

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 15, 2010
MENUSOFT SYSTEMS CORPORATION * 2:00 P.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
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(Proceedings recorded by mechanical stenography,
transcript produced on CAT system.)

1 (Bench conference concluded.)

2 THE COURT: Ladies and Gentlemen, we are
3 at a milestone. And what that means is we've heard all
4 the evidence in the Plaintiff's case, and we are now
5 going to start hearing the evidence from what's called
6 the Defendants' case-in-chief.

7 Defendant -- Mr. Carroll, you may call
8 your first witness.

9 MR. CARROLL: Thank you, Your Honor.

10 We would call Brian Smith. And I believe
11 Mr. Smith has been sworn, Your Honor.

12 THE WITNESS: That's correct.

13 THE COURT: All right. Come around,
14 Mr. Smith. If you'll have a seat and talk into the
15 microphone. Try to keep your voice up, also.

16 THE WITNESS: Yes, sir.

17 MR. CARROLL: May the Court, please, Your
18 Honor.

19 THE COURT: Mr. Carroll.

20 BRIAN SMITH, DEFENDANTS' WITNESS, PREVIOUSLY SWORN

21 DIRECT EXAMINATION

22 BY MR. CARROLL:

23 Q. Mr. Smith, are you Brian Smith, also known as
24 the DQ dude?

25 A. Yes, sir, that would be me.

1 Q. Are you the fellow we saw in the video
2 yesterday?

3 A. Yes, sir, that would be me.

4 Q. Okay. And the jury likely heard a little bit
5 of your background in the video, but let's go over it
6 again since we've all slept.

7 Where do you live?

8 A. I live in Houston, Texas.

9 Q. And how old a fellow are you?

10 A. Fifty-three.

11 Q. Now, I think you told the jury in that video
12 yesterday that you were in business in Houston in a
13 family-owned business.

14 Would you tell them about that, please.

15 A. I'm basically a second generation. My dad was
16 with NCR. After a successful career with NCR, he
17 started our company, and I went to work for him at the
18 age of 17, I believe.

19 Q. Now, NCR, for those of us who may not be in
20 the business, is what?

21 A. It stands for National Cash Register.

22 Q. Now, was your daddy a bigshot with National
23 Cash Register?

24 A. He was the -- he was -- he was very
25 successful. He started with NCR as the janitor. He

1 felt certain that with Graham there, our representation
2 to the customer was solid.

3 He was the developer of the software. He was
4 there making the pitch with me, and we were successful.
5 And it's been a long ride, and they're still using the
6 product today.

7 Q. Now, when was that?

8 A. I believe we actually installed it maybe
9 around the very beginning of '93, maybe --

10 Q. So somebody --

11 A. Maybe the end of '92.

12 Q. Right after you hooked up with Menusoft?

13 A. Yes, sir. That was I think -- I believe our
14 very first sale.

15 Q. And you said that the Greyhound Track, is that
16 between -- for those on the jury who might know that
17 area, is that between Houston and Galveston on 45?

18 A. Yes, sir. I think it's considered the
19 La Marque area.

20 Q. Or Dickinson maybe?

21 A. Close to there, yes, sir. I think it is
22 actually considered La Marque.

23 Q. Okay. And it's still in business?

24 A. Still in business today.

25 Q. Still running greyhounds?

1 A. Yes, sir.

2 Q. Chasing rabbits?

3 A. Yes, sir.

4 Q. And I think you told the jury they still use
5 the software that you sold them back in '93?

6 A. Yes, sir. Just -- I think it kind of goes
7 without saying how reliable the product is. We're still
8 servicing it. We're still taking care of it. It was a
9 great product.

10 And it was probably a very key part of our
11 success to land that account and to open up that
12 business with that size of an installation. It was a
13 testimonial to the product and to our company. So it
14 really did help pioneer us and lead us down the road.
15 We would take customers there and show them the product,
16 and then we would more likely do our demonstrations
17 right there at that facility. So it was, by all means,
18 I think the start of a very good relationship.

19 Q. And I've heard a fair amount of talk in the
20 case about that greyhound track.

21 In '92 or '3, when you made that sale, did you
22 sell them handhelds?

23 A. No, sir, we didn't. I mean, they had an
24 interest. They were -- they were a MICROS user, and I
25 was a MICROS dealer actually in 1978. That's dating me

1 back there a little while.

2 But they were actually a MICROS user, and
3 their Tuscaloosa, Alabama, track facility, they had been
4 using the MICROS product, so they were our competitors.
5 I don't really think at that time anybody could afford
6 the price of what handheld technology would have cost,
7 because it would have been very expensive.

