

**IN THE UNITED STATES DISTRICT COURT FOR
SOUTHERN DISTRICT OF NEW YORK**

BEIJING NEU CLOUD ORIENTAL
SYSTEM TECHNOLOGY CO., LTD.

Plaintiff,

v.

INTERNATIONAL BUSINESS MACHINES
CORPORATION; IBM WORLD TRADE
CORPORATION; and IBM CHINA
COMPANY LIMITED,

Defendants.

Civil Action No. 21-7589

JURY TRIAL DEMANDED

COMPLAINT

This is an action by Plaintiff Beijing Neu Cloud Oriental System Technology Co., Ltd. (“Neu Cloud”) against Defendants International Business Machines Corporation (“IBM Corp.”); IBM World Trade Corporation (“IBM WTC”); and IBM China Company Limited (“IBM China”) (collectively, “IBM” or “Defendants”) for trade secret misappropriation under the Defend Trade Secrets Act (DTSA).

INTRODUCTION

1. Neu Cloud brings this action as a result of IBM’s fraudulent and unfair business practices. Over a number of years, IBM has played a bait-and-switch game with Neu Cloud, repeatedly inducing Neu Cloud and its majority owner through later-breached contracts to expend resources and provide IBM with access to sensitive, confidential customer information, which IBM then secretly used to create competing ventures in China.

2. Three product categories lie at the heart of this dispute: IBM server products, IBM middleware products, and IBM database products.

3. Neu Cloud arose as a joint venture between IBM and Beijing TeamSun Technology Co., Ltd. (“TeamSun”). Neu Cloud was to sell IBM’s server products in China.

4. To establish this venture, TeamSun invested significant resources into Neu Cloud to establish a market for IBM’s server products.

5. However, IBM subsequently established a rival joint venture, refused to sell the server products to Neu Cloud except through the new joint venture, and induced its own employees with knowledge of Neu Cloud’s confidential customer lists to join this new joint venture and share that confidential information with the new joint venture.

6. This course of conduct unfairly benefitted IBM and unfairly deprived Neu Cloud of its investments and expectation of profits in the IBM server market.

7. As detailed below, these actions by IBM have caused significant harm to Neu Cloud.

THE PARTIES

8. Plaintiff Beijing Neu Cloud Oriental System Technology Co., Ltd. (“Neu Cloud”) is a corporation organized under the laws of the People’s Republic of China and headquartered in Beijing, China. Neu Cloud is a joint venture of TeamSun, IBM, and a third-party individual.

9. Defendant International Business Machines Corporation (“IBM Corp.”) is a multinational corporation incorporated under the laws of the State of New York and headquartered at 1 New Orchard Rd, Armonk, New York 10504.

10. Defendant IBM World Trade Corporation (“IBM WTC”) is a 100%-owned subsidiary of IBM Corp. incorporated under the laws of the State of New York, and headquartered in Armonk, New York.

11. Defendant IBM China Company Limited (“IBM China”) is a 100%-owned subsidiary of IBM Corp. organized under the laws of the People’s Republic of China and

headquartered in Beijing, China. IBM China has branch offices in Guangzhou, China, and Shanghai, China.

OTHER ENTITIES MENTIONED IN THE COMPLAINT

12. Beijing TeamSun Technology Co., Ltd. (“TeamSun”) is a corporation organized under the laws of People’s Republic of China and headquartered at TeamSun Building, Z-Park II, Xibeiwangdong Road, Haidian District, Beijing 100193, China. TeamSun is a leading integrated information technology service provider in China, and its service network covers the Greater China region and Southeast Asia. TeamSun has a majority ownership in Neu Cloud.

13. OpenPower Foundation (“OpenPower”) is a non-stock, not-for-profit mutual benefit corporation exempt from federal income taxes under Section 501(c)(6) of the Internal Revenue Code. OpenPower is organized under the laws of the State of Delaware and headquartered in Piscataway, New Jersey.

14. INSPUR Co. Ltd. (“INSPUR”) is a corporation organized under the laws of the People’s Republic of China and headquartered in Ji’nan, China.

15. INSPUR Power Commercial Systems Co. Ltd. (“INSPUR Power”) is a corporation organized under the laws of the People’s Republic of China and, on information and belief, is headquartered in Ji’nan, China, or Beijing, China. INSPUR Power is a joint venture formed by IBM and INSPUR.

16. The Beijing Municipal Commission of Economy and Information Technology (“BEITC”) is a municipal department of Beijing, China.

TECHNOLOGIES INVOLVED

17. Power Microprocessors refer to a series of microprocessors originally produced and serviced by IBM. Power Microprocessors have been used in a series of IBM servers and computers.

