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Case Number 596,2012

IN THE SUPREME COURT OF THE STATE OF DELAWARE

NATIONAL INDUSTRIES GROUP (HOLDING),	:	No. 596,2012
Defendant Below, Appellant,	:	Court Below: Chancery Court of the State of Delaware in and for New Castle County
v.	:	
CARLYLE INVESTMENT MANAGEMENT L.L.C. and TC GROUP, L.L.C.,	:	C.A. No. 5527-CS
Plaintiffs Below, Appellees.	:	

DEFENDANT BELOW, APPELLANT
NATIONAL INDUSTRIES GROUP (HOLDING)'S REPLY BRIEF ON APPEAL

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Dated: February 4, 2013

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CITATION REFERENCES:

1. Citation to briefs before the Court of Chancery shall be as follows:

> Defendant's Opening Brief Below in Support of Motion to Vacate: "OBB [page]."
>
> Plaintiffs' Brief Below in Opposition to the Motion: "ABB [page]."
>
> Defendant's Reply Brief Below in Support of the Motion: RBB [page]".

2. Citation to the Court of Chancery's October 11, 2012 decision shall be:

> "Decision, [page]."

3. Citation to the transcript of oral argument held on September 24, 2012, shall be:

> "Trans. [page]."

4. Citation to NIG's Opening Brief on Appeal shall be:

> "OB, [page]."

5. Citation to Carlyle's Answering Brief on Appeal shall be:

> "AB, [page]."

6. All citations to the Joint Appendix shall be followed by the appropriate Joint Appendix reference number:

> "JA[page].".

7. Citation to Appellant's Supplemental Appendix on Appeal shall be:

> "ASA[page]."

8. All other citations are defined within the brief or are self-explanatory.

ARGUMENT

I. CARLYLE'S ACTION IS PREMISED ON THE CREATION OF SUBJECT MATTER JURISDICTION BY CONTRACT.

A. Carlyle's Brief Offers Nothing New.

Carlyle's Answering Brief[1] treads no new ground. As it did below, it ignores the *stare decisis* of *El Paso Natural Gas Co. v. TransAmerica Natural Gas Corp.*, 669 A.2d 36 (Del. 1995) (hereafter "*El Paso*") and completely misconstrues *Ingres v. CA, Inc.*, 8 A.3d 1143 (Del. 2010) (hereafter "*Ingres*"); it continues to disregard the explicit carve out in the Subscription Agreement of securities issues from Delaware law, subjecting them to Kuwait law;[2] and, it overlooks entirely the governing principles that inform the issues on appeal here, including the burden of proof and the presumptions that attend them.[3]

Perhaps the only surprise in Carlyle's Answering Brief appears early on, in its Summary of Argument. There Carlyle telegraphs its plan of attack by emphasizing that "it is not a contract that confers subject matter jurisdiction here." AB, 2, Summary of Argument, ¶2.[4] This remarkable spin is contrary to the position Carlyle took before

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[1] Citation to Carlyle's Answering Brief on Appeal shall appear as "AB, [page]."

[2] JA000237; Subscription Agreement, ¶7.

[3] OB, 11-14. Carlyle does not challenge any of the legal points made therein.

[4] See also AB, 16 ("NIG argues repeatedly that the clause in the present case is invalid because it purports to 'create [equity] jurisdiction by contract.' [] But it does no such thing")(citation omitted).

the Court of Chancery,[5] as it is to the many comments of the Court in the Decision.[6] Indeed, it is even contrary to arguments that Carlyle proceeds to muster later in its Answering Brief:

> Through this action, 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.

AB, 11 (emphasis added).

Carlyle's declaration in its Summary of Argument makes one thing clear: It intends to run away from *El Paso*. It has no choice.

