IN THE SUPREME COURT OF THE STATE OF DELAWARE

NATIONAL INDUSTRIES GROUP (HOLDING), Defendant Below-Appellants, v. CARLYLE INVESTMENT MANAGEMENT L.L.C. and TC GROUP, L.L.C., Plaintiffs Below-Appellees.	No. 596, 2012 On Appeal from the Court of Chancery of the State of Delaware, C.A. No. 5527-CS

CORRECTED PLAINTIFFS BELOW-APPELLEES' ANSWERING BRIEF

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January 28, 2013

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NATURE OF THE PROCEEDINGS

Defendant National Industries Group (Holding) ("NIG") invested in Carlyle Capital Corporation Ltd. ("CCC"). NIG agreed that the Delaware courts would have exclusive jurisdiction over any claim "with respect to" the Subscription Agreement pursuant to which NIG made its investment. After the investment proved unsuccessful, NIG filed suit in Kuwait (the "Kuwait Action") on claims undisputedly "with respect to" the Subscription Agreement. NIG was free to make those claims, but only in Delaware. Plaintiffs Carlyle Investment Management L.L.C. ("CIM") and TC Group, L.L.C. ("TC Group," and together with CIM, "Carlyle") held NIG to its bargain, and filed the present action in the Court of Chancery in May of 2010, seeking to enjoin NIG's prosecution of the Kuwait Action in violation of the Delaware forum selection clause.

Although NIG was properly served and received notice of all proceedings, it chose not to answer this suit. After a year passed, Carlyle moved for a default judgment. NIG was notified, but declined to respond. In July 2011, the Court of Chancery entered a default judgment and enjoined NIG from prosecuting the Kuwait Action. Another year passed. In June 2012, NIG moved to vacate the default judgment and dismiss the complaint. The Court of Chancery issued an opinion on October 11, 2012 (the "Opinion") rejecting NIG's arguments and sustaining the default judgment. This appeal followed.

The Court should affirm the Court of Chancery's opinion in all respects.

SUMMARY OF ARGUMENT

1. **Denied.** NIG voluntarily submitted to jurisdiction in Delaware, and the Court of Chancery possessed subject matter jurisdiction to enforce a forum selection clause. The judgment therefore was not void under Court of Chancery Rule 60(b)(4).

2. **Denied.** "[W]here contracting parties have expressly agreed upon a legally enforceable forum selection clause, a court should honor the parties' contract and enforce the clause." *Ingres Corp. v. CA, Inc.*, 8 A.3d 1143, 1145 (Del. 2010). That is all Carlyle sought. Subject matter jurisdiction cannot be created by contract; but it is not a contract that confers jurisdiction here. Rather, jurisdiction stems from Carlyle's claim for injunctive relief based on the irreparable harm it stands to suffer, with no adequate remedy at law. *El Paso Natural Gas Co. v. TransAmerican Natural Gas Corp.*, 669 A.2d 36 (Del. 1995), is not on point, as the clause there (1) was facially void and (2) did not encompass the claims in the foreign jurisdiction.

3. **Denied.** NIG claims that Carlyle "could raise its forum selection clause as a defense in Kuwait," and that this was an adequate remedy at law. Appellant's Opening Brief ("AOB") at 2. Delaware law does not compel Carlyle to prove in Kuwait why it may not be compelled to litigate in Kuwait. Being forced to litigate exactly where Carlyle bargained to avoid litigating is irreparable harm, for which Carlyle has no adequate remedy at law. And even if that were required in some instances, NIG has not shown that this remedy was adequate *here*. NIG attempts to make that showing based solely on affidavit testimony from a purported Kuwaiti law expert who (1) has

testified in federal court that Kuwait's legal system does not afford basic procedural fairness or fundamental due process, (2) was unable to identify a single Kuwait case enforcing a forum selection clause, and (3) repeatedly advocated that Carlyle *is* subject to jurisdiction in Kuwait, thus undermining the proposition that Carlyle will be free to raise the clause as a defense. NIG has fallen well short of showing that Carlyle has an adequate remedy at law.

4. **Denied.** Through the forum selection clause, NIG expressly submitted to personal jurisdiction in Delaware on all claims with respect to the Subscription Agreement. NIG's efforts to escape jurisdiction hinge on unrelated contract language that permits substantive "blue sky" securities claims under the laws of other *states* to be raised notwithstanding the express choice of Delaware law. That language has no bearing on whether a party knowingly has accepted jurisdiction in Delaware, as NIG did. And even taking at face value NIG's tortured argument that Kuwaiti law applies to the agreement's overall validity, NIG has failed to satisfy its burden with respect to what Kuwaiti law says on the subject. At most, NIG might have raised arguments about the agreement's validity under Kuwaiti law *in Delaware*, which NIG consciously chose not to do.

5. **Denied.** NIG gambled that it could avoid Delaware, the forum to which it committed. It ignored this action for two years. Now NIG claims that because of time bars, the only way it can proceed is in Kuwait, where it agreed not to sue. NIG should not be rewarded for disregarding its obligations. The Court of Chancery did not abuse its discretion in declining to vacate the default judgment.

STATEMENT OF FACTS

I. The Parties.

TC Group is a private equity firm that manages investment funds through its affiliates, including CIM. *See* Joint Appendix ("JA") JA000015 (Compl., ¶ 7). One such fund, for which CIM served as Investment Manager, was CCC. *Id.* (¶ 8). CCC invested primarily in residential mortgage-backed securities. JA000016 (Compl., ¶ 13).

NIG is a "Kuwait-based multi-national, multi-billion dollar conglomerate." *See* JA000742 (Op. at 1). It is a "large, sophisticated, international organization[.]" JA000745 (Op. at 4). NIG has a long history with Carlyle, dating to 2000, and has invested over $80 million in more than ten Carlyle funds. *Id.*; JA000469 (¶ 4). This case pertains to one of those investments: NIG's $10 million investment in CCC in 2006.[1]

II. NIG's Investment in CCC.

In connection with the private placement of CCC, Carlyle met with a select group of sophisticated, high-net-worth investors in a number of countries, including Kuwait. JA000470 (¶ 7). Each was required to warrant, *inter alia*, that it was an "accredited investor" under the Securities Act of 1933 (Regulation D), a "qualified purchaser" under the Investment Company Act of 1940, and a "qualified investor" under Guernsey law. JA000746 (Op. at 5); JA000230 (Sub. Agmt., § 3(b)). NIG satisfied these requirements, made those representations, and executed a Subscription Agreement for the purchase of $10 million in

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[1] NIG later invested $15 million more in CCC, JA000747 (Op. at 6).

CCC shares. JA000470 (¶¶ 3, 6); JA000746-47 (Op. at 5-6); JA000257 (Sub. Agmt.).

The Subscription Agreement contains an exclusive Delaware forum selection clause pursuant to which NIG agreed that all claims "with respect to" the agreement would be brought only in Delaware. JA000237 (Sub. Agmt., ¶ 8). Through that clause, NIG expressly submitted to the jurisdiction of the Delaware courts and "irrevocably waive[d]" any objections to such jurisdiction. *Id.* The agreement also contains a Delaware choice of law clause providing that "all terms and provisions hereof" are governed by Delaware law, but with a carve-out preserving the ability to raise substantive claims under the "blue sky" laws of other states. *Id.* (¶ 7).