18. Power Systems™ is a family of server computers produced and serviced by IBM and employing Power Microprocessors.

19. Advanced Interactive eXecutive (“AIX®”) is an operating system originally developed and serviced by IBM. It is used in IBM servers and computers.

20. WebSphere® is a family of Java™ EE application servers (which is a kind of middleware system) originally developed and serviced by IBM.

21. MQ is a family of messaging and queuing middleware systems originally developed and serviced by IBM.

22. Informix is a family of relational database management systems originally developed and serviced by IBM.

JURISDICTION AND VENUE

23. This Court has personal jurisdiction over IBM Corp. because IBM Corp. is a New York corporation that resides in this judicial district.

24. This Court has personal jurisdiction over IBM WTC because IBM WTC is a New York corporation that resides in this judicial district.

25. This Court has personal jurisdiction over IBM China because IBM China is a 100%-owned subsidiary of IBM Corp. and IBM China was fully controlled by IBM Corp. in its interactions with Neu Cloud and acted on behalf of IBM Corp. at all times relevant here. In particular, for all dealings relevant here, IBM China acted as the alter ego of IBM Corp.

26. This Court has subject matter jurisdiction over this case because it arises out of a federal question (*i.e.*, a cause of action under the DTSA).

27. Venue is proper in this judicial district because IBM Corp. and IBM WTC reside within this district. IBM China is a foreign corporation and therefore can be sued in any judicial district in the United States.

FACTUAL ALLEGATIONS

28. On or about January 1, 2010, TeamSun entered into a distribution agreement with IBM China, on behalf of IBM Corp., concerning certain Power Systems™ server products manufactured by IBM Corp. This agreement had a one-year duration.

29. Between 2010 and 2014, reliant on its relationship with IBM, and at substantial expense, TeamSun developed technology solutions dependent upon IBM Power Systems™ products and actively marketed them in China.

30. TeamSun's efforts in this regard helped to develop the Chinese market for IBM Power Systems™ products.

31. On or about June 16, 2014, TeamSun and Mr. Zhuangyan Hao established Neu Cloud. TeamSun held 70% of the shares of Neu Cloud, and Mr. Hao held the remaining shares.

32. TeamSun's purpose in establishing Neu Cloud was to deepen the collaboration with IBM and further open up the Chinese market for Power Systems™-based integrated hardware and software solutions.

33. On or about July 7, 2014, IBM China, TeamSun, and Mr. Hao signed a Share Purchase Agreement providing for IBM China's investment into Neu Cloud in exchange for 19.35% of the shares of the company.

34. The Share Purchase Agreement was predicated on cooperation between IBM and Neu Cloud. Under the 2014 Share Purchase Agreement, and the related re-stated Neu Cloud Shareholders' Agreement, IBM China was provided with redemption rights conditioned on non-fulfillment of strategic collaboration plans.

35. The agreement between the parties established that Neu Cloud was to act as an original equipment manufacturer ("OEM") provider of systems based on Power Systems™

products, and that Neu Cloud would purchase its inventory of Power Systems™ products only from IBM.

36. Consequently, Neu Cloud was completely reliant upon IBM's good-faith cooperation and willingness to supply Power Systems™ products on favorable prices and conditions, and IBM controlled Neu Cloud's pricing and sourcing for its products.

37. Through this leverage, IBM retained substantial control of Neu Cloud's operations.

38. On June 25, 2014, TeamSun specifically asked for IBM to send key technical personnel to Neu Cloud, which IBM complied with.

39. On August 26, 2014, during an email exchange, TeamSun (through Mr. Hao) expressed concerns about possible similar collaborations between IBM China and a separate entity, INSPUR.

40. IBM China (through its representative Mr. Ricky Chung) replied that there were no discussions between IBM China and INSPUR regarding licensing of software source code or database products, and that the main objective between IBM China and INSPUR was to license the use of WebSphere® products on INSPUR's server products.

41. In order to move further with this collaboration, on or about November 11, 2014, TeamSun, IBM China, and BEITC signed a Memorandum of Understanding (the "2014 MOU"), which outlined the following key provisions:

- (a) that TeamSun shall organize certain corporations ("TOP corporations") that would obtain licenses from IBM China for certain technologies and intellectual property, in particular those related to Power Systems™ products; AIX®; and other databases, middlewares, and toolchains maintained by IBM;

- (b) that IBM China shall cooperate with TOP corporations and provide training to TOP corporations so that TOP corporations may develop reliable computing solutions based on the technologies and intellectual property and market such solutions in China;
- (c) that IBM China shall support the TOP corporations' endeavors to develop motherboards and server systems based on Power Microprocessors, on substantially the same terms as generally offered to members of the OpenPower Foundation.

