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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

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

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Dated: December 21, 2012

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

> Defendant's Opening Brief in Support of Motion to Vacate: "OB [page]."
>
> Plaintiffs; Brief in Opposition to the Motion: "AB [page]."
>
> Defendant' Reply Brief in Support of the Motion: RB [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. All citations to the Joint Appendix shall be followed by the appropriate Joint Appendix reference number:

> "JA[page].".

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

NATURE AND STAGE OF THE PROCEEDINGS

Carlyle Investment Management L.L.C. ("CIM") and TC Group, L.L.C. ("TC Group" and, together with Carlyle IM, "Plaintiffs" or "Carlyle") initiated this action by filing a Verified Complaint on May 28, 2010 (the "Carlyle Complaint") against defendant National Industries Group (Holding) ("NIG" or "Defendant"). The Carlyle Complaint is a naked anti-injunction action. It pleads only one count: a declaratory judgment claim seeking to enforce the terms of a Subscription Agreement between Carlyle Capital Corporation, Ltd. ("CCC"), a Guernsey corporation, and NIG, and, more specifically, an injunction shutting down litigation brought by NIG against CCC in Kuwait in December, 2009.[1]

The Court of Chancery entered a Default Judgment (the "Default Judgment") against NIG on July 13, 2011. Despite expressing concern about entering an anti-suit injunction, which the Court acknowledged was "not something we often like to do," the Court issued the injunction as part of the Default Judgment.

NIG filed a Motion to Vacate the Default Judgment and Dismiss Complaint on June 25, 2012. NIG filed an Amended Motion to Vacation on August 13, 2012. Briefing thereon followed, and argument was heard on September 24, 2012. The Court took the matter under advisement on October 3, 2012. A decision on the Motion issued on October 11, 2012. This appeal followed.

This is Appellant NIG's Opening Brief in Support of its Appeal.

[1] CIM executed the Subscription Agreement as investment manager for CCC.

SUMMARY OF ARGUMENT

1. The Court of Chancery erred in refusing to vacate the Default Judgment pursuant to Chancery Rule 60(b)(4) because the Default Judgment was void due to lack of subject matter and personal jurisdiction.

2 The Court of Chancery is a court of limited jurisdiction. That jurisdiction does not include actions for which a remedy at law is available and from which no irreparable harm can result. Chancery subject matter jurisdiction cannot be created by contract. *El Paso Natural Gas Co. v. TransAmerican Natural Gas Corp.*, 669 A. 2d 36 (Del. 1995) is *stare decisis* on this point of law. Neither *Ingres v. CA, Inc.*, 8 A.3d 1143 (Del. 2010) nor *ASDC Holdings, LLC v. Malouf 2008 All Smiles Guarantor Retained Annuity Trust*, 2011 WL 4552508 (Del. Ch. Sept. 14, 2011) overcomes the *stare decisis* of *El Paso*.

3. The Court's ruling that NIG failed to establish that the Kuwait courts "would enforce" the forum selection clause is in error. Delaware law requires only that NIG establish that Carlyle had the ability to raise the clause as a defense. As NIG did establish that Carlyle could raise its forum selection clause as a defense in Kuwait, Carlyle had a remedy at law available and could not suffer irreparable harm. Therefore, the Court of Chancery lacked subject matter jurisdiction over the Carlyle Complaint.

4. The Court of Chancery erred in refusing to vacate the Default Judgment because it lacked personal jurisdiction over NIG, making the Default Judgment void. NIG established that Carlyle was in violation of Decree Law No. 31 at the time of its sales to NIG in

Kuwait. NIG also established that, under Kuwait law, that violation rendered the Subscription Agreement void *ab initio*. Carlyle had expressly agreed that Kuwait law would govern all issues pertaining to the existence and enforceability of the Security Agreement. The Court of Chancery refused to apply Kuwait law as required. That failure resulted in the Court's acceptance of the Carlyle Complaint when the Subscription Agreement void *ab initio*, and the Court lacked personal jurisdiction over NIG.

5. The Court of Chancery erred in refusing to vacate the Default Judgment under Rule 60 (b)(6) because, in so doing, it effectively denied NIG the opportunity to litigate its claims against Carlyle. The apparent reasons for the Court's refusal: its failure to enforce the laws of Kuwait invoked by the parties in the Subscription Agreement and its conclusion that NIG lacked any good faith reason for pursuing its claims in Kuwait, are also erroneous.

STATEMENT OF FACTS

I. INTRODUCTION.

A. General Background

NIG is a Kuwaiti corporation with its principal place of business in Kuwait. Carlyle Complaint, ¶ 4; JA000015. The Public Institution for Social Security, a Kuwaiti government entity, is a minority owner of NIG. See Declaration of Ahmed Mohammed Hassan, ¶ 3 (JA000218) (hereinafter cited as "Hassan Decl., ¶ ___").

Upon information and belief, CIM is a Delaware limited liability company with its principal place of business in the District of Columbia. Carlyle Complaint, ¶ 5; JA000015.

Upon information and belief, TC Group is a Delaware limited liability company with its principal place of business in the District of Columbia. Carlyle Complaint, ¶ 6; JA000015.

CCC was a corporation organized as a limited liability company under the laws of Guernsey. CIM served as the investment manager for CCC. Carlyle Complaint, ¶ 8; JA000015.

B. Negotiations in Kuwait

In November, 2006, representatives of CCC and its affiliates (collectively, "Carlyle") travelled to Kuwait to sell investment opportunities to Kuwaiti and other potential buyers in the region. Kuwait Summons, ¶ 1; JA000212; Hassan Decl., ¶ 5; JA000219. At the time of Carlyle's 2006 "road show", Kuwait law provided that "[t]ransactions of buying and selling non Kuwaiti securities or shares in foreign investment funds may not be concluded unless after obtaining a license from the [Kuwait] Minister of Commerce and

Industry, and the license may not be granted to foreign companies to run such business in the State of Kuwait except through a Kuwaiti agent, either an individual or a company." Kuwait Summons, ¶ 10 (Exhibit B to the Magied Decl.); (JA000214). See also Declaration of Ahmed Zakaria Abdel Magied, ¶ 4 (hereinafter cited as "Magied Decl., ¶ ___"); JA000199-JA000200.

