IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ALTIGEN COMMUNICATIONS, INC., Plaintiff, v. RYAN DAY, Defendant.	C.A. No. 2025-1298-JTL

OPINION GRANTING MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

Date Submitted: August 5, 2026
Date Decided: August 21, 2026

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LASTER, V.C.

A Delaware corporation hired a Chief Strategy Officer. The corporation has sued him, claiming he breached his fiduciary duties as an officer by failing to report that key customers were planning to reduce or terminate their business relationships with the corporation.

The Chief Strategy Officer moved to dismiss the complaint for lack of personal jurisdiction. This decision grants the motion.

I. FACTUAL BACKGROUND

The facts are drawn from the complaint and documents it incorporates by reference.[1] At this procedural stage, the court must credit the complaint's well-pled allegations and draw all reasonable inferences in the plaintiff's favor.

A. The Asset Purchase Agreement

Intermountain Technology Group, LLC conducted business under the trade name ZAACT. Ryan Day founded ZAACT and served as its Chief Executive Officer. Day resides in Utah.

Altigen Communications, Inc. (the "Company") agreed to acquire ZAACT by purchasing its assets. The Company is a publicly listed Delaware corporation.

The parties documented the transaction in an asset purchase agreement dated March 4, 2022 (the "Asset Purchase Agreement"). The transaction closed on May 6,

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[1] Citations in the form "Compl. ¶ ___" refer to paragraphs of the verified complaint, which is the operative pleading. Dkt. 1. Citations in the form "Ex. ___ at ___" refer to exhibits defendant filed in support of its motion. Dkt. 7. Citations in the form "OB ___ at ___" and "AB ___ at ___" refer to defendant's opening brief and plaintiff's answering brief, respectively. Dkts. 7, 12.

2022. Day received approximately $2,000,000 at closing. He also stood to receive (i) $225,000 in cash and $300,000 in Company stock one year after closing, (ii) the same consideration two years after closing, and (iii) $225,000 in cash three years after closing.

The Asset Purchase Agreement contained representations about ZAACT's customers. Day represented that he was not aware of any circumstances that "would reasonably be expected to cause any Material Customer . . . to terminate or materially change its business relationship with [ZAACT]."[2] Under the Asset Purchase Agreement, the Company could seek indemnification from Day for breaches of representations. The Company could also offset losses for those breaches against the consideration Day would otherwise receive.

B. Day Becomes Chief Strategy Officer.

When entering into the Asset Purchase Agreement, the parties anticipated that Day would become the Company's Chief Strategy Officer after closing. By email dated March 10, 2022, the Company's Chief Executive Officer informed Day that his duties as Chief Strategy Officer would include responsibility for "Strategic Customers."[3] The CEO also envisioned Day meeting with him three times per week for regular updates.

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[2] Compl. ¶ 20. That is how the complaint describes the Asset Purchase Agreement. The parties did not submit a copy.

[3] *Id.* ¶ 29.

Shortly before closing, Day executed an employment agreement effective as of May 4, 2022 (the "Employment Agreement"). It described Day's duties and responsibilities as follows:

> During the Employment Period, Employee will serve as the Chief Strategy Officer of the Company, reporting to the President of the Company (the "Supervisor") as of the date hereof. Such Supervisor may be changed at any time by the Company, and the Company shall provide notice of such change to Employee as soon as practicable. As the Chief Strategy Officer of the Company, Employee will perform all duties and accept all responsibilities incident to such position or as may be reasonably assigned to Employee by the Supervisor.[4]

The Employment Agreement also contained a section titled "Extent of Service." It stated that "[d]uring the Employment Period, Employee will use Employee's full and best efforts to carry out Employee's duties and responsibilities . . . with the highest degree of loyalty and the highest standards of care, in compliance with applicable laws and written policies of the Company Group . . . ."[5]

The Employment Agreement permitted the Company to terminate Day with or without cause.[6] The Employment Agreement defined cause to include six categories of misconduct. One was "material non-performance of Employee's duties (including any material breach of fiduciary duty) or gross misconduct or gross negligence in the performance of Employee's duties."[7] Another was "commission of any other act or

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[4] Ex. A (cited as "EA") § 1.4.

[5] *Id.* § 1.5.

[6] *Id.* § 2.1.

[7] *Id.* art. III, "Cause."

omission involving theft, misappropriation, embezzlement, fraud, self-dealing, conflict of interest, or dishonesty, in each case, relating the performance of Employee's duties to any member of the Company Group."[8] Still another encompassed "any material willful or grossly negligent breach or nonperformance of any of Employee's . . . obligations under this Agreement (including any of Employee's duties hereunder, including Employee's fiduciary duties to any member of the Company Group)."[9]

C. Issues With Material Customers

Between the signing of the Asset Purchase Agreement and closing, Day learned that three material customers intended to reduce and eventually terminate their business relationships with ZAACT. He did not disclose what he learned to the Company.

After becoming Chief Strategy Officer, Day continued not to disclose what he knew about the three customers reducing and eventually terminating their business relationships with ZAACT. Day also did not participate in the anticipated thrice-weekly update sessions with the Company's CEO. Day skipped the Company board meetings held in May and August 2022.

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[8] *Id.*

[9] *Id.*

During the year after closing, the three customers reduced their business relationships with ZAACT. ZAACT's revenue for that year fell by $1,400,000. Operating profit fell from $850,000 to a loss of $340,000.

During the second year after closing, ZAACT's performance fell even further. The declines tracked the loss of business from the three material customers.

D. The Utah Action

In June 2024, Day and ZAACT sued the Company in state court in Salt Lake County, Utah for breach of the Asset Purchase Agreement. The Company removed the case to federal court in Utah and filed counterclaims.[10]

In November 2024, the Company discovered evidence relating to the three customers' plans to reduce and eventually terminate their business relationships with ZAACT. The Company did not amend its counterclaims in the Utah action to assert a claim against Day for breach of fiduciary duty. The deadline to move to amend the Utah pleadings passed on April 30, 2025.

E. This Litigation

On November 10, 2025, the Company filed this lawsuit. The complaint's sole count asserts that Day breached his fiduciary duties in his capacity as an officer.

The complaint alleges that Day breached his duties of loyalty and care by failing to disclose that the three customers planned to reduce and eventually terminate their relationships with the Company. The complaint asserts that Day had

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[10] *See Intermountain Tech. Gp., LLC and Ryan Day v. Altigen Commc'ns, Inc.*, 2:24-cv-0538-DAK-CMR (D. Utah).

a self-interested motive to conceal his knowledge because the Company could have used the information to assert a claim for breach of the Asset Purchase Agreement and seek indemnification from Day. The Company contends that if Day had disclosed what he knew, then the Company could have repaired the relationships, reallocated resources to other customers, or taken steps to reduce costs to offset the lost revenue.

Day moved to dismiss the complaint on multiple grounds. He moved for dismissal under Rule 12(b)(2) for lack of personal jurisdiction over him. He moved for dismissal under Rule 12(b)(3) on the theory that a forum-selection clause in the Employment Agreement makes courts in Utah the exclusive forum for disputes. He moved for dismissal under Rule 12(b)(6), arguing that the Company has not stated a claim independent of the Employment Agreement and, in any event, the Employment Agreement's contractual language preempts fiduciary duty claims. And he moved for dismissal under Rule 13, arguing the Company had to assert its claim for breach of fiduciary duty as a compulsory counterclaim in the Utah action.

After reviewing the papers, the court entered a minute order *sua sponte*:

> When briefing Day's status as an officer under Section 3114(b), the parties have relied on *In re P3 Health Group Holdings, LLC*, 282 A.3d 1054 (Del. Ch. 20[2]2). The *P3* case involved an LLC, and the material participation standard derives from 6 *Del. C.* [§] 18-109. The court addressed de facto officer status under Section 3114(b) in *Harris v. Harris*, 289 A.3d 310 (Del. Ch. 2023). Acting sua sponte, the court directs the parties to be prepared to address the *Harris* precedent.[11]

[11] Dkt. 30.