42. Based on the prolonged course of dealings between TeamSun and IBM China, and based on IBM China's various communications with TeamSun and BEITC, TeamSun believed that IBM was fully committed to close collaboration with TeamSun and would continue to apprise TeamSun of any possible issues regarding such collaboration, in particular any planned action that may adversely affect TeamSun's position, such as any possible cooperation with INSPUR.

43. On December 10, 2014, TeamSun, IBM China, and BEITC held a meeting in accordance with the 2014 MOU, and came to an understanding of Neu Cloud's role in this collaboration.

44. In particular, the participants came to an understanding that Neu Cloud would become the OEM provider of certain IBM product-based solutions (including servers, localized operating systems, and middleware) and outlined the production targets for Neu Cloud for the coming year.

45. On December 30, 2014, IBM sent a PowerPoint presentation to TeamSun that contained the statement that IBM's goal is "to help the TOP team establish an advanced R&D system and realize Chinese-produced IP-owned Informix products."

46. IBM Corp. was an active participant in the TOP collaboration between TeamSun, IBM China, and BEITC. For example, on January 1, 2015, Bradley McCredie, who was a Vice President and IBM Fellow within IBM's Systems and Technology Group, emailed TeamSun to discuss the status of the TOP project on behalf of the "IBM team."

47. On or about January 29, 2015, Neu Cloud and IBM entered into an OpenPower Original Equipment Manufacturer Agreement (the "2015 OEM Agreement"), which allowed Neu Cloud to purchase IBM Power Systems™ servers, together with certain pre-installed software products, and to develop Neu Cloud's own solutions based on such servers and sell them to end users.

48. The 2015 OEM Agreement was signed by IBM WTC.

49. Under the 2015 OEM Agreement, the target revenue of Neu Cloud for the whole term of agreement was set to \$19,000,000 USD.

50. The 2015 OEM Agreement is governed by the laws of the State of New York and contains no arbitration or choice of forum clause, but it does contain an anti-assignment clause.

51. On or about June 30, 2016, Neu Cloud and IBM entered into an Amendment ("Amendment Number 2") to the 2015 OEM Agreement. Amendment Number 2 was signed by IBM WTC.

52. On June 22, 2017, Neu Cloud and IBM entered into an Amendment ("Amendment Number 3") to the 2015 OEM Agreement, which extended the term of agreement to end on December 17, 2020.

53. Amendment Number 3 was signed by IBM WTC.

54. Under the agreement with IBM, Neu Cloud submitted various bid requests to IBM China. These bid requests included customer information that was confidential to Neu Cloud and confidentially maintained by Neu Cloud as a trade secret.

55. As part of the agreement between the parties, and through representations made to Neu Cloud, IBM China agreed to confidentiality obligations regarding this information, including that only a few individuals at IBM China would have access to this confidential information, and would only use in connection with the bids submitted by Neu Cloud.

56. On September 8, 2017, INSPUR announced that INSPUR and IBM had established a joint venture to develop and market Power Systems™ products. This joint venture was established as INSPUR Power.

57. On February 5, 2018, IBM China notified Neu Cloud by email that the OEM agreement has been assigned to INSPUR Power.

58. IBM China requested a modification of the 2015 OEM Agreement (and its amendments) to substitute INSPUR Power for IBM China.

59. On or about May 3, 2018, Neu Cloud placed a purchase order in accordance with the 2015 OEM Agreement.

60. Also on or about May 3, 2018, IBM China notified Neu Cloud that IBM would not be able to fulfill any purchase orders under 2015 OEM Agreement, starting May 1, 2018, and instructed Neu Cloud to contact INSPUR Power.

61. On May 7, 2018, in a shareholder meeting of Neu Cloud, IBM China proposed a collaboration between Neu Cloud and INSPUR Power (a special resolution item requiring unanimous support).

62. On May 14, 2018, TeamSun and Mr. Hao vetoed IBM China's shareholder proposal.

63. On information and belief, at least two individuals at IBM China with knowledge of Neu Cloud's confidential customer information were encouraged by IBM China to join INSPUR Power. On information and belief, these individuals include INSPUR Power sales manager Zhen Yu and INSPUR Power sales representative Quanjun Shen.

64. On June 5, 2018, INSPUR Power sent letters to various entities, including certain end-user customers of Neu Cloud, to the effect that INSPUR Power was the exclusive dealer of Power Systems™ in China.

