FIDUCIARY INCONGRUITY: OPEN QUESTIONS ARISING FROM ASCRIBING IDENTICAL FIDUCIARY DUTIES TO CORPORATE DIRECTORS AND OFFICERS

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INTRODUCTION

In the 2009 decision of *Gantler v. Stephens*,[1] the Delaware Supreme Court confirmed, in what it described as a "matter of first impression" for the court, that non-director corporate officers[2] owe to their corporations fiduciary duties that are "identical to those of directors."[3] As discussed below, there are important unanswered questions regarding this aspect of the opinion in light of the practical realities of the corporate governance role of a corporate officer. After a summary of the relevant aspects of the *Gantler* decision, this article will suggest and discuss a few of these open questions.

A. The Gantler *Decision*

Gantler involved a breach of fiduciary duty action in which the plaintiffs, who were certain shareholders of First Niles Financial, Inc. ("First Niles"), filed suit in the Delaware Court of Chancery asserting that the defendants, who were officers and directors of First Niles, violated their fiduciary duties by (i) rejecting a valuable opportunity to sell the company, (ii) deciding instead to reclassify the company's shares in order to benefit themselves, and (iii) disseminating a materially misleading proxy statement to induce shareholder approval.[4] The defendants moved to dismiss the lawsuit, essentially arguing that the claims were legally deficient for failure to allege facts sufficient to overcome the business judgment presumption and because

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[1] Gantler v. Stephens, 965 A.2d 695 (Del. 2009).

[2] Unless otherwise indicated, references in this article to "officers" are intended to refer to non-director officers (*i.e.*, officers who are not also directors of their respective corporations). Similarly, references herein to "directors" are intended to refer to directors who are not also officers of their corporations.

[3] *Gantler*, 965 A.2d at 708.

[4] *Id*. at 699.

the First Niles shareholders had "ratified" the Board's decision to reclassify the First Niles shares.[5] The Court of Chancery agreed with these arguments and dismissed the complaint. The plaintiffs appealed to the Delaware Supreme Court.[6]

The Delaware Supreme Court ultimately reversed the Court of Chancery's judgment in its entirety and remanded the proceedings.[7] Significantly, in addressing the claim that the defendants breached their fiduciary duties to the First Niles shareholders, the Delaware Supreme Court stated:

> That issue—whether or not officers owe fiduciary duties identical to those of directors—has been characterized as a matter of first impression for this Court. In the past, we have implied that officers of Delaware corporations, like directors, owe fiduciary duties of care and loyalty, and that the fiduciary duties of officers are the same as those of directors. We now explicitly so hold. The only question presented here is whether the complaint alleges sufficiently detailed acts of wrongdoing by [Management] to state a claim that they breached their fiduciary duties as officers. We conclude that it does.[8]

As discussed below, the doctrine that corporate officers owe fiduciary duties to their corporations identical to those owed by directors—which doctrine is referred to herein as "*fiduciary duty equivalency*"—can lead to potentially confounding and disharmonious outcomes.

B. Who Qualifies as an Officer for Purposes of Fiduciary Duty Equivalency?

Applying fiduciary duty equivalency in an effective manner necessarily requires a definition—or at least some common understanding—of who is (and is not) a corporate officer. Certainly, an individual's tenure as an employee (even a senior employee) of a corporation, does not, without more, mean that he or she is an "officer" of the corporation.[9] Delaware's General Corporation Law statute ("DGCL") does not define the term "officer" of a corporation.[10] Another Delaware statute, Section 3114(b) of the Courts and Judicial

[5] *Id.* at 703.
[6] *Id.*
[7] *Id.* at 714.
[8] *Id.* at 708–09 (citations omitted).
[9] *See* Goldman v. Shahmoon, 208 A.2d 492, 494 (1965) ("It is clear that the terms officers and agents are by no means interchangeable. Officers as such are the corporation. An agent is an employee."); *see generally* GARY LOCKWOOD, LAW OF CORPORATE OFFICERS AND DIRECTORS: INDEMNIFICATION AND INSURANCE § 1:44 (2d ed. 2014).
[10] *See* LOCKWOOD, *supra* note 9, at § 1:44.

