No. 20-1462

In the Supreme Court of the United States

ENI USA GAS MARKETING LLC,

Petitioner,

v.

GULF LNG ENERGY, LLC
and GULF LNG PIPELINE, LLC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Supreme Court of the State of Delaware correctly held, on the particular facts at issue, that Petitioner's attempt to collaterally attack a final arbitration award by commencing a second arbitration is foreclosed by Federal Arbitration Act provisions establishing the exclusive court process for challenging such final arbitral awards?

CORPORATE DISCLOSURE STATEMENT

Respondents Gulf LNG Energy, LLC and Gulf LNG Pipeline, LLC are indirectly owned by Kinder Morgan, Inc. No other publicly held company holds 10% or more of their stocks.

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Pursuant to the Court's request for a response, dated June 10, 2021, Respondents Gulf LNG Energy, LLC and Gulf LNG Pipeline, LLC (together, "Respondents" or "Gulf") respectfully submit this brief in opposition to the petition for a writ of certiorari, dated April 15, 2021 (the "Petition"), filed by Petitioner Eni USA Gas Marketing LLC ("Petitioner" or "Eni").

STATUTORY PROVISIONS INVOLVED

Section 9 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 9, provides:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at 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.

Section 10 of the FAA, 9 U.S.C. § 10, provides, in relevant part:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbi-

> tration—(1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Section 11 of the FAA, 9 U.S.C. § 11, provides:

> In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—
>
> (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
>
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the

> merits of the decision upon the matter submitted.
>
> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.
>
> The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

Section 12 of the FAA, 9 U.S.C. § 12, provides, in relevant part:

> Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered.

Section 13 of the FAA, 9 U.S.C. § 13, provides, in relevant part:

> The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

INTRODUCTION

The provisions of the FAA governing this fact-bound case are well settled. Section 9 allows a party to seek a court order confirming a final award, which the court "must grant," unless the award is "vacated, modified, or corrected as prescribed in Sections 10 and 11." 9 U.S.C. § 9. Sections 10 and 11 provide the exclusive grounds for a vacatur, modification, or correction. 9 U.S.C. §§ 10, 11; *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 578 (2008). And Section 12 requires that a motion for such relief be served within three months after the arbitration award is filed or delivered. 9 U.S.C. § 12. Petitioner chose not to pursue this exclusive statutory process and instead filed a second arbitration demand 12 months after the award was rendered, seeking to challenge conduct before the first tribunal and to claw back the tribunal's net damages award. The Supreme Court of Delaware correctly enjoined Petitioner's attempt to evade the exclusive process prescribed by the FAA and disturb the finality of the judgment entered on the award. That decision does not warrant this Court's review.

Petitioner contends that the decision below conflicts with the decisions of two courts of appeals and this Court's decision in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019). That contention is incorrect. The two court of appeals decisions Petitioner cites did not involve the question presented here. And *Schein* does not "control this dispute," Pet. App. 22a, because it dealt with determinations about arbitrability on the front end, before arbitration has taken place. As the Supreme Court of Delaware correctly observed, *Schein* "did not ad-

dress, much less do away with, a court's jurisdiction to enjoin collateral attacks on arbitration awards" on the back end, once an arbitration is complete. Pet. App. 22a.

There is similarly no merit to Petitioner's repeated contention that the decision below was based on common-law claim or issue preclusion. *See* Pet. 2–3, 8, 10, 13, 18. Far from relying on any common-law doctrine, the Supreme Court of Delaware applied the text and structure of a federal statute, the FAA, correctly holding that attacks on an arbitration award must be brought in the manner set forth in Sections 10, 11, and 12 of that statute. As the decision below recognized, parties cannot "circumvent the . . . FAA review procedure" by filing follow-on proceeding[s]," including a second arbitration, to "in effect appeal[] the prior award." Pet. App. 23a–24a.

Nor is there merit to Petitioner's attempt to portray the decision below as creating a "policy-based" exception to the FAA based on an "anti-arbitration" rationale. *See* Pet. 3–4, 14–17. On the contrary, the Supreme Court of Delaware's conclusion is consistent not only with the FAA's text but also with its pro-arbitration purpose. The decision below promotes the integrity and finality of arbitration awards. In contrast, Petitioner's approach would substantially undermine those interests by permitting parties to evade the FAA through serial attacks on arbitrations that have run their course and resulted in final arbitration awards. Making final arbitration awards subject to endless challenges—as Petitioner advocates—would seriously undermine the federal policy favoring arbitration.

In any event, even if this Court were interested in addressing the issues Petitioner seeks to present,

this case would be a poor vehicle for doing so. The dispute is highly fact-bound, featuring an unusual procedural history involving repeated attempts by Petitioner to reassert the same claims in multiple fora in an effort to undermine the finality of the arbitration award, and an arbitration agreement that contains a broad contractual waiver of award challenges outside the FAA review procedure. There is no reason, moreover, for the Court to review this issue right now. If appellate courts were someday to experience the kind of confusion and conflict that Petitioner speculatively predicts, the Court could take up any issues at that time and with the benefit of all of that further development and maturation.

The Petition should be denied.

STATEMENT

This case is part of a complex series of arbitrations and civil actions concerning the parties' obligations under a long-term agreement to reserve capacity at a Gulf Coast liquefied natural gas ("LNG") regasification facility.

1. On December 8, 2007, Petitioner and Respondents entered into a Terminal Use Agreement ("TUA"), pursuant to which Respondents would construct and operate an LNG import facility at the Port of Pascagoula, Mississippi (the "Facility"), and reserve capacity at the Facility for Petitioner, in exchange for fixed monthly fees Petitioner would remit to Respondents over the course of an initial term of twenty years.

Respondents constructed the Facility on time and to specification, commencing the initial term at the contractually defined "Commercial Start Date" of

October 1, 2011. The increased availability of domestic shale gas, however, reduced demand for imported LNG, causing Petitioner to direct its LNG cargoes to other markets where it could command a higher price.

2. a. On March 1, 2016, Petitioner invoked the parties' arbitration agreement to seek early termination of the TUA and release from its obligations thereunder. As grounds for termination, Petitioner invoked the common-law doctrine of frustration of purpose. In the alternative, Petitioner alleged that Respondents' effort to obtain regulatory permits needed to modify the Facility to add a liquefaction and export capability breached a provision of the TUA describing Respondents' corporate purpose.

b. In the TUA, the parties agreed to arbitration administered by the American Arbitration Association's International Centre for Dispute Resolution ("ICDR") as the exclusive and definitive forum for resolving disputes arising out of, relating to, or connected with the TUA. Pet. App. 5a. The parties further agreed that any arbitration award rendered by the ICDR tribunal "shall be final and binding"; that "[j]udgment on the award of the arbitral tribunal may be entered and enforced by any court of competent jurisdiction"; and that they would waive their rights to challenge any such award, except pursuant to the "limited grounds" for award challenge available under the FAA:

> To the extent permitted by Applicable Law, the Parties hereby waive any right to appeal from or challenge any arbitral decision or award, or to oppose enforcement of any such decision or award be-

> fore a court or any governmental authority, *except with respect to the limited grounds for modification or non-enforcement provided by any applicable arbitration statute* or treaty.

