IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

TECHMER ACCEL HOLDINGS, LLC and ACCEL CORPORATION,	:	
Plaintiffs/Petitioners,	:	
v.	:	**C.A. No. 4905-VCN**
NANCY AMER, CRESCENT PRIVATE CAPITAL L.P. and CRESCENT GATE PARTNERS L.L.C.,	:	
Defendants/Respondents.	:	

MEMORANDUM OPINION

Date Submitted: November 16, 2010
Date Decided: December 29, 2010

David J. Teklits, Esquire and Kevin M. Coen, Esquire of Morris, Nichols, Arsht & Tunnell LLP, Wilmington, Delaware, Attorneys for Plaintiffs-Petitioners.

Thomas P. Preston, Esquire, Alisa Moen, Esquire, and Elizabeth Sloan, Esquire of Blank Rome LLP, Wilmington, Delaware, and Scott A. Birnbaum, Esquire of Birnbaum & Godkin, LLP, Boston, Massachusetts, Attorneys for Defendant-Respondent Nancy Amer.

NOBLE, Vice Chancellor

I. INTRODUCTION

This memorandum opinion addresses cross-motions for summary judgment as to Count I of the Plaintiffs' Complaint by which they seek nullification of the certificates of cancellation filed on behalf of Defendants Crescent Private Capital, L.P. ("Crescent" or the "Limited Partnership") and Crescent Gate Partners, L.L.C. ("Crescent Gate"). The Plaintiffs, also in Count I, seek appointment of a receiver to manage the affairs of Crescent under 6 *Del. C.* § 17-805.

In essence, the Plaintiffs contend that Defendant Nancy Amer ("Amer") and Crescent Gate caused Crescent to wind up in contravention of the requirements of 6 *Del. C.* § 17-804 by failing to provide for Crescent's contingent liabilities owed to them. The parties, however, fundamentally disagree as to the proper application of that statutory provision. For that reason, each side reaches a result completely contrary to the other as to whether Crescent was properly wound up before its cancellation. Because Count I of the Complaint turns primarily on the operation of § 17-804, the Court must come to an understanding of that statutory provision and then determine its relevance, if any, to the undisputed facts presented to it.

II. BACKGROUND

A. *The Parties*

The Plaintiffs are Techmer Accel Holdings, LLC ("Techmer Accel"), a wholly-owned subsidiary of Techmer PM, and Accel Corporation ("Accel")

(collectively, "Techmer"). Techmer Accel is a Delaware limited liability company with the sole purpose of owning 100% of Accel. Accel is a Delaware corporation in the business of compounding plastic color and additives. In March 2008, a wholly-owned subsidiary of Techmer PM merged with and into Accel.

Crescent, a Delaware limited partnership, was the majority stockholder of Accel before the merger. A certificate of cancellation, effective as of April 30, 2009, was filed on behalf of Crescent with the Delaware Secretary of State on April 21, 2009.

Crescent Gate, a Delaware limited liability company, was the general partner of Crescent. A certificate of cancellation was filed on behalf of Crescent Gate with the Delaware Secretary of State on April 21, 2009. Unlike the certificate of cancellation filed for Crescent, the certificate of cancellation for Crescent Gate did not specify an effective date.

Amer was designated as the stockholders' representative for Accel's shareholders under the Agreement and Plan of Merger dated March 20, 2008 (the "Merger Agreement"), through which Techmer Accel acquired Accel.

B. *Factual Background and Procedural History*

Crescent was formed as a Delaware limited partnership under the Delaware Revised Uniform Limited Partnership Act (the "DRULPA") on November 2,

1998.[1] Crescent Gate, of which Amer was a managing member, served as Crescent's general partner.[2] Crescent sought to produce significant returns for its partners primarily "by making, holding and disposing of privately negotiated equity and equity-related investments . . . ."[3]

Crescent's last remaining portfolio company was Accel.[4] Because it was in "the process of winding up its affairs," Crescent wanted to divest its stake in Accel.[5] This objective would be achieved under the Merger Agreement by which Techmer PM agreed to merge its wholly-owned subsidiary with Accel.[6] In return, Crescent received $4,355,235.68 in merger consideration when the merger closed on March 31, 2008.[7]

In the Merger Agreement, "the stockholders of Accel indemnified Techmer for breaches of certain representations and warranties of Accel."[8] The agreement capped such indemnification, however, at 10% of the total merger proceeds.[9]

---

[1] Aff. of Nancy Amer ("Amer Aff. 1") ¶ 3; *see also* Transmittal Aff. of Kevin M. Coen, Esq., filed Dec. 1, 2009 ("Coen Aff. 1"), Ex. 29 ("Crescent Certificate of Limited Partnership").
[2] Amer Aff. 1 ¶ 4.
[3] Transmittal Aff. of Kevin M. Coen, Esq., filed May 28, 2010 ("Coen Aff. 2"), Ex. A (Crescent Consolidated Financials of March 31, 2007) at 4.
[4] Amer Aff. 1 ¶ 11; Coen Aff. 2, Ex. C ("General Partners' Letter, March 2008") (stating that, in March 2008, Crescent Gate was "engaged in the orderly sale or liquidation of all portfolio assets" of Crescent, in particular "a sale of [Crescent's] last portfolio asset, its position in Accel . . . .").
[5] General Partners' Letter, March 2008.
[6] Second Aff. of Nancy Amer ("Amer Aff. 2") ¶¶ 1, 3.
[7] Amer Aff. 1 ¶ 12.
[8] Amer Aff. 2 ¶ 3; *see also* Coen Aff. 1, Ex. 1 ("Merger Agreement") § 5.1(a).
[9] Amer Aff. 2 ¶ 3. A party seeking indemnification as permitted by the Merger Agreement must have claims exceeding the "basket amount"—2% of the cash merger consideration paid upon

Thus, Crescent's indemnification liability based on the representations and warranties of the Merger Agreement could not exceed $435,524.[10] Moreover, the Merger Agreement provided that, should the parties dispute an indemnification claim, "such dispute shall be decided by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association then pertaining."[11]

On April 10, 2008, Crescent distributed $3,314,000 of the merger proceeds to its limited partners; Crescent Gate received $209,231.[12] Based on Crescent's financial statement dated March 31, 2008—the month before the distribution—Crescent retained approximately $1,134,608 in cash and cash equivalents at the time of the distribution.[13] According to Crescent's financials, the Limited Partnership's total liabilities for that same period equaled $431,698.[14] As of June 30, 2008, Crescent's cash and cash equivalents amounted to $782,456, with

---

closing—before being entitled to indemnification. *See* Merger Agreement § 5.4(b). If a claim exceeds that threshold, the agreement provides for full indemnification of any damages in excess of the 2% basket amount. *See id.* However, the indemnified party's entitlement is limited by the "cap," or 12% of the cash merger consideration paid upon closing. *See id.* § 5.4(a). Accordingly, the indemnified party's maximum indemnification entitlement cannot exceed 10% of the cash merger consideration.

[10] Amer Aff. 1 ¶ 15.

[11] Merger Agreement §§ 5.5, 5.7.

[12] Amer Aff. 1, Ex. E (Crescent Consolidated Financials of March 31, 2008) at 7.