CCC unfortunately "fell victim to the collapse of the U.S. housing market, and defaulted on its financing obligations in March 2008." JA000748 (Op. at 7). In May 2008, CCC entered liquidation. *Id.*[2] Only later, when NIG was "[c]onfronted with the unexpected loss of millions of dollars," did NIG first contend that Carlyle required a license to market CCC in Kuwait (such that, in NIG's view, the absence of a license would render the agreement void). *See* AOB at 7; JA000220 (¶ 7). Harry Alverson of Carlyle, who frequently has met in Kuwait with potential investors, including regarding CCC, testified that throughout his experience in Kuwait, he "ha[s] never heard NIG (. . . or any other Carlyle investor in Kuwait) claim that any such fund or product, marketed as a private placement to a select group of

[2] The CCC liquidators ultimately announced in September 2009 that investors likely would receive no distribution. JA000748 (Op. at 7).

sophisticated potential investors, required licensing from the Kuwaiti Ministry of Commerce and Industry." JA000471 (¶ 10).

III. NIG's Suit in Kuwait, and Carlyle's Suit in Delaware.

NIG maintains that it determined in January 2009 that Carlyle did not have a license to market CCC in Kuwait. AOB at 7. Ten months later, in November 2009, NIG filed suit in Kuwait against "Carlyle Group" (ostensibly a reference to a trade name used by TC Group), purporting to assert claims with respect to its initial $10 million investment in CCC. JA000748 (Op. at 7).[3] NIG attempted to serve process at Carlyle's headquarters in May 2010. *Id.*; JA000016 (Compl., ¶ 16). That month, Carlyle promptly filed this suit to ensure that CCC-related claims by NIG would proceed only in the agreed forum. JA000014-18 (Compl., *passim*). Carlyle sought an injunction against NIG's prosecution of any action subject to the forum selection clause in the Subscription Agreement anywhere other than the Delaware courts. JA000017. Carlyle disclaimed seeking money damages, "in the expectation that this dispute promptly will be transferred to or reinitiated in the courts of the State of Delaware." *Id.* ¶ 17.

Carlyle served NIG with process pursuant to the Hague Convention in September 2010. *See* JA000022-23. In December 2010, Carlyle wrote NIG, noting that the time to respond had expired, but nonetheless inviting discussion regarding a schedule for this action. JA000026 (Mot. for Default Judgment, ¶ 11). NIG did not respond. *Id.* That decision was a "tactical" one. JA000749 (Op. at 8).

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[3] NIG has since added CIM as a defendant in Kuwait. JA000163 (NIG's brief in the Court of Chancery at 7 n.6); AOB at 8.

In June 2011, Carlyle moved for entry of a default judgment and an order enjoining NIG from prosecuting the Kuwait Action. JA000024-27 (motion); JA000749 (Op. at 8). Carlyle provided notice of this motion; NIG did not respond. *Id.* On July 13, 2011, the Court of Chancery heard the motion. In light of the "sophisticated parties" and the "reasonable and enforceable" forum selection clause, the court had "no concerns at all about entering the default judgment." JA000067 (Tr. at 7).[4] The court noted Carlyle's "extensive efforts to communicate to [NIG] the existence of the suit, the nature of the suit, and then above and beyond that, in connection with this hearing, notices were given and . . . every effort was made to communicate with them." JA000068 (Tr. at 8). The court found that (1) the forum selection clause was "valid and enforceable," (2) the Kuwait Action was subject to that clause, and (3) by filing the Kuwait Action, NIG breached the Subscription Agreement. JA000060-61 (Order); JA000750 (Op. at 9). The Order of Default Judgment "permanently enjoined [NIG] from filing or prosecuting any action subject to the forum clause contained in the NIG Subscription Agreement, including but not limited to the Kuwait Action, in any forum other than the courts of the State of Delaware." JA000061 (Order); JA000750-51 (Op. at 9-10).

Carlyle notified NIG of the default judgment in August 2011; NIG did not respond. JA000751 (Op. at 10). In January 2012, Carlyle learned that NIG was prosecuting the Kuwait Action "in defiance of the

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[4] At JA000749, the Court of Chancery wrote in a scrivener's error that "Carlyle chose not to appear for the [July 13, 2011] hearing." As is apparent at JA000062-69, it was *NIG* that "chose not to appear."

default judgment against it," and notified NIG again of the July 2011 order. *Id.* NIG did not respond, but instead attempted in April 2012 to serve Carlyle with process in the Kuwait Action. *Id.* In response, Carlyle began preparing contempt papers; shortly before Carlyle filed its motion for contempt, JA000076-93, NIG filed an unbriefed motion to vacate the default. JA000073. At that time, NIG's sole theory was that the default was void for lack of personal jurisdiction. *Id.*

On August 13, 2012, NIG filed its brief in the Court of Chancery, with an amended motion. JA000149-78. For the first time, NIG argued that the court lacked subject matter jurisdiction and also should dismiss on comity grounds. JA000149. NIG's briefing largely focused on personal jurisdiction, though, with subject matter jurisdiction and comity addressed only as an aside. JA000152-78. Carlyle filed its brief in opposition on August 27, 2012 (JA000266), NIG filed its reply on August 31, 2012 (JA000473), and the court heard argument on September 24, 2012 (JA000528 (Tr.)). NIG then submitted supplemental materials, JA000589-737, to which Carlyle responded, JA000738, and the court issued the Opinion on October 11, 2012, JA000741.

IV. The Opinion of the Court of Chancery and the Present Appeal.

The Court of Chancery explained that a Rule 60(b) motion is not a "do-over or an appeal," but may be granted under Rule 60(b)(4) only if the judgment was void and under Rule 60(b)(6) only in the case of "extraordinary circumstances." JA000752-53 (Op. at 11-12). The Court of Chancery noted that NIG expressly consented to the forum selection clause, and thereby consented to jurisdiction. JA000755-56 (Op. at 14-15). The Court rejected NIG's contention that the clause was

unenforceable for reasons of comity, JA000759-61 (Op. at 18-20), or because the application of Kuwaiti law might serve to invalidate the entire contract. JA000764-68 (Op. at 23-27). Moreover, "even if this issue is one governed by Kuwaiti law, it is one that [NIG] agreed would be determined by the courts of Delaware." JA000766 (Op. at 25). The Court of Chancery rejected the argument that the forum selection clause was unenforceable because NIG otherwise would have nowhere to litigate. JA000768-70 (Op. at 27-29). It rejected the argument that it lacked subject matter jurisdiction, since this case shows "why the Supreme Court held in *Ingres* that injunctive relief could properly issue to protect a party's contractual rights in having disputes resolved in the chosen forum." JA000770-73 (Op. at 29-32). And it rejected NIG's claim for relief under Rule 60(b)(6) for lack of "extraordinary circumstances," where any harm suffered "is entirely self-inflicted." JA000770 (Op. at 29).

NIG appealed the Opinion, but has reordered and reprioritized the issues; most notably, its throw-away argument on subject matter jurisdiction, addressed only minimally below, JA000175-77, now occupies the most attention. AOB at 11-25. Reordered and reweighted, NIG's arguments still fail, and the Court should affirm.