Resp. App. 17a–18a; Pet. App. 5a–6a (emphasis added).

c. On June 29, 2018, the tribunal issued a final award ("Award") declaring the TUA terminated because its essential purpose had been frustrated, and addressing the economic consequences of termination. In recognition of the benefits realized by Petitioner in signing the TUA, and the obligations Petitioner would be relieved of upon early termination of the agreement with respect to future decommissioning costs, the tribunal ordered Petitioner to pay equitable restitution to Respondents, plus pre- and post-award interest. To this amount the tribunal applied a set-off for the fixed-fee payments received by Respondents after December 2016. In light of this comprehensive relief on the frustration of purpose claim, the tribunal determined that Petitioner's breach of contract claim had "become academic and deserves no further consideration." Pet. App. 7a.

d. On July 26, 2018, Petitioner sought a correction to the operative portion of the Award to clarify Respondents' obligation to reimburse Petitioner's post-December 2016 fee payments. Petitioner invoked Article 33(1) of the governing ICDR International Arbitration Rules, which provides:

> Interpretation and Correction of Award. Within 30 days after the receipt of an award, any party, with notice to the

> other party, may request the arbitral tribunal to interpret the award or correct any clerical, typographical, or computational errors *or make an additional award as to claims, counterclaims, or setoffs presented but omitted from the award*.

Resp. App. 1a (emphasis added). Petitioner made no equivalent application for any "additional award" or "setoff" premised on its breach of contract claim. On July 31, 2018, the tribunal granted Petitioner's application. Pet. 7.

3. a. In September and December 2018, Respondents moved and Petitioner cross-moved, respectively, for confirmation of the Award "in its entirety" in the Delaware Court of Chancery. Pet. App. 8a–9a; Resp. App. 4a. Neither party sought an order vacating or correcting the award on any of the grounds permitted by the FAA within the three-month period following issuance of the Award (or anytime thereafter). 9 U.S.C. §§ 10(a), 11, 12.

To the contrary, Petitioner represented to the Court of Chancery that "no grounds for challenging the Award have been raised (and none exists)"; and that "Eni USA has no intention to collaterally attack or re-litigate any issues decided in the Award." Resp. App. 3a, 5a. Based on these representations, the Court of Chancery noted at the confirmation hearing that, "[s]ignificantly, none of the parties in their pleadings have asserted a claim to modify, correct, or vacate the [Award]"; "[t]he sole relief sought is to confirm [it]." Resp. App. 7a.

b. The Award was confirmed by final order and judgment of the Court of Chancery on February 1,

2019. Pet. App. 9a. The judgment declared the TUA terminated as of March 1, 2016, pursuant to the Award, and entered judgment in favor of Respondents and against Petitioner in the amount of $371,577,849, which Petitioner subsequently paid in full. Pet. App. 9a. Although Petitioner initially refused to pay outright and sought instead to pay Respondents by monthly installment, the Court of Chancery emphasized that its judgment "is immediately due and payable." Resp. App. 10a, 13a. At no point did Petitioner avail itself of the FAA challenge procedures.

4. a. On June 3, 2019, four months after it secured the order confirming the Award, Petitioner commenced another arbitration at the ICDR, seeking to constitute a new panel to decide two causes of action (the "Second Arbitration"). First, Petitioner alleged that Respondents had made negligent misrepresentations to the first tribunal regarding Respondents' claim for equitable compensation. Specifically, Petitioner contended that Respondents' enforcement of the continued payment obligations of their remaining customer at the Facility, Angola LNG Supply Services ("ALSS"), under a virtually identical TUA between Respondents and ALSS (the "ALSS TUA"), was inconsistent with Respondents' representation to the first tribunal that ALSS would likely seek to terminate the ALSS TUA in the event Eni prevailed on its frustration claim, such that Petitioner's liability in respect of decommissioning costs should not be offset by future amounts owed by ALSS under the ALSS TUA. Pet. App. 73a–74a. In its second Notice of Arbitration, Petitioner alleged that had Respondents not made the alleged misrepresentations in the first arbitration, "*the compensa-*

tion amount paid by Eni for decommissioning costs would have been greatly reduced, or reduced to zero." Pet. App. 74a (emphasis added).

Second, Petitioner asserted the same breach of contract claim with respect to Respondents' exploration of developing a liquefaction capability at the Facility, again in an effort to undo the restitution awarded in the first arbitration. As with the negligent misrepresentation count, Petitioner claimed as damages the very same amounts it paid in satisfaction of the Award just four months prior, seeking specifically to recover "*the amounts that Eni has had to pay to Gulf* for Gulf's purported decommissioning of the Pascagoula Facility" as the Award required. Pet. App. 27a (emphasis added).

b. In addition to Petitioner's renewed pursuit of the breach of contract claim in the Second Arbitration, Petitioner's parent company, Eni S.p.A., is currently pursuing the same claims against Respondents, in New York state court, in response to Respondents' assertion of their rights under Eni S.p.A.'s irrevocable guarantee of Petitioner's TUA obligations. Pet. App. 8a, 34a.

5. a. Respondents sought an injunction of the Second Arbitration in the Delaware Court of Chancery on grounds that the Second Arbitration sought improperly to collaterally attack the Award and the Court of Chancery's judgment confirming it. Resp. App. 11a–17a. That court enjoined the negligent misrepresentation claim but denied the injunction as to the breach of contract claim. Respondents appealed the denial of the injunction as to the latter claim, and Petitioner cross-appealed the injunction of the former.

b. In an opinion issued on November 17, 2020, the Supreme Court of Delaware ordered the Court of Chancery to enjoin the Second Arbitration in full. Pet. App. 35a. The Court "agree[d] with Gulf that the Court of Chancery should have enjoined Eni from pursuing all claims in the Second Arbitration," because "Eni sought through the Second Arbitration, to in effect, 'appeal' the Final Award outside the FAA's review process." Pet. App. 29a. With respect to the breach of contract claim, the court reasoned that "a collateral attack does not hinge upon the nature of the claims or whether they were actually resolved in the prior arbitration," but instead turns on whether the "complainant's objective is to rectify the alleged harm . . . suffered in the first arbitration." Pet. App. 31a (internal quotation marks omitted). Reviewing the particular facts at issue, the court reasoned that the breach of contract claim constituted a collateral attack because it "aim[s] to modify the Final Award by revisiting the core issue in the First Arbitration—was the contract terminated and, if so, what is the appropriate remedy?" Pet. App. 34a. Because Petitioner "should have" sought "to clarify, amend, or challenge the First Arbitration's financial award . . . under the FAA within the three-month limitations period," the court reasoned, Petitioner's "arbitral mulligan" is forbidden by the FAA and should be enjoined. Pet. App. 34a–35a.

6. Meanwhile, litigation on the same issues has proceeded elsewhere. On July 15, 2021, an ICDR tribunal issued a final award on the merits, which denied, with prejudice, ALSS's assertion of the same contract breach claim, by the same counsel, under the virtually identical ALSS TUA. Resp. App. 21a–22a.

REASONS FOR DENYING THE WRIT

This Court should deny certiorari for three reasons.

