

1 Michael P. Kenny, Esq. (admitted *pro hac vice*)
mike.kenny@alston.com
2 Debra D. Bernstein, Esq. (admitted *pro hac vice*)
debra.bernstein@alston.com
3 Matthew D. Kent, Esq. (admitted *pro hac vice*)
matthew.kent@alston.com

4 **ALSTON & BIRD LLP**
5 1201 West Peachtree Street
Atlanta, Georgia 30309-3424
6 Tel: (404) 881-7000
7 Facsimile: (404) 881-7777

8 James M. Wagstaffe, Esq. (SBN 95535)
wagstaffe@kerrwagstaffe.com

9 **KERR & WAGSTAFFE LLP**
10 101 Mission Street, 18th Floor
San Francisco, California 94105-1576
Tel: (415) 371-8500
11 Facsimile: (415) 371-0500

12 *Attorneys for Plaintiffs Dell Inc. and Dell Products L.P.*
13 **[Additional Counsel Listed on Signature Page]**

14 **UNITED STATES DISTRICT COURT**
15 **NORTHERN DISTRICT OF CALIFORNIA**
16 **SAN FRANCISCO DIVISION**

17 In re: CATHODE RAY TUBE (CRT)
ANTITRUST LITIGATION

18 This Document Relates to:

19 *Electrograph Sys. v. Hitachi, Ltd.*, No. 11-cv-01656;

20 *Electrograph Sys., Inc. v. Technicolor SA*, No. 13-cv-
21 05724;

22 *Siegel v. Hitachi, Ltd.*, No. 11-cv-05502;

23 *Siegel v. Technicolor SA*, No. 13-cv-05261;

24 *Best Buy Co. v. Hitachi, Ltd.*, No. 11-cv-05513;

25 *Best Buy Co. v. Technicolor SA*, No. 13-cv-05264;

26 *Interbond Corp. of Am. v. Hitachi, Ltd.*, No. 11-cv-
27 06275;

Master File No. 3:07-cv-05944-SC/ MDL

MDL No. 1917

**PLAINTIFFS' OPPOSITION TO
KONINKLIJKE PHILIPS N.V.'S
MOTION FOR SUMMARY
JUDGMENT [MDL DKT. NO. 3040]**

Date: February 6, 2015
Time: 10:00 a.m.
Place: Courtroom 1, 17th Floor
Hon. Samuel Conti

[FILED UNDER SEAL]

1
2 *Interbond Corp. of Am. v. Technicolor SA.*, No. 13-cv-05727;

3 *Office Depot, Inc. v. Hitachi Ltd.*, No. 11-cv-06276;

4 *Office Depot, Inc. v. Technicolor SA*, No. 13-cv-5726

5 *CompuCom Sys., Inc. v. Hitachi, Ltd.*, No. 11-cv-06396;

6
7 *P.C. Richard & Son Long Island Corp. v. Hitachi, Ltd.*,
8 No. 12-cv-02648;

9 *P.C. Richard & Son Long Island Corp. v. Technicolor SA.*, No. 13-cv-05725;

10 *Schultze Agency Servs., LLC v. Hitachi, Ltd.*, No. 12-cv-02649;

11
12 *Schultze Agency Servs., LLC v. Technicolor SA.*, No. 13-
13 cv-05668;

14 *Tech Data Corp. v. Hitachi, Ltd.*, No. 13-cv-00157;

15 *Dell Inc. and Dell Products L.P., v. Hitachi, Ltd.*, No.
16 13-cv-02171;

17 *Sears, Roebuck and Co. and Kmart Corp. v. Technicolor SA*, No. 13-cv-05262;

18 *Sears, Roebuck and Co. and Kmart Corp. v. Chunghwa Picture Tubes, Ltd.*, No. 11-cv-05514;

19
20 *Sharp Elecs. Corp. v. Hitachi, Ltd.*, No. 13-cv-1173 SC;

21 *Sharp Elecs. Corp. v. Koninklijke Philips Elecs., N.V.*,
22 No. 13-cv-2776 SC;

23 *ViewSonic Corp. v. Chunghwa Picture Tubes, Ltd.*, No.
24 14-02510;

25 *All Indirect Purchaser Actions.*

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28 Fed. R. Civ. P. 56(a)13

1 **STATEMENT OF THE ISSUE PRESENTED**

2 Whether Defendant Koninklijke Philips N.V. (“Royal Philips”) carried its burden of
3 demonstrating that no genuine issue of material fact exists as to its participation in the conspiracy.

