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Transaction ID 46923883
Case No. 5527-CS

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CARLYLE INVESTMENT MANAGEMENT L.L.C. and TC GROUP, L.L.C.,	)	
Plaintiffs,	)	
v.	)	C.A. No. 5527-CS
NATIONAL INDUSTRIES GROUP (HOLDING),	)	
Defendant.	)	

MEMORANDUM OPINION

Date Submitted: October 3, 2012
Date Decided: October 11, 2012

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STRINE, Chancellor.

I. Introduction

This is a dispute between one of the world's largest private equity firms, the Carlyle Group ("Carlyle"), and a Kuwait-based multi-national, multi-billion dollar conglomerate, National Industries Group ("National"). In 2006, these two sophisticated parties, who had long-standing business dealings with each other, entered into an agreement for National to make a $10 million investment into a Carlyle-affiliated closed-end investment fund, Carlyle Capital Corporation, that was going to make investments primarily in residential mortgage-backed securities. The investment fund was not successful, and was placed in compulsory liquidation. National wanted its money back. Ignoring the forum selection clause in the agreement between the parties, which provided that "[t]he courts of the State of Delaware shall have exclusive jurisdiction over any action, suit or proceeding with respect to [the parties'] Agreement," National filed suit against Carlyle in Kuwait.[1]

In response, Carlyle sought to enforce the forum selection clause in the agreement by filing this action in the Court of Chancery. After National failed to answer the complaint or to take advantage of numerous other chances to enter this case, Carlyle eventually obtained a default judgment enjoining National from litigating the dispute outside of this state.

National flouted the default judgment. Only when Carlyle moved to hold National in contempt did National finally appear in this litigation, some two years after this case was first initiated and over a year after the default judgment was entered. National seeks

[1] Hassan Decl. Ex. A ("Subscription Agreement") ¶ 8 [hereinafter SA].

to vacate the judgment against it, which precludes it from pressing its suit in Kuwait. National argues that the default judgment was void under Rule of Chancery 60(b)(4) because this court had neither personal jurisdiction over it nor subject-matter jurisdiction over the dispute. National also seeks relief under Rule 60(b)(6), on the ground that it would be "manifestly unjust" to enforce the forum selection clause in the parties' agreement.

But, National is a sophisticated entity that regularly participates in international commerce and freely contracted to resolve all its disputes with Carlyle regarding its investments in Carlyle Capital Corporation in Delaware. By the settled law of our Supreme Court and the U.S. Supreme Court, a sophisticated party such as National can, by freely executing a forum selection clause, contractually consent to the personal jurisdiction of the courts of a particular polity. National has no basis to escape the forum selection clause on grounds of fraud, and thus National by its voluntary agreement has subjected itself to the personal jurisdiction of the courts of Delaware.

But in any case, it is not unjust or unreasonable in any way to hold National to its contractual promise. Contrary to National's contention that it would show a lack of comity toward Kuwait to uphold the default judgment, the opposite is in fact true. National, not this court, is the party that agreed that any disputes National had with Carlyle would be adjudicated in Delaware. Had National wished to ask this court not to enter an anti-suit injunction and to allow the Kuwait courts in the first instance to consider whether to dismiss National's action because of it, National had plenty of opportunities to do so *at the right time*. But it ignored the clear promise it made in the

forum selection clause and suffered a default judgment. The only basis to lift the injunction contained in the default judgment now would be to show the very lack of respect that is the opposite of comity. The interests of justice would tip in favor of National only if I were to conclude that a multi-billion dollar Kuwaiti enterprise that has far-flung investments on many continents, and that had invested on several prior occasions with Carlyle, was incapable of making a binding contract in international commerce. In other words, I would have to conclude that National is like a child or an adult incapable of handling its own affairs and thus should be relieved of its contractual duties. Such a ruling would be insulting to it and to Kuwait itself, because it would suggest that even multi-billion dollar Kuwaiti corporations that boast of their sophistication cannot be relied upon as contractual partners.

Taking National at its own words – those that it uses to describe itself on its website – I accord it the full respect it deserves as a sophisticated enterprise that regularly makes investments and contracts in many nations. As such, it is bound by the clear forum selection clause it signed with Carlyle and its own tactical choice to refuse to participate in this litigation in a timely manner, and there is no basis to lift the default judgment against it on grounds of a lack of personal jurisdiction.

This court also had subject-matter jurisdiction, because the Carlyle Group was seeking the traditional equitable remedies of injunctive relief and specific performance in order to secure its rights under the forum selection clause. In the recent case of *Ingres Corp. v. CA, Inc.*, our Supreme Court concluded that these traditional equitable remedies are available to a party such as Carlyle seeking to enforce its contractual rights under a

forum selection clause.[2] And, as the previous factors illustrate, any injury to National from the default judgment was self-inflicted, and there is no basis to lift the default judgment under Rule 60(b)(6). For all these reasons, I deny National's motion to vacate the default judgment.

II. Factual Background

The plaintiffs are the TC Group, a U.S. private equity firm, and its investment manager, Carlyle Investment Management, both Delaware limited liability companies. They are affiliated with each other, and I therefore refer to them as "Carlyle." The defendant is a Kuwaiti conglomerate, National Industries Group (Holding), and I refer to it as "National."

The parties are large, sophisticated, international organizations. Carlyle has over $150 billion dollars under management and offices in 20 countries.[3] National, founded 50 years ago, has over $5.5 billion in assets and its shares are traded on the Kuwait and Dubai stock exchanges.[4] The parties began their business relationship in 2000, and since then National has invested over $80 million in various Carlyle funds.[5]

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[2] *Ingres Corp. v. CA, Inc.*, 8 A.3d 1143, 1144 (Del. 2010), *aff'g* 2009 WL 4575009 (Del. Ch. Dec. 7, 2009); *see also ASDC Hldgs., LLC v. Richard J. Malouf 2008 All Smiles Grantor Retained Annuity Trust*, 2011 WL 4552508, at *6 (Del. Ch. Sept. 14, 2011) (holding that the court had subject-matter jurisdiction to enforce a forum selection clause) (citing *Ingres*, 8 A.3d at 1145-46).

[3] *Second Quarter 2012 Earnings Results*, Carlyle Group 5 (Aug. 8, 2012), http://files.shareholder.com/downloads/AMDA-UYH8V/1845082487x0x589870/bd8f5236-3c38-4adf-b4d8-0aadddf6bfcb/2012_2Q_earnings_release_FINAL.pdf; *Geographic Reach*, Carlyle Group, http://www.carlyle.com/about-carlyle/global-offices.

[4] Whitesell Aff. Ex. B, at 4, 9 (National Industries Group (Holding) – SAK and Subsidiaries, Kuwait, *Interim Condensed Consolidated Financial Information and Review Report* (Mar. 31, 2012)).

[5] Alverson Decl. ¶ 4.