B. ***El Paso* Stands Fundamentally Opposed to the Decision and to Carlyle's Complaint.**

Carlyle would elude *El Paso* via a two pronged challenge that ignores or exaggerates the plain thrust of that decision. Arguing that the holdings of *El Paso* are "far narrower than NIG contends,[7]" Carlyle disregards *El Paso's* broad affirmations of the fundamental roots of equity jurisprudence, each one of which is controverted in the Decision and by Carlyle. For example:

- "Where there is no other basis for [subject matter] jurisdiction to exist;" it cannot be created by contract.[8]

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[5] See, e.g., Answering Brief Below (hereafter "ABB"), 26, JA000297 ("This Court clearly possesses subject matter jurisdiction over this dispute because Plaintiffs will suffer irreparable injury if required to litigate in Kuwait in violation of the Subscription Agreement's forum selection clause."). See also, Trans. 38, JA000565.

[6] See OB, 13-14; Decision, 30-32, JA000771-JA000773.

[7] AB, 14.

[8] *El Paso*, 669 A.2d at 39, quoting *Timmons v. Cropper*, 172 A.2d 757, 760 (Del. Ch. 1961), and *Elia Corp. v. Paul N. Howard Co.*, 391 A.2d 214, 215-16 (Del. Super. 1978) (secondary citation omitted).

- Subject matter jurisdiction is determined from the face of the complaint as of the time it was filed.[9]

- The ability to raise a forum selection clause as a defense in the foreign action constitutes an adequate remedy at law.[10]

The *El Paso* Court relied upon the legislative directives that define the precise parameters of equity jurisdiction as well as some of the seminal cases called upon to uphold the mandate of those statutory grants.[11] Contrary to Carlyle's suggestion, *El Paso* does not premise its holdings on the fine parsing of contractual venue provisions,[12] as its discussion makes plain. It is a decision with a precise focus: to insulate the legislatively defined, equitable bases of Chancery jurisdiction from expansion by contract or side agreement. Hence the didactic pronouncement, made at least five times in the body of the decision: jurisdiction cannot be created by contract.[13]

Carlyle also takes an *in terrorem* approach to *El Paso*, urging that, if NIG's construction of the case is correct, a litigant could

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[9] *Prestancia Mgmt. Group, Inc. v. Virginia Heritage Found., II LLC, et al.*, 2005 WL 1364616 *3 (Del. Ch. 2005), quoting *Block Fin. Corp. v. Inisoft Corp.*, 2003 WL 136182 *2 (Del. Ch. 2003).

[10] *El Paso*, 669 A.2d at 40. See AB, 2, Summary of Argument, ¶3 ("Being forced to litigate exactly where a party bargained not to have to litigate is irreparable harm").

[11] *El Paso*, 669 A.2d at 39, citing *10 Del. C.* § 342; *Timmons v. Cropper*, 172 A.2d 757, 760 (Del. Ch. 1961); Bayard *v. Martin*, 101 A.2d 329, 334 (Del. 1953); *Gray v. Alemite Corp.*, 174 A. 135, 144 (Del. Ch. 1934), citing *Pefkaros v. Harman*, 174 A. 24 (Del. Ch. 1924).

[12] See, e.g., AB, 15-16 (arguing that *El Paso* allows a broad forum selection clause, rather than a narrow one, to be used by parties to create subject matter jurisdiction).

[13] See *El* Paso, 669 A.2d at 39 (three times); 40 (one time); 41 (one time).

"*essentially never obtain an injunction* in Delaware to specifically *enforce* (sic) a forum selection clause."[14] This is nonsense, as *Ingres*, discussed below, makes plain.

Standing as it does entirely on a contractual forum selection clause, the Decision can only survive if it can be reconciled with *El Paso*. It cannot.

C. Carlyle's Answering Brief Fails to Overcome El Paso.

Carlyle would elude *El Paso* through its reliance on *Ingres*, *Malouf*, and other more general cases cited, at best, for vanilla descriptions of Chancery's equitable parameters. Review of those cases reveals that they in fact support *El Paso*. As for its analysis of *Ingres*, Carlyle continues to ignore the obvious distinction there: the complaint in *Ingres* sets out in detail independent bases for equitable jurisdiction *aside from the forum selection clause*.[15]

1. *Ingres* Does Not Reverse *El Paso*.