4 **INTRODUCTION**

5 [REDACTED]
6 [REDACTED]
7 [REDACTED], Royal Philips and its subsidiaries—Defendants Philips
8 Electronics North America Corporation (“PENAC”), Philips Taiwan Limited (“Philips Taiwan”), and
9 Philips do Brasil Ltda. (“Philips do Brasil”) (collectively “the Philips Subsidiaries”)—have filed
10 separate motions for summary judgment in an attempt to artificially isolate their operations.¹ By filing
11 separate motions, Philips apparently hopes to immunize itself from liability from June 2001 forward,
12 when it created a joint venture with another CRT conspirator—LGE—and formed LG Philips Display
13 (“LPD”), which continued to actively participate in the CRT conspiracy. Although both motions
14 should be denied, this Opposition addresses only Royal Philips’ Motion on its alleged lack of
15 participation in the CRT conspiracy.²

16 In its Motion, Royal Philips argues that it cannot be held liable because it is a passive holding
17 company completely removed from the operations of its subsidiaries. But the facts and law are to the
18 contrary. [REDACTED]

19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]

24 _____
25 ¹ Royal Philips and the Philips Subsidiaries are collectively referred to as “Philips” or the “Philips Defendants.”

26 ² In the interest of efficiency and minimizing the burden on the Court, Plaintiffs sought Philips’ consent
27 to file a single, consolidated opposition addressing both motions. Plaintiffs proposed limiting their
28 consolidated opposition to 35 pages—15 fewer pages than the combined 50 page limit if separate
oppositions were filed. Philips refused Plaintiffs’ request for tactical reasons. *See* MDL No. 3228.

1 [REDACTED]
2 [REDACTED] And two
3 tribunals—the European Commission (“EC”) and the Delaware Chancery Court—have already held
4 that Royal Philips was aware of the conspiracy activities of its CRT division. [REDACTED]

5 [REDACTED]
6 [REDACTED]
7 [REDACTED] Accordingly, a genuine
8 issue of material fact exists as to Royal Philips’ participation in the conspiracy.

9 **STATEMENT OF FACTS**

10 **I.** [REDACTED]
11 [REDACTED]

12 [REDACTED] Philips’ businesses included CRTs, as well as products containing CRTs like televisions
13 and computer monitors. [REDACTED]

14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]

19
20 ³ Royal Philips takes issue with references to “Philips.” [REDACTED]
21 [REDACTED]

22 Unless otherwise noted, all Exhibits cited are to the Declaration of Debra D. Bernstein in Support of
23 Plaintiffs’ Opposition to Koninklijke Philips N.V.’s Motion for Summary Judgment and Plaintiffs’
24 Oppositions to Philips Electronics North America Corporation’s, Philips Taiwan Limited’s, and Philips
do Brasil Ltda.’s Motion for Partial Summary Judgment.

25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

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[REDACTED]

A. Philips Display Components (PDC)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

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B. Philips Consumer Electronics (PCE)

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[REDACTED]

[REDACTED]

1 **III. Royal Philips Formed Super Conspirator LPD with Co-Conspirator LGE**

2 **A. The Formation, Structure, and Financing of LPD**

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

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20 [REDACTED]

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B. [Redacted]

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[REDACTED]

In holding Royal Philips liable for LPD’s participation in the CRT conspiracy, the EC highlighted the “decisive influence” Royal Philips had on LPD:

[T]he parent companies of [LPD] did not intend to create an independent company. [Royal Philips] and LGE as shareholders had influence on the most important decisions for the company that was jointly controlled by them. The joint venture was organised in such a way as to allow the shareholders to make the strategic commercial decisions, generate both strategic and operational plans, control the day-to-day management and ensure they were kept informed [T]he Supervisory Board’s role was more than just advisory and neutral. It entailed approving major management decisions and was setting the direction of

[REDACTED]

1 the company's business [Royal Philips] and LGE were in a position to and
2 did actually exert a decisive influence over [LPD's] commercial policy.⁶³

3 **C. Royal Philips and PCE Knew LPD Participated in the CRT Conspiracy and**
4 **Reached Price Agreements with Competitors**

5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]

19
20 ⁶³ *Vichi v. Koninklijke Philips Elecs., N.V.*, 85 A.3d 725, 752 (Del. Ch. 2014) (citing EC Decision at
21 ¶¶ 836-37.

22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]

[REDACTED]

ARGUMENT AND CITATION OF AUTHORITIES

The formal Philips corporate structure does not immunize the Philips Defendants from liability for their illegal price-fixing and/or information sharing activities.⁷³ [REDACTED]

[REDACTED]

[REDACTED] At the very least, a question of material fact exists as to Royal Philips’ participation in the CRT conspiracy. For these reasons and as detailed further below, the Court should deny Royal Philips’ Motion.