First, there is no split of authority among federal courts of appeals and state courts of last resort warranting this Court's review. Petitioner contends that the decision below conflicts with a 1998 decision from the Third Circuit and a 2015 decision from the Second Circuit. But the decision below correctly distinguished those cases as addressing only the arbitrability of common-law preclusion principles when they are raised as substantive defenses to claims pursued in a second arbitration. They did not address—let alone resolve—the separate question of whether a court may effectuate the FAA's exclusive statutory scheme by enjoining collateral attacks on a prior arbitration award outside the FAA's time- and scope-limited procedure. That issue is governed by a separate and distinct line of cases.

Second, the decision below correctly applied the FAA and enforced the parties' agreement. The FAA requires a party seeking to challenge a prior arbitration award to do so on specific grounds and "within three months after the award is filed or delivered." 9 U.S.C. §§ 10–12. The parties went even further in this case and agreed by contract to respect that exclusive framework and waive any other routes to challenge final awards. Instead of respecting the FAA's mandatory scheme, Petitioner filed a second arbitration demand expressly seeking to undo and claw back the Award 12 months after it was rendered. By enjoining that attempted end-run around Sections 10, 11, and 12 of the FAA, the decision below effectuated the exclusivity of the FAA's review

procedure as recognized by this Court in *Hall Street*, 552 U.S. at 578, and in doing so enforced the parties' agreement. There is no conflict between the decision below and this Court's decision in *Schein*, which enforced entirely different provisions of the FAA and addressed a context not at issue in this case.

Third, even if the Petition had implicated an issue worthy of certiorari, which it has not, this case would be a poor vehicle for resolving it. The case involves unusual factual circumstances, including Petitioner having sought judicial confirmation of the Award and made representations to the Delaware court that are inconsistent with its subsequent commencement of the Second Arbitration; a provision in the parties' arbitration agreement expressly waiving any appeal or challenge to the Award other than under the FAA; and serial litigation of Petitioner's breach of contract claim across multiple fora. Even if Petitioner were correct that conflicting decisions might result on the basis of different sets of facts, those conflicts should be addressed by the appellate courts in the first instance.

The Petition should be denied.

A. The Petition Does Not Implicate a Genuine Split of Authority Warranting Resolution by This Court.

Certiorari is unwarranted because the Petition does not present a conflict of authority that warrants this Court's review.

1. Petitioner contends that the decision below conflicts with the Third Circuit's decision in *John Hancock Mutual Life Insurance Co. v. Olick*, 151 F.3d 132 (3d Cir. 1998), and the Second Circuit's

decision in *Citigroup, Inc. v. Abu Dhabi Investment Authority*, 776 F.3d 126 (2d Cir. 2015). There is no such conflict.

In *Olick*, the Third Circuit declined to enjoin an arbitration on *res judicata* grounds. 151 F.3d at 140. Olick initiated arbitration against his former employer related to certain limited partnership transactions. *Id.* at 134. After prevailing in that proceeding, he then initiated a second arbitration against his former employer related to various torts. *Id.* The former employer sought to enjoin the second arbitration on the ground that *res judicata* barred the claims. *Id.* The Third Circuit affirmed the denial of an injunction, reasoning that while an injunction to prevent relitigation of a prior federal judgment confirming an arbitration award was within the court's province, the preclusive effect of the prior arbitration award was an issue for arbitration. *Id.* at 137–40.

In *Citigroup*, the Second Circuit similarly considered an attempt to enjoin a second arbitration "on the ground that [the] new claims were barred by the doctrine of claim preclusion, or *res judicata*, because they were or could have been raised in the first arbitration." 776 F.3d at 128. Drawing on its precedent concerning the arbitrability of the *res judicata* effect of state and federal judgments, the Second Circuit held that "the determination of the claim preclusive effect of a prior federal judgment confirming an arbitration award is to be left to the arbitrators." *Id.* at 131.

2. A separate line of "[s]ettled federal and state precedent" recognizes that collateral attacks on a final arbitration award seeking to undo the award or rectify the harm suffered in the prior arbitration—whether brought in litigation or arbitration—are an

"improper" end-run "around the FAA's exclusive review process." Pet. App. 17a.

For example, in *Corey v. New York Stock Exchange*, the Sixth Circuit held that an arbitration claimant could not circumvent Sections 10 and 11 by filing a second proceeding challenging a prior arbitration award. 691 F.2d 1205, 1212 (6th Cir. 1982). The court determined that the second proceeding had "no purpose other than to challenge the very wrongs affecting the award for which review is provided under section 10." *Id.* at 1213. The court explained that allowing the second proceeding to continue would render Section 12's three-month time bar "meaningless if a party to the arbitration proceedings may bring an independent direct action asserting such claims outside of the statutory time period provided for in section 12." *Id.*

In *Decker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, the Sixth Circuit similarly affirmed an injunction against a second arbitration that challenged the first arbitration's final award. 205 F.3d 906, 912 (6th Cir. 2000). The court observed that the claimant's "ultimate objective" in the second proceeding was to "rectify the alleged harm" suffered in the first. *Id.* at 910. The court recognized that the FAA provides the exclusive remedy for challenging an arbitration award and refused to allow the claimant to "bypass the exclusive and comprehensive nature of the FAA by attempting to arbitrate her claims in a separate second arbitration proceeding." *Id.* at 911.

The Northern District of Illinois adopted the same position in *Prudential Securities Inc. v. Hornsby*, 865 F. Supp. 447, 453 (N.D. Ill. 1994). The court observed that the "attempt to arbitrate an 'independent' fraud claim . . . is, in reality, an attempt to aug-

ment and modify the first arbitration award" and concluded that "[b]ecause 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." *Id.* at 451.

And in *Arrowood Indemnity Co. v. Equitas Insurance Ltd.*, the Southern District of New York likewise enjoined a second arbitration seeking to rectify harm allegedly suffered in the first arbitration. No. 13cv7680 (DLC), 2015 WL 4597543, at *8 (S.D.N.Y. July 30, 2015). The district court concluded that the claimant's "Second Arbitration demand to recover sums already paid" was "in direct contravention of the FAA" and "must be enjoined." *Id.* at *6. The *Arrowood* court further explained that an injunction was required to enforce the FAA *notwithstanding* the existence of a broad arbitration clause:

> Although parties are generally free to seek arbitration under a broad arbitration clause, courts may intervene if the "ultimate objective . . . is to rectify the alleged harm" a party suffered from an unfavorable arbitration award "by attempting to arbitrate [its] claims in a separate second arbitration proceeding." Such arbitral mulligans are forbidden by the FAA, which is "the exclusive remedy for challenging acts that taint an arbitration award[,] whether a party attempts to attack the award through judicial proceedings or through a second arbitration."

Id. at *5 (internal citation omitted) (quoting *Decker*, 205 F.3d at 910–11).

Arrowood demonstrates the absence of conflict warranting this Court's review. *Arrowood* decided the collateral attack issue without reference to the Second Circuit's *res judicata* decision in *Citigroup*, which was decided about seven months earlier and is one of two cases the Petition invokes to portray a conflict.

3. Unlike *Olick* and *Citigroup*, the decision below does not concern the arbitrability of a preclusion defense to a claim in arbitration. The Petition's repeated contentions otherwise—on the grounds that Respondents' complaint for an injunction was based on "preclu[sion] by the prior arbitration award," Pet. 8; *see also* 2–3, 10, 13, 18—is incorrect. Respondents expressly contended that Petitioner's Second Arbitration sought to collaterally attack the final Award. *See* Resp. App. 11a–17a.

