IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE: PHILIPS RECALLED CPAP, BI-LEVEL PAP, AND MECHANICAL VENTILATOR PRODUCTS LITIGATION	:	Master Docket: No. 21-mc-1230-JFC
	:	MDL No. 3014
	:	(Oral Argument Requested)
This Document Relates to: Consolidated Third Amended Class Action Complaint for Economic Losses (ECF No. 785)	:	

MEMORANDUM IN SUPPORT OF THE PHILIPS DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

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PRELIMINARY STATEMENT

Defendants Koninklijke Philips N.V. ("KPNV"), Philips North America LLC ("Philips NA"), Philips Holding USA, Inc. ("Philips Holding") and Philips RS North America Holding, Inc. ("Philips RS Holding"; collectively, the "Philips Defendants") are entitled at the pleading stage to know precisely what each of these distinct entities allegedly did to incur liability with regard to the products that one of their affiliates, Philips RS North America LLC ("Respironics"), sold. After noting the "sloppy" group pleading that pervaded the Second Amended Complaint ("SAC"), this Court sent Plaintiffs back with one task: to plead what each Philips Defendant actually did. Forcing Plaintiffs to try to unpack the ubiquitous "Philips" that starred in the SAC (and emerges, yet again, in the Third Amended Complaint ("TAC")) has confirmed that Plaintiffs have no claims at all against any of the Philips Defendants.

The overwhelming majority of claims in the TAC (71 of the 72 counts) rests on the conduct of Respironics *alone*; it was Respironics that designed, manufactured, sold and warranted the devices at issue. In fact, the documents Plaintiffs received in discovery and attach as exhibits to the TAC demonstrate this. Plaintiffs simply have no liability-inducing allegations related to any of the Philips Defendants for any period prior to the Respironics recall in 2021. Tellingly, the only claim actually arising out of any allegedly *direct* conduct by the Philips Defendants is the negligent recall claim (Count 3); Plaintiffs offer *nothing at all* in the way of pre-recall direct involvement by any of the Philips Defendants to support liability for their other claims.

Confronted with their fatal inability to plead that the Philips Defendants are directly liable for Respironics's pre-recall conduct, Plaintiffs claim "guilt by corporate affiliation." Plaintiffs say that this Court should use its equitable powers to pierce the corporate veil between the Philips Defendants and Respironics, such that all are liable for Respironics's

alleged conduct. Why should the Court do this according to Plaintiffs? Apparently because of KPNV's alleged support of Respironics's global recall (conduct which could help Plaintiffs on their negligent recall claim *only*), KPNV's ownership of certain intellectual property, and KPNV's guidance to its subsidiaries through various corporate policies.

Unsurprisingly, Plaintiffs' allegations come nowhere close to what is required to pierce the corporate veil: a showing that Respironics is "a sham and exist[s] for no other purpose than as a vehicle for fraud." *In re Sunstates Corp. S'holder Litig*., 788 A.2d 530, 534 (Del. Ch. 2001) (applying the law of Delaware, Respironics's place of incorporation). Plaintiffs not only fail to allege that Respironics is a "sham," but they do not even allege any of the factors that courts typically rely on to evaluate whether a subsidiary was an alter ego or agent of its parent. Most notably, Plaintiffs make no allegations—zero—that Respironics was inadequately capitalized, that it failed to observe corporate formalities, that it or any intervening subsidiary was insolvent, that it was subject to inappropriate siphoning of funds, or that it acted as a façade to perpetrate fraudulent ends. *See, e.g.*, *Zarichny* v. *Complete Payment Recovery Servs.*, 80 F. Supp. 3d 610, 619 (E.D. Pa. 2015) (dismissing complaint that "allege[d] none of these factors" and whose "generalized allegations . . . f[e]ll far short of the intrusive control our Court of Appeals requires to hold a parent corporation accountable for its subsidiary's actions"). Without these critical factual allegations, Plaintiffs have failed to plausibly allege a basis for this Court to take the extraordinary step of piercing the corporate veil to hold KPNV liable for the alleged conduct of the legally distinct Respironics entity, which itself is separated from KPNV by two holding companies.[1]

[1] Worse still, the TAC contains *no* factual allegations regarding the corporate relationship between Respironics and Philips NA, Philips Holding or Philips RS Holding. When dealing with

These deficiencies are fundamental *pleading* defects requiring dismissal at this stage, not after discovery (jurisdictional or otherwise). Although Plaintiffs have sought to delay dismissal by arguing for jurisdictional discovery relevant to KPNV's separate jurisdictional defense under *Rule 12(b)(2)*, the Court should reject Plaintiffs' attempt to side-step their threshold pleading defects, which is a *Rule 12(b)(6)* issue. *See Essex Ins.* v. *Miles*, 2010 WL 5069871, at *3 (E.D. Pa. Dec. 3, 2010) ("The Supreme Court precludes the use of even limited discovery to overcome a pleading insufficiency."); *Shihadeh* v. *Smeal*, 2011 WL 1743398, at *3 (E.D. Pa. May 6, 2011) (courts may not "permit discovery in order to give [plaintiff] access to information with which [plaintiff] *might* state a cognizable claim" because the "burden of factual sufficiency in pleadings [is] on plaintiffs"). In fact, even in cases where "Plaintiff[s'] alter ego and agency arguments with respect to jurisdiction and liability appear to blend together," courts still "only consider[] the allegations in [Plaintiffs'] Complaint and the appropriate pleading standard in determining whether Plaintiff has stated a plausible claim under Rule 12(b)(6)." *Quality Int'l Packaging* v. *Chamilia*, 2015 WL 4749156, at *9 n.8 (D.N.J. Aug. 5, 2015).

Irrespective of whether any claims against Respironics survive the pleading stage,[2] all claims against the legally distinct Philips Defendants should be dismissed.

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layers of parents and subsidiaries, as here, Plaintiffs are required to allege facts sufficient to pierce the corporate veil at *each* level. Plaintiffs cannot rely on factual allegations regarding KPNV (which are inadequate in any event) to plead that Respironics was the alter ego or agent of the other Philips Defendants. *See, e.g., Energy Marine Servs.* v. *DB Mobility Logistics*, 2016 WL 284432, at *3 (D. Del. Jan. 22, 2016) (granting motion to dismiss where "[t]he alleged multilevel alter-ego relationship amounts to naked assertion[s] devoid of further factual enhancement," which is "insufficient to meet the minimum pleading requirements").

[2] The Philips Defendants join in the arguments for dismissal made by Respironics in its Rule 12(b)(6) brief, all of which also apply to the Philips Defendants.

ALLEGATIONS OF THE THIRD AMENDED COMPLAINT

A. The Philips Defendants

KPNV, a multinational technology company, is a Dutch *naamloze vennootschap* headquartered in Amsterdam, the Netherlands. (TAC ¶¶ 151, 163.) KPNV has nearly 300 subsidiaries across the globe, with approximately 70 directly and indirectly held subsidiaries in the United States alone, including Philips NA. (*Id*. ¶ 151.) Philips NA is a Delaware limited liability company with its principal place of business in Massachusetts and is wholly owned by a single member, Philips Holding. (*Id.*) Philips Holding is a Delaware corporation 100% directly or indirectly owned by KPNV and it, in turn, owns 100% of Philips RS Holding, a Delaware corporation, which owns Respironics. (*Id*. ¶¶ 153-54.) Before KPNV acquired it in 2008, Respironics had been an independent entity for 30+ years. (*Id*. ¶¶ 154, 206.)