I. Legal Standard

Summary judgment is proper only “if [the Philips Defendants] show[] that there is no genuine dispute as to any material fact and [they are] entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The Philips Defendants have “both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment.” *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210

[REDACTED]

⁷³ The Sharp Plaintiffs also maintain that the Philips Defendants conspired to exchange competitively sensitive information which caused CRTs sold in the United States to be sold at anticompetitive levels, constituting a violation of antitrust law under a rule of reason analysis.

1 F.3d 1099, 1102 (9th Cir. 2000). As the Ninth Circuit has ruled, “[i]n order to carry [their] burden of
2 production, [the Philips Defendants] must either produce evidence negating an essential element of
3 [Plaintiffs’] claim or defense or show that [Plaintiffs do] not have enough evidence of an essential
4 element to carry [their] ultimate burden of persuasion at trial.” *Id.* Thus, “[i]n order to carry [their]
5 ultimate burden of persuasion on the motion, [the Philips Defendants] must persuade the [C]ourt that
6 there is no genuine issue of material fact.” *Id.* In determining whether a genuine issue of material fact
7 exists, the Court must view the evidence in the light most favorable to Plaintiffs and draw all justifiable
8 inferences in their favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

9 **II. Royal Philips’ Motion Should Be Denied Because Royal Philips Is Directly Liable For**
10 **Its Role in the CRT Conspiracy**

11 The Ninth Circuit has long recognized that “[p]articipation by each conspirator in every detail
12 in the execution of the conspiracy is unnecessary to establish liability, for each conspirator may be
13 performing different tasks to bring about the desired result.” *Beltz Travel Serv., Inc. v. Int’l Transp.*
14 *Ass’n*, 620 F.2d 1360, 1367 (9th Cir. 1980). Accordingly, Plaintiffs do not need to “show an explicit
15 agreement” between Royal Philips and the other Defendants to establish its liability for the conspiracy.
16 *Movie 1 & 2 v. United Artists Commcn’s, Inc.* 909 F.2d 1245, 1251-52 (9th Cir. 1990); *see In re High*
17 *Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 662 (7th Cir. 2002) (highlighting that plaintiff need
18 not present evidence “tantamount to an acknowledgement of guilt” and that trier of fact must consider
19 all evidence, including ambiguous statements). Nor do Plaintiffs have to prove that Royal Philips’
20 employees attended conspiracy meetings themselves.⁷⁴ In fact, Royal Philips’ employees “need not
21 know of the existence or identity of the other members of the conspiracy or the full extent of the

22 ⁷⁴ For example, the Northern District of California twice denied summary judgment where
23 circumstantial evidence linked a defendant to a conspiracy even though it did not attend the LCD
24 equivalent of Glass Meetings or reach explicit agreements on price or output. *See In re TFT-LCD (Flat*
25 *Panel) Antitrust Litig.*, MDL No. 1827, 2012 WL 4808425, at *1-2 (N.D. Cal. Oct. 9, 2012); *In re TFT-*
26 *LCD (Flat Panel) Antitrust Litig.*, MDL No. 1827, 2012 WL 5383197, at *1 (N.D. Cal. Sept. 22,
27 2012); *see also Precision Assocs., Inc. v. Panalpina World Transp., (Holding) Ltd.*, No. 08-cv-42, 2013
28 WL 6481195, at *16 (E.D.N.Y. Sept. 20, 2013) (“[A]lthough certain employees of certain affiliates
were in actual attendance at the meetings, this does not preclude the inference that they acted on behalf
of and engaged the knowing assistance of their corporate families.”) (adopted 2014 WL 298594
(E.D.N.Y. Jan. 28, 2014)).

1 conspiracy” to be held liable. *In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103, 1118 (N.D.
2 Cal. 2012). Instead, Plaintiffs can prove Royal Philips’ liability based solely on circumstantial
3 evidence if they “provide specific evidence tending to show that [Royal Philips] was not engaging in
4 permissible competitive behavior.” *In re Citric Acid Litig.*, 191 F.3d 1090, 1094 (9th Cir. 1999). This
5 inquiry is highly fact-intensive. See *United States v. Murphy*, 937 F.2d 1032, 1039 (6th Cir. 1991).