The dissent below questioned whether the distinction between the preclusive effect of an arbitral award and the prohibition on attacking an arbitral award outside the FAA might be reduced to artful pleading, *see* Pet. App. 40a, but in so doing ignored important differences between these doctrines. Preclusion derives from common-law equitable principles, is not arbitration-specific, and requires a court or arbitrator to consider what was decided in the initial proceeding. The rule against collateral attack, on the other hand, is arbitration-specific, derives from a statute—the FAA—which relegates review and enforcement of final arbitration awards to courts (not arbitrators), *see* 9 U.S.C. §§ 10(a), 11, and guards against dissatisfied parties effectively seek-

ing to undo a prior award. These doctrines are not, as the dissent suggests, interchangeable.

Consequently, even crediting the dissent's observation that preclusion might equally be invoked to bar Petitioner's Second Arbitration is beside the point. While the claims Petitioner raised in the Second Arbitration might be subject to preclusion defenses, it is no less true that the Second Arbitration *also* ran afoul of the statutory scheme of the FAA because it sought to undo the Award outside the framework of Sections 9 through 13 of the FAA. When parties attempt to circumvent the FAA's requirements in this way, courts "may intervene" to forbid such "arbitral mulligans" notwithstanding the presence of a broad arbitration clause. *Arrowood*, 2015 WL 4597543, at *6.

Moreover, the dissent's proposed approach—to collapse the rule against collateral attack with preclusion, "enforce the agreement as written," and send the arbitrability of both of Petitioner's claims to arbitration, *see* Pet. App. 41a—would lead to unworkable and manifestly incorrect consequences. First, under that approach, a disappointed party could even bring an explicit Section 10 challenge—such as that the first award should be undone due to "evident partiality or corruption in the arbitrators," 9 U.S.C. § 10(a)(2)—to a second arbitration tribunal instead of to the courts. If that were permissible, the FAA framework would be completely eviscerated. Second, that approach would create a legal quagmire because it could well result in two final arbitration awards with opposite conclusions, each of which would qualify for confirmation under the FAA. Because there is no hierarchy of arbitration tribunals—unlike the authority the FAA vests in courts to review tribunals'

awards once rendered—parties would be left with what on their face were two (or more) equally valid awards requiring completely different outcomes, with no way to resolve that conflict because a party could always bring yet another arbitration and hope for a different result.

B. The Decision Below Is Correct and Consistent with the FAA's Pro-Arbitration Policy.

Certiorari is also unwarranted because the Supreme Court of Delaware correctly applied established law to the facts of this case. There is no reason for the Court to review that fact-bound decision.

The Supreme Court of Delaware correctly concluded that each of the claims in Petitioner's second arbitration demand was an impermissible collateral attack on the first arbitration award in circumvention of the FAA's mandatory and exclusive framework. Petitioner's Second Arbitration demand asserted counts for declaratory relief and damages for Respondents' alleged breach of the TUA, and declaratory relief, damages, and restitution for Respondents' alleged negligent misrepresentations in the first arbitration. By way of relief, Petitioner specifically sought, among other categories of damages, to claw back the damages it paid to Respondents in satisfaction of the final Award. *See* Pet. App. 27a, 74a.

The nature of Petitioner's claims shows that the second arbitration demand was an impermissible collateral attack on the first arbitration award. Petitioner's breach of contract claim plainly "aim[s] to modify the Final Award by revisiting the core issue in the First Arbitration—was the contract terminat-

ed and, if so, what is the appropriate remedy?" Pet. App. 34a. And Petitioner's misrepresentation claim is that Respondents "procured damages in the First Arbitration by engaging in misconduct that tainted the Final Award." Pet. App. 75a. These features squarely align with the test articulated by the Sixth Circuit in *Decker* and reiterated in *Arrowood*: a follow-on proceeding is an impermissible collateral attack when its "ultimate objective . . . is to rectify the alleged harm [the claimant] suffered" in the first arbitration. *See Decker*, 205 F.3d at 910; *Arrowood*, 2015 WL 4597543, at *5.

The nature of Petitioner's requested relief also confirms that the Second Arbitration demand is a collateral attack on the first arbitration award. Petitioner seeks to undo the result of the Award by having a new panel claw back the restitution it paid to Respondents for the benefits it received under the TUA and avoidance of its future TUA obligations. Petitioner's second Notice of Arbitration explicitly states that it seeks to recover the very amounts Petitioner paid to Respondents pursuant to the Award, seeking, as relief, "the amounts that Eni has had to pay to Gulf for Gulf's purported decommissioning of the Pascagoula Facility." Pet. App. 27a. The sole reason Petitioner paid those amounts is the Award. If Petitioner were to prevail in the Second Arbitration, Respondents' monetary recovery from the Award would be nullified, and the finality of the Award would be undone.

Had Petitioner wished to challenge the conduct of the First Arbitration, or to "clarify, amend, or challenge" the resulting financial award, it should have done so as the FAA requires, within the three-month limitations period set forth in Section 12.

Pet. App. 34a. In particular, Petitioner could have sought vacatur of the award on the grounds that "the award was procured by corruption, fraud, or undue means," instead of launching its negligent misrepresentation claim in the Second Arbitration. *See* 9 U.S.C. § 10(a)(1). Petitioner also could have sought vacatur on the grounds that "a mutual, final, and definite award upon the subject matter submitted was not made," *id.* § 10(a)(4), or modification on the basis of a "material miscalculation of figures," *id.* § 11(a), rather than reassert the same breach of contract claim in the Second Arbitration. Having chosen not to do so, Petitioner cannot now file a second arbitration demand to "evade[] the jurisdictional time limit for challenging the award." Pet. App. 24a.

The decision below effectuates not only the FAA's exclusive framework but also the parties' prior agreement to enforce that framework. The parties here specifically agreed in their arbitration agreement to treat arbitration awards as "final and binding"; that judgments confirming final awards may be "enforced by any court of competent jurisdiction"; and to "waive any right to appeal from or challenge any arbitral . . . award . . . except with respect to the limited grounds for modification . . . provided by any applicable statute"—in this case, the FAA. Resp. App. 17a–18a; Pet. App. 5a–6a. As the Supreme Court of Delaware correctly found, when "the parties agreed that the FAA controls review of an arbitration award, they signed up for a court to apply an exclusive procedure and the restrictions that accompany it." Pet. App. 24a.

