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16		Master File No. 3:07-cv-05944-SC/ MDL
17	In re: CATHODE RAY TUBE (CRT)	MDL No. 1917
	ANTITRUST LITIGATION	PLAINTIFFS' OPPOSITION TO
18	This Document Relates to:	KONINKLIJKE PHILIPS N.V.'S
19	Electrograph Sys. v. Hitachi, Ltd., No. 11-cv-01656;	MOTION FOR SUMMARY JUDGMENT [MDL DKT. NO. 3040]
20	Electrograph Sys., Inc. v. Technicolor SA, No. 13-cv-	Date: February 6, 2015
21	05724;	Time: 10:00 a.m. Place: Courtroom 1, 17 <sup>th</sup> Floor
22	Siegel v. Hitachi, Ltd., No. 11-cv-05502;	Hon. Samuel Conti
23	steget v. Ittaerii, Etai, 1 (ö. 11 e v össöz,	
	Siegel v. Technicolor SA, No. 13-cv-05261;	[FILED UNDER SEAL]
24	Siegel v. Technicolor SA, No. 13-cv-05261;	[FILED UNDER SEAL]
24 25		[FILED UNDER SEAL]
	Siegel v. Technicolor SA, No. 13-cv-05261;	[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;
5	Office Depot, Inc. v. Technicolor SA, No. 13-cv-5726
6	CompuCom Sys., Inc. v. Hitachi, Ltd., No. 11-cv-06396;
7	P.C. Richard & Son Long Island Corp. v. Hitachi, Ltd., No. 12-cv-02648;
8 9	P.C. Richard & Son Long Island Corp. v. Technicolor SA., No. 13-cv-05725;
10 11	Schultze Agency Servs., LLC v. Hitachi, Ltd., No. 12-cv-02649;
12	Schultze Agency Servs., LLC v. Technicolor SA., No. 13-cv-05668;
13   14	Tech Data Corp. v. Hitachi, Ltd., No. 13-cv-00157;
15	Dell Inc. and Dell Products L.P., v. Hitachi, Ltd., No. 13-cv-02171;
16 17	Sears, Roebuck and Co. and Kmart Corp. v. Technicolor SA, No. 13-cv-05262;
18 19	Sears, Roebuck and Co. and Kmart Corp. v. Chunghwa Picture Tubes, Ltd., No. 11-cv-05514;
20	Sharp Elecs. Corp. v. Hitachi, Ltd., No. 13-cv-1173 SC;
21 22	Sharp Elecs. Corp. v. Koninklijke Philips Elecs., N.V., No. 13-cv-2776 SC;
23	ViewSonic Corp. v. Chunghwa Picture Tubes, Ltd., No. 14-02510;
24 25	All Indirect Purchaser Actions.

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#### STATEMENT OF THE ISSUE PRESENTED

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

#### INTRODUCTION

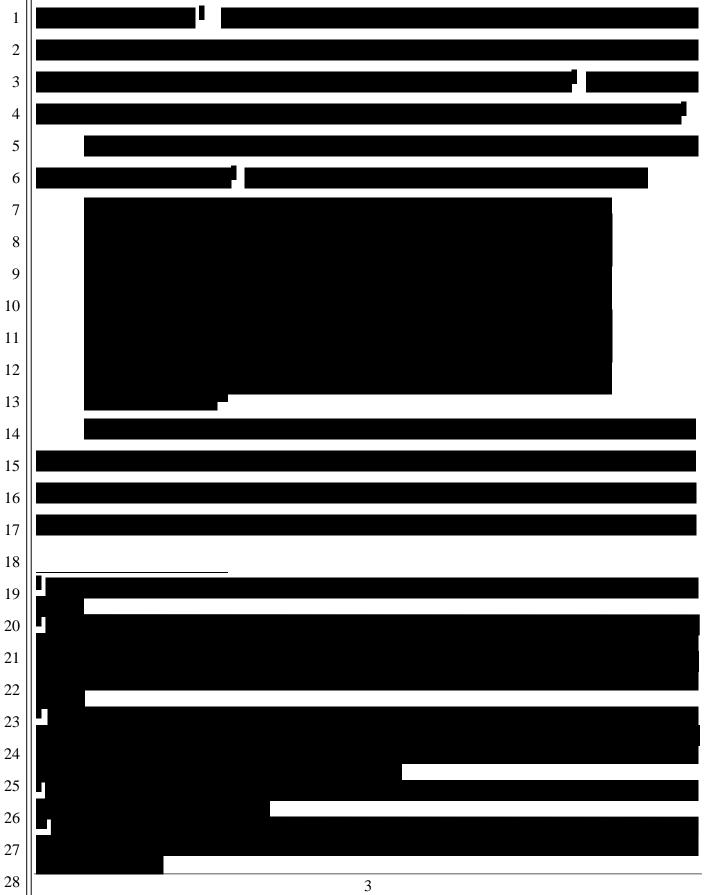
, Royal Philips and its subsidiaries—Defendants Philips
Electronics North America Corporation ("PENAC"), Philips Taiwan Limited ("Philips Taiwan"), and
Philips do Brasil Ltda. ("Philips do Brasil") (collectively "the Philips Subsidiaries")—have filed
separate motions for summary judgment in an attempt to artificially isolate their operations. <sup>1</sup> By filing
separate motions, Philips apparently hopes to immunize itself from liability from June 2001 forward,
when it created a joint venture with another CRT conspirator—LGE—and formed LG Philips Display
"LPD"), which continued to actively participate in the CRT conspiracy. Although both motions
should be denied, this Opposition addresses only Royal Philips' Motion on its alleged lack of
participation in the CRT conspiracy. <sup>2</sup>

