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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

IN RE: LITHIUM ION BATTERIES ANTITRUST LITIGATION

This Document Relates To:
MICROSOFT MOBILE, INC., et al.

Plaintiffs,

vs.

LG CHEM AMERICA, INC., et al.

Defendants.

Case No. 4:13-MD-2420 YGR (DMR)

MDL NO. 2420

SONY CORPORATION, SONY ELECTRONICS INC., AND SONY ENERGY DEVICES CORPORATION'S MOTION TO COMPEL ARBITRATION AND TO DISMISS OR STAY MICROSOFT MOBILE INC. AND MICROSOFT MOBILE OY'S COMPLAINT

Oral Argument Requested

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

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NOTICE OF MOTION AND MOTION TO COMPEL ARBITRATION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on Tuesday, August 16, 2016 at 2:00 p.m., or as soon thereafter as this matter may be heard before the Honorable Yvonne Gonzalez Rogers, defendants Sony Corporation, Sony Electronics Inc., and Sony Energy Devices Corporation ("Sony") will and hereby do move the Court, pursuant to 9 U.S.C. § 206 and Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), for an order compelling plaintiffs Microsoft Mobile Inc. and Microsoft Mobile Oy (together, "Plaintiffs" or "Microsoft") to arbitrate their claims against Sony and dismissing Plaintiffs' complaint against Sony in its entirety, or alternatively, staying the proceedings between Microsoft and Sony pending the arbitrators' decision on arbitrability.

Microsoft's action against Sony should be dismissed or stayed because the entirety of Microsoft's Sherman Act claim against Sony is subject to arbitration. Microsoft's predecessor, Nokia Corporation and its subsidiary Nokia Inc. (together, "Nokia"), from which Microsoft acquired its claim, entered into a valid and enforceable arbitration agreement that broadly covers all "disputes related to" its commercial relationship with Sony regarding lithium-ion batteries ("LIBs"). That agreement further requires that any disputes as to the scope of the arbitration agreement and the arbitrability of any claim must be submitted to the arbitrator for resolution. Accordingly, Microsoft is barred from prosecuting this lawsuit against Sony in this Court.

This motion is based upon this Notice of Motion, the accompanying Memorandum of Points and Authorities, the concurrently-filed Declaration of Jon Cieslak ("Cieslak Decl.") and accompanying exhibits, argument of counsel, and such other matters as the Court may consider.

STATEMENT OF THE ISSUE TO BE DECIDED

Microsoft and Sony are parties to a valid and enforceable arbitration agreement that requires arbitration of "[a]ny disputes related to" Microsoft's commercial relationship with Sony regarding LIBs. Should the Court compel arbitration of this dispute and dismiss or stay proceedings between Microsoft and Sony?

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Court has already decided the underlying issues in this motion when it ruled to compel arbitration of Microsoft's claims against defendants Panasonic and Sanyo. (ECF No. 986.) There are no material differences here that should cause the Court to stray from its previous ruling, which was based on a similarly broad arbitration clause that likewise involved Nokia.

Like Panasonic and Sanyo, Sony entered into a product purchase agreement (the "PPA") with Nokia that governed the parties' commercial relationship regarding the sale and purchase of LIBs. The PPA contains a broad arbitration provision mandating arbitration of all claims "related to" that commercial relationship.

Here, the Court need only decide whether that arbitration provision is valid and enforceable, which is not reasonably in dispute. If the Court makes that determination in the affirmative, the Court's inquiry ends. Microsoft's claims and any ancillary (or gateway) disputes regarding the arbitrability of Microsoft's claims must be decided by the arbitrator, leaving no room for the exercise of discretion by the Court. Indeed, the exercise of any discretion would divest the arbitrators of their contractual authority to determine the scope of the arbitration agreement.

Sony does, however, expect Microsoft to oppose this rather straightforward motion despite this Court's previous ruling and the weight of case law against it. For example, Microsoft may argue that the Court should take a closer look at whether Sony's motion is "wholly groundless" based on case law that is not applicable within the Ninth Circuit. However, consistent with this Court's ruling in compelling arbitration of Panasonic and Sanyo's claims, Sony's motion easily clears that low hurdle. Specifically, Microsoft may renew its argument that its joint and several claims are not arbitrable. But these joint and several claims are no different from those against Panasonic and Sanyo that this Court already referred to arbitration. Microsoft may also argue that, at the very least, its claim for injunctive relief under the Sherman Act should be excluded from arbitration despite the fact that that claim is effectively meaningless in the context of this litigation. In any case, these are issues of arbitrability that can only be decided by

the arbitrator. Accordingly, Sony requests that the Court grant its motion, compel arbitration of all of Microsoft's claims, and dismiss or stay the proceedings.