Procedure Code,[11] provides that, for purposes of that Section (which imposes constructive consent to service of process obligations on officers of Delaware corporations), the word "officer" means, in relevant part, an officer of the corporation who is the president, chief executive officer, chief operating officer, chief financial officer, chief legal officer, controller, treasurer or chief accounting officer of the corporation.[12] As a basis for defining an officer for purposes of applying fiduciary duty equivalency, this statutory approach has the weakness of emphasizing the title of the employee rather than the substance of his or her duties. As an example, an employee of one corporation may have a job title that is not one of the "officer" titles listed in the statute while, in substance, her duties may be the same as those of an employee of a second corporation whose job title is so listed in the statute.[13] It is clearly not appropriate for the employee of the second corporation to be subject to fiduciary duty equivalency, whereas the employee of the first corporation is not.

The judicial approach to defining a corporate officer appears to endorse the view that an employee that is performing services for a corporation is an officer of the corporation if there is an office corresponding to his or her duties provided for in the charter or bylaws of the corporation.[14] This approach, while having the attraction of focusing on the substance of the employee's role rather than necessarily the employee's title, does have limitations as a rule of universal application for purposes of applying fiduciary duty equivalency. For example, each of two corporations may have an employee performing certain duties. The bylaws of the first corporation expressly designates those duties to the holder of a titled office of the corporation; whereas the second corporation's charter and bylaws make no such designation. Here, again, it would not be an appropriate outcome, simply because of the different formulations of their constitutive documents, for the first corporation's employee to be subject to fiduciary duty equivalency while the second corporation's employee is not.

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[11] Del. Code Ann. tit. 10, § 3114(b) (West 2009).

[12] *Id. at* §3114(b)(1).

[13] *See generally id.* (providing that an officer may be someone who "has, by written agreement with the corporation, consented to be identified as an officer for purposes of this section.").

[14] *See Shahmoon*, 208 A.2d at 494.

The Delaware case law and statutes do not offer any universal definition of the term "officer" for purposes of fiduciary duty equivalency.[15] This should be addressed by the Delaware courts or legislature. As one academic puts it "[i]f Delaware courts decide to impose a form of officer liability, it is incumbent on the courts to specify precisely which officers are at risk for personal liability, and how they can be identified"[16] and "[t]here are numerous practical difficulties with this kind of uncertainty . . . [t]he most important is that an officer would not know whether she was an officer for liability purposes until a court made that determination[;] [c]onsidering the potential dysfunction wrought by the uncertainty, this sort of arrangement is untenable in the real world of running a business."[17]

A solution for defining which employees of a corporation are "officers" for purposes of fiduciary duty equivalency might be some combination of the statutory and case-law approaches discussed above. Under this proposal, the Delaware courts or legislature would establish a two-pronged definition of "officer" as meaning either (i) any of the employees of a corporation holding certain types of job titles, or (ii) any employee, regardless of title, whose duties are those customarily performed by a person holding any of those job titles. A good example of this approach may be found in Rule 16a-1(f) under the Securities and Exchange Act of 1934, which reads, in relevant part, as follows:

> The term ''officer'' shall mean an issuer's president, principal financial officer, principal accounting officer (or, if there is no such accounting officer, the controller), any vice-president of the issuer in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy-making function, or any other person who performs similar policy-making functions for the issuer.[18]

C. Should Directors and Officers Have Identical "Caremark Duties?"

In accordance with one branch of the fiduciary duties of directors (namely, the duty of loyalty), directors have an oversight responsibility with respect to the corporation's functioning within the law and its business performance.[19] In 1996, the Delaware Court of Chancery, in *Caremark International Inc.*

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[15] *See generally id.* (stating that "officers . . .are the corporation" and failing to elaborate on a further definition); *see also* Del. Code Ann. tit. 10, § 3114(b) (West 2009).

[16] Paul Graf, *A Realistic Approach to Officer Liability*, 66 BUS. LAW. 315, 335 (2011).

[17] *Id*.

[18] 17 C.F.R. § 240 16a–1(f) (2011).

[19] *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967 (Del. Ch. 1996).

Derivative Litigation, held that "a director's obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may, in theory at least, render directors liable for losses caused by non-compliance with applicable legal standards."[20] Ten years later, in *Stone v. Ritter*,[21] the Delaware Supreme Court affirmed the *Caremark* criterion for director oversight liability. In *Stone*, the court stated "[w]e hold that *Caremark* articulates the necessary conditions predicate for director oversight liability: (a) the directors utterly failed to implement any reporting or information system or controls; or (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention."[22]

It is not immediately apparent that directors' *Caremark* "duty of attention"[23] can or should apply in an identical manner to officers of a corporation.[24] A central issue in *Caremark* was whether the corporation's directors exercised adequate monitoring and oversight to ensure that the corporation's officers and employees complied with federal law.[25] Imposing this monitoring oversight responsibility on officers would seem to disturb the familiar allocation of corporate roles under traditional corporate and legal theory that directors oversee and officers execute.[26] Giving officers such a "double duty" of actively executing day-to-day operational tasks while

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20 *Id.* at 970.