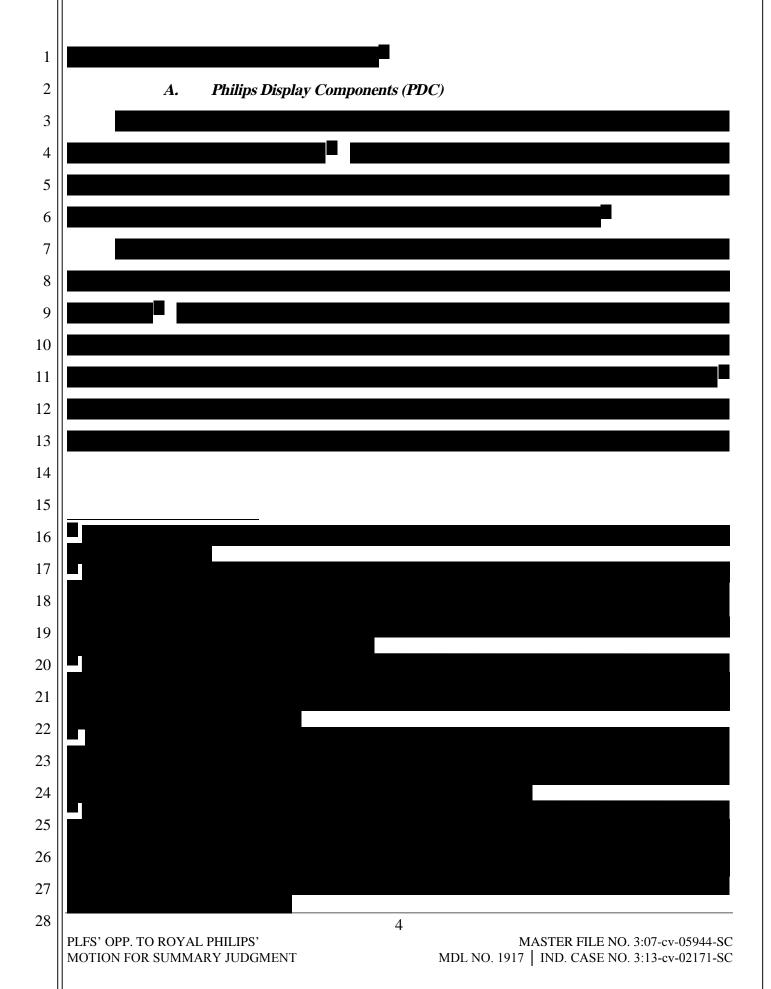
In its Motion, Royal Philips argues that it cannot be held liable because it is a passive holding company completely removed from the operations of its subsidiaries. But the facts and law are to the contrary.

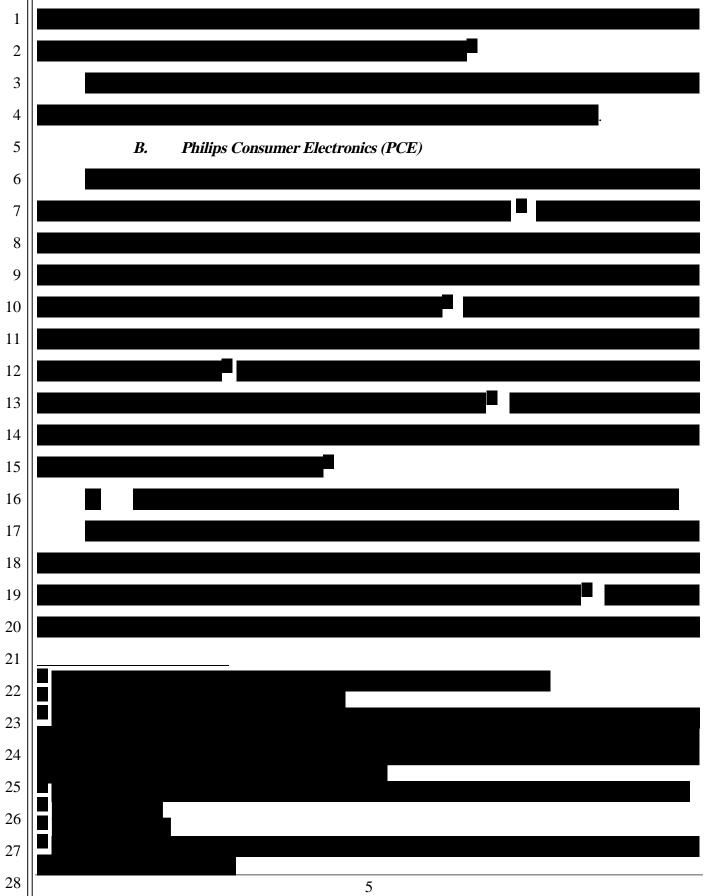
Royal Philips and the Philips Subsidiaries are collectively referred to as "Philips" or the "Philips Defendants."