[13] *See id.* at 1. According to Crescent's financial statement, as of March 31, 2008, the Limited Partnership had cash and cash equivalents of $4,448,608. Crescent defined "cash and cash equivalents" to include "all highly liquid investments with original maturities of three months or less at the time of acquisition." *Id.* at 4.

[14] *See id.* at 1 (making provision for liabilities of accounts payable and accrued expenses and management fee payable only).

total liabilities of $229,424.[15] Although Crescent's liabilities, as set forth in its financial statements, did not specifically encompass the indemnification exposure, Crescent acknowledged that "[i]n connection with the sale of Accel Corporation in March 2008, [Crescent had] agreed to indemnify the buyer against certain damages arising under the [M]erger [A]greement."[16]

As a result of alleged breaches of certain representations and warranties in the Merger Agreement, Techmer purported to give notice—as required by the agreement[17]—of its indemnification claims by letters dated September 4, 2008,[18] and November 4, 2008.[19] In response, Amer informed Techmer that the claims notice was wrongly addressed and that materials referenced in Techmer's notice to Amer were not enclosed.[20]

Techmer later filed a demand for arbitration with the American Arbitration Association ("AAA") on January 27, 2009—as required by Section 5.7 of the Merger Agreement—wherein Techmer asserted claims against Crescent and Amer, in her capacity as Accel's stockholders' representative.[21] Techmer sought a declaration that certain representations and warranties of the Merger Agreement

---

[15] Coen Aff. 2, Ex. E (Crescent Consolidated Financials of June 30, 2008) at 1.
[16] *Id.* at 7.
[17] Merger Agreement § 5.2(a).
[18] Coen Aff. 1, Ex. 2 (Claims Notice, dated Sept. 4, 2008).
[19] *Id.* Ex. 3 (Claims Notice, dated Nov. 4, 2008).
[20] *See* Decl. of Nancy Amer, Ex. A (Letters of Nancy Amer, dated Oct. 7, 2008; Oct. 21, 2008; Nov. 10, 2008).
[21] Coen Aff. 1, Ex. 4 (Demand for Arbitration and Statement of Claim) ¶ 1.

had been breached and that indemnification was owed to Techmer for those alleged breaches in the amount of $1,009,380.[22] In response, by letter dated February 9, 2009, Amer rejected Techmer's claim for indemnification—both in substance and in amount—asserting that the purported grounds for indemnification failed under the terms of the Merger Agreement.[23]

Even though the Merger Agreement required that all indemnification claims arising under that agreement be submitted to arbitration, Crescent and Amer repeatedly refused to pay fees arising out of that proceeding.[24] As a result, the arbitrator suspended the proceedings as of June 16, 2009, and subsequently terminated the arbitration on August 6, 2009 because of Crescent and Amer's failure to comply with AAA's deposit requirements.[25]

While the arbitration was ongoing, certificates of cancellation were filed on behalf of both Crescent[26] and Crescent Gate[27] with the Delaware Secretary of State, effectively terminating their status as separate legal entities.[28] Under the terms of

---

[22] *Id.* ¶ 23.
[23] Coen Aff. 1, Ex. 5 (Letter of Nancy Amer, dated Feb. 9, 2009).
[24] *See, e.g.*, *id.*, Ex. 22 (Electronic message of Melanie Cabrera, dated May 29, 2009); *Id.* Ex. 25 (Letter of Melanie Cabrera, dated August 6, 2009); *Id.* Ex. 28 (Letter of Melanie Cabrera, dated Nov. 16, 2009).
[25] *Id.* Ex. 27 (Termination Order).
[26] *Id.* Ex. 33 ("Crescent Certificate of Cancellation") (showing that certificate of cancellation for Crescent was filed on April 21, 2009 and became effective on April 30, 2009).
[27] *Id.* Ex. 32 ("Crescent Gate Certificate of Cancellation") (showing that certificate of cancellation for Crescent Gate was filed on April 21, 2009).
[28] *See* 6 *Del. C.* § 17-201(b) ("A limited partnership formed under this chapter shall be a separate legal entity, the existence of which . . . shall continue until cancellation of the limited partnership's certificate of limited partnership."); 6 *Del. C.* § 18-201(b) ("A limited liability

Crescent's limited partnership agreement (the "LPA"), dated November 2, 1998, the Limited Partnership was to exist for a 10-year term measured from the "final closing date"—as defined by the LPA—which was April 30, 1999.[29] Because none of the defined events of dissolution under the LPA caused Crescent to dissolve earlier,[30] and because the term of the Limited Partnership was not extended as allowed by the LPA,[31] Amer believed that Crescent's term would expire as of April 30, 2009 by virtue of the LPA. At that time, Crescent retained total assets of $59,892—equal in amount to its total known liabilities as of that date.[32]

After the failed arbitration, Techmer brought suit in this Court on September 17, 2009, alleging breaches of the representations and warranties in the Merger Agreement,[33] and seeking the nullification of the certificates of cancellation of Crescent and Crescent Gate as well as the appointment of a receiver for Crescent.[34]

---

company formed under this chapter shall be a separate legal entity . . . until cancellation of the limited liability company's certificate of formation.").

[29] *See* Amer Aff. 1 ¶¶ 5-6; *id.* Ex. A (LPA) § 9.1.

[30] *See* LPA §§ 9.2, 9.3.

[31] *See id.* § 9.4.

[32] Coen Aff. 2, Ex. E ("Crescent Consolidated Financials of April 30, 2009") at 1 (showing that, as of April 30, 2009, Crescent had total assets of $59,892—cash and cash equivalents of $59,888 and accrued interest receivable of $4—and total liabilities of $59,892—accounts payable and accrued expenses of $8,000 and management fee payable of $51,892).

[33] Verified Compl. ¶¶ 1-2, 14, 41.

[34] *Id.* ¶ 37.

Amer subsequently filed a motion to compel arbitration or, alternatively, to dismiss. Amer asserted that, because the claims alleged by Techmer arose out of the indemnification provision of the Merger Agreement, the parties were subject to, and bound by, that agreement's arbitration clause.[35] Alternatively, Amer argued that the Court should stay the action pending the outcome of the arbitration.[36] The Court concluded that, although the parties agreed that the Merger Agreement requires disputes such as the one alleged in the Complaint to be submitted to arbitration,[37] Amer had "frustrated that process [and] . . . cannot now invoke the very process that she frustrated."[38] Thus, the Court denied Amer's motion to compel arbitration or, alternatively, to dismiss because Amer had "waived and relinquished her right to arbitration" through her earlier conduct.[39]

Techmer and Amer now request summary judgment, through cross-motions, as to Count I of the Complaint.