ARGUMENT

I. THE COURT OF CHANCERY POSSESSED SUBJECT MATTER JURISDICTION.

A. QUESTION PRESENTED.

Did the Court of Chancery possess subject matter jurisdiction over Carlyle's request for injunctive relief to specifically enforce a valid forum selection clause? *See* JA000175.

B. STANDARD OF REVIEW.

Carlyle agrees that the standard of review is *de novo*.

C. MERITS OF ARGUMENT.

The core of NIG's appeal is the contention that the Court of Chancery lacked subject matter jurisdiction over Carlyle's request for injunctive relief to specifically enforce a valid forum selection clause.[5] *See* AOB at 13-25. NIG posits that, under Delaware law, a litigant can essentially *never* obtain an injunction in Delaware to specifically enforce a forum selection clause mandating exclusive jurisdiction in Delaware. Instead, and misreading *El Paso*, NIG asserts that Carlyle must go litigate the question in Kuwait – squarely undermining its bargain – and ask *that* court to enforce the agreement. AOB at 21-25.

NIG's argument runs headlong into the Court's recent decision in *Ingres*, where the Court held that "[f]orum selection clauses are presumptively valid and should be specifically enforced" via an

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[5] NIG suggests that the Court of Chancery premised its ruling on NIG's motion coming "too late." AOB at 12-13. That is a red herring. The Court of Chancery did not deny NIG's motion because it was untimely, but because NIG's arguments failed on their merits. *See* JA000752-74 (Op. at 11-33).

injunction. 8 A.3d at 1146 (alteration and internal quotation marks omitted). It is well-established that the Court of Chancery has subject matter jurisdiction where a party seeks an equitable remedy, such as specific performance or an injunction, and lacks an adequate remedy at law. *See Rizzo ex rel. JJ & B, LLC v. Joseph Rizzo & Sons Constr. Co.*, 2007 WL 1114079, at *1 (Del. Ch.); *Jacobson v. Ronsdorf*, 2005 WL 29881, at *3 (Del. Ch.), *aff'd*, 906 A.2d 807 (Del. 2006) (Table); *see also* DONALD J. WOLFE, JR. & MICHAEL A. PITTENGER, *CORPORATE AND COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY* § 2.03[a], at 2-20 (July 2012) (hereinafter "WOLFE & PITTENGER"). Indeed, the "Court of Chancery has *exclusive* jurisdiction where injunctive relief is sought." *Kerns v. Dukes*, 707 A.2d 363, 368 (Del. 1998) (emphasis added).

Carlyle sought injunctive relief by way of specific enforcement of its contract right: that is, to enjoin NIG from prosecuting the Kuwait Action in violation of its commitment to litigate all claims only in Delaware. Under *Ingres*, that equitable remedy is available under Delaware law. Carlyle would suffer irreparable harm if required to proceed in Kuwait in contravention of the bargain it struck, and it has no adequate remedy other than an injunction. Accordingly, the Court of Chancery had subject matter jurisdiction.

1. Under *Ingres* and *Malouf*, the Court of Chancery had subject matter jurisdiction.

The Court made clear in *Ingres* that the Chancery Court has subject matter jurisdiction to enjoin violations of a valid forum selection clause. In *Ingres*, the plaintiff CA, Inc. filed suit in the Court of Chancery seeking to enjoin the defendant Ingres Corporation "from prosecuting the California Action" that Ingres had filed in

derogation of several forum selection clauses. 8 A.3d at 1145. That is just what Carlyle did here with respect to the Kuwait Action that NIG filed in derogation of the Subscription Agreement's forum selection clause. The clauses in *Ingres* specified Delaware or New York as the exclusive fora for "any action or proceeding in respect of any claim directly arising out of or related to" the agreements. *Id.* at 1145 n.1 (emphasis omitted). The clause here is equally broad, applying to "any action, suit or proceeding with respect to this Subscription Agreement." JA000237 (Sub. Agmt., § 8).[6] In *Ingres*, the Court of Chancery granted CA's request and enjoined the California suit. *See CA, Inc. v. Ingres, Corp.*, 2009 WL 4575009, at *5, *46-48 (Del. Ch.). That is exactly what the Court of Chancery did here, too.

Ingres appealed, and this Court affirmed. This Court held that the Court of Chancery "did not err in enjoining Ingres from prosecuting its . . . claims [outside of Delaware]" in violation of the forum selection clauses. *Ingres*, 8 A.3d at 1147. "[W]here contracting parties have expressly agreed upon a legally enforceable forum selection clause, a court should honor the parties' contract and enforce the clause[.]" *Id.* at 1145. Under Delaware law, the Court explained, "[f]orum selection clauses are presumptively valid and should be specifically enforced" through an injunction. *Id.* at 1146 (alteration and internal quotation marks omitted).

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[6] The First Circuit recently held that the same clause, in an agreement executed by another CCC investor, was broad and encompassed, *inter alia*, contract, tort and statutory claims. *Huffington v. T.C. Grp., LLC*, 637 F.3d 18, 21 (1st Cir. 2011).

Just as in *Ingres*, the Subscription Agreement here contains a valid forum selection clause that vests exclusive jurisdiction and venue in the courts of Delaware. And as in *Ingres*, Carlyle sought and obtained an injunction specifically enforcing that clause. *Ingres* confirms that this equitable remedy was available to Carlyle under Delaware law. 8 A.3d at 1145-47. And *Ingres* makes clear that the jurisdictional prerequisites to injunctive relief - namely, irreparable harm and the absence of an adequate remedy at law - are present in situations such as the one here, where absent an injunction, Carlyle would be forced to litigate in Kuwait in violation of the bargain it struck with NIG.[7] Indeed, had the requirements for injunctive relief been missing in *Ingres*, the Court of Chancery *could not have* enjoined Ingres, and this Court *could not have* affirmed that injunction.

NIG argues that *Ingres* has no application here "because in that case plaintiffs plead[ed] equity jurisdiction apart from the forum selection clause." AOB at 14. NIG misses the point, which is that the Court in *Ingres* affirmed the injunction. In doing so, the Court necessarily agreed that (1) CA had the right to seek an equitable remedy - *i.e.*, an injunction - specifically enforcing the clause and (2) CA stood to be irreparably harmed by Ingres's breach. *See Draper Commc'ns, Inc. v. Del. Valley Broadcasters LP*, 505 A.2d 1283, 1288 (Del. Ch. 1985) (irreparable harm required for preliminary and

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[7] *See Fellowes, Inc. v. Changzhou Xinrui Fellowes Office Equip. Co.*, 2012 WL 3544841, at *5 (N.D. Ill.) (noting requirement that there be no adequate remedy at law, and enjoining action in China).

permanent injunctive relief). And to find that CA would suffer irreparable harm absent an injunction, the Court necessarily had to determine that CA lacked an adequate remedy at law. *See Horizon Pers. Commc'ns, Inc. v. Sprint Corp.*, 2006 WL 2337592, at *24 (Del. Ch.) ("Irreparable harm 'consists of harm for which there can be no adequate recompense at law'" (quoting prior edition of WOLF & PITTENGER, § 12.02[e], at 12-27)).[8] Critically, the availability of an equitable remedy and the lack of an adequate remedy at law *are the same elements needed to establish the Court of Chancery's subject matter jurisdiction*. *See Rizzo*, 2007 WL 1114079, at *1; *Jacobson*, 2005 WL 29881, at *3. It thus makes no difference that, in *Ingres*, CA also sought injunctive relief to enforce provisions other than the forum selection clauses. That the Court affirmed the injunction establishes that the predicates for subject matter jurisdiction existed with respect to CA's claim to enforce the forum clause.