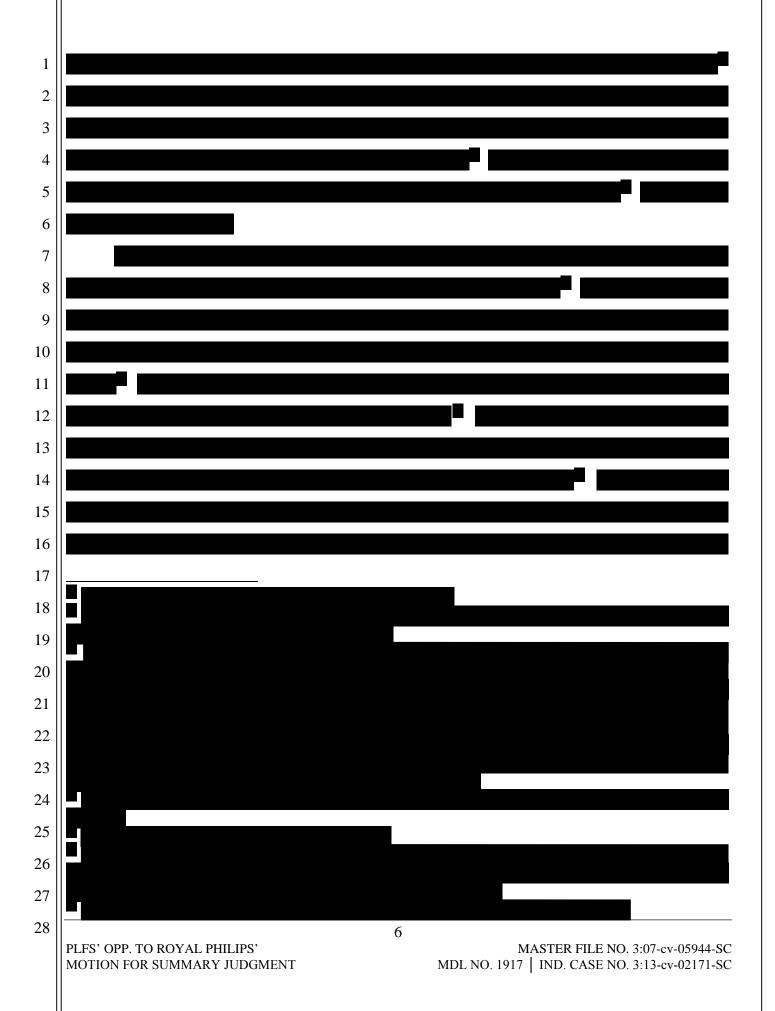
<sup>&</sup>lt;sup>2</sup> In the interest of efficiency and minimizing the burden on the Court, Plaintiffs sought Philips' consent to file a single, consolidated opposition addressing both motions. Plaintiffs proposed limiting their consolidated opposition to 35 pages—15 fewer pages than the combined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

