EFiled: May 20 2020 03:22PM EDT
Filing ID 65648602
Case Number 22,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GULF LNG ENERGY, LLC and GULF LNG PIPELINE, LLC,	)	
	)	No. 22, 2020
Plaintiffs Below, Appellants,	)	
	)	CASE BELOW:
v.	)	
	)	COURT OF CHANCERY
ENI USA GAS MARKETING LLC,	)	OF THE STATE OF DELAWARE
	)	C.A. No. 2019-0460-AGB
Defendant Below, Appellee.	)	

APPELLANTS' REPLY BRIEF AND ANSWERING BRIEF ON CROSS-APPEAL

ROSS ARONSTAM & MORITZ LLP

Bradley R. Aronstam (Bar No. 5129)
S. Michael Sirkin (Bar No. 5389)
R. Garrett Rice (Bar No. 6242)
100 S. West Street, Suite 400
Wilmington, Delaware 19801
(302) 576-1600

Attorneys for Plaintiffs Below, Appellants Gulf LNG Energy, LLC and Gulf LNG Pipeline, LLC

Of Counsel:

Joseph S. Allerhand
Seth Goodchild
Tania C. Matsuoka
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Mark W. Friedman
William H. Taft V
Carl Micarelli
Lisa Wang Lachowicz
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, New York 10022
(212) 909-6000

Dated: May 4, 2020
PUBLIC VERSION FILED:
May 20, 2020

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NATURE OF PROCEEDINGS

This appeal and cross-appeal raise important issues of first impression for this Court concerning arbitral awards subject to the FAA: (1) when is a "second" proceeding an impermissible collateral attack on a prior arbitral award, and (2) who decides the collateral attack issue—the courts, under the FAA framework for award review, or a second arbitral panel, under an arbitration agreement.[1]

As Gulf explained in its opening brief, the national policy favoring arbitration depends upon courts rigorously enforcing the FAA provisions governing the limited and exclusive avenues for attacking an arbitral award. Here, Eni's attempted second bite at the apple, whether framed in terms of negligent misrepresentation or breach of contract, indisputably seeks to claw back some or all of the damages the first panel ordered Eni to pay Gulf. In so doing, Eni would necessarily upset the balanced determination the prior panel made in allowing Eni an early release from the 20-year terminal use agreement between the parties, but requiring Eni to pay equitable damages. Eni therefore seeks to undo the prior award in disregard of the FAA's exclusive provisions for challenging that award.

In this brief, Gulf first shows that the Court of Chancery erred in permitting Eni's breach of contract claim to proceed before a new arbitration panel on the rationale that the prior panel did not separately resolve the merits of that claim.

[1] Unless otherwise defined, capitalized terms herein have the meaning set forth in Appellants' Opening Brief.

Just like Eni's negligent misrepresentation claim, its breach of contract claim seeks to fundamentally change the first tribunal's net damages award and thereby rectify the "harm" Eni claims to have suffered by the Final Award. Having failed to challenge the Final Award under the FAA, Eni now has no right to bring a collateral attack in a second arbitration. Gulf then addresses Eni's unpersuasive effort to show that the Court of Chancery erred in holding that Eni's negligent misrepresentation claim constituted the "epitome" of an impermissible collateral attack.

Finally, Gulf addresses Eni's contention that the Court of Chancery lacked jurisdiction to consider Eni's collateral attack on the Final Award, an argument properly rejected below. The FAA requires a party wishing to attack an arbitration award to do so directly and address that challenge to a court, not arbitrators. Allocation of that role to courts is critical to both the overall FAA scheme and any agreement for final and binding arbitration, as it ensures the finality of arbitral awards and prevents potentially endless litigation.

SUMMARY OF ARGUMENT

Summary of Reply Argument in Support of Appeal

The collateral attack doctrine turns on whether a party's "ultimate objective" in a second arbitration or judicial proceeding is to rectify harm suffered, or address misconduct or other defects occurring, in a prior arbitration. Because it seeks to recoup some or all of the damages the first arbitral tribunal awarded Gulf, and thereby upend the Final Award, Eni's attempted redo of its breach of contract claim in the Second Arbitration constitutes an impermissible collateral attack. If Eni believed the first panel failed to fully resolve the parties' dispute when it determined that the breach of contract claim was "academic" and deserving of "no further consideration" in light of the panel's overall resolution of the parties' dispute, then Eni could have raised that issue only with that prior panel under the applicable rules of arbitration, or in court under the FAA's exclusive process for challenging arbitral awards.

The Court of Chancery thus erred in allowing Eni's breach of contract claim to proceed in a second arbitration on the ground that the first panel granted no relief on Eni's breach of contract claim. Importantly, the Court of Chancery's focus on whether the breach of contract claim was actually decided on the merits ignores that Eni's Second Arbitration seeks to unwind the careful balance the first panel struck in deciding that the claim was "academic" and worthy of "no further

consideration" in light of its overall determination releasing Eni from its obligations under the TUA, but in return requiring Eni to pay equitable restitution. Moreover, the creation of this exception is not supported by case law and is at odds with the very purpose of the collateral attack doctrine. Finally, the doctrine of "independent legal significance," which Eni apparently seeks to invoke, has nothing to do with the FAA or the collateral attack doctrine.

Summary of Argument in Opposition to Cross-Appeal

1. Denied. Under settled Delaware and federal court precedent, courts must enforce the provisions of the FAA and bar collateral attacks on arbitral awards. Eni mischaracterizes the issue on appeal as one concerning "the applicability and scope of an arbitration *agreement*." Eni Br. at 27 (emphasis added). Not so. This appeal addresses an entirely different question, namely a court's power to protect and enforce a final arbitration *award* from collateral attack in a new proceeding when that award has not been timely challenged under the FAA. Here, the Court of Chancery possessed jurisdiction to enjoin Eni's claims because the FAA grants courts the exclusive power to review and enforce arbitration awards. Eni's assertion that the Court should have punted this issue to a Second Arbitration contravenes the FAA, and would eviscerate the circumscribed but vital role of the courts in ensuring the integrity and finality of arbitrations. Eni's reliance on the U.S. Supreme Court's decision in *Schein* is unavailing

because, as the Court of Chancery properly held, that case did not address award enforcement, let alone the collateral attack doctrine.

2. Denied. The Court of Chancery properly enjoined Eni's negligent misrepresentation claim in the Second Arbitration, which (incorrectly) asserts that Gulf misled the tribunal in the first arbitration and thereby increased the damages award Gulf received. The Court of Chancery properly found that this claim is an impermissible collateral attack because: (1) Eni, by its own admission, seeks to "claw back some or all of the damages that were awarded to Gulf" in the first arbitration, a proceeding "that is supposed to be concluded"; and (2) the essence of the claim "is that Gulf procured damages in the First Arbitration by engaging in misconduct that tainted the Final Award." Op. at 30-31. The Court of Chancery's decision enjoining Eni's negligent misrepresentation claim should be affirmed.

