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Case Number 465,2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CITY OF PROVIDENCE, RHODE ISLAND, derivatively on behalf of JPMORGAN CHASE & CO.,	)	
Plaintiff-Below, Appellant	)	
v.	)	No. 465, 2015
JAMES DIMON, *et. al.*,	)	On appeal from the Court of Chancery of the State of Delaware, C.A. No. 9692-VCP
Defendants-Below, Appellees	)	
and	)	
JPMORGAN CHASE & CO.,	)	
Nominal Defendant-Below, Appellee	)	

ANSWERING BRIEF OF APPELLEE MARTHA GALLO

Gregory P. Williams (#2168)
Catherine G. Dearlove (#3328)
Christopher H. Lyons (#5493)
Richards, Layton & Finger, P.A.
One Rodney Square
920 North King Street
Wilmington, Delaware 19801
(302) 651-7700

Attorneys for Martha Gallo

OF COUNSEL:

John F. Savarese
Emil A. Kleinhaus
C. Lee Wilson
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, New York 10019
(212) 403-1000

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NATURE OF THE PROCEEDINGS

This appeal challenges the Court of Chancery's dismissal of a derivative claim by the Plaintiff-below/Appellant ("Plaintiff") alleging that the board of directors of JPMorgan Chase & Co. ("JPMorgan" or the "Company") and other officer and employee defendants breached their fiduciary duties through failures of oversight. *See* Ex. A to Appellant's Corrected Opening Brief (hereafter cited as "Mem. Op. __").

Ms. Gallo joins in all arguments made by the other Defendants-below/Appellees: the Court should affirm dismissal of all claims against all Defendants, including Ms. Gallo, on the basis of res judicata and collateral estoppel as explained in the other Defendants-below/Appellees' brief filed contemporaneously herewith.

Ms. Gallo submits this separate brief only to explain why the Court should also affirm dismissal of all claims against her on the alternative basis that she is not subject to personal jurisdiction in Delaware. Accordingly, rather than repeat the full procedural history, Ms. Gallo describes here only proceedings on her motion to dismiss for lack of personal jurisdiction.

On September 9, 2014, Ms. Gallo (together with Defendants William Langford and Nina Nichols) moved to dismiss for lack of personal jurisdiction. Plaintiff filed an answering brief on November 3, 2014, conceding that Mr. Langford and Ms. Nichols were not subject to personal jurisdiction in Delaware but arguing that Ms. Gallo is subject to personal jurisdiction under 10 *Del. C.* § 3114(b). The reply brief in support of the motion was filed on December 17, 2014.

Oral argument on this motion was held on March 10, 2015, at the same time as oral argument on all Defendants' motion to dismiss on the basis of *res judicata*, collateral estoppel, and failure to allege demand futility. Given Plaintiff's concession that there was no basis for personal jurisdiction over Defendants Langford and Nichols, both were dismissed from the action by order dated March 12, 2015. That order was not appealed.

On July 29, 2015, Vice Chancellor Parsons issued a memorandum opinion holding that Plaintiff's claims were barred by *res judicata* under New York law and dismissing the case with prejudice as to all Defendants. (Mem. Op. at 10.) Although fairly presented below as grounds for dismissal, the Court of Chancery did not reach the issue of whether the exercise of personal jurisdiction over Martha Gallo was proper. (*See* Mem. Op at 15.)

Plaintiff filed its notice of appeal on August 27, 2015 and its opening brief in support of its appeal on October 19, 2015 (the corrected opening brief was filed on November 6). This is Ms. Gallo's answering brief.

SUMMARY OF ARGUMENT

Plaintiff ¶ 1. Denied. Ms. Gallo joins in the Summary of Argument in the Answering Brief of Nominal Defendant-Appellee JPMorgan Chase & Co. and the Director and Officer Defendants-Appellees (the "JPMorgan Brief"), and adopts and incorporates by reference herein the analysis and arguments set forth in that brief.

Plaintiff ¶ 2. Denied. Ms. Gallo joins in the Summary of Argument in the JPMorgan Brief, and adopts and incorporates by reference herein the analysis and arguments set forth in that brief.