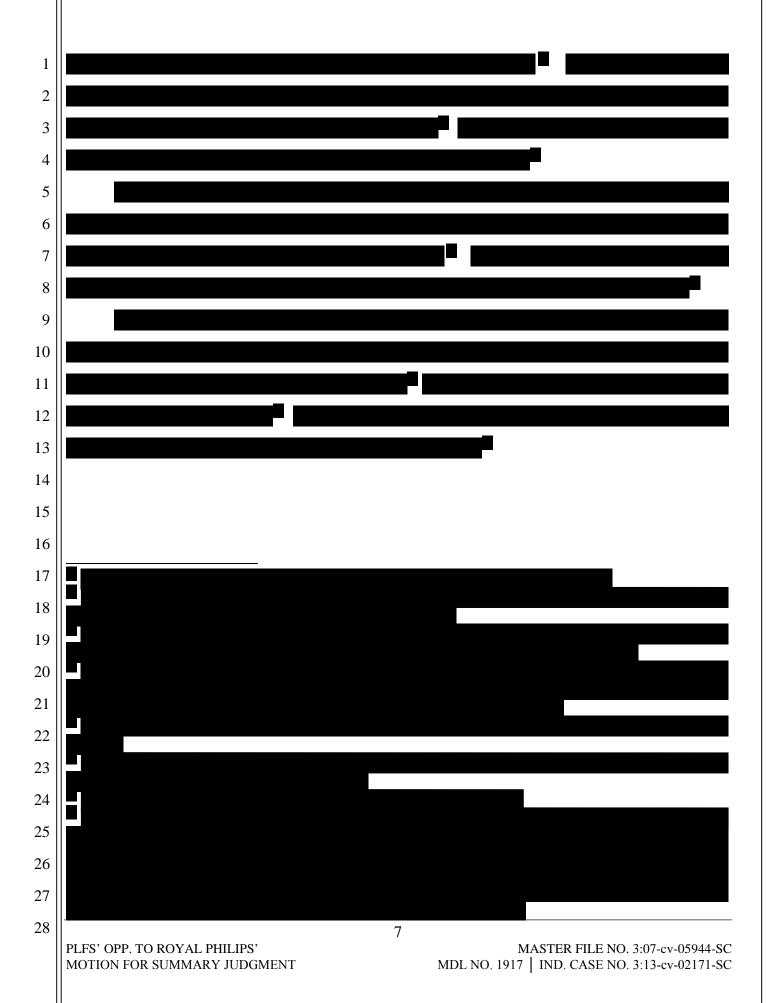
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2	And two
3	tribunals—the European Commission ("EC") and the Delaware Chancery Court—have already held
4	that Royal Philips was aware of the conspiracy activities of its CRT division.
5	
6	
7	Accordingly, a genuine
8	issue of material fact exists as to Royal Philips' participation in the conspiracy.
9	STATEMENT OF FACTS
10	I.
11	
12	Philips' businesses included CRTs, as well as products containing CRTs like televisions
13	and computer monitors.
14	and computer monitors.
15	
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20	Royal Philips takes issue with references to "Philips."
21	
22	Unless otherwise noted, all Exhibits cited are to the Declaration of Debra D. Bernstein in Support of Plaintiffs' Opposition to Koninklijke Philips N.V.'s Motion for Summary Judgment and Plaintiffs'
23	Oppositions to Philips Electronics North America Corporation's, Philips Taiwan Limited's, and Philips do Brasil Ltda.'s Motion for Partial Summary Judgment.
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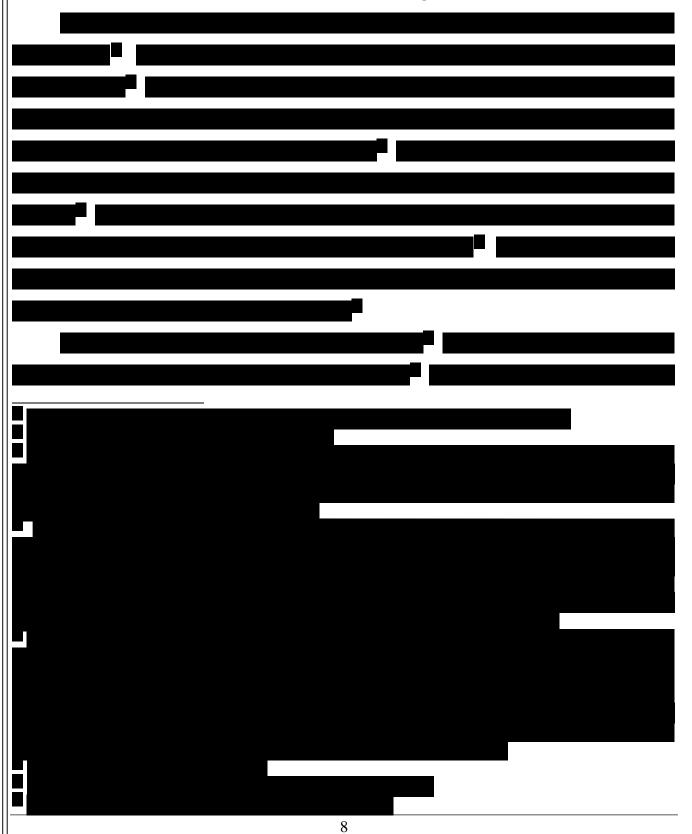


