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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

IN RE: LITHIUM ION BATTERIES ANTITRUST LITIGATION

This Document Relates to:

Microsoft Mobile, Inc. et al. v. LG Chem America Inc. et al.

Case No. 4:13-md-02420-YGR (MDL)

Case No. 4:15-cv-03443-YGR

MICROSOFT MOBILE INC.'S AND MICROSOFT MOBILE OY'S RESPONSE IN OPPOSITION TO SONY'S MOTION TO COMPEL ARBITRATION AND TO DISMISS OR STAY MICROSOFT MOBILE'S COMPLAINT

Date: August 16, 2016
Time: 2:00 p.m.
Before: Hon. Yvonne Gonzalez Rogers
Courtroom 1, 4th Floor

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INTRODUCTION AND STATEMENT OF ISSUES

Defendants Sony Corporation, Sony Electronics Inc., and Sony Energy Devices Corporation (collectively "Sony" or the "Sony Defendants") move to compel arbitration of all claims asserted by Microsoft Mobile Inc. and Microsoft Mobile Oy (collectively "Microsoft Mobile"), including those that pre-date the Product Purchase Agreement ("PPA") between Nokia and Sony. Citing this Court's decision referring claims against Sanyo and Panasonic to arbitration, Sony argues that the governing arbitration provision is essentially the same as the provisions contained in the Sanyo and Panasonic PPAs and the Court should therefore compel arbitration of the claims against Sony without much debate. *See* Motion, ECF No. 1316, at 2. Sony's characterization of the PPAs is wrong, and thus the conclusion is wrong too.

Microsoft Mobile does not seek to re-litigate issues that this Court has already addressed. Rather, there are at least two relevant and material differences between the arbitration provisions in the Sony PPA and in the Sanyo and Panasonic PPAs: (1) the effective date of the PPA and (2) the carve-out clause in the arbitration provision.

First, unlike the Sanyo and Panasonic PPAs, the Sony PPA was not effective until July 1, 2001—a year and a half after the conspiracy period began.[1] *See* Cieslak Decl., Ex. A (the "Sony PPA" or "PPA") at § 23.1. As a result, claims related to Sony's anti-competitive conduct prior to the PPA's effective date and Nokia's purchases from other defendants at prices affected by that conduct—in other words, claims that arose when there was *no agreement or business relationship in existence* between Nokia and Sony—are not arbitrable. It is puzzling that Sony elected not to address this issue in its brief, given that Microsoft Mobile's counsel raised this as the main issue of dispute on multiple occasions during meet and confers prior to the filing of Sony's Motion. *See* Miller Decl. at ¶¶ 2-4. In any event, the law is clear that, even where there is a delegation provision, questions concerning the formation of an arbitration agreement are for

[1] In contrast, the Sanyo and Panasonic PPAs were effective on January 10, 2000 and March 6, 2000, respectively. *See* Amato Decl., Ex. E, ECF No. 892-6, at §§ 1, 27.1; Amato Decl. Ex. A, ECF No. 892-2, at §§ 1, 27.1.

the Court, not the arbitrator, to decide. *See Sanford v. MemberWorks, Inc.*, 483 F.3d 956, 962 (9th Cir. 2007). Here, this Court must determine whether there was an arbitration agreement in place between Sony and Nokia prior to July 1, 2001, and the facts are clear that there was not. Additionally, even if this were a matter of "scope" and therefore a question for the arbitrators, this Court should still deny the Motion because any claim that the PPA should apply retroactively to conduct unrelated to any contract or business relationship between Sony and Nokia is wholly groundless. A holding otherwise would set a dangerous precedent for businesses and consumers alike by significantly expanding the scope of existing arbitration provisions beyond what the parties reasonably intended. When parties agree to arbitrate claims related to a specific contract, they do not waive their right to litigate claims based on prior tortious conduct unrelated to that contract. *See, e.g.*, *Mohebbi v. Khazen*, No. 13-CV-03044-BLF, 2014 WL 6845477, at *2, *10 (N.D. Cal. Dec. 4, 2014) (J. Freeman) (holding that provision requiring arbitration of "[a]ll disputes arising out of or relating to this Agreement" did not extend to false advertising claims that arose before the agreement was signed).

Second, unlike the Sanyo and Panasonic PPAs, the Sony PPA expressly carves out certain categories of claims, including those "for injunctive relief." *See* PPA § 25.2. Despite Sony's arguments to the contrary, this Court cannot compel arbitration of claims, such as those for injunctive relief, that the parties have expressly agreed are *not* subject to arbitration.

"[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960); *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) ("[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes – *but only* those disputes – that the parties have agreed to submit to arbitration" (emphasis added)). Applying this principle here, Microsoft Mobile did not agree to arbitrate claims that pre-date the PPA or claims for injunctive relief, and this Court should deny Sony's Motion as to such claims. Additionally, for all of the reasons forth in its prior briefing (ECF No. 931), Microsoft Mobile continues to believe its claims based

1 on joint and several liability are not arguably encompassed by the PPA's arbitration provision.
2 Microsoft Mobile recognizes, however, that the Court has previously ruled on this issue, but
3 incorporates its prior arguments on this point by reference in order to preserve them.
4 Finally, this Court must determine the disposition of Microsoft Mobile's claims against
5 Sony in light of its demand for arbitration. On this issue, the Court should deny Sony's request
6 that all claims against the Sony Defendants be dismissed in their entirety. None of the claims –
7 whether pre- or post-PPA, whether for injunctive relief or damages, or whether based on direct
8 or joint and several liability – should be dismissed. Instead, in order to prevent prejudice to
9 Microsoft Mobile and to avoid inefficiencies, the Court should stay those claims that it finds are
10 arguably arbitrable and should permit the remaining claims to proceed.

