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February 8, 2011

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Re: Techmer Accel Holdings, LLC, et al. v. Amer
C.A. No. 4905-VCN
Date Submitted: January 12, 2011

Dear Counsel:

Defendant Nancy Amer has moved, under Court of Chancery Rule 59(f), for reargument of the Court's appointment on summary judgment of a receiver for Crescent.[1]

In brief, the Court determined that Crescent dissolved no later than April 21, 2009, under 6 *Del. C.* § 17-801(3) because of an event of withdrawal by its general

[1] *Techmer Accel Hldgs., LLC v. Amer*, 2010 WL 5564043 (Del. Ch. Dec. 29, 2010) (the "Memorandum Opinion" or the "Mem. Op."). For convenience, defined terms from the Memorandum Opinion are employed here. References to the text of the Memorandum Opinion are to its slip opinion version.

partner, Crescent Gate.[2] Because Crescent's cancellation became effective on April 30, 2009, in accordance with its certificate of cancellation, Crescent had a winding up period between its dissolution and its cancellation.[3] According to its financials, Crescent retained assets and had liabilities as of its termination. As a result, the Court could not conclude that Crescent had closed and settled its business or that it had complied with the pro rata, priority scheme of 6 *Del. C.* § 17-804 before its cancellation.[4] Because a certificate of cancellation had been filed under 6 *Del. C.* § 17-203, the Court appointed a receiver under 6 *Del. C.* § 17-805 to undertake all activities allowed by that provision on behalf of Crescent—specifically, to close and to settle any outstanding business of the Limited Partnership.[5]

In her motion for reargument, Amer contends that because "[t]he Court predicated the Memorandum Opinion on an entirely new legal theory not previously advanced or raised by either the Plaintiffs or Amer . . . the Court

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[2] Mem. Op. at 28-30.
[3] *Id.* at 30.
[4] *Id.* at 32.
[5] *Id.* at 34-35.

misconstrued the facts because it lacked a complete record and guidance from the parties as to the legal significance of certain facts."[6]

A. *The Motion for Reargument Standard*

Under Court of Chancery Rule 59(f), "the moving party must demonstrate either that the court overlooked a controlling decision or principle of law that would have a controlling effect, or the court misapprehended the facts or the law so the outcome of the decision would be different."[7] It is the moving party's burden to demonstrate "that the Court misunderstood a material fact or misapplied the law."[8] The Court will deny a motion for reargument where a party simply restates arguments already presented and rejected.[9]

Based on her assertion that "the absence of a complete record" caused the Court to misunderstand outcome determinative facts,[10] Amer attempts to supplement the record through her Fourth Affidavit submitted with her motion for

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[6] Def. Amer's Mot. for Recons. of Order Appointing Receiver for Crescent Private Capital, L.P. ("Def.'s Mot.") at 1.
[7] *Pharmerica Long Term Care Inc. v. New Castle RX, LLC*, 2010 WL 5130746, at *2 (Del. Ch. Dec. 8, 2010).
[8] *In re William Lyon Homes S'holder Litig.*, 2007 WL 270428, at *1 (Del. Ch. Jan. 18, 2007).
[9] *Pharmerica Long Term Care Inc.*, 2010 WL 5130746, at *2.
[10] Def.'s Mot. ¶ 2.

reargument. Generally, however, "a court considering a motion for reargument under Court of Chancery Rule 59(f) may reexamine only the existing record," not new evidence.[11] Amer's contention that the Memorandum Opinion is grounded in novel legal theories not advocated by the parties is unavailing.