Raising additional authority comports with the principle that "[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law."[12] Foreclosing a court from considering authorities the parties did not raise would function as a binding stipulation regarding governing law, which cannot bind a court.[13] When in practice, I found requests for supplemental briefing helpful because it suggested what issues were on the judge's mind. As a trial judge, I have found counsel's answers helpful for reciprocal reasons.

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[12] *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991); *see U.S. Nat. Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 447 (1993) (holding that the court of appeals properly ordered supplemental briefing on a legal issue that no party raised or took a position on; explaining that a "court may consider an issue 'antecedent to . . . and ultimately dispositive of' the dispute before it,' even an issue the parties fail to identify and brief" (quoting *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990)); *see Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 88 n.9 (1993) (addressing a legal question even where parties agreed on the answer)).

[13] *Swift & Co. v. Hocking Valley Ry. Co.*, 243 U.S. 281, 289–90 (1917) ("If the stipulation is to be treated as an agreement concerning the legal effect of admitted facts, it is obviously inoperative; since the court cannot be controlled by agreement of counsel on a subsidiary question of law."); *accord Bank of Or.*, 508 U.S. at 448 ("After giving the parties ample opportunity to address the issue, the Court of Appeals acted without any impropriety in refusing to accept what in effect was a stipulation on a question of law."); *Fisher v. First Stamford Bank & Tr. Co.*, 751 F.2d 519, 523 (2d Cir. 1984) ("Generally, a stipulation of fact that is fairly entered into is controlling on the parties and the court is bound to enforce it. But a court is not governed by a stipulation on a question of law." (citations omitted)).

II. LEGAL ANALYSIS

Day has moved for dismissal on four grounds. The first is lack of personal jurisdiction. That issue generally presents a threshold question that a court should address before reaching the merits.[14] Sometimes, issues of personal jurisdiction are so intertwined with the merits that an upfront determination is not possible.[15] Here, however, the court can address that threshold issue. The court lacks personal jurisdiction over Day. This decision need not reach his other arguments.

When a defendant moves for dismissal under Rule 12(b)(2), "the plaintiff bears the burden of showing a basis for the court's exercise of jurisdiction over the defendant."[16] That burden is an evidentiary one.[17] A verified complaint is the legal

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[14] *See Branson v. Exide Elecs. Corp.*, 625 A.2d 267, 268–69 (Del. 1993) ("This Court has concluded that the Court of Chancery should have decided the personal jurisdictional challenge regarding the individual defendants, raised by Exide's motion to dismiss, prior to addressing the substantive aspect of that motion with respect to all defendants. Accordingly, this matter will be remanded to the Court of Chancery for that purpose.").

[15] *See Arxada Hldgs. NA Inc. v. Harvey*, 351 A.3d 519, 543–45 (Del. Ch. 2026) (deferring ruling on personal jurisdiction until trial because of extensive overlap between jurisdictional analysis and the merits; describing a cautionary tale in which an early evidentiary hearing on personal jurisdiction only served to complicate the litigation where the court's ability to exercise personal jurisdiction was intertwined with the merits); Ch. Ct. R. 12(i) ("The Court may defer until trial ruling on any defense listed in Rule 12(b)—whether made in a pleading or by motion—or any motion under Rule 12(c).").

[16] *Ryan v. Gifford*, 935 A.2d 258, 265 (Del. Ch. 2007).

[17] *Hart Hldg. Co. Inc. v. Drexel Burnham Lambert Inc.*, 593 A.2d 535, 538 (Del. Ch. 1991) (Allen, C.).

equivalent of an affidavit and can provide the necessary evidentiary support.[18] A court can also consider evidentiary submissions.[19]

If the court has not conducted an evidentiary hearing, then a plaintiff "need only make a prima facie showing" sufficient to support jurisdiction, with the record construed "in the light most favorable to the plaintiff."[20] If the court takes that approach, then the jurisdictional question technically remains open until trial, when the plaintiff must prove the jurisdictional facts by a preponderance of the evidence.[21] Often, the jurisdictional challenge falls by the wayside, but not always.

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[18] *See Bruce E. M. v. Dorothea A. M.*, 455 A.2d 866, 869 (Del. 1983) ("A verified pleading may also be used as an affidavit if the facts stated therein are true to the party's own knowledge."); *accord Weber v. Kirchner*, 2003 WL 23190392, at *3 (Del. Ch. Dec. 31, 2003); *Taylor v. Jones*, 2002 WL 31926612, at *2 & n.6 (Del. Ch. Dec. 17, 2002).

[19] *Sample v. Morgan* (*Sample II*), 935 A.2d 1046, 1055–56 (Del. Ch. 2007) ("In considering a motion to dismiss for lack of personal jurisdiction under Court of Chancery Rule 12(b)(2), I am not limited to the pleadings. Rather, I am 'permitted to rely upon the pleadings, proxy statement, affidavits, and briefs of the parties in order to determine whether the defendants are subject to personal jurisdiction.'" (quoting *Crescent/Mach I P'rs, L.P. v. Turner*, 846 A.2d 963, 974 (Del. Ch. 2000)); *Ryan*, 935 A.2d at 265 ("In ruling on a Rule 12(b)(2) motion, the court may consider the pleadings, affidavits, and any discovery of record.").

[20] *Sprint Nextel Corp. v. iPCS, Inc.*, 2008 WL 2737409, at *5 (Del. Ch. July 14, 2008); *see Sample II*, 935 A.2d at 1056 ("In evaluating the record [on a Rule 12(b)(2) motion], I must draw reasonable inferences in favor of the plaintiff."); *Ryan*, 935 A.2d at 265 ("If, as here, no evidentiary hearing has been held, plaintiffs need only make a prima facie showing of personal jurisdiction and the record is construed in the light most favorable to the plaintiff." (footnotes and internal quotation marks omitted)).

[21] *Travelers Indem. Co. v. Calvert Fire Ins. Co.*, 798 F.2d 826, 831 (5th Cir. 1986) ("However, 'at any time when the plaintiff avoids a preliminary motion to dismiss by making a prima facie showing of jurisdictional facts, he must still prove the jurisdictional facts at trial by a preponderance of the evidence,' or, as otherwise

Under Delaware law, analyzing whether personal jurisdiction exists involves two steps.[22] First, the plaintiff must identify a valid method of serving process on the defendant. Second, the plaintiff must show sufficient minimum contacts between the defendant and Delaware such that the exercise of personal jurisdiction by a Delaware court "does not offend traditional notions of fair play and substantial justice."[23] In this case, the analysis falls short on the first step, so the court need not reach the second.

The Company relies on two statutes as its bases for valid service of process on Day. One is Section 3114(b) (the "Officer-Consent Statute").[24] The other is Section 3104 (the "Long-Arm Statute").[25] Neither authorizes service of process in this case.

A. The Officer-Consent Statute

Under the Officer-Consent Statute, a person who serves a Delaware corporation in specified roles consents to service of process through the corporation's registered agent or, if none, the Delaware Secretary of State. The Officer-Consent

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stated, '[e]ventually, of course, the plaintiff must establish jurisdiction by a preponderance of the evidence, either at a pretrial evidentiary hearing or at a trial.'" (first quoting *Data Disc., Inc. v. Sys. Tech. Assocs., Inc.*, 557 F.2d 1280, 1285 n.2 (9th Cir. 1977); then quoting *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981))).

[22] *Matthew v. Fläkt Woods Gp. SA*, 56 A.3d 1023, 1027 (Del. 2012).

[23] *Id.* (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

[24] 10 *Del. C.* § 3114(b).

[25] *Id.* § 3104.

Statute only applies to the identified roles. The statute does not extend to Day because he did not occupy an identified role or its functional equivalent.