Plaintiff ¶ 3. Denied. Ms. Gallo joins in the Summary of Argument in the JPMorgan Brief, and adopts and incorporates by reference herein the analysis and arguments set forth in that brief.

Gallo ¶ 1. Martha Gallo is not subject to personal jurisdiction in Delaware. The only basis on which Plaintiff has asserted Ms. Gallo is subject to personal jurisdiction is 10 *Del. C.* § 3114. Under Section 3114's plain language, Ms. Gallo is not, and never has been, an officer (or director) of JPMorgan, and therefore is not subject to service of process or personal jurisdiction under that statute. Thus, although the Court of Chancery did not reach the issue of personal jurisdiction, the dismissal of all claims against Ms. Gallo should be affirmed on the alternate grounds that Ms. Gallo is not subject to personal jurisdiction in Delaware, even if this Court does not affirm the dismissal of all claims against all Defendants on the basis of *res judicata* or collateral estoppel.

STATEMENT OF FACTS

Ms. Gallo joins in the Statement of Facts in the JPMorgan Brief, and adopts and incorporates by reference herein the facts set forth in that brief. Here, Ms. Gallo describes only the facts relevant to the nonexistence of personal jurisdiction over Ms. Gallo.

There is no dispute that Martha Gallo is not and never has been a director of JPMorgan. Plaintiff's Complaint alleges only that Ms. Gallo served as JPMorgan's Executive Vice President and General Auditor between 2006 and 2011, and then was promoted to serve as Head of Global Compliance and Regulatory Management between 2011 and 2013. A34 ¶ 32.

In its Answering Brief in opposition to the motion to dismiss below, Plaintiff claimed that Ms. Gallo was an "officer" who consented to personal jurisdiction in Delaware under 10 *Del. C.* § 3114(b). Plaintiff did not allege or argue that Ms. Gallo was ever identified in JPMorgan's public filings with the SEC as one of the most highly compensated executive officers of the corporation, or that she has, by written agreement with the Company, consented to be identified as an officer for purposes of Section 3114(b). B26 n.5. Thus, Plaintiff conceded that jurisdiction does not exist over Ms. Gallo under Section 3114(b)(2) or (b)(3). Plaintiff likewise conceded that Ms. Gallo is not subject to personal jurisdiction under 10 *Del. C.* § 3104.

Instead, the only basis that Plaintiff has asserted for the exercise of jurisdiction over Ms. Gallo is under 10 *Del. C.* § 3114(b)(1). For the reasons set forth below, personal jurisdiction does not exist under this provision, either.

ARGUMENT

Ms. Gallo joins in the JPMorgan Brief, and adopts and incorporates by reference herein the analysis and arguments set forth in that brief as to why the dismissal of all claims against all Defendants should be affirmed. Below, Ms. Gallo explains only why, even if the Court reverses dismissal of claims against all other defendants, it should affirm dismissal of claims against Ms. Gallo.

I. DISMISSAL OF ALL CLAIMS AGAINST MS. GALLO SHOULD BE AFFIRMED ON THE ALTERNATIVE BASIS THAT SHE IS NOT SUBJECT TO PERSONAL JURISDICTION IN DELAWARE.

A. Question Presented

Where jurisdiction is asserted only under Section 3114(b)(1), may a Delaware court exercise jurisdiction over a nonresident defendant who is alleged to have been a "high-ranking" officer of a Delaware corporation but is not alleged to have held one of the "officer" positions specifically enumerated in 10 *Del. C.* § 3114(b)? B1-B14, B94-B116.

B. Scope of Review

This Court applies a *de novo* standard of review to a decision on a motion to dismiss for lack of personal jurisdiction. *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 437 (Del. 2005). In addition, because the Court of Chancery did not reach the merits of Ms. Gallo's jurisdictional argument, this Court would necessarily decide the issue *de novo*.

