

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

FELIX NEDLER, FRIDA VAYSMAN,	:	CIVIL ACTION
INNA PROSHAK, Individually and	:	
Derivatively on behalf of CIRCLE OF	:	
FRIENDS ADHC, INC., and STEVEN	:	NO. 05-6113
PROSHAK, Individually and Derivatively	:	
on behalf of ODESSA PARTNERS, LLC	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
VICTORIA and ALAN VAISBERG, h/w,	:	
JOSEPH AND LANA MANDALE, h/w,	:	
MICHAEL and ELINA ZAVERUKHA,	:	
MIKHAIL SLOBODSKOI,	:	
GRACE ADULT DAY HEALTHCARE,	:	
INC., LJ CAB CO., INC.,	:	
METROPOLITAN TRANSPORTATION,	:	
CO., LLC. , TWO STAR CAB CO.,	:	
and ODESSA PARTNERS, LLC.	:	
Defendants.	:	

ORDER & MEMORANDUM

ORDER

AND NOW, this 18th day of April, 2006, upon consideration of Plaintiffs' Motion for the Appointment of a Corporate Custodian Pursuant to Pennsylvania's Business Corporation Law Section 1767 (Document No. 2, filed November 23, 2005), Opposition and Memorandum of Law In Opposition to Motion To Appoint Custodian For Circle of Friends ADHC, Inc. (Document No. 27, filed February 21, 2006), and Plaintiffs' Reply Memorandum in Support of Plaintiffs' Motion for the Appointment of a Corporate Custodian Pursuant to 15 Pa. C.S.A. § 1767 (Document No. 30, filed March 2, 2006), and good cause appearing, for the reasons set forth below, **IT IS ORDERED** that the Plaintiffs' Motion for the Appointment of a Corporate

Custodian Pursuant to Pennsylvania’s Business Corporation Law Section 1767 (Document No. 2, filed November 23, 2005) is **DENIED WITHOUT PREJUDICE** on the present state of the record.

MEMORANDUM

I. INTRODUCTION

Presently before the Court is the Plaintiffs’ Motion for the Appointment of a Corporate Custodian Pursuant to Pennsylvania’s Business Corporation Law Section 1767 (Document No. 2, filed November 23, 2005) (“Motion for Custodian”). For the reasons set forth in this Memorandum, the motion is denied.

II. DISCUSSION

Plaintiffs Felix Nedler, Frida Vaysman, and Inna Proshak allege that at all times relevant to this action, they have been, and continue to be, shareholders of Circle of Friends ADHC, Inc. (“Circle of Friends”). Compl. at ¶¶ 1-3.¹ These plaintiffs seek the appointment of a custodian pursuant to Section 1767 of Pennsylvania Business Corporations Law.² See Motion for

¹ The relationships among plaintiffs, defendants, and Circle of Friends is outlined in the “Background” section of this Court’s Memorandum dated April 18, 2006, which denied defendants’ Motion to Dismiss.

² 15 Pa. C.S. § 1767 provides for the “[a]ppointment of custodian of corporation on deadlock or other cause.” It states:

(a) GENERAL RULE.-- Except as provided in subsection (b), upon application of any shareholder, the court may appoint one or more persons to be custodians of and for any business corporation when it is made to appear that:

(1) at any meeting for the election of directors, the shareholders are

so divided that they have failed to elect successors to directors whose terms have expired or would have expired upon the qualification of their successors;

(2) in the case of a closely held corporation, the directors or those in control of the corporation have acted illegally, oppressively or fraudulently toward one or more holders or owners of 5% or more of the outstanding shares of any class of the corporation in their capacities as shareholders, directors, officers or employees; or

(3) the conditions specified in section 1981(a)(1), (2) or (3) (relating to proceedings upon application of shareholder or director), other than that it is beneficial to the interests of the shareholders that the corporation be wound up and dissolved, exist with respect to the corporation.

(b) EXCEPTIONS.--

(1) The court shall not appoint a custodian to resolve a deadlock if the shareholders by agreement or otherwise have provided for the appointment of a provisional director or other means for the resolution of the deadlock, but the court shall enforce the remedy so provided if appropriate.

(2) Subsection (a)(2) shall not be applicable:

(i) to a corporation that has at the time a person holding or owning 5% or more of the outstanding shares of any class of the corporation that is:

(A) a registered corporation or a foreign corporation for profit described in section 4102(b) (relating to registered corporation exclusions); or

(B) a person (other than a natural person) that is engaged principally in the business of making equity investments in other businesses; or

(ii) with respect to any matter involving a person described in subparagraph (i) that is or was a holder or owner of shares of the corporation.

Custodian. In support of their motion, plaintiffs attach the Complaint for this case and a Shareholder Agreement for Circle of Friends dated December 9, 2002.

