COURT OF CHANCERY
OF THE
STATE OF DELAWARE

DONALD F. PARSONS, JR.
VICE CHANCELLOR

New Castle County CourtHouse
500 N. King Street, Suite 11400
Wilmington, Delaware 19801-3734

Submitted: July 18, 2008
Decided: July 22, 2008

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Re: *Sprint Nextel Corporation, et al. v. iPCS, Inc., et al.*,
Civil Action No. 3746-VCP

Dear Counsel:

This action concerns a series of contracts ("Management Agreements") that Plaintiffs, Sprint Nextel Corporation and several of its subsidiaries (collectively, "Sprint"), entered into with Defendants iPCS Wireless, Inc. ("iPCS Wireless"), Horizon Personal Communications, Inc. ("Horizon"), and Bright Personal Communications Services, LLC ("Bright"), which are subsidiaries of Defendant iPCS, Inc. ("iPCS"). Sprint seeks declaratory relief with respect to its rights and obligations under the Management Agreements as they pertain to its recently announced Clearwire Transaction. After entering an expedited schedule, I granted Defendants' motion to dismiss for lack of personal jurisdiction as to Bright and Horizon under Rule 12(b)(2), but denied their motions to dismiss for failure to state a claim under Court of Chancery

Rule 12(b)(6) as to iPCS, and to dismiss or stay this action pending a parallel suit brought by the three iPSC subsidiaries in Illinois (the "Illinois Action").[1]

On July 16, 2008, Defendants iPCS and iPCS Wireless applied for certification of an interlocutory appeal pursuant to Supreme Court Rule 42 from the portion of this Court's July 14 Opinion and Order denying Defendants' motion to stay this action pending the Illinois Action. This letter opinion constitutes the Court's ruling on Defendants' application. For the reasons stated, I conclude that the Opinion and Order do not involve such exceptional circumstances that the challenged ruling can be said to have determined a substantial issue or established a legal right warranting an interlocutory appeal and that it does not satisfy any of the additional criteria enumerated in Rule 42(b). I therefore deny Defendants' application to certify this matter for an interlocutory appeal.

I. STANDARD

Applications for interlocutory review are governed by Supreme Court Rule 42, which prohibits certification of an interlocutory appeal unless the order of the trial court to be appealed from 1) determines a substantial issue, 2) establishes a legal right, *and* 3) meets at least one of the criteria in Rule 42(b)(i) – (v).[2] "Those criteria include the reasons listed in Rule 41 for certification of questions of law, questions of the trial court's

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1 *See Sprint Nextel Corp. v. iPCS, Inc.*, 2008 WL 2737409 (Del. Ch. July 14, 2008) (the "Opinion and Order").

2 *In re Pure Res., Inc. S'holders Litig.*, 2002 Del. Ch. LEXIS 116, at *1 (Oct. 9, 2002).

jurisdiction, instances where the trial court has set aside precedent, or instances where the trial court has ruled on a dispositive issue."[3] Applications for certification of an interlocutory appeal require the exercise of the trial court's discretion and are granted only in extraordinary or exceptional circumstances.[4]

II. ANALYSIS

A. The Court's Opinion and Order Did Not Determine a Substantial Issue or Establish a Legal Right

The "substantial issue" requirement is met when an interlocutory order decides a main question of law which relates to the merits of the case, and not to collateral matters.[5] To be appealable, an interlocutory order also must establish a legal right.[6] A legal right is established when a court determines an issue essential to the positions of the parties regarding the merits of the case, *i.e.*, "where one of the parties' rights has been enhanced

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[3] *Ryan v. Gifford*¸ 2008 WL 43699, at *4 (Del. Ch. Jan. 2, 2008); *see also Pure Resources*, 2002 Del. Ch. LEXIS 116, at *1 ("Applications for interlocutory appeal . . . balanc[e] the public interest in advancing appellate review of potentially case dispositive issues while avoiding fragmentation and delay when interlocutory review is unlikely to terminate the litigation or otherwise serve the administration of justice.") (internal citation and punctuation omitted).

[4] *See Gifford*¸ 2008 WL 43699, at *4; *Pure Resources*, 2002 Del. Ch. LEXIS 116, at *1.

[5] *Casteldo v. Pittsburgh-Des Moines Steel Co.*, 301 A.2d 87, 87 (Del. 1973).

[6] *Pepsico v. Pepsi-Cola Bottling Co. of Asbury Park*, 261 A.2d 520, 521 (Del. 1969).

or diminished as a result of the order."[7] In other words, "a legal right is established where the court determines an issue essential to the position of the parties regarding the merits of the case."[8]

As Defendants note, the Supreme Court occasionally has found that a denial of a motion to stay on the ground of *forum non conveniens* determined a substantial issue and established a legal right.[9] In the absence of "exceptional circumstances," however, the Supreme Court has refused to accept interlocutory appeals from decisions on such motions to stay.[10]

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[7] Donald J. Wolfe, Jr. & Michael A. Pittenger, CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY § 14-4(b) (2008).

[8] *Id.*; *cf. Pure Resources*, 2002 Del. Ch. LEXIS 116, at *8-9 (questioning whether an injunction entered in favor of plaintiffs but not as broadly as plaintiffs sought met the Rule 42(b) requirement, but accepting plaintiffs' argument that the absence of a more complete injunction deprived them of a legal right for purposes of the Rule).

[9] *See Moore Golf, Inc. v. Ewing*, 269 A.2d 51, 51-52 (Del. 1970) (citing *States Marine Lines v. Domingo*, 269 A.2d 223, 225 (Del. 1970)). A motion to dismiss or stay on the ground of *forum non conveniens* implicates the plaintiff's "right to choose the forum of his action; and it deals with the defendant's right to a fair and just trial of his defenses to the action in a proper forum. Necessarily intertwined with the determination of such legal rights is the determination of issues which are substantial because they relate to such important rights." *Domingo*, 269 A.2d at 225.