C. Merits of the Argument

This Court may affirm a ruling on an alternative basis presented to but not considered by the lower court. *See Cent. Laborers Pension Fund v. News Corp.*,

45 A.3d 139, 141 (Del. 2012) ("[T]his Court may rest its appellate decision on any issue that was fairly presented to the Court of Chancery, even if that issue was not addressed by that court. Accordingly, this Court may affirm the judgment of the Court of Chancery on the basis of a different rationale." (footnote omitted)); *Haley v. Town of Dewey Beach*, 672 A.2d 55, 58–59 (Del. 1996) ("An appellee who does not file a cross-appeal . . . may defend the judgment with any argument that is supported by the record, even if it . . . relies upon precedent overlooked or disregarded by the trial court."). Here, although the jurisdiction question was fairly presented to the trial court, *see* Supr. Ct. R. 8, the Court of Chancery did not need to address it.[1] Thus, Ms. Gallo has not filed a cross-appeal, but this Court may consider the jurisdictional issue for the first time on appeal.

In determining whether they have personal jurisdiction over a nonresident, Delaware courts "will engage in a two-step analysis; first determining whether service of process on the nonresident is authorized by statute; and, second, considering whether the exercise of jurisdiction is, in the circumstances presented, consistent with due process." *Werner v. Miller Tech. Mgmt., L.P.*, 831 A.2d 318, 326 (Del. Ch. 2003). The Plaintiff has the "burden of showing a basis for a trial court's exercise of jurisdiction over a nonresident defendant." *AeroGlobal*, 871 A.2d at 437.

[1] *See Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 40 (Del. 1996) (finding that despite general rule that jurisdictional matters should be decided before substantive matters, judicial economy requires exception where case may be dismissed as to all defendants for substantive failure to state claim and only subset of defendants have moved to dismiss on jurisdictional grounds).

Here, the jurisdictional analysis is simple. Plaintiff has relied entirely on the assertion that Ms. Gallo is subject to personal jurisdiction under 10 *Del. C.* § 3114(b)(1). Plaintiff is wrong: Ms. Gallo has never occupied any of the positions enumerated in Section 3114(b)(1) as falling within the definition of the term "officer" for purposes of implied consent to jurisdiction in Delaware. That should end the analysis. But even if the Court were to expand Section 3114(b)(1) to include positions "like" the ones specifically enumerated in Section 3114(b)(1)—which it should not do—Ms. Gallo *still* would not be subject to jurisdiction because a "General Auditor" is not the same as a "chief accounting officer." Finally, Plaintiff's assertion that JPMorgan considered the "General Auditor" to be a high-ranking position, and identified it as an officer position in its Bylaws, is irrelevant to the jurisdictional analysis.

1. Section 3114(b) Must Be Read Literally and Narrowly, and It Does Not Provide for Jurisdiction Over General Auditors.

Section 3114 offers no statutory means for exercising personal jurisdiction over Ms. Gallo. Plaintiff agrees, as it must, that Section 3114(a), (b)(2), and (b)(3) (as well as Section 3104) are inapplicable here. *See* B26 n.5; A34-A35 ¶¶ 32–34. Instead, Plaintiff contends that Ms. Gallo "consented to personal jurisdiction in this venue when she became an officer of the Company pursuant to 10 *Del. C.* § 3114(b)(1)." B23. The problem for Plaintiff, however, is that Ms. Gallo was never an "officer" as defined in Section 3114(b). Section 3114(b)(1) provides specifically:

> As used in this section, the word "officer" means an officer of the corporation 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 . . . .

10 *Del. C.* § 3114(b)(1).

Where, as here, the language of a statute "is unambiguous, no interpretation is required and the plain meaning of the words controls." *Ingram v. Thorpe*, 747 A.2d 545, 547 (Del. 2000). That is, "[a] court may not engraft upon a statute language which has been clearly excluded therefrom." *In re Adoption of Swanson*, 623 A.2d 1095, 1097 (Del. 1993); *see also HMG/Courtland Props., Inc. v. Gray*, 729 A.2d 300, 306 (Del. Ch. 1999) ("This court should be chary about reading words into a statute that the General Assembly could have easily added itself."). "The role of judges is limited to applying the statute objectively and not revising it." *Fid. & Deposit Co. of Md. v. State Dep't of Admin. Servs.*, 830 A.2d 1224, 1228 (Del. Ch. 2003) (citation omitted). There is no ambiguity about the list of positions identified as "officers" for purposes of Section 3114(b)(1), and neither "General Auditor," nor any other "Auditor" position is listed.