CCC did neither. That failure notwithstanding, the Carlyle Group made a full court press in Kuwait, sending representatives, including prominent members of its board of directors, to Kuwait to convince NIG to buy into CCC's investment. The full court press was required as NIG was both cautious about and suspicious of such investments and the risks that might attend them. Kuwait Summons, ¶ 3; JA000213. Ultimately, CCC and the Carlyle Group convinced NIG of the conservative and relatively risk free nature of the investments it was marketing, and of the opportunity for "great profits." *Id.* ¶ 4; JA000213. The fruit of that effort: a $10 million investment in CCC by NIG in February 2007. *Id.* ¶ 5; JA000213.

Carlyle's failure to arm itself with a license to sell securities or foreign investment funds in Kuwait, as required by Decree Law 31, is critical here, where the choice of law provision in the Carlyle Capital Corporation Limited Subscription Booklet for Non-U.S. Investors executed by NIG on or about December 7, 2006 (the "Subscription Agreement", Exhibit A to the Hassan Decl.; JA000221-JA000258), made any issues arising under the Subscription Agreement affected by Kuwait securities laws exclusively subject to Kuwait law:

> 7. Notwithstanding the place where the Subscription Agreement may be executed by any of

> the parties, the parties expressly agree that all terms and provisions hereof shall be governed, construed and enforced solely under the laws of the State of Delaware, without reference to any principles of conflicts of law (except insofar as affected by the state securities or 'blue sky' laws of the jurisdiction in which the offering described herein has been made to the Investor).

Subscription Agreement ¶ 7; JA000237.

Given that plaintiffs and CCC knew or should have known of the licensing requirement imposed by Kuwait law, and of the impact of failing to obtain the required license, it is a fair inference that CCC's failure to obtain a license was designed to intersect with the forum selection clause, also contained in the Subscription Agreement, allowing CCC the benefit of a safe-harbor forum free from the potential burdens of a Kuwait license:

> 8. The courts of the State of Delaware shall have exclusive jurisdiction over any action, suit or proceeding with respect to this Subscription Agreement and the Investor hereby irrevocably waives, to the fullest extent permitted by law, any objection it may have, whether now or in the future, to the laying of venue in, or to the jurisdiction of, any and each such courts for the purposes of any such suit, action, proceeding or judgment and further waives any claim that any such suit, action, proceeding or judgment has been brought in an inconvenient forum, and the Investor hereby submits to such jurisdiction.
> . . . .

Subscription Agreement ¶ 8; JA000237. However, insofar as CCC was not licensed by the Kuwait Minister of Commerce and Industry during the sale to NIG, the Subscription Agreement was from the outset void and of no effect. Magied Decl. ¶¶ 4,5; JA000199-JA000200.

In March, 2008, CCC defaulted on its financing agreements. Carlyle Complaint ¶ 14; (JA000016). On May 17, 2008, CCC was placed

into liquidation pursuant to the laws of Guernsey. *Id.* "On September 29, 2009, the Joint Liquidator for CCC announced that there would not likely be any distribution paid to investors in CCC in respect of their investment following liquidation." *Id.*

Confronted with the unexpected loss of millions of dollars on what was marketed as a secure, relatively risk free investment, NIG contacted the Carlyle Group and insisted it be made whole. In response, David M. Rubenstein travelled to Kuwait to meet with NIG. He was informed of Kuwait's requirements for licensure before foreign investment funds or securities could be sold in Kuwait. Counsel for NIG requested of Mr. Rubenstein that Carlyle provide proof of that licensure. None was forthcoming. Instead, Mr. Rubenstein offered NIG the opportunity to invest in other opportunities as a means of recouping its losses. Hassan Decl., ¶ 7; JA000220.

On January 6, 2009, NIG, through counsel, was informed that Carlyle had never been licensed to be market its investments in the State of Kuwait. Hassan Decl., ¶ 8; JA000220. Given CCC's position, and seeing no other recourse, NIG filed suit against Carlyle in late 2009.

C. Litigation Commences under the Securities Laws of Kuwait

In November, 2009, NIG commenced litigation in Kuwait against CCC by filing a summons in Kuwait (the "Kuwait Summons") under the securities laws of Kuwait with respect to its investment in CCC (Case 6818/2009 (Commercial)) (hereafter the "Kuwaiti Action"). In the Kuwait Summons, NIG seeks a decree that the Subscription Agreement is void and of no effect due to CCC's failure to obtain the required

license prior to concluding the sales to NIG. NIG also seeks to have CCC (and CIM) ordered to refund to NIG $10 million as well, as legal interest at the rated of 7% per annum until the full repayment thereof.

NIG includes a second claim for relief, seeking a declaration that the Subscription Agreement is void and of no effect due to the "fraudulence and deceit to persuade [NIG] to enter into" the Subscription Agreement. Kuwait Summons, ¶¶ 10-12; JA000214-JA000216.

On May 28, 2010, CIM and TG Group filed in the Court of Chancery an "action for an anti-suit injunction ordering NIG to suspend its litigation in Kuwait." Carlyle Complaint, ¶ 3; JA000014. Neither TC Group nor CIM is a party to the Subscription Agreement. CIM signed the Subscription Agreement as investment manager of CCC.

Believing this Court lacked personal jurisdiction over it, NIG did not respond to the Carlyle Complaint. On July 13, 2011, this Court entered the Default Judgment against NIG. A copy of the Default Judgment appears in the Appendix at JA000060-JA000061.

Although willing to entertain the default motion, the Court expressed concern about entering an anti-suit injunction:

> The only part of it that gave me any pause, and I just wanted to confirm that you had asked for it in the complaint, was the anti-suit injunction . . . . And why that is something that ought to be in a default judgment as opposed to simply entering the default judgment. It's just not something we often like to do . . . . [T]o the extent that there is any concern later on about the injunction aspect of [the default judgment], that would be an appropriate subject for some Rule 60 motion before the Chancellor whose case it is.

Trans. 5 (JA000066), 7 (JA000068) (emphasis added).

D. The Motion to Vacate the Default Judgment and the Decision

On June 25, 2012, NIG filed a Motion to Vacate the Default Judgment for, *inter alia*, lack of personal jurisdiction. NIG later filed an Amended Motion to Vacate the Default Judgment adding as a basis for its Motion lack of subject matter jurisdiction (the two motions will be referred to as ("Motion"). Briefing on the Motion followed. In support of the Motion, NIG also filed Declarations from Ahmed Zakaria Abdel Magied, an attorney who has practiced law in Kuwait for seventeen years.