Even on their third attempt, Plaintiffs still make no factual allegations that any of the Philips Defendants had any involvement in the design, manufacture, sale, or warranty of the products forming the basis of Plaintiffs' claims. Nor do Plaintiffs identify any alleged misrepresentations made by the Philips Defendants directly. In the TAC, Plaintiffs for the first time attempt to allege facts showing that KPNV had some involvement with the business of Respironics beyond mere ownership. In particular, Plaintiffs try to convert KPNV's limited promotion of products sold by Respironics through press releases and at various conferences as evidence of KPNV's "control [over] all aspects of [Respironics]." (TAC ¶¶ 160, 229-38.) Plaintiffs also claim that KPNV somehow controlled Respironics by virtue of owning intellectual property associated with Respironics's products and website, jointly prosecuting infringements of that intellectual property, and maintaining policies that apply to all of KPNV's subsidiaries, including Respironics. (*See, e.g.*, *id*. ¶¶ 162-69, 178-80, 213, 301-02.) Nowhere in the TAC do

Plaintiffs allege that KPNV instructed Respironics what products to manufacture, how to manufacture those products, what foam to use, or how to run its daily operations.

B. Respironics and Its Manufacture, Sale and Recall of the Devices at Issue

Prior to KPNV's acquisition of Respironics in 2008, Respironics was called Respironics, Inc. (TAC ¶ 154.) At the time KPNV acquired Respironics, Respironics was *already* a leader in the treatment of sleep apnea and other breathing conditions, having pioneered the first publicly available CPAP treatment for sleep apnea in 1985. (*Id*. ¶ 206.) Respironics changed its name to Philips RS North America LLC in 2019. (*Id*. ¶ 154.) Despite Plaintiffs' attempt to hide the ball in its pleading, Respironics designed, manufactured, sold and warranted all of the devices at issue in this litigation. (*See* TAC Exs. 44 at 1; 47 at 32; 48 at 24; 49 at 171-72.)[3]

In 2015, 2018 and 2019, Respironics received and investigated discrete complaints concerning foam degradation in one of its devices, a Trilogy 100 ventilator. (TAC ¶¶ 321, 330, 351.) In each instance, Respironics investigated the complaints, evaluated what was necessary to address the claimed degradation, and then closed its investigations. (*Id*. ¶¶ 323, 330, 352-56.) At that time, in the years leading up to the recall, Respironics was working with only "an initial, limited data set and toxicological risk assessment." (TAC Ex. 125.)

Despite "a low complaint rate [of foam degradation]," Respironics initiated a voluntary recall of the devices at issue in this litigation on June 14, 2021. (TAC Exs. 4 & 34.) Since initiating the recall, Respironics has not only established a robust repair and replacement program, it has also conducted extensive additional testing on the foam to determine what risk, if

[3] *See also* TAC Ex. 72 at 2 (proposed FDA 518(b) order identifying "Philips"—which the FDA expressly defined to be *only* Philips Respironics, Inc.—"as the manufacturer of the devices at issue"); TAC ¶ 298 n.217 (citing FDA's database identifying "Philips RS, Inc." as the manufacturer).

any, degraded foam poses to patients. (TAC Ex. 126.) For instance, although Plaintiffs have alleged that volatile organic compounds ("VOCs") can be off-gassed by degraded foam (TAC ¶¶ 4, 9), testing since the recall shows that "VOC concentrations are within safe exposure limits." (TAC Ex. 126.) Respironics is continuing to conduct tests and evaluate test data to better understand the extent of any risk. Despite operating under the constraints of a global supply chain crisis, Respironics has already reached "the vast majority of the installed base in the US" and has shipped millions of remediated devices. (*Id.*)

Given the magnitude of the global recall—more than 11 million devices in the United States alone (TAC ¶ 5)—KPNV has supported Respironics during its recall, including by updating the public through press releases on Respironics's progress and by providing resources to Respironics to assist in its recall efforts. While the TAC makes reference to KPNV's assistance to Respironics in connection with the recall, it does not allege the "sham" required to plead alter ego, and, in any event, this conduct could only help Plaintiffs on their negligent recall claim (Count 3), not all of the other claims dating back to Plaintiffs' original purchase or acquisition of the devices.

C. Plaintiffs Pursue 72 Causes of Action Against the Philips Defendants on Behalf of a Putative Class of Millions of Consumers, Third-Party Purchasers and Insurers

Plaintiffs seek to represent a putative nationwide class of all "persons or entities . . . in the United States . . . who, in whole or part, paid for or reimbursed payment for a Recalled Device or a device to replace a Recalled Device, but did not resell it." (TAC ¶ 428.) Plaintiffs' claims fall into two categories: (1) claims arising out of Plaintiffs' purchase or other acquisition of the devices (Counts 1, 2, and 4 through 72); and (2) a negligent recall claim (Count 3) based principally on the pace of the recall. Despite the Court's previous instructions (Aug. 31, 2022

Tr. at 16:17-25, 17:1), Plaintiffs persist with allegations collectively lobbed against all of the separate entities under the omnibus tag of "Philips." (*E.g.*, TAC ¶¶ 8-9, 11-14, 245-64.)

ARGUMENT

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009). Plaintiffs must plead "facts concerning the specific conduct of each Defendant." *Pushkin* v. *Nussbaum*, 2017 WL 1591863, at *7 (D.N.J. Apr. 28, 2017); *see also, e.g.*, *Wright* v. *City of Phila.*, 2005 WL 3091883, at *11 (E.D. Pa. Nov. 17, 2005) (stating that "the Third Circuit [] has a policy against Plaintiffs using a shotgun pleading approach"). The Court must disregard the complaint's "labels and conclusions," as well as any "naked assertions" devoid of "further factual enhancement." *Iqbal*, 556 U.S. at 678. Where the well-pleaded allegations are "not only compatible with, but indeed [] more likely explained by lawful [] behavior"—such as an ordinary relationship between affiliated corporations—the complaint has failed to state a claim. *Id*.

I. THE TAC FAILS TO ALLEGE ANY DIRECT LIABILITY BY THE PHILIPS DEFENDANTS ARISING OUT OF THEIR OWN CONDUCT.

The law in the Third Circuit is clear: "[a]llegation[s] against multiple defendants that [are] bereft of specific wrongdoing by those proposed defendants [are] insufficient to state a claim." *Bret Binder* v. *Weststar Mortg.*, 2016 WL 3762710, at *3 (E.D. Pa. July 13, 2016).[4] Yet, Plaintiffs' pleadings *still* remain littered with allegations against a non-existent "Philips," a term which could refer to any one of five distinct entities at any given point in the TAC. (*E.g.*, TAC ¶ 156 ("reference to 'Philips' refers to each Philips Defendant individually and

[4] "Because pleading rules are procedural in nature, the transferee court must apply federal law as interpreted by the court of the district where the transferee court sits." *In re Asbestos Prods. Liab. Litig.*, 611 F. App'x 86, 89 (3d Cir. 2015).

collectively"); *see also, e.g.*, TAC ¶¶ 239, 241, 245, 345.) Despite having access to discovery and another chance to plead a claim, Plaintiffs continue to refer to the Philips Defendants collectively as "Philips" even when information identifying the appropriate entity is available.[5] Where Plaintiffs did pepper in a handful of allegations directed at KPNV, each is either patently conclusory or demonstrably false, as illustrated by the very exhibits on which the TAC relies. Other than this superficial attempt to conjure up *something* to say about KPNV, the TAC still includes no allegations directed at Philips NA, Philips Holding or Philips RS Holding. *See Hisey* v. *QualTek*, 2019 WL 3936555, at *17 n.11 (E.D. Pa. Aug. 20, 2019) (plaintiffs had not crossed the plausibility threshold where the complaint "only state[s] generally that 'Defendants' engaged in [actionable] conduct (but do[es] not distinguish among the named defendants)").