8 Q. And at the time you made this big sale to the
9 greyhound track for Menusoft in '92 or '3, whenever it
10 was, were you still an authorized dealer for MICROS?

11 A. No, sir, I was not at that time. No, sir.

12 Q. But you had been?

13 A. Yes, sir.

14 Q. Now, you heard a lot of talk in the case about
15 this -- I think Mr. McNally called it the MICROS brick.

16 You've been sitting in the courtroom the whole
17 trial, right?

18 A. Yes, sir.

19 Q. Did any of that stuff look familiar to you?

20 A. Yes, sir.

21 Q. Did you sell it?

22 A. No, sir.

23 Q. Did you try?

24 A. No, sir.

25 Q. Why not?

1 A. I think, again, it was more of an
2 acceptability factor. A lot of people were -- it may
3 have had a new wow factor back then, but people weren't
4 really buying it, just like they're not really buying it
5 today.

6 Q. Does the greyhound track in Dickinson or
7 La Marque, or wherever it is down there, use what I call
8 Handies, or handhelds today?

9 A. No, sir.

10 Q. So they don't even use what the lawsuit is
11 over?

12 A. No, sir.

13 Q. Today?

14 A. No, sir.

15 MR. CARROLL: May I approach, Mr. Smith,
16 Your Honor?

17 THE COURT: Yes.

18 MR. CARROLL: I'm just going to get them
19 to identify that this is software.

20 Q. (By Mr. Carroll) Let me show you what is in a
21 little plastic package that's called the Restaurant
22 Solution Digital Dining. Then under it in red it says
23 Professional, and there's a date, April 29th, '10, and
24 7.3.5.

25 Is that what you sell for Menusoft?

1 A. Yes, sir, it is.

2 Q. Anything else?

3 A. As far as other products you mean or just --

4 Q. Anything other than software that looks like
5 that disk?

6 A. All we get from Menusoft is strictly software.

7 Q. Okay.

8 MR. CARROLL: Your Honor, may we publish
9 that to the jury as a demonstrative?

10 THE COURT: Any objection?

11 MR. GOULD: No.

12 THE COURT: Yes.

13 MR. GOULD: How do you want me to do
14 that? Do you want me to --

15 MR. CARROLL: Pass it down the row.

16 MR. GOULD: Okay. Glad I asked.

17 Q. (By Mr. Carroll) And it's a pretty standard
18 looking piece. I say piece; looks like a disk, right?

19 A. Yes, sir.

20 Q. Okay. But that's all you get?

21 A. Yes, sir.

22 Q. Do they tell you how to use it or anything
23 like that?

24 A. Well, we were schooled. We went to classes in
25 the early stage of becoming a dealer, but we pretty much

1 know how to service it, install it, and sell it.

2 Q. Okay. Now, over the years, the jury has heard
3 that there have been various versions or, I guess,
4 updates of the software that's on that disk or a disk
5 like it; is that true?

6 A. Yes, sir.

7 Q. How many do you remember going back to '92?

8 A. I would assume there's quite a few. I don't
9 know how many it would be, but we had early versions
10 that were in DOS, and we had quite a few versions that
11 were in the Windows, which is on that disk that they're
12 holding right now.

13 Q. Okay.

14 MR. CARROLL: And if the Court please, if
15 I can walk right over here.

16 Q. (By Mr. Carroll) The jury has heard some talk
17 of the word called DOS. Is it two S's or just S?

18 A. Just one.

19 Q. What is that?

20 A. DOS was the -- Microsoft DOS, it was an
21 operating system that was available back in that
22 timeframe.

23 Q. When you -- back in the early '90s, when you
24 made your deal -- distributor deal with Menusoft?

25 A. Yes, sir.

1 Q. Is DOS still around today?

2 A. In the sense that it's still being used at
3 Gulf Greyhound, it is. But it's not sold today, no,
4 sir.

5 Q. Okay. Well now -- so would you say it's
6 obsolete?

7 A. I would say it's obsolete, yes, sir.

8 Q. Well, why hasn't the folks at the race track
9 changed?

10 A. It's basically due to the fact that they would
11 have to spend money. The product is working. Most of
12 my customers have this aspect of it ain't broke, I'm not
13 fixing it, you know, and they just don't want to spend
14 the money.

15 And I don't, quite frankly, blame them for not
16 spending the money. So they're still using the product,
17 and we're still servicing it, and they're very happy
18 with us.