Petitioner cloaks itself in pro-arbitration rhetoric, invoking cases concerning only the enforcement of agreements to arbitrate under Sections 2 through

4 of the FAA, at the outset of proceedings, and characterizing the decision below as "creat[ing] a categorical judicial policy exception" to the FAA. Pet. 16. But it is Petitioner who seeks to disregard the FAA—especially Sections 9 through 13—and undermine its pro-arbitration policy with regard to arbitrations that have run their course and resulted in final arbitration awards. This Court has confirmed that the FAA's statutory grounds for vacatur and modification of awards are "exclusive" and thus has declined to enforce an arbitration agreement allowing for judicial review of awards on additional grounds. *Hall St.*, 552 U.S. at 585–86. In so holding, this Court rejected the argument that parties can override the exclusivity of the FAA procedures simply by arguing—as Petitioner does here, *see* Pet. 12—that "arbitration is a creature of contract, and the FAA is motivated by a congressional desire to enforce such agreements," *Hall St.*, 552 U.S. at 585:

> [W]e think the argument comes up short. . . . [T]o rest this case on the general policy of treating arbitration agreements as enforceable would be to beg the question, which is whether the FAA has textual features at odds with enforcing a contract to expand judicial review *following the arbitration*. To that particular question we think the answer is yes, that the text compels a reading of the §§ 10 and 11 categories as exclusive. . . . Instead of fighting the text, it makes more sense to see the three provisions, §§ 9–11, as substantiating a *national policy favoring arbitra-*

> *tion with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway*.

Id. at 586–88 (internal citation omitted) (emphasis added).

Prohibiting collateral attacks of the kind Petitioner attempted is therefore not a "policy exception" to Section 2 of the FAA (concerning enforcement of arbitration agreements), *see* Pet. 4, but rather an application of the same pro-arbitration policy of the FAA as reflected in the separate and equally important provisions in Sections 9 through 13 of that statute (concerning enforcement of arbitral awards).

Contrary to Petitioner's contentions, *see* Pet. 17, there is no tension between the decision below and this Court's recent ruling in *Schein*, *see* Pet. App. 22a. In *Schein*, this Court applied its long line of precedents establishing that courts must enforce arbitration agreements as written to strike down a judge-made rule that agreements to delegate arbitrability questions to arbitrators are not enforceable when the argument for arbitrability is "wholly groundless." *Schein*, 139 S. Ct. at 526. Because it concerned the arbitrability of a dispute at the outset of arbitration, *Schein* "did not address, much less do away with, a court's jurisdiction to enjoin collateral attacks on arbitration awards." Pet. App. 22a. Indeed, this Court in *Schein* expressly described the Sections of the FAA at issue here—including Section 10 in particular—as pertaining to "back-end judicial review" and distinguished that context from arbitrability at "the front end," which was at issue in *Schein*. 139 S. Ct. at 530.

The rule this Court announced in *Schein*, moreover, does not favor Petitioner's preferred result. In *Schein*, this Court relied on the absence of a "wholly groundless" exception in the FAA's text. *See id.* at 529 ("We must interpret the Act as written."). That same rationale supports the decision below: the FAA's text sets forth an exclusive review procedure, which contains no exception permitting a disappointed litigant to overturn a final arbitration by ignoring the statutory review procedure and instead commencing a second arbitration.

C. This Case Would Be a Poor Vehicle to Review the Question Presented.

Even if this Court were interested in further exploring the contours of Sections 10, 11, and 12 of the FAA, this case would be a poor vehicle for doing so.

1. The decision below is highly fact-bound for three reasons. First, it involves a procedural history that does not frequently arise: Petitioner filed an arbitration demand; the tribunal rendered a decision; Petitioner joined Respondents in seeking judicial confirmation of the "entire[]" Award, Resp. App. 3a–4a; Petitioner represented to the confirmation court that "no grounds for challenging the Award . . . exists" and that it had "no intention to collaterally attack . . . the Award," Resp. App. 3a, 5a; the court confirmed the Award; and Petitioner paid the Award. Then, despite not having invoked Section 10 or 11 of the FAA, Petitioner filed a second arbitration demand expressly attacking the first arbitration award, well after the expiration of the three-month period the FAA prescribes. *See* 9 U.S.C. § 12. Petitioner has not cited any case involving a similar set

of facts where the second arbitration was permitted to proceed.

Second, the parties' arbitration agreement contains a provision expressly waiving "any right to appeal from or challenge any arbitral . . . award" except under the FAA. *See* Pet. App. 5a–6a. Thus, even determining the arbitration clause's scope and what, if any, delegation to arbitrators it contains—at least when it comes to a second arbitration that seeks to undo a prior award—entails a set of issues, including potential fact issues, that were not fully developed in the Delaware courts. Petitioner's threshold assumption that the arbitration agreement contains a "clear and unmistakable" delegation to arbitrators of what it characterizes as "arbitrability" issues under *First Options*, *see* Pet. 2, is simply an inaccurate oversimplification of the TUA provisions that are relevant to this case. *Cf. First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *AT&T Techs., Inc. v. Commc'ns Workers*, 475 U.S. 643, 649 (1986). This Court would need to address that antecedent issue of contract interpretation, and its decision in this case would have limited applicability.

Third, Petitioner has engaged in serial litigation of its breach of contract claim in derogation of the finality embedded in the FAA and the parties' arbitration agreement. After the tribunal in the first arbitration held that Petitioner's breach claim "deserves no further consideration," Pet. App. 49a, and Petitioner represented to the confirmation court that no grounds existed to challenge that Award (including that a "definite award upon the subject matter submitted was not made," 9 U.S.C. § 10(a)(4)), Petitioner or its affiliates would in fact go on to seek "further consideration" of the breach claim in multiple

other fora. To date, Petitioner, its parent company, and its affiliate ALSS—all represented by the same counsel—have reasserted breach against Respondents in the ALSS arbitration (where the claim was dismissed on the merits with prejudice), in New York state court, and now in Petitioner's Second Arbitration (which the court below properly enjoined). Courts have rejected similar efforts by serial litigants such as Petitioner to evade the FAA principle of award finality. *See Decker*, 205 F.3d at 911 ("It would be a violation of the FAA to allow Decker to arbitrate the very same claims that we have determined constitute an impermissible collateral attack when previously presented for adjudication by a court.").

2. Moreover, the ALSS tribunal's dismissal with prejudice of ALSS's identical breach of contract claim indicates that even a decision by this Court in Petitioner's favor would be highly unlikely to have any practical effect. ALSS is not just an affiliate of Petitioner; Petitioner is one of ALSS's five member companies. And ALSS pursued the same breach of contract claim, under a nearly identical TUA, using the same counsel as Petitioner. *See* Resp. App. 21a–22a. There is therefore no reasonable prospect that, even if Petitioner were given the mulligan it requests, the result of the first arbitration will be clawed back in the manner Petitioner seeks.

3. Finally, Petitioner's speculation that the decision below will "create confusion among lower state and federal courts," *see* Pet. 18, is unlikely to come to pass and, in any event, is premature at best. As explained above, the cases invoked by Petitioner, including *Schein* and the Second and Third Circuit decisions on the arbitrability of *res judicata* defenses,

have no bearing on the established law of the exclusivity of FAA remedies, on which the Supreme Court of Delaware correctly decided this case. The Supreme Court of Delaware did not disagree with the reasoning of any of those cases; rather, it correctly recognized that they addressed different issues than this case.