11 **STATEMENT OF RELEVANT FACTS**

12 In this litigation, Microsoft Mobile, which acquired Nokia Corporation's mobile device
13 business in 2013, has brought claims on behalf of its predecessors, Nokia Inc. and Nokia
14 Corporation ("Nokia"), for defendants' willful violation of the antitrust laws. *See* Complaint at
15 ¶¶ 14-18, 75. From at least January 1, 2000 through at least May 31, 2011, defendants—LG
16 Chem, Panasonic, Samsung SDI, Sanyo, and Sony—and additional co-conspirators engaged in
17 an illegal conspiracy to fix, raise, stabilize, and maintain prices for lithium ion battery cells and
18 lithium ion batteries. *Id.* ¶¶ 3, 75-174. Sanyo and LG Chem have already pled guilty to
19 engaging in a conspiracy to fix the price of lithium ion battery cells. *Id.* ¶¶ 180-181. Nokia
20 purchased lithium ion cells and batteries directly from each of the defendants and, as a result of
21 defendants' illegal price-fixing, Nokia paid more for these products than it otherwise would have
22 paid. *Id.* ¶¶ 4, 16, 18.

23 Nokia's lithium ion cell and lithium ion battery purchases from Sony were governed by a
24 PPA with an effective date of July 1, 2001. *See* PPA § 23.1. Prior to July 1, 2001, Nokia did not
25 purchase any lithium ion cells or batteries from Sony. *See* Cieslak Decl. ¶ 3. The PPA includes
26 an arbitration provision that provides:

27 > Any disputes related to this Agreement or its enforcement shall be resolved and
28 > settled by arbitration in the English language in United Kingdom, in accordance

> with the Arbitration Rules of the International Chamber of Commerce in United Kingdom. However, any disputes related to BUYER's Intellectual Property Right(s) or Confidential Information, or for injunctive relief, may, at BUYER's sole election, be resolved by a court of competent jurisdiction. The decision of the arbitrators shall be final, binding and executable. The arbitration shall be the exclusive remedy of the Parties to the dispute.

PPA § 25.2.

ARGUMENT

I. THE COURT SHOULD DENY SONY'S MOTION TO COMPEL ARBITRATION OF ALL PRE-PPA CLAIMS.

For the first 18 months of the conspiracy period, there was no arbitration agreement – or any agreement at all – between Nokia and Sony. Accordingly, any and all claims prior to the effective date of the PPA are not subject to arbitration. These claims pre-date the contract and would have existed even if the contract had never been entered.

A. The Court, Not the Arbitrator, Must Decide Whether and When the Agreement to Arbitrate Was Formed.

As Sony concedes, this Court must "decide whether that arbitration provision is valid and enforceable." Motion at 2. Nonetheless, because Sony has wholly ignored the issue of when the PPA became effective, Microsoft Mobile can only assume that they will argue in reply[2] that under cases such as *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010), this is a question to be decided by the arbitrator rather than the Court because it is an attack on the validity of the contract as a whole rather than a challenge to the validity of the arbitration agreement itself. But this is not a question of the validity of the agreement; it is a question as to *whether any*

[2] Sony, as the moving party, had an obligation to include such arguments in its opening brief and any issues Sony raises in its reply related to arbitrability of pre-PPA claims should be stricken. *See, e.g., Thrasher v. Colvin*, 611 F. App'x 915, 918 (9th Cir. 2015) ("These arguments are waived because they were not raised in the opening brief."); *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1066 n.5 (9th Cir. 2003) ("[W]e decline to consider new issues raised for the first time in a reply brief."); *McKay v. Town & Country Cadillac, Inc.*, No. 97 C 2102, 2002 WL 664024, at *8 n.5 (N.D. Ill. Apr. 23, 2002) (admonishing defendant's "strategy of ambushing the plaintiff" by omitting arguments from its opening brief and holding that "consider[ation of] such arguments would be tantamount to requiring the plaintiff to anticipate and respond to arguments that were not made in the original motion").