19 Q. Now, let me ask you this: I understand you're
20 not an engineer, correct?

21 A. Yes, sir.

22 Q. There aren't many of us in this courtroom, so
23 we need to stick together.

24 A. I'm with you.

25 Q. But based on what you understand, what's the

1 difference between the software that you were selling
2 for Menusoft, say, after 2002 and before 2002, just
3 based on what you can tell?

4 A. There's not -- I mean, there's not a lot of
5 difference. The product in the point-of-sale business
6 has pretty much covered the gamut. I mean, they all,
7 like I said, do 2 plus 2 is 4, and pop the drawer.
8 So, you know, the technology that's out there and what
9 we're using the point-of-sale for is serving the public
10 just like it was 20 years ago. And they're using it
11 today, and they're getting pretty much the same benefits
12 they were getting from us 20 years ago.

13 So in my opinion, we're doing exactly what
14 we've been doing all our life.

15 Q. So when you go out into the countryside and
16 pitch the Menusoft product or any other point-of-sale
17 software -- well, let's stay on the Menusoft product.
18 Do you tell them that it's anything different than what
19 you were telling them back in '93, when you made the big
20 sale to the race track?

21 A. No. It's kind of -- you know, think of the
22 restaurant industry. I mean, it has evolved some, but
23 primarily it's still the same thing. You place an
24 order. It prints to the kitchen printer or a screen in
25 the back. They make the food for you. They serve the

1 food to you. They print a check. They hand you the
2 check. You pay the check.

3 The methodology in which restaurants run their
4 business has really -- is constant. It's pretty much
5 the same. I promise you, if you go into a Dairy Queen
6 today, it's going to be run pretty much the same way it
7 was run when I was in a Dairy Queen.

8 Q. You were in the courtroom, I think it was
9 yesterday, when Dr. Shamos was testifying to
10 Mr. Osborne. And I didn't write it down, but I think I
11 remember it.

12 He talked about that if -- if we want to do
13 something different, it would be a step back to the time
14 that waiters rolled around on roller skates and wrote
15 down orders on pads.

16 Do waiters still write down orders on pads in
17 your business?

18 A. I would much prefer a waiter writing things
19 down with a pad in my business. I mean, the ones that
20 come to my table thinking they can remember everything
21 usually forget to put the extra onions on the enchiladas
22 and stuff. So the pen and pad I don't think is ever
23 going to go away. I think it's here forever.

24 Q. You told me yesterday -- or this morning that
25 you-all in the business have a word for that?

1 A. We call it sneaker-ware. Basically, you take
2 the order on a pencil and pad, and you run it back to
3 the kitchen, or you run it back to the terminal.

4 Q. Sneaker-ware as opposed to software?

5 A. Yes, sir.

6 Q. Now, is that -- I mean, no foolin'. I mean,
7 all of us know that that's still around. Is that still
8 around in your customers?

9 A. Most definitely.

10 Q. Okay. So let's talk -- well, let me ask you
11 this before I forget it: Do you sell other dealers'
12 software which competes with Mr. Granger's software?

13 A. We do sell other competing software packages,
14 yes.

15 Q. Can you give us a for instance?

16 A. Well, in the retail world, we sell a product
17 called InfoTouch, which is a software package, and it's
18 used in the retail environment where they do the
19 scanning, like in a grocery store, convenience store, or
20 in the clothing store.

21 We also sell a very low-end restaurant
22 solution for customers who want to spend even less
23 money, because I think today, again, in the economy,
24 you're not going to find people wanting to reach out and
25 spend a whole lot of money on the point-of-sale systems.

1 So we have another package that's very inexpensive, very
2 simple to use, and it's just -- it pretty much does the
3 exact same thing as a cash register does.

4 Q. Does that low-end product work on a Handy?

5 A. I think just about anything out there could
6 work on a Handy, if it wanted to.

7 Q. When did you first hear the name Ameranth, the
8 Plaintiff in this lawsuit?

9 A. When we got sued.

10 Q. When you -- when your company got sued?

11 A. Yes, sir, when we were sued.

12 Q. I think Mr. McNally conceded to the jury that
13 he didn't give you any advance warning before he pulled
14 the trigger on you; is that true?

15 A. I believe that would be a true statement, yes.

16 Q. Before he sued you or his company sued you,
17 had you ever heard of Mr. McNally?

18 A. No, sir, not at all.

19 Q. Have you ever heard -- had you ever heard of
20 his revolutionary new invention in the -- in the world
21 of hospitality?

22 A. No, sir, not at all.

23 Q. Had you ever heard of his Software Wizard?

24 A. Never heard of the Software Wizard.

25 Q. Now, you were in the courtroom when the jury

1 heard a lot of testimony about trade shows, and you
2 talked about a trade show.