A. National's Investment In Carlyle Capital Corporation

This case arises out of National's investment in a particular investment fund affiliated with Carlyle, Carlyle Capital Corporation. In August 2006, Carlyle organized the Carlyle Capital Corporation as a limited liability company under the laws of Guernsey, with Carlyle Investment Management serving as its investment manager.[6] Carlyle Capital Corporation's primary purpose was to invest in U.S. residential mortgage-backed securities.[7] As part of its efforts to place shares in Carlyle Capital Corporation with investors, Carlyle sent representatives to Kuwait to meet with National, with which it already had a substantial business relationship.[8]

Before investing in Carlyle Capital Corporation, National was required to represent that it was sophisticated enough to participate in the private placement. Specifically, National had to represent that it was a "qualified purchaser" under the Investment Company Act of 1940, meaning that it had over $25 million in assets, and an "accredited investor" under SEC Regulation D.[9] National further had to represent that it was a "qualified investor" under Guernsey law.[10] In December 2006, after making these representations, National signed a Subscription Agreement with Carlyle Capital Corporation, and committed to purchase $10 million of Carlyle Capital Corporation's

[6] Compl. ¶ 8.
[7] *Id.* ¶ 13.
[8] Def.'s Op. Br. at 5; Alverson Decl. ¶ 4.
[9] *See* 15 U.S.C. § 80a-2(a)(51) (defining "qualified purchaser" under the Investment Company Act); 17 C.F.R. § 230.501(a) (2012) (defining "accredited investor" under Regulation D); Alverson Decl. ¶ 3.
[10] Alverson Decl. ¶ 3; *see* SA Q-9 (Guernsey "qualified investor" verification sheet).

non-voting stock.[11] A few weeks later, it invested another $15 million in Carlyle Capital Corporation.[12]

National's investment was governed by a Subscription Agreement. This Agreement provided that any dispute "with respect to" National's investment would be subject to the jurisdiction of the "courts of the State of Delaware":

> 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 that it may have,* whether now or in the future, to the laying of venue in, or *to the jurisdiction of, any and each of 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.[13]

The Subscription Agreement also contains a choice of law clause providing that Delaware law will apply to any dispute, "except insofar as affected by … state securities or 'blue sky' laws":

> 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

[11] The Subscription Agreement was signed on December 7, 2006, and the transaction closed on December 28, 2006. SA at 16 (signature page); Alverson Decl. ¶ 9. The funds were finally transferred to Carlyle Capital Corporation on February 28, 2007. Magied Op. Decl. Ex. B ("Kuwait Summons") ¶ 6.

[12] National signed another Subscription Agreement on December 22, 2006. This Subscription Agreement covered both the original $10 million investment and the additional $15 million, and this transaction closed on January 4, 2007. Compl. ¶ 10; Alverson Decl. ¶ 9; *see* Pls.' Br. in Opp. at 3 n.5.

[13] SA ¶ 8 (emphasis added).

> in which the offering described herein has been made to the Investor).[14]

Carlyle Capital Corporation was not formed at a propitious time, given its intention to invest in mortgage-backed securities. It fell victim to the collapse of the U.S. housing market, and defaulted on its financing obligations in March 2008.[15] It entered liquidation in May 2008.[16] In September 2009, the liquidator of Carlyle Capital Corporation informed its investors that they had likely lost all of their investment.[17]

B. Litigation Begins In Kuwait And Delaware

National filed a complaint in Kuwaiti court to recover its first $10 million investment in November 2009.[18] National alleged that the Subscription Agreement was "null and void" because Carlyle never had a license to sell securities in Kuwait.[19] The complaint named as defendant "Carlyle Group," which is a trade name used by TC Group. The complaint made no reference to the forum selection clause.

National attempted to serve "Carlyle Group" at Carlyle's offices in Washington, D.C., on May 10, 2010.[20] In response, Carlyle filed a complaint against National in this court on May 28, 2010, seeking a "preliminary and permanent injunction against the filing or prosecution of any action subject to the forum selection clause in the NIG

[14] *Id*. ¶ 7.
[15] Compl. ¶ 14.
[16] *Id*.
[17] *Id*.
[18] Def.'s Op. Br. at 7. The complaint does not reference National's later $15 million investment, or investments made by National's majority-owned investment and asset manager, Noor Investment Company. Kuwait Summons at 5; Alverson Decl. ¶¶ 6, 9.
[19] Kuwait Summons ¶ 11.
[20] Pls.' Br. at 5.

Subscription Agreement in any forum other than the courts of the State of Delaware."[21] Carlyle did not seek any money damages.[22]

Carlyle gave National proper and repeated notice of the Delaware proceedings. Carlyle informally provided the complaint to National on June 20, 2010.[23] Carlyle completed formal service of process on National under the Hague Convention on September 19, 2010.[24] On December 6, 2010, Carlyle emailed the complaint to National.[25] National made the tactical decision not to respond to any of these communications, as it admits in its briefing. "Believing this Court lacked personal jurisdiction over it, NIG did not respond to the Carlyle Complaint."[26]

Carlyle moved for a default judgment against National on June 1, 2011. Carlyle informed National of this motion by FedEx and email; National again chose not to respond.[27] Carlyle filed a Notice of Hearing on June 17, 2011, and again informed National.[28] On July 13, 2011, this court ruled on Carlyle's motion for a default judgment. Carlyle chose not to appear for the hearing.[29]

At the hearing, the court confirmed that there had still been no communication from National, and that Carlyle's request for the anti-litigation injunction had been in the

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[21] Compl. at 4.
[22] *Id*. ¶ 17.
[23] Pls.' Mot. for Default J. ¶ 6.
[24] Letter from Christine H. Dupriest, Esq., to the Register in Chancery (Dec. 3, 2010).
[25] Pls.' Mot. for Default J. ¶ 11.
[26] Def.'s Op. Br. at 8.
[27] Aff. of David S. Kurtzer-Ellenbogen (June 1, 2011).
[28] Notice of Hr'g Ex. 5 (email from David Kurtzer-Ellenbogen to National) (June 17, 2011).
[29] *Carlyle Inv. Mgmt. L.L.C. v. Nat'l Indus. Grp. (Hldg.)*, C.A. No. 5527-CS, at *7:8-10 (Laster, V.C.) (TRANSCRIPT) [hereinafter Default Hr'g].

complaint.[30] The court expressed some reticence about granting the anti-suit injunction, saying "It's just not something we often like to do."[31] This, of course, suggests that had National chosen to appear in the litigation and make its arguments at the right time, it had a fair chance to convince the court to stay its hand in the first instance, and require Carlyle to seek dismissal of the Kuwaiti action by invoking the forum selection clause in Kuwait itself. But, National did not do that, and the court was therefore required to consider the request for an injunction in the context of a motion for a default judgment. After doing so, the court concluded that the parties were sophisticated business entities and the forum selection clause was enforceable, and therefore the default judgment was "appropriate":

> These are sophisticated parties. The forum selection clause looked to me to be reasonable and enforceable, and so I have no concerns at all about entering the default judgment from a substantive standpoint, and certainly from a procedural standpoint.
>
> There have been extensive efforts to communicate to National Industries Group Holdings 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 it seemed to me that every effort was made to communicate with them.
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> I should also add that we are here this morning at the appointed time and no one has appeared from the other side.
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> So I think that the default judgment is appropriate, and to the extent that there is any concern later on about the injunction aspect of it, that would be an appropriate subject for some Rule 60 motion before the Chancellor whose case it is.[32]

The default order permanently enjoined National "from filing or prosecuting any action subject to the forum selection clause contained in the NIG Subscription

[30] *Id*. at *4:1-6, *5:6-12.
[31] *Id*. at *5:15-16.
[32] *Id*. at *6:20-*7:15.

Agreement, including but not limited to the Kuwait Action, in any forum other than the courts of the State of Delaware."[33] The order thus covered National's claims on the $10 million that it had sued to recover in the Kuwaiti suit, and any claims that it might make on its additional $15 million investment, both investments that were covered by the version of the Subscription Agreement that Carlyle had referenced in its Complaint.[34]

Carlyle sent National a copy of the ruling by email, fax, and FedEx on August 12, 2011.[35] National again chose not to respond. On January 10, 2012, Carlyle, having learned that National was still prosecuting the Kuwaiti litigation in defiance of the default judgment against it, sent National a copy of the ruling by email, fax, and FedEx again.[36] Once more, National chose not to reply, and on April 12, 2012, National attempted to serve Carlyle Investment Management in the Kuwaiti action.[37]

On June 25, 2012, National, having purposely ignored numerous deadlines for action and opportunities to appear in this case, filed a motion in this court to vacate the default judgment and dismiss Carlyle's complaint.[38] The motion alleged that the default judgment was void for lack of personal jurisdiction and therefore sought relief under Rule

[33] Order of Default J. (July 13, 2011).
[34] Compl. ¶ 10; *see* Pls.' Br. in Opp. at 3 n.5.
[35] Aff. of David Kurtzer-Ellenbogen ¶ 4 & Exx. C-E (July 2, 2012).
[36] *Id*. ¶ 8 & Exx. F-H.
[37] *Id*. ¶ 12. By this time, National had also amended the name of the defendant on the Kuwait Summons from "Carlyle Group" to Carlyle Capital Corporation.
[38] Def.'s Mot. To Vacate Order of Default J. & Dismiss Compl. (June 25, 2012).

