

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

ORIGINAL
74

JOHN W. NOLLE
VICE CHANCELLOR

417 S. STATE STREET
DOVER, DELAWARE 19901
TELEPHONE (302) 739-4397
FACSIMILE (302) 739.6179

October 9, 2001

VIA FACSIMILE AND
FIRST CLASS MAIL

Collins J. Seitz, Jr., Esquire
CONNOLLY BOVE LODGE
& HUTZ, LLP
1220 Market Street
P.O. Box 2207
Wilmington, DE 19899-2207

Jon E. Abramczyk, Esquire
MORRIS, NICHOLS, ARSHT
& TUNNELL
1201 North Market Street
P.O. Box 1347
Wilmington, DE 19899-1347

RECEIVED
OCT 9 11 2001
19899-1347

Re: Telcom-SNI Investors, L.L.C., et al. v,
Sorrento Networks, Inc., et al.
CA. No. 19038-NC
Submitted: October 1, 2001

Dear Counsel:

Defendants, Sorrento Networks, Inc. ("Sorrento"), Xin Cheng and Jim Dixon, have moved, pursuant to Supreme Court Rule 42, for certification of an interlocutory appeal to the Supreme Court of that portion of this Court's Order of September 7, 2001 (the "Order"), which preliminarily enjoined Defendants from issuing additional shares of Sorrento Class A Preferred Stock without the prior approval of the holders

Telcom-SNI Investors, L.L.C., et al. v. Sorrento Networks, Inc., et al.
C.A. No. 19038-NC
October 9, 2001
Page 2

of a majority of the Class A Preferred Stock. For the reasons that follow, I am granting the application.

The Court concluded that Plaintiffs had demonstrated a reasonable probability of success on the merits of their claim that Sorrento's certificate of incorporation precluded Sorrento from issuing additional Series A Preferred Stock without their consent.¹ Although the issue was addressed in the context of a preliminary injunction motion, it, nevertheless, was an evaluation of a matter of law, i.e., a reading of the language set forth in the certificate of incorporation. In essence, two questions were evaluated: (i) was the applicable provision of the certificate of incorporation ambiguous and (ii) if not, what was that unambiguous meaning?

It may be that, with the more detailed consideration of the issues allowed at the time of final hearing, I will be persuaded that "other" means "different," that the right of first offer constitutes the principal

¹ *Telcom-SNI Investors, L.L.C. v. Sorrento Networks, Inc.*, Del. Ch., C.A. No. 19038-NC, Noble, V.C. (Sept. 7, 2001). Defendants do not seek certification of that portion of the Order restricting the incurrence of additional indebtedness.

Telcom-SNI Investors, L.L.C., et al. v. Sorrento Networks, Inc., et al.
C.A. No. 19038-NC
October 9, 2001
Page 3

protection of the Class A Preferred shareholders against dilution, and that Plaintiffs did not negotiate an effective veto over Sorrento's ability to raise additional funding through the issuance of additional shares of Class A Preferred. Thus, the Court's determination was not final, but that is the inherent nature of a preliminary injunction decision. However, interlocutory appeals of preliminary injunctions do occur, and appellate review may be particularly appropriate for matters involving the construction of corporate charters. Furthermore, there are no other facts that may be developed, at least of which the Court is aware, that may be brought to bear on the issue of interpretation of the certificate language, as long as it is deemed to be unambiguous.

Defendants assert that the Order should be certified for an interlocutory appeal under Supreme Court Rule 42(b) because the Order

Telcom-SNI Investors, L.L. C., et al. v. Sorrento Networks, Inc., et al.
C.A. No. 19038-NC
October 9, 2001
Page 4

determined a substantial issue, the Order established a legal right, and review of the Order would serve considerations of justice.²

I will now turn to a consideration of each of these factors.

Substantial Issue

Two issues that may be considered substantial were resolved, for preliminary injunction purposes, by the Court: (i) that the protective provision of the certificate is not ambiguous and (ii) that it should be interpreted as supporting Plaintiffs' contentions. Even though those conclusions were under the reasonable probability of success standard and, thus, not final resolutions, they reflect a determination of substantial issues because of the significance of the act of construing the corporate charter

² Supreme Court Rule 42(b). Of the several additional criteria set forth in Supreme Court Rule 42(b)(i)-(v), Defendants rely only upon, and the Court will only consider, the criterion set forth in Rule 42(b)(v): "A review of the interlocutory order may terminate the litigation or may otherwise serve considerations of justice." Defendants have not asserted that interlocutory review may terminate the litigation; they limit their arguments to the contention that interlocutory review will "serve considerations of justice."

Telcom-SNI Investors, L.L.C., et al. v. Sorrento Networks, Inc., et al.
C.A. No. 19038-NC
October 9, 2001
Page 5

and because they are not premised upon an application of the law to facts which have only been preliminarily assessed.

Legal Rights

The Order limits Sorrento's capacity to raise capital without the approval by the holders of a majority of the Class A Preferred Stock. The limitation of what, in general, is a critical legal right of a corporate entity constitutes the establishment of a legal right in Plaintiffs at the expense of Defendants.

Considerations of Justice

For purposes of determining whether interlocutory review is appropriate, considerations of justice under Supreme Court Rule 42(b)(v) include whether such review would materially advance the litigation or protect a party from continuing and serious harm.

Whether an interlocutory review will materially aid resolution of this matter is a subject of fair debate. If Defendants are successful in their appeal, other grounds for the preliminary injunction (or eventual success of

Telcom-SNI Investors, L.L.C., PC al. v. Sorrento Networks, Inc., et al.
C.A.No. 1903%NC
October 9, 2001
Page 6

Plaintiffs) not yet considered by this Court will have to be addressed.³ On the other hand, if the Court was wrong in its assessment of Plaintiffs' probability of success on the merits, a significant issue would then be resolved, as a matter of law, and the remaining litigation would be narrowed.

In addition, as noted above, the preliminary injunction carries with it the continuing consequence that Sorrento's ability to gather additional capital is impaired. Resolution of this question involving construction of the corporate charter as quickly as possible is obviously desirable. When the preliminary injunction was granted, I had hoped that the final hearing could be held within a few months. It appears now that the parties will not be able to bring this matter to final hearing on that schedule.

Thus, on balance, I conclude that an interlocutory review would serve considerations of justice.

³ These other grounds include, for example, alleged violation of 8 Del. C. § 212 and Plaintiff's claim that the primary purpose for issuance of additional Series A Preferred Stock was dilution of their interests with an intent to defeat certain protective rights which they had negotiated.

Telcom-SNI Investors, L.L.C., et al. v. Sorrento Networks, Inc., et al.
C.A. No. 1903%NC
October 9, 2001
Page 7

Accordingly, I am entering the enclosed Order certifying the
interlocutory appeal.

Very truly yours,

A handwritten signature in black ink, appearing to read "J. L. Adkins". The signature is written in a cursive style with a large, looping initial "J" and "A".

3WN/cap

Enc,

oc: Register in Chancery-NC