3 To your knowledge, have you ever been to a
4 trade show where Ameranth was displaying anything?

5 A. No, sir.

6 Q. Are there a few or a lot of trade shows?

7 A. There's a lot -- for our industry, there's a
8 lot. And the one in Texas is usually between Houston
9 and Dallas. It's what they call the Texas Restaurant
10 Show. And I've been in that show for probably the
11 better part of 25 years and never seen an Ameranth ever
12 at any one of those shows.

13 Q. Has Menusoft had a booth in that Texas show?

14 A. Yes, definitely.

15 Q. Have you had a booth in that Texas show?

16 A. We worked that booth together, yes, sir.

17 Q. Okay. How about MICROS? Have they had a
18 booth?

19 A. Yes, sir. Every competitor that's in my
20 industry.

21 Q. How about the Squirrel?

22 A. Every competitor. Squirrel, POSI, Aldelo,
23 RMS. Every competitor that sells hospitality was in
24 that show pretty much.

25 Q. When did you first hear, see, or learn in your

1 business that somebody was promoting or selling wireless
2 point-of-sale devices?

3 A. Basically, MICROS. I mean, I saw handheld
4 devices myself at the Astrodome. There was a company
5 called POSitouch, which used a SACO handheld device.

6 Q. Are you talking about the Eighth Wonder of the
7 World?

8 A. Yes, sir, I am.

9 Q. Those of us who remember that.

10 A. I'm hoping it still stays there.

11 Q. Yeah. So the Astrodome opened in, what, '62?

12 A. I'm not sure when it opened.

13 Q. Because the Houston Astros started in '62, and
14 then they played there right after they started.
15 But I interrupted you. Finish your thought.

16 A. The Astrodome skyboxes, POSI was in there, and
17 they had the SACO handhelds, which I know from personal
18 experience. They brought them to my office to see if we
19 could service them, which we could not at the time.
20 We also know that MICROS, their 8700 or how somebody
21 referred to it as a brick, that handheld technology was
22 out.

23 People who were in the point-of-sale business
24 and in our industry were introducing handhelds as early
25 as -- I think y'all saw '94 up on the screen.

1 So, I mean, it's not like there was no
2 handhelds out there, and these guys pioneered it.

3 Q. All right.

4 MR. CARROLL: Your Honor, may I approach
5 the witness?

6 THE COURT: Yes. You can also retrieve
7 your exhibit that you published to the jury.

8 MR. CARROLL: Thank you, Your Honor.
9 This is 98.

10 Q. (By Mr. Carroll) Let me show you what's been
11 received into evidence as Defendants' Exhibit 98, and it
12 says: 8700 HMS, Version 2.10 User's Manual. And I
13 think that's the --

14 MR. CARROLL: Thank you.

15 Q. (By Mr. Carroll) -- the MICROS user's manual
16 that the jury has heard a fair amount about?

17 A. Yes, sir.

18 Q. When you were a MICROS dealer, were user
19 manuals, such as the one in front of you, available to
20 you as a dealer?

21 A. Yes, sir, they were.

22 Q. Were manuals, such as the one in front of you,
23 available to your customers?

24 A. Most definitely.

25 Q. Were manuals, such as the one in front of you,

1 available to your prospective customers, somebody who
2 might want to think about buying the MICROS system?

3 A. I think pretty much back in those days,
4 everybody would get a manual.

5 I mean, if you were looking to buy a system,
6 brochures were one piece of the marketing material you
7 would get, but an owner's manual or some type of like
8 request for information or request for proposal, a lot
9 of the companies would send those out.

10 They would want documents like this before you
11 could even consider -- be considered a bidder on the
12 actual project.

13 Q. Before Ameranth, Mr. McNally's company, sued
14 you, had you ever heard of the Amer -- or the McNally
15 patent?

16 A. No, sir.

17 Q. Have you read that patent today?

18 A. No, sir.

19 Q. Would you know what you were reading if you
20 were to read it?

21 A. No, sir. I wouldn't know what I was reading
22 today.

23 Q. You've heard a lot of testimony, along with
24 the jury, by technical folks and by Mr. McNally about
25 what he invented. Today, do you understand what it is

1 that he claims he invented?

2 A. I do not, and I can tell you, it sure isn't
3 anything we do.

4 Q. Well, if you don't understand, why do you
5 think it's something you don't do?

6 A. I've never seen it. I mean, it's like, you
7 know, we're looking at something that I don't even know
8 if it ever existed.

9 Q. Well, you heard a lot of descriptions about
10 what he says his invention solved problem-wise. Did any
11 of those problems sound familiar to you based on what
12 you had heard from your customers?

