

ORAL ARGUMENT – 9/5/01
00-1019
BMC SOFTWARE V. MARCHAND

CHASTAIN: The CA's decision is contrary to law and public policy and denies BMC Belgium its constitutional right to due process. The CA's opinion is also replete with factual findings that find no support in the record. However, even if all of the facts supposedly found by the CA regardless of how erroneous are considered as true BMC Belgium is still entitled to a finding that is not subject to personal jurisdiction in Texas.

The first issue concerns stock options. Now the courts below in Marchand seem to believe that stock options are some magical jurisdictional _____.

HANKINSON: Before you get in to some of the specifics of this case, has this court ever decided what the appropriate standard of review is in reviewing _____ decision by a TC?

CHASTAIN: I haven't seen a case that's specific - a case from this court that actually identifies what the standard of review is.

HANKINSON: How should we review it? What should be the standard of review that we need to decide that question since this is such a fact intensive case?

CHASTAIN: This is a fact intensive case. The way that I approach this is that although all of the cases out there from lower courts say that it's reviewed for factual sufficiency, given this courts inability to resolve factual issues, I had always approached this as a standard of legal sufficiency.

HANKINSON: I know that from reading the briefs that there is a tremendous dispute between the parties about what the facts of the case are. If we go to the record are there disputed facts or are the facts undisputed in this case?

CHASTAIN: I think that if you actually look at the record, the facts are quite apparent.

HANKINSON: But are they disputed or not? Obviously you all filed an affidavit from one of the officers of the Belgium corporation. That was not controverted.

CHASTAIN: That's correct. That was not controverted by any affidavit by Mr. Marchand.

HANKINSON: And the gentleman who was disposed in Houston does his testimony in any way conflict with anything, or are we dealing with a record that is undisputed?

CHASTAIN: I believe that we are dealing with a record that is undisputed. Mr. Max Watson's deposition does not have any statement that are contrary to Andrea Cox affidavit. The only way that conflicting inferences - Marchand is trying to create conflicting inferences is essentially misstating what the testimony is. That's our position.

HANKINSON: If it's your position that we review this from a sufficiency of the evidence and since we are prohibiting from conducting factual sufficiency review, if there are disputed issues then we do it of the legal sufficiencies for _____, and we would be required I guess to determine there's no evidence to support the TC's decision to deny the special appearance?

CHASTAIN: That's my understanding.

HANKINSON: And that's what your arguing today, or are you arguing that the facts are undisputed, so this is a de novo review on just questions of law?

CHASTAIN: I believe that the facts as found in the record are in fact undisputed. We of course had different takes on those facts. I think ours which pretty much track exactly what is in the record are the actual correct facts. And the spin that Mr. Marchand has attempted to place on it simply mischaracterizes the record. And unfortunately the CA placed all too much reliance on Mr. Marchand's supposed _____ of the facts.

HECHT: I know when you say 20,000 options, that's a translation of the contract. But usually you have an option for some number of shares. Is this really 20,000 options or one share each?

CHASTAIN: No. My understanding of this is that in this initial letter agreement that was executed in Belgium on March 29, 1996, that what they were trying to convey is at that point in the stage of negotiation, they were prepared to grant him one option of 20,000 shares of stock.

PHILLIPS: Let me ask you about general jurisdiction. A specific jurisdiction it seems to me turns on what was said in this meeting in Houston. We don't have evidence that there was any plot hatched in that meeting in Houston, and the record _____ one might develop at a trial I suppose. But on general jurisdiction to what extent should a court look at the normal communications and interworkings between a subsidiary and its parent to determine if the subsidiary has contacts where the parent is located?

CHASTAIN: I think that contacts between a parent company and its foreign subsidiary are essentially irrelevant to a jurisdictional analysis unless the threshold determination that these two companies are in fact alter egos of one another is first made.

HANKINSON: Why should that be irrelevant? If a subsidiary is doing business on a regular basis with its parent company within Texas, why should that be treated any differently than an unrelated corporation doing business with a Texas corporation on an ongoing basis?