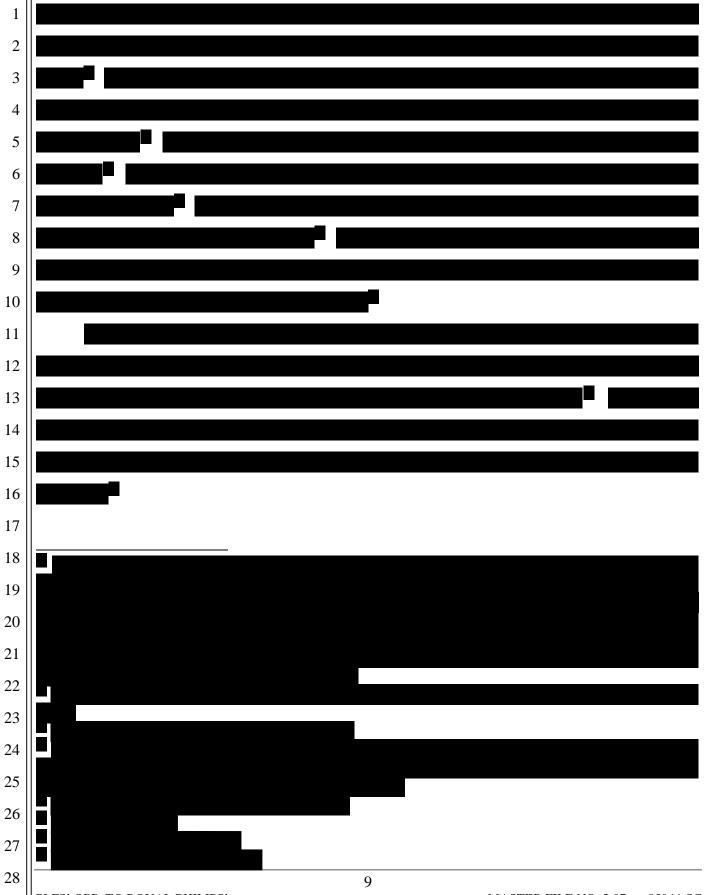


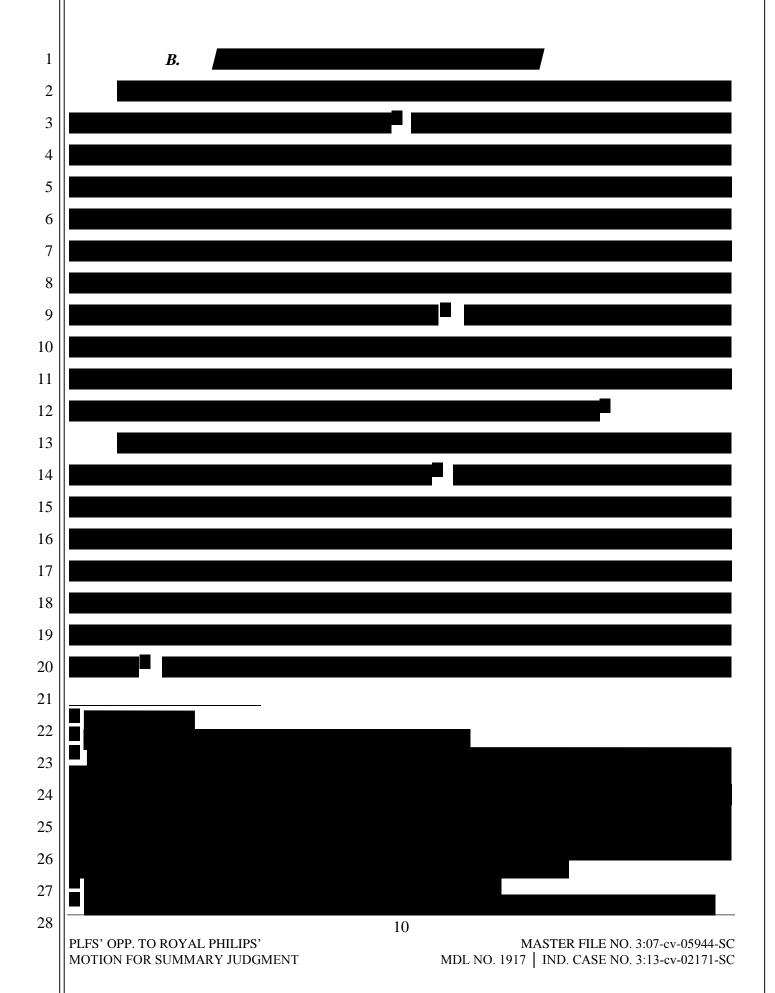


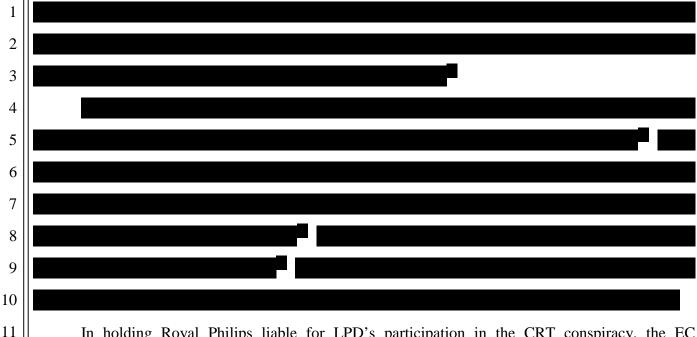
# III. Royal Philips Formed Super Conspirator LPD with Co-Conspirator LGE