1. A Three-Part Statute

The Officer-Consent Statute has three parts. It starts by deeming service as an officer to be consent to jurisdiction (the "Deemed-Consent Clause"). Next, it identifies the types of cases to which the Deemed-Consent Clause applies (the "Covered-Cases Clause"). Last, it defines who qualifies as an officer for purposes of the Deemed-Consent Clause (the "Officer Definition").

The Deemed-Consent Clause provides as follows:

> Every nonresident of this State who after January 1, 2004, accepts election or appointment as an officer of a corporation organized under the laws of this State, or who after such date serves in such capacity, . . . shall, by such acceptance or by such service, be deemed thereby to have consented to the appointment of the registered agent of such corporation (or, if there is none, the Secretary of State) as an agent upon whom service of process may be made in all civil actions or proceedings brought in this State [that satisfy the Covered-Cases Clause] . . . .[26]

Day does not challenges the effectiveness of the Deemed-Consent Clause.

The Covered-Cases Clause identifies two categories of cases to which the Deemed-Consent Clause applies. One encompasses cases brought "by or on behalf of, or against such corporation, in which such officer is a necessary or proper party."[27]

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[26] *Id.* § 3114(b).

[27] *Id.*

The other encompasses "any action or proceeding against such officer for violation of a duty in such capacity."[28] This case falls within both categories.

Most importantly for this case, the Officer Definition identifies the officer roles to which the Deemed-Consent Clause applies. For purposes of the statute, an officer is someone who

> (1) Is or was the president, chief executive officer, chief operating officer, chief financial officer, chief legal officer, controller, treasurer or chief accounting officer of the corporation at any time during the course of conduct alleged in the action or proceeding to be wrongful;
>
> (2) Is or was identified in the corporation's public filings with the United States Securities and Exchange Commission because such person is or was 1 of the most highly compensated executive officers of the corporation at any time during the course of conduct alleged in the action or proceeding to be wrongful; or
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> (3) Has, by written agreement with the corporation, consented to be identified as an officer for purposes of this section.[29]

The Company only invokes the first definitional bucket (the "Roles Clause"). Despite being a publicly listed entity, the Company does not argue that it identified Day in its filings as one of its most highly compensated executive officers during the course of conduct. The Company also has not pointed to any agreement in which Day consented to treatment as an officer for purposes of the Officer-Consent Statute.

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[28] *Id.*

[29] *Id.*

2. Applying The Roles Clause To A Non-Identified Role

The Company contends that Day's role as Chief Strategy Officer falls within the Roles Clause. As a technical matter, that is incorrect. The Roles Clause only identifies "the president, chief executive officer, chief operating officer, chief financial officer, chief legal officer, controller, treasurer or chief accounting officer of the corporation." But for reasons addressed at length in a prior decision, the Roles Clause does not stop at individuals who hold the identified titles.[30] It extends to "a person who discharges the duty or function" contemplated by the identified titles.[31] "The top executive at a company who uses the title 'Grand Poobah' still is subject to service of process under Section 3114(b)(1) as the president or chief executive officer."[32]

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[30] *Harris*, 289 A.3d at 327–37.

[31] *Id.* at 327.

[32] *Id.* at 329. The Officer-Consent Statute therefore differs from a provision in the Delaware Limited Liability Company Act (the "LLC Act") under which a Delaware court can exercise jurisdiction over a person who "participates materially in the management of the limited liability company." 6 *Del. C.* § 18-109(a). Day originally suggested that the LLC Act standard applied here, relying on language in a decision that ruled on whether the court could exercise personal jurisdiction over an acting manager of an LLC. *See In re P3 Health Gp. Hldgs., LLC*, 282 A.3d 1054, 1069 (Del. Ch. 2022). That was the wrong standard. *See Harris*, 289 A.3d at 333 (comparing and contrasting the Officer-Consent Statute with Section 18-109(b) and noting that "the material participation standard in Section 18-109(b) sweeps more broadly than any language in Section 3114(b)"). The Company tried to claim that "Day admit[ted]" that was the operative standard. AB at 8 (citing OB at 7).

As discussed previously parties cannot bind the court regarding the governing law, either formally or informally. *See* Part I.E., *supra.* A court can choose to treat an argument as waived, but need not do so. Waiver makes the most sense for case-specific or party-specific issues. Here, using the right standard for the Officer-

The Roles Clause is also flexible enough to account for some variation in roles. By its terms, the Roles Clause extends expressly to the chief legal officer, but a company might conceivably divide that role in two, perhaps with one person addressing traditional transactional and litigation matters and another addressing compliance. In that case, the Roles Clause would reach both co-equal senior legal officers; they could not evade the statute by acting as *duumviri*.

That example generalizes. A company might have a president, CEO, and three executive vice presidents who collectively fill the role of chief operating officer. If a plaintiff could make the necessary evidentiary showing, then the Officer-Consent Statute would extend to the EVP triumvirate.

What the Officer-Consent Statute cannot do is encompass the entire c-suite or extend more deeply into the organization. After scandals at Enron, Worldcom, Tyco, Global Crossing, and Adelphia, Chancellor Chandler and then-Vice Chancellor Strine spearheaded a legislative initiative to expand Section 3114 to include officers.[33] The

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Consent Statute matters. Otherwise, a decision using the errant standard might reinforce the mistake, leading others to err and creating uncertainty.

[33] *See* William B. Chandler III & Leo E. Strine, Jr., *The New Federalism of the American Corporate Governance System: Preliminary Reflections of Two Residents of One Small State*, 152 U. Pa. L. Rev. 953, 953 (2003). By advancing their initiative, the two judges ran with an idea that two academics had published earlier that year. Robert B. Thompson & Hillary A. Sale, *Securities Fraud as Corporate Governance: Reflections Upon Federalism*, 56 Vand. L. Rev. 859, 906 (2003) ("For Delaware to expand its focus on officer conduct it would have to amend its jurisdictional statute to include officers rather than just directors."). *See* Chandler & Strine, *supra,* at 1004 n.125 (citing Thompson & Sale, *supra*, at 868–72).

General Assembly took up their initiative and enacted the Officer-Consent Statute in its current form.[34]

In an article formally published after the General Assembly had amended the Officer-Consent Statute, Chancellor Chandler and then-Vice Chancellor Strine explained their rationale:

> In the past year, several of the most prominent of the corporate scandals have involved (apparently) serious breaches of fiduciary duty by corporate officers and executives who were not directors. . . . [I]t would make sense for Delaware to adopt a new subsection of Section 3114 designed to cover top executives. This provision could be modeled on Section 3114 and simply state that top executives of Delaware companies consent to service of process in Delaware for claims brought against them in their official capacities as an officer or employee.[35]

In a footnote, they argued for "conservatism in the first instance" by tailoring the statute to "chief executive officers, presidents, chief operating officers, chief financial officers, chief technology officers, treasurers, general counsel, controllers, secretaries, and executive vice presidents."[36]

The forward-looking language is confusing because by that time, the General Assembly had acted. Notably, however, the General Assembly had not adopted the Chandler-Strine initiative's proposal on scope. The General Assembly instead chose

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[34] *See* Del. S.B. 126, 142d Gen. Assem. (2003) [hereinafter S.B. 126].

[35] Chandler & Strine, *supra*, at 1003.

[36] *Id.* at 1004 n.126.

the more limited Roles Clause, supplemented by the other portions of the Officer Definition.[37]

The Roles Clause identifies three roles with a whole-company remit (president, chief executive officer, and chief operating officer), four roles in the finance function (chief financial officer, controller, treasurer, and chief accounting officer), and the chief legal officer.[38] But those are not the only senior corporate roles. A bevy of c-suite titles now dot the landscape, including Chief Business Development Officer, Chief Compliance Officer, Chief Human Resources Officer, Chief Information Officer, Chief Information Security Officer, Chief Investment Officer, Chief Marketing Officer, Chief People Officer, Chief Product Officer, Chief Revenue Officer, Chief Risk Officer, Chief Science Officer, Chief Sustainability Officer, and Chief Technology Officer. There are also Executive Vice President and Senior Vice President roles with substantial portfolios that occupy rungs on organizational charts comparable to where a corporate controller or treasurer sits relative to a CFO.