The fatal flaw in Carlyle's *Ingres* analysis is betrayed in its summary of that case:

> In *Ingres*, the plaintiff CA, Inc. filed suit in the Court of Chancery seeking to enjoin the defendant "from prosecuting the California Action" that Ingres had filed in derogation of a forum selection clause mandating litigation in Delaware or New York. [] That is just what Carlyle did here. . .

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[14] AB, 10 (emphasis added). See also AB, 14 ("As NIG reads *El Paso*, a Delaware court *can never enjoin* an action in violation of a forum selection clause")(emphasis added).

[15] *El Paso*, 669 A.2d at 39, quoting *Timmons v. Cropper*, 172 A.2d 757, 760 (Del. Ch. 1961), and *Elia Corp. v. Paul N. Howard Co.*, 391 A.2d 214, 215-16 (Del. Super. 1978) (secondary citation omitted).

AB, 11 (internal citation omitted). As it did with *El Paso*, Carlyle grossly understates the scope of the *Ingres* action so as to allow it to draw necessary, but unfounded, comparisons to this action.[16] *Ingres* involved much, much more than this case.

In the *Ingres* complaint, plaintiff CA, Inc. sets out in painstaking detail, over 80 paragraphs, the continuing obligations that arose between the parties as a consequence of a series of inter-related agreements.[17] Then, in Count II of the Complaint, CA, Inc. articulates, in an additional 13 paragraphs, its claim for preliminary and permanent injunctive relief, alleging that

- It has performed all obligations and conditions to be performed on its part under the various agreements.
- It has no adequate remedy at law to enforce defendant's reciprocal obligations.
- It will be irreparably harmed if those reciprocal obligations are not enforced.[18]

The Court of Chancery awarded equitable relief aimed specifically at CA, Inc.'s injunctive request in Count II.[19] This Court, in

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[16] See AB, 14 ("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*").

[17] See Appellant's Supplemental Appendix ("ASA"), ASA00001, 000012-000020; Verified Complaint in *CA, Inc. v. Ingres Corp.*, C.A. No. 4300, January 20, 2009, ¶¶81-163.

[18] See ASA000023-000024; Verified Complaint in *CA, Inc. v. Ingres Corp.*, C.A. No. 4300, January 20, 2009, ¶¶190-202.

[19] See OB, 19, n. 34 citing *C.A., Inc. v. Ingres Corp.*, 2009 WL 4575009, *48 (Del. Ch. 2009) ("Furthermore, I find that CA has the right to continue to provide these licenses to Olympus under the March 2009 amendment to their ISV Agreement, and **that Ingres is required to continue to provide support** for these licenses under the CA Support Agreement"(emphasis added)).

affirming *Ingres*, noted the substantive equitable remedies sought at trial.[20]

Consideration of the *Ingres* complaint dramatizes the stark distinctions between that complaint and the complaints in *El Paso* and the instant case.[21] Both the *El Paso* and Carlyle complaints are bald anti-suit injunction complaints. OB, 16-17. They make no attempt to plead any independent equitable basis for jurisdiction.[22] This point is lost in Carlyle's approach to *Ingres*. Carlyle does not even address the fact that, at the outset of the case, the Court of Chancery denied Ingres' motion to stay the California action.[23]

Ingres fails to support Carlyle's arguments for other reasons. It is, entirely, a *McWane* case.[24] It neither comments on nor distinguishes in any way *El Paso*. Nowhere does it intimate any intent to reverse *El Paso*. It strains reason to suggest that this Court intended *Ingres* to dispense with the absolute requirement that equity

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[20] *Ingres*, 8 A.3d at 1145 (noting that the complaint sought injunctive relief requiring "Ingres to perform its obligations under various contracts, which addressed related subjects").

[21] Carlyle not only disregards these distinctions, it exploits that disregard. See AB, 14 ("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 AB, 16 (after again invoking *Ingres*, "Carlyle is no more attempting to 'create jurisdiction by contract' than any litigant who seeks an order in equity to enforce a valid contract").

