

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION

AMERANTH, INC. \* Civil Docket No.  
\* 2:07-CV-271  
VS. \* Marshall, Texas  
\*  
\* September 14, 2010  
MENUSOFT SYSTEMS CORPORATION \* 8:30 A.M.

TRANSCRIPT OF TRIAL  
BEFORE THE HONORABLE JUDGE CHAD EVERINGHAM  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

FOR THE PLAINTIFFS: MR. JOHN W. OSBORNE  
MR. JAMES W. GOULD  
MR. PETER N. FILL  
MR. STEVEN M. PURDY  
MR. PETER H. NOH  
Locke Lord Bissell & Liddell  
3 World Financial Center  
New York, New York 10281  
  
MR. MICHAEL C. SMITH  
Siebman Burg Phillips & Smith  
113 East Austin Street  
Marshall, TX 75670

APPEARANCES CONTINUED ON NEXT PAGE:

COURT REPORTERS: MS. SUSAN SIMMONS, CSR  
MS. JUDITH WERLINGER, CSR  
Official Court Reporters  
100 East Houston, Suite 125  
Marshall, TX 75670  
903/935-3868

(Proceedings recorded by mechanical stenography,  
transcript produced on CAT system.)

APPEARANCES CONTINUED:

FOR THE DEFENDANTS: MR. MARC L. DELFLACHE  
MR. DUSTIN MAUCK  
Fulbright & Jaworski  
2200 Ross Avenue, Suite 2800  
Dallas, TX 75201  
  
MR. RICHARD S. ZEMBEK  
Fulbright & Jaworski  
1301 McKinney, Suite 5100  
Houston, TX 77010  
  
MR. OTIS CARROLL  
Ireland Carroll & Kelley  
6101 South Broadway, Suite 500  
Tyler, TX 75703

\* \* \* \* \*

P R O C E E D I N G S

LAW CLERK: All rise.

(Jury in.)

THE COURT: All right. Thank you.

Please be seated.

All right. Have a witness in the  
courtroom?

Good morning.

THE WITNESS: Good morning, Your Honor.

THE COURT: Mr. Carroll?

MR. CARROLL: If the Court please, Your  
Honor.

1 A. Yes, I do.

2 Q. Okay. Now, this piece of -- this document --  
3 can you see it on your screen, by the way?

4 A. Yes, I can.

5 Q. Okay. This is called Hospitality Technology.  
6 And in the very middle, it says: Our Premier Issue.  
7 And then on the corner --

8 MR. CARROLL: Can you flip that thing  
9 over on the side, Jim?

10 There we go. And lift that out.

11 Q. (By Mr. Carroll) And this says Keith McNally,  
12 President, Ameranth Technology, 27201 Tourney Road,  
13 Valencia, California, and then it gives a ZIP Code.  
14 Is that your proper address, or was it at the time?

15 A. It was the address of an old Ameranth office  
16 at the time, yes.

17 Q. Okay. But, again, you gave this to us out of  
18 your files.

19 You don't dispute that, correct?

20 A. No, we produced it.

21 Q. Okay. So -- and can you find with me up in  
22 the upper right-hand corner, the date on this document?

23 January of 1997, correct?

24 A. Yes; that's correct.

25 Q. And that's before the date that you filed your

1 disclosure of your patent to the Patent Office by two  
2 years, is it not?

3 A. Yes, it is.

4 Q. Now, let's look at this document that came  
5 from your files and the -- by the way, the title of the  
6 issue says: Bringing Technology to the Table.

7 You see that, correct?

8 A. Yes.

9 Q. Okay. Now, let's flip over to 37731, if we  
10 can, where it says Wireless Technology. Here we go.

11 Okay. And this is a page out of this  
12 magazine, correct? This is an article?

13 A. Yes, it is.

14 Q. And this starts out: For a small but growing  
15 number of restaurant operators, order entry systems that  
16 can communicate directly from a dining area to the  
17 kitchen without being tied to a landline connection or  
18 slashing customer wait times and beefing up employee  
19 productivity in operations as diverse as hotels and  
20 quick-serve restaurants.

21 You see that, correct?

22 A. Yes.

23 Q. And then you see a piece -- a picture.  
24 That's -- that is the MICROS -- it says: Photo, MICROS  
25 Systems, Inc., down in the right-hand corner of the

1 picture.

2 That's a MICROS product, is it not?

3 A. Yes.

4 Q. Okay. Now let's -- let's flip over to the  
5 next page, 37732, and up at the top, it starts talking  
6 about the Hilton Hotel chain or the Hilton Hotel at the  
7 Walt Disney World Village.

8 See where I am?

9 A. Yes.

10 Q. And it starts out saying: The 814-room Hilton  
11 at Walt Disney World Village has been using a handheld  
12 touchscreen system from MICROS Systems, Inc., in its  
13 pool area for about 18 months to deliver beverage  
14 service in roughly the time it takes for guests to towel  
15 themselves off.

16 Do you see that, right?

17 A. Yes.

18 Q. And then it goes on to describe the Hilton  
19 uses four HHT units.

20 What does that mean? Handheld transmitters?

21 A. That seems to be the case, yes.

22 Q. Have you ever heard that term before, HHT?

23 THE COURT: The document refers to it as  
24 touchscreen as opposed to a transmitter.

25 Q. (By Mr. Carroll) Okay. Do you know what

1 HHT --

2 MR. CARROLL: Thank you, Your Honor.

3 Q. (By Mr. Carroll) Do you know what HHT means?

4 A. Handheld terminal.

5 Q. Handheld terminal.

6 Okay. Is that a -- is that an acronym that  
7 people in your industry use?

8 A. It's -- yes, it's a common acronym.

9 Q. Okay. Okay. Then it goes on to say: Hilton  
10 uses four of these HHT units that communicate via  
11 spread-spectrum RF technology with the hotel's POS  
12 system.