6 At the summary judgment stage, Plaintiffs need only create a genuine issue of material fact as
7 to whether Royal Philips participated in the conspiracy or “*control[led], direct[ed], or encourage[d]*
8 [its] subsidiary’s anticompetitive conduct.” *Nobody in Particular Presents, Inc. v. Clear Channel*
9 *Comm’n’s, Inc.* (“*NIPP*”), 311 F. Supp. 2d 1048, 1070 (D. Colo. 2004) (emphasis added); see
10 *BanxCorp v. Apax Partners, L.P.*, No. 10-cv-4769, 2011 WL 1253892, at *4 (D.N.J. Mar. 28, 2011)
11 (endorsing rule that when a parent company “controls, directs, or encourages” its subsidiary’s
12 anticompetitive conduct, the parent company is directly liable). If a parent company directs, controls,
13 or encourages its subsidiary’s conduct, then it has “engage[d] in sufficient independent conduct to be
14 held directly liable.” *NIPP*, 311 F. Supp. 2d at 1070.⁷⁵ [REDACTED]
15 [REDACTED] *Id.* at 1068-70 (rejecting
16 argument that, because “holding company” was “not a seller, supplier, participant, or competitor,” it
17 could not be held directly liable for controlling, directing, and/or encouraging subsidiary’s
18 misconduct). After all, it is “counterintuitive” to allow Royal Philips to “escape antitrust liability by
19 hiding behind its separate incorporation.” *Id.* at 1069.

20 A. [REDACTED]
21 [REDACTED]

22 As detailed below, Plaintiffs have provided more than sufficient evidence to create a genuine
23 issue of material fact as to Royal Philips’ participation in the conspiracy [REDACTED]
24 [REDACTED]

25 ⁷⁵ The Court has already recognized the applicability of this rule. At the motion to dismiss stage, it
26 held that Plaintiffs plausibly alleged that each Philips Defendant participated in the conspiracy by
27 alleging that Royal Philips “dominated and controlled the finances, policies, and affairs” of the Philips
28 Subsidiaries. *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 738 F. Supp. 2d 1011, 1021 (N.D. Cal.
2010).

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I. [REDACTED]

Royal Philips was not, as it suggests in its Motion, a holding company with a passive investment in its CRT business. [REDACTED]

[REDACTED]

[REDACTED]

⁷⁹ See *supra* notes 14-15.

⁸⁰ See *id.*

[REDACTED]

⁸² See Statement of Facts (“SOF”) at Section II.

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]

5 At the very least, construing the facts in the light most favorable to Plaintiffs, a reasonable jury
6 could conclude that Royal Philips participated, controlled, and/or directed the CRT conspiracy [REDACTED]
7 [REDACTED]. See *NIPP*, 311 F. Supp. 2d at 1071 (holding parent liable for anticompetitive
8 conduct occurring at the subsidiary level in part because it “direct[ed] and control[led] the policies and
9 behavior of its subsidiaries” and “operate[d] its subsidiaries as divisions of the company, with each
10 division, such as entertainment and radio, reporting up to [the parent company]”). These facts alone,
11 [REDACTED],
12 are sufficient to create a question of fact as to whether Royal Philips participated in the conspiracy
13 [REDACTED].

14 2. [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]

23 ⁸³ See *id.*
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]

27 ⁸⁶ See SOF at Section II.

28 ⁸⁷ See *id.*

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED] At

11 the very least, it creates a genuine issue of material fact sufficient to survive Royal Philips' Motion.⁹²

12 3. *Royal Philips Formed LPD with Co-Conspirator LGE*

13 Royal Philips also knowingly participated in the CRT conspiracy by joining with co-
14 conspirator LGE to form LPD. [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]

19 ⁸⁸ *See id.*
20 [REDACTED]
21 ⁹⁰ *See* SOF at Section II.
21 ⁹¹ *See* SOF at Section II.
22 ⁹² Plaintiffs do not need to present a “smoking gun” document where [REDACTED] makes statements
23 “tantamount to an acknowledgment of guilt” in order to tie him to the conspiracy. *In re High Fructose*
24 *Corn Syrup*, 295 F.3d at 661. [REDACTED]
25 [REDACTED]
26 [REDACTED]

27 ⁹³ *See* SOF at Section III.C.
28 ⁹⁴ *See id.* at III.B.

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
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20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]

⁹⁹ See SOF at Section III.

¹⁰⁰ See *supra* note 32.

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[REDACTED]

Royal Philips cannot diminish the importance of this document.

[REDACTED]

Accordingly, this document, in conjunction with other circumstantial evidence, creates a genuine issue

[REDACTED]

¹⁰⁴ See SOF at Section III.B; [REDACTED]

¹⁰⁵ See *supra* notes 56-58.

[REDACTED]

1 of material fact as to Royal Philips’ knowledge and participation in the CRT conspiracy. *See In re*
2 *High Fructose Corn Syrup*, 295 F.3d at 662 (highlighting that even “ambiguous statements” should not
3 be disregarded because “most [conspiracy] cases are constructed out of a tissue of such statements and
4 other circumstantial evidence, since an outright confession will ordinarily obviate the need for trial”).