[22] *El Paso*, 669 A.2d at 39.

[23] *Ingres*, 8 A.3d at 1145. It was only after trial and the award of $2.25 million in damages did the Court enjoin the California action. *Id*.

[24] *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Eng. Co.*, 263 A.2d 281 (Del. 1970). In *El Paso*, the Court noted that neither party there had raised the *McWane* issue. 669 A.2d at 38, n.1.

jurisdiction must exist in order for an action to proceed in the Court of Chancery. That right is reserved to the Legislature.[25]

Carlyle also seeks cover in *Ingres* by arguing that Carlyle "sought only *equitable relief* (in the form of specific performance and an injunction) *to enforce the parties' valid contractual agreement*."[26] Accepting *arguendo* Carlyle's point, where jurisdiction is based solely on a claimed need for equitable relief, the court is required to find that the complaint adequately states a claim for an equitable remedy, *and* "that there is not otherwise a sufficient remedy in the law courts of this state."[27] The question raised by *Comdisco*, which is relied upon by *Jacobson v. Ronsdorf*, cited in Carlyle's Answering Brief,[28] is resolved by *El Paso*: The "ability to raise the forum selection claim as a defense in the [foreign] action [is] an adequate remedy at law."[29] Carlyle's argument that "the Court in *Ingres* considered and affirmed the injunction" completely misses the point.[30]

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[25] OB, 19-20, note 36, citing 10 *Del. C.* § 342 ("The Court of Chancery shall not have jurisdiction to determine any matter wherein sufficient remedy may be had by common law, or statute, before any other court of jurisdiction of this State").

[26] AB, 16 (emphasis in original). See, c*ontra*, AB, 2, Summary of Argument, ¶2 ("it is not a contract that confers subject matter jurisdiction here").

[27] *IBM Corp. v. Comdisco, Inc.*, 602 A.2d 74, 80 (Del. Ch. 1991). The Court of Chancery here was troubled by this issue when presented with the proposed anti-suit injunction order, noting that an anti-suit injunction is "just not something we often like to do" and "would be an appropriate subject for some Rule 60 motion." JA000066, 68.

[28] AB, 11.

[29] *El Paso*, 669 A.2d at 40.

[30] AB, 13.

2. ***Malouf* Has No Application Here.**

Carlyle continues to backstop its end run of *El Paso* with the Court of Chancery's decision in *ASDC Holdings, LLC v. Malouf 2008 All Smiles Guarantor Retained Annuity Trust*, 2011 WL 4552508 (Del. Ch. Sept. 14, 2011) (hereafter "*Malouf*"). As discussed in detail in NIG's Opening Brief, that effort fails.[31]

First, Carlyle validates *Malouf* based on its tortured construction of *Ingres*. *Ingres*, as shown above, does not stand for the proposition Carlyle needs, and does not validate *Malouf*. Further, like the complaint here and in *El Paso*, plaintiffs' complaint in *Malouf* is a bald anti-suit injunction action.[32] It lacks any independent basis for equity jurisdiction. These critical facts notwithstanding, Carlyle would prop up *Malouf* with its "broad versus narrow" argument and its "unenforceability" analysis.

Malouf's "broad versus narrow" argument is disposed of, plainly and entirely, by another of the black letter holdings of *El Paso*: "jurisdiction of a court over the subject matter cannot be conferred by contract or agreement."[33] *El Paso* affirms that the statutory limits of equity jurisdiction are, as they must be, beyond the reach of creative drafters. No contract or agreement can extend them.

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[31] OB, 18-21. Carlyle chirps at NIG for "only briefly" discussing *Ingres* and *Malouf* and "largely eliding their reasoning." AB, 14 .In offering the remarks, Carlyle cites to the wrong pages of NIG's brief – OB, 15-17 – which may explain its comments. That aside, we harken to Lord Polonius' wisdom: "Brevity is the soul of wit." Shakespeare, *The Tragedy of Hamlet, Prince of Denmark*, Act 2, scene 2.