CHASTAIN: The answer to your question is, I don't think that it really should be any different. As you know, a big dispute between the parties in this case is whether there is any evidence in the record that BMC Belgium actually purchased any products from BMC Software, Inc.

HANKINSON: I was just trying to follow-up on CJ Phillips' question. Before you go into the facts of this case, you said it was irrelevant the contact between the subsidiary and the parent unless the subsidiary and the parent an alter ego relationship could be established. And I don't understand why you said it was irrelevant.

CHASTAIN: I was more addressing the issue as I understood it from CJ Phillips. I don't think that the interactions between a subsidiary and a parent are necessarily irrelevant from a jurisdictional standpoint. If the contacts of the foreign subsidiary with the parent company are sufficient in quality and number as the cases have set out, you know what constitutes minimum contacts, what constitutes purposeful availment, I think that if the contacts truly are sufficient under the law as it is as to what minimum contacts and traditional notions of fair play and substantial justice require, then those contacts are relevant.

PHILLIPS: If the contacts between a subsidiary in Belgium and a parent in Texas you weigh those the same as you would the contacts between the subsidiary in Belgium and say another supplier in Texas? You just look at the number of contacts and the quality of the frequency and seriousness?

CHASTAIN: Well I think that's right. If you actually look at what we have here, and I am trying to get into the facts of this a little bit more, but that falls right into our argument. There is no evidence in the record that BMC Belgium had any real contacts with the parent company in Houston other than what would not satisfy a jurisdictional minimum contacts analysis when considering any other type of situation. Whether it was a subsidiary or some other supplier dealing with the company in Texas.

O'NEILL: But they did have contacts in Texas specifically relating to this option. Talk to me about the testimony in the record that the BMC Belgium officer, who apparently was an officer of both companies flew to Texas to talk about these specific options. And how do you connect the dots on that if we're supposed to look at the general contacts with the foreign state as they relate to the issue in dispute, that's the most direct contact I believe they are relying upon and why wouldn't that carry a lot of weight?

CHASTAIN: First of all, I don't believe that that is actually supported by the record either.

O'NEILL: And that's what I said. Talk to me about that. What does the record say on that?

CHASTAIN: What the record says on that is that Max Watson recalls discussing Michelle Marchand with Ordelheide, who was the President of the Board of BMC Belgium, on one occasion

prior to BMC Belgium actually extending this offer to him. He simply couldn't recall.

O'NEILL: If in fact the record did show that he flew to Texas specifically to discuss the issuance of this stock option, assume with me that the record shows that, would that be enough?

CHASTAIN: I don't believe that is enough. For purposes of specific jurisdiction, I don't believe that is enough because if he's flying there for the sole purpose of just discussing these particular options, first of all there is no - I mean that is not what would really be considered under the law to be a jurisdictional contact. There are many cases out there indicating that even occasional visits to Texas for purposes of conducting business are insufficient to establish minimum contact.

O'NEILL: But he has sued over this stock option, and that there was a specific contact in Texas over this stock option. How much more direct could you get than that?

CHASTAIN: What it really has to be is that BMC Belgium directing its activities towards Texas for the purpose of acquiring this particular stock option. The only reason that it says that the board has to approve stock options granted whether it's to employees of BMC Software or employees of any other BMC subsidiary is simply because that's what federal law requires. The board has to approve that. The plan was adopted pursuant to federal law, and, therefore, the plan specifically says that the board must approve the stock option _____.

O'NEILL: So under that analysis, you're saying it was just sort of pro forma. But let's say for example that in order to grant a stock option to someone who was going to remain an independent contractor, and there had to be a meeting held in Texas, and people from Belgium came over to try to get an exception made to accommodate a stock option for an independent contractor and a week long meeting took place and they worked it out and decided to grant them. Would that be enough for you?

CHASTAIN: That really assumes quite a lot because under federal law only employees can be granted stock options. So there would be no discretion of BMC's board to try to negotiate an exception because you simply can't do it under federal law.