Even if lower courts were to confront collateral attacks on final arbitration awards and reach different conclusions, further percolation in the appellate courts would be warranted before this Court takes up a collateral attack case, especially in light of the vastly different factual settings in which such issues may arise. *See, e.g.*, *Credit Suisse AG v. Graham*, __ F. Supp. 3d __, No. 21-cv-951 (LJL), 2021 WL 1315812 (S.D.N.Y. 2021), at *5, *9–*10 (noting that decision below relied in part on TUA's contractual waiver of challenges to awards outside FAA; rejecting collateral attack objection where second arbitration arose under different arbitration clause than first arbitration, pursued claims under different contract, involved new parties, and sought damages incurred after first arbitration concluded). If federal courts of appeals and state courts of last resort reach different conclusions, this Court will be able to review any such conflict at that time, and to do so with the benefit of the lower appellate courts' reasoning analyzing any points of disagreement. *See Maryland v. Baltimore Radio Show*, 338 U.S. 912, 918 (1950) ("A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illuminated by the lower courts. Wise adjudication has its own time for ripening.").

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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August 11, 2021

APPENDIX

Appendix A

APPENDIX A—ICDR INTERNATIONAL DISPUTE RESOLUTION PROCEDURES, JUNE 1, 2014 (Excerpt)

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

INTERNATIONAL DISPUTE
RESOLUTION PROCEDURES
(Including Mediation and Arbitration Rules)

Rules Amended and Effective June 1, 2014

available online at icdr.org

[…]

INTERNATIONAL ARBITRATION RULES

[…]

Article 33: Interpretation and Correction of Award

1. Within 30 days after the receipt of an award, any party, with notice to the other party, may request the arbitral tribunal to interpret the award or correct any clerical, typographical, or computational errors or make an additional award as to claims, counterclaims, or setoffs presented but omitted from the award.

2. If the tribunal considers such a request justified after considering the contentions of the parties, it shall comply with such a request within 30 days after receipt of the parties' last submissions respecting the requested interpretation, correction, or additional award. Any interpretation, correction, or additional award made by the tribunal shall contain reasoning and shall form part of the award.

3. The tribunal on its own initiative may, within 30 days of the date of the award, correct any clerical, typographical, or computational errors or make an additional award as to claims presented but omitted from the award.

4. The parties shall be responsible for all costs associated with any request for interpretation, correction, or an additional award, and the tribunal may allocate such costs.

Appendix B

APPENDIX B—PETITIONER'S REPLY IN SUPPORT OF CROSS-MOTION TO CONFIRM AWARD, DELAWARE COURT OF CHANCERY, JANUARY 30, 2019 (Excerpts)

In the Court of Chancery of the State of Delaware

GULF LNG ENERGY, LLC and
GULF LNG PIPELINE, LLC,

Plaintiffs/
Counterclaim
Defendants,

v.

ENI USA GAS MARKETING LLC,

Defendant/
Counterclaim-Plaintiff.

[…]

This is an action solely for confirmation of the final arbitration Award. The only purpose of a confirmation action is to convert an arbitrator's award—the entirety of the award—into a judgment of the court. Because the parties no longer dispute that the Award should be confirmed in its entirety, and no grounds for challenging the Award have been raised (and none exists), the Court should grant Eni USA's

cross-motion for confirmation of the Award in its entirety.[1]

[…]

Yet, Gulf does not explain what ambiguities, complications or delays it is trying to avoid, how the requested relief would avoid any such purported ambiguities, complications or delays, or how such circumstances satisfy the elements required for obtaining injunctive relief.[3]

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[1] Plaintiffs also have sought entry of judgment on the Award while keeping portions of the Award secret and under seal. *See* Dkt. 4 (Complaint); Dkt. 28 (Motion for Continued Confidential Treatment with redactions to Award). Eni USA addresses the confidentiality issues separately, in its Opposition to Plaintiffs' Motion for Continued Confidential Treatment, filed contemporaneously herewith.

[3] Indeed, to the extent Gulf is trying to avoid harm resulting from any delay in the receipt of the monetary compensation granted in the Award, injunctive relief cannot be granted on that basis, as harm from delay in payment is adequately compensable by money damages. Further, such relief already has been granted in the Award by imposition of interest that accrues on the monetary compensation provided in the Award. *See* Dkt. 24 Revised Proposed Order ¶ 5; *see also Rovner v. Health-Chem Corp.*, 1996 WL 377027, at *12 (Del. Ch. July 3, 1996) ("[T]his Court will not issue an injunction for claims in which the plaintiffs

Appendix B

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have an adequate remedy at law in the form of an action for money damages"). Gulf's contention that Eni USA intends to "collaterally attack" and "re-litigate" the Award likewise lacks merit. Dkt. 24 ¶¶ 1, 2, 8. Gulf continues to conflate two separate and distinct types of proceedings—*i.e.*, those proceedings seeking judgment confirming an award and those proceedings seeking execution or enforcement of a judgment. The instant action is solely for entry of judgment confirming the Award. Eni USA has no intention to collaterally attack or re-litigate any issues decided in the Award. Nevertheless, in the event Gulf takes future steps relating to execution of the judgment confirming the Award, Eni USA reserves any and all rights and defenses that are legally or equitably available to it at that time in the forum in which execution is pursued. However, the issues that may be raised in any such future proceedings are not before this Court.

Appendix C

APPENDIX C—TRANSCRIPT OF ORAL ARGUMENT ON CROSS-MOTIONS TO CONFIRM AWARD, DELAWARE COURT OF CHANCERY, FEBRUARY 1, 2019 (Excerpt)

In the Court of Chancery of the State of Delaware

GULF LNG ENERGY, LLC and
GULF LNG PIPELINE, LLC,

Plaintiffs/ Counterclaim Defendants,

v.

ENI USA GAS MARKETING LLC,

Defendant/ Counterclaim-Plaintiff.

Courtroom No. 12A
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Friday, February 1, 2019
9:32 a.m.

BEFORE HON. ANDRE G. BOUCHARD, Chancellor

[…]

Appendix C

[44] THE COURT: Please be seated.

Before the Court are two motions: first, the motion of plaintiffs Gulf LNG Energy, LLC and Gulf LNG Pipeline, LLC, for judgment on the pleadings of Count I of their complaint seeking to confirm an arbitration award; and second, the cross-motion of defendant Eni USA Gas Marketing LLC for judgment on the pleadings of Count I of its counterclaim seeking to confirm the same arbitration award.

The arbitration award I am referring to is attached as Exhibit A to the complaint with the correction that is attached as Exhibit B to the complaint. I will refer to those two documents together as "the final award."

Significantly, none of the parties in their pleadings have asserted a claim to modify, correct, or vacate the final award. The sole relief sought is to confirm the final award.

Since the filing of the motion papers, the parties have entered into negotiations to narrow their dispute and have submitted competing forms of orders. The competing forms of orders present the Court with two issues.

[45] The first issue is plaintiffs' request that the order include a provision that payment of the amount of $371,577,849, an amount the parties have agreed upon, be made by Eni to Gulf within ten business days of entry of the final order and judgment by wire transfer to an account designated by Gulf.

Defendant contends that this provision constitutes a modification of the final award that plaintiffs did not seek in their complaint and that would be,

therefore, inappropriate to include in the final order and judgment.

I agree. I do not see such a payment term included anywhere in the final award. Rather, as I read the final award, the amounts that Eni was directed to pay Gulf in Section 9 of the final award are immediately payable. During my colloquy with Eni's counsel, I believe they conceded that point as well. Given that no request is pending before the Court to modify the final award, I thus see no basis to include the requested payment term.

