINES CORPORATION, Defendant/Counterclaim-Plaintiff.	Civil No. 2:03CV-0294 DAK Honorable Dale A. Kimball Magistrate Judge Brooke C. Wells

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Exh. 2

DECLARATION OF DAVID W. FRASURE

I, David W. Frasure, declare as follows:

1.   From 1984 through 1987, I was national sales and licensing manager at AT&T Technologies, Inc. ("AT&T Technologies") and was responsible for licensing Unix software and related materials.

2.   This declaration is submitted in connection with the lawsuit entitled The SCO Group, Inc. v. International Business Machines Corporation, Civil Action No. 2:03CV-0294 DAK (D. Utah 2003). Except as stated otherwise, this declaration is based upon personal knowledge.

3.   Section I of this declaration describes my roles and responsibilities with respect to Unix software and related materials. Section II sets out my understanding of certain terms of the standard license agreements pursuant to which Unix software and related materials were licensed by AT&T Technologies. Section III sets out my understanding of the confidentiality provisions of the license agreements. Section IV sets out my understanding of certain exceptions to the confidentiality provisions. Finally, Section V sets out my understanding of the most-favored customer provision in certain of the license agreements.

I.   Roles and Responsibilities Regarding Unix

4.   In 1968, I accepted an engineering position with Western Electric, a wholly owned subsidiary of American Telephone and Telegraph Company ("AT&T"). In approximately April 1980, I became a department chief in the computer systems and

software division, and later I became a department chief in the corporate computer standards division.

5.   In or about June 1984, I became national sales and licensing manager at AT&T Technologies with responsibility for licensing Unix software and related materials. In that position, I supervised the work of approximately eleven account representatives. I held this position until 1987, when I left AT&T Technologies to accept a position at Kidde Aerospace.

6.   As national sales and licensing manager at AT&T Technologies, I was responsible for the agreements pursuant to which AT&T Technologies licensed and sublicensed Unix software and related materials. In addition to having responsibility for these agreements, I personally negotiated many of the license agreements and consulted concerning or approved many others.

7.   I personally negotiated, on behalf of AT&T Technologies, the following agreements between International Business Machines Corporation ("IBM") and AT&T Technologies:

- the Software Agreement (Agreement Number SOFT-00015) dated February 1, 1985 (the "IBM Software Agreement");

- the Sublicensing Agreement (Agreement Number SUB-00015A) dated February 1, 1985 (the "IBM Sublicensing Agreement");

- the Substitution Agreement (Agreement Number XFER-00015B) dated February 1, 1985 (the "IBM Substitution Agreement"); and

- the letter agreement dated February 1, 1985 (the "IBM Side Letter").

True and correct copies of these agreements, referred to in this declaration as the "IBM Related Agreements", are attached hereto as Exhibits 1 through 4.

8.   I was also responsible for the following agreements between

Sequent Computer Systems, Inc. ("Sequent") and AT&T Technologies: .

- the Software Agreement (Agreement Number SOFT-000321) dated April 18, 1985 (the "Sequent Software Agreement");

- the Sublicensing Agreement (Agreement Number SUB-000321A) dated January 28, 1986 (the "Sequent Sublicensing Agreement"); and

- the Substitution Agreement (Agreement Number XFER-000321B) dated January 28, 1986 (the "Sequent Substitution Agreement").

I participated in the negotiation and verbal clarification of these agreements, true and

correct copies of which are attached hereto as Exhibits 5 through 7. These agreements

are referred to in this declaration as the "Sequent Related Agreements."

9.   Based upon my duties and responsibilities at AT&T Technologies,

I have firsthand knowledge of the Unix license agreements described in this declaration,

including in particular, the IBM Related Agreements and Sequent Related Agreements.

During the period of my employment at AT&T Technologies, I participated in the

formulation and negotiation of many agreements of this kind.

10.   Although I did not personally negotiate all of the Unix related

agreements executed by AT&T Technologies during the period from 1984 through 1987,

I believe that I am familiar with their terms and conditions and know what the parties

understood them to mean and intended them to accomplish. While the language in the

side letters to the agreements may have varied from one licensee to the next and while

some licensees did not have side letters, our intent was to hold all licensees to the same

basic standard.