In his Declarations, Mr. Magied testified that

- Under Kuwait Decree Law No. 31: "[t]ransactions of buying and selling non Kuwaiti securities or shares in foreign investment funds may not be concluded unless after obtaining a license from the Minister of Commerce and Industry, and the license may not be granted to foreign companies to run such business in the State of Kuwait except through a Kuwaiti agent, either an individual or a company."[2]

- At the time of its sales to NIG, Carlyle had violated that law by not conducting the sales through a licensed Kuwait agent;[3]

- Violation of Decree Law No. 31 renders the contract at issue a nullity;

- In that circumstance, Article 187 of Kuwait law requires that the parties be returned to the position they were in prior to the contract;[4]

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[2] Magied Decl., ¶ 4; JA000199-JA000200.

[3] Magied Decl., Exhibit A; JA000204.

[4] Magied Decl., ¶ 5; JA000200.

- Kuwait courts would allow the presentation of a forum selection clause in defense of litigation brought in Kuwait;[5]

NIG also filed a declaration from Ahmed Mohammed Hassan ("Hassan Decl."). Mr. Hassan is NIG's General Manager and Group Finance Manager. Mr. Hassan testified in his Declaration to the negotiations between Carlyle and NIG, which took place in Kuwait, and about the Subscription Agreement, which Mr. Hassan noted was executed in Kuwait. Hassan Decl., ¶ 5; JA000219. Mr. Hassan specifically stated that NIG believed that the courts of Kuwait, and not Delaware, were the proper courts to resolve issues arising under Kuwait's securities laws, "including Decree Law No. 31." Hassan Decl., ¶ 10; JA000220. For that reason, NIG did not respond to the Carlyle Complaint filed in Delaware. Hassan Decl., ¶ 10; JA000220.

Oral argument was heard on September 24, 2012. Following an exchange of letters by the parties, the Court took the matter under advisement on October 3, 2012. The Court's decision on the Motion ("Decision") was issued on October 11, 2012. The Court denied all of NIG's challenges and refused to vacate the Default Judgment.

This appeal followed.

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[5] Magied Decl., ¶ 8; JA000200.

ARGUMENT

I. RULES 59 AND 60 REQUIRE THAT THE DECISION BE REVERSED AS THE COURT OF CHANCERY LACKED SUBJECT MATTER AND PERSONAL JURISDICTION

(1) Question Presented. Where the Court of Chancery lacked personal and subject matter jurisdiction over the Carlyle Complaint, must not its Decision enforcing the Default Judgment be reversed since the Default Judgment is void as a matter of law? OB, 10-16 (JA000166-JA000172), 18-21 (JA000174-JA000177); RB, 4-10 (JA000480-JA000486), 14-17 (JA000490-JA000493).

(2) Standard of Review. The standard of review for whether the Court of Chancery's Decision is void for lack of subject matter and/or personal jurisdiction is whether the trial court correctly formulated and applied legal principles.[6] The scope of review is *de novo*.[7]

(3) Merits of the Argument.

A. The Motion to Vacate Default Under Rules 55 and 60(b).

This appeal challenges the Court of Chancery's Decision denying NIG's Motion pursuant to Chancery Rules 55 and 60(b). The application of both rules derives from common ground: Delaware courts eschew default judgments and therefore err on the side of granting relief to promote the policy of deciding litigation on the merits.[8] To that end, a party moving to vacate a default judgment is not required to show definitively that the outcome of the case, if litigated, would have

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[6] *Candlewood Timber Group, LLC v Pan American Energy, LLC*, 859 A.2d 989, 997 (Del. 2004).

[7] *Candlewood Timber Group, LLC v Pan American Energy, LLC*, *supra*; *Taylor v. LSI Logic Corp.*, 715 A.2d 837, 839 (Del. 1998).

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

been different. The moving party need only show that "there is the possibility of a different result."[9] "Any doubts raised by a Rule 60 motion must be resolved in favor of the moving party."[10]

Under Court of Chancery Rule 60(b)(4), this Court must vacate a default judgment if the judgment is void.[11] A "defendant is always free to ignore the judicial proceedings, risk a default judgment and then challenge that judgment on jurisdictional grounds."[12]

B. Defendant's Motion Is Timely.

NIG's Motion is not subject to a time bar because the Default Judgment was void *ab initio*.[13] Indeed, it is axiomatic that a void judgment cannot be rendered valid by delay:

> Where a judgment of a domestic court of record of general jurisdiction is void for want of jurisdiction apparent upon the record, it is, in legal effect, no judgment. In legal contemplation it has never had lawful existence .

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[9] *McMartin v. Quinn*, 2004 WL 249576, *3 (Del. 2004); *Williams v. DelCollo Elec., Inc.*, 576 A.2d 683, 687 (Del. Super. 1989). Nowhere in the Decision is this standard addressed.

[10] *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).

[11] *MCA, Inc. v. Matsushita Elec. Indus. Co. Ltd.*, 785 A.2d 625, 633 n.8(Del. 2001) cited in the Decision, 12, note 43.

[12] *Jackson v. FIE Corp.*, 302 F.3d 515, 522 (5th Cir. 2002) (quoting *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982)).

[13] *Swann v. Carey*, 272 A.2d 711, 712 (Del. 1971); *Robins v. Garvine*, 136 A.2d 549, 552 (Del. 1957) (noting that the Court of Chancery Rules do not set forth a time period within which a Rule 60(b) motion must be filed). See also *E.J. Hollingsworth Co. v. Cesarini*, 129 A.2d 768, 769-70 (Del. Super. 1957) (reasoning that even a 17 month delay did not impair a Rule 60(b) motion where the judgment is void for want of jurisdiction).

> . . . No action on the part of the plaintiff, no inaction on the part of the defendant, can invest it with any of the elements of power or of vitality. It is unavailing for any purpose. It can be taken advantage of at any time, and in any court where it is offered as a conclusive adjudication between the parties; for an inspection shows that it is not such, because the court had no power, for manifest want of jurisdiction, to make an adjudication. Such a judgment, when collaterally drawn in question, may be disregarded and treated as a nullity, and need not be adjudged to be such by a formal and direct proceeding for its vacation or reversal.[14]

NIG demonstrated to the Court below that subject matter and personal jurisdiction was lacking. Nevertheless, the Court of Chancery ruled that NIG's "Rule 60(b) motion is too late."[15]

C. The Court of Chancery's Decision Is Premised on the Creation of Subject Matter Jurisdiction by Contract.

NIG challenged the Default Judgment entered by the Court in part on the basis that the Court lacked subject matter jurisdiction over the dispute at issue.[16] That is, Plaintiffs had available to them an adequate remedy at law, would not suffer irreparable harm, and therefore could not bring their anti-suit injunction in the Court of Chancery.[17] The Court of Chancery rejected that challenge based on the principle that the "parties had bargained for the forum selection clause, and any remedy other than specific performance would 'deprive

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[14] *Frankel v. Satterfield*, 19 A. 898, 900 (Del. Super. 1890).