III. ANALYSIS

A. *The Summary Judgment Standard*

Summary judgment is appropriate where the record demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a

[35] Def. Amer's Opening Br. in Supp. of Mot. to Compel Arbitration and Alternatively to Dismiss at 3-4.
[36] *Id.* at 4, 10.
[37] Teleconference on Def.'s Mot. to Compel Arbitration or Alternatively to Dismiss, Tr. 9.
[38] *Id.* at 11.
[39] *Id.* at 13.

judgment as a matter of law."[40] The burden of showing "both the absence of a material fact and entitlement to judgment as a matter of law" falls on the moving party.[41] The Court must view the evidence in the light most favorable to the nonmoving party.[42] Where the moving party satisfies its burden, "the burden shifts to the nonmovant to present some specific, admissible evidence that there is a genuine issue of fact for a trial."[43] The Court will not grant summary judgment "when the record reasonably indicates that a material fact is in dispute or 'if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.'"[44]

Because both Techmer and Amer have moved for summary judgment as to Count I of the Complaint, "the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions."[45] In the briefs filed in conjunction with the cross-motions, no party has argued that an issue of material fact exists to preclude the Court from resolving the merits of the dispute framed by Count I of the Complaint. In any event, because

---

[40] Ct. Ch. R. 56(c).
[41] *Acro Extrusion Corp. v. Cunningham*, 810 A.2d 345, 347 (Del. 2002) (internal quotation omitted).
[42] *In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 356 (Del. Ch. 2008).
[43] *Id.*
[44] *Comet Sys., Inc. S'holders' Agent v. MIVA, Inc.*, 980 A.2d 1024, 1029 (Del. Ch. 2008) (quoting *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962)).
[45] Ct. Ch. R. 56(h).

the core dispute as to Count I turns on the proper interpretation of a statutory provision, a trial would not produce a more informed analysis of that claim.

B. *Plaintiffs' Allegations Under 6* Del. C. *§ 17-804*

Techmer alleges that, although the Defendants "were aware of Techmer's claims for breaches of the representations and warranties in the Merger Agreement[,] . . . Crescent, under [Amer's] direction, nevertheless failed to reserve sufficient funds to cover the amounts it owes to Techmer . . . as required by Section 17-804."[46] Because that provision, Techmer argues, "imposes an unqualified requirement on limited partnerships that have dissolved to reserve funds to cover known claims or claims that are reasonably likely to arise,"[47] Crescent's failure to do so indicates that "Crescent was not wound up and dissolved in accordance with Section 17-804(b) . . . ."[48] These assertions form the basis of Count I of the Complaint now before the Court on the cross-motions for summary judgment.

Subchapter VIII of the DRULPA sets forth the statutory framework governing the dissolution of a limited partnership. Under 6 *Del. C.* § 17-801, a limited partnership dissolves upon the first to occur of five specified events or the

[46] Verified Compl. ¶¶ 33-34.
[47] Pls.' Answering Br. in Opp'n to Def.'s Mot. for Summ. J. on Count I and Opening Br. in Supp. of Pls.' Cross-Mot. for Summ. J. on Count I of the Verified Compl. ("Pls.' Opp'n") at 7.
[48] Pls.' Reply Br. in Supp. of Cross-Mot. for Summ. J. on Count I of the Verified Compl. at 5.

"[e]ntry of a decree of judicial dissolution under § 17-802 . . . ."[49] Because "the four significant events covering the life span of a partnership would appear to be formation, dissolution, winding up and termination[,] . . . dissolution . . . does not terminate the partnership. Rather, the partnership continues until the winding up of partnership affairs is completed."[50]

During the winding up of a dissolved limited partnership, and until the filing of the certificate of cancellation in accordance with the DRULPA, "the persons winding up the limited partnership's affairs may . . . discharge or make reasonable

---

[49] 6 *Del. C.* § 17-801(6). When a judicial dissolution decree is entered under the DRULPA, dissolution of that limited partnership is effective upon entry of the decree. *See Active Asset Recovery, Inc. v. Real Estate Asset Recovery Servs., Inc.*, 1999 WL 743479, at *5 (Del. Ch. Sept. 10, 1999); 3 Edward P. Welch et al., *Folk on the Delaware General Corporation Law* (hereinafter "*Folk*") § 17-801.1, at LP-VIII-6 (5th ed. 2010 Supp.) (explaining that where a court enters a decree of dissolution, "dissolution occurs upon the entry of the decree, and does not relate back in time to the occurrence of the events justifying the decree"). For example, dissolution in that context does not relate back to the events that made it "not reasonably practicable to carry on the business in conformity with the partnership agreement." 6 *Del. C.* § 17-802.

[50] *Paciaroni v. Crane*, 408 A.2d 946, 952 (Del. Ch. 1979); *see also Insituform Techs., Inc. v. Insitu, Inc.*, 1999 WL 240347, at *12 n.9 (Del. Ch. Apr. 19, 1999) ("[T]he termination of a partnership is a three-step process: dissolution, winding up, and then termination."); Martin I. Lubaroff & Paul M. Altman, *Lubaroff & Altman on Delaware Limited Partnerships* § 8.1, at 8-1 (2010 Supp.) ("Once dissolved, the business of a Delaware limited partnership continues only to the extent reasonably necessary to wind up gradually the limited partnership's affairs."); *id.* § 8.3, at 8-16 ("After the dissolution of a limited partnership, for purposes of Delaware law, the limited partnership's existence as a separate legal entity continues until the cancellation of the certificate of limited partnership . . . . After all of the business and affairs of a limited partnership have been wound up, including, without limitation, the payment or making of reasonable provisions for the payment of obligations and liabilities and the distribution of assets to creditors and partners of the limited partnership, the termination of the limited partnership is accomplished by the filing of a certificate of cancellation with the Delaware Secretary of State [under Section 17-203].").

provision for the limited partnership's liabilities . . . ."[51] Because of the possible lengthy duration of the winding up period, the DRULPA "provides that the satisfaction of the liabilities of a limited partnership may be accomplished by payment or *the making of reasonable provision* for payment thereof."[52] More specifically, 6 *Del. C.* § 17-804 mandates that:

> (b) A limited partnership which has dissolved:
>
> (1) Shall pay or make reasonable provision to pay all claims and obligations, including all contingent, conditional or unmatured contractual claims, known to the limited partnership;
>
> (2) Shall make such provision as will be reasonably likely to be sufficient to provide compensation for any claim against the limited partnership which is the subject of a pending action, suit or proceeding to which the limited partnership is a party and
>
> (3) Shall make such provision as will be reasonably likely to be sufficient to provide compensation for claims that have not been made known to the limited partnership or that have not arisen but that, based on facts known to the limited partnership, are likely to arise or to become known to the limited partnership within 10 years after the date of dissolution.

Accordingly, if a claim against a dissolved limited partnership is among those contemplated by § 17-804(b), the limited partnership must make reasonable provision for that claim during the winding up process—the period after dissolution but before termination of the partnership. Stated differently, "a person claiming to be a creditor of a partnership in dissolution is entitled to adequate

---

[51] 6 *Del. C.* § 17-803(b).
[52] Lubaroff & Altman, *supra* note 50, § 8.4, at 8-17 (emphasis added).

security" by operation of § 17-804(b), and "where the claim is unliquidated or contingent, what constitutes adequate security is a question of judgment."[53]

If a plaintiff-creditor's claim falls within the scope of § 17-804(b), failure by the defendant-limited partnership "to explain how [it] made, or attempted to make, reasonable provisions to cover" that claim generally warrants the Court's concluding that the limited partnership failed to comply with the requirements of § 17-804(b).[54] In those instances, the Court may grant a request to nullify the limited partnership's certificate of cancellation because of the limited partnership's failure to wind up in accordance with the statutory mandate.[55] Techmer seeks the nullification of Crescent's certificate of cancellation—in addition to the appointment of a receiver under 6 *Del. C.* § 17-805—because it contends that "there is no dispute that Defendants failed to reserve funds to cover Plaintiffs' known claim, and thus, they violated Section 17-804(b)."[56]

---

[53] *Boesky v. CX Partners, L.P.*, 1988 WL 42250, at *16 (Del. Ch. Apr. 28, 1988).
[54] *In re CC&F Fox Hill Assocs. Ltd. P'ship*, 1997 WL 349236, at *4 (Del. Ch. June 13, 1997).
[55] *Id.* at *4-*5 (holding that nullification of a limited partnership's certificate of cancellation was proper, in part, because the Court could not conclude on the record as presented that the limited partnership wound up in accordance with 6 *Del. C.* § 17-804(b), which required the making of reasonable provision for the plaintiffs' claim).
[56] Pls.' Opp'n at 1.

