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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

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IN RE: WILLOWBROOK ETHYLENE OXIDE
LITIGATION

*This Filing Applies to: ALL ACTIONS
CONSOLIDATED FOR PRETRIAL AND
DISCOVERY PURPOSES*

Consolidated for Pretrial and
Discovery Purposes Under No. 2018-
L-10475

Hon. Marguerite Quinn

**DEFENDANT GTCR LLC'S MEMORANDUM OF LAW
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT (CORRECTED 3/15/22)¹**

Pursuant to 735 ILCS 5/2-1005, Defendant GTCR LLC moves for summary judgment on all claims against it in Plaintiffs' Fourth Amended Master Complaint.

Introduction

For strategic reasons that remain unclear, Plaintiffs decided to sue, among other Defendants, an entity related to a Chicago-based private equity firm. That entity, GTCR LLC, never had an ownership interest in any of the other Defendants. Instead, GTCR LLC's relationship to this litigation is both tenuous and tangential: It was the advisor to private equity funds that invested in a holding company, which was the corporate parent of Sterigenics International LLC (now known as Sotera Health LLC), which in turn was the corporate parent of Sterigenics U.S., LLC, which in turn operated the Willowbrook medical sterilization facility. The dispositive question presented in this motion is whether an investment advisor can be held liable under a "direct participant" theory for advising investment funds that invested in a company that, in turn, owned another company that, in turn, owned yet another company that allegedly harmed Plaintiffs.

¹ There is a correction on p. 10, as explained in footnote 4.

The clear answer is no. Any other answer would require a radical, unprecedented, and unwarranted change in Illinois law.

At the motion to dismiss stage, Plaintiffs evaded dismissal of their claims against GTCR LLC based on their allegation that GTCR LLC owned Sterigenics. Discovery has now disproven that allegation. Under the undisputed facts and settled law, GTCR LLC is entitled to summary judgment.²

Factual Background

I. GTCR LLC is an advisor to investment funds.

GTCR LLC is part of a private equity firm based in Chicago that provides financial advice and services to investment funds. Ex. A ¶ 3 (Affidavit of Sean L. Cunningham). Specifically, GTCR LLC is a registered investment advisor—an investment advisor registered as such with the Securities and Exchange Commission. *See, e.g.*, Ex. B (GTCR LLC Form ADV). GTCR LLC is separate from the funds it advises, as well as from the general and limited partners of those funds, and is likewise separate from the portfolio companies in which the funds invest. *Id.* ¶ 4.

