



## I. COMPLAINT

1. Plaintiff Xinuos, Inc. (“Xinuos”), for its Complaint against Defendants International Business Machines Corp. (“IBM”) and Red Hat, Inc. (“Red Hat”) alleges on knowledge as to itself, its own acts and facts known to it and reasonable inferences therefrom, and on information and belief as to all other matters, as follows:

2. This case is simple. IBM and Red Hat conspired to illegally corner a market and crush competition. First, IBM stole Xinuos’ intellectual property and used that stolen property to build and sell a product to compete with Xinuos itself. Second, stolen property in IBM’s hand, IBM and Red Hat illegally agreed to divide the relevant market and use their growing market powers to victimize consumers, innovative competitors, and innovation itself. Third, after IBM and Red Hat launched their conspiracy, IBM then acquired Red Hat to solidify and make permanent their scheme. Fourth, IBM has been misleading its investors by falsely claiming all infringement claims against IBM regarding the copied code have been waived.

3. IBM and Red Hat have engaged in this well-worn, anticompetitive conduct in order to corner the market for operating system software that companies rely on to use servers. Servers are computer hardware designed for various functions, such as data storage or email. Server operating systems are the software that actually enable companies to use the server hardware to store data, have corporate email, print documents, and many other functions.

4. Xinuos, IBM, and Red Hat compete by selling to companies their own server operating system software. IBM’s server operating systems, however, depend on code that IBM stole from Xinuos and, until that theft, IBM’s products were becoming less attractive and were losing market share. After IBM stole the code from Xinuos, IBM and Red Hat agreed that Red Hat would take control of the low end of the market, comprised of small and medium sized business, and IBM would take control of the high end of the market, comprised of the largest

companies with the most complex operating system deployments. Having made this agreement and carried it out, both Red Hat and IBM have engaged in further anticompetitive conduct to help the other corner their respective market sectors.

5. IBM's motive is straightforward: before it stole Xinuos' software and conspired with Red Hat, its server operating software was becoming less competitive, and IBM was losing market share. This gravely threatened not only IBM's server operating system business, but also its lucrative business of selling the underlying servers themselves as well as related software and services. Red Hat's motive is equally clear: in return for ceding the high-end server operating system market, it received IBM's agreement to stay out of the low-end market, as well as its financial, reputational and technological help to dominate that low-end market.

6. On top of all this, IBM has materially misled its investors, falsely representing in its securities filings that a third-party owns all of the Unix and UnixWare copyrights, and that this third-party has waived any infringement claim against IBM. IBM mischaracterizes in its securities filings a prior court ruling that found old Unix and UnixWare code, created before September 19, 1995, belonged to the third-party. IBM's filings make it sound like the third-party was found to own *all* Unix and UnixWare code. These statements are demonstrably false. In fact, with regard to Xinuos' code created after September 19, 1995, and which IBM stole, Xinuos owns that code, has never entered into a license agreement with IBM, and has never waived its infringement claims against IBM for stealing that code.

7. IBM's and Red Hat's unlawful conduct continues to inflict substantial monetary and other harm on Xinuos, has enabled each to charge prices far higher than a competitive market would bear, and has strangled innovation to the point where consumers feel locked into IBM's and Red Hat's server operating systems. Xinuos brings this action to hold IBM and Red Hat

accountable.

## II. NATURE OF THE ACTION

8. The modern economy relies on computers. Every company in the modern economy of any size utilizes servers to meet its computing needs. Major server hardware manufacturers include IBM, Dell, HPE, Inspur (in a joint venture with IBM), Lenovo (acquired assets from IBM), and Huawei. For much of the history of enterprise computing, servers have been installed “on premises”—i.e. at a physical location associated with a particular company or data center. But, over time, the concept of “cloud computing” has emerged, including the IBM Cloud, where servers are managed in a more centralized manner and allocated to business customers.

9. Servers, like all computers, need operating systems to function. Server operating systems allow the computer hardware to “run” software applications, enabling the communication between software and hardware.

10. Once there were many developers of corporate server operating systems but because of abusive practices discussed herein IBM-owned operating systems are now dominant in the relevant market.

11. Operating systems are written by software developers in computer code languages. A significant percentage of server operating systems are based on Unix programming paradigms and architectures, or related Linux programming paradigms and architectures (hereinafter, collectively “Unix/Linux operating systems”). Unix/Linux operating systems are reasonable substitutes and, if supported, can run on most servers made by the major manufacturers.

12. Xinuos develops and sells operating systems called UnixWare and OpenServer. Xinuos operating systems are competitive in the marketplace and prior to the infringement of Xinuos’ code, Xinuos’ Unix based operating systems were the most widely used operating systems worldwide in the Unix/Linux server operating system market. Xinuos’ operating systems are

Unix-based server operating systems, with versions based both on Xinuos' proprietary Unix code as well as the "open source" Unix variant called "FreeBSD."

13. Open source generally refers to software that anyone can inspect, modify, and enhance, and that is not controlled by a small handful of powerful companies. FreeBSD, upon which Xinuos' OpenServer 10 product is based, is a free and open-source variant of the Unix operating system descended from the Berkeley Software Distribution ("BSD"), which was based on Research Unix.

14. IBM sells the Unix-based server operating system called "AIX for Power," which as detailed herein copies Xinuos' proprietary software code to facilitate powerful features including the ability to compile and run Linux applications. IBM also sells the z/OS mainframe, and i midrange server operating systems, both of which include implementations and/or runtime environments of the AIX operating system.

15. Red Hat, and now IBM by virtue of their merger, sells a Linux-based operating system called "Red Hat Enterprise Linux" ("RHEL").

16. "Linux" is a name for operating systems derived from the "Linux kernel," originally written by Linus Torvalds. Pursuant to Torvalds's vision, like FreeBSD, Linux is also "open source."

17. Xinuos has attempted to sustain, innovate, and compete in the area of Unix-based server operating systems, including building its own server operating system based on the open source FreeBSD project. By contrast, as in many high technology industries, IBM has found it easier to acquire, or copy in the case of Xinuos, the technology of others (by any means available) and/or buy rivals than to compete.

18. IBM's alignment with Red Hat, their abusive and illegal practices detailed herein,

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