C. *Defendant's Construction and Application of 6* Del. C. *§ 17-804*

Amer argues that "[u]nder the express language of the statute, Plaintiffs have no claim based on a violation of 6 *Del. C.* § 17-804"[57]—that statutory provision, according to the Defendant, "does not apply as a matter of law."[58] In support of her construction, Amer asserts that "[b]ecause Crescent made no distributions after the event of its dissolution, there were no distributions that were, or could have[] been[,] made in violation of Section 17-804."[59] Thus, Amer contends, summary judgment in the Defendant's favor is proper as to Count I of the Complaint because "by its plain and unambiguous terms, 6 *Del. C.* § 17-804 does not apply."[60]

To understand Amer's conclusion, the Court summarizes below the analysis described in her briefs and supporting affidavits. Amer argues that, by its literal terms, § 17-804 only applies to a limited partnership which has dissolved and has then entered into the process of winding up the partnership's affairs.[61] Accordingly, Amer asserts that there are only two dispositive questions relevant to analyzing the allegations in Count I: when the limited partnership dissolved and whether any distributions were made to the limited partners during the winding up

[57] Def. Amer's Mot. for Summ. J. ¶ 5.
[58] 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. ("Def.'s Reply") at 1.
[59] *Id.*
[60] Mem. of Law in Supp. of Def.'s Mot. for Summ. J. on Claim under 6 *Del. C.* § 17-804 at 4.
[61] *Id.* at 4-5.

period after dissolution.[62] Otherwise, Amer contends, all distributions made by a not-yet-dissolved limited partnership to its partners are governed by 6 *Del. C.* § 17-607[63]—a provision neither addressed by nor forming the basis for this action.[64]

Because 6 *Del. C.* § 17-801 expressly prescribes the events of dissolution of a limited partnership formed under the DRULPA, an "open-ended concept of dissolution, [according to Amer] . . . flies in the face of Delaware law . . . ."[65] Since Techmer fails to allege that any statutory event caused Crescent's dissolution, Amer argues that "the terms of the partnership agreement control the time of dissolution."[66] Accordingly, Amer concludes that Crescent automatically dissolved on April 30, 2009, because, under the LPA, Crescent's term of existence expired 10 years after April 30, 1999, and the partnership was neither sooner dissolved nor its term extended under the LPA.[67]

---

[62] *See id.* at 3.

[63] The Court notes that 6 *Del. C.* § 17-804(e) directs that "Section 17-607 . . . shall not apply to a distribution to which [Section 17-804] applies." A distribution may violate § 17-607 if "at the time of the distribution, after giving effect to the distribution, all liabilities of the limited partnership, other than liabilities to partners on account of their partnership interests and liabilities for which the recourse of creditors is limited to specified property of the limited partnership, exceed the fair value of the assets of the limited partnership, except that the fair value of property that is subject to a liability for which the recourse of creditors is limited shall be included in the assets of the limited partnership only to the extent that the fair value of that property exceeds that liability." 6 *Del. C.* § 17-607(a).

[64] Def.'s Reply at 7-8.

[65] *Id.* at 4.

[66] *Id.* at 5 (citing *Active Asset Recovery, Inc.*, 1999 WL 743479, at *5-*8).

[67] *Id.* at 5-6. Under 6 *Del. C.* § 17-801(1), "the time specified in a partnership agreement" is a dissolution event for a limited partnership.

Having asserted that Crescent did not dissolve until April 30, 2009, Amer then notes that the $3.314 million April 10, 2008 distribution of the merger proceeds to the partners "preceded the partnership's dissolution by more than one year."[68] Assuming April 30, 2009 as the Limited Partnership's dissolution date, "no distributions to the partners of Crescent [were made] upon or after its dissolution."[69] At the time of the April 2008 distribution, Amer contends that "Crescent reserved over $1 million to provide for current and potential liabilities, including $435,000 to cover the maximum potential indemnification obligation to Techmer."[70] Techmer's demand for indemnification delayed Crescent's planned dissolution, according to Amer, with the consequence that by the time of Crescent's purported dissolution on April 30, 2009, "all of its reserves had been depleted."[71] Because "any obligations under Section 17-804 arose at [the] time" of Crescent's dissolution—which Amer contends occurred on April 30, 2009—Amer argues that "the distribution in April 2008 cannot have been in violation of 17-804" since it occurred before Crescent's dissolution.[72]

[68] Def.'s Reply at 4.
[69] Amer Aff. 1 ¶ 10.
[70] Amer Aff. 2 ¶ 4.
[71] *Id.* ¶¶ 7, 10.
[72] Def.'s Reply at 6.

D. *Canons of Statutory Interpretation*

Because the cross-motions for summary judgment require the Court to interpret and apply 6 *Del. C.* § 17-804, the Court begins with an overview of certain canons of statutory interpretation. "The rules of statutory construction are designed to ascertain and give effect to the intent of the legislators, as expressed in the statute."[73]

The threshold question is "whether the provision in question is ambiguous."[74] If the statute is clear and unambiguous, the Court "follow[s] the plain meaning rule in statutory construction."[75] In such instances, "there is no reasonable doubt as to the meaning of the words used and the Court's role is then limited to an application of the literal meaning of the words."[76] When, however, the statute is ambiguous because it is reasonably susceptible to multiple interpretations,[77] "the Court must rely upon its methods of statutory interpretation and construction to arrive at what the legislature meant."[78]

---

[73] *Chase Alexa, LLC v. Kent County Levy Court*, 991 A.2d 1148, 1151 (Del. 2010); *see also Dambro v. Meyer*, 974 A.2d 121, 137 (Del. 2009) ("The goal of statutory construction is to determine and give effect to legislative intent.") (internal quotation omitted).
[74] *Dewey Beach Enters., Inc. v. Bd. of Adjustment of Dewey Beach*, 1 A.3d 305, 307 (Del. 2010).
[75] *Galloway v. State Bd. of Pension Trs.*, 1992 WL 364625, at *3 (Del. Ch. Dec. 7, 1992).
[76] *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1246 (Del. 1985); *see also Zurich Am. Ins. Co. v. St. Paul Surplus Lines, Inc.*, 2009 WL 4895120, at *7 (Del. Ch. Dec. 10, 2009) ("[W]hen construing a statute, the Court must give a reasonable and sensible meaning to the words of the statute in light of their intent and purpose. Where the language is clear and unambiguous, the statute must be held to mean that which it plainly states, and no room is felt for construction.") (internal quotations, alteration, and citation omitted).
[77] *Dewey Beach Enters., Inc.*, 1 A.3d at 307.
[78] *Coastal Barge Corp.*, 492 A.2d at 1246.

