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IN THE SUPREME COURT OF THE STATE OF DELAWARE

GULF LNG ENERGY, LLC and GULF LNG PIPELINE, LLC,	)	
	)	No. 22,2020
Plaintiffs Below, Appellants/Cross-Appellees,	)	
	)	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/Cross-Appellant.	)	

CROSS-APPELLANT'S REPLY BRIEF ON CROSS-APPEAL

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The Court of Chancery lacked jurisdiction to decide whether a Final Award from a prior arbitration between the parties precluded Eni from pursing its negligent misrepresentation claim in a Second Arbitration—whether under the so-called "collateral attack" doctrine or otherwise—because the parties' broad arbitration clause clearly and unmistakably refers that issue (and all others raised by the parties in this case) to the arbitration panel. Even if the Court of Chancery had jurisdiction, it erred in its determination on the merits that Eni's negligent misrepresentation claim constituted a "collateral attack" on the Final Award because the claim has independent significance from the Final Award.[1]

[1] Unless otherwise indicated, capitalized terms herein have the meaning set forth in Appellee's Answering Brief on Appeal and Cross-Appellant's Opening Brief on Cross-Appeal ("Eni Br.").

ARGUMENT

I. THE COURT OF CHANCERY LACKED JURISDICTION TO DECIDE GULF'S "COLLATERAL ATTACK" ARGUMENT ON THE MERITS

The Court of Chancery lacked jurisdiction to entertain Gulf's "collateral attack" argument on the merits because the TUA expressly delegates to the arbitration tribunal both the threshold question of arbitrability of this claim as well as the threshold question of "who decides" arbitrability. The United States Supreme Court's recent decision in *Henry Schein* unequivocally requires courts to enforce arbitration clauses as written and allows no policy exceptions to that rule. Because it lacked jurisdiction, the Court of Chancery erred by enjoining Eni's negligent misrepresentation claim.

In the contract, the parties agreed to a broad arbitration agreement that covers all disputes of any nature or type, whether based on contract, statute or tort, including, in particular, any dispute relating to "arbitrability" or "jurisdiction." (A250, TUA, Art. 20.1; A176, TUA, Art. 1(57)). In its briefing, Gulf simply ignores this clause. Gulf cannot dispute that the parties *expressly* agreed to arbitrate all issues, including statutory issues and issues of "arbitrability" and "jurisdiction." All issues includes the "collateral attack" issue. And "arbitrability" and "jurisdiction" issues include both the question of whether the "collateral attack" issue is arbitrable and the question of "who

decides" whether the "collateral attack" issue is arbitrable. Gulf cannot challenge any of these facts.

Instead, in Appellant's Reply Brief and Answering Brief on Cross-Appeal ("Answering Brief" or "AB"), Gulf contends that under the FAA, once a party mentions the words "collateral attack," the issue becomes the exclusive province of the courts. Indeed, under Gulf's view, the FAA *precludes* parties from agreeing to arbitrate any issues associated with the magic words "collateral attack," including any threshold questions of "arbitrability" or "jurisdiction" that touch on those magic words. Gulf's position is devoid of merit for the reasons set forth below.

A. The FAA Does Not Expressly Grant Courts the Exclusive Jurisdiction to Rule on "Collateral Attack" Arguments

Gulf contends that Eni's "attacks on the first arbitration" fall within the exclusive jurisdiction of the Court of Chancery. Specifically, Gulf contends that the FAA "expressly" grants courts exclusive jurisdiction anytime the "collateral attack" doctrine is invoked by a party. (*See, e.g.*, AB at 27) ("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.").

This is nonsense. The words "collateral attack" are found nowhere in the FAA. The FAA says nothing about "collateral attacks" on awards just like it says nothing about the issues of *res judicata*, collateral estoppel, judicial

estoppel or the like. And the FAA plainly does not preclude parties from agreeing to refer such issues to arbitration, or to refer threshold questions about the "arbitrability" of such issues to arbitration as well. That should end the matter.