A. Plaintiffs Have Not Alleged Any Pre-Recall Conduct by the Philips Defendants That Could Plausibly Give Rise to a Claim (Counts 1, 2, 4-72).

All but the negligent recall claim (Count 3) arises out of conduct that necessarily occurred *before* the Respironics recall: the original design, manufacture, sale and warranty of the devices at issue.[6] Thus, in order to sufficiently plead 71 out of their 72 claims, Plaintiffs were required to allege that the Philips Defendants engaged in liability-inducing conduct when

[5] For instance, Plaintiffs mischaracterize the FDA's Form 483, 518(a) and 518(b) notices to make the baseless accusations that "Philips" was inspected by the FDA, that "Philips" was aware of complaints of foam degradation, and that "Philips" was ordered to give notice of the recall to patients. (*E.g.*, TAC ¶¶ 292, 294, 413; TAC Exs. 5, 72, 136.) In reality, the only entity identified in these documents, and the only entity to which these actions can be attributable, is Respironics. (*Id.* Exs. 5, 72, 136.)

[6] *See*, *e.g.*, TAC ¶ 672 ("Philips intentionally, knowingly, and recklessly concealed and omitted information . . . to induce Plaintiffs and Class member to purchase, lease, pay for . . . the Recalled Devices."); *id*. ¶¶ 698-704 ("While selling and profiting from the Recalled Devices, Philips knew that they were defective" but "intentionally concealed this information," and "[a]bsent Philips' [] conduct," Plaintiffs and class members "would have behaved differently and would not have purchased, leased, paid for, and/or reimbursed payment for the Recalled Devices.").

Plaintiffs originally purchased or otherwise acquired their devices. Plaintiffs have no such allegations. It was Respironics "that design[ed], manufacture[d], distribute[d] and s[old] medical devices including the [recalled devices] at issue in this case," and Plaintiffs do not allege that the Philips Defendants had any direct role in *that* conduct "other than as [Respironics's] parent [or sister] corporation." *Parkinson* v. *Guidant Corp*., 315 F. Supp. 2d 741, 745 (W.D. Pa. 2004); *see* TAC ¶ 427.

At best, Plaintiffs have only the entirely conclusory and detail-free assertions that the Philips Defendants "engaged in the wrongful conduct at issue in this litigation" and that KPNV "was involved with and controlled [] the sales and marketing of the Recalled Devices" and "decisions regarding the [] foam." (TAC ¶¶ 2, 190.) No specifics or facts are provided. Nor have Plaintiffs set forth any facts from which this Court could infer that the Philips Defendants knew of the alleged defect when Plaintiffs acquired their devices. *See Block* v. *Jaguar*, 2017 WL 902860, at *10 (D.N.J. Mar. 7, 2017) (complaint "does not contain factual allegations to raise above the speculative level the inference that [defendant] knew of the defect at the time" the allegedly defective products were "purchased by the named Plaintiffs").

1. The Direct Warranty Claims Against the Philips Defendants Fail.

Plaintiffs' warranty-related claims against the Philips Defendants (Counts 4-7) fail because, as Plaintiffs' own exhibits consistently and unambiguously demonstrate, *Respironics*, not the Philips Defendants, sold and warranted the devices. (*See* TAC Ex. 47 at 29 ("Respironics, Inc. warrants that the system shall be free from defects . . . ."); TAC Ex. 48 at 21 (same); TAC Ex. 49 at 163 (same).) Under any forum's law that could potentially govern Plaintiffs' claims, the Philips Defendants cannot be "liable for a breach of [express warranties] that they did not sign and are not referenced in." *Powell* v. *Subaru*, 502 F. Supp. 3d 856, 882 (D.N.J. 2020) (dismissing breach-of-warranty claims against parent company where warranties

"explicitly state[d] that '[t]hese warranties are made by [subsidiary]' and ma[de] no reference to [parent company] as a warrantor"); *see also* Appendix A (surveying state law standards for breach of express warranty claims).[7] This inadequacy is also fatal to Plaintiffs' implied warranty claims, as "[l]iability for an implied warranty of merchantability . . . is limited to sellers." *Oscar Mayer Corp.* v. *Mincing Trading Corp.*, 744 F. Supp. 79, 83 (D.N.J. 1990). In fact, the merchantability and usability provisions of the Uniform Commercial Code, Section 2-314, as codified in each state, explicitly defines implied warranties with reference to the "seller[s]" of goods. *See* U.C.C. § 2-314 ("[A] warranty that the goods shall be merchantable is implied *in a contract for their sale if the seller is a merchant* with respect to goods of that kind." (emphasis added)); *see also* TAC ¶¶ 596, 615.[8]

2. Plaintiffs' Fraud-Based Claims—All of Which Arise Out of *Pre*-Recall Conduct—Fail.

The pleading deficiencies as to the Philips Defendants are particularly stark on Plaintiffs' common law fraud, consumer protection, and RICO claims, which are each subject to the heightened pleading standards of Rule 9(b). *See, e.g.*, *Frederico* v. *Home Depot*, 507 F.3d 188, 200-03 (3d Cir. 2007); *Byrnes* v. *DeBolt Transfer*, 741 F.2d 620, 626 (3d Cir. 1984). To

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[7] To attempt to overcome this glaring defect, Plaintiffs add the non-sequitur that KPNV "owns the copyright to all, or most, of th[e] User Manuals" containing the express warranty for the recalled devices. (TAC ¶¶ 574-75.) But the text of the manuals plainly states that Respironics warrants the devices (*e.g.*, TAC Ex. 47 at 29), and KPNV's alleged copyright over the manuals is irrelevant.

[8] Plaintiffs' unjust enrichment and Magnuson-Moss claims fail for the same reasons: Respironics, not the Philips Defendants, sold and warranted the devices. Thus, only Respironics warranted the sale, or—as Plaintiffs allege in their unjust enrichment claim—"received . . . a measurable direct financial benefit from the sale of its products . . . in the form of payment for and reimbursement payment for, in whole or part, the Recalled Devices" (TAC ¶ 681). *See Snyder* v. *Farnam Cos.*, 792 F. Supp. 2d 712, 724 (D.N.J. 2011) (dismissing claim for unjust enrichment where plaintiffs "failed to allege that they purchased the Products directly from Defendants"); 15 U.S.C. § 2310(d)-(f) (Magnuson-Moss claim may be stated "only against such warrantor and no other person").

satisfy Rule 9(b), "the plaintiff must plead or allege the date, time and place of the alleged fraud or otherwise inject precision or some measure of substantiation into a fraud allegation." *Frederico*, 507 F.3d at 200. "Collectivized allegations that generally allege fraud as against multiple defendants, without informing each defendant as to the specific fraudulent acts he or she is alleged to have committed, do not satisfy Rule 9(b)." *Hale* v. *Stryker Orthopaedics*, 2009 WL 321579, at *6 (D.N.J. Feb. 9, 2009).