O'NEILL: Well let's say there was a federal exception and let's say that someone came here to negotiate it and it was a hotly negotiated issue. Would that get you there? I mean it sounds like you're asking us to make a qualitative judgment here on - there was a meeting relating to these options, and you're asking us to presume that it was just sort of a proforma thing and not enough, not specifically discussed enough or not enough of an issue to be sufficient.

CHASTAIN: Well that's correct. What Max Watson testified to very clearly was that he didn't discuss stock options with Ordelleide about Michelle Marchand until after he had essentially already been offered them. And that's when he said, well this guys going to be an independent contractor. He simply can't do that. Here's a copy of the plan. Read it. And then y'all work it out afterwards. There wasn't any, and the record will bear out, there were no pre-offer discussions

concerning the stock options, and they certainly didn't occur in Houston.

ENOCH: Assume there's not general contacts between the subsidiary and the parent company. If someone is asserting a specific jurisdictional issue, a particular event occurred that I'm suing over and I'm trying to get that person in Texas, is it sufficient that say a couple of partners whose business is in another state happen to be at Houston Intercontinental Airport and discussed the matter and then left and went back to wherever they came from, would that be a sufficient contact for a third party who is suing based on the subject matter of that discussion to claim there was jurisdictional contact in Texas?

CHASTAIN: I don't believe so. I think that that is just simply too tenuous to actually build a case for a specific jurisdiction on.

ENOCH: Suppose that I'm suing a company in Belgium that has a parent company in Texas and I'm negotiating with the Belgium company, and the Belgium company in order to get permission to complete the transaction flies to Texas, talks to their senior partner over there, the senior partner either says yes or no, whatever happens, they go back to Belgium and they contact them, would that one contact in Texas between the parties deciding among themselves what they will do, is that sufficient for the third party to then claim that there was sufficient contact in Texas to merit jurisdiction in Texas to govern their contract?

CHASTAIN: I don't believe so. I still think that it is simply too tenuous even for specific jurisdiction because you have to purposefully engage in some action within the state that actually relates to the lawsuit. Even if there was discussions in Texas, what he's claiming is that when he got back and he said you're entitled to stock options, here, here is the agreement, sign this. That is the real issue here. Any harm that supposedly occurred, occurred back in Belgium where they signed, they negotiated, and they agreed to it.

* * * * *

RESPONDENT

HANKINSON: Are the facts in this matter undisputed?

NELKIN: The facts are disputed.

HANKINSON: In the record are they disputed?

NELKIN: They are disputed in the record. They are disputed in two fashions. One is, as you've heard, there is the affidavit of Mr. Coke. There is also deposition testimony of Max Watson, the CEO and Chairman of the Board of BMC Belgium. They were asked questions which we believe directly conflict with what Mr. Coke had to say.

HANKINSON: You think the Coke affidavit and the deposition conflict with each other?

NELKIN: That's correct. And we also think that the annual report, which was placed in evidence...

PHILLIPS: Where did you place that in evidence?

NELKIN: Before the district judge.

PHILLIPS: Is it in our record or did we get it by supplemental...

NELKIN: No. It's in the record. The annual report was before Judge Wood and that dealt with the issue of the fact that BMC distributed or sold all of its goods through its subsidiaries and basically it was a pass-through and...

HANKINSON: Do you take the position the CA's opinion refers to the fact that the Belgium subsidiary purchased products for sale from the parent in Texas for sale in Europe?

NELKIN: As I read the CA's opinion, there is never any statement in there that the Belgium company purchased a product. What Judge Wittig said in the majority was that BMC of Texas sold its products through its subsidiaries. But whether or not there was an actual purchase by Belgium from BMC of Texas...

HANKINSON: So you don't know how the products got from Texas to Belgium then, and the record doesn't reflect?

NELKIN: The record does not reflect. The record does reflect that they were sold to end users through the subsidiaries by BMC.

HANKINSON: So is the only place in the record we're going to find evidence about this - how the products made it from Texas to Europe - is going to be in the SEC filings?

NELKIN: And the annual report as well, because it uses the through language.