In response, defendants strenuously urge the Court not to appoint a custodian. See Opposition and Memorandum of Law In Opposition to Motion To Appoint Custodian For Circle of Friends ADHC, Inc. (Document No. 27, filed February 21, 2006) (“Def. Opposition”). They explain, inter alia, that Circle of Friends provides daytime care services for senior citizens in the Northeast section of Philadelphia, Pennsylvania pursuant to a contract with the Philadelphia Corporation for Aging (“PCA”). Id. at 2-4. The contract between Circle of Friends and the PCA allows the PCA to immediately terminate the contract if Circle of Friends has a receiver appointed. See Def. Opposition, Ex. 1, Agreement between Philadelphia Corporation for Aging and Circle of Friends Adult Day Health Care, July 1, 2003, p. 10 ¶ 20(b)(v) (“This Agreement

(c) POWER AND TITLE OF CUSTODIAN.-- A custodian appointed under this section shall have all the power and title of a receiver appointed under Subchapter G of Chapter 19 (relating to involuntary liquidation and dissolution), but the authority of the custodian shall be to continue the business of the corporation and not to liquidate its affairs and distribute its assets except when the court shall otherwise order.

(d) CONTRARY PROVISIONS OF THE ARTICLES.--

(1) The articles may not contain a provision that varies or is otherwise inconsistent with subsection (b)(2).

(2) A provision of the articles that varies or is otherwise inconsistent with any provision of this section shall not be effective unless it is included in the original articles or in an amendment adopted by the affirmative vote of all shareholders of the corporation whether or not otherwise entitled to vote thereon.

(e) CROSS REFERENCES.-- See sections 2525 (relating to appointment of custodian) and 3137 (relating to appointment of custodian).

may be immediately terminated should Provider [Circle of Friends] . . . have a receiver appointed . . .”). Defendants contend that the relief sought by plaintiffs could destroy the business of Circle of Friends because Pennsylvania law does not materially distinguish between a receiver and a custodian. Def. Opposition 4, 4 n.1.

The appointment of a custodian for a corporation lies within the discretion of the Court. See 15 Pa. C.S. § 1767; Simms v. Exeter Architectural Prods., 868 F. Supp. 668, 673 (E.D. Pa. 1994) (“call[ing] attention to the permissive ‘may’ language in § 1767 and not[ing] [the Court’s] statutory discretion to decide whether to appoint a custodian.”). “This remedy . . . is a drastic one to be applied cautiously and only in clear cases.” Tyler v. O’Neill, 1998 U.S. Dist. Lexis 15616, *7 (E.D. Pa. 1998).

After reviewing the Motion and the evidence presented, the Court denies plaintiffs’ Motion for Custodian on the present state of the record. Plaintiffs have offered only allegations in support of their claims, and have not sought an opportunity to present additional evidence. Such allegations are insufficient for the Court to grant the extraordinary equitable remedy of appointing a corporate custodian. This is particularly true in this case because defendants have offered substantial evidence to contradict parts of plaintiffs’ allegations. See, e.g., Def. Opposition, Ex. 1, Agreement between Philadelphia Corporation for Aging and Circle of Friends Adult Day Health Care, July 1, 2003; Ex. 3, Shareholder Agreement of Circle of Friends ADHC, Inc.; Ex. 4, Declaration of Defendant Joseph Mandale; Ex. 5, Letter Re: Notice of Termination from Circle of Friends, Addressed to Michael Zaverukha from Felix Nedler; Ex. 6, Letters Re: Notice of Special Shareholder Meeting for Circle of Friends, Addressed to Frida Vaysman, Michael Zaverukha, Leonid Gorbatov, Felix Nedler, Alex Grizotsky, Joseph Mandale; Ex. 7,

Agenda and Motions of Shareholders Meeting for Circle of Friends; Ex. 11, Declaration of Leonid Gorbatov; Ex. 12, Declaration of Alexander Grizotsky. Therefore, the Court concludes that the appointment of a custodian to Circle of Friends is unwarranted at this time.

In addition, the Court notes that plaintiffs have requested that the Court defer ruling on the Motion to Appoint Custodian until plaintiffs have inspected the operational and financial records of Circle of Friends and Odessa Partners, LLC. Plaintiffs' Reply Memorandum in Support of Plaintiffs' Motion for the Appointment of a Corporate Custodian Pursuant to 15 Pa. C.S.A. § 1767 (Document No. 30, filed March 2, 2006). The Court denies this request because, on the present state of the record, there is no reason to delay ruling on the Motion to Appoint Custodian. Moreover, the entry of this Order is without prejudice to plaintiffs' right to seek appointment of a corporate custodian for Circle of Friends if plaintiffs conclude that is warranted by discovery or other evidence.

III. CONCLUSION

For the foregoing reasons, the Motion to Appoint Custodian is denied without prejudice on the present state of the record.

BY THE COURT:

JAN E. DUBOIS, J.