Gulf's own Answering Brief demonstrates the flaw in its position. Gulf relies repeatedly on some variation of the following incorrect, non-sequitur proposition: "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." (AB at 24); (*id.* at 4) (the FAA expressly "grants courts the exclusive power to review and enforce arbitration awards"). This proposition is incorrect. Arbitration tribunals "review" prior awards all the time to address issues such as collateral estoppel, *res judicata* and judicial estoppel. *See* Born, International Commercial Arbitration at 3762 (2014) ("U.S. preclusion rules . . . apply equally in judicial, arbitral and other quasi-judicial contexts" and "the arbitrators' obligation to apply the law . . . includes preclusion rules").

In fact, the FAA is much more limited than Gulf claims. The FAA grants courts the authority to enforce arbitration awards and limits their power to deny enforcement of such awards to the grounds stated for vacating or modifying an award. Gulf itself acknowledges this by relying on FAA Sections 9 through 13

in its brief. (*See, e.g.*, AB at 26) ("The FAA thus clearly and expressly vests courts—not arbitrators—with jurisdiction over challenges to arbitration awards.") (referring to the FAA, Sections 9 through 13). This allows parties to take such enforced awards and have them treated as court judgments.

The instant case is not about the enforcement of a prior arbitration award. The instant case is not about vacating or modifying a prior award.[2] The Final Award from the prior arbitration has already been confirmed. The Final Award from the prior arbitration has been fully paid by Eni USA. Gulf does not dispute that the Final Award has been confirmed. Gulf does not dispute that the Final Award has been paid.

What Gulf asserts in this case is that a judicially-created doctrine—which is not mentioned or addressed anywhere in the FAA—can be used to bar claims in subsequent proceedings that are *not FAA proceedings to enforce or vacate an award*. Nothing in the FAA addresses this common-law doctrine. And nothing in the FAA provides that the parties cannot agree to arbitrate the application of this common law doctrine in the same way that they can agree to arbitrate *res judicata*, collateral estoppel or the like.

[2] Indeed, contrary to Gulf's assertion, the Court of Chancery would not have jurisdiction to rule on a claim seeking to vacate an award rendered in Texas.

In sum, Gulf's argument that the FAA authorizes courts to rule on applications to enforce or vacate arbitration awards is irrelevant to the question presented here: whether the Court of Chancery had jurisdiction to entertain Gulf's "collateral attack" argument on the merits or whether Gulf's arguments are to be submitted to arbitration pursuant to the parties' arbitration agreement. Gulf's contention that the FAA "expressly" vests courts with exclusive jurisdiction over "collateral attack" issues is devoid of merit and finds no support in the language of the FAA.

Indeed, Gulf acknowledges that the Court of Chancery's decision was not based on the language of the FAA but rather on the FAA's "policy mandate." According to Gulf, "the Court of Chancery correctly exercised its jurisdiction to enjoin Eni's collateral attack on the Award . . . 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." (AB at 25). Yet, Gulf's "policy" argument likewise lacks merit for the reasons set forth below.

B. Finality Policy Does Not Grant Courts the Exclusive Power to Rule On "Collateral Attack" Arguments

Despite finding a "clear and unmistakable agreement" to arbitrate the issue of arbitrability, the Court of Chancery held that the "collateral attack" doctrine allows a court to "intervene [ ] 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*." (Op. at 19) (emphasis in original).

Thus, relying on "policies" "embedded in the FAA," the Court of Chancery determined that it could refuse to apply the parties' "broad arbitration clause" as written and could enjoin arbitration "based on a prior arbitration award" notwithstanding the clear language of the parties' arbitration agreement. In its Answering Brief, Gulf argues that the Court of Chancery's decision correctly relied on the policies embedded in the FAA. (AB at 25). Gulf's argument lacks merit on numerous grounds.

First, *Schein* prohibits invoking a vague and unwritten finality "policy" under the FAA to override the parties' express agreement to arbitrate. (*See e.g.*, Eni Br. at 28-30; 36-37). The Supreme Court made clear that the FAA makes no provision for policy exceptions to enforcing arbitration clauses. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019) ("The short answer is that the Act contains no 'wholly groundless' exception, and we may not engraft our own exceptions onto the statutory text."); *id*. at 531 ("[W]e may not rewrite the statute simply to accommodate that policy concern."); *see also Dean Witter Reynolds Inc. v. Byrd*, 105 S. Ct. 1238, 1239 (1985) ("By its terms, the [FAA] leaves no place for the exercise of discretion by a district court, but

instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed") (emphasis in original).