ARGUMENT

I. THE COURT OF CHANCERY'S APPLICATION OF THE COLLATERAL ATTACK DOCTRINE

A. The Court of Chancery Erred in Failing to Apply the Collateral Attack Doctrine to Bar Eni's Breach of Contract Claim.

Eni misses the central point of the collateral attack doctrine. Eni's breach of contract claim is a collateral attack on the Final Award because it seeks to claw back the net damages awarded, and it entails a question about the scope of issues the first tribunal decided that Eni had to challenge—if at all—in court under the FAA. Whether or not the tribunal decided that breach claim on the merits is irrelevant.

1. The Court Erred in Holding That Eni's Breach of Contract Claim Is Not a Collateral Attack Because it Believed the Claim Was Not Addressed on the Merits.

The crux of Eni's argument is that, even though the relief sought would upend the first panel's damages award, its reassertion of its same breach of contract claim in the Second Arbitration nevertheless cannot be a collateral attack because it "was never addressed on the merits" and "no award was ever made" on that claim. Eni Br. at 17. But whether the particular claim asserted in a second proceeding was decided on the merits in a prior arbitration is irrelevant to application of the collateral attack doctrine. Opening Br. at 28-29. Eni simply ignores what the case law makes clear, namely that the appropriate inquiry is

whether the new claim attacks the conduct of the prior arbitration, or the party's "ultimate objective" in bringing the claim (whether previously raised or not) is to "rectify the alleged harm [] suffered" as a result of a prior arbitral award. *Id.* at 23, 28-29. If either of these conditions applies, the claim is a challenge that must be timely raised to the prior tribunal under the parties' agreed-upon arbitration rules or in court under the FAA's limited review provisions. *Id.* at 21-22, 30-31.

By any measure, Eni's breach of contract claim is an impermissible attack under this standard. Eni ignores that it claims as damages in the Second Arbitration the restitution it was required to pay under the Final Award. Eni cannot escape the fact that its own Notice of Arbitration clearly and expressly alleges that "Gulf's breaches have caused substantial injury and damages to Eni, including … the amounts that Eni has had to pay to Gulf [under the Final Award] for Gulf's purported decommissioning of the Pascagoula Facility." A353 A146-47; *see also* Opening Br. at 9-10. It is hard to imagine a more self-evident attack on the first arbitration's outcome.

Eni's contention that its breach of contract claim purportedly seeks damages in addition to this restitution (as well as declaratory relief) (Eni Br. at 12, 25-26) is beside the point. It of course does not fix the problem that Eni expressly seeks to have a second tribunal revisit "the amounts that Eni has had to pay to Gulf for Gulf's purported decommissioning," the dominant part of the tribunal's

restitutionary damages award. A353. Nor does it change the fact that those other damages, in this context, represent further means of recovering the net damages that the tribunal awarded Gulf. Importantly, allowing parties to evade the FAA review process by simply tacking on additional damages theories would eviscerate the collateral attack doctrine's underlying purpose, and the important policies of finality and efficiency it serves.

Contrary to Eni's position, and the decision below, courts applying the collateral attack doctrine do not consider or examine how an arbitration award was determined, what particular claim or claims upon which it was based, whether the party acknowledges its goal of reversing the award, the label the party assigns its new claim, or whether that claim was previously asserted in the first proceeding. Indeed, courts have regularly barred parties from asserting claims that were never previously raised (and on which no award was ever made), but which sought to undo a prior award without raising that challenge to the prior panel or under the FAA scheme.[2] As such, the proper focus is whether the new proceeding seeks, in

[2] *See, e.g.*, *Decker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 205 F.3d 906, 910-11 (6th Cir. 2000) (allegedly "independent" breach of contract and tort claims brought in subsequent proceeding that did not "directly challenge the [prior] arbitration award" barred as collateral attack on prior arbitration award); *Gulf Petro Trading Co. v. Nigerian Nat'l Petro Corp.*, 512 F.3d 742, 749-50 (5th Cir. 2008) (claims that were "separate from the contract dispute … that was the subject of the [first] arbitration" constituted a collateral attack); *Corey v. N.Y. Stock Exch.*, 691 F.2d 1205, 1212-13 (6th Cir. 1982) (party "may not transform what would

effect, to upset the arbitration's final result.[3] Given that Eni is claiming injury from the first tribunal's damages award, it is simply immaterial to the application of the collateral attack doctrine whether the first tribunal "rule[d] on the merits of" Eni's contract claim, the claim "asserted in [the] second arbitration." Eni Br. at 20. For example, if Eni tried to attack the net damages the tribunal ordered it to pay Gulf by recharacterizing its breach of contract claim as a tort claim, it would also be barred by the collateral attack doctrine even though the first tribunal never heard that claim, nor decided it on the merits.

Tellingly, neither Eni nor the Court of Chancery in its decision below cites a single case refusing to apply the collateral attack doctrine because the supposedly new claim was not previously decided or did not serve as the basis for the award. Indeed, the Court of Chancery itself eschewed any such requirement in enjoining

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ordinarily constitute an impermissible collateral attack … by changing defendants and altering the relief sought").

[3] *See, e.g.*, *Decker*, 205 F.3d at 910 (contract and tort law claims impermissible collateral attacks where "ultimate objective" was to "rectify the alleged harm" suffered in prior arbitration); *Prudential Sec. Inc. v. Hornsby*, 865 F. Supp. 447, 451-52 (N.D. Ill. 1994) (claim alleging adversary fraudulently concealed evidence during an arbitration an impermissible collateral attack because it was an "attempt to right that alleged injustice"); *Gulf Petro*, 512 F.3d at 749-50 (common law and statutory claims an impermissible collateral attack where alleged harm derived from the impact the conduct had on the final award issued by the arbitrators); *Pryor v. IAC/InterActive Corp.*, 2012 WL 2046827, at *6 (Del. Ch. June 7, 2012) (breach of contract claim an impermissible collateral attack where its "objective [was] to remedy the alleged harm [] suffered by receiving a smaller arbitration award than [plaintiff] would have received in the absence of the [submission of the allegedly improper evidence]") (internal quotations omitted).

Eni's negligent misrepresentation claim even though it was not asserted in the first arbitration and thus not part of the Final Award. The Court nevertheless found Eni's newly minted claim to be the "epitome" of an impermissible collateral attack because it sought to "nullif[y]" Gulf's recovery in the first arbitration and "undo[]" the Final Award by "claw[ing] back some or all of the damages" awarded outside of the FAA process for challenging awards. Op. at 30. Eni's objective in seeking to assert its breach of contract claim in the Second Arbitration is no different: it too seeks to claw back or effectively reduce the very same damages awarded in the first arbitration, and likewise is the "epitome" of a collateral attack. *See* Opening Br. at 25-29. Similarly, both challenges are premised on a ground for setting aside an award under the FAA, which further supports a finding that each represents an impermissible collateral attack. *See id.* at 30-31; Op. at 31.

Without any authority supporting its position, Eni criticizes the cases cited by Gulf, claiming that they all "involve attempts to undo or alter awards rendered on claims that were actually addressed and decided in a prior arbitration." Eni Br. at 17-18. Eni's attack is a red herring, as *every* arbitral award—including the one at issue here—is necessarily an award that was rendered on a claim "actually addressed and decided in a prior arbitration." Otherwise, there would be no award to challenge. But that truism does not confine the collateral attack doctrine to

cases in which a party reasserts the exact same claim that a prior tribunal decided on the merits.