II. In 2011, Fund IX invested in a company that owned a company that owned Sterigenics U.S., LLC.

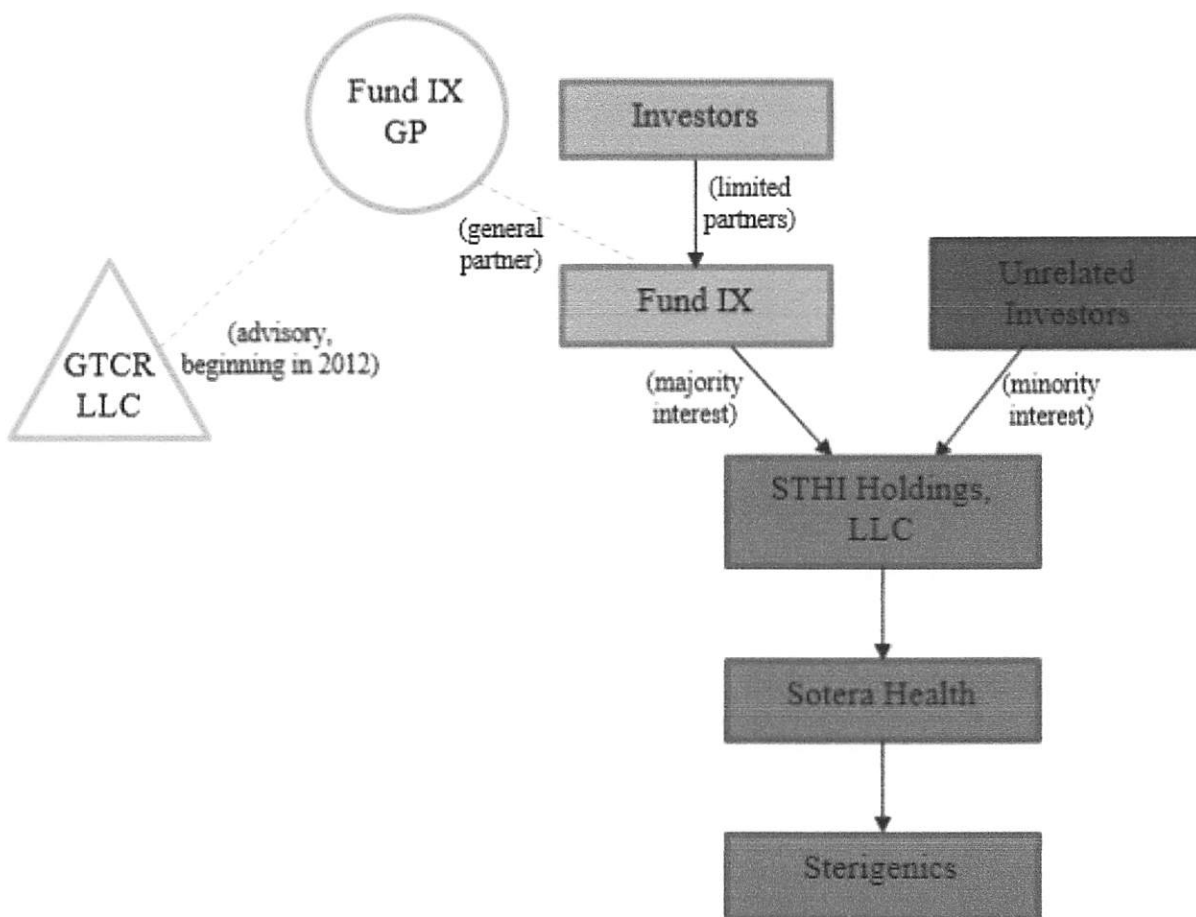
In 2011, three investment funds collectively known as “Fund IX” acquired a controlling ownership interest in STHI Holdings, LLC, the parent company of Sterigenics International, LLC (the predecessor to Sotera Health).³ *See* Ex. C (Stock Purchase Agreement, dated Feb. 18, 2011). Sterigenics International, LLC (Sotera Health), in turn, was the parent company of Sterigenics

² Although not addressed in this motion, Plaintiffs have likewise failed to establish that any actions of GTCR LLC affected Plaintiffs’ exposure to ethylene oxide, much less proximately caused the Plaintiffs’ injuries. GTCR LLC reserves all rights as to proximate causation.

³ For ease of reference, this brief will refer to Sterigenics International, LLC, Sotera Health LLC, and any other corporate predecessors or successors as “Sotera Health.”

U.S., LLC (“Sterigenics”), which owned and operated the Willowbrook facility that sterilized life-saving medical equipment using ethylene oxide. Ex. A ¶ 5.

Starting in 2012, GTCR LLC entered into a contract to perform management and operational services on behalf of GTCR Golder Rauner II, L.L.C. (“Fund IX GP”), the general partner of GTCR Partners IX, L.P., which in turn was the general partner of Fund IX. *See* Ex. D (Management Agreement between GTCR LLC and GTCR Golder Rauner II, LLC, dated Feb. 1, 2012). The relationship among the various entities is depicted in this chart:



The Court may also assume—for purposes of this motion only—that GTCR LLC advised Fund IX with respect to its decision in 2011 to invest in Sotera Health.