60(b)(4).[39] A week later, Carlyle filed a motion to have National held in contempt for continuing to litigate the action in Kuwait.[40]

National submitted briefing on its motion to vacate several weeks after its motion. In this briefing, National expanded its theory of relief under Rule 60(b)(4) by arguing that the default judgment was also void for lack of subject-matter jurisdiction. In addition, National argued that this court should vacate the judgment under Rule 60(b)(6), which provides this court may grant relief from a final judgment "for any other reason."[41]

III. Legal Analysis

For the reasons that follow, I decline to reopen the final judgment. I first find that the default judgment was not void for lack of either personal or subject-matter jurisdiction. I then find that there is no ground to vacate the judgment under Rule 60(b)(6).

Before I discuss the merits of National's Rule 60(b) motions, I first explain what a Rule 60(b) motion is *not*. A Rule 60(b) motion is not an opportunity for a do-over or an appeal.[42] Rather, a Rule 60(b) motion may be granted only for the reasons stated in the

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[39] Ct. Ch. R. 60(b)(4) ("On motion and upon such terms as are just, the Court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: … (4) the judgment is void ….").

[40] Mot. for Order of Civil Contempt (July 2, 2012). In the brief accompanying the motion, Carlyle states that it was in the process of preparing the contempt motion when National filed to reopen the judgment. The parties have agreed to brief and argue this motion after the court issues this decision.

[41] Ct. Ch. R. 60(b)(6) ("[The court may grant relief for] any other reason justifying relief from the operation of the judgment.").

[42] *See, e.g.*, *Dixon v. Del. Olds, Inc.*, 405 A.2d 117, 119 (Del. 1979) ("[The defendant] is using the Rule 60(b) motion as a substitute for a motion for a new trial and for appeal from judgment. That is not the purpose of Rule 60(b)."). This principle has particular force when a party is attempting to vacate a default judgment under Rule 60(b)(4). When a party seeks to vacate a

text of the rule: in the case of a Rule 60(b)(4) motion, relief is to be granted if the judgment is "void," and in a motion under Rule 60(b)(6), relief may be granted for "any other reason justifying relief from the operation of the judgment."[43] The Rule 60(b)(6) standard is stringent, and courts must find "extraordinary circumstances" before granting relief.[44]

These principles apply with even more force when a party like National, which was properly served and chose not to respond, seeks to use Rule 60(b) to reopen a default judgment. Such a party is in the least equitable position to seek to argue the merits anew, because it consciously chose not to do so at the correct time.[45] To permit a defaulting

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default judgment as being void under Rule 60(b)(4), it usually may not make any arguments about the merits of his case. *See, e.g.*, *Grace v. Bank Leumi Trust Co.*, 443 F.3d 180, 193 (2d Cir. 2006) (noting that, for a default judgment to be vacated under Rule 60(b)(4), the court must have lacked jurisdiction or have acted in a manner "inconsistent with due process of law") (citation omitted); *see also Jackson v. FIE Corp.*, 302 F.3d 515, 524-30 (5th Cir. 2002) (ruling on a Rule 60(b)(4) motion to vacate a default judgment, and noting that the defendant could only make an argument on the merits insofar as the merits overlapped with the question of jurisdiction). And although courts have shown themselves more willing to entertain the merits of a default judgment when faced with a Rule 60(b)(6) motion, this is because of the catch-all nature of the rule, and the courts have not receded from the requirement that the party seeking relief establish the existence of "extraordinary circumstances." *See, e.g., Carl Marks & Co. v. USSR*, 665 F. Supp. 323, 332-333 (S.D.N.Y. 1987), *aff'd*, 841 F.2d 26 (2d Cir. 1988) (noting that a court may examine the merits of a default judgment on a Rule 60(b)(6) motion, but not on a Rule 60(b)(4) motion); *First Fidelity Bank, N.A. v. Gov't of Ant. & Barb. – Permanent Mission*, 877 F.2d 189, 196 (2d Cir. 1989) (holding that party seeking to reopen a default judgment under Rule 60(b)(6) must show "extraordinary circumstances").

[43] "A motion to reopen a judgment under Court of Chancery Rule 60(b) is addressed to the sound discretion of the trial court." *MCA, Inc. v. Matsushita Elec. Indus. Co.*, 785 A.2d 625, 633 (Del. 2001). But, if the court finds that the judgment was void, the judgment must be vacated. *Id*. n.8 (citations omitted).

[44] *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005) (citations omitted); *MCA*, 785 A.2d at 634 n.9 (citations omitted); *Scureman v. Judge*, 1998 WL 409153, at *5 (Del. Ch. June 26, 1998) (citation omitted).

[45] "Equitable principles may be taken into account by a court in the exercise of its discretion under Rule 60(b)." 11 Charles Alan Wright et al., *Federal Practice and Procedure: Federal Rules of Civil Procedure* § 2857 (2d ed. updated 2012). Thus, when deciding a motion to vacate

party a free shot to reargue the merits would make defaulting a cost-free option for the defaulting party, but impose on litigation adversaries and society as a whole great costs in terms of delay, expense, and the inefficient use of judicial resources.[46]

Because of these principles, National's argument that this court, when it granted the anti-suit injunction, expressed hesitation, is beside the point. It is certainly true that this court does not lightly grant anti-suit injunctions, and it may well be that, with the benefit of full adversarial pre-judgment briefing, this court would have declined to grant such an injunction at that time. But, in a Rule 60(b) hearing, National does not have the privilege of contesting whether the injunction should have issued. Instead, National must either show simply that the judgment is void, under Rule 60(b)(4), or that "extraordinary circumstances" warrant vacating it under Rule 60(b)(6). Because National cannot do either, I deny its motion.

A. The Judgment Is Not Void Under Rule 60(b)(4)

National's argument that the judgment is void is based on a confusing set of arguments, premised on the notion that this court lacked personal jurisdiction over it and lacked subject-matter jurisdiction to consider Carlyle's request for an injunction against

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a judgment under Rule 60(b), a "principal factor" for the court may be "whether the default was willful." *State St. Bank & Trust Co. v. Inversiones Errazuriz Limitada*, 374 F.3d 158, 166-67 (2d Cir. 2004). Even when faced with a challenge to a default judgment on the ground that the judgment was void under Rule 60(b)(4), the court may still require that the challenge be brought "within a reasonable time." *Id*. at 179 (citations omitted).

[46] *See, e.g., C.K.S. Eng'rs, Inc. v. White Mountain Gypsum Co.*, 726 F.2d 1202, 1204-06 (7th Cir. 1984) (on a review of case law, finding that Rule 60(b) motions are granted less readily when the moving party has "failed to live up to [its] responsibilities through unexcused carelessness or negligence," and recognizing "the need to promote efficient litigation and to protect the interests of all litigants").

the Kuwaiti suit. I address the questions of personal jurisdiction and subject-matter jurisdiction in turn.