13 A. I think the problems in the hospitality
14 industry have been prevalent forever. They're out
15 there. I mean, you know, getting orders faster, using
16 more reliable hardware.

17 So solving problems in the restaurant is what
18 our industry has always been about. We invented the
19 first cash register. You know, we invented basically --
20 or the industry invented, you know, the first POS
21 systems to take care of customers' problems.

22 These -- these tools have been out there for a
23 long time solving problems within restaurants and many
24 types of retail business forever.

25 MR. CARROLL: Do you have the last page

1 in Dr. Kennedy's report?

2 Q. (By Mr. Carroll) You were in Court when the --
3 Ameranth's damage man, Dr. Kennedy, showed this tote-up
4 slide, were you not, Mr. Smith?

5 A. Yes, sir.

6 Q. Do you know today how much Ameranth is going
7 to ask this jury to give them because of whatever they
8 claim you did wrong?

9 A. You're looking at a total, looks like in the
10 4-million-dollar price range.

11 Q. Do you know how much of it they're going to
12 say was yours as opposed to any one of the other or all
13 of the other 59 dealers or Menusoft?

14 A. No. No, sir. No, sir.

15 Q. Have they ever told you that?

16 A. No, sir.

17 Q. And from this column, I guess you fall under
18 the 33 percent column. Is that what you understood?

19 A. Well, I would say a lot less, but --

20 Q. But, I mean, that -- based on what you
21 under -- what you heard?

22 A. From what I heard, yes, sir.

23 Q. And you heard Dr. Kennedy admit to
24 Mr. Delflache here that that's all the distributors.

25 A. Yes, sir.

1 Q. So you're one of, what, 60?

2 A. I believe that was correct, yes, sir.

3 Q. And I think we heard you're not the biggest.

4 A. That's correct, sir.

5 Q. So do you know today -- has anybody told you
6 how much you're going to have to pay of that based on
7 whatever it is they say you did wrong?

8 A. No, sir.

9 Q. Let's talk a little bit about --

10 (Sotto voce discussion.)

11 MR. CARROLL: May I approach again, Your
12 Honor?

13 THE COURT: Yes, sir.

14 Q. (By Mr. Carroll) This is another MICROS
15 document that's been accepted into evidence as No. 194.
16 And this is another variation of that 8700 manual.
17 Same questions as before. Is this the kind of document
18 that would be available to you as a dealer of MICROS?

19 A. Yes, sir.

20 Q. As me as a customer of MICROS?

21 A. Yes, sir.

22 Q. As me as somebody who might be interested in
23 MICROS products?

24 A. Yes, sir.

25 Q. And if I were to read that magazine article

1 that Mr. McNally and I talked about that was published
2 back in the early '90s talking about MICROS' product, if
3 I were interested, are you telling the jury I could have
4 gotten a copy of that manual?

5 A. Yes, sir.

6 Q. When you sell the -- when you sell this
7 (indicates) to your customers, when you go to Shepherd,
8 to the hospital and sell them this, do you sell them
9 typically anything else to go along with it?

10 A. Yes, sir. We sell the entire system. So we
11 sell the hardware and the printers and computers and
12 cash drawers and everything that goes with it.

13 Q. If you're lucky.

14 A. If I'm lucky, yes, sir.

15 Q. Okay. But nothing but this (indicates) comes
16 from Menusoft?

17 A. That is correct.

18 Q. So let's suppose -- and by the way, do the --
19 and you may have already told me this, but do the --
20 does the Shepherd hospital have Handies?

21 A. No, sir, they do not.

22 Q. Do you have any retail establishments in East
23 Texas or Western Louisiana which have Handies?

24 A. I do not believe so.

25 Q. Tell the jury where you do have customers who

1 buy handheld wireless -- what do you call them?

2 A. Handheld terminals.

3 Q. Handheld terminals.

4 A. Yes, sir.

5 Q. HHTs?

6 A. That would be -- yes, sir.

7 Q. Okay. Where -- where do you have customers
8 that have HHTs that we can talk about?

9 A. As far as the city location, you mean?

10 Q. Yeah, the name of the place.

11 A. Okay. In -- in the San Antonio market, we
12 have Bill Miller Bar-B-Q.

13 Q. Okay. And Bill Miller -- and I talked to the
14 jury panel about that a couple of weeks ago, and the
15 lady up in the right-hand corner had been to Bill
16 Miller's. Got a lot of locations in San Antonio, right?