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II.   Basic Grant of Rights to Unix System V Licensees

11.   During the period from 1984 through 1987, AT&T Technologies licensed Unix source code and related materials to a large number of licensees. The software agreements pursuant to which the code and related materials were licensed granted the licensee the right, among others, to use and modify the source code for its own internal business purposes.

12.   The software agreements also granted licensees the right to modify a Unix software product and to prepare derivative works based upon the product. Licensees owned their modifications and derivative works and were permitted to use or disclose them as they might choose, so long as any modification or derivative work containing any part of a software product was treated the same as a software product under the license agreements.

13.   In early versions of the standard software agreement, including the IBM Software Agreement, Section 2.01 included the following language regarding modifications and derivative works:

> Such right to use includes the right to modify such SOFTWARE
> PRODUCT and to prepare derivative works based on such SOFTWARE
> PRODUCT, provided the resulting materials are treated hereunder as part
> of the original SOFTWARE PRODUCT.

This language did not give AT&T Technologies or any of its successors or assigns the right to assert ownership or control over modifications or derivative works prepared by its licensees, except to the extent that the licensed Unix source code was included in such modifications or derivative works. We never intended to assert ownership or control over modifications or derivative works prepared by our licensees, except to the extent of the licensed Unix source code included in such modifications or derivative works.

14.   Some of our licensees sought to clarify that they, not AT&T

Technologies (or its successors or assigns), would own and control modifications and

derivative works prepared by or for the licensee. We provided the requested clarification

when asked because it was a clarification of our intent with respect to the standard

software agreement. For example, Paragraph A.2 of the IBM Side Letter, with which I

am familiar because I negotiated it, clarified the standard provisions as follows:

> Regarding Section 2.01, we agree that modifications and derivative works
> prepared by or for [IBM] are owned by [IBM]. However, ownership of
> any portion or portions of SOFTWARE PRODUCTS included in any such
> modification or derivative work remains with [AT&T Technologies].

Clarifications of this kind did not represent a substantive change to the standard software

agreement, since AT&T Technologies did not intend to assert ownership or control over

modifications and derivative works prepared by licensees, except to the extent of the

licensed Unix source code included in such modifications and derivative works.

15.   At some point, we revised the standard software agreement to

clarify this point. The revision was prompted by the number of side letters issued to

clarify this point. For example, Section 2.01 of a software agreement between AT&T

Technologies Information Systems Inc. and Santa Cruz entered into in May 1987, a true

and correct copy of which is attached hereto as Exhibit 8, included the following

language:

> Such right to use includes the right to modify such SOFTWARE
> PRODUCT and to prepare derivative works based on such SOFTWARE
> PRODUCT, provided that any such modification or derivative work *that
> contains any part of a SOFTWARE PRODUCT subject to this Agreement*
> is treated hereunder the same as such SOFTWARE PRODUCT. *AT&T-IS
> claims no ownership interest in any portion of such a modification or
> derivative work that is not part of a SOFTWARE PRODUCT.* (emphasis
> added)

16.   Whether or not AT&T Technologies entered into a side letter to clarify the treatment of modifications or derivative works or altered the language of Section 2.01 of the standard software agreement, our intent was the same. To my knowledge, no one at AT&T Technologies ever intended to assert ownership or control over any portion of a modification or derivative work that was not part of our licensed Unix source code base. The licensee was free to use, copy, distribute or disclose such modifications or derivative works, provided that it did not copy, distribute or disclose any portion of the licensed Unix source code (except as permitted by the license agreements).

17.   Some of AT&T Technologies' licensees developed technology for their own sublicensed products that AT&T Technologies wished to integrate into Unix System V software. We entered into cooperative development agreements with a number of these customers, because we did not have rights to modifications or derivative works, or standalone products, prepared by or for our customers in the absence of such agreements. Indeed, under the license agreements, we did not even have copies of the modifications and derivative works developed by our licensees in either source or object code form.