HANKINSON: Where in the record will we be able to locate whether or not there was actually a meeting in Houston in which folks from the parent company and someone from the subsidiary discuss the employment contract? And I believe that the CA said that Houston had approved the employment contract. And the only thing I see in your brief is a cite from the CA opinion. I'm wondering where in the record we are going to find that fact.

NELKIN: Max Watson testified that Ordelheide and he spoke about these options. He couldn't remember if it was in Texas or not, but the inference would go with us under the general rules of review of a situation where there were no findings of fact and conclusions of law either requested or...

HECHT: What difference does it make where they met? If they met in New York would that give you jurisdiction in New York?

NELKIN: No. I think the fact is that the plan itself provided that the board of directors of Texas had to approve the grant of options. Mr. Watson testified in response to a direct question: Does the board of directors of BMC have to approve any grant of options anywhere...

HECHT: And so your view is that alone is enough. It doesn't matter that they met on it or that they met in Texas.

NELKIN: I think that's right. His testimony was: well it's the compensation committee, not necessarily the board of directors. But he clearly is the BMC Texas entity that had to make those decisions. And that goes to specific jurisdiction.

OWEN: That's what the Texas company did. How does that give the Belgium company contact in Texas: purposeful contact...

NELKIN: Ordelleide was an officer of both.

PHILLIPS: Is there evidence that he was an officer or both, or only evidence that he was an officer of Belgium and a director of Texas?

NELKIN: No. It's conceded by the petitioner that he was an officer of Texas. He was the senior VP in charge of European operations. And that's in their brief. There's no question about that.

ENOCH: Well let's assume that he himself was here. He may have been serving on the boards of any number of corporations. Does that then give you jurisdiction of a foreign corporation just because while he was here he talked to somebody else about some business that the subsidiary was doing?

NELKIN: I don't think so. I think that would be too tenuous. He was the one that was negotiating at least originally with Mr. Marchand.

PHILLIPS: How is he an officer in Belgium? I know he was an officer of Texas.

NELKIN: If you will look at record No. 216, which is the termination letter that Mr. Ordelleide sends to Mr. Marchand or his company. He signs that, BMC Software Belgium N.V., _____ Ordelleide President. And that's what the man says he is. And that's the record. And certainly went beyond a scintilla. Now the petitioner in this case says, well he was president of the board of directors, not the president of the company. Where does that come from? That's nowhere in the record at all.

OWEN: Let's suppose as president of the Belgium company, he agreed to compensate Mr. Marchand with Dell, Compaq, and Southwestern Bell stock at the end of the year. And the year comes to the close. He flies to Texas, purchases the stock in Texas on the open market, and flies back to Belgium. Is that sufficient contacts by the Belgium company to submit them to the jurisdiction of Texas?

NELKIN: First, it certainly wouldn't be to general jurisdiction. That's for sure. And specific jurisdiction would be a question of what was the issue if Marchand got the options...

OWEN: Then he didn't deliver the stock. He said, I'm not going to give it to you. And then Marchand sued him for breach of his employment contract.

NELKIN: Personally, I'm not sure that that would be sufficient if the Texas player had no contact with that. If he simply went and bought stock and got it. It might be but I don't think we have to get to that point.

OWEN: What's the difference? You're agreeing to give the stock of some company to this employee that's compensation, and the fact that the stock was procured in Texas, how was that _____?

NELKIN: Because all of the approvals have to be from Texas and the stock was never received.

OWEN: What does the Texas company's approvals have to do with the Belgium company's intent?

NELKIN: The Belgium company had to come get approval from Texas in order to deliver that stock.

OWEN: They had to come to Texas or some place in the US to buy Compaq, Dell & Southwestern Bell stock. Let's assume they did it in Texas.

NELKIN: I don't think that that would make the same situation, because the Texas company is in league with its subsidiary in this situation...

BAKER: Is your argument that the two entities - that the Belgium company is actually the alter ego or the other way around?