Indeed, the Court of Chancery recently relied on *Ingres* to find subject matter jurisdiction over a similar dispute. *See ASDC Holdings, LLC v. Richard J. Malouf 2008 All Smiles Grantor Retained Annuity Trust ("Malouf")*, 2011 WL 4552508 (Del. Ch.). Just as here, the plaintiffs in *Malouf* filed suit in the Court of Chancery seeking to enjoin the defendants from litigating in Texas in violation of an exclusive Delaware forum selection clause. *Id.* at *2-3. The *Malouf* defendants argued in response that the Court of Chancery lacked

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[8] *See also* WOLF & PITTENGER, § 12.02[b] at 12-22 ("th[e] irreparable harm requirement derives largely from equity's inability to act unless there is no adequate remedy at law").

subject matter jurisdiction because the plaintiffs could raise the clause as a defense in Texas, and therefore had an adequate remedy at law. *Id.* at *3. Relying on *Ingres*, the Court of Chancery rejected that argument. The court explained that requiring the plaintiffs "to litigate the forum selection issue in Texas, when they bargained for a contractual provision that would avoid such a result, would deprive Plaintiffs of the benefit of their bargain and cannot be an adequate remedy at law." *Id.* at *6. Because the *Malouf* plaintiffs had no adequate remedy at law and stood to suffer irreparable harm if compelled to proceed in Texas, the Court of Chancery had subject matter jurisdiction. *Id.* at *6.

Ingres confirms that the Court of Chancery had subject matter jurisdiction over this case. The Subscription Agreement's forum clause can be specifically enforced via injunction, *see Ingres*, 8 A.3d at 1145-46, and Carlyle stood to suffer irreparable harm, with no adequate remedy at law, if required to litigate in Kuwait. After all, if CA had not faced that same irreparable harm, with the same absence of an adequate remedy at law, the Court could not have affirmed the injunction in *Ingres*. *See also Malouf*, 2011 WL 4552508 at *6; *Gen. Protecht Grp., Inc. v. Leviton Mfg. Co.*, 2010 WL 5559750, at *25-26 (D.N.M.), *aff'd*, 651 F.3d 1355 (Fed. Cir. 2011).[9] The Court of

[9] Delaware courts have long recognized that requiring a party to litigate in violation of an *arbitration* clause constitutes irreparable harm. *See, e.g., HDS Inv. Hldg. Inc. v. Home Depot, Inc.*, 2008 WL 4606262, at *9 (Del. Ch.). And an arbitration clause "is, in effect, a specialized kind of forum-selection clause." *-Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974).

Chancery thus had all it needed for subject matter jurisdiction. *See Rizzo*, 2007 WL 1114079, at *1; *Jacobson*, 2005 WL 29881 at *3; WOLFE & PITTENGER, § 2.03[a], at 2-20.

2. *El Paso* does not apply to the valid and broad forum selection clause here.

NIG relies principally on *El Paso* to argue that a Delaware court can never enjoin an action brought in violation of a forum selection clause, because invoking the clause in the foreign forum is always an adequate legal remedy. NIG is incorrect. The holding of *El Paso* is far narrower than NIG contends and, in any event, is distinguishable. *See Malouf*, 2011 WL 4552508, at *4. The forum clause at issue here is akin to those in *Ingres* and *Malouf*, but differs materially from that in *El Paso*, which had a circumscribed scope and which was facially invalid.[10] *El Paso* has no application here.

First, the forum clause in *El Paso* purported to vest exclusive jurisdiction *solely in the Court of Chancery* for all disputes. 669 A.2d at 38 (internal quotation marks omitted). The clause itself thus was facially invalid, as it improperly purported to confer subject matter jurisdiction directly on the Court of Chancery, including over purely legal claims, by agreement. *Id.* at 39-41.

The Court grounded its decision in *El Paso* on the facial invalidity of the forum clause. *See, e.g.*, 669 A.2d at 39-41. Because the clause was invalid, El Paso had no basis to argue that it

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[10] NIG contends that *Malouf* is "contrary to *El Paso*." AOB at 20. But *Malouf* is fully consistent with *El Paso*, as explained below. This case, like *Malouf* and *Ingres*, simply differs from *El Paso* because the forum clause and claims are different.

was suffering an irreparable injury by being compelled to litigate in Texas. *Id.* at 40. Rather, El Paso's argument "rest[ed] upon the faulty premise that jurisdiction in the Delaware Court of Chancery is a right that could be created by contract." *Id.* Because El Paso had no power to confer exclusive jurisdiction over all disputes, even purely legal ones, on the Court of Chancery, "there is no right that could have been lost and there is no basis for El Paso's claim for compensation for the non-existent loss." *Id.* Had the forum clause been enforceable, though, equitable jurisdiction would have existed. *E.g.*, *Rizzo*, 2007 WL 1114079, at *1. But because the clause was invalid and created "no right that could have been lost," *El Paso*, 669 A.2d at 40, El Paso could suffer no irreparable injury by being forced to litigate in Texas. And because El Paso could suffer no irreparable injury, El Paso did not lack an adequate remedy at law, and the Court of Chancery therefore did not possess subject matter jurisdiction.

By contrast, the forum clause here is enforceable. It designates the "courts of the State of Delaware" as the exclusive forum, and does not purport to vest jurisdiction exclusively in the Court of Chancery. *See* JA000237 (Sub. Agmt., § 8), JA000747 (Op. at 6). Therefore, "the clause is fully enforceable as to any claim, legal or equitable, between the parties." *Malouf*, 2011 WL 4552508, at *4; *see also* *Ingres*, 8 A.3d at 1145 n.1 (describing enforceable clause). Simply

put, the forum clause here is enforceable; the *El Paso* clause was not.[11]

Second, *El Paso* is distinguishable because the scope of the forum clause in that case was narrow, encompassing only remedies for "alleged breach[es] of this agreement or the operative agreements." 669 A.2d at 38. As the Court of Chancery noted in *Malouf*, the clause in *El Paso* "only applied to claims directly pertaining to rights based on the contract at issue." 2011 WL 4552508, at *4-6. And in *El Paso*, the Texas complaint alleged only claims "that related indirectly, if at all, to the agreements between the parties" - "[i]n fact, [TransAmerican] amended its [Texas] complaint to drop its claims for breach of contract." *Malouf*, 2011 WL 4552508, at *5.[12] The forum clause in *El Paso* therefore not only was facially invalid, but it was "highly unlikely that [it] could have been applied to the contested claims" pending in Texas. *Id.*; *see El Paso*, 669 A.2d at 38 (describing claims). Because the Texas claims were not subject to the forum clause, El Paso had no right to an injunction barring

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[11] NIG argues that the clause here is invalid because it purports to "create [equity] jurisdiction by contract." AOB at 21; *see also id.* at 2, 13. It does no such thing. Carlyle is not seeking, as El Paso was, to enforce a contractual right to litigate *all* disputes in the Court of Chancery. Rather, Carlyle sought *only equitable relief* to enforce the parties' valid contractual agreement to litigate all disputes in the "courts of the State of Delaware." JA000237 (Sub. Agmt., § 8). *Ingres* confirms that such equitable relief is available to Carlyle under Delaware law, 8 A.3d at 1145-46, and Carlyle is no more attempting to "create jurisdiction by contract" than any litigant who seeks an order in equity to enforce a valid contract.