The Supreme Court made clear that when there is no explicit, statutory constraint that prohibits a contractual delegation of disputes to arbitration, including delegation of questions of arbitrability, such prohibition cannot be imposed based on "policy" considerations. (Eni Br. at 36); *Schein*, 139 S. Ct. at 530-31 ("Congress designed the FAA in a specific way, and it is not the proper role of the courts to redesign the statute" . . . to "accommodate policy concerns").

Second, even if the FAA had an embedded "finality" policy, such a policy would not be materially advanced by the position Gulf espouses here. Whether Eni's new arbitration claims are barred "based on a prior arbitration award" is a question that must be answered in some forum. Whether a court or arbitration tribunal answers this question does not make the previous arbitration award any more, or less, final. (Eni Br. at 41). No different "finality" purpose is served by having a court, rather than an arbitration tribunal, rule on Gulf's "collateral attack" allegation. That issue is not a "finality" issue but rather purely a matter of choice of forum. The parties have agreed on the forum that is to apply whatever "finality" concerns are embodied in law. In this case, that forum is the arbitration.

Moreover, while Gulf dives head-first into the abstract concept of "finality," *see* AB at 4, 12, 16, 21, 25, 27, 29, 30, 31, 33, Gulf fails to distinguish the "collateral attack" doctrine from other finality doctrines, such as *res judicata*, collateral estoppel and the like. These doctrines, too, raise finality concerns but these issues are routinely submitted to and decided by arbitrators.

In its Answering Brief, Gulf does not challenge that arbitrators have jurisdiction to decide whether a prior award or judgement has preclusive effects on a subsequent arbitration. *John Hancock Mut. Life Ins. Co. v. Olick*, 151 F.3d 132, 140 (3d Cir. 1998) (holding that a "*res judicata* objection based on [a] prior arbitration is an issue to be arbitrated and is not to be decided by the courts").

The United States Court of Appeals for the Second Circuit's decision in *Citigroup* is illustrative. *Citigroup, Inc. v. Abu Dhabi Investment Auth.*, 776 F.3d 126, 128-33 (2d Cir. 2015). In *Citigroup*, a party sought to enjoin a second arbitration based on an award in a prior arbitration that had been confirmed by the court. *Id*. at 128. The party seeking the injunction raised virtually all of the same policy concerns that Gulf raises here. The party seeking the injunction claimed that "the second arbitration constituted an 'assault' on the district court's [prior] judgment confirming the first award" and that the FAA as well as the court's "inherent authority" gave it the power to "protect its proceedings and judgments." *Id*. at 127-28. The party sought to preclude the second arbitration

because it purportedly would "give [the opposing party] an opportunity to relitigate the same underlying substantive claims that were . . . raised in the parties' first arbitration." *Id.* at 132. The court noted that the FAA provided only limited grounds for review of the prior award—just like Gulf emphasizes here. However, the court found that those factors weighed in favor of referring the issues to arbitration. *Id.* at 132-33. Accordingly, the court found no FAA "finality" exception and held instead that the issue of the preclusive effect of the prior award on a subsequent arbitration must be referred to arbitration because the parties' broad arbitration agreement required that result.

Gulf's attempt to distinguish *Olick* and *Citigroup* is unavailing and little more than a labeling exercise. In fact, Gulf initially relied principally on the *res judicata* doctrine and the United States Court of Appeals for the Third Circuit's decision in *Olick* in the proceedings below, A495, until it was shown that *Olick* cut against Gulf. However, simply calling the issue "collateral attack" does not make "finality" more important than it is in the *res judicata* context. According to Gulf, "the proper focus is whether the new proceeding seeks, in effect, to upset the arbitration's final result." (AB at 8-9). *Res judicata* and claim preclusion arguments (at issue in *Olick* and *Citigroup*) focus precisely on whether a new proceeding seeks, in effect, to upset the prior result that already finally resolved

a claim or issue in dispute. (*See* Eni Br. at 39, 40). Gulf does not contend otherwise.