5 ***B. Two Independent Tribunals Have Held that Royal Philips Was Aware of the***
6 ***Conspiracy***

7 Based on this evidence of Royal Philips’ role in the CRT conspiracy, two independent tribunals
8 concluded that Royal Philips knew about the conspiracy. After investigating the CRT conspiracy in
9 Europe, the EC held Royal Philips liable for its involvement in the conspiracy for both the period
10 before and after the formation of LPD.¹⁰⁸ Moreover, the Delaware Chancery Court in *Vichi* conducted
11 an independent analysis and concluded that there was “sufficient admissible evidence in the record to
12 support a reasonable inference that [Royal Philips] was aware of LPD’s and its other subsidiaries’
13 participation in an illegal price fixing cartel.”¹⁰⁹ The *Vichi* court found the following to be “persuasive
14 circumstantial evidence that [Royal Philips] was aware of its subsidiaries’ involvement in a CRT price
15 fixing cartel”: (1) the continuity of involvement, both in terms of entities and individuals, before and
16 after the formation of LPD; (2) Royal Philips’ formation of LPD with LGE, another price fixer; and (3)
17 Mr. Chang’s role as “chairman of the cartel for two years” and his subsequent appointment by Royal
18 Philips to LPD’s Supervisory Board.¹¹⁰ [REDACTED]

19 [REDACTED]

20 ***C. The Cases Royal Philips Relies Upon Are Inapposite to the Facts Here***

21 The cases cited by Royal Philips cannot save its Motion. Those cases address the situation
22 where, in response to a motion for summary judgment, a plaintiff fails to differentiate between various
23 corporate entities.¹¹¹ But, in response to Royal Philips’ Motion, Plaintiffs do not, as Royal Philips

24 ¹⁰⁸ *See Vichi*, 85 A.3d at 735.

25 ¹⁰⁹ *Id.* at 810.

26 ¹¹⁰ *Id.* at 810-11.

27 ¹¹¹ *See Sun Microsystems, Inc. v. Hynix Semiconductor Inc.*, 608 F. Supp. 2d 1166, 1194 (N.D. Cal. 2009)
(granting summary judgment because plaintiff could not “preliminarily tell the court which entity is
28 responsible for which communication or act); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 07-cv-
1827, 2014 WL 4827378 (N.D. Cal. Sept. 4, 2014) (same).

1 speculated, attempt to “blur” the corporate lines between the Philips’ entities. [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 Royal Philips’ reliance on *In re Publication Paper Antitrust Litigation* is similarly misplaced

6 because the plaintiff there did not offer any evidence tying the European parent-defendant to the U.S.-

7 only conspiracy. 690 F.3d 51, 69 (2d Cir. 2012). Instead, the only evidence the plaintiff offered related

8 to the parent was a single European meeting with no ties to the U.S. conspiracy. *Id.* By contrast, here,

9 there is ample circumstantial evidence from which a reasonable jury could infer that Royal Philips

10 participated in the overarching, international CRT conspiracy or, at the very least, controlled, directed,

11 or encouraged its subsidiaries’ participation in the conspiracy.¹¹³

12 Finally, Royal Philips’ argument regarding Dutch law on piercing the corporate veil is wholly

13 inapposite as Plaintiffs do not argue that Royal Philips is vicariously liable for LPD’s participation in

14 the conspiracy under a piercing the corporate veil theory.

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED] The acts of a parent’s agents may be attributable to the parent even if those agents are

20 employed by a subsidiary. *See United States v. Bestfoods*, 524 U.S. 51, 65 (1998); *Sun Microsystems, Inc.*

21

22

23 ¹¹² See SOF at Section I.

24 ¹¹³ *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2012 WL 5383197, at *1 (denying motion for summary

25 judgment despite no direct evidence of exchanges between defendant and any competitor regarding

26 LCD pricing information); *NIPP*, 311 F. Supp. 2d at 1070 (holding that when “parent controls, directs,

27 or encourages the subsidiary’s anticompetitive conduct, the parent engages in sufficient independent

28 conduct to be held directly liable”).