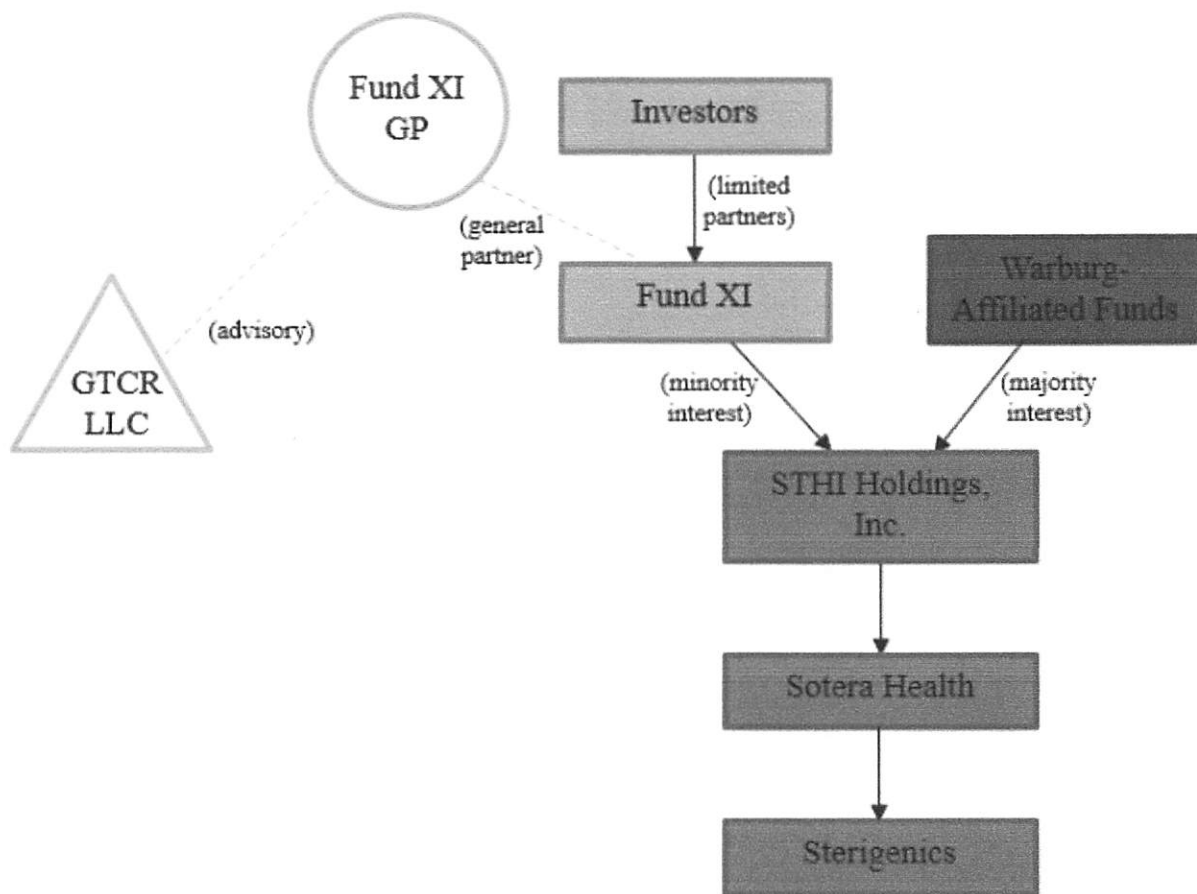
In connection with Fund IX's investment, Fund IX's general partner appointed GTCR LLC employees to serve on the board of directors of Sotera Health and its parent company. *See* Ex. E, at 101–02 (STHI Holding Corp. Offering Memorandum, dated March 11, 2011); Ex. F (Joint Written Consent of the Stockholders and the Board of Directors of Sterigenics International, Inc. dated Dec. 29, 2011). In their capacity as directors of Sotera Health and its parent company, GTCR LLC employees provided advice and guidance typical of board membership. Ex. A ¶ 9.

III. In 2015, Fund XI and a Warburg-affiliated fund invested in a company that owned a company that owned Sterigenics.

In 2015, an investment fund managed by New York-based private equity firm Warburg Pincus, LLC (a non-party to this litigation unrelated to GTCR LLC) invested approximately \$500 million to acquire a majority interest in STHI Holdings, Inc., which at the time was the parent company of Sotera Health. Ex. G (Stock Purchase Agreement, dated March 20, 2015); Ex. H (Equityholders' Agreement Term Sheet); Ex. A ¶ 6. At the same time, three new GTCR LLC-advised funds collectively known as "Fund XI" invested approximately \$333 million to acquire a non-controlling, minority interest in STHI Holdings Inc. *See* Ex. G; Ex. H. Fund IX, which had invested in 2011, divested its entire interest in Sotera Health and subsequently wound up its operations and dissolved. Ex. A ¶ 8.

At the time of the 2015 transaction, GTCR LLC was the investment advisor for Fund XI. *See* Ex. I at 466:1–24 (Cunningham Dep. Tr.). After that transaction, Fund XI did not have a majority interest or control over any entity in the Sterigenics corporate family, and Fund IX had no ownership interest whatsoever in any entity in the Sterigenics corporate family. Ex. A ¶ 7.