NELKIN: We certainly raised that. The CA felt that it did not have to reach that point because it was sufficient general jurisdiction and specific jurisdiction without ever getting to the question of alter ego.

PHILLIPS: You sued BMC Texas in Texas courts.

NELKIN: Along with BMC Belgium. Yes.

PHILLIPS: You sued Texas and your claim is that Texas didn't grant these options and Ordelheide made a representation that they would be granted and that he was an officer of Texas. Why is it so important to have the Belgium company in here? Why is it worth essentially delaying this trial?

NELKIN: The representations are made I believe by Ordelheide in his capacity as president, actually in both capacities, but Belgium is the one that he was going to go to work for. And they are the ones that the letter that we sue on that promises this option for 20,000 shares, they are they party to it. BMC Texas does not appear as a party to that particular document, which is the basis of our lawsuit.

BAKER: Is the basic assertion you're making against the Belgium corporation that the promise to secure the options for your client was fraudulent because the Belgium company never had any intention of getting those for him?

NELKIN: We raised the tort and we also raised a breach of contract saying that you promised it, we relied on that, we left lucrative employment with your competitor, we came over and you never gave us the option. So we've raised both, and they are both in our pleadings.

Justice Phillips, I do want to get to your question of general jurisdiction. As you know the court found it in this case. I don't think that there is any question that there's a doubt about general jurisdiction. As the court knows, and as the court has pronounced, general jurisdiction does not require that the contacts be related to the cause of action.

PHILLIPS: Do you agree with your opponent here this morning that you look at these contacts of a sub and a parent the same as you would the subsidiary contacts with anybody else in Texas, and you look at the quality and quantity?

NELKIN: I think you do measure the contacts with the subs. I don't think just because it's a sub it's automatically subject to jurisdiction in Texas. And we've never claimed that. We've claimed and the court impliedly found in overruling special appearance that there were consistent and continuous contacts with Texas. And the CA approved that as well.

But the point I want to make in answer to your question is, that we've all heard about the affidavit of Mr. Coke, and that's relied on. It was presented by the petitioner and it was relied on by the petitioner. There is one sentence in that affidavit. And I might say parenthetically that we disagree with almost everything that he says because we think it's demonstratively false from the record. There's one thing he says, which I think is the ball game here. And that document appears in the record at 57 - 59. And in paragraph 5 of his affidavit he states the following: BMC Belgium has the exclusive contractual right to sell software originally developed by BMC Software, Inc, which is the Texas company, or other entities, subsidiary or related company

in Belgium. And it's prohibited from selling it elsewhere. This is the petitioner's offering saying that there is a contractual relationship between a parent and a sub, whereby the sub is in fact the distributor of the parent's goods.

PHILLIPS: If you're an exclusive Volkswagen dealer in some part of Arizona, that doesn't mean you can hold Volkswagen liable for a tort in Arizona?

NELKIN: No, we're talking about the parent. You're talking about the parent. I'm talking about the sub. Where the sub is the distributor for the parent, you can in fact hold the sub in the parent's home.

PHILLIPS: The sub in Arizona can be held in whatever part of Germany Volkswagen's headquarters are?

NELKIN: I'm not sure we can stretch it that far. We have to look at what the cases say. We've got two of them cited in our brief. One is the Gator Hawk case and the other is the Temperature case. Both of those cases talk about general jurisdiction was present because of a distributorship relationship.

OWEN: What about the Coca Cola distributorship in Belgium. Could you get jurisdiction over that entity, that corporation in Texas simply because they have exclusive right to sell Coca Cola in Belgium, and they purchase it in the US?

NELKIN: I'm not sure of the answer to that. But I think from the case law there's an argument that could be made for that. Without doing more search on the nature of that particular distribution, I don't know the answer. But I don't think that the cases would deny it, and the US SC...

OWEN: So you're saying the facts of how distributed are pertinent?

NELKIN: I think this is a fact intensive inquiry in every single special appearance...

OWEN: But we don't have any facts on exactly how the software is distributed in the case.

NELKIN: We do. The annual report says they distribute through their subs...