The Roles Clause does not automatically sweep in those other positions. Instead, the Roles Clause identifies a set of titles for corporate roles where a relatively

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[37] *See* S.B. 126; *see also* 10 *Del. C.* § 3114(b).

[38] *See* 10 *Del. C.* § 3114(b)(1). Unfortunately, the legislative synopsis does not provide any insight into those choices. It states only that "[t]his amendment enables Delaware courts to exercise personal jurisdiction over persons who accept election or appointment as officers of a Delaware corporation, or who serve in such capacity, for claims brought against them in their official capacity." *See* S.B. 126 syn. That is an exaggeration. If the Officer-Consent Statute had granted jurisdiction over all officers, then the description would be apt. The Officer Definition does not go that far.

stable consensus exists regarding their responsibilities. To bring a position with a different title within the Roles Clause, a plaintiff must demonstrate that the position's responsibilities functionally equate to or significantly overlap with the responsibilities of an identified role. If not, then jurisdiction over the position under the Roles Clause does not exist. Likewise, if one or more individuals already hold the identified role or its functional equivalent, then jurisdiction over the additional position under the Roles Clause does not exist.

The Company implicitly argues for a different, multi-factor test. First, the Company emphasizes that "Chief Strategy Officer" includes the word "officer." True, but that only begins the inquiry. At one end of the officer spectrum, the Delaware General Corporation Law (the "DGCL") establishes who qualifies as an officer in the formal sense: "Every corporation . . . shall have such officers with such titles and duties as shall be stated in the bylaws or in a resolution of the board of directors which is not inconsistent with the bylaws."[39] The DGCL further provides that "[o]fficers shall be chosen in such manner and shall hold their offices for such terms as are prescribed by the bylaws or determined by the board of directors or other governing body."[40] The DGCL thus contemplates that formal officers will receive some form of official empowerment by a duly authorized corporate organ. "Generally, the empowering authority will be the board or other governing body of the entity, but

[39] 8 *Del. C.* § 142(a).

[40] *Id.* § 142(b).

it could be another duly empowered individual or group, such as a more senior officer for a more junior position."[41]

At the other end of the officer spectrum, some large organizations have handed out inflated titles to the point where armies of employees can say they are vice presidents.[42] Officer status matters for a variety of legal purposes, not just service of process under the Officer-Consent Statute. For some purposes, a junior vice president might be an officer; for others, perhaps not.

The Officer Definition is plainly narrower than whoever has an officer title. When drafting the Roles Clause, the General Assembly selected three whole-company or operational roles, four finance roles, and one legal role. The General Assembly could have tracked the Chandler-Strine proposal. The General Assembly could have extended the Officer-Consent Statute to all formal DGCL officers. We have the statute we have.

Next, the Company stresses that Day owed fiduciary duties to the Company. True again, and an example of the fallacy of consistent evidence. All officers are fiduciaries, but not all fiduciaries are officers.[43] Agents also owe fiduciary duties,[44]

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[41] *Harris*, 289 A.3d at 330.

[42] *See Gilbert v. Unisys Corp.,* 2024 WL 3789952, at *11–13 (Del. Ch. Aug. 13, 2024); *Aleynikov v. Goldman Sachs Gp., Inc.*, 2016 WL 3763246, *4–8 (Del. Ch. July 13, 2016), *aff'd*, 155 A.3d 370 (Del. 2017).

[43] *McRitchie v. Zuckerberg*, 315 A.3d 518,534 n.12 (Del. Ch. Apr. 30, 2024).

[44] All agents are fiduciaries. Restatement (Third) of Agency § 1.01 (A.L.I. 2006), Westlaw, (database updated Oct. 2024) [hereinafter Restatement of Agency] (defining

agency as "the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act"); *see Sci. Accessories Corp. v. Summagraphics Corp.*, 425 A.2d 957, 962 (Del. 1980) ("It is true, of course, that under elemental principles of agency law, an agent owes his principal a duty of good faith, loyalty and fair dealing."); Ramon Casadesus-Masanell & Daniel F. Spulber, *Trust and Incentives in Agency*, 15 S. Cal. Interdisc. L.J. 45, 68 (2005) ("While all agents are fiduciaries, not all fiduciaries are agents."); Thomas Earl Geu, *A Selective Overview of Agency, Good Faith and Delaware Entity Law*, 10 Del. L. Rev. 17, 20 (2008) (explaining that fiduciary status is "a result of agency" and collecting authorities establishing the point); Barak Orbach, *D&O Liability for Antitrust Violations*, 59 Santa Clara L. Rev. 527, 560 n.2 (2020) ("All agents are fiduciaries but not all fiduciaries are agents").

There are Delaware cases which assert errantly that an agency relationship, standing alone, does not give rise to fiduciary duties on the part of the agent. *See Wayman Fire Prot., Inc. v. Premium Fire & Sec., LLC*, 2014 WL 897223, at *20 (Del. Ch. Mar. 5, 2014) ("Under Delaware law, the relationship of agent to principal does not itself give rise to fiduciary duties." (citing *Prestancia Mgmt. Gp., Inc. v. Va. Heritage Found., II LLC*, 2005 WL 1364616, at *6 (Del. Ch. May 27, 2005)). That assertion can be traced to *Metro Ambulance, Inc. v. Eastern Med. Billing, Inc.*, 1995 WL 409015, at *3 (Del. Ch. July 5, 1995) ("The existence of a principal/agent relationship does not, in and of itself, give rise to a fiduciary relationship."). As the sole support for that assertion, *Metro Ambulance* cited *Maull v. Stokes*, 68 A.2d 200 (Del. Ch. 1949), but *Maull* did not say that not all agents are fiduciaries. The case involved a contractor who was hired to build a house and a garage. The contractor performed additional work not covered by the contract, and when he was not paid, he filed a mechanic's lien. The homeowner sued in the Court of Chancery for an accounting, and the question was whether equitable jurisdiction existed. The court held that there is "an implied relation of principal and agent between the owner of property and a general contractor for the construction of a building thereon." *Id.* at 202. In the sentence that *Metro Ambulance* seems to have relied on, *Maull* stated that "[e]quity will not compel an agent to account to his principal merely because of the existence of that relation." *Id.* That sentence addresses the availability of an accounting. It does not suggest that some agents are not fiduciaries to their principals. To the contrary, the court exercised jurisdiction over the suit because (1) there was a fiduciary relationship and (2) the numerous details of the transaction meant that the matter could not be determined accurately or fairly by a jury in a court of law. *Id.* at 202–03. The assertion that some agents are not fiduciaries is not accurate and would cause Delaware law to conflict with settled doctrine.

and employees are agents.[45] If Day did not owe fiduciary duties, that would negate his ability to qualify as an officer, which in turn would exclude him from the Officer-Consent Statute. Showing that Day owes fiduciary duties does not mean that he is an officer, nor that he comes within the Officer-Consent Statute. It means that he might be an officer and, if so, could come within the Officer-Consent Statute.

Third, during oral argument, the Company suggested a pleading-stage presumption that anyone with "Chief" and "Officer" in their title would fall within the Roles Clause. But again, that is not what the Roles Clause says.

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[45] *See* Restatement of Agency § 7.07(3)(a) ("[A]n employee is an agent whose principal controls or has the right to control the manner and means of the agent's performance of work . . . ."); *accord* Restatement (Second) of Agency § 429 (A.L.I. 1958), Westlaw (database updated Oct. 2024) ("The rules as to the duties and liabilities to the principal of agents who are not servants apply to servants."); Restatement (First) of Agency § 2 (A.L.I. 1933), Westlaw (database updated Oct. 2024) ("A master is a species of principal, and a servant is a species of agent. The words 'master' and 'servant' are herein used to indicate the relationship from which arises the tort liability of an employer to third persons for the tort of an employee."). See Restatement (Second) of Agency, *supra*, Index M100 ("A master is a principal; a servant is an agent with special powers and rights additional to those of agents not servants. Hence all the rules applicable to principal and agent apply to master and servant . . . .").