II. BACKGROUND

A. The Arbitration Agreement Between Nokia and Sony

Sony Corporation (and its "Affiliated Companies") and Nokia Mobile Phones Ltd. (and its "Affiliated Companies") entered into the PPA on May 10, 2001. The PPA became effective on July 1, 2001, and remains in effect today. (*See* Cieslak Decl., Ex. A § 23.1.) It governs "all sale and purchase of Product(s)," which are defined as "certain lithium-ion batteries manufactured by or for [Sony] subject to purchase and sale between the Parties." (*Id.* § 2.1 and at 5.)

The PPA contains a broad arbitration clause (the "Arbitration Agreement") providing as follows:

> Any disputes related to this Agreement or its enforcement shall be resolved and 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.

(*Id.* § 25.2.)

B. Microsoft's Claims Against Sony

Microsoft alleges that, in 2013, it acquired Nokia's mobile device business and any claims it may have had based on purchases of LIBs. (Case No. 2:15-cv-01038, ECF No. 1, Microsoft's Complaint for Damages and Injunctive Relief ("Complaint" or "Compl.") ¶¶ 1, 14-15.) Microsoft further alleges that Sony and other defendants engaged in a conspiracy to fix the prices of LIBs from January 1, 2000 to May 31, 2011. (*Id.* ¶ 1.) Finally, Microsoft alleges that its predecessor Nokia purchased LIBs directly from Sony and other defendants during the relevant period at artificially-inflated prices in the United States and throughout the world. (*Id.*) Microsoft thus seeks relief against Sony and the other defendants, both on an individual and joint and several basis. (*Id.* at 66.)

III. LEGAL STANDARD

The Federal Arbitration Act (the "FAA") requires a court to stay judicial proceedings and compel arbitration of claims covered by a written and enforceable arbitration agreement. 9 U.S.C. § 3. The FAA establishes a "federal policy favoring arbitration" and requires courts to "rigorously enforce agreements to arbitrate." *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (citations and internal quotation marks omitted). Critically, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). In particular, in cases like this where the arbitration agreement expressly incorporates the International Chamber of Commerce Rules of Arbitration (the "ICC Rules"), courts should compel arbitration even when faced with "gateway questions of arbitrability, such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 68- 69 (2010) (citations and internal quotation marks omitted); *Poponin v. Virtual Pro, Inc.*, No. 06-CV-4019 PJH, 2006 WL 2691418, at *9 (N.D. Cal. Sept. 20, 2006) (finding the ICC Rules clearly "provide for the arbitrator to decide arbitrability").

Moreover, "[i]n a motion to compel arbitration, the burden of proof is on the party asserting jurisdiction and contesting arbitration." *Edwards v. Metro. Life Ins. Co.*, No. C 10-03755 CRB, 2010 WL 5059553, at *4 (N.D. Cal. Dec. 6, 2010) (citing *Shearson/Am. Express*, 482 U.S. at 227). Therefore, the only question before this Court is whether Sony and Microsoft are bound by a valid and enforceable arbitration agreement.

IV. ARGUMENT

There can be no reasonable dispute that the broad arbitration provision at issue is valid and enforceable. Any further dispute between the parties as to that provision should be decided by the arbitrators.