Plaintiff asks the Court effectively to act as legislator by judicially amending Section 3114(b)(1)'s definition of officer to include not only the enumerated officers, but also any executive officers with responsibilities that are (allegedly) similar to those typically performed by the enumerated officers. Such an expansion of Section 3114 is not the role of this Court. *See, e.g.*, *Great Hill Equity P'rs IV, LP v. SIG Growth Equity Fund I, LLLP*, 80 A.3d 155, 160 (Del. Ch. 2013) ("[A]s has long been recognized by the Delaware Courts, when the General

Assembly has addressed an issue within its authority with clarity, there is no policy gap for the court to fill."). Instead, the Court should apply Section 3114(b) as written, and the plain language of Section 3114(b) provides no statutory basis to exercise personal jurisdiction over Ms. Gallo.

Following similar reasoning, the Court of Chancery in *Gantler v. Stephens* rejected the assertion that an employee who serves as a corporation's "chief compliance officer" and "corporate secretary" is an "officer" for purposes of Section 3114(b). 2008 WL 401124, at *7 (Del. Ch. Feb. 14, 2008), *rev'd in part on other grounds*, 965 A.2d 695 (Del. 2009). The Court explained that "[a]n employee is not considered an officer for personal jurisdiction purposes merely because her title includes the word, 'officer.'" *Id*. Rather, to be subject to personal jurisdiction under Section 3114(b)(1), the employee must have "held one of the enumerated positions." *Id*.; *see also Newsome v. Lawson*, 2014 WL 7051250, at *2 n.3 (D. Del. Dec. 11, 2014) (noting that court was "dubious about [the] argument" that Section 3114(b) covers nonresident serving as "*de facto* chief legal officer"). This analysis is straightforward, and ensures predictability for those who are employed by Delaware corporations.

Framed differently, even if there were room for interpretation of Section 3114(b)'s plain language, the principle of *expressio unius est exclusio alterius* compels the conclusion that, by expressing a list of positions deemed officers who have impliedly consented to jurisdiction, but excluding "General Auditor" (or, indeed, any "auditing" officer) from that list, the General Assembly did not intend to subject a "General Auditor" (or even "chief internal auditing officer") to

personal jurisdiction. *See Leatherbury v. Greenspun*, 939 A.2d 1284, 1291 (Del. 2007) ("[W]here a form of conduct, the manner of its performance and operation, and the persons and things to which it refers are affirmatively or negatively designated, there is an inference that all omissions were intended by the legislature." (emphasis omitted)).

Recognizing that the plain language of Section 3114(b)(1) does not provide for exercise of jurisdiction over Ms. Gallo, Plaintiff has resorted to a "slippery slope" argument to claim that it would somehow be absurd to read the statute as written and not allow Plaintiff to hale Ms. Gallo into court in Delaware. B26. Plaintiff's argument hinges on the perceived possibility of Delaware corporations protecting senior officers from personal jurisdiction "simply by giving them titles different from those enumerated in the statute." *Id*.

As an initial matter, such policy arguments are a matter for the General Assembly, not the Court.

In any event, Plaintiff's argument is misguided. Plaintiff ignores the fact that the General Assembly, in identifying the individuals who would be deemed to have consented to personal jurisdiction in Delaware, provided a mechanism to ensure that key executives fell within its scope: Under Section 3114(b)(2), if an officer is identified in filings with the SEC as one of the "most highly compensated executive officers of the corporation," then that person will be deemed to have consented to personal jurisdiction in Delaware, regardless of the person's title. 10 *Del. C.* § 3114(b)(2). This provision protects against the theoretical risk of companies attempting to evade application of Section 3114(b) by, for example,

naming their top executive "Czar" or "Chancellor" rather than "president" or "chief executive officer." Given that the legislature drafted the statute to protect against the "slippery slope" that Plaintiff fears, there is simply no "absurdity" that would result from reading the statute as written, nor is there any need for the Court to depart from the statute's text as Plaintiff asks.[2]