[32] See OB, 21; AB, 17.

[33] *El Paso*, 669 A.2d at 39 (quotations and citations omitted).

Nor does *Malouf's* unenforceability analysis provide an escape from *El Paso's* reach.[34] Indeed, logically pursued, it returns us to and is disposed of by *El Paso*. The *Malouf* Court excuses its offense to *El Paso* by explaining that the forum selection clause in *El Paso* was unenforceable because the claims in the Texas action were all legal in nature.[35] That proposition – that the specific performance claim is only viable if recognized by the Court of Chancery[36] - is circular. It merely foreshadows the holding that would follow in the this Court's *El Paso* decision: subject matter jurisdiction must exist independently of the forum selection clause.

Lastly, and perhaps most importantly, to promote *Malouf's* "broad versus narrow" and unenforceability analyses over *El Paso* would read *El Paso* out of existence, legitimizing the creation of subject matter jurisdiction by contract, the very threat targeted in *El Paso*.

3. Carlyle's Other Authority Supports *El Paso*.

Carlyle cites three other cases in support of its attempt to distance itself from *El Paso*: *Rizzo ex rel. JJ & B, LLC v. Joseph Rizzo & Sons Constr. Co.*, 2007 WL 1114079 (Del Ch. 2007), *Jacobson v. Ronsdorf*, 2005 WL 29881 (Del. Ch. 2005), and *Kerns v. Dukes*, 707 A.2d 363 (Del. 1998).[37]

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[34] In reaching its unenforceability conclusion, the *Malouf* court actually relied upon the decisional rationale of the trial court in *El Paso*,[34] not that of the Supreme Court. *Malouf*, *4, n. 9-12.

[35] *Malouf*, *4.

[36] *Malouf*, *9.

[37] AB, 10-11.

In *Rizzo*, the Court, "[g]enerally speaking," explained that Chancery subject matter jurisdiction arises when (1) a plaintiff seeks to press an equitable claim such as breach of fiduciary duty, and (2) when a plaintiff seeks an equitable claim or otherwise lacks an adequate remedy at law.[38] The Court also paused to explain the reach of concurrent jurisdiction, or the so-called clean up doctrine.[39]

In *Jacobson*, the Court did precisely the same thing, laying out the two "traditional bases" for equity jurisdiction. However, the court went further, emphasizing that where "equity jurisdiction is based solely on the claimed need for equitable relief, this court is required to find that the complaint adequately states a claim for an equitable remedy, and that there is not otherwise available a sufficient remedy at law."[40]

Kerns, Carlyle's last salvo at *El Paso*, is part general jurisdiction and part concurrent jurisdiction. The *Kerns* Court recognized that the Court of Chancery has exclusive jurisdiction over claims for injunctive relief.[41] The Court also noted that there must be "a basis for equitable jurisdiction" in order to award declaratory relief.[42] Its utility here ends there.

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[38] 2007 WL 1114079, *1.

[39] *Id.*

[40] 2005 WL 29881, *3, citing *IBM Corp. v. Comdisco, Inc.*, 602 A.2d 74, 80 (Del. Ch. 1991).

[41] *Kerns*, 707 A.2d at 368, citing 10 *Del. C.* § 341 and *duPont v. duPont*, 85 A.2d 724 (Del. 1951).

[42] *Id.*

Neither *Rizzo* nor *Kerns* informs the analysis of *El Paso* or supports the existence of Chancery jurisdiction here. *Ronsdorf* and its kin, *Comdisco*, return the discussion to one of the several black letter pronouncements of *El Paso*, discussed above, and affirm that the Decision should be reversed.

D. Carlyle Has An Adequate Remedy at Law.

Delaware courts prefer judgments on the merits over default judgments. This over-arching preference informs their approach to motions under Rules 55 and 60[43] and in other contexts.[44] For this reason Delaware courts do not require a party moving to vacate a default judgment to show definitively that the outcome of the case would be different had the motion not been entered. The moving party need only show that "there is the possibility of a different result."[45] "Any doubts raised by a Rule 60 motion must be resolved in favor of the moving party."[46] Carlyle does not challenge or address any of these legal predicates.