In fact, none of the cases Eni discusses in its brief requires a new claim to have been presented to and decided by the first panel to trigger the collateral attack doctrine.[4] Eni essentially seeks to import principles of claim preclusion into a distinct and unrelated doctrine that does not require identity between claims—and even bars claims that were never raised, nor could have been raised, in the first arbitration. But as the Fifth Circuit recently held in *Texas Brine*:

> The test for a collateral attack is not merely whether the claims "attempt to relitigate the facts and defenses that were raised in the prior arbitration." Such a limitation would not align with *Corey* and *Decker*, "where the plaintiffs were found to be engaged in collateral attacks even though they did not attempt to relitigate the facts and defenses of the underlying disputes that had prompted arbitration, but instead were alleging that the wrongdoing had tainted the arbitration proceedings and caused unfair awards." We found that the plaintiff's claims in *Gulf Petro* constituted a collateral attack because the

[4] Rather, each of *Arrowood*, *Prudential Securities*, and *Decker* (*see* Eni Br. at 18-19) are like the circumstances present here, entailing attempts to alter a prior arbitration award via a new proceeding and thereby rectify harm occasioned by the award. *Decker*, 205 F.3d at 907, 910; *Prudential Sec.*, 865 F. Supp. at 448-49, 452; *Arrowood Indem. Co. v. Equitas Ins. Co.*, 2015 WL 4597543, at *6 (S.D.N.Y. July 30, 2015). The fact that in *Arrowood*, the party bringing the second proceeding did not deny that it sought to revisit the prior ruling does not support Eni's position, given that its demand for reimbursement was "explicitly premised" on allegations of misconduct in the prior proceeding (withholding a document), which would have the practical effect of nullifying the award. *Id*. at *4-6. Eni cites no decision requiring what it urges here: that the "prior arbitration award[s] expressly" have ruled "on the merits of the claims sought to be asserted in a second arbitration." Eni Br. at 20.

> plaintiff was seeking to remedy wrongdoing that Section 10 [of the FAA] was meant to address.[5]

Texas Brine thus demonstrates how Eni's position is fundamentally at odds with the collateral attack doctrine and its underlying rationale. As explained in Gulf's opening brief, at its core, the collateral attack doctrine operates to prevent parties, dissatisfied with the results of an arbitration, from seeking a second bite at the apple outside the FAA's exclusive mechanisms for challenging awards by commencing a separate follow-on litigation or arbitration. Opening Br. at 18-23. Preventing such "arbitral mulligans" ensures that the statutory framework, in particular Section 10 of the FAA, remains "the exclusive remedy for challenging acts that taint an arbitration award."[6] Eni's narrow view of the collateral attack doctrine would greatly restrict Section 10's application and allow parties to end-run its mandate through artful pleading. This, in turn, would undercut the FAA as the exclusive means of challenging arbitral awards, a rule that exists in order to advance the hallmark principles of finality and efficiency that make arbitration so attractive to commercial parties in the first place. Opening Br. at 18.

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[5] *Tex. Brine Co. v. Am. Arbitration Ass'n, Inc.*, 2020 WL 1682777, at *5 (5th Cir. Apr. 7, 2020) (internal citations omitted); *see also* Op. at 31 (a party "has no right to bring a collateral attack now to 'challenge the very wrongs affecting the award for which review is provided under section 10'") (citation omitted).

[6] *Arrowood*, 2015 WL 4597543, at *5.

Eni's related contention that Gulf has engaged in a "tortured re-interpretation" of the Final Award to create a "merits decision in Gulf's favor," Eni Br. at 20, is both inaccurate and, in any event, beside the point. Eni ignores that a determination that the prior contract claim was "academic" and deserved "no further consideration" was itself a decision of the Panel—a decision that further consideration of the claim would be immaterial to the overall outcome.[7] Indeed, the careful balance of consideration struck by the first tribunal in the Final Award—allowing Eni to be released from future payments under the TUA but requiring it to pay equitable damages—underscores why the Court of Chancery erred in finding that Eni's breach of contract claim, which seeks to invade and reverse that balanced determination, is not a collateral attack. The focus on Eni's breach of contract claim in isolation ignores what the first arbitration was all about: whether Eni should be released from the TUA and, if so, at what price. *See* Opening Br. at 8-10. Eni nowhere disputes that the panel decided *that* question—taking into account, insofar as it deemed necessary, all of the parties' competing arguments and claims—or that the tribunal's decision required Eni to pay restitution to Gulf based substantially on decommissioning costs. To allow Eni to now reassert that breach of contract claim in a second proceeding, and claw back

[7] Of course, a fact finder's decision not to reach an issue in the course of resolving a dispute is a decision in and of itself that is part and parcel of the overall resolution of the matter.

some or all of the damages awarded to Gulf, would allow Eni to unwind the panel's decision. *See* Opening Br. at 27-28. As the authorities Gulf cites make clear, such efforts are precluded.

The FAA requires that if Eni had a problem with the tribunal's determination in this regard, it should have sought relief under Section 10. Eni's effort, set forth in a lone footnote, to explain away its failure to seek recourse under the FAA because it was "absolutely clear" that the Final Award "rendered no award" on its breach of contract claim (Eni Br. at 21-22, n.1) is puzzling given that Eni does not dispute that it had the ability to challenge the Final Award under Section 10, including on *precisely those grounds*.[8] And Eni's attempt to deflect the burden of seeking vacatur to Gulf ignores that it is *Eni* that now seeks redress for the alleged injury of being compelled by the First Award to pay decommissioning costs, and it is *Eni* that believes a decision on its breach of contract claim might have reduced or eliminated that injury.

Thus, Eni's argument actually makes Gulf's point because even if Eni were correct in its assumption that the first tribunal failed to resolve its breach of contract claim, that would not support a right to revisit the net damages award in a new arbitration. Rather, it would constitute *both* a ground for the original arbitral

[8] 9 U.S.C. § 10(a)(4) (permitting vacatur where arbitrators failed to render "mutual, final, and definite award upon the subject matter submitted").

tribunal to correct its award under the parties' agreed arbitration rules, *and* a ground for a court to potentially set aside an award under the FAA. Specifically, the ICDR Rules allow a party, within 30 days, to ask the same arbitral tribunal to "make an additional award as to claims … presented but omitted from the award."[9] Moreover, the FAA allows a party, within 3 months, to ask a court to set aside an award if the arbitrators failed to make "a mutual, final, and definite award upon the subject matter submitted."[10] Eni made the strategic choice to forgo both of these opportunities in this regard—even conceding that there was no ground to set aside the award. A269. It cannot now seek to attack the award on that same ground before a new panel of arbitrators. *See* Opening Br. at 30-32.

Finally, there is no merit to Eni's contention that Gulf is "switching 'operative' legal tests" from the one "proffered to the Court of Chancery." Eni Br. at 22. Eni takes exception to Gulf's explanation of the standard as one examining the "second proceeding's intended or likely effect on the prior award and its finality." *Id.* But there has been no "switch." Gulf's description of the test here is entirely consistent with its articulation of the test below where Gulf explained that: "the relevant inquiry for determining if the claims in the Second Arbitration amount to an impermissible collateral attack is whether 'the nature of the claims

[9] ICDR Rule 33(1).