1 *v. Hynix Semiconductor Inc.*, 622 F. Supp. 2d 890, 897-901 (N.D. Cal. 2009).¹¹⁵ “Where one
2 corporation is controlled by another, the former acts not for itself but as directed by the latter, the same
3 as an agent, and the principal is liable for acts of its agents within the scope of the agent’s authority.”
4 *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1238 (N.D. Cal. 2004) (quoting *Pacific Can*
5 *Co. v. Hewes*, 95 F.2d 42, 45-46 (9th Cir. 1938)). This rule applies to antitrust conspiracy cases. *See E*
6 *& J Gallo Winery v. EnCana Energy Servs.*, No. 03-cv-5412, 2008 WL 2220396, at *5 (E.D. Cal. May
7 27, 2008); *Sun Microsystems.*, 622 F. Supp. 2d at 900-01; *cf. Am. Soc. of Mech. Eng’rs, Inc. v. Hydrolevel*
8 *Corp.*, 456 U.S. 556, 577-78 (1982) (applying agency theory to establish antitrust liability because
9 holding the principal liable for agents ensures that principals “will act with care when they permit their
10 agents to speak for them”). And, unlike veil-piercing vicarious liability, “agency liability does not
11 require the court to disregard the corporate form.” *Bowoto*, 312 F. Supp. 2d at 1238.

12 To establish an agency relationship between [REDACTED], Plaintiffs need only
13 satisfy the following elements: “(1) there must be a manifestation by the principal that the agent shall
14 act for him; (2) the agent must accept the undertaking; and (3) there must be an understanding between
15 the parties that the principal is to be in control of the undertaking.” *Id.* at 1239 (internal quotation
16 omitted).¹¹⁶ This inquiry “is normally a question of fact.” *Id.* at 1241. And it “involves a fact-
17 intensive inquiry into the extent to which the parent exercises control over the activities of the
18 subsidiary.” *E & J Gallo*, 2008 WL 2220396, at *10.¹¹⁷ If [REDACTED] “can legitimately be described as only
19 a means through which the parent acts, *or nothing more than an incorporated department of [Royal*
20

21 ¹¹⁵ Federal common law controls the agency test as it is applied to Sherman Act claims. *Sun Microsystems.*,
22 622 F. Supp. 2d at 899. Tellingly, in contrast to its position on piercing the corporate veil with respect
23 to LPD, Philips concedes application of U.S. law to this issue by citing U.S. law in its Motion. *See*
24 *Royal Philips’ Mot.* at 12.

25 ¹¹⁶ This traditional common law agency test, as opposed to the personal jurisdiction “representative
26 services” test, applies for purposes of determining antitrust liability. *See Sun Microsystems.*, 622 F. Supp.
27 2d at 898. Thus, the Ninth Circuit’s application of the representative services test to a holding
28 company in *Doe v. Unocal Corp.*, 248 F.3d 915 (9th Cir. 2001), is inapposite, as is *Unocal’s* progeny.

¹¹⁷ *See Sun Microsystems.*, 622 F. Supp. 2d at 901 (“[I]t is impossible for the court to conclude with
certainty that all facts presented here cut decisively against a finding of agency as a matter of law. It is
the trier of fact who must resolve the underlying questions of fact . . . so that a conclusion of law as to
agency may be made.”).

1 *Philips]*, the subsidiary will be deemed to be the agent of the parent.” *Agricola Baja Best, S. De. R.L.*
2 *de C.V. v. Harris Moran Seed Co.*, No. 11-cv-2482, 2014 WL 4385450, at *5 (S.D. Cal. Sept. 3, 2014)
3 (emphasis added) (internal quotation omitted).

4 Here, there is, at least, a factual dispute as to whether [REDACTED]

5 [REDACTED]. *See Agricola*, 2014 WL 4385450, at *5. [REDACTED]

6 [REDACTED]
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15 [REDACTED]
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23 ¹¹⁸ See SOF at Section I.

24 ¹¹⁹ See *id.*

25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 [REDACTED]
2 [REDACTED]
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5 [REDACTED] *See Agricola,*

6 2014 WL 4385450, at *5 (finding issue of material fact as to whether subsidiary existed so parent
7 could operate in Mexico, despite the fact that parent did not control prices or customers to whom the
8 subsidiary sold its products); *Sun Microsystems*, 622 F. Supp. 2d at 901 (denying summary judgment
9 because of issues of fact regarding extent subsidiary operated on behalf of parent); *Dong AH Tire &*
10 *Rubber Co. v. Glasforms, Inc.*, No. 06-cv-3359, 2009 WL 975817, at *8 (N.D. Cal. Apr. 10, 2009)
11 (finding triable issue of fact on agency where parent and subsidiary shared logo and subsidiary had no
12 independent website); *Bowoto*, 312 F. Supp. 2d at 1244 (denying summary judgment after considering
13 various factors, including that “defendant functioned as a multi-national corporation in which [the
14 subsidiary] played a significant role”). Accordingly, Royal Philips’ Motion should be denied.