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[43] *Battaglia v. Wilmington Sav. Fund Soc.*, 379 A.2d 1132, 1135 (Del. 1977).

[44] See, e.g., *Central Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings, LLC et al.*, 27 A.3d 531 (Del. 2011); *Christian, et al. v. Counseling Res. Assoc., Inc., et al.*, No. 460, 2011 (Jan. 2, 2013); *Hill v. DuShuttle, et al.*, No. 381, 2011 (Jan. 2, 2013); *Keener, et al. v. Isken, et al.*, No. 609, 2011 (Jan. 2, 2013).

[45] *McMartin v. Quinn*, 2004 WL 249576, *3 (Del. Super. 2004); *Williams v. DelCollo Elec., Inc.*, 576 A.2d 683, 687 (Del. Super. 1989).

[46] *Johnson v. American Car Wash, Inc.*, 2012 WL 2914186, *2 (Del. Super. July 17, 2012), citing *Kaiser-Frazer Corp. v. Eaton, et al.*, 101 A.2d 345, 353 (Del. Super. 1953); *Verizon DE, Inc. v. Baldwin Line Const., Inc.*, 2004 WL 838610, *1 (Del. Super. April 13, 2004).

There is no dispute, nor could there be, that NIG provided evidence that Carlyle could raise the defense of the forum selection clause in the Kuwait action.[47] Carlyle counters by criticizing the extent and quality of the evidence, and by ignoring, again, the precise holdings of *El Paso*.

NIG is not required to provide evidence that Carlyle *would succeed* before the Kuwait court on its forum defense. Carlyle urged this position in its Answering Brief, below, and the Court of Chancery wrongly accepted it.[48] Likewise, NIG is not required to demonstrate that, in adjudicating a forum selection clause defense, Kuwait courts will act as "readily as American courts."[49] Imposing such requirements again violates an express holding of *El Paso* and miscasts the movant's burden in such a circumstance.[50]

Here, NIG provided evidence that

- Carlyle could assert the forum clause as a defense in Kuwait;
- The Kuwait courts would adjudicate its validity; and,
- Kuwait courts have upheld the assertion of a defense based on a forum selection clause.

NIG met its burden under *El Paso*. If Carlyle is not satisfied with the record, it has only itself to blame, as it has yet to contest

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[47] See OB, 21-25.

[48] See AB, 19 ("Mr. Magied studiously declined to express any view as to whether a Kuwait could *would hold* this clause [] enforceable") (emphasis added); Decision, 17, n. 60 (JA000758), 32, n. 107 (JA000773).

[49] Decision, 17, n. 60; JA000758.

[50] OB, 23; *El Paso*, 669 A.2d at 40.

that it could raise the forum selection clause in the courts of Kuwait:[51] Not in its Complaint, not before the Court of Chancery, and not in its Answering Brief on appeal.[52] Carlyle has an adequate remedy at law.

E. The Subscription Agreement Is Void *Ab Initio*; Therefore the Court Below lacked Personal Jurisdiction.

Carlyle does not dispute that the Court of Chancery was "bound to respect the chosen law of contracting parties."[53] Nor does Carlyle contest Delaware's precedent that "the law of the place where a contract is formed determines its existence and validity."[54] What it does do is cut from the Subscription Agreement the express carve out subjecting all securities issues arising thereunder to Kuwait law.[55]

Carlyle concedes that it had neither an agent nor a license permitting it to sell securities in Kuwait. NIG sets out in plain terms the laws of Kuwait implicated by Carlyle's failure to obtain the required agent and licenses *prior* to undertaking the sale of securities in Kuwait, and the legal effect of that failure: i.e., the

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[51] See OB, 23, notes 50, 51; Carlyle October 3, 2012 letter to the Court, JA000739.