[10] 9 U.S.C. § 10(a)(4).

and relief sought in the Second Arbitration … (a) seek[] to rectify alleged harm suffered in the earlier arbitration, or (b) challeng[e] alleged misconduct occurring in that earlier proceeding which purportedly tainted the prior Award.'" Op. at 25 (quoting AR002).

Discussing a subsequent proceeding's "intended or likely effect" on prior awards simply explains that the collateral attack doctrine bars claims brought in subsequent proceedings (such as Eni's) that seek to rectify alleged harm suffered in the earlier arbitration in order to circumvent the FAA and its policy of finality. Opening Br. at 21-22, 28-29. Gulf is entitled to further explain the legal test it advanced below against the backdrop of the relevant FAA policy.

2. Eni's Contention that its Breach of Contract Claim Has "Independent Legal Significance" to its Parent Company is Irrelevant.

Eni contends that its breach of contract claim "may not be construed as a collateral attack" because it has "independent legal significance from the relief set forth in the prior arbitration." Eni Br. at 23. Eni's argument finds no support in either the case law or the record before this Court.

As a threshold matter, Eni's argument has nothing to do with the independent legal significance doctrine. That doctrine, a "bedrock" principle of Delaware corporate law, ensures that a transaction effected in compliance with one section of the Delaware General Corporation Law is an "act of independent legal

significance," which will not be invalidated if it fails to comply with another section of the DGCL.[11] The rule provides certainty to parties structuring a transaction "in a way compliant with one section of the DGCL," therefore ensuring "that the courts will not invalidate the transaction for its failure to comply with a different section."[12] It has no bearing on the FAA or the collateral attack doctrine at issue here.[13]

What Eni apparently means by "independent legal significance" is its hope that if the second panel were to find that Gulf breached the TUA, that ruling might provide Eni's *parent company* a defense for non-payment to Gulf under a *separate* contract (a parent guarantee) in a separate action currently pending in New York state court. Eni Br. at 24-25. That Eni's Second Arbitration might allow it (or its parent company) to gain some perceived tactical advantage in another forum does not permit it to end-run the congressionally mandated exclusive review process by bringing an otherwise impermissible collateral attack on a prior arbitration.

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[11] C. Stephen Bigler & Blake Rohrbacher, *Form or Substance? The Past, Present, and Future of the Doctrine of Independent Legal Significance*, 63 BUS. LAW. 1, 1-2 (2007); *Orzeck v. Englehart*, 195 A.2d 375, 377 (Del. 1963).

[12] Bigler & Rohrbacher, 63 BUS. LAW. at 1-2.

[13] Neither of the cases cited by Eni addresses the doctrine of independent legal significance. Rather, they merely reflect the principle that the collateral attack doctrine does not apply to claims that present a fresh independent dispute between the parties, as opposed to an attempt to challenge a prior arbitral award outside the FAA process. *See Prudential Sec.*, 865 F. Supp. at 450-52; *Gulf Petro*, 512 F.3d at 749-50.

Nothing in the FAA, the collateral attack doctrine, or the doctrine's underlying rationale supports the exception for which Eni is advocating, which through artful pleading of disappointed litigants would easily swallow the rule. Indeed, the doctrine is designed to prevent such gamesmanship. Furthermore, contrary to the false impression Eni has conveyed, Eni's parent has in fact raised Gulf's alleged breach of contract as both a defense and in a counterclaim for damages in the New York action. That contention is currently being litigated there.[14]

B. The Court of Chancery Correctly Barred Eni's Negligent Misrepresentation Claim as an Impermissible Collateral Attack on the Final Award.

1. Question Presented

Did the Court of Chancery properly bar Eni's negligent misrepresentation claim as an impermissible collateral attack on the Final Award on grounds that it was "a transparent tactic to claw back the damages it paid Gulf" under the Final Award and sought to challenge misconduct that should have been raised under the FAA?[15]

[14] A031, A460-62; Op. at 7-8;

[15] A017-48; A487-501; A505-42; AR001-08.

2. Standard of Review

The Court of Chancery's conclusions in granting in part judgment on the pleadings and entering the permanent injunction are questions of law that this Court reviews *de novo*.[16]

3. Merits of the Argument

The Court of Chancery properly enjoined Eni's negligent misrepresentation claim as an impermissible collateral attack on the Final Award because: (a) "the essence of" that claim "is that Gulf procured damages in the First Arbitration by engaging in misconduct that tainted the Final Award;" and (b) Eni, by its own admission, seeks to "claw back some or all of the damages that were awarded to Gulf" in the first arbitration, a proceeding "that is supposed to be concluded." Op. at 30-31. Eni's brief fails to establish that the Court of Chancery's permanent injunction of the negligent misrepresentation claim should be reversed.

Aside from its jurisdictional argument, Eni's primary contention is that the Court of Chancery erred in holding that its claim constituted an impermissible collateral attack because Eni is not arguing that "the Final Award was tainted or erroneous in any way," nor is it seeking to "challenge, alter or undo any aspect of

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[16] *W. Coast Opportunity Fund, LLC v. Credit Suisse Sec. (USA), LLC*, 12 A.3d 1128, 1131 (Del. 2010) ("Judgment on the pleadings may be entered only where the movant is entitled to judgment as a matter of law."); *N. River Ins. Co. v. Mine Safety Appliances Co.*, 105 A.3d 369, 380-81 (Del. 2014) ("embedded legal conclusions" on permanent injunction are reviewed *de novo*).

the Final Award." Eni Br. at 46. But as the Court of Chancery correctly recognized in rejecting this contention below, Eni's position "exalts form over substance…. As a substantive matter, [] Eni's misrepresentation claim is a transparent tactic to claw back the damages it paid Gulf under the Judgment [confirming the Final Award] for the purpose of reducing and potentially nullifying the substance of the damages award that Gulf obtained as a result of the First Arbitration." Op. at 31-32.

Eni seeks to decouple the impact of Gulf's alleged misconduct from the damages it paid under the Final Award, claiming that "while Eni contends that Gulf's questionable conduct has consequences, it does not contend that those consequences extend to the prior award." Eni Br. at 47. But Eni's characterization of its claim in its appellate brief as somehow existing apart from the Final Award cannot be squared with the allegations in its own Notice of Arbitration. Indeed, Eni's own pleading directly links Gulf's purported misrepresentations to the amount of restitution the panel ordered Eni to pay Gulf: "As a direct result of Gulf's apparent misrepresentations, the tribunal awarded Decommissioning Costs and excluded the amount of future Reservation and Operating Fee payments that Gulf would receive from ALSS in calculating the compensation for Decommissioning Costs awarded to Gulf." A354. Thus, according to Eni, the injury caused by Gulf's alleged misconduct was that the monetary judgment it was

compelled to pay in the Final Award was larger than it otherwise would have been but for Gulf's alleged misrepresentations: "Had Gulf not made these apparent misrepresentations, the compensation amount paid by Eni for decommissioning costs would have been greatly reduced, or reduced to zero." *Id.*

While Eni speculates that its claim is somehow independent because the monetary relief in the Second Arbitration "could take a number of forms unrelated to the prior award," Eni Br. at 49, Eni's own Notice of Arbitration directly links the damages sought to the injury purportedly caused by the first tribunal's award of decommissioning costs. Nor does Eni's generalized supposition that Gulf's alleged misrepresentations may have "consequences in relation to the parties' broader transaction and dealings as a whole" fare any better. Eni Br. at 47. In fact, a party's desire to employ the result of its otherwise impermissible second proceeding in other contexts does not over-ride the collateral attack doctrine, and Eni tellingly cites no authority supporting such an outcome.