It is also necessary to read Section 3114(b) narrowly because Section 3114 operates as an implied consent statute. *See* 10 *Del. C.* § 3114(b) (providing that "acceptance [of an officer position] or service as such officer shall be a signification of the consent of such officer that any process when . . . served [on the corporation's registered agent] shall be of the same legal force and validity as if served upon such officer within this State"). That is, the constitutionality of Delaware's exercise of jurisdiction under Section 3114 rests on the legal fiction that, by accepting an "officer" position in a Delaware corporation, a non-resident is deemed to have consented to personal jurisdiction in Delaware. This deemed consent has been considered fair because the non-resident affirmatively chose to accept his or her position with notice of the potential ramifications, including that he or she will be deemed to have consented to personal jurisdiction in Delaware. *See Armstrong v. Pomerance*, 423 A.2d 174, 176 (Del. 1980) (holding Section 3114 constitutional, as applied to directors, because "[t]he defendants accepted their directorships with explicit statutory notice, via § 3114, that they could be

[2] Moreover, as discussed below in Argument Part I.C.2, as a General Auditor, Ms. Gallo's responsibilities were very different from those of any position listed in Section 3114(b)(1). Thus, even if Plaintiff's concerns regarding subterfuge might be relevant in some circumstances, they are not here.

haled into the Delaware Courts to answer for alleged breaches of the duties imposed on them by the very laws which empowered them to act in their corporate capacities."); *HMG/Courtland*, 729 A.2d at 306 ("The legal fiction of implied consent embodied in § 3114 rests on one real fact: § 3114 is in the Delaware Code and provides clear notice to any reasonably informed director that accepting service as a director of a Delaware corporation brings with it an obligation to defend official capacity suits here. This fact is the underpinning of § 3114's constitutionality.").

Here, Ms. Gallo never accepted or served in a position that was enumerated in Section 3114(b)(1), and she did not otherwise meet the statutory prerequisites to be deemed to have consented to personal jurisdiction in Delaware. Because Section 3114 does not include "General Auditor" or "chief auditing officer" in the definition of "officer," it cannot be said that she "accepted [her position of employment] with explicit statutory notice, via § 3114, that [she] could be haled into the Delaware Courts to answer for alleged breaches of the duties imposed on [her] by the very laws which empowered [her] to act in [her] corporate capacit[y]." *Cf. Armstrong*, 423 A.2d at 176.[3] To hold that an employee impliedly consents to jurisdiction in Delaware whenever she accepts or serves in a position that might (depending on how a court construes the responsibilities of the position in some

[3] *See also HMG/Courtland*, 729 A.2d at 306 ("In the absence of express statutory language, I have difficulty conceptualizing how agents or even alter egos can be thought to have fair notice that they can be haled into court in Delaware because of their mere relationship to a nonresident director and their participation in out-of-state conduct which is later alleged to be a breach of the director's fiduciary duties. Building fiction on fiction is the job of novelists writing sequels, not that of judges trying to apply the words of a statute in a common sense way." (footnote omitted)).

future legal proceeding) be determined to be *merely similar* to one of the positions that is enumerated in Delaware's implied consent statute would stretch the concept of implied consent past its breaking point.