1. National Consented To The Personal Jurisdiction Of This State When It Signed The Subscription Agreement Containing The Forum Selection Clause

National's motion to set aside the default judgment because this court lacked personal jurisdiction over it is extremely odd because National, a sophisticated, multi-billion dollar enterprise, consented to this state's jurisdiction when its signed the Subscription Agreement containing the forum selection clause. As the Supreme Court of the United States held in *The Bremen v. Zapata Off-Shore Co.*, forum selection clauses are generally valid, unless the resisting party can "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud and overreaching."[47] That principle has been endorsed by the Delaware Supreme Court as recently as 2010 in *Ingres Corp. v. CA, Inc.*[48]

National, as the party attempting to vacate the default judgment on the grounds that this court did not have personal jurisdiction over it, bears the burden of proof.[49] National does not argue that the forum selection clause was the product of fraud or overreaching, and thus concedes that the forum selection clause was valid in the sense that National freely and voluntarily submitted to the personal jurisdiction of the courts of

[47] 407 U.S. 1, 15 (1972).
[48] *Ingres Corp. v. CA, Inc.*, 8 A.3d 1143, 1146 (Del. 2010) (quoting *The Bremen*, 407 U.S. at 15).
[49] Normally, the plaintiff bears the burden of showing that the court has jurisdiction over a defendant. But, if the defendant has conceded a default judgment, and is attacking it collaterally under Rule 60(b)(4), the defendant bears the burden of showing that the court lacked jurisdiction. *See, e.g.*, *Philos Techs., Inc. v. Philos & D, Inc.*, 645 F.3d 851, 855-57 (7th Cir. 2011).

Delaware.[50] A valid forum selection clause will be upheld,[51] and, because the parties to the clause have consented freely and knowingly to the court's exercise of jurisdiction, the clause is sufficient to confer personal jurisdiction on a court.[52] The question of whether a forum selection clause should be "enforced" is separate from whether it represents a voluntary consent to personal jurisdiction.[53] By a forum selection clause, a party may clearly consent to the jurisdiction of a forum, even though the courts of that forum might not enforce the clause in all circumstances.[54] Here, there is no dispute that National freely consented to the personal jurisdiction of the Delaware courts. Thus, National's motion to lift the default judgment under Rule 60(b)(4) for lack of personal jurisdiction must be denied.

Nevertheless, in this case, National tries to lift the default judgment by arguing that the forum selection clause should not have been enforced by an injunction. The enforcement of a forum selection clause is the act of confining the litigation to the chosen

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[50] Def.'s Reply Br. at 10.

[51] *E.g., D.H. Blair & Co. v. Gottdiener*, 462 F.3d 95, 103 (2d Cir. 2006) ("[A] forum-selection clause will be upheld unless the clause was obtained through fraud or overreaching.") (citation omitted).

[52] *E.g., Nat'l Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315-16 (1964) ("[I]t is settled … that parties to a contract may agree in advance to submit to the jurisdiction of a given court ….").

[53] The judicial treatment of permissive forum selection clauses shows that this is so. Courts regularly speak of having jurisdiction over parties through a permissive forum selection clause, which permit litigation elsewhere, but at the same time the courts state that such clauses usually will not be "enforced." *E.g., K & V Scientific Co. v. BMW*, 314 F.3d 494, 499 (10th Cir. 2002) (citation omitted).

[54] *See, e.g., The Bremen v. Zapata Off-Shore Co.* 407 U.S. 1, 10 (1972) ("[Forum selection] clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' *under the circumstances*.") (emphasis added); *see also Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 30-31 (1988) (discussing factors that a federal district court might consider when "refus[ing] to transfer a case notwithstanding the counterweight of a forum-selection clause").

forum.[55] Such enforcement action may take various forms. For example, the court may dismiss or stay the case, if it is not the forum chosen in the forum selection clause;[56] the court may exercise the jurisdiction conferred by the forum selection clause, by denying a request to dismiss, remove, or stay the suit in favor of a different forum;[57] or the court may take the stronger step of issuing an anti-suit injunction against proceedings outside of the chosen forum. This latter step was the action taken by the court in this case.

National challenges the anti-suit injunction. But, as I have explained, this court's granting of the anti-suit injunction had nothing to do with the question of the court's jurisdiction, which had already been established by the valid forum selection clause in the Subscription Agreement. Rather, the issuing of the anti-suit injunction was a decision on the merits of Carlyle's complaint, which requested such an injunction.[58] National's challenge, therefore, fails to attack the basis of this court's jurisdiction.

It is well-established that a party may use a Rule 60(b)(4) motion only to attack a court's jurisdiction, not to attack the court's resolution of the case on the merits.[59]

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[55] *See, e.g.*, *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1139 (9th Cir. 2003) ("[A] forum selection clause … forecloses suit in the jurisdiction of the plaintiff's choice.") (citation omitted) (discussing a plaintiff's attempt to litigate in a forum other than the one in the forum selection clause).

[56] This was, of course, the result of *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

[57] *See, e.g.*, *Aguas Lenders Recovery Grp. v. Suez, S.A.*, 585 F.3d 696 (2d Cir. 2009) (enforcing forum selection clause by denying motion to remove on *forum non conveniens* grounds).

[58] Compl. at 4.

[59] *See, e.g.*, *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706 (1982) ("A defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment *on jurisdictional grounds* in a collateral proceeding.") (emphasis added); 11 Charles Alan Wright et al., *Federal Practice and Procedure: Federal Rules of Civil Procedure* § 2862 (2d ed. updated 2012) ("[A judgment] is void only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law.").

National, by attacking the enforcement of the forum selection clause, is contravening this basic principle. For example, it may be, and we shall never know, that Carlyle would not have obtained an anti-suit injunction in the first instance had National appeared in this action.[60] In this regard, it is critical to note that this court's reticence to grant an anti-suit injunction did not reflect *any* doubt about the enforceability of the forum selection clause, and no basis for such doubt arises from the record.[61] Rather, the reticence involved whether, as a matter of typical court-to-court comity, this court would require Carlyle to seek dismissal of the Kuwaiti litigation before the Kuwaiti courts, in the first instance, rather than issue an anti-suit injunction.[62] The proper time for National to have argued

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[60] If National had asked this court to defer to the Kuwaiti action, on the ground that Carlyle could assert the forum selection clause in Kuwait, it would have run into a problem that was presented in an affidavit by its own expert, Mr. Ahmed Zakaria Abdel Magied, an Egyptian lawyer who is experienced in Kuwaiti law. Mr. Magied testified by affidavit in a case before the Southern District of New York in 2010 that, under Kuwaiti law, "Kuwait courts assume jurisdiction over any case filed against a Kuwaiti defendant, even if the governing contract has a foreign forum selection clause." *Maersk, Inc. v. Neewra, Inc.*, 2010 WL 2836134 (S.D.N.Y. July 9, 2010), ECF No. 239 ¶ 10 (Suppl. Decl. of Ahmed Zakaria).

After argument, National responded by filing, without seeking leave to do so, a supplemental affidavit in which Mr. Magied testified that even though Kuwaiti courts refuse to enforce forum selection clauses in cases where a Kuwaiti party is a defendant, they may take forum selection clauses into account where foreign parties are defendants. Suppl. Decl. of Ahmed Zakaria Abdel Magied (Sept. 27, 2012) [hereinafter Magied Suppl. Decl.]. But Mr. Magied did not testify that Kuwaiti courts will enforce forum selection clauses as readily as American courts when foreign parties are defendants, and the Kuwaiti case he provided dealt with the scope of a forum selection clause providing for adjudication in Kuwait, not a foreign country. Therefore, even if I were to consider National's belated affidavit, it is by no means clear to me that a Kuwaiti court would defer to a foreign tribunal on account of a forum selection clause.

[61] Default Hr'g at *6:20-7:1 ("The forum selection clause looked to me to be reasonable and enforceable, and so I have no concerns at all about entering the default judgment from a substantive standpoint, and certainly from a procedural standpoint.").