18.   It is my understanding that IBM's AIX products and Sequent's Dynix/PTX products include some licensed Unix System V source code, but I do not know whether AIX and Dynix/PTX are so similar to Unix System V that they can be viewed as modifications of, or derivative works based on, Unix System V. In any event, as I understand the IBM Related Agreements and the Sequent Related Agreements, IBM and Sequent were and/or are free to use, copy, distribute, or disclose AIX and Dynix/PTX source code, provided that they do not copy, distribute or disclose any portions of the

licensed Unix System V source code (which may be disclosed as permitted by the IBM

Related Agreements or the Sequent Related Agreements). IBM and Sequent are and/or

were free, to disclose all source code for AIX and Dynix/PTX, other than those portions

of the licensed Unix System V source code included therein (which may be disclosed as

permitted by the IBM Related Agreements or the Sequent Related Agreements).

III.   Confidentiality Restrictions in the License Agreements

19.   The software agreements used during my tenure at AT&T

Technologies imposed certain confidentiality restrictions on licensees. Here again,

though, while the precise language of the agreements might have varied, essentially the

same confidentiality restrictions applied to all licensees. That is in part because a right to

disclose held by one licensee advantaged all other licensees.

20.   Section 7.06(a) of the standard form software agreement included

the following language prohibiting the disclosure of the Unix source code licensed from

AT&T Technologies:

> LICENSEE agrees that it shall hold all parts of the SOFTWARE
> PRODUCTS subject to this Agreement in confidence for AT&T.
> LICENSEE further agrees that it shall not make any disclosure of any or
> all of such SOFTWARE PRODUCTS (including methods or concepts
> utilized therein) to anyone, except to employees of LICENSEE to whom
> such disclosure is necessary to the use for which rights are granted
> hereunder.

This prohibition was subject to important exceptions, including that a licensee's

obligations under this section do not apply if "a SOFTWARE PRODUCT subject to this

Agreement at any time becomes available without restriction to the general public by acts

not attributable to LICENSEE or its employees," as is discussed in Section IV below.

21.   The purpose of this provision was to require licensees to keep

confidential those parts of the licensed software that AT&T Technologies wished to keep confidential, namely UNIX source code. The purpose of this requirement was not to impose upon licensees a confidentiality obligation beyond what AT&T Technologies could enforce under trade secret law.

22.   Certain licensees sought to clarify or modify the confidentiality restrictions of Section 7.06(a). Paragraph A.9 of the IBM Side Letter, for example, clarifies the confidentiality provision of the IBM Software Agreement in a number of respects. First, Paragraph A.9 deletes the phrase "all parts of" from the first sentence, clarifying that IBM would not be held in breach of the confidentiality provision for an immaterial disclosure of source code. Second, Paragraph A.9 deletes the parenthetical "(including methods or concepts utilized therein)" from the second sentence, indicating that IBM would not be required to keep confidential the methods or concepts used in the Unix Software product. Finally, Paragraph A.9 specifically relieves IBM from any confidentiality obligation with respect to Unix ideas, concepts, know-how, methods and techniques, because these were not definable and concrete terms and were not material to the Software Agreement. As clarified by its side letter, IBM had no obligation to keep confidential any information embodied in any of the software products provided to IBM, provided that IBM did not disclose the licensed source code except as permitted by its license agreements.

23.   AT&T Technologies did not seek, by way of the confidentiality provisions in its license agreements, to assert ownership or control over any portion of a modification or a derivative work that was not part of its Unix source code base. Such modifications and derivative works are not subject to the confidentiality restrictions of

the license agreements -- except for any licensed Unix System V source code actually included therein -- because they are owned by the licensees. Licensees are free to use, copy, distribute or disclose such modifications and contributions to derivative works, provided that they do not copy, distribute or disclose any portions of the licensed Unix source code (except as permitted by the license agreements).

24.   To reiterate, AT&T Technologies sought to impose essentially the same obligations on all of its licensees, especially with respect to confidentiality. As further discussed below, we understood that once we relieved one of our licensees of the obligation to keep a part of a software product confidential, we relieved all of our licensees of that obligation. The fact that one licensee might have had a side letter, whereas another did not, does not mean that we imposed materially different terms on different licensees. The side letters served to clarify terms that we intended to be the same for all licensees.