Whatever the causal effects that Eni now hopes its negligent misrepresentation claim might have elsewhere, the Court of Chancery correctly held that "Eni's ultimate objective in the Second Arbitration is to receive payment for decommissioning costs it was required to pay to satisfy the Final Award…. If Eni had its way, for all practical purposes, the finality of the Final Award would be undone and the monetary recovery Gulf obtained in the First Arbitration would be

nullified." Op. at 30. Eni's negligent misrepresentation claim is accordingly a classic impermissible collateral attack irrespective of the speculative benefits a decision on that claim might offer Eni in other contexts.

Furthermore, independent of the relief it seeks, Eni does not take issue with the Court of Chancery's finding that the central contention underlying this claim (*i.e.*, that Gulf's alleged misrepresentations tainted the Final Award) must be raised, if at all, only under the FAA. *Id*. at 31. Indeed, the Court of Chancery's conclusion in this regard is amply supported by decisions holding that claims attacking misconduct during an earlier arbitration constitute impermissible collateral attacks that should be pursued under Section 10, which provides the exclusive remedy to challenge awards "procured by corruption, fraud, or undue means." 9 U.S.C. § 10(a)(1).

Thus, in *Phillips Petroleum*, for example, the Court of Chancery held that a damages claim premised on a party's purported improper conduct during an arbitration constituted an impermissible collateral attack, reasoning that the FAA "provides the exclusive remedy for challenging conduct that taints an arbitration award."[17] Similarly, in *Prudential Securities*, a federal court applied the doctrine to enjoin a second arbitration claiming that the other party had fraudulently

[17] *Phillips Petroleum Co. v. Arco Alaska, Inc.*, 1988 WL 60380, at *5-6 (Del. Ch. June 14, 1988).

concealed evidence in a prior arbitration, explaining that because "the policies behind section 10 [of the FAA] would be eviscerated if it were only an optional way to modify an arbitration award, an attempt to modify an award by a route or mechanism other than section 10 must be enjoined."[18] In this section of its opposition brief, Eni neither distinguishes these cases nor offers any authority of its own. Its silence is telling.

[18] 865 F. Supp. at 451-53; *see also Arrowood*, 2015 WL 4597543, at *6 (enjoining arbitration seeking to recover amounts paid under a prior award, which the claimant alleged had been obtained through fraud and other misconduct).

II. THE COURT OF CHANCERY HAD JURISDICTION TO DECIDE WHETHER ENI'S SECOND ARBITRATION CONSTITUTED AN IMPERMISSIBLE COLLATERAL ATTACK.

A. Question Presented

Did the Court of Chancery properly conclude that it had jurisdiction to decide whether the Second Arbitration constituted an impermissible collateral attack on the Final Award and Judgment under its authority to protect the statutory FAA scheme providing the exclusive means of challenging arbitral awards?[19]

B. Standard of Review

Gulf and Eni agree that the Court's review of this question is *de novo*.[20]

C. Merits of Argument

Because the FAA grants courts the exclusive power to review arbitration awards, Eni's contention that a new panel of arbitrators should hear its attacks on the first arbitration is wrong. According to Eni's logic, as long as there is a valid arbitration agreement, even applications to enforce or vacate an award under the FAA would have to be determined by arbitrators because of a broad arbitration clause in the underlying agreement at issue. That result is contrary to the FAA, and would both deprive courts of their circumscribed but vital role in ensuring the

[19] A017-48; A505-42; A487-501; A571-79; AR008-13.

[20] Subject matter jurisdiction is a question of law that this Court reviews *de novo*. *Linn v. Del. Child Support Enforcement*, 736 A.2d 954, 959 (Del. 1999). While Eni characterizes the matter at issue differently (and erroneously) as concerning "the applicability and scope of an arbitration agreement," Eni Br. at 27, the standard of review is the same.

integrity and finality of arbitrations and invite an exhaustive series of new arbitrations, with each one challenging the process or results of the previous one. The Court of Chancery moreover properly rejected Eni's misplaced reliance on *Schein* because that case entailed an entirely separate doctrine "premised on different considerations." Op. at 26.

Consequently, the Court of Chancery correctly exercised its jurisdiction to enjoin Eni's collateral attack on the Award—not as a "policy exception" to the FAA's mandate to enforce arbitration agreements, but as a means of enforcing the FAA's separate but equally important policy mandate that arbitration awards are final, subject only to the FAA's limited grounds for challenge that Eni made a tactical decision to forsake.

1. Courts Are Required to Protect the FAA's Exclusive Framework for Review of Arbitration Awards.

The two-fold statutory arbitration framework established by the FAA exposes the infirmity of Eni's central contention that "[t]his is a dispute about arbitrability." Eni Br. at 27. This dispute is not one about arbitrability but, rather, a dispute about enforcement of final arbitration awards and protecting those awards from impermissible collateral attacks.

To protect and promote the United States' "emphatic federal policy in favor of arbitral dispute resolution,"[21] the FAA tasks courts with two distinct but equally important roles. At the outset of a dispute, courts determine whether there is a valid agreement to arbitrate and, if so, direct the parties to arbitration. 9 U.S.C. §§ 2-4. That mandate gives rise to all of the "arbitrability" cases on which Eni relies. But the FAA is not only concerned with enforcing agreements to arbitrate. Once a final award is rendered, courts must also enforce the award as rendered unless one of the parties successfully invokes the limited grounds enumerated in the FAA to vacate or modify the award within three months. *Id.* §§ 9-12.

The FAA thus clearly and expressly vests courts—not arbitrators—with jurisdiction over challenges to arbitration awards. Whereas Section 4 provides that when there is a valid agreement to arbitrate, a court "shall make an order summarily directing the parties to proceed with the arbitration," Sections 9 through 13, which concern award enforcement, contain no such language. Instead, once an arbitration has resulted in an award, these provisions require the courts to address any award challenges.[22] That is, the FAA's "statutory regime" of limited review

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[21] *KPMG LLC v. Cocchi*, 565 U.S. 18, 21 (2011).

[22] *See, e.g.*, 9 U.S.C. § 9 ("[A]t any time within one year after the award is made any party to the arbitration may apply *to the court* so specified for an order confirming the award, and thereupon *the court* must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.") (emphasis added); *id.* § 10(a) ("[T]he United States court in and for the

"leaves the fulfillment of the arbitrators' mandate, after the making of an award, entirely to *judicial*, rather than arbitral, decisions."[23] Yet by myopically focusing on only the FAA provisions regarding enforcement of arbitration agreements, Eni seeks to turn the statutory framework regarding enforcement of arbitration awards on its head by depriving courts of the authority that the FAA expressly confers on them.