A. The Formation, Structure, and Financing of LPD



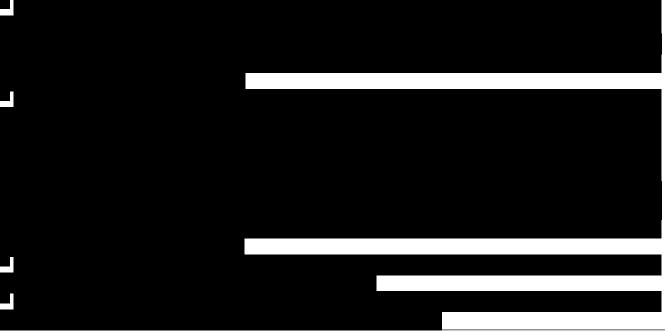






In holding Royal Philips liable for LPD's participation in the CRT conspiracy, the EC highlighted the "decisive influence" Royal Philips had on LPD:

[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



constituting a violation of antitrust law under a rule of reason analysis.

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

# II. Royal Philips' Motion Should Be Denied Because Royal Philips Is Directly Liable For Its Role in the CRT Conspiracy

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

For example, the Northern District of California twice denied summary judgment where circumstantial evidence linked a defendant to a conspiracy even though it did not attend the LCD equivalent of Glass Meetings or reach explicit agreements on price or output. *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, MDL No. 1827, 2012 WL 4808425, at \*1-2 (N.D. Cal. Oct. 9, 2012); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, MDL No. 1827, 2012 WL 5383197, at \*1 (N.D. Cal. Sept. 22, 2012); *see also Precision Assocs., Inc. v. Panalpina World Transp., (Holding) Ltd.*, No. 08-cv-42, 2013 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)).

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

At the summary judgment stage, Plaintiffs need only create a genuine issue of material fact as to whether Royal Philips participated in the conspiracy or "control[led], direct[ed], or encourage[d] [its] subsidiary's anticompetitive conduct." Nobody in Particular Presents, Inc. v. Clear Channel Commen's, Inc. ("NIPP"), 311 F. Supp. 2d 1048, 1070 (D. Colo. 2004) (emphasis added); see BanxCorp v. Apax Partners, L.P., No. 10-cv-4769, 2011 WL 1253892, at \*4 (D.N.J. Mar. 28, 2011) (endorsing rule that when a parent company "controls, directs, or encourages" its subsidiary's anticompetitive conduct, the parent company is directly liable). If a parent company directs, controls, or encourages its subsidiary's conduct, then it has "engage[d] in sufficient independent conduct to be held directly liable." NIPP, 311 F. Supp. 2d at 1070.

Id. at 1068-70 (rejecting argument that, because "holding company" was "not a seller, supplier, participant, or competitor," it could not be held directly liable for controlling, directing, and/or encouraging subsidiary's misconduct). After all, it is "counterintuitive" to allow Royal Philips to "escape antitrust liability by hiding behind its separate incorporation." *Id.* at 1069.

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As detailed below, Plaintiffs have provided more than sufficient evidence to create a genuine issue of material fact as to Royal Philips' participation in the conspiracy

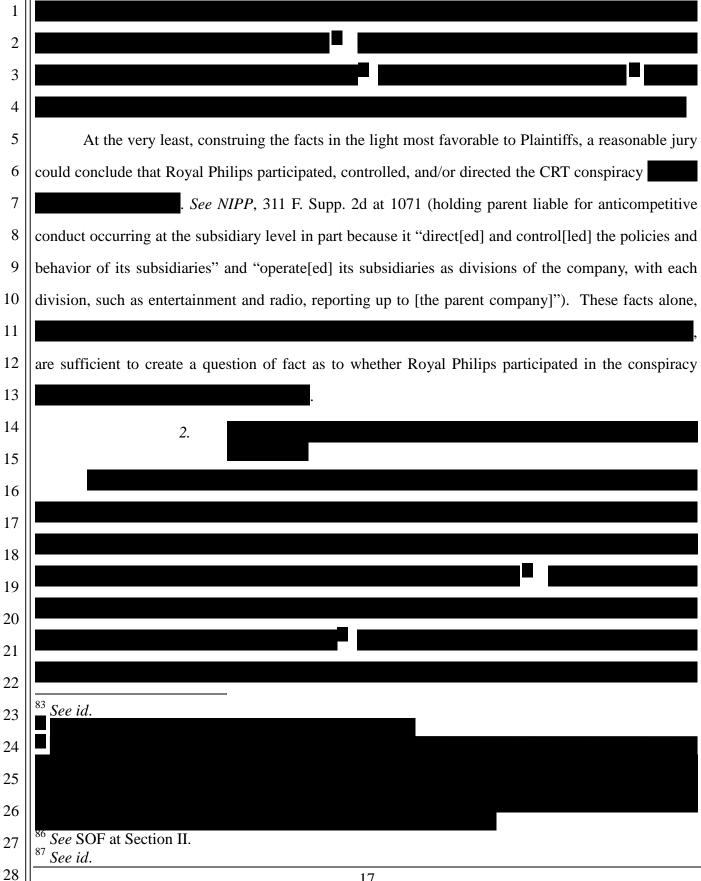
<sup>&</sup>lt;sup>75</sup> The Court has already recognized the applicability of this rule. At the motion to dismiss stage, it held that Plaintiffs plausibly alleged that each Philips Defendant participated in the conspiracy by alleging that Royal Philips "dominated and controlled the finances, policies,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