The Restatement of Employment Law takes the position that not all employees are agents, stating: "Employees in a position of trust and confidence with their employer owe a fiduciary duty of loyalty to the employer in matters related to their employment. Other employees who come into possession of the employer's trade secrets owe a limited fiduciary duty of loyalty with regard to those trade secrets." Restatement of Employment Law § 8.01(a) (A.L.I. 2015), Westlaw (database updated Oct. 2024). For present purposes of negating the Company's position that owing fiduciary duties leads to officer status, it matters only that some non-officer employees are agents and therefore fiduciaries.

The complaint does not allege facts supporting a reasonable inference that Day's position as Chief Strategy Officer encompassed or substantially overlapped with an identified role. The complaint alleges that Day was responsible for managing relationships with significant customers and meeting thrice weekly with the CEO. The Employment Agreement states that Day "will perform all duties and accept all responsibilities incident to such position" or as assigned by his supervisor (the President) but does not spell out what those might be. The complaint also attaches an email from the post-signing, pre-closing phase in which the CEO told Day he would be responsible for cultivating strategic customers in key vertical markets, overseeing talent acquisition, and employee development. Those functions could be part of what a CEO, president, or Chief Operating Officer might do. They do not support an inference that Day performed one of those roles or that his duties substantially overlapped with one of those roles.

After Day called the question by moving to dismiss under Rule 12(b)(2), the Company had an evidentiary burden to establish a prima facie case for the existence of personal jurisdiction.[46] The Company did not submit an affidavit describing Day's duties or explaining how they equated to one of the Roles Clause's identified roles.[47]

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[46] *In re Talc Prod. Liab. Litig.*, 2018 WL 4340012, at *10 (Del. Super. Sept. 10, 2018) ("Upon a defendant's motion to dismiss under Rule 12(b)(2), a plaintiff is on notice that personal jurisdiction is contested and the plaintiff thereupon has a duty to present facts or arguments demonstrating a basis to hold the defendant to account in the forum.").

[47] *See N. Am. Catholic Educ. Programming Found., Inc. v. Rob Ghewalla*, 2006 WL 2588971, at *6 n.65 (Del. Ch. Sept. 1, 2006) ("Affidavits are routinely used to

Instead, the Company chose to rely on its complaint. Although a verified complaint functions as an affidavit, the contents of the Company's complaint are not sufficient to make out a prima facie case.

During oral argument, the Company's counsel argued that some of Day's duties were central to the Company's operations, much like the kinds of responsibilities a Chief Operating Officer would have. Likely true, and the Company is entitled to an inference that Day was a relatively senior person who had some operational authority. That is not enough to bring him within the Roles Clause.

The Company failed to establish a prima facie case that service could be effected under the Officer-Consent Statute. That statute cannot provide a basis for the assertion of personal jurisdiction over Day.

B. The Long-Arm Statute

The Company alternatively invokes the Long-Arm Statute. That statutory basis for jurisdiction fails for want of a Delaware-directed act.

The Delaware Long-Arm Statute empowers a court to exercise personal jurisdiction "over any nonresident, or a personal representative, who in person or through an agent" engages in an enumerated list of acts.[48] The Company relies on the subsection of the statute that authorizes the exercise of specific personal jurisdiction over a person who "[t]ransacts any business or performs any character of work or

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assist the Court in assessing the success of a plaintiff in making the *prima faci[e]* showing of the factual basis enabling the exercise of personal jurisdiction.").

[48] 10 *Del. C.* § 3104(c).

service in the State."[49] The "business" or "work," however, must take place or have an effect in Delaware.

The Company points to Day's acceptance of the Chief Strategy Officer position and argues that because the Company is a Delaware corporation, that qualifies as transacting business or performing work in the state of Delaware. Were that true, the Officer-Consent Statute would have been unnecessary. To the contrary, "out-of-state service as an officer of a Delaware corporation . . . is insufficient 'transaction of business' here to establish personal jurisdiction absent some act taken . . . in this State."[50]

The Company suggests that *Hazout* changed that rule by recognizing that an officer who fell within the Officer Definition could be sued in Delaware for either breach of duty or on a claim by, in the name of, or against the corporation where he

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[49] *Id.* § 3104(c)(1).

[50] *LVI Grp. Invs. LLC v. NCM Grp. Hldgs., LLC*, 2017 WL 3912632, at *4 (Del. Ch. Sept. 7, 2017); *accord Kelly v. McKesson HBOC*, 2002 WL 88939, at *17 (Del. Super. Jan. 17, 2002) (declining to exercise personal jurisdiction based "on the mere fact that [the CFO] was employed by a Delaware corporation"). Day also relies on *Kelly*'s subsequent musing that "[i]t would also seem that the fiduciary shield doctrine would prevent personal jurisdiction over Hawkins" and asserted that the doctrine prevents "acts performed by an individual in the individual's capacity as a corporate employee from serving as the foundation for exercise of personal jurisdiction over that individual." *Id.* at *17 n.70. As this court has explained at length, the fiduciary shield doctrine is both contrary to Delaware law and misguided in its own right. *Metro Storage Int'l LLC v. Harron*, 2019 WL 3282613, at *23–26 (Del. Ch. July 19, 2019); *accord Mobil Oil Corp. v. Advanced Env't Recycling Techs., Inc.*, 833 F. Supp. 437, 442–43 (D. Del. 1993) (surveying Delaware law and declining to recognize fiduciary shield as a basis for avoiding jurisdiction); *see Sample II*, 935 A.2d at 1058–60 (rejecting conceptually equivalent agency-shield doctrine). *Kelly*'s passing reference to it in *dictum* should not be perpetuated.

was a necessary party.[51] That holding applied the plain meaning of the Covered-Cases Clause in the Officer-Consent Statute. It did not change the scope of the Long-Arm Statute.

Day's agreement to serve as Chief Strategy Officer does not provide a basis for service of process under the Long-Arm Statute.

C. Jurisdictional Discovery

During oral argument, the Company asked for leave to take jurisdictional discovery or replead. Neither is warranted.

When personal jurisdiction is disputed, the court may permit jurisdictional discovery. That is because the facts necessary to demonstrate the existence of personal jurisdiction are often in the defendant's control.[52] "As a plaintiff does have an evidentiary burden, [it] may not be precluded from attempting to prove that a defendant is subject to the jurisdiction of the court, and may not ordinarily be precluded from reasonable discovery in aid of mounting such proof."[53] To obtain jurisdictional discovery, a plaintiff must assert a non-frivolous basis for believing that a defendant could be subject to the court's jurisdiction.[54] As long as the plaintiff has

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[51] *Hazout v. Tsang Mun Ting*, 134 A.3d 274, 292 (Del. 2016).

[52] *See Compagnie Des Bauxites de Guinee v. L'Union Atlantique S.A. d'Assurances*, 723 F.2d 357, 362 (3d Cir. 1983); *Surpitski v. Hughes-Keenan Corp.*, 362 F.2d 254, 255–56 (1st Cir. 1966).

[53] *Hart*, 593 A.2d at 539.

[54] *MacLaughlan v. Einheiber*, 354 A.3d 864, 885 (Del. Ch. 2026).

shown that "jurisdiction in Delaware is 'minimally plausible,'" then jurisdictional discovery is appropriate.[55]

This is not the typical case where the facts relating to personal jurisdiction are in the defendant's control. The Company already has all the information it needs about Day's responsibilities and what he did. If an unaffiliated stockholder had sued, the court might have permitted a reasonable amount of jurisdictional discovery to determine whether Day fell within the Officer-Consent Statute.[56] Not here.