A. The Parties Are Bound by a Valid and Enforceable Arbitration Agreement

All the parties to this action are bound by the PPA containing the Arbitration Agreement. Nokia Mobile Phones Ltd., a signatory to the PPA, was dissolved and merged into Nokia Corporation in 2001. *See* News Release, Nokia Corporate Communications, Nokia's Finnish Subsidiaries Merged (Oct. 1, 2001), http://company.nokia.com/en/news/press-releases/2001/10/01/nokias-finnish-subsidiaries-merged. As a successor of the signatory company, Nokia Corporation is bound by the PPA. *See Prograph Int'l Inc. v. Barhydt*, 928 F. Supp. 983, 991 (N.D. Cal. 1996) (finding that the arbitration would include a nonsignatory successor under clauses signed by the corporation whose liabilities the successor was alleged to have assumed); *see also Fyrnetics (Hong Kong) Ltd. v. Quantum Group, Inc.*, 293 F.3d 1023, 1029 (7th Cir. 2002) (affirming that a successor company was bound by the arbitration agreement signed by the entity that had been merged into the successor company). As of December 31, 2011, Nokia Inc., a wholly-owned subsidiary of Nokia Corporation, was an "Affiliated Company" according to the definition and bound by the PPA. *See* Nokia Corporation, Annual Report 71 (Form 20-F) (Mar. 8, 2012); Cieslak Decl., Ex. A § 1 (definition of "Affiliated Company"). Sony Corporation is a signatory to the PPA. Sony Energy Devices Corporation and Sony Electronics, Inc. are wholly-owned subsidiaries of Sony Corporation and are therefore bound as "Affiliated Companies" under the PPA. (*See* Cieslak Decl., Ex. A § 1 (definition of "Affiliated Company").)

Further, like the arbitration agreements governing Microsoft's claims against Panasonic and Sanyo, the Arbitration Agreement here meets all four factors of the Ninth Circuit's *Balen* test to determine the enforceability of an international commercial arbitration agreement. In *Balen v. Holland America Line Inc.*, the Ninth Circuit held that international commercial arbitration agreements are enforceable where they (1) are written, (2) provide for arbitration in the territory of a signatory of the New York Convention, (3) arise out of a legal relationship which is considered commercial, and (4) involve a party to the agreement that is not an American citizen or a commercial relationship that has some reasonable relation with one or more foreign states. 583 F.3d 647, 654-55 (9th Cir. 2009).

Here, all four *Balen* factors are easily satisfied. First, the PPA is a written document. (*See* Cieslak Decl., Ex. A.) Second, it provides for arbitration in the United Kingdom, which is a signatory of the New York Convention. (*Id*. § 25.2.) Third, the PPA is a commercial document that governs Sony's sale of LIBs to Nokia. (*Id*. § 2.1.) And fourth, both Sony and Nokia are foreign companies based in Japan and Finland, respectively. (*Id*. at 3.)

Microsoft may argue that the arbitration provision under the PPA is somehow "null and void, inoperative or incapable of being performed," but that argument would have no factual or legal basis. *See Prograph Int'l Inc. v. Barhydt*, 928 F. Supp. 983, 987-88 (N.D. Cal. 1996). In *Prograph*, the court held that New York Convention requires courts to enforce arbitration provisions that satisfy the four *Balen* factors, like this one, unless those provisions are "null and void, inoperative or incapable of being performed" due solely to extenuating circumstances such as fraud, mistake, duress, or waiver. *See id*. No such extenuating circumstances are at issue here. In fact, the similarities between Sony and Panasonic's (and Sanyo's) arbitration agreements with Nokia suggest that Nokia was the primary drafter of these provisions. Given Nokia's position as one of the largest mobile phone providers in the world at the time the PPA was executed, it follows that Nokia would have had the leverage and sophistication to craft the PPA to its own satisfaction. Microsoft should not be allowed to circumvent arbitration simply because it now prefers litigation.

B. Any Disputes Regarding the Arbitrability of Microsoft's Claims Must Be Resolved by the Arbitrator

To the extent there can be any dispute regarding the arbitrability of Microsoft's claims, ICC Rules require that dispute to be decided by the arbitrator. **(***See* Cieslak Decl., Ex. A §25.2 (arbitration is to be conducted "in accordance with the Arbitration Rules of the International Chamber of Commerce")). Indeed, Microsoft has already conceded that the parties' adoption of ICC Rules demonstrates an intention to arbitrate gateway questions of arbitrability. *See* Microsoft Mobile Inc.'s and Microsoft Mobile Oy's Response in Opposition to Panasonic and Sanyo Defendants' Motion to Dismiss and Compel Arbitration ("Opp.") at 1, *In re Lithium Ion Batteries Antitrust Litig.*, No. 4:14-md-02420 YGR (N.D. Cal. Nov. 3, 2015) (ECF No. 931)

("Nor does Microsoft Mobile dispute that, by incorporating the Rules of Arbitration of the International Chamber of Commerce into their arbitration agreements, the parties agreed to delegate fairly debatable questions of arbitrability to the arbitrator.").