Under the terms of the 2015 investment, GTCR LLC did not own Fund XI. GTCR LLC's relationship with Fund XI and Sotera Health is depicted in the chart below:



In connection with the 2015 transaction, the Warburg-affiliated funds, as the majority investor, acquired the right to appoint up to five directors to the board for Sotera Health's holding company, Sterigenics-Nordion Holdings LLC. Ex. H. Fund XI, the minority investor, was entitled to appoint three directors. *Id.*

In the years after the 2015 transaction, Sotera Health made several acquisitions of companies engaged in complementary businesses and made dividend payments to investors. *See* Ex. I at 483:1–484:12; 572:11–15. In 2020, Sotera Health's ultimate parent company made its initial public offering and became a publicly-traded company. *See* Ex. J (Sotera Health Company Form S-1, dated Nov. 18, 2020); Ex. K at 420:16–19 (Roth Dep. Tr.). Fund XI retained a minority

ownership interest through its investment in Sotera Health's holding company. *See* Ex. I at 379:11–22.

GTCR LLC was sued in the first lawsuits Plaintiffs brought in 2018. The Fourth Amended Master Complaint (“Compl.”) asserts claims against GTCR LLC for negligence (Count 24), willful and wanton conduct (Count 25), and public nuisance (Count 26). GTCR LLC moved to dismiss, but the motion was denied because Plaintiffs had pleaded that GTCR LLC “owned and operated” the Willowbrook facility. *See* Order on Defendants’ Motions to Dismiss, Aug. 17, 2020, at 42. The Court noted that “a future dispositive motion can challenge any evidence or lack of evidence.” *Id.* The evidence now shows that GTCR LLC never “owned or operated” the Willowbrook facility.

Legal Standard

Summary judgment should be granted “if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” 735 ILCS 5/2-1005(c). The moving party may satisfy its burden “either by affirmatively showing that some element of the case must be resolved in its favor or by establishing that there is an absence of evidence to support the nonmoving party’s case.” *Kasper v. McGill Mgmt. Inc.*, 2019 IL App (1st) 181204, ¶ 23 (citation omitted).

To survive a motion for summary judgment, the non-moving party “must present a factual basis that would arguably entitle her to a judgment.” *Essig v. Advoc. BroMenn Med. Ctr.*, 2015 IL App. (4th) 140546, ¶ 38 (cleaned up). There must be competent evidence supporting “a bona fide factual issue and not merely general conclusions of law.” *800 S. Wells Com. LLC v. Cadden*, 2018 IL App (1st) 162882, ¶ 26 (citation omitted). “[M]ere speculation, conjecture, or guess is

insufficient to withstand summary judgment.” *Kasper*, 2019 IL App (1st) 181204, ¶ 23 (citation omitted).

Argument

A principle “deeply ingrained in our economic and legal systems” holds that separate corporate entities cannot be liable for one another’s acts. *See United States v. Bestfoods*, 524 U.S. 51, 61 (1998) (cleaned up). In seeking to hold GTCR LLC liable for the alleged actions of Sterigenics, Plaintiffs are violating this principle and seeking a radical restructuring of Illinois law. GTCR LLC is not a parent corporation of Sterigenics, but instead served as an advisor to entities that invested in a company that was Sterigenics’ ultimate parent. Even in the parent-subsidary context, Illinois requires “a great deal more” than that relationship to impose liability on a parent. *Forsythe v. Clarke USA*, 224 Ill. 2d 274, 291 (2007). Again, however, this is not a parent-subsidary situation, and no Illinois court—and as far as GTCR LLC can tell, no court anywhere—has held an investment advisor like GTCR LLC liable under any similar circumstance.

Plaintiffs claim to be pursuing their claims against GTCR LLC under the “direct participant” theory recognized in *Forsythe*. But *Forsythe* permitted that theory only in the parent-subsidary context, not the very different context presented here, and the reasoning of *Forsythe* does not extend outside the parent-subsidary relationship. Even if the direct participant theory were expanded beyond that context, Plaintiffs would have to prove that GTCR LLC was itself a “direct participant” in the conduct that allegedly caused their injuries. *See Forsythe*, 224 Ill. 2d at 290; *see also* Pls. Opp. GTCR MTD, May 29, 2020, at 1, 4 & n.3 (acknowledging that “GTCR’s direct participation is the basis for *all* of the claims Plaintiffs assert against it”). Plaintiffs have not come close to creating a question of fact about that. To the contrary, there is no evidence that

GTCL LLC took any actions with respect to Sterigenics' operations, including actions that could have caused Plaintiffs' alleged injuries.