Eni's approach undermines the FAA's very foundations. As the FAA's legislative history, structure, and text confirm,[24] Congress deliberately intended to provide for time- and scope-limited review by courts as the exclusive recourse against arbitration awards, and these limits reflect "the interests in finality of an award."[25] And as repeatedly recognized, the FAA's purposeful curtailment of parties' post-award remedies was essential to achieving Congress's goal of promoting arbitration's "speed and finality," qualities which make it so attractive

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district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration[.]"); *id.* § 11 (same).

[23] Gary B. Born, INTERNATIONAL COMMERCIAL ARBITRATION 3118 (2d ed. 2014) (emphasis added) (hereinafter "Born").

[24] *See Arbitration of Interstate Commercial Disputes: Hearing on S. 1005 and H.R. 646 Before the Subcommittees of the Committees on the Judiciary*, 68th Cong. 34 (1924) (brief submitted by of Julius Cohen, Member, American Bar Association; General Counsel, New York State Chamber of Commerce) ("The grounds for vacating, modifying, or correcting an award are limited.").

[25] Born, at 3134.

in the first place.[26] As the U.S. Supreme Court has recognized, the FAA's post-award provisions "substantiat[e] a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway."[27] Delaware courts—including the Court below—and federal courts in the Third Circuit have likewise recognized these elementary FAA principles.[28]

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[26] *See Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co.*, 397 F.2d 594, 598 (3d Cir. 1968) (setting aside awards for reasons beyond narrow grounds specified in Section 10 "would defeat the primary advantages of speed and finality which led to the development of arbitration in business disputes"); *Prudential Sec.*, 865 F. Supp. at 450 ("The strictures of section 10 and section 12 [of the FAA] are designed to afford an arbitration award finality in a timely fashion, promoting arbitration as an expedient method of resolving disputes without resort to the courts.") (alteration in original) (quoted in Op. at 15).

[27] *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 588 (2008).

[28] *See* Op. at 12 ("The rationale of these [collateral attack] decisions is that the FAA affords limited review of and a tight deadline to challenge an arbitration award to ensure that finality is achieved promptly and efficiently."); *id.* at 27 (recognizing "the policies of finality and limited review of arbitration awards embedded in the FAA"); *Sutter v. Oxford Health Plans LLC*, 675 F.3d 215, 219 (3d Cir. 2012) ("[M]indful of the strong federal policy in favor of commercial arbitration, we begin with the presumption that the award is enforceable. An award may be vacated only upon one of the four narrow grounds enumerated in the Federal Arbitration Act[.] … These grounds are exclusive and may not be supplemented by contract.") (citation omitted), *aff'd*, 569 U.S. 564 (2013); *Roquette Freres, S.A. v. Solazyme, Inc.*, 154 F. Supp. 3d 68, 74 (D. Del. 2015) ("[T]he [FAA]'s 'exclusive regimes for the review' of [] an award are confined to §§ 10 and 11 of the Act.") (quoting *Hall St.*, 552 U.S. at 590), *aff'd*, 673 F. App'x 219 (3d Cir. 2016)).

Sections 10 through 13 of the FAA provide the "*exclusive* remedy for challenging acts that taint an arbitration award."[29] The Congressional goals of finality and efficiency behind those Sections "would be eviscerated if it were only an *optional* way to modify an arbitration award."[30] Accordingly, the U.S. Supreme Court unequivocally rejected the notion that parties may contract around the FAA's exclusive scheme for review of arbitral awards by, for instance, agreeing to expand a court's scope of review to cover erroneous conclusions of law.[31]

As set forth in Gulf's opening brief, given the statutory requirement that parties can attack arbitration awards only in court and through the FAA, courts have consistently held that the FAA bars parties from trying to evade these strictures by attacking awards collaterally. As the Fifth Circuit also recently explained in the *Texas Brine* decision addressed above:

> Judicial review in the arbitration context is limited. The Supreme Court has held that the statutory bases for vacating an arbitrator's award are the only grounds on which a court may vacate an award.… Further, *purportedly independent claims are not a basis for a*

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[29] *Pryor*, 2012 WL 2046827, at *6 (emphasis added).

[30] *Prudential Sec.*, 865 F. Supp. at 451 (emphasis added).

[31] *Hall St.*, 552 U.S. at 578 ("The [FAA] provides for expedited judicial review to confirm, vacate, or modify arbitration awards. The question here is whether statutory grounds for prompt vacatur and modification may be supplemented by contract. We hold that the statutory grounds are exclusive.") (citations omitted); *see also id.* at 586 ("the text compels a reading of the §§ 10 and 11 categories as exclusive").

> *challenge if they are disguised collateral attacks on the arbitration award*.[32]

In so holding, the Fifth Circuit followed a long line of cases, including *Gulf Petro*, *Corey*, and *Decker*, which bar such collateral attacks whether in litigation or arbitration.[33]

Because such collateral attacks would "compromise[] statutory regimes for the recognition and enforcement of [arbitral] awards,"[34] the collateral attack doctrine is not, as Eni contends, "some form of nebulous, unwritten 'finality' policy exception" to FAA Sections 2 through 4 regarding agreements to arbitrate. Eni Br. at 36. Instead, it is an essential mechanism by which courts fulfill their duty to enforce the clearly written provisions of FAA Sections 9 through 13 regarding recognition of and challenges to arbitration awards.

2. The TUA Cannot Be Interpreted to Override the Exclusivity of the FAA Framework of Judicial Review.

The FAA similarly requires rejection of Eni's argument that the parties, by agreeing to the TUA's arbitration clause, somehow contracted around the FAA and

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[32] *Tex. Brine*, 2020 WL 1682777, at *4 (emphasis added) (citing *Hall St.*, 552 U.S. at 586).

[33] *Id.* at *4-7 (citing *Gulf Petro*, 512 F.3d 742; *Corey*, 691 F.2d 1205; *Decker*, 205 F.3d 906).

[34] Born, at 2030 (citing *Decker*, 205 F.3d at 909-10; *Corey*, 691 F.2d at 1211).

conferred on arbitrators the courts' authority to consider attacks on an arbitration award.[35]

First, Eni is wrong in contending that Gulf's invocation of the collateral attack doctrine is "a classic 'procedural arbitrability' issue" of the kind often referable to arbitrators.[36] Eni premises that contention on a dismissive mischaracterization of Gulf's argument: that Eni's Second Arbitration may not proceed "because some event happened (extrinsic to the scope of the arbitration itself)." Eni Br. at 32. Eni's mischaracterization obscures that the "event" is actually that Eni exercised its rights under the TUA's arbitration agreement, had its arbitration, obtained an award, moved to confirm it, represented to the Court of Chancery that no grounds existed to challenge the award (A269)—and yet nevertheless almost a year later attempted to end-run the FAA by attacking that award in a second arbitration. This sequence of events is far from a "classic 'procedural arbitrability' issue" entrusted to arbitrators. On the contrary, it typifies the precise kind of circumstance in which a court must act to enforce the finality of the award under Sections 9 through 13 of the FAA.