[62] *Id*. at *5:13-6:11, *7:11-18. *See, e.g.*, *Aveta, Inc. v. Bengoa*, 986 A.2d 1166, 1181 (Del. Ch. 2009) (citing Oral Arg., *Aveta, Inc. v. Bengoa*, C.A. No. 3598-VCL, *54:3-54:21 (Nov. 12, 2009) (noting that the defendants were litigating in Puerto Rico "in violation of [a] forum selection clause," but "[a]s a matter of comity" declining to issue an anti-suit injunction until the Puerto Rico court had been "allowed to consider th[e] issues in the first instance")).

that this court should defer considering the anti-suit injunction in favor of allowing the Kuwaiti courts to consider a motion by Carlyle to dismiss based on the forum selection clause was when it was served with Carlyle's complaint, or many of the later invitations to come to this court and contest the merits.[63] That time has passed.

2. In The Alternative, The Forum Selection Clause Is Enforceable

Despite this, I now – in the alternative – consider National's arguments that the forum selection clause should be held unenforceable. Even if this court could be deprived of jurisdiction simply because the valid forum selection clause was unenforceable in this situation, I would reject National's arguments. These arguments are threefold. First, National argues that, as a matter of international comity, it should not be enjoined from litigating in Kuwait. Second, National claims that the Subscription Agreement is void in its entirety, and that the forum selection clause is void too. Third, National claims that enforcing the Subscription Agreement would leave it without a forum in which to litigate its claims.

a. The Forum Selection Clause Is Not Unenforceable For Reasons Of International Comity

National – not this Court – decided that all of its disputes with Carlyle regarding the forum selection clause would be heard in the courts of this State, and not in Kuwait. No disrespect or lack of comity is therefore shown to Kuwait by failing to lift the default

[63] Other courts have reached the same result. *See, e.g.*, *Fin. Fed. Credit, Inc. v. Kenwood Contracting, Ltd.*, 2006 WL 760275 (N.D. Iowa Mar. 24, 2006) (granting a default judgment against defendants, who ignored a valid forum selection clause, and then declining to lift the judgment on a Rule 60(b)(4) motion, because "[t]o the exten[t] that the [defendants] were deprived their day in court, it was only because they chose not to appear and defend the lawsuit").

judgment as National freely chose this jurisdiction, and this jurisdiction alone, as the place to duel with Carlyle. In situations like this one, the courts of this state have followed the lead of the Supreme Court of the United States in giving effect to international forum selection clauses.[64] Two policy considerations drive courts' enforcement of such clauses: "(1) ensuring the orderliness and predictability [that are] essential to any international business transaction, and (2) furthering international comity."[65]

International comity is usually considered an "abstention doctrine."[66] A court that has jurisdiction over a person or dispute, after considering the "relevant factors," *may* abstain from exercising jurisdiction and defer to a foreign court.[67] But, all of the considerations that would weigh in favor of, or against, the application of the doctrine of international comity may be trumped by a forum selection clause that provides for jurisdiction of the dispute in the United States. As the U.S. Court of Appeals for the Ninth Circuit has held, enforcing an international forum selection clause, where "no public international issues" are raised, is simply a matter of "enforcing a contract and giving effect to substantive rights. This in no way breaches norms of comity."[68] The U.S. Court of Appeals for the Fifth Circuit has held that enforcing a forum selection

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[64] *See* 1 Donald J. Wolfe, Jr., & Michael A. Pittenger, *Corporate & Commercial Practice in the Delaware Court of Chancery* § 5.04 (updated 2012).
[65] *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1294 (11th Cir. 2001) (citing *The Bremen*, 407 U.S. 1, 9, 15 (1972), and *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974)).
[66] *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1237 (11th Cir. 2004).
[67] *See, e.g., Royal & Sun Ins. Co. v. Century Int'l Arms, Inc.*, 466 F.3d 88, 95 (2d Cir. 2006); *Finova Capital Corp. v. Ryan Helicopters U.S.A., Inc.*, 180 F.3d 896, 898-99 (7th Cir. 1999).
[68] *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 994 (9th Cir. 2006).

clause does not "in any way trample[] on notions of comity,"[69] and the U.S. District Court for the Southern District of New York has noted that "comity is not an excuse" for failing to enforce an international forum selection clause.[70]

In fact, international comity might be harmed by *not* enforcing the forum selection clause. The Ninth Circuit has held that refusing to enforce a forum selection clause between international parties providing for adjudication in the United States "could … have serious deleterious effects for international comity," on the ground that it would encourage a party to file first in a foreign jurisdiction in order to avoid the jurisdiction of the U.S. courts.[71] This is exactly what National has done here. If National is permitted to continue litigating in Kuwait, it will encourage other parties to flout forum selection clauses too, and put judicial systems in the very conflict that such clauses are intended to avoid. This will harm, not advance, international comity, by creating unnecessary tension between courts.[72]

Perhaps most important, failing to enforce the forum selection clause would show a lack of respect for Kuwaiti corporations, and, by extension, Kuwait as a nation. That disrespect would harm comity. American case law is consistent that forum selection

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[69] *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 627 (5th Cir. 1996).
[70] *Int'l Equity Invs., Inc. v. Opportunity Equity P'rs*, 427 F. Supp. 2d 491, 502 (S.D.N.Y. 2006), *aff'd in relevant part*, 246 F. App'x 73 (2d Cir. 2007).
[71] *E. & J. Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 994 (9th Cir. 2006); *accord Applied Med. Distrib. Corp. v. Surgical Co. BV*, 587 F.3d 909, 921 (9th Cir. 2009).
[72] *See Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Court for the S. Dist. of Iowa*, 482 U.S. 522, 544 n.27 (1987) (noting that comity aims at fostering a "spirit of cooperation" between tribunals in different countries).

clauses between sophisticated international parties should be enforced.[73] A refusal to enforce this forum selection clause would erroneously imply that, in the eyes of American courts, National is not a "sophisticated" party. Nay, it would do even more than that, as it would imply that National is not even a party competent to enter into binding agreements, and thus must be treated as if it were a minor or an incapacitated adult.[74] It is hard to understand a more disrespectful ruling of party that, on its own, bilingual website, advertises itself as follows:

> National Industries Group was listed on the Kuwait Stock Exchange in 1984.
>
> It began as a building materials manufacturing company. *Its growth from that stage to a multinational conglomerate is a great saga of dedication and commitment. Today, NIG manages several and manifold activities in investment and shares*, in Building Materials, Petrochemicals, Oil & Gas Services, Mechanical Industries, Utilities, Real estate Infrastructure, and Financial Services. *Through the asset management expertise in managing financial portfolios, equity shares, and direct investment [NIG] has brought home creditable and laudable profits to its shareholders.*
>
> The Group now owns major equities in various companies thriving in the financial investment and industrial investment sectors both regionally and internationally. *NIG has spread its wings far and wide with huge simultaneous Investments* in Saudi and the Emirates, in Singapore, UK and Latin America with major shares in several prominent companies in the region including Power Supply station and Telecom Companies.

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[73] *See, e.g.*, *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1294-95 (11th Cir. 1998) (citing cases); *Haynsworth v. The Corporation*, 121 F.3d 956, 965 (5th Cir. 1997) (same).

[74] *See, e.g.*, 6 *Del. C.* § 2705 (providing that "[a]ny person who has attained 18 years of age shall have full capacity to contract"); *Bettis v. Premier Pool & Prop. Mgmt.*, 2012 WL 4662225, at *2 (Del. Ch. Sept. 26, 2012) (noting that a mentally incompetent person "who is unable to understand in a reasonable manner the nature and consequences of the transaction" does not have full contractual capacity). *See also* Restatement (Second) of Contracts § 14 (1981) (stating that a ward, minor, mentally ill person, or drunk does not have "full legal capacity to incur contractual duties").