1 *agreement existed at all for the first 18 months of the conspiracy period*,[3] and it is clear that no
2 agreement existed until July 1, 2001.
3 "[C]ourts should order arbitration of a dispute only where *the court* is satisfied that . . .
4 the formation of the parties' arbitration agreement . . . is [not] in issue." *Granite Rock Co. v. Int'l*
5 *Bhd. of Teamsters*, 561 U.S. 287, 299 (2010) (emphasis added); *id.* at 296 (holding that it is
6 "well settled that where the dispute at issue concerns contract formation, the dispute is generally
7 for courts to decide"). Similarly, the Ninth Circuit has held that, while challenges to the validity
8 of the agreement as a whole must be submitted to the arbitrator when there is a delegation
9 provision, where the *existence* of the agreement is at issue, this is a question for the court to
10 decide. *Sanford*, 483 F.3d at 962 ("Issues regarding the validity or enforcement of a putative
11 contract mandating arbitration should be referred to an arbitrator, but challenges to the existence
12 of a contract as a whole must be determined by the court prior to ordering arbitration."); *Three*
13 *Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1140-41 (9th Cir. 1991)
14 ("[B]ecause an 'arbitrator's jurisdiction is rooted in the agreement of the parties,' a party who
15 contests the making of a contract containing an arbitration provision cannot be compelled to
16 arbitrate the threshold issue of the existence of an agreement to arbitrate. Only a court can make
17 that decision.") (citations omitted).
18 "For purposes of determining arbitrability, *when* a contract is formed can be as critical as
19 *whether* it was formed." *Granite Rock*, 561 U.S. at 303-04. As a result, where the formation
20 date "relates to [the] arbitration demand in such a way that the District Court [must determine the
21 formation date] in order to determine whether the parties consented to arbitrate the matters
22 covered by the demand," then the issue of when the contract came into existence "requires
23
24 [3] As the Supreme Court has acknowledged, the validity of the agreement is different from
25 whether an agreement exists. *See Rent-A-Center*, 561 U.S. at 71 n.2 ("The issue of the
agreement's 'validity' is different from the issue whether any agreement between the parties
26 'was ever concluded'"); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 n.1
(2006) ("The issue of the contract's validity is different from the issue whether any agreement
27 between the alleged obligor and obligee was ever concluded.").
28

judicial resolution." *Id.* at 304. Put differently, if *when* the contract was formed impacts *whether* the claims are arbitrable, the court should decide whether an agreement was in existence during the relevant time period.

Applying these principles here, it is clear that no agreement to arbitrate existed until the PPA's effective date in July 2001. Prior to that time, Nokia did not purchase any lithium ion batteries from Sony. Instead, all of Microsoft Mobile's pre-PPA claims against Sony stem from Sony's joint and several liability for the sales of lithium ion batteries by *other* defendants under *other* agreements, at prices affected by Sony's anti-competitive conduct. There is no basis for holding that claims related to Nokia's pre-July 2001 purchases from other defendants under other agreements are arbitrable under a Sony PPA that did not exist at that time. Accordingly, the Court should deny the Motion as to these claims.

B. Even Under the More Limited Wholly Groundless Inquiry, the Court Should Decline to Order Arbitration of Pre-PPA Claims.

In the face of legal authority holding that formation questions, including the issue of when the arbitration agreement was formed, are for the Court to decide, Sony may yet claim that the Court's inquiry is limited because the parties delegated issues of arbitrability to the arbitrator. Even if that were the case, under the wholly groundless standard, this Court should deny the Motion as to pre-PPA claims because there is no plausible basis for applying the arbitration provision at issue retroactively.

1. Wholly Groundless Is the Standard in the Ninth Circuit.[4]

Even where the parties "clearly and unmistakably intend[ed] to delegate the power to decide arbitrability to an arbitrator," the court should still perform a "limited inquiry to determine whether the assertion of arbitrability is 'wholly groundless.'" *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1371 (Fed. Cir. 2006). Sony argues, however, that the Ninth Circuit has rejected the wholly groundless standard. This is not an accurate reflection of the state of the law.

---

[4] In its prior arbitration ruling, the Court did not specifically determine whether the wholly groundless standard applies in the Ninth Circuit. ECF No. 986 at 3 n.3, 4.

1 Fifteen decisions from the district courts within the Ninth Circuit (including twelve cases from
2 this District), which were written by nine different judges (including six judges in this District),
3 have all adopted the wholly groundless test.[5] It is true that the Ninth Circuit has not specifically
4 addressed the wholly groundless standard, but it should be noted that the Federal Circuit said it
5 was applying Ninth Circuit law in *Qualcomm*.[6] Other jurists in this District have repeatedly held
6 that *Qualcomm* represents an application of Ninth Circuit law.[7]

7 Additionally, the Ninth Circuit cases cited by Sony and those previously cited by Sanyo
8 and Panasonic for the proposition that the Ninth Circuit would reject the wholly groundless
9 standard are misapplied. Those cases are actually entirely consistent with the requirement that
10 courts conduct a *limited* inquiry into the demand for arbitration in light of the arbitration
11

12 [5] *See Interdigital Tech. Corp. v. Pegatron Corp.,* No. 15-CV-02584-LHK, 2016 WL
13 234433, at *6 (N.D. Cal. Jan. 20, 2016) (J. Koh); *Zenelaj v. Handybook, Inc.*, 82 F. Supp. 3d 968, 971, 975-76 (N.D. Cal. 2015) (J. Henderson); *ASUS Computer Int'l v. InterDigital*, No.
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16 1027 (N.D. Cal. 2015) (J. Koh); *Tompkins v. 23andMe, Inc.*, No. 5:13-cv-05682-LHK, 2014 WL 2903752, at *4 (N.D. Cal. June 25, 2014) (J. Koh); *Bernal v. Sw. & Pac. Specialty Fin., Inc.*, No. C 12-05797-SBA, 2014 WL 1868787, at *3-5 (N.D. Cal. May 7, 2014) (J.
17 Armstrong); *Matson Terminals, Inc. v. Ins. Co. of N. Am.*, No. C 13-05571 LB, 2014 WL
18 1219007, at *4 (N.D. Cal. Mar. 21, 2014) (J. Beeler); *Guidewire Software v. Chookaszian*, No. 12-CV-03224-LHK, 2012 WL 5379589, at *4-6 (N.D. Cal. Oct. 31, 2012) (J. Koh); *Ellsworth v. U.S. Bank, N.A.*, No. C 12–02506 LB, 2012 WL 4120003, at *6-7 (N.D. Cal. Sept. 19, 2012)
19 (J. Beeler), *abrogated on other grounds by Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th
20 Cir. 2015); *Clarium Capital Mgmt. LLC v. Chouhury*, No. C 08-5157SBA, 2009 WL 331588, at *4-6 (N.D. Cal. Feb. 11, 2009) (J. Armstrong); *Marriott Ownership Resorts, Inc. v. Flynn*,
21 No. 14-00372 JMS, 2014 WL 7076827, at *15 (D. Haw. Dec. 11, 2014); *Madrigal v. New Cingular Wireless Servs., Inc.*, No. 09-cv-00033-OWW-SMS, 2009 WL 2513478, at *6 n.6
22 (E.D. Cal. Aug. 17, 2009); *Bergemann, Inc. v. Sullivan, Higgins & Brion, PPE*, No. 08-162-KI, 2008 WL 2116908, at *1, *3 (D. Ore. May 14, 2008).