[12] *See also El Paso Natural Gas Co. v. TransAmerican Natural Gas Co.*, 1994 WL 248195, at *1 (Del. Ch.) (noting withdrawal of breach of contract claim).

prosecution of those claims outside Delaware. *Malouf*, 2011 WL 4552508, at *5. It is unsurprising, then, that El Paso was unable to show irreparable harm and the lack of an adequate remedy at law.

In this case, by contrast, NIG's Kuwait claims - essentially claims for fraud in the inducement and restitution based on the purported invalidity of the agreement, *see* JA000205-16 (Kuwait summons, with translation) - are clearly within the scope of the Subscription Agreement's broad forum selection clause, which extends to "any dispute with respect to" that agreement. JA000237 (Sub. Agmt., § 8). Examining an identical forum clause, the First Circuit held that the clause's broad "with respect to" language encompasses, *inter alia*, contract, tort, and statutory claims. *Huffington v. T.C. Grp., LLC*, 637 F.3d 18, 21 (1st Cir. 2011) (internal quotation marks omitted). Unlike *El Paso*, Carlyle is well within its rights in insisting that claims unquestionably encompassed by the clause be litigated in the forum for which Carlyle bargained. It is therefore proper that a threshold dispute regarding where the litigation should proceed - itself a dispute "with respect to" the agreement - be resolved in Delaware. *See, e.g., Malouf*, 2011 WL 4552508, at *6.

In *El Paso*, the Court found no irreparable harm, but it reached that conclusion on a fact pattern involving an invalid forum clause that did not apply to the foreign claims at issue. This case is fundamentally different. The clause here is presumptively valid and plainly encompasses the Kuwait claims. As *Ingres* and *Malouf* show, and unlike the plaintiff in *El Paso*, Carlyle would suffer irreparable harm if required to defend itself in Kuwait, something it bargained to

avoid. Carlyle thus has no adequate remedy at law, and the Court of Chancery had subject matter jurisdiction.

3. NIG has failed to show that Carlyle has no adequate remedy at law.

NIG's argument is premised on the proposition that Carlyle must litigate *only* in Kuwait - and *cannot* litigate in Delaware - its right *not* to have to litigate in Kuwait in the first place. AOB at 21-25. The proposition is facially absurd. "[R]equiring [Carlyle] to litigate the forum selection issue in [Kuwait], when [it] bargained for a contractual provision that would avoid such a result, would deprive [Carlyle] of the benefit of [its] bargain and cannot be an adequate remedy at law." *Malouf*, 2011 WL 4552508, at *6. Nothing more is needed to establish the lack of an adequate remedy.

But even if, as NIG contends, Delaware law requires a party to litigate in a foreign jurisdiction, in contravention of a forum selection clause, anytime the foreign jurisdiction allows the clause to be raised as a legal defense, NIG failed to show, in this case, that Carlyle has an adequate remedy at law in Kuwait.

In determining whether a remedy is "adequate," the "question is whether the remedy available at law will afford the plaintiff full, fair, and complete relief." *El Paso*, 669 A.2d at 39 (internal quotation marks omitted). To be adequate, the "remedy at law must be as practical to the ends of justice and to its prompt administration as the remedy in equity." *Id.* (internal quotation marks omitted). The Court of Chancery retains subject matter jurisdiction over any action for an injunction "to prevent a threatened injury where the

remedy at law . . . would undoubtedly be less complete and less effective than in a court of equity." *Id.* at 39-40 (internal quotation marks omitted).[13]

NIG hangs its entire "adequate remedy" argument on a single sentence, unsupported by relevant authority, in a declaration submitted by its purported expert in Kuwaiti law, Mr. Ahmed Zakaria Abdel Magied.[14] "[T]he party seeking the application of foreign law has the burden of . . . adequately proving the substance of the foreign law." *Vichi v. Koninklijke Philips Elecs., N.V.*, 2012 WL 5949204, at *12 (Del. Ch.) (alterations in original) (quoting *Rep. of Panama v. Am. Tobacco Co.*, 2006 WL 1933740, at *4 (Del. Super.)). Mr. Magied's testimony falls well short of demonstrating that forcing Carlyle to proceed in Kuwait would afford Carlyle anything like "full, fair, and complete relief" with respect to the forum clause.

Mr. Magied's declaration states only that Kuwait law would not "restrict Carlyle from raising the forum selection clause as a defense to the Kuwait action or prevent[] the Kuwait courts from assessing and adjudicating the validity of that defense should Carlyle interpose it there." JA000200 (¶ 8). Mr. Magied studiously declined to express any view as to whether a Kuwait court would hold this clause - or indeed <u>any</u> forum clause - enforceable. And he made no effort to explain what standard, if any, the Kuwaiti court would apply when doing so. *See id.*

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[13] *See also* WOLF & PITTENGER, § 12.02[e] at 12-30 to 12-31.

[14] Mr. Magied is not a member of the Kuwait bar. *See* JA000461-62 (¶ 3); JA000554-55 (Tr.).

It is a bit rich for NIG to rely on Mr. Magied's testimony and assure the Court that Carlyle will get a fair hearing in Kuwait. Mr. Magied's prior service as an expert witness on Kuwait law includes multiple declarations filed in --*Maersk, Inc. v. Neewra, Inc.*, No. 05-cv-04356 (S.D.N.Y.), where he fell over himself to criticize the Kuwaiti legal system as one that would not afford his client (in that case) "a full and fair hearing on the underlying merits." JA000580. To that end, Mr. Magied described at length the minimal procedures available in Kuwait. JA000579-81, JA000584-87. Not only that, but Mr. Magied opined that, although the contract in that case contained a forum selection clause mandating litigation in New York, his client never bothered to invoke it in Kuwait "because the Kuwait courts would not recognize such a forum selection clause," but rather would "assume jurisdiction over any case filed against a Kuwaiti defendant, even if the governing contract has a foreign forum selection clause." JA000585-86.[15]

Having learned of Mr. Magied's work in *Maersk* only from NIG's own filings in reply, *see* JA000507 (¶ 4), Carlyle examined those declarations and provided them to the Court of Chancery at oral argument. *See* JA000563-64 (Tr.). Counsel for NIG addressed those declarations at oral argument in -response. JA000568-70. Later that