For the same reason, good cause does not exist to allow the Company to replead. The Company could have included verified allegations in its complaint addressing Day's duties and activities. The Company could have amended its complaint as of right after Day filed his opening brief and called the personal jurisdiction question.[57] The Company made no effort.

D. Policy Issues

The Company perceives injustice in not being able to sue one of its officers in Delaware. While initially that might seem odd, individuals who take positions with

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[55] *Xactus, LLC v. Sike*, 2024 WEL 3947319, at *8 (Del. Ch. Aug. 27, 2024) (citing *300 W 22 Realty, LLC v. Strathmore Ins. Co.*, 2023 WL 2300628, at *4 (Del. Super. Mar. 1, 2023), *aff'd*, 309 A.3d 1265 (Del. 2023) (TABLE)).

[56] *See Harris*, 289 A.3d at 296 (permitting jurisdictional discovery to explore whether a defendant served as acting chief financial officer, controller, or treasurer); *see also Hart*, 593 A.2d at 537 (permitting discovery to explore whether Delaware-directed act had occurred in connection with a corporate buyout and warrant issuance).

[57] *See* Ct. Ch. R. 15(a)(1)(A).

Delaware corporations do not automatically consent to suit in the corporation's legal home. Only the most senior corporate roles are sufficiently intertwined with the corporation and its ability to act in the world to justify the chartering state's courts exercising personal jurisdiction through deemed consent.

An entity is an autonomous form of property that Delaware creates through the exercise of its sovereign authority as a chartering jurisdiction.[58] The resulting

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[58] *New Enter. Assocs. 14, L.P. v. Rich*, 295 A.3d 520, 568 n.159 (Del. Ch. 2023). For this reason, the internal affairs doctrine is more than merely a choice-of-law principle; it is also a means by which the chartering state exercises sovereignty beyond its borders. *See, e.g.*, Ann M. Lipton, *Inside Out (or, One State to Rule Them All): New Challenges to the Internal Affairs Doctrine*, 58 Wake Forest L. Rev. 321 (2023) (explaining origins of internal affairs doctrine in state chartering power, discussing the continuing role of state chartering power and its implications for what a state can address as a matter of internal affairs, and identifying related disputes over the scope of internal affairs doctrine); Mohsen Manesh, *The Corporate Contract and the Internal Affairs Doctrine*, 71 Am. U. L. Rev. 501, 503 (2021) (engaging with the "foundational question: Is the internal affairs doctrine simply a choice of law rule enabling a corporation and its shareholders to choose which state's law will govern their private business arrangement? Or, does the doctrine also demarcate the outer limits of what the corporation's governing documents may regulate?"); Vincent S.J. Buccola, *Opportunism and Internal Affairs*, 93 Tul. L. Rev. 339, 370–85 (2018) (examining the historical origins of the internal affairs doctrine and its role in creating boundaries on the regulatory authority of a chartering state); Timothy P. Glynn, *Delaware's Vantagepoint: The Empire Strikes Back in the Post-Post-*Enron *Era*, 102 Nw. U. L. Rev. 91 (2008) (examining the implications of a Delaware Supreme Court decision treating the internal affairs doctrine as more than a choice-of-law principle and as constitutionally compelled); *see also* Asaf Raz, *Mandatory Arbitration and the Boundaries of Corporate Law*, 29 Geo. Mason L. Rev. 223, 226 (2021) (arguing that corporate law has unique attributes warranting its own category distinct from contract and tort); Andrew K. Jennings, *Firm Value and Intracorporate Arbitration*, 38 Rev. Litig. 1, 11–15 (2018) (discussing public law and private law dimensions of internal affairs doctrine). Reductive approaches to the internal affairs doctrine that treat it solely as a choice-of-law principle and call for using standard choice-of-law analysis based on principles of comity are therefore deeply misguided. *See, e.g.,* Daniel B. Listwa & Bradley J. Polivka, *First Principles for Forum Provisions,*

construct includes the human-occupied internal roles necessary to animate the corporation, traditionally called corporate organs.[59] By statute, the most senior corporate organ is the board of directors.[60] Senior-officer positions are also corporate

2019 Cardozo L. Rev. de novo 106 (arguing for a comity-based approach that treats the internal affairs doctrine as choice-of-law principle); *see also* Zachary J. Gubler, *Amending the Delaware Corporate Code by Going to Court: Some Thoughts on* Sciabacucchi v. Salzberg, 108 Geo. L.J. Online 106 (2020) (arguing for treating the internal affairs doctrine as a choice-of-law doctrine and contending that the doctrine had no bearing on the ability of a charter to impose a forum selection provision).

[59] *See generally* Amitai Aviram, *Officers' Fiduciary Duties and the Nature of Corporate Organs*, 2013 U. Ill. L. Rev. 763, 768 ("Since a corporation is an artificial entity, it must act through others (corporate actors). Corporate actors are divided into two types: corporate agents and corporate organs. Corporate agents—like all agents—act on behalf of the corporation and subject to its control. Yet being an artificial entity, the corporation itself cannot control anyone; it needs another type of actor—the corporate organ, who acts on the corporation's behalf but is not subject to its control. Corporate organs—in particular the board—assert the corporation's control over the agents."); *id.* at 768–76 (explaining nature of corporate organs, their roles and duties, and differences between organs and agents); *cf. XRI Inv. Holdings LLC v. Holifield*, 283 A.3d 581, 653 (Del. Ch. 2022) ("The constitutive document that creates the corporation and these powers is not an ordinary private contract among private actors. It is a multi-party contract among the corporation, the stockholders, other corporate organs such as its directors and officers, and the State of Delaware."), *rev'd in part on other grounds*, 304 A.3d 896 (Del. 2023).

[60] *See* 8 *Del. C.* § 141(a). Since 2024, stockholders and even prospective stockholders can secure contractual rights that trump board authority. *See* 8 *Del. C.* § 122(18). The board of directors, however, remains the senior internal corporate organ, even though it now can be harnessed to perform a counterparty's will. *See id.* (authorizing a corporation to covenant in a contract that "the corporation or 1 or more persons or bodies will take, or refrain from taking, actions specified in the contract (which persons or bodies may include the board of directors or 1 or more current or future directors, stockholders or beneficial owners of stock of the corporation)").

organs.[61] The director and officer positions are legal things—a *res*—over which Delaware courts can exercise jurisdiction.[62]

Because director and senior-officer roles are so closely associated with the corporation's existence and its ability to act in the world, Delaware can use its chartering authority to establish personal jurisdiction over individuals who serve in those offices through the mechanism of deemed consent. The role of Delaware's chartering authority distinguishes Delaware's deemed-consent statutes from other assertions of jurisdiction based on implied consent that courts have rejected as constitutionally infirm.[63]

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[61] *See McRitchie v. Zuckerberg*, 315 A.3d 518, 534 n.12 (Del. Ch. 2024) ("Like directors, [officers] are corporate organs whose role in the corporation's internal governance structure finds statutory recognition in the DGCL. And like directors, they too exercise corporate power on behalf of the corporation and its stockholders." (citations omitted)).

[62] *See* 8 *Del. C.* § 225; *Technicorp Int'l II, Inc. v. Johnston*, 1997 WL 538671, at *5 (Del. Ch. Aug. 25, 1997) ("A § 225 action is in the nature of an *in rem* proceeding, the 'res' being the corporate office or position in dispute."); *Steinkraus v. GIH Corp.*, 1991 WL 3922, at *3 (Del. Ch. Jan. 16, 1991) ("This jurisdiction can be conceptualized as in the nature of in rem jurisdiction, the 'rem' being the corporate office the title to which is in dispute.").