Underwriters at Lloyd's v. Century Indem. Co. illustrates that a party's labeling of its arguments as "collateral attack" does not take the argument outside of the scope of the parties' arbitration clause and within the exclusive jurisdiction of the courts. *Certain Underwriters at Lloyd's, London v. Century Indem. Co.,* 2020 WL 1083360 (D. Mass. Mar. 6, 2020). In *Certain Underwriters at Lloyd's,* plaintiff asked the court to enjoin the defendant's demand for arbitration "because it is an attempt to attack the [prior] Arbitration Award collaterally." *Id.* at *3. Plaintiff relied on the same cases Gulf has relied on here – *Corey, Decker, Prudential, Arrowood*. *Id.* at *4. Defendants countered that they were not seeking to challenge the validity of the prior award, but rather, were seeking a determination on claims not addressed in the prior arbitration proceeding. *Id.* at *3.

The court noted that the issue was "not whether [defendant] is seeking to attack the proceedings that resulted in the Arbitration Award, but whether the Arbitration Award precludes arbitration regarding [plaintiff's claim]." *Id*. at *4. The court concluded that "the preclusive effect of an arbitration award is an arbitrable issue that is not for the Court to resolve." *Id.* For the same reason, Gulf's arguments that this case involves the back-end of arbitration rather than

"outset" or front-end of arbitration is incorrect. The only issue presented in this case is Gulf's claim for an order enjoining at the "outset" an arbitration that has not yet occurred. This is a pure "front-end" issue. The question of whether a court may enjoin an arbitration and which body decides an issue is controlled by the parties' arbitration clause. The Supreme Court in *Schein* already addressed this front-end back-end issue, and made clear that a court cannot import back-end policy considerations to narrow the scope of the parties' arbitration agreement at the front-end. *Schein*, 139 S. Ct. at 527-28.

The same principle applies here. On its face, Eni's Second Arbitration does not challenge anything about the Final Award. Instead, Gulf is trying to use the existence of the Final Award to preclude Eni from pursuing its claims in the Second Arbitration. That is nothing more than a question of "the preclusive effect of an arbitration award" which is "an arbitrable issue that is not for the Court to resolve." *Id.* In fact, plaintiff in *Certain Underwriters at Lloyd's* also argued (as Gulf does here) that defendant's claim in the subsequent arbitration involved the same claim that was "considered" in the prior arbitration and rejected. *Id.* The court disagreed, noting that the prior arbitration tribunal had "stated simply that" the tribunal "did not deem it necessary to address all other

specific requests for relief and denied them." In sum, the court refused to enjoin claims in the new arbitration. *Id.*[3]

Moreover, to prevail on its "finality" policy argument in this case, Gulf would have to show that the FAA policy ***prohibits*** parties from agreeing to arbitrate any issues touching on finality even if they chose to do so. Nothing in FAA or the case law remotely supports such a draconian rule.

C. The Parties' Contract Does Not Usurp Any Court Powers Under The FAA

Gulf contends that if arbitrability is delegated to arbitrators, as the parties' contract here expressly provides, courts would be deprived "of the authority that the FAA expressly confers on them" (AB at 27) and that "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." (*Id.* at 24); (*id.* at 32) ("According to Eni. . . the parties must arbitrate—and courts have no jurisdiction to decide—even issues that the FAA expressly relegates to courts."); (*see also* AB at 3, 12, 17, 27, 29, 32-39).

Gulf's contention—that enforcing the parties' arbitration clause as written would usurp the courts power to review and set aside awards—is incredulous.

[3] On the other hand, Gulf cannot point to a single case where a court addressed the arbitrability question and ignored the express delegation of arbitrability to arbitrators in order to entertain a "collateral attack" argument. (Eni Br. at 38, fn 4).

First, as a practical matter, arbitrators do not have the power to enter judgments. Accordingly, arbitration tribunals cannot enter judgments enforcing or vacating an arbitration award and it would be useless for any party to bring such a claim to arbitration. Second, nowhere does Eni contend that the parties have agreed to submit to arbitration applications to confirm or vacate an arbitration award, and no such application is at issue here. Moreover, any application under the FAA Section 10 to vacate an award would be resolved in courts not because of policy considerations of finality, but because of the FAA's express language.