[15] *Decision*, 31; JA000772.

[16] See Motion (JA000073) and Amended Motion (JA000149).

[17] OB, 19-21 (JA000175); RB, 14-17 (JA000490-JA000493).

Plaintiffs of the benefit of their bargain.'"[18] The Court made plain that it was "specifically enforcing *Carlyle's contractual rights,"* and that equitable jurisdiction over those rights derived from "the type of *contractual promise* the breach of which would not be adequately remedied by monetary damages" (emphasis added).[19]

Nearly twenty years ago, in *El Paso Natural Gas Company v. TransAmerica Natural Gas Corp.*, 669 A.2d 36 (Del. 1995) (hereafter "*El Paso*"), this Court rejected the notion that subject matter jurisdiction can be conferred by contract. Reminded of the *stare decisis* effect of *El* Paso, the Court of Chancery acknowledged that parties cannot "confer equitable jurisdiction where it is otherwise lacking," but then disposed of *El Paso* by holding that a "broad" forum selection clause – unlike a "narrow" forum selection clause - could be used to create subject matter jurisdiction.[20] The Court cited as precedent for that holding *Ingres v. CA, Inc.*, 8 A.3d 1143 (Del. 2010) (hereafter *Ingres*) and *Malouf.* Neither case has application here.

Ingres is inapposite because in that case plaintiffs plead equity jurisdiction apart from the forum selection clause.[21] *Malouf* is

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[18] *Decision*, 30, quoting *ASDC Holdings, LLC v. Malouf 2008 All Smiles Guarantor Retained Annuity Trust*, 2011 WL 4552508, *6 (Del. Ch. Sept. 14, 2011) (hereafter "*Malouf*"); JA000771.

[19] *Decision*, 31-32; JA000772-JA000773. See also *Decision*, 32 ("Most important, however, National has advanced no colorable argument why Carlyle should have to go to Kuwait at all, given National's clear and unambiguous promise only to litigate in Delaware"); JA000773.

[20] *Decision*, 30-31, n.103; JA000771-JA000772.

[21] *El Paso*, 669 A.2d at 39("Jurisdiction over a party or subject matter, or venue of a cause, can not be determined by private bargaining **where there is no other basis for such jurisdiction** or venue" (emphasis added)).

likewise inapposite because there the Court of Chancery accepted subject matter jurisdiction based solely on the same "broad" versus "narrow" forum selection clause analysis; i.e., where subject matter jurisdiction had been created by contract.

D. The *El Paso* Decision Does Not Countenance the Creation of Subject Matter Jurisdiction by Contract.

In *El Paso*, plaintiff brought suit in the Court of Chancery in response to TransAmerican's filing of litigation in Texas. El Paso sought three specific remedies: (1) specific performance of the forum selection clause through the issuance of an injunction restraining TransAmerican from litigating its claims anywhere but in the Court of Chancery; (2) a declaratory judgment that the Settlement Agreement, which contained the forum selection clause, was valid and enforceable, and that El Paso had not breached it; and, (3) money damages for losses sustained as a result of TransAmerican's commencing suit in Texas in violation of the forum selection clause.[22] Concluding that the lawsuit fell outside the Court's limited equity jurisdiction, the Court of Chancery dismissed the action, noting that, because the Court did not otherwise have jurisdiction over the controversy, it also did not have jurisdiction to consider the declaratory judgment claim.[23]

Affirming the dismissal of the Chancery action, the Supreme Court made its holding clear:

> It is a cardinal principle of the law that **jurisdiction of a court over the subject matter cannot be conferred by consent or agreement.** Jurisdiction over a party or subject matter, or

[22] *El Paso*, 669 A.2d at 38.

[23] *Id.*, 38-39.

> venue of a cause, can not be determined by private bargaining where there is no other basis for such jurisdiction or venue.
>
> Wholly disregarding this longstanding precept, El Paso asserts that parties can contract for jurisdiction in the Court of Chancery. El Paso first asserts that the forum selection clause was created by sophisticated parties who, contemplating future litigation, expressly bargained for the right to litigate all future disputes in the Delaware Court of Chancery. In addition, El Paso argues that the choice of the Chancery Court offered important benefits, such as avoidance of a potential jury trial or punitive damages, and that these benefits significantly affected the amount of consideration it paid in settling the initial dispute. **These arguments simply miss the point: neither the Court of Chancery nor the parties to a dispute can confer equitable jurisdiction where it is otherwise lacking.**[24]

"It is plaintiff's burden to demonstrate that equitable subject matter jurisdiction exists. Subject matter jurisdiction is determined from the face of the complaint as of the time it was filed, with all material factual allegations assumed to be true."[25]

Carlyle's Complaint is a one count complaint, styled as a breach of contract action. Like the complaint in *El Paso*, Carlyle seeks three remedies:

> (a) a preliminary and permanent injunction against the filing or prosecution of any action subject to the forum selection clause [] in any forum other than the courts of the State of Delaware;

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[24] *El* Paso, 669 A.2d at 39 (citations omitted; emphasis added).

[25] *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).

> (b) A judgment providing that the forum selection clause contained in the NIG Subscription Agreement is valid and enforceable; *id.*, and,
>
> (c) Such further and other relief as this Court may deem just and proper.[26]

Aside from the injunction demand, Carlyle does not plead any equitable claims.[27] Carlyle's demands mirror El Paso's but for the absence of a demand by Carlyle for money damages suffered by virtue of the breach of the forum selection clause.[28] The similarities between *El Paso* and this case do not end there.

In denying the Motion, the Court below relied on restatements of precisely the same arguments advanced by plaintiff in *El Paso*, and rejected by this Court, seventeen years ago. *E.g.*,

- subject matter jurisdiction that is the result of a contract between "sophisticated parties" should be enforced; *Decision,* 31-32 (JA000772-JA000773); *compare El Paso*, 39;
- the "obvious purpose of having [NIG] agree to only sue in one place was for Carlyle to avoid the expense, uncertainty, and delay that would come if these diverse investors could sue in a multitude of forums", *Decision*, 31 (JA000772); *compare El Paso*, 39;

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[26] Carlyle Complaint, *Ad Damnum*, p.4; JA0000017.