21 Stone v. Ritter, 911 A.2d 362, 365 (Del. 2006).

22 *In re Caremark*, 698 A.2d at 960.

23 *See id.* at 968 ("Where a director in fact exercises a good faith effort to be informed and to exercise appropriate judgment, he or she should be deemed to satisfy fully the duty of attention.").

24 In *In re World Health Alts., Inc. v. Miller* 385 B.R. 576, 591 (Bankr. D. Del. 2008), a bankruptcy trustee in a case involving fraudulent activities by the CEO sued the debtor company's general counsel for, among other things, failing to fulfill his Caremark duty to implement a sufficient compliance monitoring system. The defendant, in seeking to dismiss the claim, argued "that Delaware law does not support the breach of fiduciary duty claims against officers because the Caremark line of cases all addressed the fiduciary duties of directors, not officers." *Id.* While agreeing "that all of the cases relied upon by the Trustee involved directors' conduct, not officers" the court nonetheless rejected this defense, stating, among other things, that "the Caremark decision itself suggests that the same test would be applicable to officers." *Id.* at 591–92.

25 *Id*. at 963.

26 *See* MARK A. SARGENT & DENNIS R. HONOBACH, PROXY RULES HANDBOOK § 1:1 (2015–2016 ed.) ("Shareholders elect the members of the board of directors to oversee their investments. The board of directors, in turn, appoints corporate officers who execute board-approved policies.").

fulfilling an oversight responsibility is somewhat like having the pitcher in a baseball game function simultaneously as the umpire.[27]

Since the *Stone* decision, the Delaware Court of Chancery has implied that directors, particularly outside directors (*i.e.*, those who are not also employees of the corporation), are best suited to shoulder the oversight and monitoring duties contemplated under the liability principles developed by Caremark and its progeny.[28] In *In re Lear Corporation Shareholder Litigation*, Vice Chancellor Strine stated:

> The line of cases running from *Graham v. Allis-Chalmers* to *Caremark* to *Guttman* to *Stone v. Ritter* dealt in large measure with what is arguably the hardest question in corporation law: what is the standard of liability to apply to independent directors with no motive to injure the corporation when they are accused of indolence in monitoring the corporation's compliance with its legal responsibilities? The question is difficult for many reasons, including the reality that even the most diligent board cannot guarantee that an entire organization will always comply with the law. But it must be answered because one of the central justifications for the use of independent directors is that they are well positioned to oversee management, particularly by monitoring the processes used by the corporation to accurately account for its financial affairs and comply with applicable laws.[29]

If, as seems to be implied by *Lear*, outside directors and insider directors may have different monitoring and oversight responsibilities because of their different corporate roles, then, *a fortiori*, those responsibilities should differ as between directors and officers. More fundamentally, spreading the *Caremark* oversight function coextensively among directors and officers might blur and dilute lines of responsibility and confuse the assignation of correlative liability. If the implementation and oversight of an effective corporate information and reporting system is a joint and coextensive obligation of the directors and officers, this could arguably produce the scenario where all directors and officers are collectively, but not any single one is, liable for any actionable failure of such implementation and oversight.

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27 As a practical matter, requiring each and every officer of a large corporation to be bound by broad oversight and monitoring responsibilities appears far less feasible and practicable than having such a requirement with respect to each and every director, especially an independent director, of the same corporation. *See id.* ("Managers acting under the oversight of those officers oversee the day-to-day activities of the corporation.").

28 *See In re* Lear Corp. S'holder Litig., 967 A.2d 640, 653 (Del. Ch. 2008).