OWEN: Well if Coca Cola listed all of its exclusive dealerships in every country but didn't give any details about how that was actually accomplished would that be enough?

NELKIN: I think the answer may lie in the Burger King case, which I think perhaps both sides have cited. Burger King was a case in the US SC where the question was, was there a due process violation where a Florida court, it was a federal court, asserted jurisdiction over a franchisee

of Burger King that had no contacts to speak of with Florida, which was the headquarters of Burger King. They claimed, like the petitioner here does, Look we sell our burgers in N. Carolina or wherever it was. We shouldn't be subjected to jurisdiction in Florida just because our parent is there. And what the SC said was, there is absolutely no constitutional infirmity in requiring you to answer that you didn't pay your debt in Florida, you had a franchise agreement between the two of you, they gave you supervision, they gave you advice. This relationship subjected you to jurisdiction in Florida...

PHILLIPS: The franchisee was larger than the franchisor in the case weren't they?

NELKIN: I'm not sure.

PHILLIPS: At one point over 1/2 of Burger King's franchises were owned by this franchisee?

NELKIN: That very well could be. But the point is...

ENOCH: Who were the litigants in the Florida case?

NELKIN: Was the franchisor, and the...

ENOCH: The franchisee. The people who were doing business.

NELKIN: Exactly.

ENOCH: In this case, the claim is I'm doing business with the franchisee in N. Carolina. I will be able to hold them in Florida because they are doing business with their franchisor.

NELKIN: The focus in a jurisdictional question like this is what are the contacts of the defendant with the foreign? They are not a question of what is the nature of the lawsuit? For general jurisdictional purposes, the question is, do you have sufficient and continuous contacts with the foreign that you are here for all purposes?

ENOCH: Your point would be that a subsidiary by the relationship of subsidiary with the parent company, if they do transactions, they cross the border, that in and of itself would constitute general jurisdiction that will make the subsidiary amenable to the courts for any claim?

NELKIN: That's general jurisdiction.

ENOCH: That's what you're saying the Burger King case was?

NELKIN: That's exactly.

ENOCH: And you're saying BMC because it is the sole distributor of BMC's products out of Houston, you have general jurisdiction?

NELKIN: And has continuing relationship with all the terms that are utilized by this court and the SC that's sufficient and all that type of things. All of those contacts are defined through that relationship...

PHILLIPS: But the fact I make a contract with somebody in New York, and we agree New York law applies or maybe we don't, but we've got a specific contract with New York, I can be sued in New York probably without everybody in the world being able to sue me. But what you're really talking about is the number of contacts that this subsidiary had to have had with Texas over a broad range of issues, over a broad range of time.

NELKIN: Not the number. The quality. That's right.

HECHT: But when would a subsidiary not have those contacts with a parent?

NELKIN: A subsidiary could be wholly owned by a company and have a totally unrelated business and the only thing that existed between the two of them was that one owned the other.

HECHT: They just don't report in, don't have meetings, they just go on about their ways in that situation. But if there is any interest in the business, then there's going to be sufficient contact.

NELKIN: Well it's beyond interest. What it is is this was a situation where they had a distributorship, and the petitioner doesn't want to call it a distributorship. But I mean that's as good as a term as any. If you have the exclusive right to sell in a particular territory.

PHILLIPS: What if you just get a big old shipment once a year, and at the end of the year you send in a check for however much you've sold?

NELKIN: I think that that is a different point, and I think that the cases say that a mere purchase is not enough. In the Helicopters case in the SC, there was a tremendous amount of helicopter equipment purchased, but just because they purchased the goods didn't mean that they were subject to the general jurisdiction of Texas.

OWEN: So where is the specific evidence in this case of how much, how many goods they purchased, how frequently, dollar amounts, any evidence of substantiality other than we know that they are going to distribute their products?

NELKIN: That would be - there is nothing in the record, and that would have been the burden of the petitioner if it was interested in showing how insignificant it was, but they didn't do

that. The burden, according to this court, is that they have to negate every single basis upon which jurisdiction could be _____, and they didn't do that.