[27] Carlyle's Complaint does not include a jurisdictional statement setting out the basis for Chancery jurisdiction, unlike many complaints filed in the Court. Ostensibly Carlyle relies on its pursuit of an injunction to carry the day. Carlyle Complaint, ¶ 3 ("This is an action for an anti-suit injunction ordering NIG to suspend its litigation in Kuwait"); JA000014.

[28] Carlyle did in the body of its Complaint plead such damages in support for its irreparable harm allegation, but asserted that "plaintiffs do not presently intend to seek money damages." Carlyle Complaint, ¶ 17; JA000017.

- that through the forum selection clause, Carlyle was "trying to ensure an efficient, predictable way of resolving potential claims by diverse, far-flung counterparties." *Decision*, 32 (JA000773); *compare El Paso*, 39; and, lastly,

- "Making Carlyle run around the globe retaining lawyers and [risking] hazardous rulings from diverse courts makes it endure precisely the harms parties like National promised Carlyle it would not endure by agreeing to the forum selection clause." Decision, 31-32 (JA000772-JA000773); compare *El Paso*, 40.[29]

As *El Paso* teaches, "[t]hese arguments simply miss the point."[30]

E. Neither *Ingres* nor *Malouf* Erodes the *Stare Decisis* Effect of *El Paso*.

1. *Ingres*

The Court of Chancery found support for its rejection of NIG's Motion in *Ingres*.[31] *Ingres* is inapposite. That seems most evident from the simple fact that *Ingres* does not even mention, let alone

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[29] On this point it merits emphasis that (1) Carlyle had been globe trotting throughout the road show it undertook to sell the highly leveraged investments that ultimately cratered, precipitating the litigation it now confronts around the globe; JA000773; and,(2) the Subscription Agreement by its express terms provides that Kuwait Law would govern securities issues implicated in the Subscription Agreement, making it clear that Carlyle would have to retain Kuwait attorneys and at least raising the specter of litigation in Kuwait. Also, the Court's comments about "uncertainty" and "hazarding rulings" seem premised on the notion that justice cannot be had in Kuwait and that Carlyle is entitled to home field advantage, an issue that taints the Decision. See Argument, *infra* at 22, n.45. See also *Decision*, 31-32; JA000772-JA000773. More basically, cost of litigation, such as hiring attorneys, does not support an irreparable harm allegation. *El Paso*, 669 A. 2d at 40.

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

[31] The Court of Chancery did not analyze in detail the basis for equitable jurisdiction in *Ingres* apart from the forum selection clause. *Decision*, 30; JA000771.

distinguish or overrule, *El Paso*. More importantly, the instant case, like *El Paso*, is a bald anti-injunction case. *Ingres* is not. In *Ingres*, as this Court noted, the complaint sought "*to require Ingres to perform its obligations under various contracts, which addressed different subjects*" (emphasis added).[32] In its post trial decision, the Court of Chancery detailed the various contractual obligations – apart from the forum selection clause - which CA, Inc. sought to enforce, initially by injunctive relief.[33] Those subjects and the claims for relief relating to them supported Chancery jurisdiction there – apart from the forum selection clause. The award ultimately made by the Court even included specific equitable relief.[34]

Also, in ratifying the principle that parties are free to draft forum selection clauses, the Supreme Court in *Ingres* reiterated that a "court of competent jurisdiction [must] exist."[35] Plainly this Court did not intend *Ingres* to dispense with the absolute requirement that equity jurisdiction must exist in order for an action to proceed in

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[32] *Ingres*, 8 A.3d at 1145.

[33] *Id.* See *C.A., Inc. v. Ingres*, 2009 WL 4575009, *1-*3 (Del.Ch. 2009).

[34] *Id.*, at *48 ("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).

[35] *Ingres*, 8 A.3d at 1146, n. 8, citing *Elia Corp. v. Paul N. Howard Co.*, 391 A.2d 214, 216 (Del. Super. 1978).

the Court of Chancery. That is a prerogative reserved to the Legislature.[36] *Ingres* does not support the Decision below.

2. *Malouf*

However one reads *Malouf*, whether as sound jurisprudence or in violation of *El Paso*, one thing is clear. *Malouf* does not, and cannot, overrule or abrogate in any way the holding of *El Paso*. It is a Chancery decision that was not appealed and is not the law of Delaware. *El Paso* remains *stare decisis* unless and until it is overruled. The simple fact is that *Malouf* is contrary to *El Paso* and lends no substantive support to the Decision.

Malouf's failure is the same as that evident in the Decision: neither Court looked to the allegations of the complaints to ascertain whether a basis for Chancery jurisdiction existed at the time of their filings apart from the forum selection clause.[37] The Decision is premised wholly on the contract between the parties; i.e., the forum selection clause. But Carlyle's Complaint pleads no basis for equitable jurisdiction beyond that. As noted, the prerequisite for proceeding with any action in Chancery is the existence of equity jurisdiction. That jurisdiction does not, and cannot, arise by virtue

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[36] *duPont v. duPont*, 85 A.2d 724, 729-30 (Del. 1951). See also 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"). The legislative mandate of Section 342 is also not mentioned or discussed in *Ingres*, further evidencing the intentionally limited scope of its holding.

[37] *Ingres*, 8 A.3d at 1146, note 8, citing *Elia Corp. v. Paul N. Howard Co.*, 391 A.2d at 216. See also *El Paso*, 669 A.2d at 39("Jurisdiction over a party or subject matter, [] can not be determined by private bargaining **where there is no other basis for such jurisdiction** or venue" (emphasis added)).

of a forum selection clause alone. *El Paso* could not be more clear on the point.

Plaintiffs' Complaint in *Malouf* also sought limited remedies: (1) specific performance of the forum selection clause; i.e., to compel litigation exclusively in Delaware; (2) declaratory judgment that the forum selection clause was valid and enforceable; and, (3) injunctive relief enjoining further prosecution of the Texas litigation.[38] These claims track identically those in the *El Paso* and Carlyle complaints. See *supra* at 14-16. Malouf's defense to the claims is likewise identical to NIG's here, founded in *El Paso*: "the ability to raise the forum selection clause [] constitutes an adequate remedy at law"[39] and cannot support equity jurisdiction.