> NIG has several accreditations at the regional and international levels.[75]

National also states, in a page describing its goals:

> To be at the forefront as the best investment holding company, we are keen to apply the best norms and standards of performance in the market by being thoroughly shareholder-centric in all operations and maximizing equity base while upholding transparency as the NIG benchmark.
>
> Propelled by an unflinching and solid strategy, the management has laid down very clear cut and result oriented objectives:
>
> - Consistently grow net asset value at an yearly rate of 15-20%
> - Maintain a solid ROE that exceeds market benchmark
> - Limit Financial Risks
> - Focus on long term investments with sustainable growing profits where NIG can add value
> - Ensure active ownership in investments
> - Develop and maintain a superior governance structure for all holdings
> - …
> - Develop and grow internal investment expertise[76]

National also owns a dedicated investment and asset management company, Noor Financial Investments, with which it shares information,[77] and whose objective, stated on its own English-language website, is to

> act as the advisor of choice for clients by offering a full spectrum of financial services. Noor aims to be the premier investment banking institution in the region, through the development of innovative

[75] *NIG Holding*, National Industries Group (Holding), http://www.nig.com.kw/AxCMSwebLive/About_En.cms (emphasis added).
[76] *Vision & Objectives*, National Industries Group (Holding), http://www.nig.com.kw/AxCMSwebLive/vision_En.cms.
[77] Alverson Decl. ¶ 6.

> strategies and the timely execution of transactions, in order for clients to achieve their business and financial goals.[78]

These website quotations make clear the obvious, which is that National is a sophisticated company. National fulfilled all the requirements to invest in Carlyle Capital Corporation,[79] has extensive other investments with Carlyle,[80] and even boasts the Kuwait government as an investor.[81] Because National is sophisticated, failing to treat National in the same way as sophisticated American parties would imply that it needs some form of special protection simply because it is Kuwaiti, and that Kuwaiti citizens should be considered as persons unable to making binding commitments in international commerce. I will not show an unwarranted lack of respect for a nation by treating one of its corporations, which boasts of its far-flung international investments, as incapable of being a counterparty to an unambiguous commercial agreement with a clear forum selection clause. Thus, National cannot show that the forum selection clause should be held unenforceable on grounds of international comity.

b. The Application Of Kuwaiti Law Does Not Make The Forum Selection Clause Unenforceable

Likewise, the fact that National may have a claim under Kuwaiti law to invalidate the Subscription Agreement does not render the default judgment unenforceable. In its Kuwaiti suit and its motion papers here, National argues that the Subscription Agreement is invalid under Kuwaiti law because Carlyle and Carlyle Capital Corporation did not

[78] *Our Vision*, Noor Investment, http://www.noorinvestment.com/Default.aspx?pageId =4&mid=263.
[79] Alverson Decl. ¶ 3.
[80] *Id*. ¶ 4.
[81] Def.'s Op. Br. at 4.

obtain a license to market and sell securities in Kuwait.[82] National contends that, absent such a license, Carlyle Capital Corporation could not validly issue shares to Kuwaiti residents, including National. National argues that Kuwaiti, and not Delaware, law applies to this claim, because of the provision in the Subscription Agreement stating that Delaware law does not apply "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."[83]

As an initial matter, 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.[84] Nor are National's arguments under Kuwaiti law facially compelling.[85] But this is beside the

[82] Kuwait Summons ¶¶ 10-11; Def.'s Op. Br. at 18-19; Def.'s Reply Br. at 8-10. National also claimed in the Kuwait Summons that the Subscription Agreement was void because it was induced by fraud. Kuwait Summons ¶¶ 12-13. National has specifically disclaimed these arguments before this court. Def.'s Reply Br. at 4 & n.5.

[83] SA ¶ 7.

[84] The relevant phrase in the Subscription Agreement is "affected by the state securities or 'blue sky' laws of the jurisdiction in which the offering described herein has been made," but National has not shown that Kuwaiti securities law is a "state securities law" within the meaning of that contractual phrase, which is common boilerplate. It may be that the phrase "state securities law" is ambiguous, and can be taken to refer only to the state securities of U.S. states, or to the securities laws of U.S. states and foreign states. *Compare LaSala v. UBS, AG*, 510 F. Supp. 2d 213, 237-38 (S.D.N.Y. 2007) (holding that foreign law is considered "state law" for the purposes of the Securities Litigation Uniform Standards Act), *with Lasala v. Bordier et Cie.*, 519 F.3d 121, 138-39 (3d Cir. 2008) (holding the opposite). Because the meaning of the phrase "state securities law" in the Subscription Agreement may be ambiguous, it may become appropriate under principles of contract interpretation to determine its meaning by referring to its accompanying phrase, "blue sky laws." *See, e.g.*, *Gustafson v. Alloyd Co.*, 513 U.S. 561, 571 (1995) (noting, in interpreting the Securities Act of 1933, that "a word is known by the company it keeps"). That phrase, of course, refers unambiguously to *U.S. state*, not foreign, regulation. *Blue-Sky Law*, Black's Law Dictionary (9th ed. 2009).

[85] National bases its argument on two affidavits of Mr. Magied, its expert on Kuwaiti law. In Mr. Magied's view, Article 3 of Decree Law No. 31 of 1990 requires that any sale of securities of any kind, whether to a sophisticated investor like Carlyle in a private sale, or in a public offering to any investors regardless of sophistication, be made only by a person or entity who has

point. For now, what is important is that even if this issue is one governed by Kuwaiti law, it is one that National agreed would be determined by the courts of Delaware. Under Delaware and federal law, a party cannot escape a valid forum selection clause, or its analogue, an arbitration clause, by arguing that the *underlying contract* was fraudulently induced or invalid for some reason unrelated to the forum selection or arbitration clause itself.[86] Instead, the party must show that the forum selection clause *itself* is invalid. If

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received a license from the Minister of Commerce and Industry, and who is either Kuwaiti or has a licensed Kuwaiti agent. Magied Op. Decl. ¶ 4; Magied Reply Decl. ¶ 7. Mr. Magied bases this view on a reading of the plain text of Article 3, with no reference to interpretive authority, and he does not give any examples of any enforcement actions that have ever been brought by the Kuwaiti authorities under Article 3. The force of Mr. Magied's testimony is further weakened by the fact that National has invested repeatedly in Carlyle, which has never had a license to sell securities in Kuwait, but National has not indicated anywhere that it believes that these investments were also improper. Alverson Decl. ¶ 4.

Carlyle's expert, Mr. Awadhi, who is a Kuwaiti lawyer, has testified that Article 3 of Decree Law No. 31, which provides that a license is required in the case of "operations of sale and purchase of foreign securities and participations in foreign investment funds," should be read as applying only to transactions involving *existing* securities, not newly issued stock. Awadhi Decl. ¶ 5. In support of this testimony, Mr. Awadhi notes that Article 1 of Decree Law No. 31 specifically governs initial public offerings. Therefore, according to Mr. Awadhi, if any provision of Kuwaiti securities laws should apply, it would be this one. But Mr. Awadhi also observes that Article 1 limits itself to "public subscription[s]," and that it has nothing to say about private offerings, such as this one. *Id.* ¶ 6. Mr. Awadhi further testifies that Kuwaiti government funds have regularly invested in private offerings of foreign funds such as Carlyle Capital Corporation, and that such offerings have never been found in violation of either Article 1 *or* Article 3 of Decree Law No. 31.