65. On June 8, 2018, Neu Cloud asked IBM China about upgrading maintenance arrangements for Power Systems™ previously purchased by Neu Cloud, since without upgrading arrangements Neu Cloud may not be able to re-sell its inventory. IBM China did not provide an answer.

66. Neu Cloud has lost market share and sales opportunities as a result of IBM's actions.

67. Ongoing communications and negotiations with IBM China to resolve this dispute made clear that IBM Corp. has been directing IBM China's activities.

**COUNT I: NEU CLOUD'S CAUSE OF ACTION FOR
TRADE SECRET MISAPPROPRIATION UNDER THE DTSA**

68. Neu Cloud incorporates by reference each of Paragraphs 1 through 67 here.

69. On information and belief, Defendants have misappropriated the trade secrets of Neu Cloud in violation of the Defend Trade Secrets Act (DTSA).

70. Under the 2015 OEM Agreement and the amendments thereto, Neu Cloud submitted various bid requests to IBM China. These bid requests included customer information that was confidential to Neu Cloud and maintained by Neu Cloud as a trade secret.

71. As part of the agreement between the parties, and through representations made to Neu Cloud, IBM China agreed to confidentiality obligations regarding this customer information,

including that only a few individuals at IBM China would have access to this confidential information, and would only use it in connection with bids submitted by Neu Cloud.

72. On information and belief, at least two individuals at IBM China with knowledge of Neu Cloud's confidential customer information were encouraged by IBM China to join INSPUR Power to further this joint venture between INSPUR and IBM.

73. On June 5, 2018, IBM's new joint venture, INSPUR Power, sent letters to certain end-user customers of Neu Cloud (customers that Neu Cloud had confidentially submitted to the individuals at IBM China) to the effect that INSPUR Power was the exclusive dealer of Power Systems™ in China.

74. Neu Cloud discovered this misappropriation of its trade secrets no earlier than September 26, 2018. On this date, IBM China rejected the requests in Neu Cloud's September 17, 2018 email. It is at this point that Neu Cloud began to suspect that its confidential customer information was being used improperly by Defendants.

75. Neu Cloud's confidential customer information was and continues to be maintained as a trade secret, related to the international and interstate commerce in IBM's Power Systems™ servers, and acquired by IBM China under circumstances giving rise to a duty to maintain the secrecy of this trade secret.

76. In particular, Neu Cloud's misappropriated customer information constitutes financial, business, scientific, technical, economic, or engineering information within the meaning of the DTSA.

77. Neu Cloud has taken reasonable measures to keep its customer information secret, including by limiting access to these customers lists to certain employees within the company.

78. When this information was provided to Defendants, Neu Cloud asked that Defendants not share this information with anyone else.

79. Neu Cloud has not publically disclosed its customer list information.

80. Neu Cloud's misappropriated customer information derives independent economic value from not being generally known to or readily ascertainable through proper means by another person who can obtain economic value from the disclosure or use of the information. For example, this customer information would provide an unfair advantage to Neu Cloud's competitors, which would improperly benefit from the fruits of Neu Cloud's labor.

81. IBM Corp. and IBM China, knowing of the confidential trade secret customer information possessed by the IBM China employees, induced those employees to join INSPUR Power and reveal that information to INSPUR Power for INSPUR Power's benefit.

82. While at INSPUR Power, those former IBM China employees, on information and belief, used Neu Cloud's confidential customer information to contact Neu Cloud's customers and inform them of INSPUR Power's rival business, to the benefit of each of the Defendants, thereby misappropriating Neu Cloud's trade secrets. On information and belief, IBM China was acting as the alter ego of IBM Corp. in these dealings.

83. Neu Cloud's trade secrets customer information relates to a product or service used or intended for use in interstate or foreign commerce, including the IBM server products discussed throughout this complaint.

84. Defendants' initial misappropriation occurred after May 11, 2016, thus making this claim subject to the provisions of the DTSA.

85. Neu Cloud has been harmed as a result of Defendants' misappropriation.

PRAYER FOR RELIEF

WHEREFORE, Neu Cloud prays for relief as set forth below:

- (a) actual damages, punitive damages, and any such other relief available under the cause of action stated here;
- (b) pre- and post-judgment interest on this monetary relief;
- (c) equitable relief in the form of an injunction prohibiting the illegal conduct complained of here;
- (d) the costs of bringing this suit, including reasonable attorneys' fees; and
- (e) any other relief deemed appropriate by this Court.

Dated: September 10, 2021

/s/ Bryan Nese

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