But *Malouf* would stand for the contrary, insisting that the use of a broad forum selection clause, rather than a narrow clause, permits the contractual creation of Chancery subject matter jurisdiction.[40] The short response to this logic is that, broad or narrow, a contract provision that creates equity jurisdiction violates *El Paso*'s holding: one cannot create jurisdiction by contract. This elemental point is ignored in the *Malouf* Court's analysis.

F. Carlyle Has An Adequate Remedy at Law.

In *El Paso*, this Court confirmed the prerequisite for equitable jurisdiction: the lack of an adequate remedy at law.[41] "Where the

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[38] *Malouf*, 2011 WL 4552508 at *3.

[39] *Id.*, *4.

[40] *Id.*, *4-*6.

[41] *El Paso*, 669 A.2d at 39. See 10 *Del. C.* §342.

relief requested is intervention in proceedings pending in a law court, the basis for equitable jurisdiction is a showing that some serious injury is threatened which the law court will not be able to repair."[42] Absent such a showing, "there is no occasion for equity's interference."[43]

The Court of Chancery apparently reads the availability of an adequate remedy at law as requiring a "sure thing," as it criticized NIG for failing to offer proof that Kuwait courts "would recognize a forum selection clause that binds a Kuwaiti citizen to litigate in courts of another nation."[44] The Court of Chancery explained that NIG failed to show

> that Kuwaiti courts **will enforce** forum selection clauses **as readily as American courts** when foreign parties are defendants . . . . [I]t is by no means clear to me that a Kuwait court **would defer to a foreign tribunal** on account of a foreign selection clause.[45]

The Court below misapplies the "remedy at law" requirement.[46]

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[42] *Bayard v. Martin*, 101 A.2d 329, 334 (Del. 1953), citing *Conner v. Pennington & Cummings*, 1 Del. Ch. 177, 181 (Del. Ch. 1821).

[43] *Gray Co. v. Alemite Corp.*, 174 A. 136, 144 (Del. Ch. 1934)(citation omitted)).

[44] *Decision*, 32, note 107; JA000773.

[45] *Decision*, 17, note 60 (emphasis added); JA000758. The lack of comity shown to Kuwait's Courts is manifest in the Court of Chancery's requirement that Kuwait courts must do as American courts do, or be discounted.

[46] See Carlyle's October 3, 2012 letter to the Court in which Carlyle accepts Mr. Magied's testimony that "Carlyle could raise the forum selection clause in Kuwait" but criticizes him for "assiduously avoid[ing] offering any view as to whether the forum selection clause **actually would be enforced** in Kuwait" (emphasis added). (JA000739).

The issue for the Court of Chancery is "not whether another remedy would be preferable to the plaintiffs."[47] If a party has the "ability to raise the forum selection clause as a defense," it has an adequate remedy at law. Again, from *El Paso*:

> The Court of Chancery correctly determined, *inter alia*, that El Paso **could raise** the forum selection clause in the Settlement Agreement as a defense in the first Texas action and, **if successful**, recover the costs of that litigation. It further held that **the ability to raise the forum selection clause as a defense in the Texas action was an adequate remedy at law.** We agree.[48]

NIG established through the declarations of Ahmed Zakaria Abdel Magied that Carlyle could interpose the forum selection clause as a defense in Kuwait, and that the Kuwait courts would adjudicate the issue as any court would.[49] In its Answering Brief, Carlyle offered no opposition to that point whatsoever.[50] Carlyle's supporting declaration, from Nader Al-Awadhi, does not even address it.[51]

Instead, Carlyle challenged Mr. Magied for the first time at argument by attacking a declaration by Mr. Magied in an unrelated New York action. In that declaration, Mr. Magied stated that, as counsel to a **Kuwaiti defendant**, in a matter pending **in Kuwait**, he advised his Kuwait client not to interpose as a defense a forum selection clause.

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[47] *Chateau Apartments Co. v. City of Wilmington*, 391 A.2d 205, 207 (Del. 1978), quoted with approval in *El Paso*, 669 A.2d at 41.

[48] *El Paso*, 669 A.2d at 40 (emphasis added).

[49] Magied Op. Decl., ¶¶ 6, 8; JA000200; Magied Supp. Decl., ¶¶ 8, 11; JA000593; Decision, 26, n.88; JA000767.

[50] See AB, 22-26.

[51] See Declaration of Nader Al-Awadhi; JA000461-JA000467.

His reason: Kuwait courts "assume jurisdiction over any case filed against a Kuwaiti defendant, even if the governing contract has a foreign forum selection clause."[52]

Any relevance of the New York Declaration is suspect. The New York Declaration involved a suit filed in Kuwait, against a Kuwait defendant. The plaintiff had the right to bring the Kuwait litigation in the Southern District of New York, but elected to proceed in Kuwait. For obvious reasons, Mr. Magied advised his Kuwait defendant against interposing the forum selection clause in his home court.

The Court of Chancery made much of the New York Declaration, and, in the Decision, chastised NIG for its post argument submission, made "without seeking leave to do so,"[53] of a supplemental declaration by Mr. Magied.[54] But neither Carlyle's expert nor anything in the New York Declaration overcomes Mr. Magied's straight forward testimony and supporting authority that Kuwait courts will hear a defense based on a forum selection clause. Carlyle never disputed that it had the

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[52] *Maersk, Inc. v. Neewra, Inc.*, 2010 WL 2836134 (S.D.N.Y. July 9, 2010), ECF No. 239 ¶ 10 (JA000585-JA000586); Suppl. Decl. of Ahmed Zakaria (JA000591-JA000594).

[53] Carlyle's submission during argument of a document not shared with opposing counsel, even in the courtroom before argument began, called for clarification by Mr. Magied. In a subsequent letter to the Court, NIG's counsel made the point that the New York declaration had not been shown to him prior to the hearing. Counsel went on: "Given the issues joined here, and the impact that Kuwait law may have on the Motion, I respectfully request that the Court accept the Supplemental Declaration as part of NIG's submission and accord it such weight as the Court deems appropriate." (JA000589). The Court did not respond to the request to accept the letter submission. Carlyle filed a response by letter dated October 3, 2012. (JA000738-JA000740). Per the *Decision*, the Court deemed the matter submitted on October 3, 2012.

[54] *Decision*, 17, note 60; JA000758.

ability to raise the forum selection clause as a defense in the Kuwait action.[55] Hence, the existence of an adequate remedy at law is undisputed.[56]

G. NIG's Personal Jurisdiction Defense and Kuwait Law.

NIG also sought to vacate the Default Judgment for lack of personal jurisdiction. That argument derives from (1) the specific terms of the Subscription Agreement, (2) Carlyle's failure to obtain a Kuwaiti agent for purposes of its investment sales in Kuwait, and, (3) the legal impact of that failure under Kuwait law.