Specific jurisdiction in this instance is, the options have to be approved in Texas. There was a choice of law that if there's any dispute under the option agreement it had to be decided according to Texas law. Ordelheide comes to Texas to discuss the granting of the options to Mr. Marchand. And when Marchand sues on the fact that he doesn't get his options all of those things are specifically related to those very contacts that we've just been talking about. And all of those lend themselves to specific jurisdiction along with every other possible fact that could be implied from this record, because they didn't ask or receive findings of facts and conclusions of law.

ENOCH: Assuming that there's not general jurisdiction, I mean BMC Belgium can't be sued by anybody for any reason in Texas, but only that it can be sued over these stock option issues. You argue there's a big dispute in the evidence. What is your evidence on the contacts with Texas by BMC Belgium that makes it amenable to Marchand's claim in Texas about the stock option?

NELKIN: They come through Mr. Watson's deposition and they relate to the fact that Ordelheide and Watson discuss those.

ENOCH: And Watson is Ordelheide's partner essentially. That's the parent company's officer with the subsidiary's officer talking about the subsidiary's duty?

NELKIN: That's right. And talking about how they are going to get these options if they are going to get these options to Marchand.

ENOCH: That conversation occurred in Texas.

NELKIN: Watson is equivocal on that. He says, I can't say it didn't.

ENOCH: That's one conversation.

NELKIN: There were two - he testified that he recalls two conversations with Ordelheide.

ENOCH: But it was as between those two people?

NELKIN: Yes.

ENOCH: What else?

NELKIN: What else is, that Watson testifies that no options can be granted to an employee of a subsidiary or anything else without approval of the compensation committee of the parent in Texas. And then the other is, that Watson testifies that he tells Ordelheide there may be a

problem if Mr. Marchand decides to go to work as an independent contractor.

ENOCH: But this is still in that same conversation.

NELKIN: I believe that's right. But the point is, that if Ordelheide knew that there was a problem and he still allowed Marchand to leave his otherwise lucrative employment relying on these options, that creates a tort in Texas. That's a fraud or a misrepresentation or something between the two, which we also pled.

ENOCH: So it's basically a conversation between Ordelheide and Watson. Based on your evidence 1) it's a conversation that occurred in Texas, and 2) the parent had to approve the option package?

NELKIN: There were at least two conversations that Watson remembers but he won't say that they were in Texas or not. Separate conversations.

* * * * *

REBUTTAL

CHASTAIN: I would like to point out where in the record you can find the evidence and testimony by Max Watson, that he did not participate in the negotiation of this contract, and that he did not discuss the stock options with Mr. Ordelheide before they had actually been offered to Mr. Marchand.

On pages 119, 120, 122 and 123 of the record, Max Watson testifies that while Ordelheide did call him to just get advice and counsel on the decision he was about to make concerning who was going to be the new country manager for BMC Belgium, he said that Mr. Watson told Ordelheide that this is your decision, you have to make the decision. And in his exact words he said, because it was Ordelheide's responsibility for make the decision as to who he placed in that subsidiary. Meaning BMC Belgium.

Concerning the stock option issue on page 122 of the record, and it's a condensed version of a deposition transcript, pages 70 and 71, the following discussion takes place.

Q: Did you discuss with Mr. Ordelheide any of the items that appear in Ex. 2? And ex. 2 to the deposition is the page that is found on page 203 of the record, which is this agreement that Mr. Marchand is complaining about in this case.

He said, we would have had discussions in general terms but it was the responsibility of Ordelheide to come to an agreement or attempt to come to an agreement. And then he says on page 71:

Q: Did you have any discussions with Mr. Ordelheide or anybody else regarding the share options

language that appears on Ex. 2?

A: I would not have.

Now that is pretty clear and there is no evidence to the contrary in the record that deals with these share options, who actually made the offer, whether there were discussions between Max Watson and Mr. Ordelheide concerning this issue.