The second issue is defendant's request that the order require that not only a certified copy of the final order and judgment will be filed with the Prothonotary of the Superior Court, but [46] that a certified copy of the final award will filed with the Prothonotary as well.

I agree that this request is appropriate based on the language of 10 Del. Code Section 5718, which states in relevant part, and I'm now quoting, "Upon the granting of an order confirming, modifying or correcting an award for money damages, a duly certified copy of the award and of the order confirming, modifying or correcting the award, shall be filed with the Prothonotary of the Superior Court," and then it goes on.

In Bender versus Bailey, 1992 Westlaw 396306, then-Chancellor Allen applied this plain language by entering a final order confirming an arbitration award to which he appended the arbitrator's decision so that it would become a part of the filing with the Prothonotary.

I recognize an argument could be made that that provision—I'm referring to Section 5718—does not apply in this case because this application is governed by the Federal Arbitration Act.

That argument is debatable, in my view, given the interplay of the Delaware Uniform [47] Arbitration Act and the Federal Arbitration Act, as reflected, for example, in Section 5702(c) of the Delaware Act. But even if one were to assume that Section 5718 is not directly applicable here, it is certainly instructive concerning what type of document should be filed with the Prothonotary's office when this Court is asked to confirm an arbitration award.

So for that reason, I am going to include in the form of order that not only the final order and judgment be filed with the Prothonotary, but that the final award be filed as well.

With that explanation of the resolution of the two issues that have been teed up out of the way, I am now going to read you what I am going to enter as the final order when I leave here in a few minutes. And I have it on the system, so I'll be able to put it together and spare you the trouble of submitting a new form of order. I'm going to skip over the recital and just tell you what the numbered paragraphs will say.

Paragraph 1: "The arbitration award dated June 29, 2018 (with the correction issued by the Tribunal on July 31, 2018) that is defined as 'Final Award,' is confirmed in its entirety."

[48] Paragraph 2: "The LNG Terminal Use Agreement between the parties dated December 8,

2007, the 'TUA'"—defined term—"is terminated as of March 1, 2016, pursuant to the Final Award."

Paragraph 3: "Judgment is entered in favor of Gulf LNG and against Eni USA in the amount of $371,577,849 pursuant to the Final Award," period.

Let me digress for one moment. I'm not including the language "immediately payable" because I think that language is not necessary and, indeed, as Eni's own counsel agreed, would be superfluous, because as I already indicated, I believe this amount is immediately due and payable as is.

Paragraph 4 will read: "Post-judgment interest will accrue at the agreed-upon contract rate set forth in Section 20.1(m) of the TUA pursuant to the Final Award."

And finally, paragraph 5 will say the following: "Plaintiffs' counsel shall forthwith file with the Prothonotary of the Superior Court a certified copy of this final order and judgment and the Final Award, which shall be entered and recorded by the Prothonotary."

That is the end of the document.

Appendix D

APPENDIX D—RESPONDENTS' COMPLAINT FOR INJUNCTIVE RELIEF, DELAWARE COURT OF CHANCERY, JUNE 17, 2019 (Excerpts)

In the Court of Chancery of the State of Delaware

GULF LNG ENERGY, LLC and
GULF LNG PIPELINE, LLC,

Plaintiffs/

v.

ENI USA GAS MARKETING LLC,

Defendant.

VERIFIED COMPLAINT FOR INJUNCTIVE RELIEF

Plaintiffs Gulf LNG Energy, LLC and Gulf LNG Pipeline, LLC (collectively, "Gulf") bring this action to enforce this Court's final order and judgment dated February 1, 2019 (the "Judgment")[1] confirming a final arbitration award dated June 29, 2018 and cor-

[1] Attached hereto as Exhibit A.

rected July 31, 2018 (the "Award")[2] and to prevent Defendant Eni USA Gas Marketing LLC ("Eni USA") from collaterally attacking that Judgment—which Eni USA had itself sought—in a new arbitration Eni USA recently commenced. Plaintiffs allege the following based on knowledge with respect to their own acts and upon information and belief as to other matters:

1. Just a few months ago, Gulf and Eni USA appeared before this Court on cross-motions to confirm the Award,[3] in which a panel of three arbitrators (the "Tribunal") (1) terminated the parties' liquefied natural gas ("LNG") Terminal Use Agreement dated December 8, 2007 (the "TUA")[4] and Eni USA's prospective payment obligations thereunder; (2) ordered Gulf to refund to Eni USA, with interest, the amounts that Eni USA had paid under the TUA since January 1, 2017; and (3) ordered Eni USA to pay Gulf restitution, which amounted to $371,577,848 (the "Judgment Amount") including interest and net of Gulf's reimbursement obligations, as stipulated by the parties and ultimately reflected in this Court's Judgment.

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2 Attached hereto as Exhibit B.

3 C.A. No. 2018-0700-AGB.

4 Attached hereto as Exhibit C.

2. Though it did not seek to vacate or modify the Award, Eni USA repeatedly sought to evade its obligations to pay the relief that it owed to Gulf pursuant to that Award. Eni USA initially refused to pay outright and then proposed (without basis in the Award itself) to pay the amount it owed Gulf by monthly installment, extending over 13 years.

3. When Eni USA's refusal to pay led Gulf to petition this Court for confirmation of the Award, Eni USA tried to use the confirmation proceedings to wriggle out of its restitution obligation. While Eni USA too sought confirmation of the Award, it initially resisted the inclusion of the Judgment Amount in its Judgment, so as to preserve the possibility that it could collaterally attack that Judgment Amount in future proceedings. To prevent such tactics, aimed at allowing Eni USA to relitigate arguments that had already been finally resolved over the course of a 27-month arbitration, Gulf requested that this Court's Judgment should fairly encompass both aspects of the Award: termination of the TUA *and* Eni USA's net payment obligation to Gulf.

4. Ultimately, this Court's Judgment confirmed the Award in its entirety. It addressed *both* forms of relief—termination of the TUA and payment of restitution in the net amount awarded by the Tribunal—thereby closing the

door on the issue of the monetary amount owed. As stated in the Court's Judgment:

> 1. The arbitration award dated June 29, 2018 (with the correction issued by the Tribunal on July 31, 2018) ("Final Award") is confirmed in its entirety.
>
> 2. The LNG Terminal Use Agreement between the parties, dated December 8, 2007 (the "TUA") is terminated as of March 1, 2016 pursuant to the Final Award.
>
> 3. Judgment is entered in favor of Gulf LNG and against ENI USA in the amount of $371,577,849 pursuant to the Final Award.[5]

5. In the litigation that led to the Judgment, Eni USA:

   (a) agreed on the precise figure of the Judgment Amount;

   (b) raised no challenge to the Award under Federal or State arbitration law and admitted that no grounds for challenge exist;

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[5] Ex. A, ¶¶ 1–3.

(c) affirmatively sought confirmation of the Award,

(d) assured the Court that it had "no intention to collaterally attack or relitigate any issue decided in the Award"[6];

(e) failed in its initial strategy to keep the Judgment Amount out of this Court's Judgment;

(f) acknowledged that inclusion of the Judgment Amount meant that the Judgment created an "immediate debt"[7] owed to Gulf; and

(g) paid Gulf the amount specified in the Judgment.

