

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

On February 18, 2004, I issued a Memorandum Order (Docket Item ["D.I."] 404) adopting the Report and Recommendation of the Magistrate Judge (D.I. 384, 385) with respect to the parties' summary judgment motions, which granted in part and denied in part defendants' motion for summary judgment. Even though one of plaintiffs' claims survived summary judgment, they filed a Notice of Appeal of my Memorandum Order on March 19, 2004. (D.I. 405.)

On April 13, 2004, plaintiffs submitted a letter brief, acknowledging "that there is an issue concerning whether there has been a final appealable judgment in this action." (D.I. 408.) Plaintiffs assert that they do not wish to pursue their remaining claim and ask me to enter a final order providing for dismissal of that claim.¹ (*Id.*) Defendants

¹There is some dispute between the parties over how to characterize plaintiff's remaining claim. The Magistrate Judge referred to it as the "*Caremark* claim" because it concerns corporate director duties described in *In re Caremark Int'l Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996). (*See* D.I. 384 at 21-23.) Nonetheless, plaintiffs do not believe that they asserted a *Caremark* claim against defendants. (D.I. 410.) Defendants say that both they and the Magistrate Judge read Plaintiffs' Second Amended Complaint - the operative pleading in this

responded by letter brief on April 14, 2004, arguing that plaintiffs prematurely filed a Notice of Appeal, and that the proper course of action is to dismiss plaintiffs' remaining claim with prejudice if plaintiffs wish to invoke appellate jurisdiction. (D.I. 409.) Plaintiffs will not consent to dismissing their remaining claim with prejudice. (D.I. 410.) On April 29, 2004, plaintiffs filed an Expedited Motion and Certification to Stay Appeal of this matter pending resolution of the issue concerning the form of final order (D.I. 412) which was granted by the Third Circuit on April 30, 2004 (D.I. 413).

Given the strong policy against piecemeal litigation that underlies the finality requirement of 28 U.S.C. § 1291, the Third Circuit has "adhered consistently to the general rule that [it] lack[s] appellate jurisdiction over partial adjudications when certain of the claims before the district court have been dismissed without prejudice." *Freddie Mac v. Scottsdale Ins. Co.*, 316 F.3d 431, 438 (3d Cir. 2003) (citations omitted); see also *Borelli v. City of Reading*, 532 F.2d 950, 951-52 (3d Cir. 1976) ("[A]n order which dismisses a complaint without prejudice is neither final nor appealable because the deficiency may be corrected by the plaintiff without affecting the cause of action."). "Litigants should not be able to avoid the final judgment rule without fully relinquishing the ability to further litigate unresolved claims." *Id.* at 440 (quoting *Dannenberg v. Software Toolworks, Inc.*, 16 F.3d 1073, 1077 (9th Cir. 1994)).

Despite plaintiffs' reluctance to do so, the law in the Third Circuit is clear that, in order for plaintiffs to properly invoke appellate jurisdiction in this case, they must

case - as including a *Caremark* claim. (D.I. 409.) Whether plaintiffs think that their remaining claim is properly defined as a *Caremark* claim or not, the fact is that plaintiffs have one claim remaining against defendants, and if they wish to proceed on appeal at this time, that claim must be dismissed with prejudice, as discussed more fully *infra*.

voluntarily dismiss with prejudice their remaining claim against defendants. To that end, the parties are ORDERED to submit to the court a proposed form of final order consistent with this ruling, if the plaintiffs choose to pursue an appeal now. However, if plaintiffs remain unwilling to dismiss their remaining claim with prejudice, the parties are hereby ORDERED to contact the court within ten days of the date of this Order to set up a conference, pursuant to Federal Rule of Civil Procedure 16, to discuss scheduling for trial plaintiffs' remaining claim against defendants.

Kent A. Jordan
UNITED STATES DISTRICT JUDGE

Wilmington, Delaware
May 6, 2004