The cross-motions for summary judgment which spawned the Memorandum Opinion addressed when Crescent dissolved under 6 *Del. C.* § 17-801,[12] and whether Crescent wound up in accordance with 6 *Del. C.* § 17-804.[13] Moreover, Amer conceded that "the facts material to a decision [on Count I] as a matter of law are few, and they are not in dispute,"[14] and her counsel represented to the Court that "the matter is ripe for consideration."[15] Accordingly, Amer had ample

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[11] *Forsythe v. ESC Fund Mgmt. Co. (U.S.), Inc.*, 2007 WL 3262205, at *1 (Del. Ch. Oct. 31, 2007); *see also Reserves Dev. LLC v. Severn Sav. Bank, FSB*, 2007 WL 4644708, at *1 (Del. Ch. Dec. 31, 2007) ("Reargument . . . is only available to re-examine the existing record; therefore, new evidence generally will not be considered on a Rule 59(f) motion."); *In re ML/EQ Real Estate P'ship Litig.*, 2000 WL 364188, at *3 (Del. Ch. Mar. 22, 2000) ("[T]he court's focus on a motion under Rule 59(f) is solely on the facts in the record at the time of the decision.") (internal quotation omitted).

[12] *See, e.g.*, Def. Amer's Reply Br. in Supp. of Mot. for Summ. J. on Count I of the Compl. and Answering Br. in Opp'n to Pls.' Mot. for Summ. J. at 4-6.

[13] *See, e.g.*, *id.* at 6-7; *see also* Mem. Op. at 14-16 (summarizing Amer's construction and application of 6 *Del. C.* § 17-804).

[14] Mem. of Law in Supp. of Def.'s Mot. for Summ. J. on Claim under 6 *Del. C.* § 17-804 at 3.

[15] Transaction ID 31984865 (Letter of Elizabeth A. Sloan, Esq., dated July 6, 2010).

opportunity to develop the factual record pertaining to Crescent's dissolution under § 17-801 and its wind up with reference to § 17-804. Indeed, the Court permitted her to file a supplemental affidavit after completion of briefing on the cross-motions for summary judgment in the interest of "hav[ing] a full and complete factual record . . . ."[16] Although Amer's motion for summary judgment called upon the Court to analyze Crescent's dissolution, wind up, and cancellation, she offers no persuasive explanation for why she failed to introduce earlier the additional facts in her Fourth Affidavit. Thus, the Court need not consider her Fourth Affidavit on her pending motion. Even so, the evidence offered in that affidavit would not alter the Court's determination in the Memorandum Opinion.

B. *Amer's Arguments in Support of her Motion*

Amer's motion challenges the Court's conclusions regarding Crescent's date of dissolution and whether the Limited Partnership was wound up in accordance with the statutory requirements. Amer argues that had she submitted additional evidence, it "would have put the facts relied upon by the Court in context" and

[16] *Techmer Accel Hldgs., LLC v. Amer*, 2010 WL 3025575, at *1 (Del. Ch. July 27, 2010).

changed the outcome of the Court's decision.[17] Clarification of the facts misunderstood by the Court, Amer suggests, makes it "apparent that (1) Crescent took all actions necessary to wind up its business before cancellation, including having made provision for the $59,892 which is reflected on its balance sheet; and (2) Crescent did not dissolve before April 30, 2009."[18] The Court considers first Amer's contentions regarding Crescent's date of dissolution before it turns to her assertions as to whether Crescent's wind up complied with the statutory mandates.

1. Crescent's Dissolution

The Court's conclusion that Crescent dissolved by April 21, 2009 was premised upon the application of 6 *Del. C.* §§ 17-801(3), 17-101(3), and 17-402(a)(11).[19] Had Crescent Gate's dissolution been raised by the parties, Amer contends, the following additional facts would have altered the Court's analysis: (1) "Crescent Gate's certificate of cancellation was not intended to be effective on

[17] Def.'s Mot. ¶ 4.
[18] *Id.*
[19] *See* Mem. Op. at 26-30.