[52] In its Complaint, Carlyle only alleges that "[p]laintiffs are suffering irreparable harm from the proceedings in Kuwait and have suffered losses as a result of NIG's breach []." Carlyle Complaint, ¶17, JA000017.

[53] OB, 26, n. 62, quoting *Abry Partners V, LP v. F & W Acquisition LLC*, 891 A.2d 1032, 1046 (Del. Ch. 2006). See also, ABB, 11 JA000282.

[54] *Norse Petroleum v. LVO Int'l, Inc.*, 389 A.2d 771, 773 (Del. Super. 1978).

[55] See OB, 25, n. 57; OB, 27, n.65. See ABB, 11 (JA000282), 12 (JA000283).

Subscription Agreement is void *ab initio*. Carlyle offers in response, in the words of Ben Bradley, a non denial denial: that its expert "is not aware" of any cases that uphold Mr. Magied's conclusions.[56] In the Decision, the Court made a similar comment, noting that the phrase "state securities law" as used in the Subscription Agreement "is not settled" and *may be* "ambiguous."[57] Under the circumstances, given that all inferences are to be taken in favor of NIG under Rules 55 and 60, the Court should have granted the motion,[58] or, at a minimum, required further briefing on Kuwait law.[59] Instead, the Court rejected NIG's challenge under Delaware and federal law, "even if this issue is one governed by Kuwaiti law."[60] That ruling should be reversed. Under Kuwait law, properly and specifically invoked, the Subscription Agreement is void *ab initio*. As a consequence, the Court of Chancery lacked personal jurisdiction over NIG.

Neither *Huffington v. T.C. Group, LLC* ("*Huffington First Circuit*")[61] nor *Huffington v. T.C. Group, LLC* ("*Huffington Superior*

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[56] AB, 26. How Mr. Al-Awadhi's lack of awareness overcomes the specific, unambiguous statements of Mr. Magied goes unsaid. Repeated urgings to the Court at argument that Carlyle did not contest these issues were unavailing.

[57] Decision, 24, n. 84, JA000765.

[58] See OB, 29, n. 75. See also *El Paso*, 669 A.2d. at 40

[59] See, e.g., *Vichi v. Koninklijke Phillips Electr. N.V., et al.*, 2012 WL 5949204, *12 (Del. Ch. 2012) (in a summary judgment context, requiring development of expert testimony on complicated question of foreign law where disputes of law exist).

[60] Decision, 25; JA000766.

[61] 637 F.3d 18 (1st Cir. 2011).

Court")[62], relied on by Carlyle,[63] supports the Decision. *Huffington First Circuit* actually supports NIG's position, holding that the carve out preserved Massachusetts securities claims, Massachusetts being the analogue to Kuwait there.[64] The court in *Huffington Superior Court* noted that, had Huffington "challenged the validity of the *terms* of the Subscription Agreement, Delaware law would apply."[65] Even were *Huffington Superior Court* correct on this issue, which NIG has shown it is not, that is not what NIG does here. NIG challenges the existence of the Subscription Agreement so as to create personal jurisdiction. Kuwait law governs the validity of the Subscription Agreement. Under Kuwait law, that agreement is void *ab initio*, destroying personal jurisdiction.

F. The Decision Shows No Comity to Kuwait or its Laws.

Carlyle quarrels that NIG does not "endeavor to argue [] that comity considerations divest Chancery of otherwise proper subject matter jurisdiction."[66] Carlyle overreaches there, as comity is a discretionary doctrine the disregard of which does not, of itself, necessarily trigger any remedy. Here, however, the Court's refusal to show any respect for Kuwait or Kuwaiti laws infected the Court's approach to the issues joined in the Motion.

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62 2012 WL 1415930 (Del. Super. 2012).

63 AB, 24.

64 See AB, 24.

65 2012 WL 1415930 at *10-11 (emphasis added).