13 And we were told yesterday POS means  
14 point-of-sale, correct?

15 A. Yes.

16 Q. I mean, you agree with that, right?

17 A. Yes, I do.

18 Q. Okay. The MICROS 8700 Hospitality Management  
19 System, HMS, the HMS network in turn interfaces to  
20 Hilton's proprietary property management system.

21 A radio module inside the HHT sends signals to  
22 a base station with antenna mounted on the pool bar's  
23 wall. The base station is wired to a PC that houses  
24 application software and point-of-sale database.

25 You see that? Correct, you see that?

1 A. Yes, I do.

2 Q. Now, my question for you, Mr. McNally, is a  
3 real simple one. This is the same device that the  
4 Patent Office heard about, not here but (indicates) in  
5 connection with this continuation application, and  
6 turned you down; isn't that true?

7 A. I don't -- I don't accept that terminology,  
8 no.

9 Q. Okay. But the fact of the matter is that you  
10 didn't tell the Patent Office about this MICROS 8700  
11 System that was described in this article, sitting in  
12 your office, that you gave to us in connection with this  
13 lawsuit, when you asked for your patent in 1999, did  
14 you?

15 You didn't tell them about that?

16 A. No.

17 Q. And then you did tell them about it years  
18 later, because of this lawsuit, in connection with your  
19 application for this continuation, where you said I want  
20 to get more patent claims out of this same application,  
21 and they said no. Not one but three said no, correct?

22 A. Yes.

23 Q. So I'm going to put on our -- on our west side  
24 of the fence line the MICROS 8700 -- and the date of  
25 this document is January of '97.

1           By the way, before we leave this document, I  
2 want to ask you about one other part of it.

3           MR. CARROLL: Can you show me 37734,  
4 please, from this same document?

5           Okay. In the upper right-hand corner  
6 where it starts out wireless order entry systems.

7           Q. (By Mr. Carroll) It says: Wireless order  
8 entry systems that use handheld terminals to communicate  
9 via radio frequency to a PC have long been common in  
10 applications such as warehousing.

11           You agree with that?

12           A. Yes.

13           Q. These systems have just in the last few years  
14 been introduced to the hos -- hospitality industry, but  
15 they are being accepted.

16           Do you agree with that?

17           A. I wouldn't agree with that statement at that  
18 time, no.

19           Q. In 1997?

20           But you do agree with the statement that says  
21 this same idea, this same concept had long been common  
22 to applications such as warehousing.

23           Do you agree with that, correct?

24           A. Which concept are you referring to?

25           Q. Exactly what the thing says up there.



1 Wireless order entry systems that use a handheld  
2 terminal to communicate via radio frequency to a PC have  
3 long been common in applications such as warehousing as  
4 of 1997, and you said you agreed with it.

5           You want to stand by that testimony?

6           A.    Yes.

7           Q.    Okay.  Mr. McNally, yesterday we talked some  
8 about a product called the TransPad.

9           Do you remember that testimony?

10          A.    Yes.

11          Q.    And the TransPad, you and Mr. Osborne told the  
12 jury a little bit about it, but it's -- it's true, is it  
13 not, that your company, Ameranth, was marketing this  
14 device called the TransPad well before the date you  
15 applied for your patent you're suing us over?

16          A.    Yes, that's true.

17          Q.    And it's also true that you told the Patent  
18 Office nothing about the TransPad when you applied for  
19 that patent, correct?

20          A.    Yes.

21          Q.    Now, yesterday you told us -- I asked you  
22 yesterday about the TransPad, and I referred to it as  
23 your product, and you took issue with me on that.  You  
24 said it was not -- it was Synerdyne's product, hardware  
25 product, that we were reselling.

1           Was that true --

2           A.    Yes.

3           Q.    -- what you told the jury yesterday?

4           A.    Yes.

5           Q.    So you were a reseller of this product? You  
6 didn't invent it at all?

7           A.    That's correct.

8           Q.    Okay. And as a reseller, you would have been  
9 in the same boat as Brian Smith over here, who resells  
10 Menusoft's products, correct?

11          A.    I think that's a fair comparison, yes.

12          Q.    Have you ever met Brian Smith, by the way,  
13 before you sued him?

14          A.    I believe he was at the May 1999 show, but I  
15 can't say for sure.

16          Q.    Okay. But one thing you can say for sure is  
17 you never sent him any of these demand letters that you  
18 told the jury about yesterday, before you pulled the  
19 trigger on him, did you?

20          A.    No.

21          Q.    And you also sued him out of what, 60  
22 distributors of Menusoft products, and he's the only one  
23 who drew the black bean?

24          A.    Yes.

25          Q.    And you will agree with me it was just a shot

1 out of the dark, all of a sudden one day the sheriff  
2 showed up and gave him your lawsuit. He -- you didn't  
3 call him; you didn't give him a chance to take a  
4 license; you didn't do any of those things you told the  
5 jury about with regard to some of these other folks.  
6 You just hauled off and sued him; isn't that true?

7 A. Yes.

8 Q. Is that the way you do business?

9 A. No.

10 Q. So whatever this TransPad is, it's not yours,  
11 is that what you're telling the jury?

12 A. We didn't own any of the TransPads that we  
13 were marketing, no.

14 Q. Okay.

15 MR. CARROLL: Let's find that letter.  
16 Let me have 149, please.

17 Q. (By Mr. Carroll) Can you see 149 up there,  
18 Mr. McNally?

19 A. Yes, I do.

20 Q. And the date is January the 4th of '97?

21 A. Yes.

22 Q. And this is a letter that you wrote and you  
23 signed, correct?

24 A. Yes.

25 Q. And it's written on the -- on the stationery