29 *Id.*

D. Should the Business Judgment Rule Protect Officers as it Does to Directors?

An important point not explicitly addressed by *Gantler* relates to the application of the business judgment rule to corporate officers. The business judgment rule has been described by the Delaware Supreme Court as follows:

> Our law presumes that "in making a business decision the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company." Those presumptions can be rebutted if the plaintiff shows that the directors breached their fiduciary duty of care or of loyalty or acted in bad faith. If that is shown, the burden then shifts to the director defendants to demonstrate that the challenged act or transaction was entirely fair to the corporation and its shareholders.[30]

In other words, unless a plaintiff succeeds in rebutting the rule, the court will not substitute its views for those of the board directors if the board's decision can be "attributed to any rational business purpose."[31] As a consequence of the business judgment rule, it has been held that, under Delaware law, only conduct amounting to "gross negligence," as opposed to mere ordinary negligence or less culpable behavior, would result in personal liability for a director for the breach of the duty of care.[32]

The notion of extending the business judgment rule to the conduct of officers to the same extent as applicable to directors has been questioned and openly challenged as not justified by either legal precedent or policy grounds.[33] As one commentator put it four years before the *Gantler* decision:

> Case law support for extending broad business judgment rule protection to officers is far weaker than commentators and courts acknowledge or appreciate. The policy case, likewise, fails to stand

30 *In re* Walt Disney Co. Derivative. Litig., 906 A.2d 27, 52 (Del. 2006).

31 Brehm v. Eisner, 746 A.2d 244, 264 n.65 (Del. 2000).

32 Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) ("[O]ur analysis satisfies us that under the business judgment rule director liability is predicated upon concepts of gross negligence."); Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 122 (Del. Ch. 2009) ("[D]irector action is analyzed under the business judgment rule, which prevents judicial second guessing of the decision if the directors employed a rational process and considered all material information reasonably available—a standard measured by concepts of gross negligence.").

33 Lyman P.Q. Johnson, *Corporate Officers and Business Judgment Rule*, 60 BUS. LAW. 439, 440 (2005).

> up, at least based on the standard rationales underlying the rule's application to directors.[34]

Academic viewpoints are far from united regarding whether the business judgment rule should protect the actions of corporate officers.[35] One view is that officers should simply be held to the usual fiduciary standard of due care without any application of the business judgment rule.[36] One commentator states it this way: "Because the manager's role is supposed to be ministerial rather than policy setting, it would seem that decisions by officers would not normally get the full protection of the business judgment rule."[37] Echoing this, another commentator states that "the business judgment rule—a cornerstone concept in corporate law—does not and should not be extended to corporate officers in the same broad manner in which it is applied to directors" arguing that sensible policy requires "that corporate officers—like other agents—face potential liability for damages caused by breaching the duty of ordinary care they owe the corporation."[38]

An alternative view is that the business judgment rule is and should be applied to breach of fiduciary duty claims against corporate officers in the same way as it applies to such claims against corporate directors.[39] As one commentator puts it: "[W]e ultimately and respectfully disagree with . . . [the] urging that the business judgment rule should not extend to non-director officers . . . [w]e continue to believe that the policy rationales underlying the development and application of the business judgment rule to corporate

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[34] Lyman P.Q. Johnson, *Corporate Officers and the Business Judgment Rule*, 60 BUS. LAW. 439, 469 (2005); *see also* Lyman P.Q. Johnson & Robert V. Ricca, *(Not) Advising Corporate Officers about Fiduciary Duties*, 42 WAKE FOREST L. REV. 663, 666 (2007) ("Delaware law contains abundant dicta on, but has never squarely addressed, the issue of whether officers are subject to the same fiduciary duties as directors. Nor has Delaware addressed the related and pivotal question of whether officer conduct should be judicially reviewed under the deferential business judgment rule standard.").

[35] Across U.S. jurisdictions, judicial viewpoints are also uneven on this point, *see* Stephen M. Bainbridge, *Gantler: Officers, Agents, and* Directors, PROFESSORBAINBRIDGE (Aug. 4, 2009, 07:19 AM), www.professorbainbridge.com/professorbainbridgecom/2009/08/gantler-officers-agents-and-directors.html ("Judicial precedents are divided, however. [Compare Galef v. Alexander, 615 F.2d 51, 57 n.13 (2d Cir. 1980) (holding that the business judgment rule "generally applies to decisions of executive officers as well as those of directors"); FDIC v. Stahl, 854 F. Supp. 1565, 1570 n.8 (S.D. Fla. 1994) (holding that the rule "applies equally to both officers and directors") with Platt v. Richardson, 1989 WL 159584 at *2 (M.D. Pa. 1989) (holding that the rule "applies only to directors of a corporation and not to officers."). . . .]").

[36] *Id.*

[37] Lael Daniel Weinberger, *The Business Judgment Rule and Sphere Sovereignty*, 27 T.M. COOLEY L. REV. 279, 315 (2010).

[38] Lyman P.Q. Johnson, *supra* note 33, at 469.