Gulf's fear that enforcing the parties' arbitration clause in this case would result in parties "thwarting award finality by resorting to a never-ending cycle of arbitrations" is likewise misplaced. (AB at 33). Arbitrators, just like courts, are more than capable to rule on whether a party's claims are precluded by prior decisions or awards, or are otherwise not arbitrable. *Schein* 139 S. Ct. at 531 ("Arbitrators can efficiently dispose of frivolous cases by quickly ruling that a claim is not in fact arbitrable."). Indeed, courts have expressly rejected Gulf's argument that requiring an arbitrator to determine the preclusive effect of a prior arbitral award will result in "a never-ending cycle of arbitrations." *See Int'l Union of Elec., etc. v. RCA Corp*., 516 F.2d 1336, 1341 (3d Cir. 1975) (dismissing plaintiff's "fear that prior decisions will be relitigated ad infinitum presaging a demise in finality and opening the door to abuse," and concluding that "finality,

consistent with the provisions of the agreement, will be preserved" given that plaintiff would be free to raise before the arbitration tribunal the same contention it had presented to the court).

Finally, contrary to Gulf's belated contention in its Answering Brief, the parties' arbitration agreement is not ambiguous. The clause expressly states that questions of "arbitrability" and "jurisdiction" are subject to arbitration. Gulf admitted at the hearing before the Court of Chancery that the TUA's arbitration clause "clearly and unmistakably" delegates the question of "arbitrability" to the arbitrators. (A510, Hearing Tr. 6:18-24) ("And even the issue of arbitrability, if it's clear and unmistakable that the parties said—as, by the way, we don't dispute our contract does—even if there is an issue of, is the issue subject to arbitrability, that's for the panel."). The Court of Chancery correctly concluded that "the broad language of the arbitration provision" in the TUA "evinces the parties' agreement to arbitrate the issue of arbitrability." (Op. at 19) ("In my opinion, the parties to the TUA evinced a 'clear and unmistakable' agreement to arbitrate the issue of arbitrability"). Gulf's attempt to now walk back its prior concession comes too late and in any event, is devoid of merit in light of the plain language of the arbitration clause. (*See also* Eni Br. 29-31).

Gulf relies on the provisions in the parties' contract that provide that any award shall be "final and binding" and "not subject to appeal." Gulf contends

that in light of this language, it is not clear and unmistakable that the parties delegated to arbitrators the arbitrability of the following question – "who should decide whether a court has power to enforce a final award under the FAA." (AB 37-38). However, as noted above, neither Eni's claims in the Second Arbitration nor Gulf's "collateral attack" argument turns on the question of courts' powers to enforce awards under the FAA. This case has nothing to do with enforcing the Final Award. *The Final Award has already been confirmed*.

Further, as the *Olick* Court explained, such "finality" language in the contract weighs in favor of referring the dispute to arbitration. *Olick*, 151 F.3d at 139-40 (explaining that by agreeing to arbitration, the parties intended that the arbitrator, not the court, would "determine the nature and extent, if any, of that finality"); (Eni Br. at 42-43).

Accordingly, the Court of Chancery's Order enjoining arbitration of Eni's negligent misrepresentation claim should be reversed on jurisdictional grounds.

II. THE COURT OF CHANCERY ERRED IN ENJOINING ENI'S NEGLIGENT MISREPRESENTATION CLAIM

Even if the Court of Chancery had jurisdiction to decide the issues, the Court erred by enjoining Eni's negligent misrepresentation claim as a so-called "collateral attack" on the prior award.

A. Gulf's Case Law Confirms That Collateral Attack Doctrine Does Not Apply When Independent Legal Significance Is Alleged

Eni's negligent misrepresentation claim cannot be construed as a "collateral attack" on the Final Award because the claim has independent legal significance from the relief set forth in the Final Award. This principle is established by Gulf's own legal authorities. Consequently, a "plaintiff need only be able to allege wrongdoing that has caused harm ***independent of its effect on the arbitration award*** to avoid the collateral attack label." *Gulf Petro Trading Co. v. Nigerian Nat'l Petro Corp.*, 512 F.3d 742, 751 (5th Cir. 2008) (emphasis added); *see also Prudential Sec. Inc. v. Hornsby*, 865 F. Supp. 447, 450 (N.D. Ill. 1994) ("If the [new] claim is independent, then it may proceed").

Contrary to the assertions by Gulf in its Answering Brief, (*see* AB at 22), Eni has not claimed that Gulf's conduct in the arbitration tainted the Final Award. To the contrary, Eni does not assert in the Second Arbitration that the Final Award was erroneous in any way nor does Eni seek to challenge, alter or undo any aspect of the Final Award. Indeed, Eni prevailed in the prior

arbitration, the TUA was terminated as Eni had sought, and Eni has fully paid the compensation set forth in the Final Award accompanying such termination.