15 **CONCLUSION**

16 For the reasons set forth above, the Court should deny Royal Philips’ Motion for Summary
17 Judgment.

18 [REDACTED]
19 [REDACTED]
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1
2 /s/ Debra D. Bernstein

3 Michael P. Kenny (admitted *pro hac vice*)
4 Debra D. Bernstein (admitted *pro hac vice*)
5 Matthew D. Kent (admitted *pro hac vice*)
6 Elizabeth Helmer (admitted *pro hac vice*)
7 ALSTON & BIRD LLP
8 1201 West Peachtree Street
9 Atlanta, Georgia 30309-3424
10 Telephone: (404)-881-7000
11 Facsimile: (404)-881-7777
12 Email: mike.kenny@alston.com
13 debra.bernstein@alston.com
14 matthew.kent@alston.com
15 elizabeth.helmer@alston.com

16 James M. Wagstaffe, Esq. (SBN 95535)
17 KERR & WAGSTAFFE LLP
18 101 Mission Street, 18th Floor
19 San Francisco, California 94105-1576
20 Telephone: (415)-371-8500
21 Facsimile: (415)371-0500
22 Email: wagstaffe@kerrwagstaffe.com

23 *Counsel For Plaintiffs Dell Inc. and Dell Products L.P.*

24 /s/ Philip J. Iovieno

25 Philip J. Iovieno
26 Anne M. Nardacci
27 BOIES, SCHILLER & FLEXNER LLP
28 30 South Pearl Street, 11th Floor
Albany, NY 12207
Telephone: (518) 434-0600
Facsimile: (518) 434-0665
Email: piovieno@bsflp.com
anardacci@bsflp.com

William A. Isaacson
BOIES, SCHILLER & FLEXNER LLP
5301 Wisconsin Ave. NW, Suite 800
Washington, D.C. 20015
Telephone: (202) 237-2727
Facsimile: (202) 237-6131
Email: wisaacson@bsflp.com

Stuart Singer
BOIES, SCHILLER & FLEXNER LLP
401 East Las Olas Blvd., Suite 1200

1 Fort Lauderdale, FL 33301
2 Telephone: (954) 356-0011
3 Facsimile: (954) 356-0022
4 Email: ssinger@bsfllp.com

5 *Liaison Counsel for Direct Action Plaintiffs and*
6 *Attorneys for Plaintiffs Electrograph Systems, Inc.,*
7 *Electrograph Technologies, Corp., Office Depot, Inc.,*
8 *Compucom Systems, Inc., Interbond Corporation of*
9 *America, P.C. Richard & Son Long Island Corporation,*
10 *MARTA Cooperative of America, Inc., ABC Appliance,*
11 *Inc., Schultze Agency Services LLC on behalf of*
12 *Tweeter Opco, LLC and Tweeter Newco, LLC, and*
13 *Tech Data Corporation and Tech Data Product*
14 *Management, Inc.*

15 */s/ Robert W. Turken* _____

16 Robert W. Turken
17 Scott N. Wagner
18 Mitchell E. Widom
19 BILZIN SUMBERG MAENA PRICE & AXELROD
20 LLP
21 1450 Brickell Ave, Suite 2300
22 Miami, FL 33131-3456
23 Tel: 305-374-7580
24 Fax: 305-374-7593
25 Email: rturken@bilzin.com
26 swagner@bilzin.com
27 mwidom@bilzin.com

28 *Counsel for Plaintiffs Tech Data Corporation and Tech*
Data Product Management, Inc.

/s/ Roman M. Silberfeld _____

Roman M. Silberfeld
Bernice Conn
David Martinez
Jill S. Casselman
ROBINS, KAPLAN, MILLER & CIRESI L.L.P.
2049 Century Park East, Suite 3400
Los Angeles, CA 90067-3208
Telephone: (310) 552-0130
Facsimile: (310) 229-5800
Email: rmsilberfeld@rkmc.com
dmartinez@rkmc.com
jscasselman@rkmc.com

Elliot S. Kaplan
K. Craig Wildfang

1 Laura E. Nelson
2 ROBINS, KAPLAN, MILLER & CIRESI L.L.P.
3 800 LaSalle Avenue
4 2800 LaSalle Plaza
5 Minneapolis, MN 55402
6 Telephone: (612) 349-8500
7 Facsimile: (612) 339-4181
8 Email: eskaplan@rkmc.com
9 kcwildfang@rkmc.com
10 lenelson@rkmc.com

11 *Counsel For Plaintiffs Best Buy Co., Inc., Best Buy*
12 *Purchasing LLC, Best Buy Enterprise Services, Inc.,*
13 *Best Buy Stores, L.P., Bestbuy.com, L.L.C., and*
14 *Magnolia Hi-Fi, Inc.*