Plaintiffs fail in their obligation to set forth factual allegations that, at a minimum, *each individual* Philips Defendant directly made a misrepresentation or engaged in deceptive conduct, *i.e.*, "intentional[ly] misleading by falsehood spoken or acted," much less one on which Plaintiffs relied or that influenced Plaintiffs' decision *at the time they purchased or insured the devices.* *Christopher* v. *First Mutual Corp.*, 2006 WL 166566, at *3 (E.D. Pa. Jan. 20, 2006). The TAC identifies purportedly misleading statements made prior to the recall by Respironics, *not* the Philips Defendants.[9] Plaintiffs cannot meet their pleading burden in this fashion. *See id.* (dismissing consumer protection and common law fraud claims where plaintiff "has not alleged any contact with [the defendant], and has also not specified any misrepresentations made by [the defendant]"); *In re Am. Honda Motor Co., Inc. Dealerships Rels. Litig.*, 958 F. Supp. 1045, 1051 (D. Md. 1997) (parent company cannot be liable for the subsidiary's RICO "conduct solely by virtue of its ownership and control over the subsidiary").

[9] *See, e.g.*, TAC ¶¶ 358-59 nn.319-20, 323 (citing to "Philips Respironics" website as source of challenged statements), ¶ 262 n.160 (citing filtration system advertisements in "Philips Respironics DreamStation Family Brochure"); TAC ¶ 210 nn.99-100 (citing "Philips Respironics DreamStation Brochure").

The TAC contains a handful of allegations concerning KPNV's general "promotional" statements about its business and products,[10] but it does not identify a specific offending statement in these communications or allege that any of the Plaintiffs ever saw or relied on these statements in connection with their purchase decision. And where the TAC does specify an actual statement allegedly attributable to KPNV made prior to the recall, it fails to allege, as it must, what such statements concealed, how they were deceptive or misleading, or that any Plaintiff's decision was impacted by such statements.[11] At most, the TAC alleges non-actionable puffery—"an exaggeration or overstatement expressed in broad, vague, and commendatory language"—on which Plaintiffs did not rely in acquiring their devices, not specific "misdescriptions or false representations" by KPNV of "specific characteristics of a product." *Castrol* v. *Pennzoil Co.*, 987 F.2d 939, 945 (3d Cir. 1993).[12] Plaintiffs' failure to allege fraudulent conduct by any of the Philips Defendants is unsurprising, as the TAC's

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[10] *See* TAC ¶ 3 ("Royal Philips boasts on its website, www.philips.com: . . . 'At Philips, our purpose is to improve people's health and well-being through meaningful innovation.'"); ¶¶ 225-38 (characterizing statements like "DreamStation Go is a compact and lightweight device" as KPNV's "promotion" of the devices).

[11] For example, the TAC alleges that KPNV's former CEO told *investors*: "Building on the success of the Philips' integrated Dream Family solution in the United States, Europe and Japan, we recently introduced a Philips DreamStation Go portable CPAP solution. DreamStation Go is a compact and lightweight device designed to provide sleep therapy for travelers with obstructive sleep apnea." (TAC ¶ 229.) Nowhere does the TAC indicate how this statement was deceptive or misleading. Similarly, the TAC alleges that KPNV's CFO told *investors* that "we have a solid pipeline of new product introductions . . . . We will back these launches with the requisite support in advertising and promotion, which will have a dampening effect on the results of Personal Health in the second quarter. However, I hasten to add that we do expect to have continued improvements in operating results for Personal Health." (*Id*. ¶ 232.) Yet again, nothing is pled as to how this statement was somehow false or misleading, let alone that any Plaintiff relied on statements to investors in connection with their purchase decisions.

[12] The TAC also adds allegations concerning various press releases and statements of KPNV officers about the *recall*. (*See* TAC ¶¶ 393-403.) These statements could not have induced Plaintiffs to acquire the devices and therefore could not even plausibly help to state a claim for anything other than the negligent recall claim.

cornerstones are the FDA's statements about *Respironics* and the devices *Respironics* designed, manufactured, sold and warranted.

Plaintiffs also again fail to allege facts showing that any of the Philips Defendants were aware of any problem with Respironics's foam choice when Plaintiffs acquired the devices. This is fatal to their fraud-based claims. *See Gotthelf* v. *Toyota Motor Sales*, 525 Fed. App'x. 94, 104-05 (3d Cir. 2013) ("Nothing in the Complaint provides factual support for [defendant's] alleged knowledge and concealment of the defect."); *Belmont* v. *MB Inv. Partners*, 708 F.3d 470, 499 (3d Cir. 2013) (no claim for deceptive conduct under consumer protection statute where defendant was "not alleged to have had any knowledge"). While the TAC conclusorily and improperly alleges that the collective and nonexistent "Philips" knew about "the serious risks caused by the Recalled Devices long before the Recall" (TAC ¶ 11), Plaintiffs point only to documents and communications of *Respironics*, *Polymer*, and *Burnett*—not any of the Philips Defendants. (*See id.* ¶¶ 289-357.) This renders all of Plaintiffs' fraud-based claims (Counts 1-2, 8-72) insufficient. *See, e.g.*, *Corman* v. *Nationwide Life Ins. Co.*, 2022 WL 2952219, at *13 (E.D. Pa. July 26, 2022) (RICO claims cannot be stated against a defendant "who d[id] not engage in the proscribed activities at all," as liability does not "extend[] to principals who did not themselves engage in the violation"); *Kamran Khan* v. *Vayn*, 2014 WL 550552, at *5 (E.D. Pa. Feb. 12, 2014) ("Here, while Defendant clearly has a significant ownership interest in Indian Creek Investments, there is no evidence that Defendant Vayn committed any of the proscribed predicate acts or employed or conducted the affairs of Indian Creek improperly much less through a pattern of racketeering activity."); *Osness* v. *Lasko Prods.*, 868 F. Supp. 2d 402, 415 (E.D. Pa. 2012) (dismissing unjust enrichment claim because "plaintiff has not sufficiently pleaded that [defendant] knew of the alleged defect when it sold the [product]," so "plaintiff has

not alleged any facts to support an inference that [defendant's] retention of any benefits received from her purchase of [the product] would be unjust").

[redacted]

13 [redacted]

14 Courts regularly reject such attempts to hang one's case on online LinkedIn profiles and posts. *See, e.g.*, *Rockwell Automation* v. *EU Automation*, 2022 WL 1978726, at *10 (D. Del. June 6, 2022), *report and recommendation adopted*, 2022 WL 3576231 (D. Del. Aug. 19, 2022); *Prudencio* v. *Midway Importing*, 831 F. App'x 808, 810-11 (9th Cir. 2020); *Apple* v. *Allan & Assocs.*, 445 F. Supp. 3d 42, 53-55 (N.D. Cal. 2020); *Quality Int'l Packaging* v. *Chamilia*, 2015 WL 4749156, at *4-6 (D.N.J. Aug. 5, 2015).

[redacted]

Finally, with respect to Plaintiffs' RICO claims specifically, Plaintiffs have offered no factual allegations specific to the Philips Defendants—let alone with the particularity required by Rule 9(b)—for the predicate fraudulent acts of racketeering activity, namely, mail and wire fraud (TAC ¶ 490). *See Poling* v. *K. Hovnanian Enters.*, 99 F. Supp. 2d 502, 508 (D.N.J. 2000) (RICO claims sounding in fraud must inform "*each defendant* as to the specific fraudulent acts he or she is alleged to have committed"). Again, Plaintiffs offer only vague and conclusory allegations that an indistinct "Philips" was involved in a mail and wire fraud scheme (*e.g.*, TAC ¶¶ 490-93, 495, 505-24, 540-46), and disseminated alleged misrepresentations (*id.* ¶ 519). *See Duran* v. *Equifirst Corp.*, 2010 WL 936199, at *4 (D.N.J. Mar. 12, 2010) (dismissing RICO claims because the "predicate acts listed are defective under the group pleading doctrine" where "[e]ach alleged predicate act is generally alleged to have been committed by every [d]efendant"); *Teri Woods Publ'g* v. *Williams*, 2013 WL 1500880, at *6

15 [redacted]

(E.D. Pa. Apr. 12, 2013) (dismissing RICO claims where "[p]laintiffs neglect to outline the specific role played by each [d]efendant in the alleged fraudulent acts").[16]

B. Plaintiffs' Allegations Related to the Philips Defendants' Recall-Related Conduct Are Insufficient for Their Negligent Recall Claim (Count 3).