Moreover, this Court has repeatedly held that issues going to arbitrability must be decided by the arbitrators. *See* Order Granting in Part Motion to Dismiss and Compel Arbitration ("Order") at 3, *In re Lithium Ion Batteries Antitrust Litig.*, No. 13-MD-2420 YGR (N.D. Cal. Dec. 9, 2015) (ECF No. 986) (holding that "gateway questions are decided by the arbitrator instead of the Court where 'the parties clearly and unmistakably express that intention'"); *Poponin*, 2006 WL 2691418, at *9 (holding that by agreeing to arbitration under the ICC Rules, the parties clearly and unmistakably agreed that any questions of arbitrability would be submitted to arbitration).

Therefore, to the extent Microsoft even attempts to dispute whether its claims are arbitrable, this Court simply does not have the requisite jurisdiction to resolve that dispute, and it should compel this matter to arbitration. *See In re: Cathode Ray Tube (CRT) Antitrust Litig.*, No. 3:14-CV-02520, 2014 WL 7206620, at *4 (N.D. Cal. Dec. 18, 2014) ("[B]ecause the Court lacks jurisdiction to determine arbitrability, and the parties agreed to resolve such issues before the arbitrators […], the Court lacks jurisdiction even to sever [plaintiff's] claims against the co-conspirators from its claims against the contracting defendant]."); *Bldg. Materials & Constr. Teamsters Local No. 216 v. Granite Rock Co.*, 851 F.2d 1190, 1194-95 (9th Cir. 1988) ("Whether 'arguable' or not, indeed even if it appears to the court to be frivolous, the [defendants'] claim . . . is to be decided not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator.").

C. Microsoft's Claims are Arbitrable Even Under the "Wholly Groundless" Standard

As it did when opposing Panasonic and Sanyo's motion, Microsoft may argue that the Court should ignore the parties' contractual intentions (and Ninth Circuit precedent) and instead conduct its own inquiry into whether Sony's assertion that Microsoft's claims are arbitrable is "wholly groundless." *See* Opp. at 3-5; *Qualcomm Inc. v. Nokia Corp.*, 466 F.3d 1366, 1371 (Fed.

Cir. 2006). But that "wholly groundless" standard is not the law in the Ninth Circuit. *See Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1072-75 (9th Cir. 2013) (a court should not determine which claims are "arguably covered by the agreement," because that would improperly divest the arbitrators of their contractual authority to determine whether "a claim falls within the scope" of the arbitration agreement).

However, even if this Court were to entertain that "wholly groundless" standard, it should nonetheless compel arbitration of Microsoft's claims. In opposing Panasonic and Sanyo's motion to compel arbitration, Microsoft argued that its "direct" claim should be severed from its "joint and several" claim. Microsoft further argued that while its "direct" claim was subject to arbitration, it was "wholly groundless" to assert that its "joint and several" claim was covered by the arbitration agreements. But no matter how Microsoft attempts to frame its claims, Sony's motion to compel arbitration easily surpasses the low "wholly groundless" standard.[1]

1. Microsoft's Claims Based on "Direct" Sales to Sony Are Arbitrable

With regard to Microsoft's claims based on Nokia's direct purchases of LIBs from Sony, Microsoft has already conceded that these claims are subject to arbitration under the "wholly groundless" standard. (*See* Opp. at 1 ("Microsoft Mobile further acknowledges that the arbitrability of its claims against Panasonic based on Nokia's purchases from Panasonic and its claims against Sanyo based on Nokia's purchases from Sanyo (*i.e.*, the 'Direct Purchase Claims') should be decided by the arbitrator in the first instance.").) The Court agreed and so held. (Order at 5 ("[Plaintiffs] agree it is appropriate to send to the arbitrators the question of arbitrability of the claims against them relating to their direct sales to plaintiffs.").) Thus, Sony's assertion of the arbitrability of Microsoft's claims based on Nokia's purchases directly from Sony is not "wholly groundless."

[1] In addressing the issue of whether Sony's assertion of arbitrability is "wholly groundless," Sony expressly preserves, and does not waive, its right under the PPA to tender the arbitrability determination to the arbitrators—which is the result it seeks in this Motion.