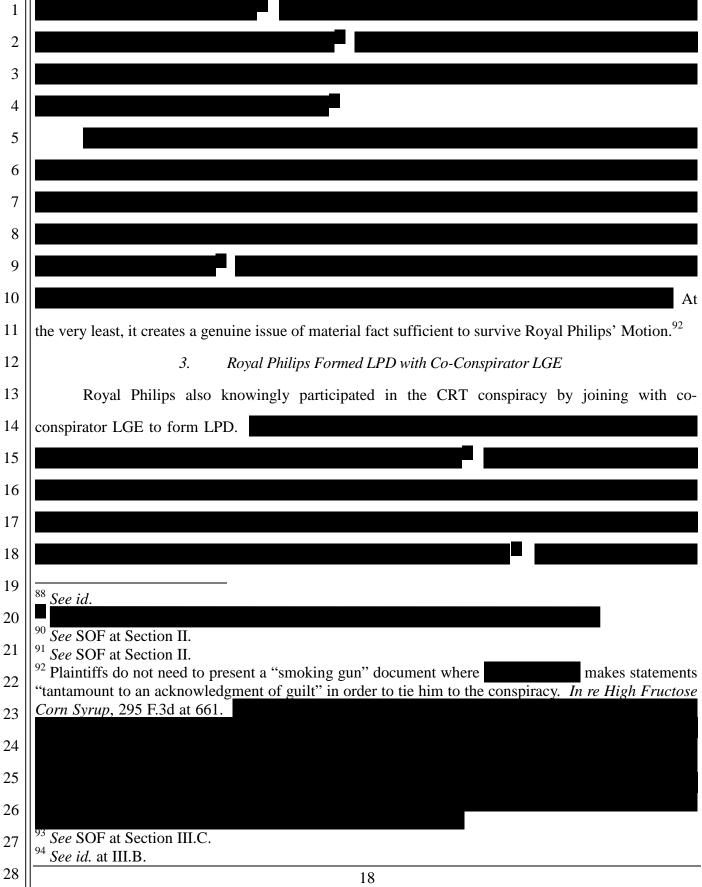
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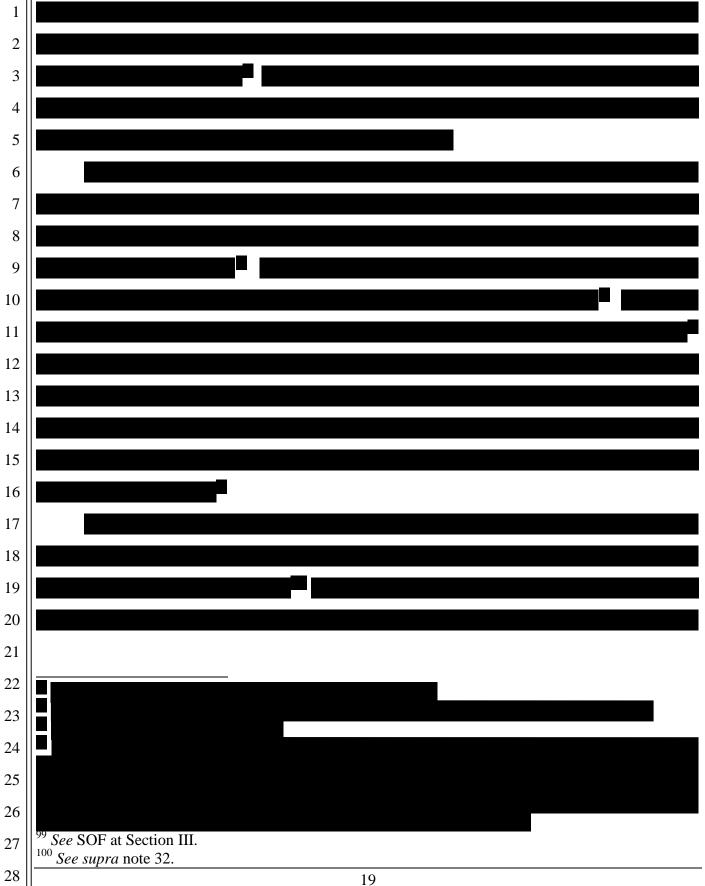
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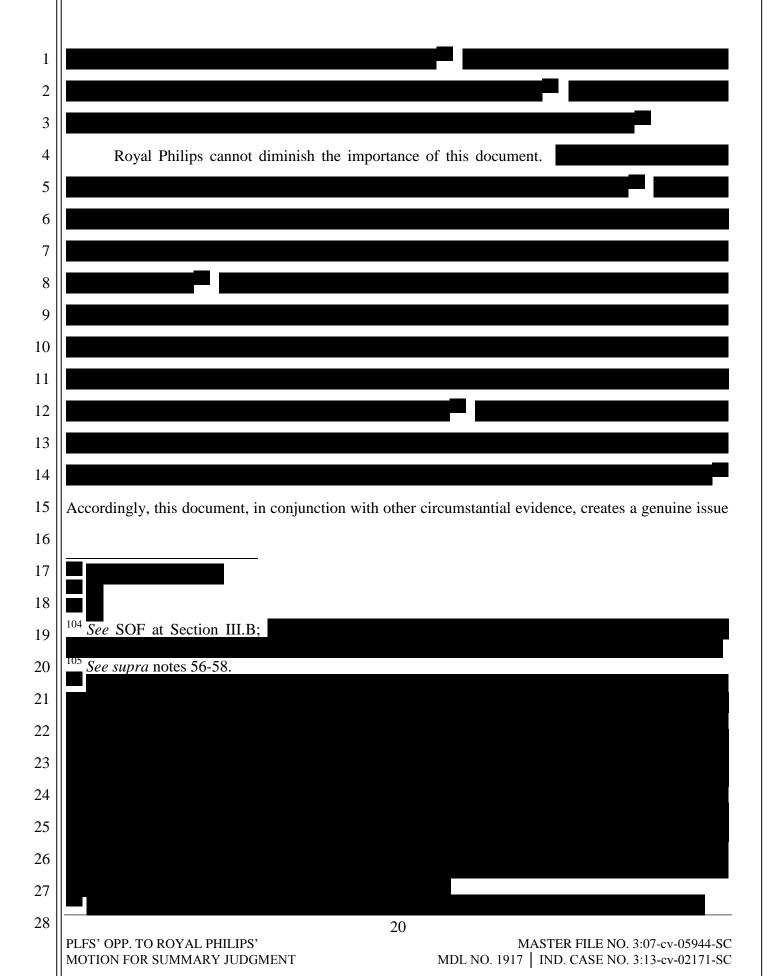
PLFS' OPP. TO ROYAL PHILIPS'