Even for their negligent recall allegations, Plaintiffs again rely almost exclusively on allegations lumping all of the Philips entities together. But the TAC's exhibits establish that Respironics initiated, conducted and was responsible for the recall, and any of the TAC's allegations to the contrary are a mischaracterization of the TAC's own exhibits.[17] Moreover, the TAC's allegations directed at KPNV are entirely conclusory and unsupported by any factual allegations. Plaintiffs claim that KPNV "took charge of and responsibility for the Recall" and "has interfaced with regulatory agencies in the U.S. and worldwide, but has not adequately notified users and their doctors about the recall or the options for obtaining a replacement device." (TAC ¶ 561.) But Plaintiffs' own exhibits show that the notifications that they claim are inadequate were from *Respironics*, not KPNV.[18] The TAC does not allege that any of the Philips Defendants directly undertook the responsibility of replacing the foam or providing replacement devices to users.

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[16] Because Plaintiffs have failed to allege substantive RICO violations under Section 1962(c) as to the Philips Defendants, their conspiracy claims against the Philips Defendants under Section 1962(d) (TAC ¶ 544) "necessarily must fail" as well. *Lightning Lube* v. *Witco Corp.*, 4 F.3d 1153, 1191 (3d Cir. 1993).

[17] For example, Plaintiffs erroneously attribute the purported inadequacy of the repair and replacement program to "Philips," even though the program is run by Respironics. (*See* TAC Ex. 126 (under the heading "Repair and replacement program," "Philips Respironics has shipped a total of more than 650,000 replacement devices to customers in the US").)

[18] Further, although Plaintiffs claim that the FDA ordered "Philips" to notify individuals "who should be notified" of the recall, all of Plaintiffs' allegations concerning inadequate notice are derived from the FDA's 518(a) notice, which was directed exclusively to Respironics and does not mention any of the Philips Defendants. (TAC ¶¶ 409-13; Ex. 136.)

II. PLAINTIFFS CANNOT RELY ON ALLEGATIONS CONCERNING RESPIRONICS'S CONDUCT TO STATE A CLAIM AGAINST THE PHILIPS DEFENDANTS.

A. The Law Applicable to Plaintiffs' Claim that Respironics Was the Alter Ego and Agent of the Philips Defendants.

"In an MDL proceeding[] the transferee court applies the choice of law rules of the transferor courts" for state law claims; by contrast, "[o]n issues of federal law or federal procedure, [] the transferee court applies the law of the circuit in which it sits (here, the Third Circuit)." *In re Johnson & Johnson Talcum Powder Prod. Mktg., Sales Pracs., & Prod. Liab. Litig.*, 553 F. Supp. 3d 211, 219 (D.N.J. 2021).[19]

Here, with respect to Plaintiffs' state law claims, the transferor courts' choice of law rules all point to Delaware, Respironics's state of incorporation, to govern whether the allegations in the TAC are sufficient to pierce the corporate veil based on Plaintiffs' contention that "each Philips Defendant acted in *all aspects* as the agent and alter ego of one another" (TAC ¶ 2 (emphasis added)). Courts use varying terminology when addressing the issue of imputed liability in a parent-subsidiary or sister-subsidiary relationship—"alter ego," "agent," "disregarding the corporate entity," and "piercing the corporate veil" are often used interchangeably—but "regardless of the precise nomenclature employed, the contours of the theory are the same." *Mobil Oil* v. *Linear Films*, 718 F. Supp. 260, 266 (D. Del. 1989); *see Phoenix Canada Oil Co.* v. *Texaco*, 842 F.2d 1466, 1476 (3d Cir. 1988) (noting that "[s]ome

[19] *See also Marshall Invs. Corp.* v. *Krones*, 572 F. App'x 149, 152 n.4 (3d Cir. 2014) ("When a case is transferred under 28 U.S.C. § 1407 for consolidated pretrial proceedings, the transferee court must apply the same state substantive law, including choice-of-law rules, that would have been applied by a state court in the jurisdiction in which a case was filed."); *In re Linerboard Antitrust Litig.,* 2005 WL 1625040, at *4 (E.D. Pa. July 11, 2005) (stating "only the law of the transferee court is binding on issues of federal law in an action transferred pursuant to 28 U.S.C. § 1407" and "several courts have specifically held that a transferee court must follow the law of its Circuit in deciding questions of federal jurisdiction in cases transferred pursuant to § 1407").

decisions apply an agency theory to assess parental liability, others focus on an alter ego basis, and some speak in terms of piercing the corporate veil"). Whatever terminology used, imputing liability to a parent or sister corporation for the conduct of its subsidiary or sister company necessitates a showing that the subsidiary is "*a sham* and exist[s] for *no other purpose than as a vehicle for fraud*." *In re Sunstates Corp. S'holder Litig*., 788 A.2d 530, 534 (Del. Ch. 2001) (emphasis added).

With respect to Plaintiffs' federal claims, this Court applies the substantive law of the Third Circuit, which is the same as Delaware's on the alter ego question. *See Am. Bell Inc.* v. *Fed. of Tel. Workers*, 736 F.2d 879, 886 (3d Cir. 1984) (applying federal substantive law to assess whether plaintiffs could pierce corporate veil for federal claims); *Mobil Oil*, 718 F. Supp. at 265-68 ("[R]egardless of which law is applied to the alter ego question—whether federal [or] Delaware [] law—the outcome is the same." (collecting cases)); *United States* v. *Golden Acres, Inc.*, 702 F. Supp. 1097, 1104 (D. Del. 1988) ("[T]he Delaware test for piercing the corporate veil is altogether compatible with the federal analysis.").

Under either federal law or Delaware law, "*[f]raud or something like it* is required" to pierce the corporate veil. *Mobil Oil*, 718 F. Supp. at 268 (emphasis added).

1. Delaware Law Governs Whether the Corporate Veil Can Be Pierced for Plaintiffs' State Law Claims.

"Courts are to look to the law of the state of incorporation to resolve issues involving the internal affairs of a corporation," and as such, in evaluating "piercing of corporate veil theories . . . courts use the corporate law of the targeted entity's [*i.e.*, the subsidiary's] state of incorporation." *Panthera Rail Car* v. *Kasgro Rail Corp.*, 2013 WL 4500468, at *6 (W.D. Pa. Aug. 21, 2013). Accordingly, under the choice of law rules from all of the states in which Plaintiffs originally filed suit, the substantive law of Delaware—the state where Respironics is

incorporated—applies to determine whether the allegations in the TAC are sufficient to attribute Respironics's alleged conduct to the Philips Defendants.[20]

This outcome is consistent with the internal affairs doctrine, which is "a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands." *Edgar* v. *Mite Corp*., 457 U.S. 624, 645 (1982). Given its widespread acceptance, the internal affairs doctrine has been applied in other MDLs to determine the operative law for claims arising from multiple jurisdictions, including veil-piercing claims. *See, e.g., In re Enron Corp. Sec., Derivative & "ERISA" Litig.*, 238 F. Supp. 3d 799, 839 (S.D. Tex. 2017) (applying internal affairs doctrine for veil-piercing claims to hold that