[63] At least two commentators have questioned the viability of Delaware's deemed-consent statutes. *See* Eric A. Chiappinelli, *The Myth of Director Consent: After* Shaffer*, Beyond* Nicastro, 37 Del. J. Corp. L. 783, 819–35 (2013) (arguing that Delaware's deemed-consent statutes cannot survive under the minimum contacts analysis conducted in *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011), to determine whether a foreign manufacturer subjected itself to a state's jurisdiction by selling allegedly defective products in the stream of commerce); Verity Winship, *Jurisdiction over Corporate Officers and the Incoherence of Implied Consent*, 2013 U. Ill. L. Rev. 1171, 1185–97 (arguing that Delaware's deemed-consent statutes are constitutionally suspect). Those critiques fail to account sufficiently for the state's role in creating the entity and the inseparable nexus between the corporation and the

That said, Delaware's ability to wield its chartering power is not unlimited. The Due Process Clause of the United States Constitution imposes one constraint, as Delaware's two-part test for evaluating the exercise of personal jurisdiction acknowledges.

Entity law also has inherent limitations. A chartering state does not act in a vacuum.

> Just like real property in the physical world, an autonomous entity has borders, and there can be other jurisdictions on the other side of those borders. In those situations, the requirements for passage must be co-created with other sovereigns. Our neighbor to the north can determine what is required to enter Canadian soil, but the United States can dictate what is required to leave American soil. There are also senior sovereigns whose law dominates (preempts) the law of junior sovereigns. Within our own republic, the United States Constitution and the protection for interstate travel secured by Privileges & Immunities Clause dominate the ability of Delaware and Pennsylvania to regulate their shared boundary.[64]

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director and senior-officer roles that enable it to act. Professor Winship, for example, equates the deemed-consent statues with an effort by Delaware to extend jurisdiction over any employee of a Delaware corporation. *See id.* at 1197–98. But the two are not comparable. Any person, natural or otherwise, can hire an employee by exercising the right to contract. By contrast, the chartering state creates the director and senior-officer roles that animate the entity. In addition to that critical distinction, more recent authority from the Supreme Court of the United States undercuts the force of the commentators' critiques. *See Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 134–35 (2023) (upholding exercise of personal jurisdiction based on mandatory corporate registration statute); *id.* at 147 (Jackson, J., concurring) ("A defendant can waive its rights by explicitly or implicitly consenting to litigate future disputes in a particular State's courts." (citing *Ins. Corp. of Ireland v. Co. des Bauxites de Guinee*, 456 U.S. 694,703–04 (1982) ("[T]he Court has upheld state procedures which find constructive consent to the personal jurisdiction of the state court in the voluntary use of certain state procedures."))).

[64] *New Enter. Assocs.*, 295 A.3d at 568 n.159.

The analogy to borders and trans-border domains provides a helpful mental model for the limits on what a state can regulate through its power to create an entity. "Consider the limits on a state's ability to regulate real property. Even if the General Assembly enacted legislation that purported to govern all of the Delmarva peninsula, those statutes would have no effect south of the Transpeninsular Line, east of the low tide mark of the Delaware River, or west of Tangent Line."[65] If the DGCL in some alternative timeline required that Delaware corporations maintain English-only language policies, I would not expect the state's chartering power and the internal affairs doctrine to carry the day outside Delaware's geographic borders.[66]

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[65] *Id.*

[66] Territorial jurisdiction remains a legal constraint on sovereign power, as shown by cases enforcing territorial limitations and the ebbs and flows of Dormant Commerce Clause jurisprudence. *See Nat'l Pork Producers Council v. Ross,* 598 U.S. 356, 375–76 (2023) (discussing "the usual legislative power of a State to act upon persons and property within the limit of its own territory" and noting that "by way of example, no one should think that one State may adopt a law exempting securities held by the residents of a second State from taxation in that second state" nor "should anyone think one State may prosecute a citizen of another State for acts committed outside the first State's jurisdiction that are not intended to produce or that do not produce detrimental effects within it" (cleaned up)); *Singer v. Magnavox Co.*, 380 A.2d 969, 981 (Del. 1977) (discussing the "presumption that a law is not intended to apply outside the territorial jurisdiction of the State in which it is enacted"), *overruled on other grounds by Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983); *Eurofins Panlabs, Inc. v. Ricerca Bioscis., LLC*, 2014 WL 2457515, at *18 (Del. Ch. May 30, 2014) (explaining that the "Delaware Securities Act is not intended to apply outside the territorial jurisdiction" of Delaware and holding that it did not apply to the sale of Taiwanese stock of a Taiwanese entity simply because certain defendants were Delaware entities (cleaned up)); *Vichi v. Koninklikje Philips Elecs. N.V.*, 2009 WL 4345724, at *19 (Del. Ch. Dec. 1, 2009) (concluding the same for a notes issuance between a Dutch company and a Delaware subsidiary of an Italian company); *Ward v. CareFusion Sols., LLC*, 2018 WL 1320225, at *2–3 (Del. Super. Mar. 13, 2018) (interpreting California Labor Code as only applying within California); *Doe v. Boy*

Scouts of Am., 2013 WL 6040344, at *2 (Del. Super. Sept. 4, 2013) (holding that 10 *Del. C.* § 8145, which provides a cause of action for damages for child sexual abuse, did not apply extraterritorially); *Marshall v. Priceline.com Inc.*, 2006 WL 3175318, at *2 (Del. Super. Oct. 31, 2006) (holding that Delaware Consumer Fraud Act does not have extraterritorial effect); *Carter v. Dep't of Public Safety*, 290 A.2d 652, 655 (Del. Super. 1972) (declining to interpret Delaware statute requiring the forwarding of convictions to the Delaware Division of Motor Vehicles as having extraterritorial effect); *see also, e.g.*, *A.R.K. Patent Intern., LLC v. Levy*, 28 N.Y.S.3d 647 (N.Y. Sup. Ct. 2014) (TABLE) (holding that a New York statute governing attorney misconduct "does not apply to acts by attorneys outside New York's territorial borders"); *Campbell v. Arco Marine, Inc.*, 42 Cal. App. 4th 1850, 1852 (Cal. Ct. App. 1996) (holding that a California fair employment and housing law did not apply to extraterritorial tortious conduct); *cf.* Note, *Dormancy and Delaware: An Emerging Threat to the Internal Affairs Doctrine*, 139 Harv. L. Rev. 799, 816–20 (2026) (highlighting territorial tensions between modern dormant commerce clause jurisprudence and Delaware's internal affairs doctrine).

Territorial jurisdiction remains a practical constraint as well. A sovereign must have the means to enforce its laws, including its courts' decrees. Even when a sovereign claims the ability to regulate outside its territory or to control its citizens when abroad, that real-world power may be lacking. *E.g.*, *26 Cap. Acq. Corp. v. Tiger Resort Asia Ltd.*, 309 A.3d 434, 468 (Del. Ch. 2023) (explaining limits on court's ability to enforce a decree of specific performance against a Delaware corporation operating in the Philippines; "The sun has set on the era in which a nation might send gunboats to enforce a judgment issued by its courts. Delaware has no blue water navy to send, and the United States Constitution confers authority over international affairs on the federal government, not the several states. Here, the Casino is located in the Philippines, and CasinoCo is a Philippine entity. Universal, the ultimate parent, is a Japanese entity headquartered in Tokyo. The court could issue bench warrants directed at individuals who failed to cause the entity defendants to comply with the court's decree, and those individuals would face arrest and extradition to Delaware if and when they travel to the United States, but if they were content to treat the rest of the world as their oyster, they would remain beyond this court's authority." (citations and footnotes omitted)).

Some choice-of-law theorists reject territorialism as playing a role in states' ability to exercise legislative power. *See* Lea Brilmayer & Daniel B. Listwa, *A Common Law of Choice of Law*, 89 Fordham L. Rev. 889, 898 n. 25 (2020); Listwa & Polivka, *supra*. Perhaps that position has theoretical appeal, but it is not realistic.