MOTION FOR SUMMARY JUDGMENT









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

# B. Two Independent Tribunals Have Held that Royal Philips Was Aware of the Conspiracy

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

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

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

<sup>&</sup>lt;sup>108</sup> See Vichi, 85 A.3d at 735.

*Id.* at 810.

<sup>&</sup>lt;sup>110</sup> *Id.* at 810-11.

<sup>&</sup>lt;sup>111</sup> See Sun Microsys. 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 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).

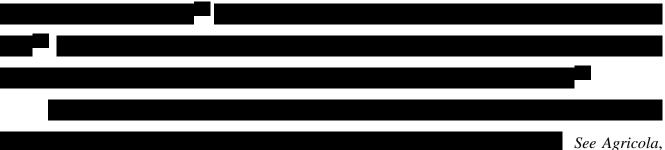
v. Hynix Semiconductor Inc., 622 F. Supp. 2d 890, 897-901 (N.D. Cal. 2009). 115 "Where one corporation is controlled by another, the former acts not for itself but as directed by the latter, the same as an agent, and the principal is liable for acts of its agents within the scope of the agent's authority."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

To establish an agency relationship between , Plaintiffs need only satisfy the following elements: "(1) there must be a manifestation by the principal that the agent shall act for him; (2) the agent must accept the undertaking; and (3) there must be an understanding between the parties that the principal is to be in control of the undertaking." *Id.* at 1239 (internal quotation omitted). This inquiry "is normally a question of fact." *Id.* at 1241. And it "involves a fact-intensive inquiry into the extent to which the parent exercises control over the activities of the subsidiary." *E & J Gallo*, 2008 WL 2220396, at \*10.<sup>117</sup> If "can legitimately be described as only a means through which the parent acts, *or nothing more than an incorporated department of [Royal* 

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

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

<sup>&</sup>lt;sup>117</sup> See Sun Microsys., 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.").



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

#### **CONCLUSION**

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



1	
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