[15] Indeed, based upon Mr. Magied's critique of Kuwait's legal system, the court in *Maersk* concluded that Maersk "never had the opportunity to fully and fairly litigate" in Kuwait. *Maersk, Inc. v. Neewra, Inc.*, 2010 WL 2836134, at *15 (S.D.N.Y.), *aff'd sub nom. Maersk v. Sahni*, 450 F. App'x 3 (2d Cir. 2011). The court "decline[d] to extend comity to" the Kuwaiti court, and found that it "would be a miscarriage of justice to preclude Maersk from litigating in this forum as a result of what transpired in Kuwait." *Id.*

week, NIG filed a third, "supplemental" declaration from Mr. Magied purporting to "clarify Kuwait law." JA000589-90 (Bonkowski letter). Even in that supplemental declaration, however, Mr. Magied could not state that a Kuwaiti court would ever enforce a forum selection clause. Instead, Mr. Magied tried to narrow his conclusions in *Maersk* by contending that *Maersk* involved a Kuwaiti *defendant*, as opposed to the present case filed by NIG in Kuwait, which involves a Kuwaiti *plaintiff*. JA000591-92 (¶¶ 3-6). He also attached a nearly incomprehensible informal English translation of a single Kuwait case which, by his characterization, does not appear to have involved a forum selection clause (and certainly not an exclusive one, as here), but rather a Kuwait court declining jurisdiction over a dispute involving only non-Kuwaitis who nevertheless had agreed to be "domiciled" in Kuwait for purpose of a contract. JA000593-94 (¶ 12); JA000735-37 (opinion).[16] Mr. Magied's efforts to distinguish his prior opinions and to supplement his conclusions with authority are unpersuasive.

Not only that, but Mr. Magied undermined his own meager defense of NIG's position by arguing at length that "Kuwait jurisdiction does apply to the Carlyle litigation," because (he says) Carlyle "accepted

[16] As Carlyle parses this inscrutable translation, and consistent with Mr. Magied's characterization, the litigants agreed to personal jurisdiction (a "selected domicile") - but that does not mean that they agreed on Kuwait as the *exclusive* forum for any disputes. *See* JA000735-37. The Court of Chancery also distinguished the case attached by Mr. Magied as one involving a Kuwait court *refusing* to enforce an agreement to submit to jurisdiction *in Kuwait*, a very different situation than presented here by NIG. JA000758 (Op. at 17 n.60). Mr. Magied's case provides no basis on which to dispatch Carlyle to Kuwait with a purportedly "adequate remedy."

expressly or impliedly [that] jurisdiction." JA000593 (¶¶ 9-10). As a declaration purporting to demonstrate that Carlyle possesses the adequate remedy of enforcing the forum selection clause in Kuwait (and therefore that Carlyle may not seek injunctive relief in Delaware), Mr. Magied's declarations are extraordinarily weak tea. Mr. Magied also offered no explanation at all for his contentions in *Maersk* about the basic procedural fairness and fundamental due process of law lacking in Kuwait. *See* JA000579-81, JA000584-85.

Where Carlyle is trying to invoke its right, under a broad and facially valid forum selection clause encompassing the claims filed against it, not to have to litigate in Kuwait, it surely cannot be an "adequate" remedy to make Carlyle go to Kuwait to do so. But even if, under some conditions, it can be "adequate" to require a party to subvert its contract rights in order to enforce those rights, such clearly is not the case here. NIG's own expert proves the point.

* * *

Carlyle filed suit in the Court of Chancery seeking equitable relief only: an injunction to specifically enforce its contractual right not to be dragged into the Kuwaiti courts. Under *Ingres*, that equitable remedy is available to Carlyle as a matter of Delaware law. Carlyle would suffer irreparable harm if required to enforce its contract rights in a manner that would nullify those very rights. Carlyle therefore has no adequate remedy at law. The Court of Chancery accordingly had subject matter jurisdiction over this matter.

II. NIG ACCEPTED PERSONAL JURISDICTION IN DELAWARE.

A. QUESTION PRESENTED.

Is NIG subject to jurisdiction in Delaware? *See* JA000166.

B. SCOPE OF REVIEW.

Legal conclusions regarding personal jurisdiction or contract interpretation are reviewed *de novo*. *Riverbend Cmty., LLC v. Green Stone Eng'g, LLC*, 55 A.3d 330, 334 (Del. 2012); *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 437 (Del. 2005).

C. MERITS OF ARGUMENT.

NIG knowingly executed a Subscription Agreement pursuant to which it "irrevocably waive[d]" any objections to personal jurisdiction in Delaware and "[t]hereby submit[ted] to such jurisdiction." JA000237 (Sub. Agmt., § 8). NIG argues that the entire agreement, including its submission to jurisdiction, is void *ab initio* under Kuwait law. AOB at 25-27. The tricky part is that the agreement has a *Delaware* choice-of-law clause. JA000237 (Sub. Agmt., § 7). NIG therefore seizes on a "blue sky" carve-out phrase to argue that Delaware law does not govern the agreement at all, whenever such law conflicts with that of any investor's home jurisdiction. AOB at 25-27.

NIG's argument fails on all fronts. First, even where the validity of a contract as a whole is under attack, a forum selection clause within it remains enforceable unless the *clause itself* is invalid, which NIG has not contended. Thus, if NIG wanted to argue that the contract was void *ab initio*, it had to do so in Delaware. Second, NIG interprets the "blue sky" carve-out in an unreasonable manner that would eviscerate the general choice of Delaware law. And

third, NIG has failed to demonstrate that, under Kuwait law, the entire agreement would be rendered void *ab initio* because of a technical licensing deficiency on Carlyle's part. NIG cannot escape the implications of its willing submission to personal jurisdiction.

1. NIG has the burden to establish that it is not subject to personal jurisdiction.

NIG cannot rest on its posture as a defendant and demand that Carlyle establish personal jurisdiction. NIG could have done so when served, but knowingly defaulted. Thus, it was NIG's burden on the motion to vacate to demonstrate the absence of jurisdiction. *See, e.g., Philos Techs., Inc. v. Philos & D, Inc.*, 645 F.3d 851, 857 (7th Cir. 2011); *Burda Media, Inc. v. Viertel*, 417 F.3d 292, 298-99 (2d Cir. 2005). NIG did not rebut Carlyle on this point, *see* JA000279, the Court of Chancery agreed, JA000755 (Op. at 14 n.49), and NIG has not appealed that conclusion. If NIG cannot establish that it is not subject to personal jurisdiction - and it cannot - it loses.

2. NIG has made no showing that the forum selection clause *itself* is invalid.

NIG jumps directly into Kuwait law, AOB at 25-27, in arguing that the contract as a whole is void. But a party challenging a forum selection clause must show that *the clause itself* is invalid. *-M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972). Otherwise, it would be extremely easy to escape a forum obligation: Just claim that the agreement is void altogether. The courts correctly have blocked such "end-run[s]" around forum clauses through "argument[s] about the enforceability of other terms in the contract." JA000804 (Op. at 26) (quoting *Ashall Homes Ltd. v. ROK Entm't Grp. Ltd.*, 992 A.2d 1239,

1248 (Del. Ch. 2010)). Rather, "[a] forum selection clause is viewed as a separate contract that is severable from the agreement in which it is contained." *Rucker v. Oasis Legal Fin., LLC*, 632 F.3d 1231, 1238 (11th Cir. 2011). If "the clause itself" is not invalid, it is enforceable. *Double Z Enters., Inc. v. Gen. Mktg. Corp.*, 2000 WL 970718 (Del. Super.). NIG has never claimed that the forum selection clause itself is invalid. Through that clause, NIG consented to jurisdiction in Delaware, JA000756 (Op. at 15).