Rather, Eni's negligent misrepresentation claim has independent significance in the parties' overall transaction and dealings, including for purposes of the New York Litigation. (A349-350, NoA ¶ 55) ("[c]ontrary to its representations to the prior tribunal, Gulf subsequently initiated litigation against Eni S.p.A. in New York state court under a Parent Company Guarantee … contending that Eni S.p.A. must continue to pay the Reservation and Operating Fees set forth in the TUA pursuant to the Guarantee."). Eni contends that the manner in which Gulf has dealt with it in the overall transaction has bearing on Gulf's ability to recover in relation to the Guarantee. The significance of Eni's claims in the Second Arbitration is heightened by Gulf's posturing in the New York Litigation. Coextensively with Gulf's efforts here to enjoin arbitration of Eni's breach of contract and negligent misrepresentation claims, Gulf asserted in the New York Litigation that these issues were not properly interposed by Eni S.p.A. in the New York action for various reasons. (A564-65, Hearing Tr. 60:22-24; 61:1-4). For this reason, Eni seeks in the second arbitration "[a]n award declaring that GLE and GLP made material negligent misrepresentations to the tribunal in the prior arbitration." (A355, NoA, p. 23).

Because Eni has alleged that its negligent misrepresentation claim has significance separate from the Final Award, Eni's claim "avoid[s] the collateral attack label" under Gulf's own legal authorities. *Gulf Petro Trading Co., Inc.*, 512 F.3d at 751.

In its Answering Brief, Gulf continues to misstate that Eni seeks to "claw back" the "decommissioning cost" amounts awarded by the tribunal in the Final Award. (*See e.g.*, AB at 1, 19). Nowhere in the NoA does Eni claim that its injury from Gulf's misrepresentations should be measured in relation to any such amounts. To be sure, Eni alleges that Gulf's misrepresentations were both material and successful (in that Gulf gained an advantage) because, absent such misrepresentations, the "decommissioning costs" that Gulf obtained would be less. However, nowhere in the NoA does Eni allege that it should recover such difference. Moreover, under Gulf's theory, any subsequent arbitration between parties that involved damages would be an impermissible "collateral attack" on a prior award, because money is fungible and a damages award in any subsequent arbitration would always have the effect of reducing the amount awarded in the prior proceeding.

B. Gulf Acknowledges that Eni's Negligent Misrepresentation Claim May Have Legal Significance Independent of the Final Award

Gulf does not dispute that Eni's negligent misrepresentation claim may have independent legal significance. Indeed, Gulf acknowledges that a

determination on this claim may provide Eni with "benefits" "in other contexts." (AB at 22) ("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.").

Yet, Gulf urges the Court to disregard the "benefits a decision on that [negligent misrepresentation] claim might offer Eni in other contexts" because, according to Gulf, such benefits are "speculative." (AB at 22). However, it is not for the Court of Chancery, or this Court, to decide whether Eni ultimately prevails on its claim. Indeed, Gulf never asked the Court of Chancery to rule on the merits of Eni's negligent misrepresentation claim (or its potential benefits "in other contexts") and it cannot ask the Court to do so at the eleventh hour in its Answering Brief.

In any event, whether Eni is correct in its theory that Gulf's conduct in the arbitration (which is deemed to be conduct in performance of the underlying contract) impacts Gulf's ability to pursue claims in the New York courts under the related Guarantee is not a question for the Court of Chancery or this Court. Gulf does not contend otherwise. Rather, it suffices that Eni is "able to allege wrongdoing that has caused harm independent of its effect on the arbitration award to avoid the collateral attack label." *Gulf Petro Trading Co., Inc.*, 512 F.3d at 751. Eni has done so.

Accordingly, the Court of Chancery's Order enjoining arbitration of Eni's negligent misrepresentation claim should be reversed on the merits as well.

CONCLUSION

For the foregoing reasons, and those set forth in Eni's Opening Brief on Cross-Appeal, the Court should reverse that portion of the Court of Chancery's Order enjoining arbitration of Eni's negligent misrepresentation claim; and remand the case to the Court of Chancery with instructions to enter judgment in favor of Eni.

Dated: May 14, 2020

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