Such a holding would also contradict the well-established rule that statutes in derogation of the common law must be strictly construed. *Gibson v. Keith*, 492 A.2d 241, 247 (Del. 1985); *see also Friends of H. Fletcher Brown Mansion v. City of Wilm.*, 34 A.3d 1055, 1059 (Del. 2011) (city zoning ordinances must be strictly interpreted because they are in derogation of common law property rights); *Waggoner v. Laster*, 581 A.2d 1127, 1134 (Del. 1990) (stock preferences in derogation of the common law must be strictly construed). Here, Section 3114 permits Delaware courts to exercise jurisdiction over non-resident defendants who, under the common law, could not otherwise be lawfully haled into Delaware court without violating constitutional principles of due process. The statute must therefore be strictly interpreted. *See Tabas v. Crosby*, 444 A.2d 250, 253 (Del. Ch. 1982) (substituted service of process, like that under Section 3114, "is purely statutory and in derogation of the common law; it is a method extraordinary in character, and hence may be used only as prescribed and in the circumstances authorized by statute. In order for such service to be effective plaintiff must bring himself and his cause of action clearly within provisions authorizing it[,] and the statutory requirements must be followed . . . strictly, faithfully, fully, literally, or at least substantially." (quoting 72 C.J.S., Process § 43 (1951))). Because Ms. Gallo did not serve in one of the positions specifically enumerated in Section 3114(b),

she is not subject to personal jurisdiction under that statute and dismissal of all claims against her should be affirmed on that basis.

2. Ms. Gallo Was Not the Company's "Chief Accounting Officer."

As explained above, the Court's analysis should begin and end with the question of whether Ms. Gallo served in one of the positions enumerated in Section 3114(b)(1). The Court need not even reach the question of whether a "General Auditor" has responsibilities similar to those of a "chief accounting officer," because serving in a position that is "similar to" one of the enumerated positions does not amount to implied consent to personal jurisdiction. But even if the Court were to reach that question, Plaintiff's attempt to assert jurisdiction over Ms. Gallo by arguing that she is the functional equivalent of a "chief accounting officer" fails, because the position of "General Auditor" necessarily differs from that of a "chief accounting officer."

In arguing that the position of General Auditor is akin to a "chief accounting officer," Plaintiff fundamentally misunderstands the role of a General Auditor. B27-B28. A General Auditor is not a "chief accounting officer" because the role of an auditor, even the chief auditor, is not to be *in charge of* or to supervise the Company's accounting function. *Cf.* B92 ("A chief accounting officer . . . is typically responsible for overseeing all aspects of an organization's accounting function."). To the contrary, the Company's Bylaws provide broadly that the General Auditor's role is to "continuously examine the affairs of the Corporation," while it is the role of the "Controller," a separate position created by the

Company's bylaws (and included expressly in the text of § 3114(b)(1)), to "exercise general supervision of the accounting departments of the Corporation." (B47 §§ 4.12, 4.09; B82-B83 §§ 4.12, 4.09.) More particularly, the General Auditor's role is to lead the Company's internal audit function, which generally audits and evaluates the Company's internal control and compliance structure. *See* A720 (JPMorgan Chase & Co., Definitive Proxy Statement (Form 14A) (Apr. 9, 2014), at 63) ("The Firm's Internal Audit Department, under the direction of the General Auditor, reports directly to the Audit Committee (and administratively to the CEO) and is responsible for preparing an annual audit plan and conducting internal audits intended to evaluate the Firm's internal control structure and compliance with applicable regulatory requirements.").

Leading a company's internal audit function is very different from leading its accounting function. "Internal auditing is an independent, objective assurance and consulting activity designed to add value and improve an organization's operations." B159 (*Institute of Internal Auditors, All in a Day's Work: A Look at the Varied Responsibilities of Internal Auditors*, at 2 (2014) [hereinafter *All in a Day's Work*]). "At its simplest, internal auditing involves identifying the risks that could keep an organization from achieving its goals, making sure the organization's leaders know about these risks, and proactively recommending improvements to help reduce the risks." *Id*. Although validating the reliability of the Company's accounting and financial reporting processes is certainly part of some internal auditors' function, that is not their only or even their primary role. More importantly, the internal auditors are not themselves responsible for

preparing or maintaining the Company's financial or accounting records and they do not manage the accounting function. Rather, internal auditors

> keep an eye on the corporate climate and perform a variety of activities such as assessing risks, analyzing opportunities, suggesting improvements, promoting ethics, ensuring accuracy of records and financial statements, educating senior management and the board on critical issues, investigating fraud, detecting wasteful spending, raising red flags, recommending stronger controls, monitoring compliance with rules and regulations, and much more!