[39] *See id.* at 441–42.

directors similarly justify application of the rule to non-director officers, at least with respect to their exercise of discretionary delegated authority."[40]

Whether and to what extent the business judgment rule should be applied to the conduct of corporate officers remains an open point yet to be resolved by the Delaware courts. The absence of that resolution constitutes a gaping fissure in the doctrine of fiduciary duty equivalency.

E. Should Statutory Exculpation be Coextensively Available to Corporate Officers and Directors?

DGCL § 102(b)(7) provides that, subject to certain exceptions (such as in the case of breaches of the duty of loyalty or conduct not in good faith or involving intentional misconduct), a corporation's certificate of incorporation may contain a provision eliminating or limiting the personal liability of *a director* to the corporation or its stockholders for monetary damages for breach of fiduciary duty *as a director*.[41] In *Gantler*, the Delaware Supreme Court acknowledged that DGCL § 102(b)(7) does not similarly permit exculpation of corporate officers from liability for breaches of their fiduciary duties.[42]

Accordingly, although, by virtue of *Gantler*, Delaware corporate officers and directors share identical fiduciary duties, the liability consequences of an identical breach of fiduciary duty by a corporation's director, on the one hand, and one of its officers, on the other hand, could be quite dissimilar.[43] If the corporation has adopted a provision in its certificate of incorporation exculpating its directors with respect to breaches of duty of care to the extent permitted by DGCL § 102(b)(7), the officer could face monetary liability to the corporation and its stockholders for such a breach while the director would face no such liability for an identical breach.[44] *Gantler* did not articulate any policy justification or other rationale for this disparate statutory treatment between directors and corporate officers.[45] Nor has any other Delaware case done so.[46] Some commentators have argued that, if corporate officers are to have "identical" fiduciary duties as directors, then the officers should be

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40 Lawrence A. Hamermesh & A. Gilchrist Sparks III, *Corporate Officers and the Business Judgment Rule: A Reply to Professor Johnson*, 60 BUS. LAW. 865, 865 (2005).

41 DGCL § 102(b)(7).

42 *Gantler*, 965 A.2d at 709 n.37.

43 *Id*. at 709 n. 36

44 DGCL § 102(b)(7).

45 *See generally* Gantler v. Stephens, 965 A.2d. 695 (Del. 2009).

46 *See id.* at 708.

entitled to identical statutory exculpation rights under DGCL § 102(b)(7).[47] Prior to *Gantler*, there were calls made on the Delaware legislature to include corporate officers within the protection of DGCL § 102(b)(7).[48] In the wake of *Gantler*, one can expect these calls to persist.

F. *Should Officers, as Employees, be Fiduciaries to the Same Extent as the Directors Charged with Overseeing Them?*

A potential criticism of the *Gantler* decision is that corporate officers, as employees of a corporation who must answer to their corporation's directors, should not be viewed as fiduciaries of equal order as those very same directors. This proposition, put more starkly, states that if corporate officers are "merely" employees of the corporation,[49] then they should not be categorized as fiduciaries of the same order as directors.[50] An elaboration on this proposition follows.

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[47] Stephen P. Lamb & Joseph Christensen, *Duty Follows Function: Two Approaches to Curing the Mismatch Between the Fiduciary Duties and Potential Personal Liability of Corporate Officers*, 26 NOTRE DAME J.L. ETHICS & PUB. POL'Y 45, 46 (2012) (stating that although the § 102(b)(7) exculpation amendment "was perhaps the most important public policy contribution the Delaware legislature has made to corporate law apart from adopting the revised General Corporation Law," its contribution is "incomplete" because "the Delaware Supreme Court held that officers owe the same fiduciary duties as directors . . . but cannot be exculpated for the same class of fiduciary breaches as directors."); Meghan Glaspy, *Delaware's Gantler Decision: A Solution to Corporate Corruption?*, 12 GEO. J.L. & PUB. POL'Y 289, 307 (2014) ("Because officers and directors have the same fiduciary duties, as held in *Gantler*, they, too, should have equal liability resulting from those duties"); *see also* Andrew D. Appleby & Matthew D. Montaigne, *Three's Company: Stone v. Ritter and the Improper Characterization of Good Faith in the Fiduciary Duty "Triad"*, 62 ARK. L. REV. 431, 469 (2009) (stating that "[w]hile *Gantler* leaves officers extremely vulnerable to *Van Gorkom*-like liability, the current 'anti-executive social-political climate' may preclude the courts or legislature from extending officers any section 102(b)(7) protection"); *see also* Dennis R. Honabach, *Smith v. Van Gorkom: Managerial Liability and Exculpatory Clauses—A Proposal to Fill the Gap of the Missing Officer Protection*, 45 WASHBURN L.J. 307, 307 (2006) (arguing that officers should be allowed statutory exculpation because "the same reasoning that supports protecting directors also applies to officers.").