66 AB, 32.

Comity requires that respect be shown to the Kuwait courts' ability to adjudicate a dispute fairly and efficiently,"[67] hardly an unusual concept and one held dear by the Court of Chancery.[68] In the face of Delaware's defense of comity, Carlyle argues that there is no public international issue raised here so as to implicate comity at all.[69] That is simply wrong. NIG provided evidence of Carlyle's right to interpose the forum selection clause in furtherance of its *El Paso* challenge. To that end, an attorney with 17 years experience in Kuwait opined that Kuwait courts would entertain a forum selection clause defense, an assertion never disputed by Carlyle. Nevertheless, the Court of Chancery rejected NIG's expert because, in its own *words*, the Kuwait courts would not "enforce forum selection clauses *as readily as American courts*."[70] This conclusion illustrates precisely why comity is so critical. If Delaware courts reject the utility of any jurisdiction that does not act as Delaware courts do, and as readily, what respect should one expect foreign courts will show to Delaware?[71]

More to the point, the Court's refusal to show comity to Kuwait underlies its rejection of NIG's reliance on its own laws. Together

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[67] OB. 27, quoting *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3rd Cir. 1972).

[68] See *Diedenhofen-Lennartz v. Diedenhofen*, 931 A.2d 439, 442 (Del. Ch. 2007)("Of all the states in the union, Delaware should be most sensitive to the need to afford comity to the courts of the jurisdiction that charters an entity").

[69] AB, 33.

[70] Decision, 17, n. 60, JA000758 (emphasis added).

[71] *General Elec. Co. v. Deutz AG*, 270 F.3d 144, 160 (3d Cir. 2001).

they give rise to the Court's "incompetent/giggle factor" syllogism.[72] As is set out in NIG's Opening Brief, the refusal to show comity to Kuwait tainted the proceedings, and resulted in denial to NIG of its right to rely on the laws of Kuwait, the invocation of which Carlyle agreed upon in the Subscription Agreement.[73]

II. RULE 60(B)(6) RELIEF IS APPROPRIATE HERE.

The totality of circumstances proves NIG's right to Rule 60(b)(6) relief, in particular (1) the Court's refusal to enforce the Kuwait law carve out in the Subscription Agreement; (2) Carlyle's failure to arm itself with an agent and licenses to sell securities in Kuwait prior to their sale; and, (3) the court's refusal to show comity to Kuwait's laws, and NIG's deference to them. The result of these decisions: NIG is put to the choice of prosecuting its action in Kuwait or dismissing that action and coming to Delaware, where it will be promptly greeted with a statute of limitations argument, notwithstanding its timely filing of suit in Kuwait, under Delaware's borrowing statute.[74]

Carlyle argues that its play is not a gambit.[75] NIG disagrees. Carlyle went to Kuwait, several times, to sell securities. It elected

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[72] OB, 27-29.

[73] *Id.*

[74] Carlyle argues that Rule 60(b)(6) relief is inappropriate here because, assuming the default were lifted, the outcome of any subsequent proceeding would be the same. This argument is, of course, premised on the assumption that the Court of Chancery would refuse to find the Subscription Agreement void *ab initio* or would again refuse to enforce Kuwait law, an outcome that will remain in question and which will be subject to debate.

[75] AB, 31.

not to obtain agency or licensure as required by Kuwait to sell the securities, facts which it does not dispute. It sold millions of dollars of "conservative, relatively risk free investments" which promptly collapsed. Now, called to court to defend those sales, it urges Delaware courts to enforce only those portions of the Subscription Agreement that insulate it from the impact of Kuwait laws *also incorporated in the Subscription Agreement*, including those that render the Subscription Agreement void *ab initio*. "Gambit: any maneuver by which one seeks to gain an advantage."[76] And Carlyle accuses NIG of "chutzpah."[77]

[76] Dictionary.com, "http://dictionary.reference.com/browse/gambit."

[77] AB, 32.

CONCLUSION

For the reasons set forth above, and in its Opening Brief on Appeal, Appellant National Industries Group (Holding) respectively requests that the decision of the Court of Chancery denying National Industries Group (Holding)'s Motions to Vacate the Default Judgment be reversed.

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