2. Microsoft's Claims Based on Joint and Several Liability are Arbitrable

In ruling on Panasonic and Sanyo's motion, the Court concluded that the assertion of arbitrability as to antitrust claims based on joint and several liability could not be considered "wholly groundless." *See* Order at 5 (finding that the "arbitration clause at issue is particularly broad" and holding that "the argument as to whether plaintiffs' entire case against defendants is subject to arbitration is not 'wholly groundless'"); *see also Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1131 (9th Cir. 2000) ("The parties' arbitration clause is broad and far reaching: 'Any dispute, controversy or claim arising out of or relating to the validity, construction, enforceability or performance of this Agreement shall be settled by binding Alternate Dispute Resolution.'").

The Court should reach the same conclusion here. As an initial matter, the Court previously found Panasonic and Sanyo's respective arbitration provisions with Nokia to be "particularly broad." (Order at 2, 5.) The agreement at issue here is similarly broad, ***if not broader***. Specifically, Panasonic and Sanyo's agreements with Nokia mandate arbitration of "[a]ny disputes arising between the Parties out of or in connection with [the Parties'] Agreement or the interpretation, breach of enforcement of [the] Agreement." (*Id*.) In modest contrast, Sony's PPA requires arbitration of "[a]ny disputes related to" the agreement. (PPA § 25.2.) Courts have repeatedly held that the "related to" language in Sony's PPA is similarly broad. *See, e.g., Nokia Corp. v. AU Optronics Corp. (In re TFT-LCD (Flat Panel) Antitrust Litig.)*, No. M 07-1827 SI, 2011 U.S. Dist. LEXIS 72389, at *34 (N.D. Cal. Jul. 6, 2011) ("Under the Ninth Circuit's reasoning, the language "related to" must be read broadly, to encompass any matter that touches the contractual relationship between the parties."). In fact, some courts have interpreted this "related to" language as even broader than the "arising out of" language in Panasonic and Sanyo's agreements. *See, e.g., Hopkins & Carley, ALC v. Thomson Elite*, No. 10-cv-05806-LHK, 2011 U.S. Dist. LEXIS 38396, at * 10-*12 (N.D. Cal. April 6, 2011) (noting that the Ninth Circuit found the phrase "arising under" to be "relatively narrow as arbitration clauses

go" and that the omission of "broader language, such as 'relating to'" was significant); *Mediterranean Enters. v. Ssangyong Corp.*, 708 F.2d 1458, 1464 (9th Cir. 1983) (same).

3. Microsoft Cannot Avoid Arbitration by Requesting Injunctive Relief

Finally, Microsoft may attempt to avoid arbitration by arguing that it is entitled to litigate its claim for injunctive relief. Indeed, the PPA does contain a carve out allowing Microsoft to litigate its injunctive relief claims. (*See* Cieslak Decl., Ex. A § 25.2 ("[A]ny disputes related to [Nokia's] Intellectual Property Right(s) or Confidential Information, or for injunctive relief, may, at [Nokia's] sole election, be resolved by a court of competent jurisdiction.")) But that potential argument has been rejected in this district and should be rejected again here for at least two reasons.

First, ICC Rules require that the arbitrability of Microsoft's request for injunctive relief is a question for the arbitrators—not the Court. *See Bitstamp Ltd. v. Ripple Labs, Inc.*, No. 15-cv-01503-WHO, 2015 U.S. Dist. LEXIS 104049, at *10-*15 (N.D. Cal. Aug. 6, 2015). The Court's reasoning in *Bitstamp* is instructive.