I. Direct participant liability is limited to the parent-subsidiary relationship and does not extend to investment advisors like GTCL LLC.

The "direct participant" theory of liability applies exclusively to *corporate shareholders* of an entity that allegedly caused harm—not investment advisors like GTCL LLC. In *Forsythe*, the seminal case on this issue, the Illinois Supreme Court adopted direct participant liability as "a valid theory of recovery" under exceptional circumstances:

Where there is evidence sufficient to prove that a *parent company* mandated an overall business and budgetary strategy *and* carried that strategy out by its own specific direction or authorization, surpassing the control exercised as a normal incident of *ownership* in disregard for the interests of the subsidiary, that *parent company* could face liability. The key elements to the application of direct participant liability, then, are a *parent's* specific direction or authorization of the manner in which an activity is undertaken and foreseeability.

224 Ill. 2d at 290 (bolded emphasis added).

As the discussion in *Forsythe* confirms, direct participant liability applies only when a parent company interferes in the affairs of a subsidiary by using "its *ownership interest* to command rather than merely cajole." *Id.* at 284 (quoting *Esmark, Inc. v. NLRB*, 887 F.2d 739, 757 (7th Cir. 1989)) (emphasis added). Thus, direct participant liability "gives rise to a duty only in limited circumstances," namely when a parent company directs the actions of the subsidiary in a manner which "disregard[s] the discretion and interests of the subsidiary, and thereby create[s] dangerous conditions." *Id.* at 299. The parent's ownership interest is the core, indispensable feature of direct participant liability because it is the source of the parent company's power to "command."

GTCL LLC had no ownership interest in Sterigenics, direct or indirect. No Illinois court—indeed, no court anywhere, as far as GTCL LLC can tell—has applied the direct participant theory to an investment advisor like GTCL LLC. To do so would eviscerate long-established rules of

corporate separateness. This Court should not take the unprecedented step of extending the scope of direct participant liability, which itself is a “very narrow exception” to the general rule of limited corporate liability. *Forsythe*, 224 Ill. 2d at 302 (Freeman, J., concurring).

Although Plaintiffs’ claims against GTCR LLC survived a motion to dismiss based on their allegations that GTCR LLC purchased Sterigenics, and that GTCR LLC “owned and operated” the Willowbrook facility, the record now shows that these allegations were false. *See* Compl. ¶¶ 77–78, 227–30. GTCR LLC was an investment advisor to Fund IX and Fund XI; it never itself invested in Sotera Health or Sterigenics, let alone owned or operated either entity or any Sterigenics facility. For this reason alone, GTCR LLC is entitled to summary judgment.

II. GTCR LLC was not a “direct participant” in any of Sterigenics’ allegedly wrongful acts.

Even if the Court were to tear the direct participant theory from its legal moorings and apply it outside the parent-subsidary context, no reasonable jury could conclude that GTCR LLC directly participated in the allegedly tortious activities at issue here. Direct participant liability applies only when “a parent company mandates an overall course of action and then authorizes the manner in which specific activities contributing to that course of action are undertaken,” resulting in “foreseeable injuries.” *Forsythe*, 224 Ill. 2d at 290. The doctrine is a “very narrow exception” to the principle of limited liability, and Plaintiffs must prove far more than that GTCR LLC acted consistently with the ordinary relationship between a parent and subsidiary. *Id.* at 302 (Freeman, J., concurring).

The “critical question” for direct participant liability is whether the parent’s actions are “eccentric under accepted norms of parental oversight.” *Id.* at 283–84; *see also Nathan v. Morgan Stanley Renewable Dev. Fund, LLC*, No. 11 C 2231, 2012 WL 1886440, at *10 (N.D. Ill. May 22, 2012) (requiring actions from parent that “amount to mandating a particular course of action and

carrying it out through specific direction and authorization”).⁴ Direct participant liability cannot flow from crafting “overall business and budgetary strategies,” *Forsythe*, 224 Ill. 2d at 291, or from “[g]eneral oversight, such as monitoring of the subsidiary’s performance, supervision of the subsidiary’s finance and capital budget decisions, and articulation of general policies and procedures.” *Prusaczyk v. Hamilton County Coal LLC*, No. 3:20-cv-73-NJR, 2021 WL 1608763, at *6 (S.D. Ill. Apr. 20, 2021).