B160.

Although "people often confuse internal auditors with accountants or external auditors," the reality thus is that "[t]he differences are significant." B161 (cataloguing some of the differences); *see also* B143-B144 (*Institute of Internal Auditors, International Standards for the Professional Practice of Internal Auditing (Standards)* §§ 2100-2130 (2012) (describing work of internal auditors)).

Not only is the broad scope of internal auditors' responsibilities different from and broader than the more narrow, financially-oriented scope of accountants' responsibilities, but the nature of the audit function necessarily requires that the chief auditor be distinct from—and independent of—senior management, including the chief accounting officer. This explains why the chief internal audit executive generally reports to the audit committee of the company's board of directors (except with regard to administrative matters), whereas a chief accounting officer reports to the chief financial officer. *Compare* B159 (*All in a Day's Work*, at 2) ("For internal auditing to be effective, . . . the internal auditors must have an

independent reporting line to the highest governing body (e.g., the audit committee of the board of directors) . . . ."), and A720 (Proxy Statement) ("The Firm's Internal Audit Department, under the direction of the General Auditor, reports directly to the Audit Committee . . . ."), with B93 (explaining that Chief Accounting Officer generally "[r]eports directly to [the] CFO").

Here, the allegations of the Complaint are entirely consistent with this commonly understood role of a General Auditor, and inconsistent with the suggestion that Ms. Gallo was, effectively, the chief accounting officer. *See, e.g.*, A63 ¶ 121 (describing report by Gallo to Audit Committee about JPMorgan's "control environment"); A66 ¶ 129 (describing report by Gallo to Board about Audit Committee meeting, AML program, global OFAC program, and global compliance program); A72 ¶ 146 (describing report by Gallo to Board about "key control issues and adverse audit reports"); A105 ¶ 209 (describing report by Gallo and Langford about "regulatory developments affecting peer institutions").

Thus, even if it were the rule that a *de facto* chief accounting officer was subject to personal jurisdiction in Delaware under Section 3114(b)(1) even if the officer's title did not use those words (though, for the reasons set out above in Argument Part I.C.1, it is not), such a rule would be irrelevant here. As General Auditor, Ms. Gallo would have best been described (if not by her actual title) as the "chief internal auditing officer," which is not among the positions subjected to personal jurisdiction under Section 3114(b)(1). Indeed, as General Auditor, Ms. Gallo's role was closer to that of the "chief compliance officer," the position found not to be an "officer" for purposes of Section 3114(b) in *Gantler*, 2008 WL

401124, at *7, than that of a chief accounting officer. In fact, Ms. Gallo's next position after General Auditor was Head of Global Compliance. A34 ¶ 32.

While Plaintiff may believe it would be good policy for Section 3114(b)(1) to provide jurisdiction over "chief internal auditing officers" or "chief compliance officers," the appropriate forum to advocate that dubious piece of public policy—the adoption of which would doubtless deter qualified individuals from accepting such positions, given the reality that it would require these individuals to defend themselves in Delaware courts any time corporate wrongdoing occurred, since a plaintiff could always claim these employees "failed" to uncover and report any wrongdoing (or failed to do so earlier)—is the General Assembly. Here, the Court's task is simply to interpret and apply Section 3114(b)(1) as written, and that statute does not provide jurisdiction over a "General Auditor," or even a "chief internal auditing officer" or "chief compliance officer."

Accordingly, Ms. Gallo is not subject to personal jurisdiction under Section 3114(b) for this reason as well.

3. That JPMorgan Considers General Auditor to Be "A Very High Ranking Position" Is Irrelevant.

Plaintiff also asserts that "JP Morgan's own bylaws consider Gallo's position to be an officer," and places much emphasis on the fact that she served "at the Executive Vice President level," apparently based on the belief that personal jurisdiction depends on whether "the corporation itself considers the position to be a very high ranking officer position." B25, B27, B28. But this argument fails on its face.

