IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MARVEL ENTERTAINMENT GROUP, INC., RONALD CANTOR, as Trustees of the MAFCO Litigation Trust, and as Successor in Interest to Marvel Entertainment Group, Inc., et al.	)	
Plaintiffs,	)	Civil Action No. 97-586-KAJ
v.	)	
RONALD O. PERELMAN, et al.,	)	
Defendants.	)	

MEMORANDUM ORDER

Presently before me are the objections of plaintiffs Ronald Cantor, Ivan Snyder and James A. Scarpone, as Trustees of the Mafco Litigation Trust (the "Trustees") (Docket Item ["D.I."] 389) to the Magistrate Judge's opinion and order[1] (D.I. 384, 385) denying the Trustees' motion for partial summary judgment (D.I. 267) and granting in part and denying in part defendants' motion for summary judgment (D.I. 274).

As a threshold procedural matter, defendants argue that the Magistrate Judge's opinion and order constitutes a judgment, as opposed to a Report and Recommendation, and that the United States Court of Appeals for the Third Circuit is the only court with jurisdiction to hear the Trustees' objections. (D.I. 396 at 21.) Defendants also argue that the parties orally consented to the Magistrate Judge's jurisdiction to decide the motions for summary judgment.[2] (*Id.* at 23.) The Trustees

[1]*Cantor v. Perelman*, 235 F. Supp. 2d 377 (D. Del. 2002).

[2]Defendants state that the parties "expressly consented to having the Magistrate Judge determine the cross-motions for summary judgment" during a July 29, 2002

dispute defendants' arguments and point out that the parties never completed a form, as required by Local Rule 73.1[3], to consent to the jurisdiction of the Magistrate Judge. (D.I. 389 at 16, Ex. E.)

The Magistrate Judge reviewed the parties' summary judgment motions pursuant to reference made by the Court on March 21, 2002. (D.I. 262.) Title 28 of the United States Code section 636(b) allows a Magistrate Judge to submit "proposed findings of fact and recommendations for the disposition" of pretrial matters, including summary judgment motions, to the district court. Given that the parties did not expressly consent, orally or in writing, to the Magistrate Judge's jurisdiction, and consistent with 28 U.S.C. § 636(b), the Magistrate Judge's December 9, 2002 opinion and order (D.I. 384, 385) is properly before me as a Report and Recommendation (the "Report").

Pursuant to 28 U.S.C. § 636(b)(1)(c) and Federal Rule of Civil Procedure 72(b), I have conducted a *de novo* review of the Magistrate Judge's thorough and well-reasoned Report containing the recommendations to which the Trustees object. Specifically, the Trustees argue that the Magistrate Judge erred in holding that defendant Ronald O. Perelman did not breach his fiduciary duty to Marvel

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teleconference. (D.I. 396 at 23.) However, during that teleconference, the parties merely expressed their mutual desire to "have a decision on the outstanding motions...at least by the time of pretrial." (D.I. 351 at 3:14-17.) This does not constitute express consent to the Magistrate Judge's jurisdiction.

[3]"In the course of conducting proceedings in any civil action upon the consent of the parties, the Magistrate Judge may hear and determine any and all pretrial and post-trial motions, including case dispositive motions...[a]fter the consent form has been executed and filed...[and] [o]nce the case has been referred, the Magistrate Judge shall have the authority to conduct any and all proceedings to which the parties have consented and to direct the Clerk to enter a final judgment in the same manner as if a District Judge presided." *See* D. Del. LR. 73.1(d).

Entertainment Group, Inc. ("Marvel") by conducting certain note transactions between the Marvel holding companies[4] and a number of investment banks. (D.I. 389 at 19.) The basic structure of those transactions is set forth in the Report.[5] (*Id.* at 3-4.)

In holding that Perelman did not breach his fiduciary duty to Marvel, the Magistrate Judge relied upon the decision of the Delaware Court of Chancery in *Bragger v. Budacz*, 1994 WL 698609 (Del. Ch. Dec. 7, 1994), which held that the possibility of future conflicts of interest is insufficient to support a breach of fiduciary duty claim. *See* 1994 WL 698609 at *4. The Trustees argue that Perelman breached his duty of loyalty by entering into a transaction which created a potential conflict of interest between Marvel's best interests and Perelman's best interests. However, under Delaware law, such a potential conflict does not constitute a breach of fiduciary duty. *See id.* Rather, the Trustees must show that Perelman caused Marvel "to act in such a way" that he benefitted at Marvel's expense. *See Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971) ("Self dealing occurs when the parent, by virtue of its domination of the subsidiary, causes the subsidiary to act in such a way that the parent receives

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[4]Perelman owns all of the Marvel holding companies either directly or indirectly. (D.I. 384 at 3 n.3.) These companies include Marvel Holdings Inc., Marvel Parent Holdings, Inc., and Marvel III Holdings Inc., which were all created to hold the Marvel stock that Perelman purchased from New World Entertainment in 1989. (*Id.*) Perelman also owned Andrews Group Incorporated, MacAndrews & Forbes Holdings Inc. and Mafco Holdings Inc., which together owned each of the Marvel holding companies. (*Id.*) Perelman and the two other named defendants were board members and directors of Andrews, MacAndrews and Mafco, and constituted a majority of the boards of directors of each of those companies. (*Id.*)

[5]The complex corporate structure created by Perelman is well summarized by Judge McKelvie in *LaSalle Nat'l Bank v. Perelman, et al.*, 82 F. Supp. 2d 279, 282 (D. Del. 2000).

something from the subsidiary to the exclusion of, and detriment to, the minority stockholders of the subsidiary.") The Magistrate Judge correctly held that Perelman's potential conflicting loyalties between Marvel and the holding companies "never materialized and cannot form the basis of a breach of fiduciary duty." (D.I. 384 at 10.)

I conclude that the Trustees' objections are without merit and that the findings and recommendations contained in the Report are well founded both in law and, based upon the standard governing summary judgment, in fact. The Report is adopted by the Court in all respects, and the objections are overruled.

Accordingly, for the reasons stated in the Report and herein, IT IS HEREBY ORDERED this 18th day of February, 2004, that:

1. The Report (D.I. 384, 385) of the Magistrate dated December 9, 2002 is adopted by the Court, and
2. Plaintiff's motion for partial summary judgment (D.I. 267) is DENIED and defendants motion for summary judgment (D.I. 274) is GRANTED-IN-PART and DENIED-IN-PART, in accordance with the Report.

Kent A. Jordan
UNITED STATES DISTRICT JUDGE