The extent to which a court can compel a corporation to produce witnesses for purposes of discovery or trial reflects similar considerations. "Through its jurisdiction over a corporation, a court can compel the biological persons who serve as its directors, officers, and managing agents to appear as witnesses at trial or for a deposition in a particular location."[67] Federal authorities apply the same principles.[68]

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[67] *In re Dole Food Co., Inc. S'holder Litig.*, 110 A.3d 1257, 1262 (Del. Ch. 2015). *See In re Activision Blizzard, Inc.*, 86 A.3d 531, 552 (Del. Ch. 2014) ("Through its jurisdiction over Vivendi, this court can compel Vivendi's directors, officers, and managing agents to appear at trial or for a deposition in a particular location."); *Hamilton P'rs, L.P. v. Englard*, 11 A.3d 1180, 1214 (Del. Ch. 2010) ("[T]hrough its jurisdiction over NYHC and Bio Balance, this Court can compel production of (i) documents in the entities' possession, custody, or control, (ii) corporate representatives pursuant to Rule 30(b)(6), and (iii) officers, directors, and managing agents of the firms pursuant to Rule 30(a). . . . Through its jurisdiction over NYHC and Bio Balance, this Court similarly can compel the appearance at trial of directors, officers, and managing agents of the corporate entities."); *Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 1997 WL 716898, at *1 (Del. Super. Aug. 18, 1997) ("It is within the power of this Court to compel the live testimony of a non-resident officer, director or managing agent of a Delaware corporate [party] which has availed itself to the jurisdiction of this Court."); *Dalton v. Am. Inv. Co.*, 1981 WL 7619, at *1 (Del. Ch. June 9, 1981) (noting court's discretionary authority to order deposition at a particular location); *Lasher v. Sterwin Lab'ys*, 1980 WL 10017, at *1–2 (Del. Ch. Jan. 28, 1980) (ordering defendant corporation to produce witnesses for deposition in Delaware); 7 Daniel R. Coquillette et al., *Moore's Federal Practice—Civil* § 30.03, LexisNexis (database updated 2026) ("When the deponent is a corporation, the person designated to be deposed on behalf of the corporation must be an officer, director, or managing agent of the corporate deponent. . . . Furthermore, since only a party may be compelled to give testimony pursuant to a simple notice of deposition, it is important to determine whether a person is an officer, director, or managing agent of a corporate party or other entity. If not deposed as a representative of the corporate party, the witness must be subpoenaed."); 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Fed. Prac. and Proc. Civ.* § 2107 (3d ed.), Westlaw (database updated Apr. 2026) ("A [third party] subpoena is not necessary if the person to be examined [by deposition] is a party or an officer, director, or managing agent of a party." (footnote omitted)).

[68] *Hamilton P'rs*, 11 A.3d at 1215 n.19 (collecting authorities).

A court cannot compel the corporation to produce any employee or agent; that power is limited to the individuals who both exercise corporate authority and are sufficiently identified with the corporation to speak on its behalf.[69]

Although the ability to compel a corporation to produce a witness involves the exercise of power similar to that underlying the Officer-Consent Statute, a key distinction remains. The power to compel a corporation to produce a witness operates against the corporate party, not the out-of-state individual.[70] "[A]ny consequence for the individual's failure to appear, including sanctions, adverse inferences, or other rulings, falls on the corporation, not the individual whom the corporation was compelled to produce."[71]

Those doctrines suggest a continuum. Jurisdiction over the corporation is not sufficient to reach employees who are not directors, officers, or managing agents, whether directly or through the exercise of power over the corporation. Jurisdiction over the corporation is sufficient to compel it to produce directors, officers, and managing agents. And chartering state jurisdiction is sufficient to support deemed-consent jurisdiction over directors and senior officers.

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[69] *See Summit Healthcare Operating P'ship, L.P. v. Best Years, LLC*, 354 A.3d 285, 291–94 (Del. Ch. 2026); *Goldman v. Shahmoon*, 208 A.2d 492, 494 (Del. Ch. 1965).

[70] *Summit Healthcare*, 354 A.3d at 291.

[71] *Hamilton P'rs*, 11 A.3d at 1215–16. *See* Ct. Ch. R. 37(b)(2); *accord* Fed. R. Civ. P. 37(d) advisory committee's note to 1970 amendment ("The failure of an officer or managing agent of a party to make discovery as required by present Rule 37(d) is treated as the failure of the party.").

When deciding whether to compel a corporation to produce a witness, a court must make a fact-specific determination about the individual's role and relationship to the corporation. By enacting the Officer-Consent Statute, the General Assembly made a similar judgment about the roles where Delaware can appropriately exercise personal jurisdiction based on deemed consent. Day does not fall within one of the functional roles that the General Assembly has identified.

The Company stresses that Delaware has a public policy interest in providing a forum for adjudicating claims involving the fiduciaries who serve its entities. When the General Assembly has enacted a statute, that statute expresses Delaware's public policy.[72] The General Assembly has identified the corporate roles where Delaware's public policy interest supports using its chartering authority to assert personal jurisdiction by deemed consent.

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[72] *See CA, Inc. v. AFSCME Empls.' Pension Plan*, 953 A.2d 227, 240 (Del. 2008) ("That statute, as currently drafted, is the expression of policy as decreed by the Delaware legislature."); *Ames v. Wilm. Hous. Auth.*, 233 A.2d 453, 456 (Del. 1967) ("[T]he General Assembly and not the Judiciary is the declarer of the public policy of this State."); *W. Palm Beach Firefighters' Pension Fund v. Moelis & Co.*, 311 A.3d 809, 877 (Del. Ch. 2024) ("When the General Assembly has enacted a statute, that statute embodies Delaware's public policy."), *rev'd on other grounds*, — A.3d —, 2026 WL 184868 (Del. 2026); *Strand-Yarbray v. Bike Del., Inc.*, 2024 WL 4950314, at *2 (Del. Super. Dec. 2, 2024) ("The Delaware General Assembly determines the public policy of this State."); *Reads, LLC v. WBCMT 2006-C29 NC Off. LLC*, 2015 WL 13698545, at *3 (Del. Super. Feb. 3, 2015) ("The public policy of the State is created by Delaware's General Assembly in the laws that they pass."); *Edwards v. William H. Porter, Inc.*, 1991 WL 165877, at *8 (Del. Super. July 26, 1991) ("Through the enactment of statutes, the General Assembly declares the public policy of the State, not the courts."), *aff'd,* 616 A.2d 838 (Del. 1992).

Finally, the Company's dissatisfaction with its inability to secure personal jurisdiction over Day fails to recognize that many lawsuits filed against directors and officers in a corporation's name are not brought by the corporation itself. Stockholders suing derivatively assert many such claims. A statute that creates personal jurisdiction for corporate actors is not plaintiff specific. In this case, the lawyers representing the Company feel aggrieved that the court cannot assert personal jurisdiction over a Chief Strategy Officer. In another case, they might share Day's perspective on the scope of the Officer-Consent Statute.

Regardless, a corporation like the Company has tools to address this issue. The Company could have included a provision in the Employment Agreement stating that Day agreed to be treated as an officer under the Officer-Consent Statute.[73] Or the Company could have included a mandatory forum-selection clause in the Employment Agreement that chose the courts of this state. Instead, the Employment Agreement's broad and mandatory forum-selection provision selects the courts of another state.[74] The Company must live with its failure to use the means it had available to secure personal jurisdiction over Day in this court.

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[73] *See* 10 *Del. C.* § 3114(b)(3) (authorizing service of process on and the exercise of personal jurisdiction over any person who "(3) [h]as, by written agreement with the corporation, consented to be identified as an officer for purposes of this section").

[74] *See* EA § 7.1 (providing that the state and federal courts located in Denver, Colorado have exclusive jurisdiction for "any action arising out of or relating to this Agreement."). Or the Company could have bargained for a mandatory forum provision selecting courts located in Delaware in the Asset Purchase Agreement. Instead, the Company bargained for a Delaware choice of law provision and a Utah mandatory forum provision. *See* Ex. B at 2.

III. CONCLUSION

Day's Rule 12(b)(2) motion is granted. The court does not reach the other bases for dismissal.