

Sony, Microsoft Spar Over Arbitrating Battery Antitrust Row

By **Cara Bayles**

Law360, San Francisco (August 16, 2016, 10:24 PM ET) -- A California federal judge considered Sony Corp.'s request to arbitrate claims arising from an alleged price-fixing ring for lithium ion battery cells at a hearing Tuesday, in which Sony argued Microsoft inherited a purchase agreement with an arbitration clause and Microsoft said the contract didn't cover all purchases.

U.S. District Judge Yvonne G. Rogers expressed her displeasure to be considering more claims under the battery MDL, which alleges direct and indirect consumers paid higher prices as a result of a price-fixing conspiracy involving Sony, LG Chem America, Toshiba Corp., NEC Corp. and other makers of rechargeable lithium ion batteries, which are widely used in laptop computers and other electronic devices.

Sony settled claims earlier this year, paying separate classes of retailers and consumers roughly \$19 million each.

"I could not understand why I was seeing this yet again," the judge told B. Parker Miller, the attorney for Microsoft's mobile phone unit. "And then I read your complaint. It has one cause of action. And I thought, 'How is it that I'm supposed to settle when you had one cause of action?' Then I read the reply, and the defendant said all the things I'd wondered to myself."

Judge Rogers said Thursday that the entire complaint arose from one claim based on the purchasing agreement. She asked Miller, "Do I even have any ability to give you leave to amend?" She added that she couldn't understand why "smart folks" would frame the complaint the way they had.

Miller said he would gladly divide the complaint into two causes of action if given leave to amend, and admitted, "Looking back, we should have pled it differently. I wish we had done that."

But he said the central argument against arbitration was still valid, because the arbitration clause in Sony's 2001 purchasing agreement with Nokia, which Microsoft later purchased, could not cover purchases that predated it, and the price-fixing claims in the MDL date back to 2000.

"The [product purchase agreement] relates to the purchase of certain lithium ion batteries, not all of them," he said. "And you can't take it and apply it to transactions that happened before the contract existed."

Sony attorney Jon Cieslak said the contract would send damages claims to arbitration and that the

injunctive relief claim was moot at this point, since Microsoft didn't allege Sony had continued to violate the Sherman Act.

"I think either path leads to arbitration," he said.

Judge Rogers asked the attorneys if she could chop the complaint up and allow pertinent parts to go forward, or if she could have the arbitrator consider the claim and decide if parts of it should be sent back to court.

Cieslak said that the single cause of action would make parsing arguments difficult, and Miller reasserted his argument that the arbitration clause didn't apply to these batteries or all of the timeframe at issue, saying, "claims that are not subject to the contract are not subject to arbitration."

Microsoft is represented by James C. Grant, Valarie C. Williams, B. Parker Miller, Edward P. Bonapfel, Lance A. Termes and Ryan W. Koppelman of Alston & Bird LLP.

Sony is represented by Stephen C. Neal, John C. Dwyer and Beatriz Mejia of Cooley LLP.

The instant case is Microsoft Mobile Inc. et al. v. LG Chem America Inc. et al., case number 4:15-cv-03443, in U.S. District Court for the Northern District of California.

The MDL is In re: Lithium-Ion Batteries Antitrust Litigation, case number 4:13-md-02420, in the U.S. District Court for the Northern District of California.

--Additional reporting by Dan Siegel and Y. Peter Kang. Editing by Philip Shea.