Section 3114 does not permit the exercise of jurisdiction over a person based on that person being an "Executive Vice President."[4] As this Court held in *Gantler*, "[a]n employee is not considered an officer for personal jurisdiction purposes merely because her title includes the word, 'officer.'" 2008 WL 401124, at *7. Undoubtedly, the corporation in *Gantler* (First Niles Financial, Inc.) considered its "chief compliance officer and corporate secretary" to be a "very high ranking officer position." Indeed, the position of "secretary" was designated in that corporation's bylaws as an officer. B125-B126 (First Niles Financial, Inc., By-Laws (Exhibit 3.2 to First Niles Financial, Inc., Registration Statement (Form SB-2) (July 10, 1998))), art. IV §§ 1, 4). But the Court in *Gantler* correctly held that to be irrelevant to whether the position is an "officer" within the definition of Section 3114(b). The same holds here.

If the General Assembly had intended to subject any person designated as an "officer" by a Delaware corporation to personal jurisdiction, it could have done so very easily (though this likely would have raised significant due process concerns). As Plaintiff noted below, Section 142(a) of the Delaware General Corporation Law provides that "[e]very corporation organized under this chapter 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." 8 *Del. C.* § 142(a). If the General Assembly intended every person thus designated as an

[4] Executive Vice President is not one of the enumerated positions of Section 3114(b)(1). The statute defines a corporation's "president" as an "officer," but not its "executive vice presidents" or any other type of "vice presidents." Again, if the General Assembly intended to subject these employees to jurisdiction, it would have included them in Section 3114(b)(1).

officer to be subject to personal jurisdiction, it could have done so by either (i) explicitly providing that an "officer" means a person designated as an officer pursuant to Section 142(a), or even (ii) simply leaving the term undefined, in which case a Court would presumably look to Section 142(a) and the corporation's bylaws and resolutions to identify the corporation's officers. Instead, the General Assembly crafted a very precise definition of the people deemed officers for jurisdictional purposes, which requires that the person be "an officer of the corporation" *and* meet one of the other requirements. 10 *Del. C.* § 3114(b). It is not the role of the Court to ignore or revise that definition. *In re Adoption of Swanson*, 623 A.2d at 1097; *Fid. & Deposit Co.*, 830 A.2d at 1228. Accordingly, there is no statutory basis to exercise personal jurisdiction over Ms. Gallo under Section 3114(b).

Because there are no statutory bases on which to assert personal jurisdiction over Ms. Gallo, there is no need to engage in a constitutional analysis. If the Court were to engage in such an analysis, however, it would find that Ms. Gallo does not have sufficient minimum contacts with Delaware to support the constitutional exercise of personal jurisdiction, because her only alleged contact—acceptance of and service in the position of "General Auditor" of JPMorgan—does not constitute implied consent, for the reasons discussed above. *See Uribe v. Md. Auto. Ins. Fund*, 115 A.3d 1216 (Del. 2015) (TABLE) (because appellants failed to articulate basis for trial court to exercise personal jurisdiction over appellee under long-arm statute, there was no need to reach appellants' due process claim); *see also Mobile Diagnostic Gp. Hldgs., LLC v. Suer*, 972 A.2d 799, 809 n.46 (Del. Ch. 2009)

("Because I have found that there is not a statutory basis for jurisdiction over Suer in Delaware, I need not reach the final step of the analysis—whether this Court's exercise of jurisdiction over Suer would comport with the requirements of the Due Process Clause of the Fourteenth Amendment.").

CONCLUSION

For the foregoing reasons, Martha Gallo respectfully requests that the Court of Chancery's dismissal of the claims against her be affirmed.

/s/ Catherine G. Dearlove
Gregory P. Williams (#2168)
Catherine G. Dearlove (#3328)
Christopher H. Lyons (#5493)
Richards, Layton & Finger, P.A.
One Rodney Square
920 North King Street
Wilmington, Delaware 19801
(302) 651-7700

Attorneys for Martha Gallo

OF COUNSEL:

John F. Savarese
Emil A. Kleinhaus
C. Lee Wilson
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, New York 10019
(212) 403-1000

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