23 [6] Although *Qualcomm* looked to California law, it was applying Ninth Circuit law and, in any event, "California law is consistent with federal law on the question of who decides
24 disputes over arbitrability." *Qualcomm*, 466 F.3d at 1372 (citing *Dream Theater, Inc. v. Dream Theater,* 124 Cal.App.4th 547, 21 Cal.Rptr.3d 322, 326 (2004)).

25 [7] *Interdigital*, 2016 WL 234433, at *4 (noting that *Qualcomm* was "applying Ninth
26 Circuit law"); *Zenelaj*, 82 F. Supp. 3d at 971 (same); *Nitsch*, 100 F. Supp. 3d at 862 (same); *SanDisk*, 84 F. Supp. 3d at 1027 (same); *Tompkins*, 2014 WL 2903752, at *4 (same); *Bernal*,
27 2014 WL 1868787, at *3 (same); *Matson Terminals*, 2014 WL 1219007, at *4 (same); *Chookaszian*, 2012 WL 5379589, at *4 (same); *Ellsworth*, 2012 WL 4120003, at *6 (same).
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1 agreement itself. They are "who decides" cases and do not speak to the application of the wholly
2 groundless standard whatsoever. For instance, Sony cites to *Oracle America, Inc. v. Myriad*
3 *Group A.G.*, 724 F.3d 1069 (9th Cir. 2013) for this point. *See* Motion at 8. *Oracle*, however, did
4 not address whether it is appropriate to conduct a wholly groundless inquiry; instead the Ninth
5 Circuit was only concerned with the prefatory question of who decides arbitrability, *id.* at 1072
6 ("The only issue in this case is whether the parties agreed to arbitrate arbitrability."), and
7 whether the existence of a carve-out provision in the arbitration agreement constituted evidence
8 of the parties' intent to submit arbitrability to the court, *id.* at 1075 ("Oracle also argues that a
9 carve-out provision in the parties' arbitration clause expresses their intent that a court would
10 decide arbitrability"). Moreover, the Ninth Circuit's silence on the appropriate scope of the
11 limited inquiry after a court has found that arbitrability has been delegated is not surprising since
12 it was a non-issue: all of the claims asserted in *Oracle* were "by definition related to" the
13 agreement at issue. *Id.* at 1076. Sony also cites to *Building Materials and Construction*
14 *Teamsters Local No. 216 v. Granite Rock* (*see* Motion at 7), but this nearly 30 year-old case did
15 not involve a delegation provision nor a question as to the scope of the arbitration clause. *See*
16 851 F.2d 1190, 1193-94 (9th Cir. 1988). Instead, the Ninth Circuit held that a court cannot
17 decide the merits of arbitrable claims (even where the merits of the claims appear "frivolous").
18 *Id.* at 1194. Moreover, the Ninth Circuit acknowledged that the Court does have a role in
19 determining arbitrability as the court must "determin[e] whether the union's claim on its face is
20 governed by the contract." *Id.* Once again, this is a "who decides" case. Finally, in their reply
21 in support of the Sanyo-Panasonic motion to compel arbitration (ECF No. 967), Sanyo and
22 Panasonic also relied on *Brennan v. Opus Bank*, 796 F.3d 1125 (9th Cir. 2015). *Brennan*, like
23 *Oracle* and *Building Materials*, is a "who decides" case. It did not address whether it is
24 appropriate to conduct a wholly groundless argument. Instead, *Brennan* dealt only with whether
25 arguments regarding unconscionability should be decided by the court or the arbitrator when
26 there is a delegation provision. *Id.* at 1128 ("'[t]he only issue before this Court is who—an
27 arbitrator or a judge—should decide' whether the Arbitration Clause is unconscionable."). As
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the Ninth Circuit pointed out, unconscionability is a defense, not a claim, *id.* at 1131, so the fact that the Ninth Circuit found that unconscionability should be addressed by the arbitrator says nothing as to whether a court should engage in a limited inquiry to ensure that wholly unrelated claims are not railroaded into arbitration.