The choice of law provision in the Subscription Agreement invokes Kuwait securities law where those laws would "affect" the governance, construction and enforcement of any of the terms in the Subscription Agreement.[57] Kuwait's Decree Law No. 31 provides that a foreign company may not undertake the sale of foreign investment funds in Kuwait except through a Kuwaiti agent.[58] Carlyle never obtained a

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[55] Rather, Carlyle argued that no evidence existed that the courts of Kuwait *would enforce* the forum selection clause. See footnote 46, *supra*.

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

[57] Notwithstanding the place where this Subscription Agreement may be executed by any of the parties, the parties expressly agree that *all terms and provisions hereof shall be governed, construed and enforced* solely under the laws of the State of Delaware, without reference to any principles of conflicts of law (***except insofar as affected by the state securities or 'blue sky' laws of the jurisdiction in which the offering described herein has been made to the Investor.*** (Emphasis added). (JA000237).

[58] Magied Decl., ¶ 4 (JA000199-JA000200); Al- Awadhi Decl., ¶ 4 (JA000462).

Kuwaiti agent to market its securities in Kuwait, a fact that is undisputed.[59] Violation of Decree Law No. 31 "results in nullity and invalidity" of the sale.[60] Article 187 of Kuwait Civil Law provides that "[I]f a contract becomes null and void, or [is] judged to be so, the contracting parties shall restitute their condition prior to contracting."[61] Restated, the contract is void *ab initio*.

Carlyle concedes that the Chancery Court was "bound to respect the chosen law of contracting parties, so long as that law has a material relationship to the transaction,"[62] which here it does. The Subscription Agreement was negotiated in Kuwait and executed in Kuwait.[63] As a consequence, Carlyle's sale to NIG of $25 million shares in CCC, and the Subscription Agreement that memorializes its terms, are a nullity; void *ab initio*.

Nevertheless, the Court below accepted Carlyle's argument, under American jurisprudence, not Kuwaiti law, that the forum selection clause stands unless the clause itself is proven to be the product of fraud or overreaching.[64] In making that argument, Carlyle simply elided the carve out subjecting all securities issues arising under

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[59] See January 6, 2009 Letter from the Kuwaiti Ministry of Commerce and Industry (Exhibit A to the Magied Decl.); JA000204.

[60] Magied Decl., ¶ 5; JA000200.

[61] Magied Decl., Exhibit B, ¶ 14; JA00215.

[62] AB, 11 (quoting *Abry Partners V, LP v. F & W Acquisition LLC*, 891 A.2d 1032, 1046 (Del. Ch. 2006)); JA000282.

[63] See OB, 4-5; JA000160-61; see also Hassan Decl., ¶ 5; JA000236.

[64] *Decision*, 25-26; JA000766-JA000767. But see, *contra, El Paso*, 669 A.2d at 40.

the Subscription Agreement to Kuwait law.[65] Under this logic, enforcement of the forum selection clause would be contrary to the Kuwait laws the applicability of which was specifically invoked in the Subscription Agreement.[66]

H. The Court's Ruling Ignores Comity and Kuwait Law.

International comity stands fundamentally on the "recognition which one nation extends [] to the legislative, executive or judicial acts of another."[67] "The proper exercise of comity demonstrates confidence in the foreign court's ability to adjudicate a dispute fairly and efficiently. Failure to accord such deference invites similar disrespect for our judicial proceedings."[68]

NIG's General Manager, Ahmed Mohammed Hassan, testified by declaration that NIG did not respond" to the Carlyle Complaint because it "[b]eliev[ed] the courts of Kuwait were the proper courts to resolve issues arising under Kuwait's securities laws, including

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[65] AB, 12 ("This straightforward language means what it says: Delaware law governs the entirety of the Subscription Agreement, including all questions as to the contract's validity and enforceability"); JA000283.

[66] *Abry Partners V, LP v. F & W Acquisition LLC*, 891 A.2d at 1046. *See also Investors Guar. Fund, Ltd. v. Compass Bank*, 779 So. 2d 185 (Ala. 2000) (holding forum selection clause in bondholder policies was not enforceable, where issuer of policies was not licensed to transact insurance business in Alabama and had not submitted policies to Department of Insurance).

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

[68] *General Elec. Co. v. Deutz AG*, 270 F.3d 144, 160 (3d Cir. 2001) (Internal citation omitted). See also *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").

Decree Law No. 31 of 1990.[69] Mr. Hassan's Declaration offers the only factual testimony in the case as to why NIG did not answer the Carlyle Complaint. The Court's rejection of NIG's good faith rejection of the forum selection clause can be summarized in a syllogism:

- If NIG did not believe it was bound by the forum selection clause, and therefore not obligated to answer the Delaware complaint, it had to be incompetent.[70]
- But, since NIG is a large, successful company that has made many securities investments in its history, it cannot be incompetent.[71]
- Therefore, it must have viewed the litigation to enforce the forum selection clause as a "giggle factor."[72]

The premise of the syllogism – that the Subscription Agreement is not void – ignores the parties' express agreement that Kuwait law would govern issues of its enforceability and the provisions of Decree Law No. 31. Moreover, the Court's rationale denigrates NIG's good faith reliance on the Law. It also ignores Carlyle's violation of the Law and the effect of that violation under Kuwait law. The Court's utter disregard for Kuwait's courts and laws is embodied in its refusal to accept Kuwait as an viable forum because Kuwait courts will not enforce forum selection clauses "as readily as American courts."[73]

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[69] Hassan Decl., ¶ 10; JA000237-JA000238. See also *id.*, ¶ 5; JA000236.

[70] *Decision*, 2-3 (JA000743-JA000744), 21-23 (JA000762-JA000763). Arg. Trans., 11 (JA000538), 24-26 (JA000551-JA000553).

[71] *Id.*; JA000533.

[72] Trans. 16; JA000543. NIG counsel's response presses the point: "No. I think they believed that the contract was void and therefore they did not have to respond. And that's the position they took." *Id.*

[73] *Decision*, 17, note 60 (emphasis added); JA000758.

Apparently, foreign courts must do as American courts do, and as quickly, or be dismissed.