17 A. Yes, sir.

18 Q. How did it come to pass that you were able to
19 sell Bill Miller a Handy?

20 A. Their IT guy, who actually used to be an
21 ex-employee of ours, went to work for them, and as he
22 did more research and was looking to, basically, get
23 into the handheld department more or less for terminals,
24 he approached us on adding it.

25 Q. Did you sell them a system that involved the

1 Menusoft software?

2 A. They had the Digital Dining software in their
3 business, yes.

4 Q. Now, you heard testimony in this case today
5 that Dr. Kennedy, the damage man for Ameranth, says that
6 there's no way to know whether one of these disks is
7 installed in a -- in a Handy, in an HHT -- what do you
8 call the non-Handies?

9 A. Fixed terminals.

10 Q. Okay. I'm going to put FT.

11 And I bet the jury knows this already, but
12 just so it's clear, a fixed terminal would be like
13 Ms. Lockhart's computer. It has wires coming out of it,
14 right?

15 A. Yes, sir.

16 Q. Okay. So Mr. -- Dr. Kennedy says one of the
17 reasons he went the route he went in coming up with his
18 number that we looked at, or numbers, is because nobody
19 can know how many of these disks for any one of your
20 customers goes into an HHT, a Handy, or a fixed
21 terminal.

22 Is that a true fact?

23 A. No. That would be very much incorrect.

24 Q. Why?

25 A. It would be nice if all we had to do is hand

1 them the disk, but we have to install the system. We
2 have to set it up, and we have to basically hook up the
3 access points and the routers.

4 So we're doing the actual installation work.
5 It's not like we're just handing somebody a disk, and we
6 don't know what they're going to do with it thereafter.

7 Q. Now, you said access points, and I think
8 Dr. Shamos said that they were in the ceiling or
9 somewhere near the ceiling where the transmission can
10 occur, and I bet there's some in this courtroom. I
11 don't see any.

12 Can you see any access points in the
13 courtroom?

14 A. No, sir.

15 Q. I mean, it's a job, isn't it? You got to have
16 a ladder.

17 A. Got to run cable.

18 Q. Got to have all that stuff.

19 So do you today know when any of your clients,
20 any of your customers, want this software to go handy as
21 opposed to going fixed?

22 A. Yes, sir.

23 Q. Each and every time?

24 A. I can only say that the only exception would
25 be if somebody actually just bought the disk from us,

1 and that's all we did. And that doesn't happen.

2 Q. Has it ever happened?

3 A. I don't believe we've ever just sold the disk
4 and then, you know, sent it off and hoped the customer
5 makes it on their own and they're successful.

6 So I think pretty much in all the cases, we're
7 involved in the installation so we know how many
8 terminals are going to be used.

9 Q. Well, did you hear Dr. Kennedy's estimates as
10 to how many buyers of these disks use them in HHTs or
11 Handies? Did you hear him say that?

12 A. I'm sorry. Say again.

13 Q. Okay. You were in the courtroom when
14 Ameranth's damage man gave the jury his opinion -- and I
15 wrote it down, I think, right -- that it was somewhere
16 between one-third and two-thirds of every disk sold
17 ended up in a Handy, in an HHT.

18 Has that been your experience as the guy who
19 actually sells these things?

20 A. Absolutely not.

21 Q. Tell the jury the truth about it.

22 A. Out of all our customers -- and I'm talking
23 about thousands of customers, plus -- I probably don't
24 have five or six customers that actually use handheld
25 devices.

1 So I don't know where he gets his numbers from
2 and where he makes them up, but it's absolutely
3 incorrect.

4 Q. And so you told the jury that you have five or
5 six customers who have Handy or HHT applications using
6 the Menusoft software, correct?

7 A. Yes, sir.

8 Q. Let's talk about the one we heard testimony
9 about. And I can't remember the name, but it was a
10 picture show in Austin. You know what I'm talking
11 about?

12 A. There's one customer that recently came to us
13 to buy software, and that customer is called Studio
14 Movie Grill.

15 Q. Say that again.

16 A. Sorry. Studio Movie Grill.

17 Q. Okay. That's the show.

18 A. That is a picture show/theater-type place.
19 They have the large theaters and multiple theater screen
20 rooms, and you go in there, and you sit down, and you
21 can eat and drink and watch a movie. So it's a really
22 cool place.

23 Q. So you -- I assume that you would like to sell
24 disks for HHTs.

25 A. The revenue would be extremely larger. By all

1 means, yes, I'd like to do that.

2 Q. Because you'd get to put in the access points
3 in the ceiling and sell those, right?

4 A. Yes. Plus, it's -- again, it's lot more
5 license. You have to have a license for each person
6 that's going to use one.