April 21[, 2009],"[20] and (2) "Crescent Gate adopted a resolution on April 17, 2009 that provided that Crescent Gate was to dissolve on *May 1, 2009*."[21]

Regardless of whether Crescent Gate adopted a resolution specifying a later date of dissolution or whether Crescent Gate's certificate of cancellation was intended to be effective at some time other than the filing date, Crescent Gate no longer existed as a distinct legal entity upon the filing of its certificate of cancellation.[22] Because no future effective date was set forth in that certificate, Crescent Gate's certificate of formation was cancelled on the filing date—April 21, 2009—under 6 *Del. C.* § 18-206(b). Thus, the Court did not misunderstand facts in determining that "by at least April 21, 2009, Crescent was dissolved under § 17-801(3) because of an event of withdrawal by its general partner, Crescent Gate."[23] By that time, because Crescent Gate was no longer a separate legal entity, it had certainly dissolved and commenced winding up sufficient to cause an "event of withdrawal" under § 17-402(a)(11).

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[20] Def.'s Mot. ¶ 12.
[21] *Id.* ¶ 13 (emphasis in original).
[22] *See* 6 *Del. C.* § 18-201(b) ("A limited liability company . . . shall be a separate legal entity, the existence of which as a separate legal entity shall continue until cancellation of the limited liability company's certificate of formation.").
[23] Mem. Op. at 28.

Separate from her argument that the Court misunderstood facts about Crescent Gate's cancellation, Amer seemingly questions the Court's application of the statutory provisions governing a limited partnership's dissolution and an event of withdrawal by a general partner.[24] Although not framed as such, the Court assumes Amer's argument is that the Court misapprehended the law when it determined that Crescent had dissolved under § 17-801(3) because of an "event of withdrawal" by its general partner.

Amer contends, for the first time, that the LPA "provided that withdrawal by Crescent Gate pursuant to . . . § 17-402(a)(11) would *not* cause Crescent to dissolve."[25] Amer offers little support for her contention other than to direct the Court to LPA § 9.2, which provides for dissolution upon the withdrawal of the general partner; that section calls for dissolution of the Limited Partnership upon the occurrence of an event of withdrawal listed in § 17-402(a) subsections (2) through (10). Notably, LPA § 9.2 makes no mention whatsoever of § 17-402(a)(11).

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[24] *See* Def.'s Mot. ¶ 14.
[25] *Id.* (emphasis in original).

Section 17-801 states that "[a] limited partnership is dissolved and its affairs shall be wound up upon the first to occur" of five statutory events of dissolution or upon the entry of a dissolution decree. Under § 17-801(3), an "event of withdrawal" is among those statutory dissolution events—with that term defined in § 17-101(3) to be the events recited in § 17-402(a). More importantly, § 17-801(3) teaches that "there are three exceptions to the general rule that an event of withdrawal by the general partner causes dissolution of the limited partnership . . . ."[26] Quoting *Lubaroff & Altman on Delaware Limited Partnerships*, the Court pointed to those exceptions in the Memorandum Opinion while determining that "none applies in this action."[27] Amer's motion does not question that conclusion and no argument has been made—either at this juncture or earlier—that any of those exceptions operates here. Moreover, the LPA does not specifically foreclose an event of withdrawal occurring because of § 17-402(a)(11) and, as would otherwise be important for the orderly, continued operation of the Limited Partnership, no provision of the LPA has been identified by Amer that

[26] Mem. Op. at 28-29 & n.121.
[27] *Id.* at 29 & n.121.

would allow for substitution of a new general partner. This suggests that the alternate strategies of § 17-801(3) should be available. Thus, in this instance, the Court disagrees with Amer's assertion that withdrawal by Crescent Gate under that provision would not cause the dissolution of Crescent.