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[20] The courts in which Plaintiffs originally filed suit are located in California, Georgia, Massachusetts, Oregon, Pennsylvania, Texas and West Virginia. *See In re Sch. Asbestos Litig*., 1993 WL 209719, at *3 (E.D. Pa. June 15, 1993) (substantive law of state of incorporation of subsidiary applied to assess whether subsidiary was alter ego of parent pursuant to **Pennsylvania** choice of law rules); *Leitner* v. *Sadhana Temple*, 2014 WL 12588643, at *16 (C.D. Cal. Oct. 17, 2014) (under **California** choice of law rules, "the law of the state of incorporation [of the subsidiary] should be applied . . . because that state has a substantial interest in determining whether to pierce the corporate veil of one of its corporations"); *Asarco* v. *Ams. Min. Corp*., 382 B.R. 49, 65 (S.D. Tex. 2007) (under **Texas** choice of law rules, "the correct choice of law" concerning veil-piercing "is the substantive law of the state of incorporation of the subsidiary"); *Jones* v. *Heil Process Equip. Corp.*, 2016 WL 3566243, at *4 (S.D.W. Va. June 27, 2016) (substantive law of state of incorporation of corporation governed liability of corporation's shareholders under **West Virginia** choice of law); *In re Galena Biopharma, Inc. Derivative Litig*., 83 F. Supp. 3d 1033, 1038 (D. Or. 2015) (explaining that "the United States Supreme Court, the U.S. Court of Appeals for the Ninth Circuit, the Delaware Court of Chancery, and the Oregon Supreme Court all . . . apply the 'internal affairs doctrine[.]'"); *Realmark Inv. Co.* v. *Am. Fin. Corp*., 171 B.R. 692, 695 (N.D. Ga. 1994) (applying **Georgia** choice of law rules and finding that "the state of incorporation's law applies to issues of piercing the corporate veil" to find shareholders liable for a corporation's conduct). Although Massachusetts courts apply the law of the state in which the impugned conduct occurred rather than the law of the state of incorporation, the laws of all relevant jurisdictions are the same. *See, infra,* n. 22; *Madico* v. *GMX Performance Films*, 2008 WL 11388640, at *1 (D. Mass. Aug. 7, 2008).

corporation's law of incorporation "applies to determine whether its corporate form should be disregarded"); *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 271 (S.D.N.Y. 2009) (same).[21]

2. Federal Law Governs Whether the Corporate Veil Can Be Pierced for Plaintiffs' Claims Under Federal Law.

Plaintiffs' attempt to pierce the corporate veil to support their federal claims is governed by substantive federal law. *See Am. Bell Inc.* v. *Fed. of Tel. Workers*, 736 F.2d 879, 886 (3d Cir. 1984) (applying federal substantive law to assess whether plaintiffs could pierce corporate veil for federal claims); *United States* v. *Pisani,* 646 F.2d 83, 88 (3d Cir. 1981) (same).

Because "the Delaware test for piercing the corporate veil is altogether compatible with the federal analysis," the Court need not apply a separate veil-piercing analysis for the federal claims versus the state law claims. *United States* v. *Golden Acres, Inc.*, 702 F. Supp. 1097, 1104 (D. Del. 1988); *see Mobil Oil Corp.* v. *Linear Films*, 718 F. Supp. 260, 265-68

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[21] Even if any of the seven transferor courts were to apply their own state's substantive law on veil-piercing, there would be no conflict because each of their substantive veil-piercing standards do not differ from those in Delaware. "[W]here the laws of the two jurisdictions would produce the same result on the particular issue presented, there is a false conflict," *Berg Chilling Sys.* v. *Hull Corp.*, 435 F.3d 455, 462 (3d Cir. 2006), and the court "may refer interchangeably to the laws of the states whose laws potentially apply." *Huber* v. *Taylor*, 469 F.3d 67, 74 (3d Cir. 2006); *see, e.g.*, *Trans–World Int'l* v. *Smith–Hemion Prod.*, 972 F. Supp. 1275, 1291 (C.D. Cal. 1997) ("[B]oth Delaware and California examine similar factors in determining whether an individual or corporation is the alter ego of another corporation."); *Madico*, 2008 WL 11388640, at *2 ("[I]f Delaware law [on veil-piercing] is applicable, it is the same as that of Massachusetts."); *Pictsweet Co.* v. *R.D. Offutt Farms Co*., 2021 WL 4034222, at *11 (M.D. Tenn. Sept. 3, 2021) ("[T]he veil-piercing law of . . . Oregon is not substantially different from that of Delaware."); *Kipperman* v. *Onex Corp.*, 2006 WL 8421931, at *28 n.24 (N.D. Ga. Sept. 15, 2006) (applying Delaware law to assess whether corporate veil could be pierced but stating that "the same result would ensue with the application of Georgia law"); *Wheeling-Pitt. Steel-Corp.* v. *Intersteel, Inc*., 758 F. Supp. 1054, 1057 (W.D. Pa. 1990) ("[T]here is no conflict between the alter ego laws of the State of Georgia and that of Pennsylvania"); *Clapper* v. *Am. Realty Invs.*, 2015 WL 3504856, at *9 n.15 (N.D. Tex. 2016) ("[T]he laws of Texas [] and Georgia do not appear to conflict concerning the piercing the corporate veil doctrine.").

(D. Del. 1989) ("[R]egardless of which law is applied to the alter ego question—whether federal [or] Delaware [] law—the outcome is the same," noting that under any approach "[f]raud or something like it is required." (collecting cases)).

B. The Allegations of the TAC Do Not Support Disrupting the Corporate Form, Mandating Dismissal at the Pleading Stage.

1. The Relevant Legal Standards for Veil Piercing

"It is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation . . . is not liable for the acts of its subsidiaries." *United States* v. *Bestfoods*, 524 U.S. 51, 61 (1998). Accordingly, a parent or sister company is not responsible for the acts of their subsidiaries or sister companies "unless specific, unusual circumstances call for an exception." *Zubik* v. *Zubik*, 384 F.2d 267, 273 (3d Cir. 1967). "[B]ecause Delaware public policy does not lightly disregard the separate legal existence of corporations, a plaintiff must do more than plead that one corporation is the alter ego of another in conclusory fashion in order for the Court to disregard their separate legal existence." *MicroStrategy Inc.* v. *Acacia Res. Corp.*, 2010 WL 5550455, at *11 (Del. Ch. Dec. 30, 2010).

The burden for piercing the corporate veil "is notoriously difficult for plaintiffs to meet." *Pearson* v. *Component Tech. Corp.*, 247 F.3d 471, 485 (3d Cir. 2001). "[P]ierc[ing] the corporate veil," whether characterized as "based on an agency or 'alter ego' theory," necessitates a showing that the subsidiary is "*a sham* and exist[s] for *no other purpose than as a vehicle for fraud*." *In re Sunstates Corp. S'holder Litig.*, 788 A.2d 530, 534 (Del. Ch. 2001) (emphasis added); *see StrikeForce Techs., Inc.* v. *PhoneFactor, Inc.*, 2013 WL 6002850, at *5 n.60 (D. Del. Nov. 13, 2013) ("[L]iability found solely on parent's dominion and control of subsidiary is merely alter ego theory under a different name," even if referred to as "agency."). "Under both state and federal common law," courts may "employ the tool of equity known as veil-piercing,

i.e., disregard of the corporate entity," only upon a showing by Plaintiffs that there was an "abuse of the corporate form." *Pearson*, 247 F.3d at 484.