7 And so in a restaurant like that, it could
8 have 30 waiters. You would need to sell 30 handhelds,
9 whereas, normally, we sell three or four fixed term
10 names for an average restaurant.

11 Q. Well, why haven't you been successful in the
12 thousands you've told us about, but these folks at the
13 picture show bought however many they bought? What's
14 the difference?

15 A. The difference is mom and pop. I mean, really
16 our model has always been to mostly sell to independent
17 restaurants.

18 So our average customer is a small independent
19 restaurant or bar or fast food place, and they don't
20 want to spend that much money on the technology.

21 They think it's great, and I think everybody
22 will agree it's kind of neat-looking, but it's very
23 expensive. It's flawed, in my opinion. It doesn't
24 really work well.

25 It doesn't bounce well. If you drop one, you

1 pretty much pay for a device, which costs about \$1295.

2 So it may demo well, but it doesn't sell well, period.

3 Q. So did you make the sale to the picture show?

4 A. No, sir.

5 Q. But do you know about why they did what they
6 did from your salesmen?

7 A. Yes, sir.

8 Q. Okay. So tell the jury why it would be, from
9 everything you know, that that particular kind of
10 establishment would spend the money that maybe another
11 restaurant wouldn't spend to get these Handies?

12 What is it that's unique or different or
13 special about that setup that would justify them
14 spending all that money on these devices?

15 A. It's just basically their size. I think you
16 heard somebody, maybe in the video or something, make
17 this comment about stadiums and skyboxes. Large, huge
18 facilities that buy from MICROS can afford to do that.
19 This particular complex is a very large complex. I
20 think it has maybe a dozen screens, and they seat
21 thousands of people. So, you know, having a server go
22 into the theater area to take the drink order does help
23 in the process.

24 And so, you know, only the largest, biggest
25 chain-type customers, in my opinion, are the only ones

1 that could afford it, and they're pretty much the only
2 ones that are probably using it today.

3 And I think y'all can answer that question
4 yourself by figuring out how many you've seen out there
5 in the world. There's not a lot.

6 Q. Mr. Smith, you've been in the courtroom with
7 the jury and seen a lot of these projections that, for
8 instance, Dr. Kennedy said that he thought were
9 important, articles and discussions about where the
10 market was going.

11 Since 1993, in your experience and from your
12 observation, has the market gone to HHTs?

13 A. No, sir, it has not.

14 Q. In the last two or three years, has there been
15 a surge toward HHTs --

16 A. Absolutely not.

17 Q. -- in your experience?

18 A. In my experience, absolutely not.

19 Q. Are you selling fewer or more HHTs today than
20 you were a year ago?

21 A. We're selling very little, and I would say
22 probably, in today's economy, we would be selling even
23 less, with the exception of the Studio Movie Grill.

24 Q. Are restaurants closing in your area?

25 A. I think they're closing pretty much in

1 everybody's area, sir.

2 Q. How do you know or how do your folks know what
3 to charge for the Menusoft product?

4 A. There's a standard suggested retail price that
5 is, I think -- I don't know if it's published, but it's
6 a standard retail price that most everybody is given to
7 use.

8 I think if you think of retail, you have to
9 ask yourself how many of you go down and pay sticker
10 price for a car or truck or something. Usually not.
11 So retail is what's established, and when we sell it, we
12 have, basically, the advantages and opportunity of being
13 a small independent company to negotiate and to discount
14 to try to win the business, and we do that.

15 Q. Do your salesmen have the authority to make
16 deals and discounts and that kind of thing to
17 customers --

18 A. Yes, sir.

19 Q. -- for this Menusoft product?

20 A. Yes, sir, they do.

21 Q. Okay. What's the sticker price for this one?

22 A. If it was a three-terminal system, the retail
23 price -- the suggested retail price would be \$5,000.

24 Q. And what all would that include? If I were a
25 restaurant, and I wanted three of them, and I had

1 \$5,000, and I wanted to buy from you, what would that
2 get me?

3 A. That would include the Digital Dining
4 software, which is a very feature-rich package. I mean,
5 it has a lot of features and functionality. So they
6 would get the -- in my opinion, one of the best software
7 packages on the market today.

8 Q. Now, we've heard a lot of testimony about
9 various versions of the -- and by the way -- and I'm
10 sure the jury knows this, but the term Digital Dining
11 means what? What is Digital Dining? Is this Digital
12 Dining (indicates)?