Because the Court must "presum[e] that the Legislature did not intend an unreasonable, absurd or unworkable result,"[79] ambiguity may exist "where a literal interpretation of the words of the statute would lead to such unreasonable or absurd consequences as to compel a conviction that they could not have been intended by the legislature."[80] After making such a determination, "the statute must be construed to avoid 'mischievous or absurd results.'"[81] For that reason, "[t]he golden rule of statutory interpretation . . . is that unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another which would produce a reasonable result."[82] Thus, the Court will reject any statutory construction incompatible with the intent of the General Assembly.[83]

---

[79] *E. I. Du Pont De Nemours & Co. v. Clark*, 88 A.2d 436, 438 (Del. 1952).
[80] *In re Kent County Adequate Pub. Facilities Ordinances Litig.*, 2009 WL 445611, at *6 (Del. Ch. Feb. 11, 2009) (internal quotation and alteration omitted); *see also CML V, LLC v. Bax*, 6 A.3d 238, 241 (Del. Ch. 2010) (holding that "the literal terms of the LLC Act control" but recognizing that the "Court may depart from the literal reading of a statute where such a reading is so inconsistent with the statutory purpose as to produce an absurd result . . ."); *In re Estate of Nelson*, 447 A.2d 438, 444 (Del. Ch. 1982) ("[I]t is a well accepted principle of our law that unjust, absurd and mischievous consequences flowing from a literal interpretation of statutory language may create an ambiguity calling for construction.").
[81] *Del. Bay Surgical Servs., P.A. v. Swier*, 900 A.2d 646, 652 (Del. 2006) (quoting *Moore v. Wilmington Hous. Auth.*, 619 A.2d 1166, 1173 (Del. 1993)).
[82] *Coastal Barge Corp.*, 492 A.2d at 1247.
[83] *Dambro*, 974 A.2d at 130.

E. *Analysis of 6* Del. C. *§ 17-804*

In accordance with the rules of statutory construction, the Court begins its analysis by determining if any ambiguity exists in the language of 6 *Del. C.* § 17-804. Section 17-804 imposes limitations and requirements only on "[a] limited partnership which has dissolved"[84] and "[u]pon the winding up" of a limited partnership's affairs.[85] To determine when § 17-804 first applies to a limited partnership, the date of dissolution—as informed by 6 *Del. C.* § 17-801—must be established.[86] Under § 17-804, only upon dissolution must a limited partnership "pay or make reasonable provision to pay all claims and obligations" of the partnership before making distributions to its partners.[87] In the event there are insufficient assets to pay or make reasonable provision to pay a limited partnership's obligations at the time of dissolution, § 17-804(b) requires compliance with the priority scheme detailed in § 17-804(a). Under § 17-804(e), distributions made to partners by a dissolved limited partnership are exclusively controlled by § 17-804, while § 17-607 governs distributions at all other times

[84] 6 *Del. C.* § 17-804(b).
[85] *Id.* § 17-804(a).
[86] Under 6 *Del. C.* § 17-801, a limited partnership dissolves upon the first to occur of the following: (1) at the time specified in the partnership agreement, (2) after a vote in compliance with the statutory requirements, (3) upon an event of withdrawal of the general partner, (4) if there are no limited partners remaining, (5) upon the occurrence of events specified in the partnership agreement, or (6) upon entry of a decree of judicial dissolution.
[87] *Id.* § 17-804(b)(1).

during the limited partnership's existence before dissolution.[88] Nothing in § 17-804 is susceptible to alternate interpretations and, as a result, it is not ambiguous.

Because ambiguity may also exist "if the literal reading of the statutory language would result in unjust, absurd or mischievous consequences,"[89] the Court must also consider whether the plain language of the provision produces unreasonable consequences in light of legislative intent. If "giving a literal interpretation to words of the statute would lead to such unreasonable or absurd consequences as to compel a conviction that they could not have been intended by the legislature,"[90] that "may create an ambiguity calling for construction" by the Court.[91] Where the literal reading of the statute produces absurd consequences and, as a result, causes ambiguity, the Court must determine and effectuate the intent of the General Assembly.[92]

The prevailing policy of the DRULPA is "to give maximum effect to the principle of freedom of contract and to the enforceability of partnership agreements."[93] Nevertheless, the DRULPA contains certain mandatory provisions

---

[88] *Id.* § 17-804(e).
[89] *Galloway*, 1992 WL 364625, at *4.
[90] *Coastal Barge Corp.*, 492 A.2d at 1246.
[91] *Nelson*, 447 A.2d at 444.
[92] *See Coastal Barge Corp.*, 492 A.2d at 1246 ("To apply a statute the fundamental rule is to ascertain and give effect to the intent of the legislature.").
[93] 6 *Del. C.* § 17-1101(c); *see also Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 291 (Del. 1999). In *Elf Atochem*, our Supreme Court analyzed the Delaware Limited Liability Company Act (the "DLLC Act"), which it described as "modeled on the popular Delaware LP Act." *Id.* at 290. Because the two acts contain the same "architecture and much of [their] wording is almost

generally "intended to protect third parties, not necessarily the contracting [partners]."[94] Because "[t]he terms of Section 17-804 are skeletal and starkly so when compared with the elaborate provisions dealing with the analogous [dissolution] problem" in the Delaware General Corporation Law (the "DGCL"),[95] this Court has previously determined that "it is helpful to look to those provisions of our corporation statute for guidance."[96] The DGCL provisions—Sections 280-82—exist "to protect the valid interests of creditors of a dissolved company"[97] and, similar to the requirements of the DRULPA, generally "a corporation must pay or make reasonable provision to pay all claims and obligations of the corporation."[98] Thus, § 17-804 provides mandatory protection to creditors of a limited partnership if the partnership dissolves and winds up its affairs.[99] By enacting § 17-804,

---

identical," the Supreme Court analyzed the DLLC Act by reference to the DRULPA. *See id.* at 290-91 ("[T]he following observation relating to limited partnerships applies as well to limited liabilities companies."). For that reason, the Court analyzes the DRULPA by citing analysis of analogous DRULPA counterparts in the DLLC Act. *Compare* 6 *Del. C.* §§ 17-804, 17-1101(c), *with* 6 *Del. C.* §§ 18-804, 18-1101(b).

[94] *Elf Atochem*, 727 A.2d at 292 (citation omitted); *see also* Robert L. Symonds, Jr. & Matthew J. O'Toole, *Symonds & O'Toole on Delaware Limited Liability Companies* § 16.06[E][1], at 16-38 (2006 Supp.) (noting that "the DLLC Act sets forth rules that must be observed regarding the priority treatment of creditors" in § 18-804 and that that provision is "among the relatively few mandatory rules under the statute").

[95] *Boesky*, 1988 WL 42250, at *16. *See* 8 *Del. C.* §§ 280-82.

[96] *Boesky*, 1988 WL 42250, at *16. Within the DGCL, "Sections 273 through 285 . . . regulate the dissolution and winding-up of Delaware corporations." 1 R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations and Business Organizations* § 10.10, at 10-35 (3d ed. 2010 Supp.).

[97] *Blue Chip Capital Fund II Ltd. P'Ship v. Tubergen*, 906 A.2d 827, 835 (Del. Ch. 2006).

[98] 2 *Folk*, *supra* note 49, § 281.1, at GCL-X-120.