2. Any Argument that the Arbitration Provision of the PPA Applies Retroactively is Wholly Groundless.

Applying the wholly groundless inquiry here, there is no basis for arguing that the arbitration provision should be applied retroactively, and therefore the Court should decline to order arbitration of the pre-PPA claims. ***First,*** the arbitration provision does not explicitly provide that it would apply retroactively. As noted above, arbitration is a matter of contract and, as a result, in order for an arbitration provision to apply retroactively, the agreement must clearly indicate the parties' intent to encompass past claims. *See Mohebbi*, 2014 WL 6845477, at *10 ("Because the arbitration clause does not explicitly encompass claims that predate the signing of the Engagement Agreement, Plaintiff's false advertising claims are not arbitrable."); *Morse v. ServiceMaster Glob. Holdings Inc.*, No. C 10-00628 SI, 2012 WL 4755035, at *4 (N.D. Cal. Oct. 4, 2012) (J. Illston) (holding that the language "'any and all claims,' is not retroactive on its face" and finding "there is no doubt [that t]he totality of the clause refers to the *material* scope of the arbitration agreement, not *temporal* scope"); *Long v. Fid. Water Sys., Inc.*, No. C-97-20118 RMW, 2000 WL 989914, at *3-4 (N.D. Cal. May 26, 2000) (J. Whyte) (holding that provision at issue lacked "the type of express, unequivocal language that is required" to apply the clause retroactively and noting that "Defendants have cited no case in which a court retroactively applied an arbitration clause that did not clearly and unequivocally apply to existing claims").[8]

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[8] *See also Thomas v. Carnival Corp.*, 573 F.3d 1113, 1119 (11th Cir. 2009), *overruled on other grounds by Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257, 1277 (11th Cir. 2011) ("We think if the parties had intended retroactivity, they would have explicitly said so."); *Security Watch, Inc. v. Sentinel Sys., Inc.*, 176 F.3d 369, 374 (6th Cir. 1999) ("Had the parties intended to apply the new ADR processes to disputes arising under the previous contracts, we believe they would have done so explicitly."); *Hendrick v. Brown & Root, Inc.*, 50 F.Supp.2d 527, 533–34 (E.D. Va. 1999) (holding that silence on retroactive application does not create a presumption that disputes predating the agreement are arbitrable).

1 ***Second,*** the PPA has a clearly stated effective date. *See* PPA § 23.1 ("This Agreement becomes
2 effective on July 1st, 2001."). In this situation, arbitration provisions have been held to be
3 prospective only. *In re TFT-LCD (Flat Panel) Antitrust Litig.*, Master Case No. 3:07-md-01827-
4 SI, 2011 WL 3353867, at *2 (N.D. Cal. Aug. 3, 2011) ("The LTA provides that it is only
5 effective between May 1, 2004 and January 31, 2007. Thus Dell's claims are not subject to
6 arbitration to the extent that they are based upon purchases that occurred before May 1, 2004.");
7 *see also In re TFT-LCD (Flat Panel) Antitrust Litig.*, Master Case No. 3:07-md-01827-SI, 2014
8 WL 1395733, at *2 (N.D. Cal. April 10, 2014) ("[I]t is clear from the language of the contract
9 that it was intended to cover purchases made during the contractual period . . . Therefore, the
10 phrase 'under this Agreement' must refer only to purchases made during the time-span covered
11 by the contract."). ***Third,*** the arbitration provision in the PPA extends only to "disputes related
12 to *this* Agreement or its enforcement," language that courts have consistently held is *not*
13 retroactive. *Mohebbi*, 2014 WL 6845477, at *2; *In re TFT-LCD*, 2011 WL 3353867, at *1-2,
14 *10; *In re TFT-LCD (Flat Panel) Antitrust Litig.,* Master Case No. 3:07-md-01827-SI, 2011 WL
15 5325589, at *3 (N.D. Cal. Sept. 19, 2011); *In re TFT-LCD*, 2014 WL 1395733, at *2.[9]

16 Courts have applied arbitration provisions retroactively, but in very specific situations
17 that are not present here. First, courts will apply arbitration provisions to preexisting claims
18 when the parties expressly provide for the provision to be retroactive. *See, e.g., In re TFT-LCD*
19 *(Flat Panel) Antitrust Litig.*, Master Case No. 3:07-md-01827-SI, 2011 WL 2650689, at *6 (N.D.
20 Cal. July 6, 2011) ("[T]he PPA includes a term specifically stating that the agreement as a whole
21 applies retroactively.").[10] The Sony PPA has no such explicit retroactivity provision. Second,
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23 [9] *See also Security Watch*, 176 F.3d at 372; *Carter v. Doll House II, Inc.*, 608 F. App'x 903, 904 (11th Cir. 2015); *Thomas v. Carnival Corp.*, 573 F.3d 1113, 1117 (11th Cir. 2009);
24 *Coffman v. Provost Umphrey Law Firm, LLP*, 161 F. Supp. 2d 720, 730 (E.D. Tex. 2001); *George Washington Univ. v. Scott*, 711 A.2d 1257, 1261 (D.C. 1998); *Goodrich Cargo Sys. v.*
25 *Aero Union Corp.,* No. C 06-06226, 2006 WL 3708065, at *3 (N.D. Cal. Dec. 14, 2006) (J. Breyer); *Rosenblum v. Travelbyus.com Ltd.,* 299 F.3d 657, 664 (7th Cir. 2002).