15 /s/ David J. Burman

16 David J. Burman (*pro hac vice*)
17 Cori G. Moore (*pro hac vice*)
18 Eric J. Weiss (*pro hac vice*)
19 Nicholas H. Hesterberg (*pro hac vice*)
20 Steven D. Merriman (*pro hac vice*)
21 PERKINS COIE LLP
22 1201 Third Avenue, Suite 4900
23 Seattle, WA 98101-3099
24 Telephone: (206)359-8000
25 Facsimile: (206)359-9000
26 Email: DBurman@perkinscoie.com
27 CGMoore@perkinscoie.com
28 EWeiss@perkinscoie.com
NHesterberg@perkinscoie.com
SMerriman@perkinscoie.com

Joren Bass, Bar No. 208143
PERKINS COIE LLP
Four Embarcadero Center, Suite 2400
San Francisco, CA 94111-4131
Telephone: (415)344-7120
Facsimile: (415)344-7320
Email: JBass@perkinscoie.com

Counsel for Plaintiff Costco Wholesale Corporation

23 /s/ Richard Alan Arnold

24 Richard Alan Arnold (*pro hac vice*)
25 William J. Blechman (*pro hac vice*)
26 Kevin J. Murray (*pro hac vice*)
27 KENNY NACHWALTER, P.A.
28 201 S. Biscayne Blvd., Suite 1100
Miami, FL 33131
Tel: 305-373-1000

1 Fax: 305-372-1861
2 Email: rarnold@knpa.com
3 wblechman@knpa.com
4 kmurray@knpa.com

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
*Counsel for Plaintiff Sears, Roebuck and Co. and
Kmart Corp.*

/s/ Kenneth S. Marks

Kenneth S. Marks
Jonathan J. Ross
Johnny W. Carter
David M. Peterson
SUSMAN GODFREY L.L.P.
1000 Louisiana Street, Suite 5100
Houston, Texas 77002
Telephone: (713) 651-9366
Facsimile: (713) 654-6666
Email: kmarks@susmangodfrey.com
jross@susmangodfrey.com
jcarter@susmangodfrey.com
dpeterson@susmangodfrey.com

Parker C. Folse III
Rachel S. Black
Jordan Connors
SUSMAN GODFREY L.L.P.
1201 Third Avenue, Suite 3800
Seattle, Washington 98101-3000
Telephone: (206) 516-3880
Facsimile: (206) 516-3883
Email: pfolse@susmangodfrey.com
rblack@susmangodfrey.com
jconnors@susmangodfrey.com

*Counsel for Plaintiff Alfred H. Siegel, as Trustee of the
Circuit City Stores, Inc. Liquidating Trust*

/s/ Jason C. Murray

Jason C. Murray (CA Bar No. 169806)
CROWELL & MORING LLP
515 South Flower St., 40th Floor
Los Angeles, CA 90071
Telephone: 213-443-5582
Facsimile: 213-622-2690

1 Email: jmurray@crowell.com

2 Jerome A. Murphy (*pro hac vice*)
3 Astor H.L. Heaven (*pro hac vice*)
4 CROWELL & MORING LLP
5 1001 Pennsylvania Avenue, N.W.
6 Washington, D.C. 20004
7 Telephone: 202-624-2500
8 Facsimile: 202-628-5116
9 E-mail: jmurphy@crowell.com
10 aheaven@crowell.com

11 *Counsel for Target Corp. and ViewSonic Corp.*

12 /s/ Kenneth A. Gallo

13 Kenneth A. Gallo (*pro hac vice*)
14 Joseph J. Simons (*pro hac vice*)
15 Craig A. Benson (*pro hac vice*)
16 PAUL, WEISS, RIFKIND, WHARTON &
17 GARRISON LLP
18 2001 K Street, N.W.
19 Washington, DC 2006-1047
20 Telephone: 202-223-7300
21 Facsimile: 202-223-7420
22 Email: kgallo@paulweiss.com
23 jsimons@paulweiss.com
24 cbenson@paulweiss.com

25 *Counsel for Sharp Electronics Corporation; Sharp
26 Electronics Manufacturing Company of America, Inc.*

27 /s/ Mario N. Alioto

28 Mario N. Alioto
Lauren C. Russell
TRUMP, ALIOTO, TRUMP & PRESSCOTT LLP
2280 Union Street
San Francisco, CA 94123
Telephone: 415-563-7200
Facsimile: 415-346-0679
Email: malioto@tatp.com
lauren russell@tatp.com

Lead Counsel for Indirect Purchaser Plaintiffs