There is a couple of other points. Mr. Marchand's counsel brought up the annual report. And they have relied substantially on BMC's software annual report in their brief, and in their prior filings with the CA as well as the TC. But the bottom line is that BMC Belgium as a domestic company with domestic as well as foreign wholly owned subsidiaries is required under SEC regulations to present the consolidated position of itself as well as all of its subsidiaries in its annual report and 10K filing.

So to the extent that they are alleging that some alter ego relationship or some closer than normal relationship is established by the annual report, that is simply a nullity. It's pretty clear in the *Preussag v. Coleman* case, which is a case I believe that may have a petition pending here out of the CA that if you are required by law to report the consolidated position of your company as well as the subsidiaries of your company, that is essentially a jurisdictional nullity.

Additionally, I wanted to point out on page 77 of the record, that is the formal management agreement that Marchand's company, Procurement NV, entered into with BMC Software Belgium and is the agreement that, you know it's not terribly relevant in this situation, but is the agreement that we are contending superseded that, and that's what Belgium law will have to decide. But on page 77 of the record, you will see that Mr. Ordelheide signs his name as the director. He was the president of the board of directors, not an officer of BMC Belgium.

So essentially what you have here if we are talking overlapping directors and officers, is that you have one person, Ordelheide, who was an officer of BMC Software, and then a director of BMC Belgium. But in any event what the cases bear out is that simply because you have overlapping or may have overlapping directors or officers, that is not a factor that should be considered in the jurisdictional or alter ego analysis.

PHILLIPS: Do you accept the characterization that if you have enough systematic contacts, the Belgium subsidiary would have jurisdiction in Texas even if all the formalities were observed and there is no alter ego _____? And do you also accept that it's your burden to show the facts to show that there was an insufficient amount of those contacts?

CHASTAIN: I believe that it is our burden to negate the jurisdictional facts, which we've done in this case. It is not our burden to establish that an alter ego relationship exist between...

PHILLIPS: Let's assume that if enough formalities are observed that there is no problem

here. But you put in the record enough of the overall nature of the relationship between this sub and its parent that we can tell that those contacts are not sufficiently important to infer general jurisdiction over the sub in Texas courts.

CHASTAIN: There is one single contact with Texas, and it's not even a real contact once you read the record. That the only contact that the CA or Marchand has been able to identify are these alleged purchases of products in Texas by BMC Software. The two cases that they really rely on (apparently at this point they acknowledge that mere purchases of products in Texas are insufficient to establish jurisdiction) but the two cases they rely on, the Temperature Systems case and the Gator Hawk case, both of those are distinguishable from our case. In Temperature Systems there was an extremely long term written, agreed distribution agreement that required Temperature Systems not only to purchase products from Texas, but also to sell products to other companies in Texas in times of high demand. It was somewhat of an overall, overarching distributor group.

OWEN: What did you put in the record about the nature, duration, whatever it is about the purchases from Texas by your Belgium company?

CHASTAIN: Is that we don't purchase any property in Texas.

OWEN: How do you get the software from the Houston company?

CHASTAIN: We acquire from the Netherlands.

OWEN: And that's in the record?

CHASTAIN: That is not in the record. But the Andre Cox affidavit on pages 57-59 of the record do specifically state that we don't conduct business in Texas. We don't purchase property in Texas. And that is directly on point with what the issue is here.

Burger King actually addressed a specific jurisdiction case, not general jurisdiction. And the court initially came out of the gate saying that just the simple fact that there's a contract between two parties of different states isn't sufficient by itself. You have to look underneath the contract: what's the purpose of the contract? And in this case the contract that he's suing on was to secure the services of Marchand for BMC Belgium in Belgium.

Gator Hawk is distinguishable as well because there were three distributor written, agreed to agreements between the defendant and companies in Texas. One of those agreements had a forum selection clause, not just a choice of law clause, but a forum selection clause. The court that decided that case really focused on that particular fact that there was a forum selection clause indicating purposeful availment to the laws of Texas, plus the court also pointed out that the defendant in that case produced essentially no evidence to controvert the jurisdiction and they essentially had no choice but to hold that jurisdiction was proper in that case.