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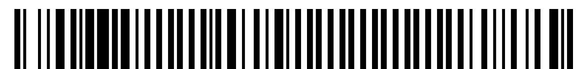
UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: EASTMAN KODAK COMPANY, *et al.*,[1] Debtors.	Chapter 11 Case No. 12-10202 (ALG) (Jointly Administered)
EASTMAN KODAK COMPANY, Plaintiff, v. APPLE INC. AND FLASHPOINT TECHNOLOGY, INC., Defendants.	Adv. Proc. No. 12-01720 (ALG)

PLAINTIFF EASTMAN KODAK COMPANY'S OBJECTION TO APPLE INC.'S AND FLASHPOINT TECHNOLOGY, INC.'S NOTICES OF APPEAL

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Eastman Kodak Company (7150); Creo Manufacturing America LLC (4412); Eastman Kodak International Capital Company, Inc. (2341); Far East Development Ltd. (2300); FPC Inc. (9183); Kodak (Near East), Inc. (7936); Kodak Americas, Ltd. (6256); Kodak Aviation Leasing LLC (5224); Kodak Imaging Network, Inc. (4107); Kodak Philippines, Ltd. (7862); Kodak Portuguesa Limited (9171); Kodak Realty, Inc. (2045); Laser-Pacific Media Corporation (4617); NPEC Inc. (5677); Pakon, Inc. (3462); and Qualex Inc. (6019). The location of the Debtors' corporate headquarters is: 343 State Street, Rochester, NY 14650.



Plaintiff and Counterclaim Defendant Eastman Kodak Company ("Kodak") submits this Objection to the notices of appeal filed by Apple Inc. ("Apple") [Dkt. No. 63] and FlashPoint Technology, Inc. ("FlashPoint") [Dkt. No. 65] of the Bankruptcy Court's Order Granting Plaintiff Eastman Kodak Company's Motion for Summary Judgment in Part [Dkt. No. 53].[2] In support of its Objection, Kodak respectfully states as follows:

STATEMENT

1. On August 22, 2012, Apple and FlashPoint each filed a Notice of Appeal seeking to appeal as of right pursuant to Rule 8001(a) of the Federal Rule of Bankruptcy Procedure (the "Bankruptcy Rules") or, alternatively, seeking leave to appeal pursuant to Bankruptcy Rule 8003(c). Both Apple's and FlashPoint's notices of appeal are improper and should be rejected.

2. Apple and FlashPoint requested that the Bankruptcy Court authorize an immediate appeal of the interlocutory order granting Kodak summary judgment in part pursuant to Bankruptcy Rule 7054, and the Bankruptcy Court expressly declined to do so, citing the strong federal policy against piecemeal appeals expressed by the Second Circuit in *Novick* v. *AXA Network, LLC*, 642 F.3d 304, 310 (2d Cir. 2011). (Order at ¶ 7.) The Bankruptcy Court noted that its Order was without prejudice to the right of Apple or FlashPoint to seek permission for an interlocutory appeal of the Order. (*Id.*)

3. Rather than filing a motion seeking leave to file an interlocutory appeal pursuant to 28 U.S.C. § 158(a) and Bankruptcy Rule 8003(a) as the Bankruptcy Court instructed them to do, Apple and FlashPoint each filed only a notice of appeal. In a plain admission that

[2] For the convenience of the District Court, Kodak addresses both notices of appeal in this single combined Objection.

their notices of appeal fail to comply with 28 U.S.C. § 158(a) and Federal Rule of Bankruptcy Procedure 8003(a), Apple and FlashPoint each "request[] that the [District] Court consider this notice of appeal pursuant to Rule 8003(c) of the Bankruptcy Rules." (*See* Notices of Appeal [Dkt Nos. 63, 65].) Bankruptcy Rule 8003(c) addresses only "[a]ppeals [i]mproperly [t]aken" and is thus inapplicable in these circumstances. Fed. R. Bankr. P. 8003(c). As the Advisory Committee Notes to Rule 8003 explain, "[s]ubdivision (c) provides that if a party *mistakenly believes* the order appealed from is final and files only a notice of appeal, the appeal is not automatically dismissed." Fed. R. Bankr. P. 8003(c) Advisory Committee Notes (emphasis added). Here, Apple and FlashPoint are not operating under some mistake. They recognize that the Bankruptcy Court's order was interlocutory, which is why they asked the Bankruptcy Court to certify the order for immediate appeal, a request that was denied.

4. In a letter to the Bankruptcy Court dated August 22, 2012, Apple represents that it is attempting to "protect its rights" while "recogniz[ing] that normally, leave for interlocutory appeal is granted where exceptional circumstances are present." (Letter from B. Lennon to Judge Gropper, August 22, 2012 [Dkt. No. 64].) The "normal" rule should be enforced here.

5. If the District Court is inclined to consider Apple's and FlashPoint's notices of appeal pursuant to Bankruptcy Rule 8003(c), as Apple and FlashPoint both suggest, the Court should "direct[] that a motion for leave to appeal be filed." Fed. R. Bankr. P. 8003(c). Neither Apple nor FlashPoint have provided any basis for the Court to grant them leave for an interlocutory appeal—and none exists. Apple and FlashPoint would be required to satisfy the three-part test codified in 28 U.S.C. § 1292(b), which neither could do. *See Picard* v. *Estate of Madoff*, 464 B.R. 578, 582-83 (S.D.N.Y. 2011); *cf. In re Beker Indus. Corp.*, 89 B.R. 336, 341

n.3 (S.D.N.Y. 1988) (granting leave to appeal without requiring a motion for leave to appeal because appellants "reasonably believed that they were entitled to an appeal as of right . . . and because the parties have thoroughly briefed the issue of appealability").

CONCLUSION

For these reasons, Kodak respectfully submits that Apple's and FlashPoint's notices of appeal should be rejected outright or, in the alternative, that Apple and FlashPoint be directed to file motions for leave to appeal.

Dated: August 24, 2012
New York, New York

/s/ Andrew G. Dietderich

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