26 [10] *See also In re Currency Conversion Fee Antitrust Litig.*, 265 F. Supp. 2d 385, 406
27 (S.D.N.Y. 2003) ("This arbitration agreement applies to all Claims now in existence or that may arise in the future"); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. King*, 804 F.Supp.
28 (continued…)

courts have found that arbitration provisions apply retroactively where the language of the provision is significantly broader than the language contained in this PPA and explicitly extends beyond claims related to the agreement containing the arbitration provision. *See, e.g., In re TFT-LCD (Flat Panel) Antitrust Litig.*, Master Case No. 3:07-md-01827-SI, Dkt. No. 4526, at 2 (N.D. Cal. Jan. 10, 2012) ("All disagreements or controversies of any kind whether claimed in tort, contract or otherwise, either concerning this Agreement or any other matter whatsoever, will be arbitrated"); *In re Verisign, Inc., Derivative Litig.*, 531 F. Supp. 2d 1173, 1224 (N.D. Cal. 2007) (J. Hamilton) ("[T]he arbitration provision is extremely broad, and covers not just services provided under the agreement, but also 'any other services provided by KPMG' . . . ").[11] Perhaps anticipating these cases, Sony repeatedly and incorrectly describes the arbitration provision at issue as one covering disputes related to the parties' "commercial relationship." (Motion at 1-2). But saying this does not make it so. The arbitration provision in the PPA is limited to "disputes related to *this* Agreement or its enforcement," PPA § 25.2, and does not apply to all claims regarding the parties' "commercial relationship." Third, courts have applied arbitration provisions retroactively when there was an ongoing business relationship between the parties prior to entering into the arbitration agreement and that relationship continued after the

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1512, 1513-14 (M.D. Fla. 1992) (arbitration agreement applying to "all controversies which may arise between us, including but not limited to those involving . . . this or any other agreement between us, whether entered into prior, on or subsequent to the date hereof . . .").

[11] *See also Trujillo v. Gomez*, No. 14CV2483 BTM BGS, 2015 WL 1757870, at *8 (S.D. Cal. Apr. 17, 2015) ("The [arbitration] clause is not limited to claims arising under the Agreement itself."); *Kristian v. Comcast Corp.*, 446 F.3d 25, 33 (1st Cir. 2006) ("[T]he phrase 'or services provided' covers claims or disputes that do not arise 'out of this agreement' and hence are not limited by the time frame of the agreements."); *Belke v. Merrill Lynch, Pierce, Fenner & Smith*, 693 F.2d 1023, 1028 (11th Cir. 1982), *overruled on other grounds by Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985) ("An arbitration clause covering disputes arising out of the contract *or* business between the parties evinces a clear intent to cover more than just those matters set forth in the contract."); *Zink v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 13 F.3d 330, 332 (10th Cir.1993) ("[A]ny controversy between [the parties] arising out of [plaintiff's] business *or* this agreement shall be submitted to arbitration."); *Watson Wyatt v. SBC Holdings, Inc.*, 513 F.3d 646, 650 (6th Cir. 2008) ("It is noteworthy that the language of the agreement specifically extends its application to any claims arising from 'the services provided by Watson Wyatt.'").

agreement was entered into. *See, e.g., Levin v. Alms & Assoc.*, 634 F.3d 260, 269 (4th Cir. 2011) ("[T]he parties here had an ongoing relationship that was seamlessly renewed on an annual basis"); *Hancock Med. Ctr. v. Quorum Health Res., LLC*, No. 1:14-cv-55-HSO-RWH, 2015 WL 1387469, at *7 (S.D. Miss. March 25, 2015) ("[T]he Amended Complaint includes allegations about conduct occurring prior to the 2012 Agreement but continuing with the services provided by Quorum pursuant to the 2012 Agreement, and conduct occurring after the 2012 Agreement"); *Robinson v. Taboo Gentlemen's Club, LLC*, No. 3:14-cv-123, 2015 WL 3868531, at *1 (N.D.W. Va. June 23, 2015) (noting that plaintiff worked for defendant from 2009 through 2014 and that beginning in September 2011, the parties entered into a series of agreements containing arbitration provisions). Here, however, Sony admits that prior to the PPA, Nokia did not purchase *any* lithium ion batteries from Sony and, thus there was no ongoing relationship to which the PPA's arbitration provision could retroactively apply. Finally, in certain cases, courts have found that the existence of an integration or merger clause incorporated the arbitration provision of one contract into another. *See, e.g., Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 723-24 (9th Cir. 1999) (holding that merger clause in an umbrella agreement incorporated earlier preliminary agreements making such earlier agreement subject to arbitration provision contained in the later more comprehensive agreement). Here, however, while it is true that the PPA contains a merger clause, *see* PPA § 26.1, there is no prior agreement to supersede since there was no contract in existence between the parties prior to the PPA. Instead, the merger clause contained in the PPA is merely a "boilerplate clause" of the sort "routinely incorporated in agreements in order to signal to the courts that the parties agree that the contract is to be considered completely integrated." *Security Watch*, 176 F.3d at 372; *Choice Sec. Sys., Inc. v. AT&T Corp.*, No 97-1774, 1998 WL 153254, at *1 (1st Cir. Feb. 25, 1998) ("the run-of-the-mill integration clause . . . was designed to do nothing more than prevent any unincorporated side agreements previously negotiated by the parties during the pre-contract negotiation stage from becoming enforceable provisions in their finalized post-1994 contracts."); *In re TFT-LCD*, 2011

WL 5325589, at *6 (holding that integration clause did not make the contract at issue retroactive and distinguishing *Simula* on the grounds that it involved a series of interrelated agreements).