13 A. It's -- I believe it's their registered
14 trademark, yes, sir.

15 Q. Okay. So when we talk about Digital Dining,
16 we're talking about what's in this disk?

17 A. From Menusoft, yes, sir.

18 Q. From Menusoft?

19 A. Yes, sir.

20 Q. Okay. So -- and we've heard a lot of
21 testimony about various versions. This one says 7.3.5.
22 Does that mean anything to you?

23 A. Yes, sir, it does.

24 Q. Well, what point in the -- in the continuum
25 does 7.3.5 mean? What year?

1 A. Well, 7.3.5 is still a version that I have
2 been employing today and selling -- deploying and
3 selling today.

4 So it is an older version, but it's also a
5 version that's been out for probably -- it released when
6 I was -- maybe four or five years. It's very stable,
7 very reliable. We know it well and like it.

8 Q. How long have you been selling 7.3.5?

9 A. I would say a few years now, sir.

10 Q. Two years, five years, ten years?

11 A. At least three years.

12 Q. Okay. Do you sell any later versions than
13 7.3.5?

14 A. They have the newest version out, which is, I
15 think, the 7.4 version. And I believe our office maybe
16 in Dallas has started to buy the 7.4 version, maybe a
17 few packages. I'm not sure of the total number. But
18 we're slowly taking on the newer version, and we're
19 slowly adopting it to sell.

20 Q. You've heard some and the jury's heard some
21 testimony about an online ordering feature. You heard
22 that.

23 A. Yes.

24 Q. Do you sell any versions of Menusoft software
25 that will accommodate or allow online ordering?

1 MR. GOULD: Object to foundation.

2 THE COURT: Overruled.

3 MR. GOULD: No qualification.

4 THE COURT: Overruled.

5 A. We don't sell any version of Menusoft that has
6 online ordering, and it doesn't have online ordering,
7 sir.

8 Q. (By Mr. Carroll) To your knowledge, is there
9 any Menusoft Dining -- Digital Dining product on the
10 market today that accommodates or allows online
11 ordering?

12 A. No, sir, absolutely not.

13 Q. So for \$5,000 --

14 MR. CARROLL: And, again, Your Honor, if
15 I might step over here to the board?

16 THE COURT: Yes.

17 Q. (By Mr. Carroll) For \$5,000, you're going to
18 put me in the Menusoft system, but that doesn't buy me
19 my cash register, right?

20 A. No, sir. You still have to buy the hardware,
21 and then you have to pay us to install it.

22 Q. Okay. And what about the service and
23 maintenance? Do you throw that in, or do I have to pay
24 for that?

25 A. We -- we usually supply a one-year warranty

1 usually on our installation; sometimes maybe 90 days.

2 But, normally, you get a year of warranty from us.

3 Q. Okay. And you heard Dr. Kennedy, Menusoft's
4 (sic) damage man, say that you get -- you, as a dealer,
5 get 40 percent of that; is that true? Is that your
6 trade with Menusoft?

7 A. That would be the percentage margin, yes, sir.

8 Q. So that means that you make as gross profit
9 \$2,000; is that right? Yep, that's right. Is that
10 true?

11 A. If sold at retail, that would be true, yes,
12 sir.

13 Q. Okay. Would you --

14 MR. CARROLL: Jim, would you put up
15 Defendants' Exhibit 490?

16 Q. (By Mr. Carroll) Let me show you one of the
17 exhibits that's in evidence.

18 MR. CARROLL: And if you can -- can you
19 sharpen that a tad? There we go.

20 Q. (By Mr. Carroll) It's CRS. That's you. What
21 part of town is Westglen Drive, by the way?

22 A. It's on the west side, the Hillcroft and
23 Westpark area.

24 Q. Inside or outside the loop?

25 A. Outside the loop, sir.

1 Q. Have you been there a fair amount of time?

2 A. A long time.

3 Q. And then your billing, it says: Invoice,
4 dated '07, correct?

5 A. Yes, sir.

6 Q. Is that before you got sued or after?

7 A. You know, I think that's before I got sued.

8 Q. Okay. And it says: Bill to: Third Base.
9 Do you recognize that customer, Third Base?

10 A. I believe that's a customer of my sister's.
11 She sold the account in Austin.

12 Q. Is your sister part of the business?

13 A. My sister and my brother, yes.

14 Q. And do they do pretty much the same thing you
15 do?

16 A. Pretty much, yes, sir.

17 Q. Are you the boss?

18 A. I think I'm a little bit of everything.

19 Q. Okay. You don't want to testify to that in
20 case it gets back, I bet.

21 So your sister made this sale?

22 A. Yes, sir, I believe that would be correct.

23 Q. So what is Third Base? Is it a restaurant or
24 a bar?

25 A. I think it --