[99] *See Follieri Gp., LLC v. Follieri/Yucaipa Invs., LLC*, 2007 WL 2459226, at *1 (Del. Ch. Aug. 23, 2007) (concluding that § 18-804 of the DLLC Act fully protects creditors of a dissolved limited liability company); *CC&F Fox Hill*, 1997 WL 525841, at *1 ("Section 17-804

therefore, the General Assembly intended to safeguard creditors from events of dissolution and the winding up of a limited partnership.

Because the Court must ensure that it "give[s] effect to the intent of the legislature,"[100] the Court renews its analysis of § 17-804 to determine if a literal reading "yield[s] illogical or absurd results" that are inconsistent with the intent of the General Assembly.[101] Under a literal reading of the statute, a limited partnership could largely avoid the limitations of § 17-804 by a course of action resembling what Crescent did here. Before dissolution, a limited partnership could make a distribution to its partners. So long as that distribution did not violate § 17-607[102]—applicable to partner distributions before dissolution—the distribution would escape judicial scrutiny and would also fall entirely outside of the scope of § 17-804. Although at the time of the distribution the limited partnership would

---

establishes a process by which the rights of parties to which the partnership has an obligation (or may have an obligation) are protected.").

[100] *Coastal Barge Corp.*, 492 A.2d at 1246.

[101] *Cochran v. Supinski*, 794 A.2d 1239, 1251 n.18 (Del. Ch. 2001) (citing *State v. Cooper*, 575 A.2d 1074, 1076 (Del. 1990)).

[102] 6 *Del. C.* § 17-607(a), discussed *supra* note 63, reads as follows:

> A limited partnership shall not make a distribution to a partner to the extent that at the time of the distribution, after giving effect to the distribution, all liabilities of the limited partnership, other than liabilities to partners on account of their partnership interests and liabilities for which the recourse of creditors is limited to specified property of the limited partnership, exceed the fair value of the assets of the limited partnership, except that the fair value of property that is subject to a liability for which the recourse of creditors is limited shall be included in the assets of the limited partnership only to the extent that the fair value of that property exceeds that liability. For purposes of this subsection (a), the term "distribution" shall not include amounts constituting reasonable compensation for present or past services or reasonable payments made in the ordinary course of business pursuant to a bona fide retirement plan or other benefits program.

have to maintain sufficient assets in excess of its liabilities as described by § 17-607, the partnership could later allow its reserves to deplete before dissolution. Depletion could result, for example, from ordinary course liabilities or payment obligations—other than distributions to partners—required by a limited partnership agreement or other contracts. Only upon dissolution does § 17-804 operate to further limit partner distributions and mandate payment of or provision for obligations of the limited partnership and, more importantly, the Court determines compliance with § 17-804 by reference to the limited partnership's assets as of dissolution. With its reserves lacking upon dissolution because of earlier depletion, the limited partnership would then only be required to pay its claims and obligations "ratably to the extent of assets available therefor."[103] If the limited partnership entirely exhausted its reserves before dissolution, it could avoid its obligations so long as it made no additional distributions to its partners when winding up its affairs and demonstrated that it otherwise wound up in accordance with § 17-804.

The foregoing analysis demonstrates the limited protection afforded by a literal reading of § 17-804. Nevertheless, the Court "may not ignore statutory language simply because undesirable consequences could conceivably follow."[104]

---

[103] *Id.* § 17-804(b).
[104] *Galloway*, 1992 WL 364625, at *5.

Section 17-804 "deals with how claims of creditors of a limited partnership are to be satisfied and, in doing so, attempts to balance the rights of creditors with the rights of partners."[105] The DRULPA provides creditor protection before dissolution through the distribution limitations of § 17-607. Upon dissolution, however, only the creditor protections of § 17-804 apply—specifically, the Court determines whether a limited partnership wound up in accordance with that statutory mandate by considering the partnership's assets as of dissolution and whether it, in disposing of those assets, adhered to the priority scheme, distribution limitations, and the making of reasonable provision requirement. The statute makes clear that the General Assembly intended different methods of protecting creditors based on the status of the limited partnership—§ 17-804(e) provides that § 17-607 ceases to apply upon the dissolution of a limited partnership. Ultimately, the DRULPA always provides statutory creditor protection but the methods of protection vary during the lifetime of the limited partnership because different statutory provisions apply depending on the state of existence of the partnership.[106]

Although a literal reading of § 17-804 creates the potential for offensive behavior by those who control limited partnerships, the Court cannot conclude, on

---

[105] Lubaroff & Altman, *supra* note 50, § 8.4, at 8-18.

[106] The DRULPA makes a bright-line distinction between a limited partnership that has dissolved and one that has not. Dissolution marks the point where § 17-607 ceases to operate. Only then do the limitations of § 17-804 take effect and subsequently continue until the limited partnership winds up its affairs and terminates its existence. As a result, it is critical to establish the date of dissolution by reference to the events of dissolution described in § 17-801.

that basis alone, that a strict application of that provision produces absurd results;[107] the legislature clearly intended that § 17-804 apply only upon the dissolution of a limited partnership, with dissolution determined by reference to § 17-801. At all other times, creditors concerned with partner distributions must look to § 17-607 for statutory protection under the DRULPA. Because "[c]reditors generally are presumed to be capable of protecting themselves through the contractual agreements that govern their relationships with firms,"[108] creditors may ensure that additional protective measures apply in instances not captured by § 17-607 or § 17-804 by operation of their bargained-for rights.

F. *Application of 6* Del. C. *§ 17-804*

Having determined that 6 *Del. C.* § 17-804 is unambiguous, the Court's role is limited to applying the literal meaning of the statutory language. That task requires the Court first to establish the date of Crescent's dissolution before it decides whether Crescent wound up in accordance with the requirements of § 17-804.

[107] Applying a literal reading of the DLLC Act, this Court recently emphasized the importance of recognizing that "consistent interpretation and stable commercial expectations have particular salience" in the context of uniform acts. *CML V, LLC*, 6 A.3d at 244. That same principle applies to the DRULPA.

[108] *Id.* at 250 (internal quotation omitted).

1. When Did Crescent Dissolve?

Amer contends that Crescent dissolved on April 30, 2009 because the Limited Partnership's term expired on that date under the LPA.[109] That expiration date, Amer argues, was the first of the 6 *Del. C.* § 17-801 dissolution events to occur[110]—none of the other § 17-801 dissolution events applies and the Limited Partnership was not earlier dissolved by any of the specified events of dissolution in the LPA. In response, the Plaintiffs argue that "[a]s early as April 2007, Crescent Gate began the process of winding up and dissolving Crescent's affairs," and "Crescent's own records show that Crescent was in dissolution long before April 2009 when it filed its certificate of cancellation."[111]

In order to establish when Crescent dissolved, the analysis begins with § 17-801. Because that provision mandates that a limited partnership dissolves when the first of the listed dissolution events occurs, the Court must determine which, if any, events occurred and then, if multiple events transpired, which occurred first. Amer correctly points out that Crescent's term would have expired under the LPA on April 30, 2009, a dissolution event under § 17-801(1). An event of withdrawal, however, by the Limited Partnership's general partner occurred before that date causing Crescent to dissolve under § 17-801(3) at the latest by April 21, 2009.

---

[109] *See* LPA § 9.1.

[110] Under § 17-801(1), a limited partnership is dissolved and shall wind up "[a]t the time specified in a partnership agreement . . . ."