[10] *See, e.g.*, *Derdiger v. Tallman*, 2000 WL 1589929, at *1 (Del. Aug. 29, 2000) (TABLE) (refusing appeal of Court of Chancery decision staying a Delaware action under the first-filed doctrine in favor of an earlier action in California); *Fleming & Hall, Ltd. v. Clarendon Nat'l Ins. Co.*, 1998 WL 985342, at *1 (Del. Nov. 16, 1998) (TABLE) (refusing appeal of Superior Court decision granting motion to stay pending outcome of a related arbitration proceeding in New York);

In this action, iPCS and iPCS Wireless have not identified any exceptional circumstances that persuade me that my July 14 Opinion and Order should be certified for an interlocutory appeal. To the contrary, the unique circumstances of this action militate *against* certification. For example, I explicitly noted the provisional nature of my decision to deny Defendants' motion to stay this action in favor of the Illinois Action.[11] In that regard, I consider instructive the Supreme Court's denial of an interlocutory appeal in a situation where the trial court reserved decision on the underlying issue in the case.[12] Due to the preliminary nature of my denial of Defendants'

Berman Real Estate Dev., Inc. v. Berdel, Inc., 1995 WL 788597, at *1 (Del. Dec. 6, 1995) (TABLE) (refusing appeal of Court of Chancery decision denying motion to stay a Delaware action pending the outcome of another action in Pennsylvania on *forum non conveniens* grounds); *Transamerica Corp. v. Reliance Ins. Co. of Ill.*, 1995 WL 6224452, at *1 (Del. Oct. 5, 1995) (TABLE) (refusing appeal of Superior Court decision staying a Delaware proceeding in favor of a first-filed California action).

[11] The Opinion and Order states in pertinent part:

> I fully appreciate the disadvantages of duplicative proceedings and running the risk of inconsistent rulings. Accordingly, I will not run that risk lightly and will remain open to mechanisms to minimize that possibility, including ultimately a stay of this action, if necessary. At this time, however, I am not convinced the pendency of the Current Illinois Action justifies staying this action and depriving the Sprint parties of their choice of forum.

Sprint Nextel Corp. v. iPCS, Inc., 2008 WL 2737409, at *16 (Del. Ch. July 14, 2008).

[12] *See In re Hybrilonics, Inc.*, 1986 WL 17355 (Del. Aug. 15, 1986) (TABLE) (citing *Consol. Film Indus., Inc. v. Johnson*, 192 A. 603, 609 (Del. 1937)); *see also Delaware Pub. Employees v. New Castle Co.*, 1994 Del. Ch. LEXIS 170, at *2

motion to stay, and the absence of exceptional circumstances militating in favor of an immediate appeal, I find Defendants have not shown that the portion of the Opinion and Order they challenge determined a substantial issue or established a legal right sufficient to justify certification of an interlocutory appeal.

B. Defendants' Appeal Does Not Meet Any of the Enumerated Criteria Under Rule 42(b)

The only criterion under which Defendants apply for certification and that conceivably could apply, Rule 42(b)(v), requires in pertinent part that a "review of the interlocutory order … may otherwise serve considerations of justice."[13] Defendants

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(Sept. 21, 1994) (ruling did not "determine[] a substantial issue or establish[] a legal right" when it was a "a preliminary, provisional determination of the parties' rights under a tentative agreement").

[13] The Opinion and Order plainly does not meet the requirements for certification of a question of law under Supreme Court Rule 41. It also does not involve controverted jurisdiction of this Court, reverse or set aside a prior decision of this Court, or vacate or open a judgment of the Court. *See* S. Ct. R. 42(b)(i)-(iv). Conceivably, a reversal of the Opinion and Order could result in a dismissal and terminate this litigation. Because Defendants did not make the requisite showing of "overwhelming hardship" required for a dismissal on grounds of *forum non conveniens*, however, I consider a dismissal highly unlikely. *See Berger v. Intelident Solutions, Inc.*, 906 A.2d 134, 136 (Del. 2006) (motion to dismiss on grounds of *forum non conveniens* requires a showing of "overwhelming hardship"); *Mar-Land Indus. Contrs., Inc. v. Caribbean Petroleum Ref., L.P.*, 777 A.2d 774, 780 (Del. 2001). Accordingly, for all practical purposes, Defendants' application for certification rests solely on the "considerations of justice" criterion under Rule 42(b)(v).

I also find unconvincing Defendants' suggestion that certification would be proper to resolve the debate regarding the appropriate burden a defendant must meet to obtain a stay on *forum non conveniens* grounds. Defendants essentially invite the Supreme Court to provide an advisory opinion on an issue that is moot for

contend they would suffer irreparable injury if they had to prosecute and defend parallel proceedings in Illinois and Delaware. As discovery in the two cases is proceeding on a coordinated basis, this Court is favorably situated to handle the litigation expeditiously, and mechanisms exist to minimize the risk of duplicative proceedings and inconsistent results, I am not persuaded that Defendants are likely to suffer irreparable injury.

Because Defendants have not satisfied the prerequisites for certification under Rule 42(b), I decline to certify the Opinion and Order for interlocutory appeal.

IT IS SO ORDERED.

Sincerely,

/s/Donald F. Parsons, Jr.

Vice Chancellor

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purposes of this action. As noted in the Opinion and Order, Defendants did not satisfy even the lower threshold arguably applicable on a motion to stay. *See Sprint Nextel*, 2008 WL 2737409, at *15 n.22. *A fortiori*, Defendants did not satisfy the more stringent "overwhelming hardship" test.