3. The agreement is governed by Delaware law.

In its rush to apply Kuwait law, NIG also misreads the choice of law provision. NIG breezily concludes that Kuwait securities law applies to the agreement whenever such law "would 'affect' the governance, construction and enforcement of any of the terms in the Subscription Agreement." AOB at 25. But the exception would far swallow the rule if read as NIG contends. What would be the point of agreeing that "all terms and provisions" are to be enforced "solely under the laws of the State of Delaware," JA000237 (Sub. Agmt., § 7), if the conflicting laws of any investor's jurisdiction trump Delaware law regarding "the governance, construction and enforcement of any of the [agreement's] terms," AOB at 25?

NIG's interpretation makes no sense. And indeed, multiple courts have construed this clause as Carlyle advocates. In *Huffington*, another CCC investor sued in Massachusetts, in derogation of the same forum clause at issue here. The First Circuit observed that "[u]nder the choice of law clause, the agreement itself . . . is (the blue sky exception aside) governed by Delaware law." 637 F.3d at 21. That is,

the "Delaware choice of law clause . . . is addressed to interpretation and enforcement of *the agreement*." *Id.* at 25. The court correctly interpreted the "blue sky" exception to mean that while Huffington had to sue in Delaware, he could raise Massachusetts securities law claims in such a suit.[17] In Delaware, the Superior Court reached the same conclusion, holding that while Huffington's substantive securities law claim under Massachusetts law was not barred (in view of the "blue sky" exception), "[i]f Huffington had challenged the validity of the terms of the Subscription Agreement itself, Delaware law would apply." *Huffington v. TC Grp., LLC*, 2012 WL 1415930, at *10-11 (Del. Super.).

There is no support for NIG's reading of the choice-of-law clause; Kuwait law has no bearing on the agreement's enforceability.

4. NIG's interpretation of Kuwait law is not persuasive.

NIG's entire personal jurisdiction analysis is that, under Kuwait law, the Subscription Agreement was null and void *ab initio*. NIG engages in sleight-of-hand to disguise that its position rests entirely on Mr. Magied's say-so. But that is NIG's only support.

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[17] As the Court of Chancery noted, though, "it is not at all settled that the Kuwaiti state securities laws can be considered a 'state securities law' for the purposes of the 'blue sky' carve-out." JA000765 (Op. at 24); *see LaSala v. Bordier et Cie*, 519 F.3d 121, 138-39 (3d Cir. 2008) (holding that "state" law did not encompass foreign law under a federal statute). The Court of Chancery proposed that the term "state securities law" be interpreted with reference to the accompanying phrase "blue sky laws," which "refers unambiguously to *U.S. state*, not foreign, regulation." JA000765 (Op. at 24 n.84). NIG has not demonstrated that this language authorizes application of *Kuwait* securities law to any issue at all regarding the agreement.

NIG cites two Kuwait statutes. -AOB at 25-26. First, Decree Law No. 31, which NIG says "provides that a foreign company may not undertake the sale of foreign investment funds in Kuwait except through a Kuwaiti agent." AOB at 25. Second, Civil Law Article 187, which (per NIG) provides that, where a contract is null and void, the parties revert to their pre-contract state. AOB at 26. The legerdemain takes place where NIG tries to bridge the two, stating that "[v]iolation of Decree Law No. 31 'results in nullity and invalidity' of the sale." AOB at 26. *That* quote is taken not from Kuwait law, but rather from Mr. Magied, who offered no authority at all to support it. JA000200 (¶ 5). NIG has offered nothing but Mr. Magied's *ipse dixit* for the proposition that under Kuwait law, a technical licensing violation nullifies, *post-facto*, a contract between sophisticated parties with a long-standing relationship.[18]

Carlyle's expert Nader Al-Awadhi noted that Mr. Magied "offers neither authority nor reasoning to support the conclusion that a technical violation of Article 3 [of Decree Law No. 31] renders a contract signed in contravention of Article 3 null and void." JA000462 (¶ 4). Mr. Al-Awadhi noted further that Mr. Magied cited the wrong statute. Article 3 (which Mr. Magied referenced) pertains to sales of shares in *existing* entities, while Article 1 governs

[18] NIG cites *Investors Guar. Fund, Ltd. v. Compass Bank*, 779 So. 2d 185 (Ala. 2000), as a case where a forum clause was not enforced because of a licensing failure. AOB at 27 n.66. But as the Court of Chancery noted, had that party been licensed, it would have been barred by Alabama insurance law from invoking forum selection clauses of that nature. JA000804 (Op. at 26 n.88). NIG is making the exact opposite argument here, of course, where it contends that Carlyle has the adequate remedy of raising the forum selection clause in Kuwait.

"subscriptions" in newly formed entities such as CCC; but Article 1 by its terms is limited to "public subscriptions." JA000462-63 (¶¶ 5-6). Thus, a new subscription of CCC's nature - limited to sophisticated and high net worth investors, and not publicly communicated or promoted - would not fall under either statute. *Id.*

Mr. Al-Awadhi bolstered his analysis with his experience. He testified that he is aware of *no cases at all* through 2006 (when NIG signed the Subscription Agreement) in which marketing efforts like these were ever held unlawful for failure to obtain a license. JA000463-64 (¶ 7). Nor was he aware of *any* enforcement actions "under either Article 1 or Article 3 in connection with a private placement of a non-retail fund offered on a limited basis to select, sophisticated and qualified investors." JA000464 (¶ 8).

After Mr. Al-Awadhi submitted his declaration, Mr. Magied submitted two more declarations, but not a single counterexample. *See* JA000506; JA000591. It is not surprising that the Court of Chancery rejected an analysis offered "with no reference to interpretative authority [nor] examples of any enforcement actions." JA000766 (Op. at 25 n.85). The court noted in particular "that [NIG] has invested repeatedly in Carlyle, which has never had a license to sell securities in Kuwait, but [NIG] has not indicated anywhere that it believes that these investments were also improper." *Id.*

NIG's characterization of Kuwait law is a contrivance. NIG has failed to demonstrate that the agreement would be void under Kuwait law (nor that Kuwait law should factor at all on the question). NIG voluntarily submitted to jurisdiction, and is bound by that.

III. THE COURT OF CHANCERY DID NOT ABUSE ITS DISCRETION IN DECLINING TO VACATE THE DEFAULT.

A. QUESTION PRESENTED.

Did the Court of Chancery abuse its discretion under Chancery Court Rule 60(b)(6) in declining to vacate the default? JA000165.

B. SCOPE OF REVIEW.

Carlyle agrees that a motion under Rule 60(b)(6) is reviewed for an abuse of discretion. AOB at 30. *De novo* review is not implicated; NIG's cite, AOB at 30 n.78 (citing *Bartley v. Davis*, 519 A.2d 662, 664 (Del. 1986)), has nothing to do with Rule 60(b)(6).