[111] Pls.' Opp'n at 3, 8.

Under the LPA, Crescent Gate served as the general partner of the Limited Partnership.[112] Section 17-801(3) deems a limited partnership dissolved upon "[a]n event of withdrawal of a general partner," unless certain exceptions apply as described in that provision.[113] The DRULPA defines an event of withdrawal of a general partner to be "an event that causes a person to cease to be a general partner as provided in § 17-402 . . . ."[114] Under that provision, a limited liability company ceases to be a general partner of a limited partnership upon the "the dissolution and *commencement* of winding up of the limited liability company."[115]

Crescent Gate, a Delaware limited liability company governed by the DLLC Act, had a certificate of cancellation filed on its behalf on April 21, 2009.[116] The DLLC Act requires a certificate of cancellation to set forth "[t]he future effective date or time . . . of cancellation if it is not to be effective upon the filing of the certificate."[117] Because the certificate of cancellation for Crescent Gate made no reference to a future effective date, the certificate of cancellation became effective as of the filing date, April 21, 2009. As a result, that filing cancelled Crescent

---

[112] Crescent Certificate of Limited Partnership ("The name and the business address of the sole general partner of [Crescent] is as follows: Crescent Gate Partners L.L.C.").
[113] 6 *Del. C.* § 17-801(3).
[114] *Id.* § 17-101(3).
[115] *Id.* § 17-402(a)(11) (emphasis added).
[116] Crescent Gate Certificate of Cancellation.
[117] 6 *Del. C.* § 18-203; *see also id.* § 18-206(b) ("Upon the filing of a certificate of cancellation . . . or upon the future effective date or time of a certificate of cancellation . . . the certificate of formation is canceled.").

Gate's certificate of formation,[118] and caused Crescent Gate no longer to exist as a separate legal entity as of April 21, 2009.[119]

Because the DLLC Act requires that a limited liability company dissolve and complete winding up before filing a certificate of cancellation,[120] Crescent Gate unquestionably ceased to be the general partner of Crescent by April 21, 2009 because of an event of withdrawal. For the event of withdrawal under § 17-402(a)(11) of the DRULPA to occur, Crescent Gate, as the general partner of Crescent, first had to dissolve and *commence* winding up its affairs; by filing a certificate of cancellation on, and effective as of, April 21, 2009, Crescent Gate was required to have already dissolved and *completed* winding up under § 18-203 of the DLLC Act. Accordingly, 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. Although there are three exceptions to the general rule that an

---

[118] *See id.* § 18-203 ("A certificate of cancellation shall be filed in the office of the Secretary of State to accomplish the cancellation of a certificate of formation upon the dissolution and the completion of winding up of a limited liability company . . . .").

[119] *See id.* § 18-201(b) ("A limited liability company formed under [the DLLC Act] 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.").

[120] *See id.* § 18-203 ("A certificate of formation shall be canceled upon the dissolution and the completion of winding up of a limited liability company . . . . A certificate of cancellation shall be filed . . . upon the dissolution and the completion of winding up of a limited liability company . . . .").

event of withdrawal by the general partner causes dissolution of the limited partnership, none applies in this action.[121]

The Court cannot decide on the current record whether Crescent Gate had begun winding up before filing its certificate of cancellation on April 21, 2009; had Crescent Gate dissolved and commenced winding up before then, the general partner's event of withdrawal would have occurred even earlier. In any event, Crescent dissolved by April 21, 2009, at the latest—not April 30, 2009 as Amer suggests. Although Crescent's certificate of cancellation was also filed on

[121] "There exists in Section 17-801(3) three express exceptions to the rule that an event of withdrawal of a general partner causes the dissolution of a Delaware limited partnership. The first exception is that, upon an event of withdrawal of a general partner, a Delaware limited partnership is not dissolved if there is at least one other general partner and a partnership agreement permits a remaining general partner to continue the business of the limited partnership and such general partner does so. . . . The second exception . . . is if, within ninety (90) days or such other period as is provided for in a partnership agreement after the withdrawal of a general partner either (A) if provided for in the partnership agreement, the then current percentage or other interest in the profits of the limited partnership specified in the partnership agreement owned by the remaining partners agree in writing or vote to continue the business of the limited partnership and to appoint, effective as of the date of withdrawal, one (1) or more additional general partners if necessary or desired, or (B) if no such right to agree or vote to continue the business of the limited partnership and to appoint one or more additional general partners is provided for in the partnership agreement, then more than fifty percent (50%) of the then current percentage or other interest in the profits of the limited partnership owned by the remaining partners or, if there is more than one class or group of remaining partners, then more than fifty percent (50%) of the then current percentage or other interest in the profits of the limited partnership owned by each class or classes or group or groups of remaining partners, agree in writing or vote to continue the business of the limited partnership and to appoint, effective as of the date of withdrawal, one or more additional general partners if necessary or desired. In such case, a limited partnership will not be deemed to have dissolved. . . . The third exception . . . is if the business of the limited partnership is continued pursuant to a right to continue stated in the partnership agreement and the appointment, effective as of the date of withdrawal, of 1 or more additional general partners if necessary or desired. In such a case, a limited partnership will be deemed not to have dissolved." Lubaroff & Altman, *supra* note 50, § 8.1, at 8-5 to 8-9.

April 21, 2009, the certificate's effective date was April 30, 2009.[122] Accordingly, Crescent was not cancelled until April 30, 2009. Upon dissolution, Crescent entered its wind up period which continued until its cancellation.[123] To summarize, Crescent dissolved on April 21, 2009, or earlier, because of an event of withdrawal by its general partner; there was a winding up period between the Limited Partnership's date of dissolution and the effective date of its cancellation; and Crescent's existence as a separate legal entity ceased upon the cancellation of its certificate of limited partnership on April 30, 2009.

2. Did Crescent Properly Wind Up under 6 *Del. C.* § 17-804?

Because Crescent may have dissolved earlier than April 21, 2009, the Court cannot determine at this stage what statutory provision governs the April 10, 2008 distribution of $3,314,000 of the merger proceeds by the Limited Partnership. Had Crescent Gate dissolved *and* commenced winding up by that date, Crescent would have experienced an event of withdrawal by its general partner causing Crescent's dissolution. In that instance, the distribution and all subsequent actions by

[122] Crescent Certificate of Cancellation. Although filed on the same day as the certificate of cancellation for Crescent Gate, the certificate of cancellation for Crescent provides that "[t]his Certificate of Cancellation shall become effective April 30, 2009." *Id.* As already noted in the context of the DLLC Act, so too here a certificate of cancellation is effective when filed under the DRULPA, unless another future effective date is specified. *See* 6 *Del. C.* § 17-206(b) ("Upon the filing of a certificate of cancellation . . . or upon the future effective date or time of a certificate of cancellation . . . the certificate of limited partnership is canceled.").

[123] Delaware courts recognize that "winding up logically follows dissolution in an entity's life cycle." *Spellman v. Katz*, 2009 WL 418302, at *4 (Del. Ch. 2009).

Crescent would be subject to the requirements of § 17-804. If, however, Crescent Gate had not dissolved and commenced winding up by the date of that distribution, § 17-804 would not apply and any statutory challenge under the DRULPA would have to be based on § 17-607. The Court notes that the Plaintiffs make no allegations under § 17-607.