In short, there is simply no basis for holding that the arbitration clause contained in the Sony PPA applies to claims that arose before the agreement existed. To hold otherwise would set a dangerous precedent. For example, assume that a consumer purchases services from Company A but does not agree to arbitration in connection with that purchase, and that the same consumer later purchases additional, different services from the same company and enters into an agreement whereby the consumer agrees to arbitrate claims "related to *this* service agreement." It could hardly be said that the parties in this hypothetical would have contemplated that entering into an arbitration regarding the second service contract thereby made issues concerning the first service contract arbitrable. Similarly, it was clearly not the intent of the parties to the Sony PPA that when they entered into the PPA that any pre-PPA claims would be become arbitrable. Any claim that the PPA applies retroactively is wholly groundless and the pre-PPA claims should not be sent to arbitration.

II. CLAIMS FOR INJUNCTIVE RELIEF ARE NOT ARBITRABLE.

"The FAA does not require parties to arbitrate when they have not agreed to do so, nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement. It simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478 (1989); *Van Ness Townhouses v. Mar Indus. Corp.*, 862 F.2d 754, 757 (9th Cir. 1988) ("[A]s with any contract, the parties' intentions control and '[n]othing . . . prevents a party from excluding statutory claims from the scope of an agreement to arbitrate.'"). Moreover, where the parties to an arbitration provision have carved out certain claims, there is no arbitration agreement in existence as to the excluded claims and the usual policy favoring arbitration is inapplicable. *Id.* ("[A]rbitration agreements are to be rigorously enforced; however, an agreement must exist before it may be enforced. Because the parties did not actually agree to arbitrate their securities claims, the policy favoring arbitration

1 does not, by itself, support the district court's order compelling this matter to arbitration.").
2 Accordingly, where injunctive relief claims are carved out as they are here, courts should not
3 compel such claims to arbitration. *Frydman v. Diamond*, No. 1:14-CV-8741-GHW, 2015 WL
4 5294790, at *7 (S.D.N.Y. Sept. 10, 2015).

5 The cases cited by Sony are distinguishable in that they involve ambiguous carve-out
6 provisions. For example, in *Bitstamp Ltd. v. Ripple Labs, Inc.*, 2015 WL 4692418, at *3-5, the
7 carve-out provision was contained in a separate paragraph from the arbitration provision. While
8 the arbitration provision on its face applied to "any dispute, claim, or controversy arising out of
9 this Agreement" regardless of whether the claim was for injunctive relief, a separate provision of
10 the contract carved out injunctive claims. *Id.* at *5. Given the overlap between these two
11 conflicting provisions, the court found that the claim for arbitration was not wholly groundless.
12 *Id.* By contrast, the carve-out in the PPA is contained in the same paragraph as the arbitration
13 provision with no ambiguous overlap, leaving no room to argue that injunctive relief claims are
14 arbitrable if Nokia elects to pursue them in litigation. *Noodles Dev., LP v. Latham Noodles,*
15 *LLC*, is similarly distinguishable because it too involved an ambiguous carve-out provision. No.
16 CV09-1094-PHX-NVW, 2009 WL 2710137, at *3 (D. Ariz. Aug. 26, 2009) ("The ambiguous
17 relationship between the Agreement's arbitration clause and the injunction provision must be
18 reconciled in favor of arbitration.").[12]

19 Sony further argues that Microsoft Mobile's injunctive relief claims are moot and that
20 arbitration should be compelled on that basis. As an initial matter, the Court should not consider
21 whether such claims are moot on a motion to compel arbitration as that goes to the merits of the
22 claim. *Cal. Nurses Ass'n v. Alta Bates Med. Ctr.*, No. C 94-3524 SBA, 1995 WL 420774, at *5
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24 [12] Although not cited by Sony for this point, *Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d
25 1069, 1071, 1076 (9th Cir. 2013) is similarly unhelpful to Sony's argument. As the Ninth Circuit
pointed out, "by definition, the claims excepted from arbitration by the carve-out clause are
26 claims 'arising out of or relating to' the Source License." In other words, like *Bitstamp* and
Noodles, application of the carve-out was ambiguous, and it was therefore unclear whether the
27 specific claims at issue were intended to be arbitrable or not.
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(N.D. Cal. June 16, 1995) (J. Armstrong) ("The issue of whether the grievance is moot is a question going to the merits of the grievance. As such, whether or not the grievances are moot has absolutely no bearing on whether they are arbitrable."). In any event, the injunctive relief claims are not moot since without the requested relief, defendants could resume their illegal price fixing activities. *See United States v. Or. State Med. Soc.*, 343 U.S. 326, 333 (1952) ("It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption.").

Because the PPA expressly grants Microsoft Mobile the option to bring its injunctive relief claims in court, this Court should deny Sony's motion to compel arbitration as to these claims.

III. THE COURT SHOULD NOT DISMISS ANY OF MICROSOFT MOBILE'S CLAIMS AGAINST PANASONIC AND SANYO.

A. The Court Should Not Stay the Non-Arbitrable Claims, But Instead Allow Them to Proceed.

As detailed above, the pre-PPA and injunctive relief claims are not arbitrable. Consequently, there is no basis for dismissing these claims. Moreover, to stay these claims would be inefficient in light of the ongoing class action litigation.