The massive record developed in these cases is conspicuous for the absence of any evidence that GTCR LLC—an investment advisor to funds that invested in Sotera Health—directed Sterigenics or Sotera Health to act in a specific way, much less that it somehow overrode “the discretion of the managers of the subsidiary.” *Forsythe*, 224 Ill. 2d at 283. As the Court knows, discovery here has been broad and deep, yet not a single document or witness suggests that GTCR LLC “directed [Sterigenics] to take any specific actions or to refrain from taking any action with regard to [Plaintiffs’] allegations.” *See Prusaczyk*, 2021 WL 1608763, at *6 (granting summary judgment to parent company on direct participant theory); *see also Linsner v. Exelon Corp.*, 2012 IL App (1st) 110753-U ¶¶ 39, 43 (affirming summary judgment in favor of corporate parent where subsidiary “had existing safety rules” for adhering to regulatory requirements, which were “not substantially modified” by the parent company). In particular, there is no evidence that GTCR LLC ever directed or controlled decisions about investing in emissions control equipment at the Willowbrook facility or any other aspect of operations that affected the volume of ethylene oxide emissions. And, even if typical board-level decision-making were sufficient to generate liability

⁴ This parenthetical has been corrected from the initially filed version. The parenthetical initially provided: “(requiring actions from parent that ‘amount to mandating a particular course of action and carrying it out *to an eccentric degree* through specific direction and authorization’).” The bolded language has now been removed.

(it is not), the Sotera Health board (on which GTCR LLC employees sat) never rejected a request to invest in or upgrade that equipment.

Relying on three arguments, Plaintiffs claim that GTCR LLC nevertheless was a “direct participant” in Sterigenics’ alleged wrongdoing. As explained below, none of these arguments creates a triable issue of fact.

Executive Team and Directors. Plaintiffs assert that GTCR LLC can be held liable as a direct participant because it allegedly installed its own team of executives and directors to lead Sotera Health, including executives who had previously led other companies in which GTCR-affiliated funds had invested. *See* Compl. ¶¶ 180–83, 191–94. But the selection of a parent’s “desired directors and officers” is the “normal and orderly procedure of corporate control.” *Forsythe*, 224 Ill. 2d at 283; *see also Bestfoods*, 524 U.S. at 69 (noting that it was “entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary”). GTCR LLC cannot be held liable for the acts of other companies merely because GTCR LLC, on behalf of the investment funds it advised, helped choose members of the Sotera Health management team. All members of the Sotera Health management team were employed by Sotera Health, and none were employees of GTCR LLC, Fund IX, Fund XI, or any GTCR-affiliated fund. *See* Ex. A ¶ 10. Their previous experience managing other companies in which GTCR-affiliated funds had invested is irrelevant. *See Forsythe*, 224 Ill. 2d at 283.

Nor can Plaintiffs establish liability based on GTCR-affiliated funds’ right to appoint directors of Sotera Health and its parent company. As an initial matter, GTCR LLC never had a right to appoint directors—that right belonged to the general partner of the fund. But even if it did, GTCR LLC employees who served on the boards of Sotera Health and its parent companies are presumed to have been acting solely as directors of those companies when they did so. *Forsythe*,

224 Ill. 2d at 293 (in context of a parent-subsidary relationship, directors are presumed to be “wearing their ‘subsidiary hats’ and not their ‘parent hats’ when acting for the subsidiary”); *id.* at 303-04 (Freeman, J., concurring).

Budgetary Management. Plaintiffs next argue that GTCR LLC can be held liable as a direct participant because it exercised budgetary control over Sterigenics. *See* Compl. ¶ 195. This argument also fails. “Parent companies are free to craft overall business and budgetary strategies” without being held liable for the actions of the subsidiary. *Forsythe*, 224 Ill. 2d at 291. Activities like “monitoring of the subsidiary’s performance, supervision of the subsidiary’s finance and capital budget decisions, and articulation of general policies and procedures” do not establish direct participant liability. *Id.* at 303 (Freeman, J., concurring). Even “allegations of mere budgetary mismanagement alone do not give rise to the application of direct participant liability.” *Id.* at 290.

In any event, Plaintiffs can point to no competent evidence that GTCR LLC (which, again, was not a parent company to Sotera Health or Sterigenics, and never held any interest in either) “created and approved [Sterigenics’] budget” or crafted a budgetary strategy for Sotera Health or Sterigenics, whether at the company or facility level. *Forsythe*, 224 Ill. 2d at 279. In particular, neither GTCR LLC nor its employees, including those serving as directors on the Sotera Health board, ever rejected a request to maintain or upgrade emission control equipment or other safety-related features, either at the Willowbrook facility or elsewhere.