[86] *See, e.g., Scherk v. Alberto-Culver*, 417 U.S. 506, 519 n.14 (1974) ("[A]n arbitration or forum-selection clause in a contract is not enforceable if the *inclusion of that clause in the contract* was the product of fraud or coercion."); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967) (holding that a federal court may adjudicate a question of "fraud in the inducement in the arbitration clause itself"); *Afram Carriers, Inc. v. Moeykens*, 145 F.3d 298, 302 (5th Cir. 1998) ("Only when we can discern that the [forum selection] clause itself was obtained in contravention of the law will the federal courts disregard it …."); *Maloney-Refaie v. Bridge at School, Inc.*, 958 A.2d 871, 886 (Del. Ch. 2008) (noting federal precedent that "arbitration agreements are severable and independently enforceable from the contract as a whole"); *Anadarko Petroleum Corp. v. Panhandle E. Corp.*, 1987 WL 13520, at *11 (Del. Ch. July 7, 1987) (enforcing an agreement to arbitrate where the plaintiff did not "separately attack the validity of the arbitration clause").

the forum selection clause, standing alone, is found to be valid, the court that has jurisdiction over the dispute is to decide whether the contract is enforceable. Delaware has embraced the same approach because it sensibly prevents a party from making "an end-run around an otherwise enforceable [f]orum [s]election [p]rovision through an argument about the enforceability of other terms in the contract."[87] National has not cited any Delaware case law to support the contrary proposition.[88]

In fact, a case that National itself seeks to rely on supports this very proposition. In the recent decision of the U.S. Court of Appeals for the First Circuit in *Huffington v. T.C. Group*, [89] the plaintiff made an investment in Carlyle Capital Corporation under a subscription agreement that was, in relevant part, identical to that here.[90] The plaintiff was a Massachusetts investor, and sought to bring claims against Carlyle under

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[87] *Ashall Homes Ltd. v. ROK Entm't Grp. Ltd*., 992 A.2d 1239, 1248 (Del. Ch. 2010) (citing *Karish v. SI Int'l, Inc.*, 2002 WL 1402303, at *4 (Del. Ch. June 24, 2002) ("A claim of fraud in the inducement of the contract generally – as opposed to the arbitration clause itself – is for the arbitrators and not for the courts.")).

[88] National cites the Alabama case of *Investors Guaranty Fund v. Compass Bank*, 779 So.2d 185 (Ala. 2000). In *Investors Guaranty Fund*, the trial court held that a forum selection clause in a bondholder insurance policy was unenforceable because the issuer of the bondholder policy was not licensed to transact insurance business in Alabama. The Supreme Court of Alabama upheld the trial court's decision. But, *Investors Guaranty Fund* is distinguishable from this case. The appellee in that case introduced evidence that, if the insurer had sought to be licensed in Alabama – as required by law – it would not have been permitted to write insurance contracts with forum selection clauses providing for adjudication exclusively in foreign countries. Therefore, the Supreme Court of Alabama found that "under the circumstances of this case, it was fair and reasonable" for the trial court to refuse to enforce the forum selection clause. *Id*. at 191. But in this case, National is not arguing that Carlyle would not have been permitted to include the forum selection clause in the Subscription Agreement if it had got a license to sell securities in Kuwait; in fact, National's expert has argued that Carlyle would be permitted to present it as a defense to suit to a Kuwaiti court. Magied Op. Decl. ¶ 8; Magied Suppl. Decl. ¶¶ 8, 11. Therefore, the reasoning of the Supreme Court of Alabama is not applicable to this case.

[89] 637 F.3d 18 (1st Cir. 2011).

[90] *Id*. at 20.

Massachusetts's blue sky laws. The First Circuit agreed with the plaintiff that these claims fell into the blue sky exception in the Subscription Agreement, and that Massachusetts law governed these claims.[91] But the court did not agree that the Massachusetts claims had to be adjudicated by a Massachusetts court. Instead, the court held, these claims had to be adjudicated in a court in Delaware under the forum selection clause.[92] Thus, any claim that National might have under Kuwaiti securities laws would lead to those laws being applied in Delaware rather than Kuwait.

c. The Forum Selection Clause Is Not Unenforceable Because National Would Be Deprived Of A Forum

National advances another confusing variant on its argument that the forum selection clause is unenforceable. Under this variant, the default judgment should be set aside because failure to do so would deprive National of any forum in which to press its claims that the Subscription Agreement is invalid. The reason for that is that the time that National had to bring a claim in Delaware challenging the Subscription Agreement's validity has, both it and Carlyle agree, come and gone.[93]

National argues that a forum selection clause is not enforceable where its enforcement would leave a party without any forum to litigate its action.[94] But National offers little authority for the dubious proposition that a forum selection clause is rendered unenforceable because a party, through its own choices, has caused the statute of

[91] *Id*. at 22.
[92] *Id*. at 25.
[93] Def.'s Op. Br. at 16; Pls.' Br. in Opp. at 19.
[94] Pls.' Op. Br. at 16-17.

limitations in the contractually chosen forum to expire.[95] In this circumstance, where National's own voluntary decision to violate the forum selection clause and to duck this litigation for more than two years may have left it without a forum, National has no equitable basis to ask that this court endorse its breaching behavior by lifting the default judgment.[96] National voluntarily signed the forum selection clause and it has known since this suit was filed that Carlyle intended to enforce it. Instead of participating in this suit in a timely way or otherwise acting to bring its claims in Delaware promptly, National chose to flout this case and take the chance that it would get away with violating the forum selection clause.

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[95] National relies on two cases, neither of which is persuasive in this context. In *Brandt v. Hicks, Muse & Co., Inc. (In re Healthco Int'l, Inc.)*, the court declined to enforce a forum selection clause providing for adjudication in Delaware that would have deprived the plaintiffs of a forum because the Delaware statute of limitations had expired. But the court noted that, even if the limitations period had not expired, "trial in Delaware would have had serious drawbacks." 195 B.R. 971, 989 (Bankr. D. Mass. 1996). In *Elia Corp. v. Paul N. Howard Co.*, the court held that a court should decline to enforce a forum selection clause if it is "unreasonable at the time of the litigation." 391 A.2d 214, 216 (Del. Super. 1978). The *Elia* court defined unreasonableness as "when [the forum selection clause's] enforcement would … seriously impair the plaintiff's ability to pursue his cause of action." But the *Elia* court opted to enforce the forum selection clause, and when the Supreme Court cited *Elia* in *Ingres Corp. v. CA, Inc.*, it implied that the reasonableness test applied to the time of the *agreement* of the forum selection clause, not the time of its *litigation*. 8 A.3d 1143, 1146 n.9 (Del. 2010).

[96] *Trafigura Beheer B.V. v. M/T PROBO ELK*, 266 F. App'x 309, 312 (5th Cir. 2007) ("[Where a party has] occasioned its own predicament by failing timely to file its claim in the contractually specified forum[,] no policy against unfairness counsels in favor of rewarding such behavior by adjudicating this case in a forum that would otherwise be contractually barred."); *Ziya v. Global Linguist Solutions, LLC*, 2011 WL 5826081, at *4 (D. Ariz. Nov. 18, 2011) (collecting cases); *see also New Moon Shipping Co., Ltd. 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. That party could simply postpone its cause of action until the statute of limitations has run in the chosen forum and then file its action in a more convenient forum.").

The recent decision of our Superior Court in *Huffington v. T.C. Group* is instructive here.[97] As described above, the plaintiff in that dispute, seeking to recover his investment in the collapsed Carlyle Capital Corporation, had filed suit in Massachusetts asserting claims under a Massachusetts blue sky law, despite the existence of a forum selection clause in favor of litigation in Delaware. After the U.S. Court of Appeals for the First Circuit had dismissed his suit, he brought his claims to the Superior Court – but at a point when they had become untimely. The Superior Court refused to waive the operation of the Delaware borrowing statute, which would allow the plaintiff to make his claims, because the plaintiff "tried to avoid the clear and unambiguous forum selection clause by filing in [the foreign forum]. He clearly sought to avoid litigating his claims here. Sometimes when you gamble, you lose."[98]

Here, National deliberately chose not to sue in the contractually proper forum, and failed to take repeated chances to raise its claims in a timely manner in Delaware despite knowing that Carlyle intended to enforce the forum selection clause. National gambled and lost. There is nothing unreasonable about enforcing the forum selection clause against National, because any harm it has suffered is entirely self-inflicted.