In *Bitstamp*, the agreement at issue likewise contained both an arbitration clause applicable to "[a]ny dispute . . . arising out of or relating to" the parties' contractual relationship and a clause entitling the parties to seek an injunction in court. *See id*. at *9-*10. The *Bitstamp* agreement incorporated the JAMS Arbitration Rules, which, like the ICC Rules, delegate questions of arbitrability to the arbitrator. *See id*. at *9. In that case, plaintiff sought only injunctive relief and specific performance and therefore argued that the arbitration provision did not apply to its claims. *Id*. But the *Bitstamp* court rejected that argument and refused to decide the issue of arbitrability because the parties "clearly and unmistakably assigned the arbitrability question to the arbitrator." *Id*. at *14. Instead, it granted defendant's motion to compel arbitration in deference to the parties' similarly broad arbitration agreement. *Id*. at *14-*15; *see also Noodles Dev., L.P. v. Latham Noodles, LLC*, No. CV 09-1094-PHX-NVW, 2009 U.S. Dist. LEXIS 81773, at *8 (D. Ariz. Aug. 26, 2009) (compelling arbitration of plaintiff's claims for injunctive relief pursuant to broad arbitration clause despite provision allowing plaintiff to pursue injunctive relief in court); *cf. RISO, Inc. v. Witt Co.*, No. 03:13-cv-02064-HZ, 2014 U.S. Dist.

LEXIS 92947, at *25-*27 (D. Ore. Jul. 9, 2014) (finding that an injunctive relief carve-out was ambiguous and may have required arbitration of a claim for damages that was incidental to or in addition to a claim for injunctive relief).

By contrast, the facts at issue here favor arbitration even more strongly than those in *Bitstamp*, where plaintiff sought *only* injunctive relief and specific performance, both of which were subject to the arbitration clause carve-out. *See Bitstamp*, 2015 U.S. Dist. LEXIS 104049 at *9. Here, Microsoft is primarily seeking damages; its prayer for injunctive relief is secondary at best. Accordingly, like the *Bitstamp* agreement, the broad Arbitration Agreement between Microsoft and Sony requires the Court to delegate the question of arbitrability of ***all*** of Microsoft's claims, including its request for injunctive relief, to the arbitrators.

Second, it would render the parties' Arbitration Agreement meaningless if Microsoft were allowed to evade arbitration simply by including in its Complaint a single paragraph requesting injunctive relief. It would also violate the federal policy favoring arbitration. *See Noodles*, 2009 U.S. Dist. LEXIS 81773, at *8-*9. Like the Arbitration Agreement between Microsoft and Sony, the agreement at issue in *Noodles* contained both a broad arbitration clause and a clause permitting plaintiff to seek injunctive relief in court. *Id*. at *1-*2. And, like Microsoft, the plaintiff in *Noodles* sought both damages and injunctive relief. *Id*. at *6-*7. But the *Noodles* court found that permitting plaintiff to litigate the merits of its claims would "nullif[y] the arbitration clause" and "conflict[] with the parties' demonstrated intent to have an arbitral tribunal, not a court, decide the merits of 'any dispute or claim arising out of or related to' the Agreement." *Id*. at *8-*9. The *Noodles* court therefore resolved the duality of the arbitration clause and the injunctive relief carve-out by compelling arbitration of plaintiff's claims and by finding that plaintiff was permitted to seek emergency injunctive relief to preserve the status quo while it arbitrated if it so desired. *Id*. Thus, Microsoft cannot use a prayer for injunctive relief to make an end run around the parties' agreement to arbitrate the merits of their claims.

This is especially true where Microsoft's request for injunctive relief is effectively moot. According to Microsoft's own allegations, the alleged conspiratorial activity ended more than five years ago and cannot now be enjoined. *See* Compl. at 1, ¶¶ 3, 79, 167, 285; *United States v.*

Oregon State Medical Soc., 343 U.S. 326, 333 (1952) ("The sole function of an action for injunction [under the Sherman Act] is to forestall future violations. It is so unrelated to punishment or reparations for those past that its pendency or decision does not prevent concurrent or later remedy for past violations by indictment or action for damages by those injured."); *Zenith Radio Corp. v. Hazeltime Research*, 395 U.S. 100, 130 (1969) (an injunction is available under the Sherman Act only where plaintiff demonstrates "a significant threat of injury from an *impending* violation of the antitrust laws or from a *contemporary* violation likely to continue or recur") (emphasis added). Microsoft does not allege any impending or contemporary violation of the Sherman Act, and its prayer for injunctive relief amounts to nothing more than a general request that defendants be ordered to follow the law. As such, Microsoft should not be allowed to evade its contractual obligations to arbitrate this dispute with Sony.

V. CONCLUSION

For the foregoing reasons, Sony respectfully requests that the Court compel arbitration of Microsoft's claims and dismiss or stay proceedings between Microsoft and Sony.

Dated: June 20, 2016

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