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[35] Eni Br. at 29-30 (asserting that by "broad arbitration agreement," the Parties "delegated the question of 'arbitrability' to the arbitrators," and "[t]hat ends the matter").

[36] *Id*. at 31-32 (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002)).

Second, Eni's argument leads to the irrational conclusion that even Section 10 applications to vacate an arbitral award must be arbitrated instead of litigated in court. Eni argues that because the TUA's arbitration clause covers disputes "'of any and every kind or type' including disputes 'based on contract, tort, statute, regulation or otherwise,'" the parties agreed to arbitrate *even about the FAA itself*. Eni Br. at 34. Categorizing Gulf's FAA-based arguments as a mere form of "preclusion," Eni contends that the "TUA expressly requires arbitration of precisely this type of claim," whether "based on the contract's language, common law doctrines, *or the FAA* or other statutory terms." *Id.* at 33 (emphasis added). Eni then asserts that because the TUA's arbitration agreement refers to arbitrators "substantive disputes based on a 'statute,'" it follows that "the Court of Chancery lacked jurisdiction to consider any so-called FAA 'finality' questions." *Id.* at 42.

The logical conclusion of this argument disproves it. According to Eni, by agreeing to arbitrate "substantive *statutory* issues" including "any so-called FAA 'finality' questions," (*id.*) the parties must arbitrate—and courts have no jurisdiction to decide—even issues that the FAA expressly relegates to courts. This presumably includes claims under Section 10(a)(1) that an award was procured by fraud or misrepresentation and claims under Section 10(a)(4) that a mutual, final, and definite award upon the claims presented was not made—which are the very claims that Eni makes in its Second Arbitration. The U.S. Supreme

Court's decision in *Hall Street*, which held that parties may not by contract dispense with the FAA's limits on judicial review of arbitral awards, confirms that the FAA provisions for limited review of arbitral awards are an integral part of the "national policy favoring arbitration" rather than a matter of contract.[37]

In addition to running afoul of the FAA's express language and structure, Eni's argument would produce absurd results. If Eni was correct, *no* party to a broad arbitration clause could *ever* realize "the primary advantages of speed and finality which led to the development of arbitration in business disputes."[38] Under Eni's theory, nothing would prevent a party from thwarting award finality by resorting to a never-ending cycle of arbitrations—each before a different panel of arbitrators—on a perennial series of claims that a prior arbitration was tainted. A "cumbersome … post arbitration process" of this sort would be the antithesis of "arbitration's essential virtue" of finality.[39] It would moreover make it impossible to enlist the powers of courts to enforce an award as authorized by the FAA,[40] and

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[37] *Hall St.*, 552 U.S. at 588.

[38] *Newark Stereotypers' Union*, 397 F.2d at 598.

[39] *Hall St.*, 552 U.S. at 588.

[40] *See* 9 U.S.C. § 9 (court "must" enter judgment confirming award unless award is vacated or modified under § 10 or § 11); *id.* § 13 ("The judgment so entered shall have the same force and effect," and may be enforced to the same extent, as a judgment "in an action in the court in which it is entered.").

it would additionally contradict Eni's own conduct in agreeing to confirmation of the award in a prior proceeding. *See* A032-39; Op. at 8-9.

That cannot be the logical result of an arbitration clause, no matter how broad,[41] and Eni is wrong to argue that "[w]hether a court or arbitration tribunal" addresses attacks on a prior award "does not make the previous arbitration award any more, or less, final." Eni Br. at 41. It certainly does matter, because "[a]rbitrators have no power to enforce their decisions. Only courts have that power."[42] A final and enforceable judicial judgment is the only way to bring a definitive end to the dispute process and compel compliance with whatever relief the arbitrators have awarded.

Third, the TUA itself confirms that the parties did not intend to displace a court's jurisdiction under the FAA to address attacks against an award. On the contrary, they explicitly agreed to treat awards as final and binding and to waive any recourse *except under the FAA*.[43] Eni's attempt to use that waiver provision as an argument *in favor* of recourse to a second arbitration and *not* under the FAA

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[41] *See Federated Rural Elec. Ins. Exch. v. Nationwide Mut. Ins. Co.*, 134 F. Supp. 2d 923, 926 (S.D. Ohio 2001) ("[The parties] agreed to submit disputes arising from the [contracts] to arbitration, and that was what occurred and gave rise to the 1996 arbitration award. The parties did not, however, agree to re-arbitrate, or appeal, the award issued by the arbitrators, nor did the parties agree to arbitrate the finality of any award issued by the arbitration panel.").

[42] *Pac. Reins. Mgmt. Corp. v. Ohio Reins. Corp.*, 935 F.2d 1019, 1023 (9th Cir. 1991).

[43] TUA, Arts. 20.1(a), (h), (o). A250-52.

would upend the agreement. As a federal court held in rejecting this very argument that the interpretation of "final and binding" contractual language is arbitrable under a broad arbitration clause, a party's "thinly disguised effort [] to re-arbitrate, in effect appeal, the [prior] award," if "carried to its logical conclusion," would render the "final and binding" provision utterly "meaningless."[44] Eni's defense of this position—that "interpretation of a contract's terms is a principal activity of arbitrators and a quintessential task of arbitral tribunals" (Eni Br. at 43)—only underscores how far it has deviated from the FAA framework. Under the FAA, deciding attacks on arbitration awards—which is what Eni's Second Arbitration attempts collaterally to do—is a "principal activity" and "quintessential task" of *courts* (*id.*). The FAA allows arbitrators no role in addressing these challenges, and the parties' explicit acknowledgement of that fact in the TUA cannot create one. Eni's arbitrability arguments, including its heavy reliance on *Schein*, do not change the analysis.

The FAA framework also explains why Eni's reliance on the U.S. Supreme Court's decision in *Schein* and other cases concerning "arbitrability" and "preclusion" issues are irrelevant.

None of the cases on which Eni relies refers to the collateral attack line of cases or deals with the courts' power to protect the FAA's exclusive recourse

[44] *Federated*, 134 F. Supp. 2d at 926-28.

against arbitration awards.[45] As the Court of Chancery recognized below, *Schein* "nowhere mentions the collateral attack doctrine" and "does not even refer to any of the cases … that have applied that doctrine." Op. at 26. This is because *Schein*, just like *Howsam* and *Vertiv* (upon which Eni also relies),[46] all confronted a very different scenario where parties at the *outset* of arbitration proceedings sought court assistance to compel arbitration under Section 4 of the FAA.[47] *Schein* is thus the latest in a series of U.S. Supreme Court "arbitrability" cases, not the kind of revolutionary development in arbitration law with respect to *award enforcement* that Eni implies.[48] The Court of Chancery thus correctly held that "[i]n the

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[45] *See* Op. at 27 ("[I]t is not surprising that a decision applying the collateral attack doctrine would not separately consider the question of arbitrability. The point of the doctrine is that a court may intervene to dismiss litigation claims or to enjoin a second round of arbitration based on a prior arbitration in order to vindicate the policies of finality and limited review of arbitration awards embedded in the FAA *notwithstanding the existence of a broad arbitration clause.*") (citing *Arrowood*, 2015 WL 4597543, at *5) (emphasis in original).