Growth Strategy and Dividends. Finally, Plaintiffs argue that GTCR LLC was a direct participant in Sterigenics’ operations through its alleged imposition of a growth strategy that encouraged Sotera Health and Sterigenics to acquire other companies and make dividend

payments, all in a manner that drained the company of the cash needed to invest in safety. *See* Compl. ¶¶ 179, 184–89, 198–203, 207–08. This theory too fails on the record.

The financial activity complained of, including merger-and-acquisition activity and dividend payments to shareholders, is well within the norms of an ordinary parent-subsiary relationship. At least one Illinois court concluded that such activity did *not* establish that the parent company had interfered in the subsidiary’s work in any relevant way, even when the total dividends paid by the subsidiary over a four-year period far exceeded the subsidiary’s total net income. *Gillespie Comm. Unit Sch. Dist. No. 7 v. Union Pacific R. Co.*, 2015 IL App (4th) 140877, ¶¶ 32, 117–19 (granting summary judgment to parent company on direct participant theory). The dividend payments made here are insufficient to establish direct participation.

Not only are Plaintiffs unable to point to any facts to show GTCR LLC’s direct participation, they also cannot identify any evidence that Sotera Health pursued corporate acquisitions or dividend payments to its shareholders (which, again, never included GTCR LLC) *at the expense* of safety improvements. None of the challenged transactions placed Sterigenics or Sotera Health in “survival mode” or forced the companies to turn to austerity measures to continue operating. *Cf. Forsythe*, 224 Ill. at 294. And there is no evidence that any of these transactions required “budget cuts . . . from safety, maintenance, and training expenses.” *Id.*

III. GTCR LLC’s alleged actions did not foreseeably cause Plaintiffs’ injuries.

In addition to establishing an “eccentric” level of control (which Plaintiffs have failed to do), Plaintiffs must prove a “causal nexus between the parentally mandated budgetary strategy” or some other action of the corporate parent and the plaintiff’s injury. *Gillespie*, 2015 IL App (4th) 140877, ¶ 117. “A wrong can be traced to the parent company when the parent specifically directs

an activity and an injury is foreseeable.” *Prusaczyk*, 2021 WL 1608736, at *6 (granting summary judgment on direct participant liability theory).

Plaintiffs cannot point to evidence showing that any of GTCR LLC’s actions could have foreseeably caused their alleged injuries. There is no evidence that GTCR LLC “hinder[ed] or discourage[ed]” Sterigenics from making adequate investments in safety. *Gillespie*, 2015 IL App (4th) 140877, ¶ 119. Nor is there evidence that GTCR LLC directed any actions that affected the level of ethylene oxide emitted from the Willowbrook facility.⁵ In fact, there is no evidence that Sterigenics’ ethylene oxide emissions “had anything to do with [GTCR LLC’s] overall business strategy.” *Id.* ¶ 118. GTCR LLC merely advised funds that made indirect investments in Sterigenics and Sotera Health.

Other Illinois courts have granted summary judgment under similar circumstances, where plaintiffs present “no detail or evidence” connecting a defendant’s policies or strategies to their injuries. *See, e.g., Linsner*, 2012 IL App (1st) 11075-U ¶¶ 36-37 (general allegations that defendant contributed to subsidiary’s decisions and established policies and programs for the subsidiary could not withstand summary judgment); *Gillespie*, 2015 IL App (4th) 140877, ¶ 118 (summary judgment affirmed where there was no link between subsidiary’s challenged actions and parent company’s strategy). This is not a case where GTCR LLC’s strategies required any action or inaction by Sterigenics that foreseeably led to Plaintiffs’ injuries. *Cf. Forsythe*, 224 Ill. 2d at 295 (denying summary judgment because officer of the parent company “knew both that the budgetary

⁵ The Glassdoor reviews on which Plaintiffs relied for their allegations are inadmissible hearsay. *See Nixon v. Inquisitr Ltd.*, No. 20-cv-1819-JS-SIL, 2021 WL 3667154, at *4 (E.D.N.Y. Aug. 17, 2021) (“The Glassdoor website submitted by Plaintiff constitutes hearsay and is not admissible as support for his claim.”). Plaintiffs have not identified any admissible evidence suggesting that any action or strategy implemented by GTCR can be linked to deficient investments in safety.