3. The Default Judgment Is Not Void For Lack Of Subject-Matter Jurisdiction

National's final argument that the default judgment is void is based on the argument that this court did not have subject-matter jurisdiction over the dispute because Carlyle had no basis to seek equitable relief, either in the form of an anti-suit injunction

[97] 2012 WL 1415930, at *4-10 (Del. Super. Apr. 18, 2012).
[98] *Id*. at *9.

or an order of specific performance, to vindicate its rights under the forum selection clause.

That argument, however, is contradicted by recent precedent of our Supreme Court and of this court. In *Ingres Corp. v. CA, Inc.*, the Delaware Supreme Court ruled that this court did not err in granting an anti-suit injunction in order to enforce a forum selection clause and prevent a party from litigating in another forum.[99] Even more recently, in *ASDC Holdings v. Malouf*, this court was asked to consider arguments that this court did not have jurisdiction to hear an action seeking a preliminary injunction to enforce a forum selection clause.[100] The clause in *Malouf* vested jurisdiction to hear disputes "with respect to any claim or cause of action arising under or relating to" the contract in "any state court within New Castle County, Delaware."[101] The court found that it had subject-matter jurisdiction to enforce the forum selection clause through an anti-suit injunction, because monetary damages would not be adequate to compensate the injured party for breach of the forum selection clause. Rather, the court found that the parties had bargained for the forum selection clause, and any remedy other than specific performance would "deprive Plaintiffs of the benefit of their bargain."[102] This principle applies here.[103]

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[99] *See Ingres Corp. v. CA, Inc.*, 8 A.3d 1143, 1144 (Del. 2010), *aff'g* 2009 WL 4575009 (Del. Ch. Dec. 7, 2009).
[100] *ASDC Holdings, LLC v. Richard J. Malouf 2008 All Smiles Grantor Retained Annuity Trust*, 2011 WL 4552508 (Del. Ch. Sept. 14, 2011).
[101] *Id*. at *5.
[102] *Id*. at *6.
[103] Despite National's arguments, the Supreme Court's 1995 decision in *El Paso Natural Gas Co. v. TransAmerican Natural Gas Corp.* does not establish that this court did not have the jurisdiction to grant an injunction or order of specific performance in aid of Carlyle's rights

In the circumstances of National's relationship with Carlyle, National is in no position to second-guess the court's determination to enter the default judgment enjoining National from violating the forum selection clause and thus, by doing so, specifically enforcing Carlyle's contractual rights. The undisputed facts indicate that Carlyle marketed Carlyle Capital Corporation's shares to many sophisticated parties from many jurisdictions.[104] The obvious purpose of having those investors promise 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.[105] A Rule 60(b) motion is too late for National to make the argument that there was no basis for this court to conclude that the forum selection clause was the type of contractual promise the breach of which

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under the forum selection clause. 669 A.2d 36 (Del. 1995). In *El Paso*, the Supreme Court ruled that this court did not have jurisdiction over an action based on a forum selection clause that purported to vest jurisdiction to adjudicate "[a]ll actions to enforce or seek damages, specific performance or other remedy for the alleged breach of [a settlement agreement] in the Chancery Court of the State of Delaware." *Id*. at 38. As the Court noted, parties may not "confer equitable jurisdiction [on the Court of Chancery] where it is otherwise lacking." *Id*. at 39. In other words, the Supreme Court found that the forum selection clause at issue in *El Paso* was itself an improper one because it ignored the limited jurisdiction given this court by our state's laws. But the forum selection clause in this case differs from that in *El Paso*, because the clause confers jurisdiction not on the Court of Chancery but on "the courts of the State of Delaware." SA ¶ 8. Carlyle thus came to this court – rather than Superior Court – to enforce that clause for an obvious reason, which distinguishes this case from *El Paso*: the Court of Chancery is the court constitutionally and statutorily empowered to grant injunctions and the remedy of specific performance. Del. Const. art. 4, § 10; 10 *Del. C.* §§ 341-42. Furthermore, the forum selection clause in *El Paso* was a "narrow" one, in that it purported only to cover certain kinds of action, which did not include the particular wrongs alleged by the plaintiff in that case. *See Malouf*, 2011 WL 4552508, at *5 (discussing "broad" and "narrow" forum selection clauses in the context of *El Paso*). Here, the forum selection clause is a "broad" one, covering "any … proceeding with respect to this Subscription Agreement." SA ¶ 8. Therefore, *El Paso* does not apply, and the more general rule stated in *Ingres* does.

[104] Alverson Decl. ¶ 7.

[105] *Cf. Carnival Cruise Lines v. Shute*, 499 U.S. 585, 593 (1991) (upholding a forum selection clause on a cruise contract, and noting that "a mishap on a cruise could subject the cruise line to litigation in several different fora").

would not be adequately remedied by monetary damages. The context of this case – with a party like Carlyle trying to ensure an efficient, predictable way of resolving potential claims by diverse, far-flung counterparties through the use of a forum selection clause – presents a good example of 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.[106] Making Carlyle run around the globe retaining lawyers and hazarding 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.[107]

B. National Cannot Obtain Relief Under Rule 60(b)(6)

I finally discuss National's claim for relief under Rule 60(b)(6). National has not briefed this claim fairly and has instead just noted it in passing, perhaps realizing that it is not a strong argument.

Rule 60(b)(6) is a catch-all provision whereby the court may grant relief "for any other reason," but the standard is stringent: the party moving for relief must show "extraordinary circumstances."[108] National cannot demonstrate "extraordinary circumstances" in this case. Instead, National itself made the decision not to contest this

[106] *Ingres*, 8 A.3d 1143.

[107] As I noted, when discussing whether Carlyle might have been able to raise the forum selection clause in Kuwait, National has not even conceded that a Kuwaiti court would recognize any forum selection clause that binds a Kuwaiti citizen to litigate in courts of another nation. *See* Magied Suppl. Decl. Thus, National is poorly positioned to argue that Carlyle can get any relief from the Kuwaiti courts. 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 to only litigate in Delaware.

[108] *See, e.g.*, *Bachtle v. Bachtle*, 494 A.2d 1253, 1256 (Del. 1985); *Scureman v. Judge*, 1998 WL 409153, at *5 (Del. Ch. June 26, 1998).

lawsuit in the required manner, ignoring numerous opportunities to do so for two years. Rule 60(b)(6) does not apply when one party has made a deliberate choice to handle a case in a certain way, suffers an adverse result, and therefore seeks to adopt a new strategy.[109] National's decision to not appear and thus to suffer a default judgment may have been unwise, but does not constitute extraordinary circumstances relieving it of the consequences of its own tactical choice.

IV. Conclusion

For the foregoing reasons, National's motion to reopen the default judgment under Rules 60(b)(4) and 60(b)(6) is DENIED.

[109] *See, e.g.*, *In re Pac. Far E. Lines, Inc.*, 889 F.2d 242, 250 (9th Cir. 1989) ("[W]here parties have made deliberate litigation choices, Rule 60(b)(6) should not provide a second chance."); *In re U.S. Robotics Corp. S'holders Litig.*, 1999 WL 160154, at *13 (Del. Ch. Mar. 15, 1999) ("There is nothing extraordinary about a litigant's wish, in retrospect, that litigation on his behalf had been handled differently.").