25.   I understand that plaintiff claims that IBM and/or Sequent have breached the their license agreements with AT&T Technologies by using/disclosing Unix methods, derivative works and modifications in violation of the confidentiality and other restrictions contained in those agreements, irrespective of whether IBM and/or Sequent have disclosed any specific protected source code from Unix System V. Any such claim is, in my view, inconsistent with the provisions of the license agreements generally, and the IBM Related Agreements and the Sequent Related Agreements in particular.

26.   I do not believe that anyone at AT&T Technologies intended our Unix license agreements to be construed to exercise control of unlicensed or non-original Unix source code. In all cases, as I understand the agreements and believe they were

intended, modifications and derivative works are not subject to the confidentiality and

other restrictions contained in the license agreements (except for any licensed Unix

System V source code actually included therein) because they are owned by the licensees.

IV. Relief from Confidentiality Restrictions

27.   For the most part, AT&T Technologies endeavored to keep its

Unix source code confidential. We understood it would become increasingly difficult to

do so, however, as we intended to widely distribute the source code (and related

information). Because we (and, I believe, our licensees) recognized that it would become

increasingly difficult to require that Unix software source code be kept confidential, the

software agreements provided that a licensee would not be required to keep a software

product confidential if it became "available without restriction to the general public." A

licensee is free to disclose, without any restriction whatsoever, information that becomes

available without restriction to the general public by acts not attributable to that particular

licensee or its employees.

28.   I was mindful of this exception in negotiating the IBM Related

Agreements, the Sequent Related Agreements and other of our Unix licensing

agreements. That is because if part or all of a software product is "available without

restriction to the general public" then it is no longer subject to confidentiality restrictions,

and because this limitation appeared to be important to most of AT&T Technologies'

licensees, including in particular IBM.

29.   So far as I am aware, we never defined the term "generally

available without restriction" in any of our Unix licensing agreements. However, I

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understand the term to include at least the following five situations. I am not aware that anyone at AT&T Technologies had a different view.

30.   First, a software product or any part of a software product is "available without restriction to the general public", as I understand and intended this language, if published by no fault of the licensee. I believe that many materials have been published regarding Unix software, many of which provide detailed information regarding the design and implementation of the Unix operating system. The information contained in these publications is not subject to the confidentiality restrictions of the software and related agreements.

31.   Second, a software product (or any part of a software product) is "available without restriction to the general public" if accessible without meaningful restriction, such as for download from the internet without enforceable confidentiality restrictions. I understand that certain Unix source code is available for download (free of charge) from the internet to anyone with an internet connection, subject only, in some circumstances, to narrow caveats, such as that it not be used for commercial purposes. Any such source code is not subject to the confidentiality restrictions of the Unix license agreements whatsoever, even if plaintiff purported to place limited restrictions on use of the downloaded source code (such as that it not be used for commercial purposes).

32.   Third, a software product (or any part of a software product) is "available without restriction to the general public" if available outside the bounds of a confidentiality agreement due to the inadvertence or negligence of the licensor or owner (or an affiliate of the licenser or owner). I am told that, between 1985 and 1996, AT&T Capital Corporation, then a subsidiary of AT&T, sold thousands of used or discontinued

AT&T computer systems, hundreds of them from Bell Laboratories, that some of the computers included Unix System V, Release 3 and Release 4 source code, and that neither AT&T nor AT&T Capital Corporation imposed any confidentiality or other restrictions on the purchasers of the machines. If this is true -- and I do not have personal knowledge as to whether it is -- then any information (including source code) on these computer systems is "available without restriction to the general public", and not subject to the confidentiality restrictions in the software and related agreements and may properly be disclosed by any licensee.

33.   Fourth, a software product (or any part of a software product) is "available without restriction to the general public" if distributed so widely that no confidentiality provision could adequately preserve the confidentiality of the software. While I was responsible for the distribution of licensed Unix source code, we were concerned about Unix source code becoming unprotectable as confidential material, based upon the breadth of its distribution.