The Court's unwillingness to show any comity to Kuwait's laws and courts prejudiced its ability to evaluate fairly the issues implicated in Decree Law No. 31. In addition, as the Decision reflects, the delay that preceded NIG's filing of the Motion is what troubled the Court the most.[74] NIG's good faith reliance on Decree Law No. 31, at a minimum, explains, if not mitigates, the delay that so offended the Court and inspired the "giggle factor" conclusion.[75] As the Hassan Declaration makes clear, NIG firmly believed that the Subscription Agreement was void as a matter of Kuwait law. It still does. The Court of Chancery rejected that notion out of hand. In doing so, it ignored the parties' invocation of Kuwait law, Decree Law No. 31, and Carlyle's disregard of that law.

[74] See, e.g., *Decision*, 28 ("Instead of participating in this suit in a timely way [],National chose to flout this case and take the chance that it would get away with violating the forum selection clause"); JA000769.

[75] It is not clear from the Decision if the Court rejected, wholly, at all, or in part, NIG's construction of Decree Law No. 31 and related Kuwait law. See, e.g., Decision; JA000765-JA000766. But any uncertainty begs the issue. NIG has demonstrated at least the possibility that the Subscription Agreement is void *ab initio*. The possibility compels that the Decision be reversed. See Argument, Section I. A., *supra*.

II. THE DECISION MUST BE REVERSED AS ITS ENFORCEMENT DEPRIVES NIG OF THE RIGHT TO LITIGATE ITS CLAIMS AGAINST CARLYLE

(1) Question Presented. Where the Court of Chancery's decision to enforce the forum selection clause, based on its refusal to apply Kuwait law as required and failure to show comity to that law, denies NIG its right to litigate its claims against Carlyle, must not the Decision be reversed? OB, 16-18 (JA000172-JA000173); RB, 6-13 (JA000482-JA000489); Decision, 27-29 (JA000768-JA000770).

(2) Standard of Review. The Court of Chancery's refusal to vacate the Default under Rule 60(b)(6) is reviewed for an abuse of discretion.[76] Factual findings will not be set aside unless they are clearly erroneous or not the product of a logical and orderly deductive process.[77] To the extent that factual determinations implicate issues of law, however, they are subject to *de novo* review.[78]

(3) Argument. NIG also challenged the forum selection clause under Chancery Rule 60(B)(6) because enforcing the clause would deny NIG the right to litigate its claims against Carlyle. Rule 60(b)(6) allows the Court to vacate a judgment if the movant can sufficiently show "any other reason justifying relief." Rule 60(b)(6) "encompasses circumstances that could not have been addressed using other

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[76] *Poe v. Poe*, 872 A.2d 960 (Del. 2004) (Table), 2005 WL 1076524, *2.

[77] *Kahn v. Lynch Communications Sys., Inc.*, 638 A.2d 1110, 1114 (Del. 1994).

[78] *Bartley v. Davis*, 519 A. 2d 662, 664 (Del. 1986).

procedural methods, [that] constitute an 'extreme hardship,' or [when] 'manifest injustice' would occur if relief were not granted."[79]

As discussed above, NIG acted at all times in reliance on the Subscription Agreement's "carve out" in favor of Kuwait law and with the good faith belief that Kuwait, and not Delaware, was the proper venue for prosecution of its claims against Carlyle. Its suit was properly initiated in Kuwait and is pending there now. Kuwait law does not allow a suit commenced in Kuwait to be transferred to a court in the United States.[80] Therefore, enforcement of the forum selection clause would require that NIG dismiss its Kuwait action and file a new suit in Delaware. Plaintiffs would then argue that a new suit is time-barred under the three-year statute of limitation set forth in 10 *Del. C.* § 8106.

Plaintiffs used exactly this gambit to bar the claim of another CCC investor in *Huffington v. T.C. Group, LLC*, 2012 WL 1415930 (Del. Super. Apr. 18, 2012), a decision relied upon by the Court of Chancery here.[81] There, the investor, whose claim was dismissed in Massachusetts,[82] re-filed his claim in Delaware. But the Superior Court's *Huffington* decision is not determinative. As shown above, the forum selection clause here specifically invokes Kuwait law on issues

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[79] *Wolf v. Triangle Broad. Co., LLC*, 2005 WL 1713071, *1 (footnote omitted).

[80] Magied Decl., ¶ 7; JA000200.

[81] Decision, 29; JA000770.

[82] *Huffington v. T.C. Group, LLC*, 637 F.3d 18 (1st Cir. 2011)

as to the enforceability of the Subscription Agreement, a point the Court below avoids.[83]

The Court below also cites *Ingres* to dispose of this challenge, suggesting that the reasonableness test that informs Rule 60(b)(6) applies to the time of the agreement to the forum selection clause.[84] That distinction misreads *Ingres* and Rule 60. Rule 60(b)(6) allows the Court to vacate the Default Judgment for "any [] reason justifying relief" and bears no temporal limitation. Enforcement of the Default Judgment triggers, at least conceptually, dismissal of the Kuwait action and the attack of any later filed Delaware action on statute of limitations grounds. As used in *Ingres*, the phrase "under the circumstances then existing" relates to "enforcement" of the forum selection clause, here, by Default Judgment.[85] *Ingres* does not forestall the conclusion that, if this Court were to hold that the forum selection clause applies, it would effectively deprive NIG of a forum in which to litigate.[86]

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[83] See e.g., Decision, 25, where the Court accepts for purposes of its discussion that Kuwait law applies, then applies Delaware and Federal law. (JA000766). See also *Norse Petroleum*, 389 A.2d, 771, 773 (Del. Super 1978) (recognizing the general rule in Delaware that the law of the place where a contract is formed determines its existence and validity").

[84] Decision, 28, n. 95; JA000769.

[85] *Ingres*, 108 A.3d at 1146, n. 9.

[86] *Brandt v. Hicks, Muse & Co., Inc.* (*In re Healthco Int'l, Inc.*), 195 B.R. 971 (Bankr. D. Mass. 1996) (holding that it would be unjust to enforce a Delaware forum selection clause where suit in Delaware would be barred by the statute of limitations) (distinguished on other grounds by *Hechinger Inv. Co. of Delaware*, 274 B.R. 71 (D. Del. 2002)). The Court below discounts *Brandt* because the court there noted that, in addition to the statute of limitations running, "trial in Delaware would have had serious drawbacks." Decision, 28, n.95,

CONCLUSION

For the reasons set forth above, Appellant National Industries Group (Holding) respectively requests that the decision of the Court of Chancery refusing to vacate the default judgment be reversed.

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quoting *Brandt*, 195 B. R. at 989. This point fails to alter its precedential value, however.