[46] Eni Br. at 31-32 (citing *Howsam*, 537 U.S. at 85); *id.* at 31 (citing *Vertiv Corp. v. SVO Bldg. One, LLC*, 2019 WL 1454953, at *2-3 (D. Del. Apr. 2, 2019)).

[47] *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 528 (2019); *Howsam*, 537 U.S. at 85; *Vertiv*, 2019 WL 1454953, at *1; *see also* A545 (Tr. 41:7-9) (the Court) ("But we don't have the multiple parameter arbitration issue in *Schein*. … *Schein* is just a clean first arbitration[.]").

[48] *Compare Schein*, 139 S. Ct. at 526 (holding that its "conclusion follows … from this Court's precedent," including "arbitrability" cases *AT&T Techs., Inc. v. Commc'ns Workers*, 475 U.S. 643 (1986), *and Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63 (2010)), *with* Eni Br. at 28 ("This case is controlled by [*Schein*]."), *and* A549 (Tr. 45:12-18) (counsel for Eni dismissing as irrelevant collateral attack cases which "predated *Henry Schein* anyway" as "completely useless [] for purposes of this case, which is governed by *Henry Schein*").

absence of any actual discussion or analysis of the collateral attack doctrine," *Schein* cannot be read "to overrule this well-established doctrine." Op. at 27.

Yet even if Eni was correct that the "arbitrability" line of cases governed or is at the very least instructive here, those decisions would not support Eni's extreme position that the parties agreed to arbitrate even the arbitrability of issues of award enforcement. Both *Schein* and *Howsam* reiterated the U.S. Supreme Court's holding in *First Options v. Kaplan*, 514 U.S. 938 (1995), that courts "should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so."[49] In light of the parties' unambiguous agreement to waive "any right to appeal from or challenge any arbitral decision or award ... except with respect to the limited grounds for modification or non-enforcement provided by any applicable arbitration statute [*i.e.*, the FAA] or treaty,"[50] it is not "clear and unmistakable" that the parties delegated to arbitrators (rather than courts) the arbitrability of the FAA itself, as opposed to run-of-the-mill questions as to the arbitrability of the subject matter of the underlying dispute. As *First Options* notes, courts "hesitate to interpret silence or ambiguity on the 'who should decide arbitrability' point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter

[49] *Schein*, 139 S. Ct. at 531 (quoting *First Options*, 514 U.S. at 944); *Howsam*, 537 U.S. at 83 (same).

[50] TUA, Art. 20.1(o). A252.

they reasonably would have thought a judge, not an arbitrator, would decide."[51] That principle applies with even greater force when the issue is not who should decide arbitrability at the outset of the dispute, but who should decide whether a court has power to enforce a final award under the FAA—a question that parties would rarely, if ever, expect to be heard by a panel of arbitrators. Here, in fact, the parties addressed that issue in agreeing that the only recourse against the award must be under the FAA, which calls for review by a court and not a second panel of arbitrators. 9 U.S.C. §§ 9-11.

Olick and *Citigroup* likewise did not address the collateral-attack doctrine, despite the fact that in both cases the parties resisted a second arbitration.[52] In *Olick*, the party resisting arbitration invoked the *res judicata* effect of a prior award and judgment but did not separately allege (as Gulf did here) that the second arbitration was a collateral attack in violation of Section 10 of the FAA. The court was not asked to decide, and therefore had no occasion to decide, whether the collateral attack doctrine applied.[53]

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[51] *First Options*, 514 U.S. at 945.

[52] Eni Br. at 39-40 (citing *John Hancock Mut. Life Ins. Co. v. Olick*, 151 F.3d 132 (3d Cir. 1998); *Citigroup, Inc. v. Abu Dhabi Inv. Auth.*, 776 F.3d 126 (2d Cir. 2015)).

[53] Eni's contention that Gulf's position "became a moving target" (Eni Br. at 35 n.3) ignores that Gulf from its very first brief to the Court of Chancery consistently invoked the collateral attack doctrine alongside other arguments. A493-98. It is irrelevant that the argument assumed greater prominence as the parties' briefing

Similarly, *Citigroup* does not address the collateral attack line of cases. Eni's argument that "*Citigroup* is indistinguishable from the instant case in numerous important respects" (Eni Br. at 39) glosses over this critical distinction. While Eni stretches to analogize *Citigroup* by observing that "[t]he party seeking the injunction based its claim on … *the FAA*" and that "the court noted that the FAA provided only limited grounds for review of the prior award,"[54] the party seeking to avoid a second arbitration cited the FAA only for the provision in Section 13 that a judgment under the FAA may be enforced like other judgments, and did not invoke the court's power to protect the *exclusivity of award review* under Sections 10 and 11.[55]

Eni's arguments founder on its refusal to acknowledge that courts' duties are different at the pre-arbitration stage than at the post-award stage is fatal to its arguments. Because this dispute concerns Eni's attempted attack on a final award outside the FAA's exclusive review mechanism, the Court of Chancery properly held that it had jurisdiction to enjoin the Second Arbitration.

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unfolded, including in the supplemental round of briefing that the Court of Chancery requested concerning the collateral attack doctrine. In emphasizing one argument, a party does not waive alternative arguments that it has raised at the same time. *SIGA Techs., Inc. v. PharmAthene, Inc.*, 67 A.3d 330, 343 n.40 (Del. 2013).

[54] Eni Br. at 40 (emphasis in original).

[55] *Citigroup*, 776 F.3d at 134.

CONCLUSION

For the foregoing reasons, and those set forth in its Opening Brief, Gulf respectfully submits that the Court should reverse the judgment below with respect to the breach of contract claim and bar Eni from proceeding with that claim in the Second Arbitration, while affirming the judgment below enjoining Eni from proceeding with its negligent misrepresentation claim in the Second Arbitration.

ROSS ARONSTAM & MORITZ LLP

/s/ Bradley R. Aronstam
Bradley R. Aronstam (Bar No. 5129)
S. Michael Sirkin (Bar No. 5389)
R. Garrett Rice (Bar No. 6242)
100 S. West Street, Suite 400
Wilmington, Delaware 19801
(302) 576-1600

Attorneys for Plaintiffs Below, Appellants Gulf LNG Energy, LLC and Gulf LNG Pipeline, LLC

Of Counsel:

Joseph S. Allerhand
Seth Goodchild
Tania C. Matsuoka
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Mark W. Friedman
William H. Taft V
Carl Micarelli
Lisa Wang Lachowicz
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, New York 10022
(212) 909-6000

Dated: May 4, 2020
PUBLIC VERSION FILED:
May 20, 2020

CERTIFICATE OF SERVICE

I, Bradley R. Aronstam, hereby certify that on May 20, 2020, I caused a true and correct copy of the foregoing *PUBLIC VERSION of Appellants' Reply Brief and Answering Brief on Cross-Appeal* to be served through File & Serve*Xpress* on the following counsel of record:

Joseph B. Cicero
Gregory E. Stuhlman
CHIPMAN BROWN CICERO
& COLE, LLP
Hercules Plaza
1313 North Market Street, Suite 5400
Wilmington, Delaware 19801

/s/ Bradley R. Aronstam
Bradley R. Aronstam (Bar No. 5129)