Courts in this Circuit, including in Delaware, have employed a non-exhaustive list of factors to determine whether "the two corporations actually functioned as a single entity and should be treated as such." *Id.* at 484-85 (citing factors including "gross undercapitalization, failure to observe corporate formalities, nonpayment of dividends, insolvency of debtor corporation, siphoning of funds from the debtor corporation by the dominant stockholder, nonfunctioning of officers and directors, absence of corporate records, and whether the corporation is merely a facade for the operations of the dominant stockholder").[22] "[N]o single factor could justify a decision to disregard the corporate entity, but [] some combination of them [i]s required," and "an overall element of injustice or unfairness must always be present, as well." *Harper* v. *Del. Valley Broadcasters*, 743 F. Supp. 1076, 1085 (D. Del. 1990). Put simply, "[i]n order to reach a parent corporation under the alter-ego theory, the plaintiff must show fraud, injustice, or inequity in the use of the corporate form." *Sears, Roebuck & Co.* v. *Sears plc*, 744 F. Supp. 1297, 1304 (D. Del. 1990).

[22] *See also, e.g.*, *Harco Nat'l Ins. Co.* v. *Green Farms*, 1989 WL 110537, at *4 (Del. Ch. Sept. 19, 1989) ("[A]n alter ego analysis must start with an examination of factors which reveal how the corporation operates and the particular defendant's relationship to that operation," including "whether the corporation was adequately capitalized for the corporate undertaking; whether the corporation was solvent; whether dividends were paid, corporate records kept, officers and directors functioned properly, and other corporate formalities were observed; whether the dominant shareholder siphoned corporate funds; and whether, in general, the corporation simply functioned as a facade for the dominant shareholder.").

2. Plaintiffs' Allegations Concerning the Philips Defendants' Pre-Recall Corporate Relationship With Respironics (Counts 1, 2, 4-72) Are Inadequate To Establish that Respironics Was the Philips Defendants' Alter Ego or Agent.

For all of their claims except the negligent recall claim, Plaintiffs were required to allege sufficient facts showing that Respironics was the alter ego or agent of the Philips Defendants when Plaintiffs *originally* purchased or otherwise acquired (or insured) the devices. *See, e.g.*, *Craig* v. *Lake Asbestos of Quebec*, 843 F.2d 145, 150 (3d Cir. 1988) ("The control which a parent must exercise over a subsidiary so as to warrant piercing the veil between them is . . . complete domination, not only of finances but of policy and business practice *in respect to the transaction attacked* so that the corporate entity *as to this transaction* had *at the time no* separate mind, will or existence of its own." (emphasis added)); *Ziegler* v. *Del. County Daily Times*, 128 F. Supp. 2d 790, 797 n.21 (E.D. Pa. 2001) (relevant question was the nature of the relationship "as it existed [when the allegedly wrongful conduct occurred]").

Here, however, the TAC is devoid of any factual allegations that would justify finding that Respironics was an alter ego or agent of KPNV or the other Philips Defendants, particularly in the pre-recall time period. Plaintiffs offer *none* of the paradigmatic veil-piercing allegations, such as that Respironics was inadequately capitalized, that Respironics failed to observe corporate formalities, that Respironics's business was dependent on the Philips Defendants, or that Respironics was subject to any inappropriate siphoning of funds by the Philips Defendants. The absence of any such allegations requires dismissal at the pleading stage. *See, e.g., MicroStrategy* v. *Acacia Rsch. Corp.*, 2010 WL 5550455, at *11-12 (Del. Ch. Dec. 30, 2010) (dismissing claims where complaint failed to "allege any facts that Delaware courts traditionally rely upon for piercing the corporate veil").

The TAC fails entirely to plead facts showing that Respironics was a "sham" company that the Philips Defendants used "as a vehicle for fraud." *See In Re Suboxone Antitrust Litig.*, 2017 WL 4810801, at *10-11 (E.D. Pa. Oct. 25, 2017) (granting parent corporation's motion to dismiss where "none of the alleged facts set forth by Plaintiffs allow any reasonable inference that [parent corporation] exercises a greater than normal degree of control over [subsidiary]," and "[n]otably absent from Plaintiffs' pleading and briefing is any suggestion that [subsidiary] is a mere sham corporation"); *McGovern* v. *Jack D's*, 2004 WL 228667, at *3 (E.D. Pa. Feb. 3, 2004) (plaintiff must plead "that a corporation's affairs and personnel were manipulated to such an extent that it became nothing more than a sham used to disguise the alter ego's use of its assets for his own benefit in fraud of its creditors"). The allegations of the TAC show nothing of the kind; rather, Plaintiffs allege that Respironics began manufacturing CPAP devices in the 1980s (before KPNV had acquired it), and developed technology, filed patents, and sold respiratory therapy devices even after KPNV acquired it in 2008. (TAC ¶¶ 154, 179, 206.) A pioneering business in the CPAP field is hardly a "sham."

Because Plaintiffs cannot meet the applicable sham standard, Plaintiffs instead offer a hodgepodge of allegations concerning KPNV's branding, corporate policies, marketing, and intellectual property. But these allegations do not come close to showing that Respironics was a sham company. For example, Plaintiffs allege that KPNV and Respironics (putting aside dozens of other subsidiaries of KPNV) used common branding, but courts have consistently "found that common marketing image and joint use of trademark logs fail to render entities as alter egos." *Horowitz* v. *AT&T Inc.*, 2018 WL 1942525, at *9 (D.N.J. Apr. 25, 2018) (collecting cases); *see In re Enterprise Rent-A-Car Wage & Hour Emp. Pracs. Litig.*, 735 F. Supp. 2d 277, 323 (W.D. Pa. 2010) (Conti, J.) ("common marketing image and joint use of trademarked logos"

did not establish alter ego relationship); *Energy Marine Servs.* v. *DB Mobility Logistics*, 2016 WL 284432, at *3 (D. Del. Jan. 22, 2016) (holding that "shared branding is insufficient to support [plaintiffs' alter ego] argument," explaining that "[c]ommon branding, trademarks and shared internet domains may demonstrate a close business relationship" but are insufficient to suggest an alter-ego relationship).

It is similarly insufficient that KPNV put in place "General Business Principles" to maintain its "unified global presence" (TAC ¶ 167), as courts have held that shared corporate policies do not establish liability of the parent company. *See, e.g.*, *Horowitz*, 2018 WL 1942525, at *9 ("Accepting Plaintiffs' position would extend the alter ego doctrine, such that entities utilizing the same brand, website, and policies would be imputed as alter egos, without demonstrating the subsidiaries ignored corporate formalities in day-to-day activities.").[23] Similarly, although Plaintiffs colorfully allege that KPNV "created a complex, confusing, and ever-changing labyrinth of interrelated and interconnected Philips entities and holding companies" (TAC ¶ 190), this supports only the innocuous proposition that KPNV is a corporation with international corporate holdings. It comes nowhere close to pleading facts showing that KPNV abused the corporate form, or even that this structure is materially different from the corporate structures employed by other companies with affiliates across the globe.