Accordingly, to the extent Amer's motion challenges the Court's conclusion that Crescent dissolved by April 21, 2009, her motion is denied because she has failed to demonstrate that the Court misunderstood facts or misapprehended the law.[28]

2. Crescent's Wind Up

Because the Court determined that Crescent had failed to settle and close its business when it cancelled its certificate of limited partnership, the Court

[28] Related to her assertions regarding Crescent's date of dissolution, Amer contends that even if the Court's conclusion that Crescent dissolved by April 21, 2009 is correct, "there is no evidence whatsoever in the record from which a conclusion can be drawn that Crescent dissolved *before* April 2009." Def.'s Mot. ¶ 16 (emphasis in original). In the Memorandum Opinion, the Court observed that it could not decide on the record then before it "whether Crescent Gate had begun winding up before filing its certificate of cancellation on April 21, 2009." Mem. Op. at 29. For that reason, the Court left open the question of whether Crescent's dissolution occurred before April 21, 2009; had Crescent Gate dissolved and commenced winding up before that time, Crescent's dissolution would have occurred even earlier. Mem. Op. at 30-31. Because the Court made no determination as to whether Crescent had dissolved before April 21, 2009, there is no decision to reexamine on a Court of Chancery Rule 59(f) motion for reargument. Accordingly, the Court need not consider the argument raised in Paragraph 16 of Amer's motion.

concluded that good cause exists to appoint a receiver under 6 *Del. C.* § 17-805 to manage Crescent's affairs.[29] Amer challenges that conclusion by arguing that "contrary to the Court's inference, Crescent did not have assets that had not been disposed of as of April 21, 2009."[30] Amer offers evidence that purportedly demonstrates that "Crescent Gate, as general partner, completed the wind-up of Crescent's business, and provided for the disposition of all of its remaining assets, including the $59,892"[31]—the remaining assets reflected on the April 30, 2009 financial statement.[32] Specifically, Amer contends that Crescent Gate gave instructions to its service provider on April 17, 2009 "to take possession of all cash remaining in Crescent's bank accounts . . . and to disburse that sum as follows: $8,000 to Crescent's accountant, JH Cohn LLP, upon completion of Crescent's final tax return, and the remaining $51,868 to Crescent Gate in partial payment of $163,672 of management fees payable."[33]

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[29] Mem. Op. at 34.
[30] Def.'s Mot. ¶ 9.
[31] *Id.* ¶ 5.
[32] *See* Mem. Op. at 31 ("Crescent's financials reflect that as of April 30, 2009, the date its existence as a separate legal entity terminated, the Limited Partnership had total assets of $59,892 and total liabilities in the same amount.").
[33] Def.'s Mot. ¶ 5.

Even if the Court accepts this newly offered evidence as true, the Court did not misunderstand material facts that would change its decision. By January 2009, the time when Techmer filed a demand for arbitration, Amer was on notice of Techmer's indemnification claim against Crescent.[34] More importantly, she recognizes that "[i]n March 2009, Techmer finally acknowledged the liability cap specified in the [M]erger [A]greement and conceded that Crescent's maximum potential obligation was 'under $500,000.'"[35] The evidence Amer proffers to suggest that the Court misunderstood facts in determining that Crescent did not wind up in accordance with the statutory mandates in fact bolsters that conclusion; she concedes that, despite being on notice of Techmer's indemnification claim, Crescent made no provision for that claim.[36] Instead, assuming the truth of Amer's factual assertions, Crescent disbursed all of its remaining assets to its accounting firm and to its general partner in satisfaction of management fees payable.

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[34] *See* Second Affidavit of Nancy Amer ¶ 8 ("In January 2009, Techmer filed a demand for arbitration against Crescent . . . .").
[35] *Id.* ¶ 9.
[36] *See* 6 *Del. C.* § 17-804(b) (requiring that "[a] limited partnership which has dissolved . . . make reasonable provision to pay all claims and obligations, including all contingent, conditional or unmatured contractual claims, known to the limited partnership").

Thus, the Court did not misunderstand facts in determining that it could not "conclude that Crescent complied with the requirements of [6 *Del. C.*] § 17-804" and that "Crescent failed to make a final settlement of its unfinished business, as required by [6 *Del. C.*] § 17-203 . . . ."[37] Accordingly, Amer's motion challenging those conclusions is denied.

C. *Conclusion*

Because Amer failed to demonstrate that the Court misunderstood a material fact or misapprehended controlling law, her motion for reargument is denied.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

[37] Mem. Op. at 32.