Section 3 of the FAA instructs courts to stay proceedings on application of one of the parties, but only "upon being satisfied that the issue . . . is referable to arbitration." 9 U.S.C. § 3.[13] Accordingly, Section 3 by its terms does not empower the Court to stay non-arbitrable claims. Nonetheless, courts have held that "[w]here plaintiffs assert both arbitrable and nonarbitrable claims, district courts have discretion whether to proceed with the nonarbitrable

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[13] 9 U.S.C. § 3 provides: "[T]he court . . . upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action . . ." The mandatory stay provision found in Section 3 applies to arbitrable claims that fall under the New York Convention and foreign parties. *See* 9 U.S.C. § 208 ("Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.").

claims before or after the arbitration and [have] . . . authority to stay proceedings in the interest of saving time and effort for itself and litigants." *Nitsch*, 100 F. Supp. 3d at 870 (staying arbitrable claims but denying stay as to nonarbitrable claims). Here, the Court should not issue a stay because practical considerations weigh decidedly against it.

Typical reasons for imposing a stay—such as the predominance of arbitrable claims or the ability to streamline subsequent proceedings—are not present here. *See Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863-64 (9th Cir. 1979) (discussing that courts have inherent power to impose stays if continuing litigation "would waste judicial resources and be burdensome upon the parties"); *Wilcox v. Ho-Wing Sit*, 586 F. Supp. 561, 567 (N.D. Cal. 1984) (noting the court "has authority to stay proceedings in the interest of saving time and effort for itself and litigants"). Instead of promoting judicial efficiency and an organized docket, a stay would create duplicative discovery and prejudice all parties involved. Regardless of whether the Court issues a stay of the non-arbitrable claims in Microsoft Mobile's action, Sony will still proceed in litigation related to the claims of at least one other Direct Action Plaintiff. Allowing the non-arbitrable claims to proceed would not prejudice Sony's interests nor burden the Court. *See In re TFT-LCD*, 2011 WL 3353867, at *3 (denying stay where parties seeking to compel arbitration were "defendant[s] in many other proceedings in this MDL and must therefore conduct [their] defense regardless of whether this matter is stayed"); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, Master Case No. 3:07-md-01827-SI, 2011 WL 4017961, at *7 (N.D. Cal. Sept. 9, 2001) ("Given the scope of these MDL proceedings, however, and defendants' extensive involvement in the class and direct-purchaser actions, the Court finds that a stay will have little benefit."). Additionally, staying the non-arbitrable claims would lead to significant inefficiencies for the Court, the parties, and the witnesses, as Microsoft Mobile would be forced to call back witnesses (many of whom are located in Japan) to re-open depositions, and to litigate issues that would have been more efficiently handled in conjunction with the ongoing MDL proceedings. This would put an undue burden on Microsoft Mobile, defendants, and witnesses. For these reasons, the Court should not impose a stay on the Joint and Several Claims, but

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instead allow them to proceed in the MDL.

B. The Court Should Stay, Not Dismiss, Any Potentially Arbitrable Claims.

While the Court should allow the non-arbitrable claims to proceed, it should stay those claims that it determines are arguably arbitrable. The Ninth Circuit has held that "notwithstanding the language of § 3, a district court may either stay the action or dismiss it outright when . . . the court determines that all of the claims raised in the action are subject to arbitration." *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072, 1074 (9th Cir. 2014) (citing *Sparling v. Hoffman Constr. Co*., 864 F.2d 635, 638 (9th Cir.1988)); *see also Nitsch*, 100 F. Supp. 3d at 870. Here, however, dismissal would be inappropriate. First, as explained above, only some of the claims between the parties are potentially arbitrable. Second, because the parties agree that they delegated the power to decide arbitrability to the arbitrator, the Court's inquiry is a narrow one, asking only whether arbitrability is wholly groundless rather than conducting a full arbitrability analysis. *See Qualcomm*, 466 F.3d at 1371. Given the limited analysis performed by courts when the parties have delegated arbitrability questions, if a court finds that arbitrability is not wholly groundless, it should "stay the trial of the action to permit an arbitrator to rule on the arbitrability of those issues." *Id.* at 1375; *see also Guidewire,* 2012 WL 5379589, at *6 ("Because the Court concludes that Defendant's claim that this matter is arbitrable is not wholly groundless, the Court must stay these proceedings pursuant to 9 U.S.C. § 3." (citing *Qualcomm*, 466 F.3d at 1374)). A stay, rather than dismissal, in this situation protects parties in the event that the arbitrator, upon conducting a full arbitrability inquiry under the relevant law of the contract, determines that the claims are not arbitrable. If a court dismisses claims, the statute of limitations is no longer tolled. As a result, dismissal of the claims could leave Microsoft Mobile without recourse if the statute of limitations period expires while the arbitrability question is being resolved by the arbitrator. Accordingly, the Court should stay rather than dismiss all claims that it finds to be plausibly arbitrable.

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IV. CONCLUSION

The Court should deny the Sony Defendants' motion to compel arbitration in part and deny their request for dismissal in its entirety. Specifically, the Court should deny Sony's motion to compel arbitration as to claims pre-dating the PPA and claims for injunctive relief and such claims should be allowed to proceed in this Court. The Court should grant Sony's motion to compel arbitration as to the post-PPA damages claims and should stay those claims while the arbitrator rules on the arbitrability of those issues.[14]

Dated: July 19, 2016.

<u>/s/ B. Parker Miller</u>

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[14] Additionally, to the extent that the Court wishes to reconsider its prior ruling regarding joint and several liability, it should deny the motion as to claims based on joint and several liability and allow those claims to proceed.