[48] *See, e.g.*, Dennis R. Honabach, *Smith v. Van Gorkom: Managerial Liability and Exculpatory Clauses-A Proposal to Fill the Gap of the Missing Officer Protection*, 45 WASHBURN L.J. 307, 331 (2006) ("One way to eliminate the uncertainty over how courts will resolve the officer liability issues would be to amend the exculpatory provisions to provide officers statutory protection from personal liability.").

[49] *Gantler* and other Delaware decisions provide scant guidance as to whether corporate officers are solely employees or something further. *See* Paul E. McGreal, *Corporate Compliance Survey*, 65 BUS. LAW. 193, 211 (2009) ("While acknowledging a distinction between officers and mere agents and employees, the Delaware courts have not clearly identified the dividing line.").

[50] Judicial statements implying some support for this view include the following: "[U]nder Delaware law, an employer and employee, simply by virtue of their present or contemplated future employment relationship, [do] not stand in a fiduciary relationship to one another with respect to agreements governing such relationship." Toner v. Allstate Ins. Co., 829 F. Supp. 695, 704–05 n.10 (D. Del. 1993); *see also* Meyer Ventures, Inc. v. Barnak, No. 11502, 1990 WL 172648 at *6 n.5 ("Even the existence of an employment agreement is not dispositive as to whether or not there was a fiduciary relationship . . . plaintiff has not

A director of a corporation is typically elected by the corporation's stockholders; the corporate officers are employees of the corporation and typically serve at the pleasure of the board of directors.[51] Given this hierarchy, it might seem more logical and justifiable for directors, as the elected overseers (and not corporate officers, as the overseen employees), to owe fiduciary duties to the corporation and its stockholders. In other words, one might see a mismatch between corporate officers owing to the corporation and its shareholders fiduciary duties that are identical to those duties owed by directors, while at the same time being subject to plenary direction and control of the board of directors.[52] As one commentator explains:

> The directors control the specificity of the delegation and the level of discretion involved which determines liability for breach. The board of directors delegates the authority and discretion to the officers, so it seems unfair for them to be insulated and let off the hook while officers are exposed to liability for carrying out the delegation. Insulation of directors and imposition of liability solely on the officers would frustrate corporate governance because officers would be incentivized to leave more decisions to the board of directors and would take fewer of the risks that are necessary for a company to grow . . . . While it is true officers are often more involved on a day-today basis with the corporation, the operations of the corporation are ultimately controlled by the directors, not the officers.[53]

In sum, *Gantler* requires us to reconcile the seemingly inconsistent precepts that (1) under Delaware law, the employer-employee relationship is not fiduciary in itself,[54] and (2) by virtue of *Gantler*, all corporate officers, a genus of employee, are fiduciaries of the same order as directors.[55]

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advanced the existence of a fiduciary relationship as a basis for granting relief, and since it is a question of fact, it is inappropriate for this court to assume, *sua sponte*, on a motion for summary judgment that a fiduciary relationship, in fact, existed.").

51 *See The Basics of Corporate Governance*, HUTCHISON PLLC (Mar. 18, 2009), http://www.hutchlaw.com/library/the-basics-of-corporate-governance.

52 *See* Meghan Glaspy, *Delaware's Gantler Decision: A Solution to Corporate Corruption?*, 12 GEO. J.L. & PUB. POL'Y 289, 307–08 (2014).

53 *Id.*

54 *Meyer Ventures*, 1990 WL 172648, at *4 n.5 ("The employee-employer relationship is not fiduciary in itself.") (citations omitted).

55 *See Toner,* 829 F. Supp. 695 at 704 n.10.

CONCLUSION

The *Gantler* decision was unequivocal in its pronouncement that corporate officers and directors are subject to identical fiduciary duties.[56] However, the decision was scant on detail regarding the practical effect of applying fiduciary duty equivalency to corporate officers. As discussed above, several key issues regarding the duties and liabilities of corporate officers remain open for resolution by Delaware's courts. If the courts determine to resolve these questions, the task will not be without guiding stars; they will find at their disposal a robust body of academic discussion regarding these important, but judicially overlooked, corporate governance issues.

56 *Gantler*, 965 A.2d 695 at 708–09.