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[23] The TAC's allegation that Respironics relied on KPNV's "Complaint Handling Policy" (TAC ¶¶ 302-03) fails for the same reason. Further, Plaintiffs' allegations concerning Roy Jakobs, whom they allege "is in charge of Philips' Connected Care businesses" (which includes Respironics), do not help Plaintiffs. (*Id.* ¶ 184.) The fact that Mr. Jakobs leads a global business line comes nowhere close to establishing that Respironics was a sham company. *See Savin Corp.* v. *Heritage Copy Prod., Inc.*, 661 F. Supp. 463, 470 (M.D. Pa. 1987) (parent corporation's executive "oversee[ing]" operations at subsidiary insufficient to show "that [parent] exercised the type of control over [subsidiary's] day-to-day operations which would evidence an alter-ego relationship"). Of course, as the ultimate parent, it would be expected that KPNV would oversee its subsidiaries and ensure coordination with the owner's goals, but this does not plead day-to-day management.

Allegations concerning KPNV's marketing of Respironics's products are also inadequate to show that the companies "fail[ed] to observe corporate formalities" or that Respironics was a mere sham. *Pearson*, 247 F.3d at 484. The TAC attempts to substantiate its conclusory assertion that KPNV "took a lead role in launching and marketing several of the recalled devices" (TAC ¶ 222) by pointing to various press releases and statements made by KPNV or one of its other affiliates at conferences concerning Respironics products. (*See id.* ¶¶ 222-38 But that a parent company "provides individual operating subsidiaries with marketing materials, and produces national advertisements," is "insufficient to justify disregarding the general rule of corporate distinctions." *In re Enterprise*, 735 F. Supp. 2d at 287, 323. In fact, that a parent company and its subsidiary "identify themselves as a single entity in marketing materials . . . merely describe[s] indicia of a typical parent-subsidiary relationship." *IBM* v. *Expedia*, 2019 WL 3322542, at *4-5 (D. Del. July 24, 2019). The unremarkable proposition that KPNV supported its subsidiary's products comes nowhere close to demonstrating the extensive control Plaintiffs must show to disregard the corporate form. *See Bausch Health Ireland* v. *Myland Labs.*, 2022 WL 683084, at *5 (D.N.J. Mar. 8, 2022) ("[U]se of an online product catalogue . . . that does not differentiate between subsidiaries" does not "support the conclusion that Defendants are mere alter egos of the other.").

Finally, Plaintiffs allege that KPNV relies on a subsidiary it owns as an assignee of patents for Respironics devices, and KPNV "jointly prosecute[s]" with Respironics "patent infringement and unfair competition cases." (TAC ¶¶ 179-80.) These allegations cannot establish any abuse of the corporate form: as KPNV explained in its 2021 annual report, KPNV owns "57,000 patent rights, 33,000 trademarks, 114,000 design rights and 2,900 domain names," and its "industrial IP organization provid[es] world-class IP solutions" to its subsidiaries to

support their "growth, competitiveness and profitability." (TAC Ex. 13 at 23.) Mere ownership and enforcement of intellectual property rights does not in any way show that KPNV "exercised any control over the internal workings or day-to-day operations of its subsidiaries." *In re Enterprise Rent-a-Car*, 735 F. Supp. 2d at 324. In fact, Plaintiffs do not even allege that KPNV itself directly manages its massive intellectual property portfolio. Instead, Plaintiffs allege that, at various times, non-parties RIC Investments, LLC and Philips IP Ventures B.V. performed that role. (TAC ¶ 179.)

3. Plaintiffs' Allegations Concerning the Philips Defendants' Post-Recall Conduct (Count 3) Are Similarly Insufficient To Pierce the Corporate Veil.

Nor have Plaintiffs set forth sufficient factual allegations showing that Respironics was the alter ego or agent of the Philips Defendants *after* the recall was announced for purposes of Plaintiffs' negligent recall claim. Respironics initiated and managed the recall, and KPNV's involvement never exceeded the general support and assistance expected of a parent company. Despite Plaintiffs' misleading allegations to the contrary, their own exhibits prove as much. For example, the recall notice itself stated that "*Philips Respironics* is voluntarily recalling" the devices. (TAC Ex. 4 at 1 (emphasis added).) The FDA understood this as well, as it directed its communications regarding various aspects of the recall to Respironics.[24] Plaintiffs plead no facts to the contrary.[25]

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[24] *See, e.g.,* TAC Ex. 5 (FDA 483 report directed to Respironics), Ex. 72 (FDA proposed 518(b) order to Respironics), Ex. 136 (FDA 518(a) order directing Respironics to "notify all health professionals who prescribe or use the Recalled Products . . . of the recall and the health risks presented by the Recalled Products").

[25] *See also, e.g.*, TAC Ex. 126 (Respironics is responsible for "comprehensive customer and patient outreach," the recall "repair and replacement program," and additional VOC testing related to the recalled devices), Ex. 125 ("Philips Respironics[] initiated a voluntary recall notification" and "has been conducting a comprehensive test and research program on the PE-

Furthermore, Plaintiffs concede there was a *global* recall of the Respironics devices. (TAC ¶ 14.) Thus, even if it were true that KPNV "has directly overseen and managed the Recall" (*id.* ¶ 387), that would not support the conclusion that Respironics was acting either as the alter ego or agent of KPNV, much less all of the Philips Defendants. As a parent company with operations and subsidiaries across the world, KPNV could not simply refrain from communicating about and supporting Respironics's recall, or for the KPNV Supervisory Board, Quality and Regulatory Committee, CEO, or person "in charge of Philips' Connected Care businesses that include Philips RS," to simply remain silent. (*See* TAC ¶¶ 184, 380-81, 401-02.) Especially in the context of a global recall, a parent company's involvement and support is indicative of nothing beyond "a normal-parent subsidiary relationship." *Trinity Indus.* v. *Greenlease Holding Co.*, 903 F.3d 333, 367 (3d Cir. 2018); *see Avicolli* v. *BJ's Wholesale Club*, 2021 WL 2454454, at *5 (E.D. Pa. June 16, 2021) (allegations that parent "made the decision for [wholly owned subsidiary] to issue a recall," "share common management," "utilize[d] similar logos," and "oversaw products distributed by [subsidiary]" insufficient to pierce corporate veil); *Bunch* v. *Centeon*, 2000 WL 1741905, at *1 (N.D. Ill. Nov. 24, 2000) (parent company not liable for subsidiary's defective product where its participation in the product recall merely constituted "aid [to] a new company during a difficult time").

PUR foam."), Ex. 127 ("[The recall] led to an increase [in the number of] MDRS filed by Philips Respironics to the FDA between April 2021 and April 2022.").

CONCLUSION

Irrespective of whether the Court allows any claims against Respironics to proceed past the pleading stage, the Court should dismiss all claims against the Philips Defendants (KPNV, Philips NA, Philips Holding and Philips RS Holding) for failure to state a claim. The Court should separately consider Plaintiffs' two discrete types of claims: (1) claims dating back to the original purchase decision (Counts 1, 2, and 4-72), and (2) claims relating to the recall itself (Count 3). Should the Court conclude that Plaintiffs' negligent recall claim (Count 3) is sufficiently pled as to the Philips Defendants, the Court should still dismiss all other claims against the Philips Defendants.[26]

[26] The TAC represents Plaintiffs' third attempt to state a claim. Given the multiple opportunities, combined with voluminous discovery to date, the dismissal should be with prejudice. *See, e.g.*, *McLeod* v. *Fifth Jud. Dist. of Pa.*, 2022 WL 13986832, at *6 (D.N.J. Oct. 24, 2022) (dismissing third amended complaint with prejudice where plaintiff failed to adequately plead a claim due to improper group pleading, among other issues, despite having taken "three bites at the apple").

Dated: December 6, 2022

Respectfully submitted,

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