More important in determining whether Crescent was wound up in accordance with § 17-804, the Court considers the Limited Partnership's actions from April 21, 2009—the date by which Crescent had certainly dissolved—until its cancellation on April 30, 2009.[124] 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.[125] Although Amer contends that, by April 30, 2009, all of Crescent's "reserves had been depleted,"[126] and Defendant's counsel represented to the Court that "[b]y April 2009, Crescent had exhausted all of its funds and assets,"[127] Crescent's

[124] The Plaintiffs question the management fees paid by the Limited Partnership to Crescent Gate—an entity that they contend Amer held a stake in and reaped benefits from—in arguing that Crescent was not wound up in accordance with § 17-804. The Plaintiffs suggest that Crescent lacked sufficient assets to indemnify Techmer in part because the Limited Partnership paid excessive management fees before its dissolution as a result of self-dealing and inequitable conduct by Amer. In response, Amer contests the Plaintiffs' calculation of the management fees paid by Crescent and argues that those fees were contractually required under the LPA. This issue, raised only in the Plaintiffs' briefs as support for their contention that Crescent violated § 17-804 and not alleged in the Complaint, need not be addressed by the Court because the Court concludes that the relief sought by the Plaintiffs as to Count I is warranted.

[125] Crescent Consolidated Financials of April 30, 2009 at 1.

[126] Amer Aff. 2 ¶ 10.

[127] Letter of Thomas P. Preston, Esq., dated Apr. 7, 2010, at 2.

financial records indicate otherwise. Even though its assets equaled its liabilities according to its financials, Crescent nonetheless retained $59,892 in total assets upon its termination.

Under § 17-203, "[a] certificate of limited partnership shall be canceled upon the dissolution and the *completion* of winding up" of the partnership.[128] Because Crescent's April 30, 2009 financials demonstrate that the Limited Partnership not only retained assets but also had outstanding liabilities as of April 30, 2009, the Court cannot conclude that Crescent settled and closed its business before the effective date of its certificate of cancellation. Moreover, § 17-804 required the Limited Partnership to wind up consistent with the priority structure set forth in that provision. The record contains no evidence that the $59,892 in total assets was distributed to satisfy Crescent's liabilities—the accounts payable and accrued expenses and the management fee payable—in accordance with the pro rata, priority requirements of § 17-804. Thus, the Court cannot conclude that Crescent complied with the requirements of § 17-804 as to the assets retained by the Limited Partnership upon its dissolution. Moreover, Crescent failed to make a final settlement of its unfinished business, as required by § 17-203, before filing its certificate of cancellation. As a result, it did not complete its wind up before cancelling its legal existence.

[128] 6 *Del. C.* § 17-203.

3. Is the Appointment of a Receiver Warranted?

In Count I, the Plaintiffs contend that "the certificates of cancellation filed by Crescent and Crescent Gate must be nullified and a[] receiver must be appointed pursuant to Section 17-805 to run the affairs of Crescent" in order for Crescent to defend the Plaintiffs' "claims for breaches of the representations and warranties in the Merger Agreement."[129] The Plaintiffs further assert that "[u]nless the[] certificates of cancellation are nullified and a receiver is appointed . . . Techmer will have no way to recover from Crescent the amounts it is owed . . . ."[130]

Under 6 *Del. C.* § 17-805, the Court may appoint a receiver to act on behalf of a limited partnership "on application of any creditor or partner of the limited partnership, or any other person who shows good cause . . . ."[131] This Court may only appoint a receiver under § 17-805 "[w]hen the certificate of limited partnership of any limited partnership formed under this chapter shall be canceled by the filing of a certificate of cancellation pursuant to § 17-203 . . . ."[132] Section 17-805 grants broad powers to a receiver appointed under the statute.[133] Most

[129] Verified Compl. ¶ 37.
[130] *Id.* ¶ 31.
[131] 6 *Del. C.* § 17-805.
[132] *Id.*
[133] The statute permits, for example, an appointed receiver "to take charge of the limited partnership's property, and to collect the debts and property due and belonging to the limited partnership, with the power to prosecute and defend, in the name of the limited partnership, or otherwise, all such suits as may be necessary or proper for the purposes aforesaid . . . ."

relevant to this action, that provision empowers an appointed receiver "to do all other acts which might be done by the limited partnership, if in being, that may be necessary for the final settlement of the unfinished business of the limited partnership."[134]

Because Crescent filed a certificate of cancellation under § 17-203, the Court may appoint a receiver in accordance with § 17-805 upon a showing of good cause. With the conclusion that Crescent failed to settle and close the Limited Partnership's business because it retained assets and had outstanding liabilities when it cancelled its certificate of limited partnership on April 30, 2009, good cause exists for appointment of a receiver to undertake all activities permitted by § 17-805. Specifically, the receiver should engage in all activities "which might be done by [Crescent], if in being, that may be necessary for the final settlement of [its] unfinished business . . . ."[135]

Although grounds may also exist for nullification of Crescent's certificate of cancellation,[136] the appointment of a receiver under § 17-805 provides the necessary relief under the circumstances. If the Court were only to nullify Crescent's certificate of cancellation, the Limited Partnership would have no general partner and no party to act on its behalf—the general partner, Crescent

---

[134] *Id.*
[135] *Id.*
[136] For example, Crescent had not made a final settlement of the Limited Partnership's business when it filed its certificate of cancellation under § 17-203.

Gate, was cancelled as of April 21, 2009 and there is no evidence before the Court to suggest that Crescent Gate's certificate of cancellation should be nullified. Moreover, § 17-805, by providing broad powers to a receiver appointed under that provision to act on behalf of a cancelled limited partnership, makes it unnecessary for the Court to nullify Crescent's certificate of cancellation.[137]

Thus, the Court will not nullify the certificates of cancellation for Crescent and Crescent Gate. Instead, the Court will appoint a receiver under § 17-805 to settle the unfinished business of Crescent through all of the powers conferred by that provision. The appointment of a receiver provides adequate relief to the Plaintiffs as to Count I of the Complaint.

[137] The Court's authority to appoint a receiver under § 17-805 arises because Crescent filed a certificate of cancellation under § 17-203. *See, e.g.*, *Ross Hldg. & Mgmt. Co. v. Advance Realty Gp., LLC*, 2010 WL 3448227, at *5-*6 (Del. Ch. Sept. 2, 2010) (noting that, in the context of the DLLC Act, the Court must find statutory authority, or act "in accordance with its general equity powers," before appointing a receiver). The appointment of a receiver of a limited partnership on other grounds is not before the Court and, as a result, the Court's analysis here in exercising its discretion to appoint a receiver for Crescent is limited to actions where § 17-805 applies. A question remains as to whether the Court could exercise its discretion to appoint a receiver under § 17-805 because a limited partnership has—or at least colorably has—filed a certificate of cancellation improvidently and simultaneously nullify that certificate of cancellation. Although Techmer requests both forms of relief in Count I, for the reasons stated above, the circumstances here require only that the Court appoint a receiver under § 17-805. Accordingly, the Court need not, and does not, decide that issue.

IV. CONCLUSION

For the foregoing reasons, the Plaintiffs' motion for summary judgment as to Count I is granted in part to the extent described herein. Amer's motion for summary judgment is denied. Counsel are requested to confer and to submit an implementing form of order.