C. MERITS OF ARGUMENT.

NIG argues that the Court of Chancery abused its discretion in not vacating the default, because (1) NIG is now time-barred except in Kuwait, and (2) the court did not vacate the default on comity grounds. AOB at 30-31. Rule 60(b)(6) permits a court to vacate a judgment for "any other reason justifying relief from the operation of the judgment." This "extraordinary remedy" requires "extraordinary circumstances." *Shipley v. New Castle Cnty.*, 975 A.2d 764, 767 (Del. 2009); *MCA, Inc. v. Matsushita Elec. Indus. Co.*, 785 A.2d 625, 635 n.9 (Del. 2001). Such circumstances are only those that "could not have been addressed using other procedural methods, constitute an 'extreme hardship,' or that 'manifest injustice' would result if relief were not granted." *Wolf v. Triangle Broad. Co.*, 2005 WL 1713071, at *1 (Del. Ch.). They do not exist where conduct "has been intentional or willful," because Rule 60(b)(6) "cannot be used to relieve a party from the duty to take legal steps to protect his interests." *Phillips v. Siano*, 1999 WL 1225245, at *4 (Del. Super.).

1. NIG argues too little, too late.

NIG's first problem is its own delay. *See, e.g.*, *Borsello v. Warner*, 553 A.2d 638 (Del.) (Table), *available at* 1988 WL 147396, at *1 (delay in motion supported denial); *Schremp v. Marvel*, 405 A.2d 119, 120 (Del. 1979) (denying without reaching merits because plaintiff waited two months after knowing of judgment before filing Rule 60(b)(6) motion). Having knowingly dallied for a year before seeking to lift the default, NIG is doomed from the start.

2. NIG cannot complain about problems of its own making.

NIG claims that it had the "good faith belief" that the proper forum for its claims was Kuwait. AOB at 31. NIG argues that because its claims are now time-barred, *id.* (citing 10 Del. Code § 8106(a)), and it cannot, under Kuwaiti law, transfer its case to Delaware, *id.*, the Court of Chancery therefore abused its discretion in not vacating the default judgment, since NIG can proceed only in Kuwait.

But Carlyle filed suit in the Court of Chancery in May 2010, only two years after CCC was placed into liquidation. JA000748 (Op. at 7). NIG was served through the Hague Convention in September 2010, JA000749 (Op. at 8), while substantial time remained on any claim under 10 Del. C. § 8106, the statute NIG cites (AOB at 31). NIG could have raised its jurisdictional arguments to ensure that it still could proceed in Delaware if necessary. NIG chose not to do that. Instead, it decided unilaterally that it was not subject to jurisdiction, ignored service, repeated communications from Carlyle, and the July 2011 hearing, then took another year to seek to vacate the judgment.

Not only that, but Carlyle's action was triggered by NIG's suit in November 2009 and its attempt to serve Carlyle in May 2010. JA000748 (Op. at 7). Even if NIG pivots and claims application of some *other* statute of limitation, it was *NIG* that decided to bring CCC-related claims a year-and-a-half after CCC went into liquidation. Had NIG acted more promptly, Carlyle would have enforced its rights earlier, and NIG would not find itself in this pickle. NIG's timing, in Kuwait and in Delaware, was either extraordinarily imprudent or a conscious effort to construct exactly its present argument about the lack of an alternative forum. Either way, NIG's claim must fail.

Carlyle briefed below the overwhelming weight of authority confirming that a time bar precluding litigation in the agreed forum cannot invalidate a forum selection clause. *See* JA000292-93 (collecting cases). The Court of Chancery agreed with those cases. JA000769 (Op. at 27-28 & n.96). NIG does not mention any of that authority. NIG's position would create perverse incentives, rewarding NIG for leveraging its own breach to avoid its contract obligations. *See, e.g., New Moon Shipping Co. v. MAN B & W Diesel AG*, 121 F.3d 24, 33 (2d Cir. 1997) ("[C]onsideration of a statute of limitations would create a large loophole for the party seeking to avoid enforcement of the forum selection clause.").

NIG cites only one case, by footnote, in support of its position. AOB at 32 n.86 (citing *Brandt v. Hicks, Muse & Co.*, 195 B.R. 971 (Bankr. D. Mass. 1996)). But in *Brandt*, the court had other reasons to decline to enforce the forum selection clause. The court thought it unwise to sever from the bankruptcy only the claim covered by the

clause, potentially yielding inconsistent trials and a "tremendous duplication of time and effort." 195 B.R. at 989. Those factors have no bearing here, as the court found, JA000769 (Op. at 28 n.95).

NIG claims that this is a "gambit" by Carlyle. AOB at 31. But Carlyle has done nothing more than seek to have claims against it litigated in the agreed-upon forum. Carlyle filed suit immediately after NIG attempted service in the Kuwait Action, and it was NIG that gambled, not Carlyle. Now, NIG must live with the consequences.

As NIG itself notes, AOB at 31, the Delaware Superior Court dismissed the claim of another CCC investor who placed the same bet by suing elsewhere and refusing to take action in Delaware to preserve his claims until he was out of time. *See Huffington*, 2012 WL 1415930, at *4-9. Like NIG, that investor "did forum shop. . . . He clearly sought to avoid litigating his claims here. Sometimes when you gamble, you lose." *Id.* at *9. NIG did not even try to "hedge[] [its] bet" by filing a protective action in Delaware — it went "all in" in Kuwait. *See id.* That hardly merits turning the forum selection clause on its head simply because NIG now has nowhere else to sue.

NIG has "occasioned its own predicament by failing timely to file its claim in the contractually specified forum." *Trafigura Beheer B.V. v. M/T PROBO ELK*, 266 F. App'x 309, 312 (5th Cir. 2007) (per curiam). Thus, as the Court of Chancery noted, "any harm [NIG] has suffered is entirely self-inflicted." JA000770 (Op. at 29).

3. Comity considerations do not render the Court of Chancery's decision an abuse of discretion.

Though NIG discusses comity only in its jurisdiction arguments, AOB at 27-29, NIG cannot argue that comity considerations divest the

Court of Chancery of otherwise proper jurisdiction. NIG's only avenue to raise comity is under Rule 60(b)(6), but it fails there too.[19] NIG contends that the Court of Chancery showed "utter disregard" for Kuwait law, which "prejudiced its ability to evaluate fairly the issues." AOB at 28-29. Enjoining litigation in violation of a forum selection clause simply does not "implicate comity at all." *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 994 (9th Cir. 2006). *See also* JA000760-61 (Op. at 19-20); JA000287-88 (same). This is because comity is a background principle that "the parties to [] litigation are free to displace by a valid contractual agreement," as they did here. *Ingres*, 8 A.3d at 1145-47. This case is a private contract dispute; enforcing the forum clause "in no way breaches norms of comity." *Gallo*, 446 F.3d at 994.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court affirm the opinion of the Court of Chancery.

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[19] Insofar as NIG's comity argument may be that the Court of Chancery did not consider Kuwait law in finding NIG subject to jurisdiction, the court's thoughtful consideration of NIG's points on Kuwaiti law belie that claim. *See* JA000765-66 (Op. at 24-25 & n.85).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 28, 2013, she caused to be served by LexisNexis Files & Serve a copy of the foregoing CORRECTED PLAINTIFFS BELOW-APPELLEES' ANSWERING BRIEF upon the following counsel of record:

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