34.   Fifth, a software product (or any part of a software product) is "available without restriction to the general public" if made available to a third party (including, of course, one of AT&T Technologies' licensees) who has the right to disclose the software product (or any part of it). To the extent a third party has acquired or were to acquire the right to disclose part of a software product, that part of the software product is or would no longer be subject to the confidentiality provisions of the software and related agreements. For instance, AT&T Technologies granted IBM the right to disclose ideas, concepts, know-how, methods and techniques of Unix, as discussed above. As a result, IBM may properly disclose the ideas, concepts, know-how, methods

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and techniques of Unix to anyone, at any time, without restriction. They are, thus, "available without restriction to the general public" and may properly be disclosed by a licensee.

35.   AT&T Technologies distributed licensed Unix source code widely to promote the widespread adoption of Unix operating systems. The idea was to ensure that Unix ideas, concepts, know-how, methods and techniques would be widely known and understood by future programmers. Although I am not close enough to the situation to know, I would be very surprised if there are many, if any, parts of the Unix System V Release 4.x and earlier source code that could be said still to be confidential, based solely on the breadth of its distribution

36.   I understand that plaintiff has alleged that IBM and Sequent have breached the confidentiality restrictions in the IBM Related Agreements and the Sequent Related Agreements. I have no personal knowledge concerning public disclosures by IBM or Sequent, but I think it improbable at best that there is any merit to plaintiff's claims. I say this because, in view of IBM's right to disclose ideas, concepts, know-how, methods and techniques of Unix, the confidentiality provisions of the license agreements are, as a practical matter, limited to protecting the disclosure of licensed source code. Ideas, concepts, know-how, methods and techniques of Unix are not subject to the confidentiality provisions of the license agreements, at least because AT&T Technologies expressly gave IBM the right to disclose them and because they are also (as a result) available without restriction to the general public. In view of the breadth of distribution of the Unix source code (and related information), it seems just as unlikely that any Unix

System V Release 4.x and earlier source code remains subject to confidentiality

restrictions of AT&T Technologies' license agreements.

V.　　Most-Favored Customer Provision

37.　　As stated above, while I was employed by AT&T Technologies,

we intended to treat all of our licensees essentially the same. That is to say, that we

endeavored to subject all licensees to the same material terms.

38.　　Some of our licensees, including IBM, requested (and we

provided) a "most-favored customer" provision to give them comfort that we would

adhere to our stated policy of treating all licensees the same. Paragraph A.12 of the IBM

Side Letter provides:

> We agree that all SOFTWARE PRODUCTS, including enhancements to
> or new versions of existing SOFTWARE PRODUCTS, generally
> available under the Software Agreement will be made available to you at
> the fees and under terms, warranties and benefits equivalent to those
> offered to other licensees.

This provision meant that if any other licensee were offered or obtained terms more

favorable to the licensee than those contained in the IBM Related Agreements, then IBM

would have the benefit of such more favorable terms as if they had been set forth in the

IBM Related Agreements. This would be the case even if the other licensee had paid a

higher total licensing fee than IBM because the other licensee distributed more copies of

its sublicensed products than IBM.

39.　　To be sure, not all of our licensees had side letters or most-favored

customer provisions. The practical reason for this is that different agreements were

negotiated at different times, and different licensees required different degrees of

clarification. Moreover, to my knowledge, our licensors did not have access to one

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another's agreements. We nevertheless interpreted all of our agreements based upon the collective body of Unix license agreements. Our account representatives used the existing body of side letters, for example, generally to interpret our Unix license agreements. We treated a licensee that did not have a most-favored customer provision in a side letter (like Sequent) no different from a licensee that had a side letter with such a provision. If Sequent had perceived IBM to have an advantage that Sequent perceived it lacked, for example, we would have clarified that Sequent was subject to the same terms as IBM, notwithstanding that its agreements employed language different from the language in the IBM agreements.

40.   I declare under penalty of perjury that the foregoing is true and correct.

Executed: October 7, 2003.

Wilson, North Carolina

David W. Frasure