6. Yet now, Eni USA has launched a new arbitration (the "Second Arbitration"), by which it

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[6] Defendant's Reply in Support of its Cross-Motion for Judgment on the Pleadings in Gulf LNG Energy, LLC & Gulf LNG Pipeline, LLC v. Eni USA Gas Marketing, LLC, Del. Ch. C.A. No. 2018-0700-AGB, Jan. 30, 2019, at 8 n.3 (attached hereto as Exhibit D).

[7] Transcript of Oral Argument regarding Cross-Motions for Judgment on the Pleadings and the Court's Ruling in Gulf LNG Energy, LLC & Gulf LNG Pipeline, LLC v. Eni USA Gas Marketing LLC, Del Ch. C.A. No. 2018-0700-AGB, Feb. 1, 2019, at 38:10-40:19 (attached hereto as Exhibit E).

again seeks to attack the Judgment Amount and even recoup the money it paid pursuant to the Judgment.[8]

7. By the Second Arbitration, Eni USA seeks to undermine this Court's Judgment, violate Federal and State arbitration law, and have a new arbitral tribunal decide issues that Gulf never agreed to arbitrate. No change of circumstance in the few months since this Court entered its Judgment can justify Eni USA's brazen attempt to carry on with the collateral attack strategy that this Court already rejected and to override the Judgment.

8. Accordingly, Gulf respectfully requests that the Court enforce its Judgment, the applicable law, and the parties' agreement by enjoining Eni USA from maintaining or pursuing the Second Arbitration and issuing an appropriate declaration. In the event that the parties are unable to reach an agreement to stay the Second Arbitration pending the final judgment of this Court, Gulf also respectfully requests a temporary restraining order and preliminary injunction to preserve the status quo and pre-

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[8] *See* Claimant's Notice of Arbitration in *Eni USA Gas Marketing LLC v. Gulf LNG Energy, LLC & Gulf LNG Pipeline, LLC*, ICDR Case No. __, June 3, 2019 (attached hereto as Exhibit F).

vent irreparable harm during the pendency of this action.

[…]

18. The arbitration provisions of the TUA emphasize the importance of achieving finality in the resolution of any dispute between the parties. Article 20.1(a) provides that "[a]ny Dispute (other than a Dispute regarding measurement under Annex I or II) shall be exclusively and definitively resolved through final and binding arbitration[.]"[13] Article 20.1(h) further provides that "[t]he award of the arbitral tribunal shall be final and binding" and that "[j]udgment on the award of the arbitral tribunal may be entered and enforced by any court of competent jurisdiction."[14]

19. Article 20.1(o) provides that "[t]o the extent permitted by Applicable Law, the Parties hereby waive any right to appeal from or challenge any arbitral decision or award, or to oppose enforcement of any such decision or award before a court or any governmental authority, except with respect to the limited grounds for modification or non-enforcement

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[13] *Id.*, Art. 20.1(a).

[14] *Id.*, Art. 20.1(h).

provided by any applicable arbitration statute or treaty."[15]

[15] *Id.*, Art. 20.1(o).

Appendix E

APPENDIX E—KINDER MORGAN FORM 10-Q, JULY 23, 2021 (Excerpt)

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

FORM 10-Q

QUARTERLY REPORT PURSUANT TO
SECTION 13 OR 15(D)
OF THE SECURITIES EXCHANGE ACT OF 1934

For the quarterly period ended **June 30, 2021**

[…]

Commission file number: 001-35081

KINDER MORGAN, INC.
(Exact name of registrant as specified in its charter)

[…]

9. Litigation and Environmental

[…]

Gulf LNG Facility Disputes

Appendix E

On March 1, 2016, Gulf LNG Energy, LLC and Gulf LNG Pipeline, LLC (GLNG) received a Notice of Arbitration from Eni USA Gas Marketing LLC (Eni USA), one of two companies that entered into a terminal use agreement for capacity of the Gulf LNG Facility in Mississippi for an initial term that was not scheduled to expire until the year 2031. Eni USA is an indirect subsidiary of Eni S.p.A., a multinational integrated energy company headquartered in Milan, Italy. Pursuant to its Notice of Arbitration, Eni USA sought declaratory and monetary relief based upon its assertion that (i) the terminal use agreement should be terminated because changes in the U.S. natural gas market since the execution of the agreement in December 2007 have "frustrated the essential purpose" of the agreement and (ii) activities allegedly undertaken by affiliates of Gulf LNG Holdings Group LLC "in connection with a plan to convert the LNG Facility into a liquefaction/export facility have given rise to a contractual right on the part of Eni USA to terminate" the agreement. On June 29, 2018, the arbitration tribunal delivered an Award that called for the termination of the agreement and Eni USA's payment of compensation to GLNG. The Award resulted in our recording a net loss in the second quarter of 2018 of our equity investment in GLNG due to a non-cash impairment of our investment in GLNG partially offset by our share of earnings recognized by GLNG. On February 1, 2019, the Delaware Court of Chancery issued a Final Order and Judgment confirming the Award, which was paid by Eni USA on February 20, 2019.

On September 28, 2018, GLNG filed a lawsuit against Eni S.p.A. in the Supreme Court of the State

of New York in New York County to enforce a Guarantee Agreement entered into by Eni S.p.A. in connection with the terminal use agreement. On December 12, 2018, Eni S.p.A. filed a counterclaim seeking unspecified damages from GLNG. This lawsuit remains pending.

On June 3, 2019, Eni USA filed a second Notice of Arbitration against GLNG asserting the same breach of contract claims that had been asserted in the first arbitration and alleging that GLNG negligently misrepresented certain facts or contentions in the first arbitration. By its second Notice of Arbitration, Eni USA sought to recover as damages some or all of the payments made by Eni USA to satisfy the Final Order and Judgment of the Court of Chancery. In response to the second Notice of Arbitration, GLNG filed a complaint with the Court of Chancery together with a motion seeking to permanently enjoin the arbitration. On cross-appeals from an Order and Final Judgment of the Court of Chancery, the Delaware Supreme Court ruled in favor of GLNG on November 17, 2020 and a permanent injunction was entered prohibiting Eni USA from re-arbitrating both the breach of contract and negligent misrepresentation claims. On April 15, 2021, Eni USA filed a petition for writ of certiorari with the U.S. Supreme Court seeking review of the Delaware Supreme Court's decision. This petition remains pending.

On December 20, 2019, GLNG's remaining customer, Angola LNG Supply Services LLC (ALSS), a consortium of international oil companies including Eni S.p.A., filed a Notice of Arbitration seeking a declaration that its terminal use agreement should

be deemed terminated as of March 1, 2016 on substantially the same terms and conditions as set forth in the arbitration award pertaining to Eni USA. ALSS also sought a declaration on substantially the same allegations asserted previously by Eni USA in arbitration that activities allegedly undertaken by affiliates of Gulf LNG Holdings Group LLC in connection with the pursuit of an LNG liquefaction export project gave rise to a contractual right on the part of ALSS to terminate the agreement. ALSS also sought a monetary award directing GLNG to reimburse ALSS for all reservation charges and operating fees paid by ALSS after December 31, 2016 plus interest. On July 15, 2021, the arbitration tribunal delivered a Final Award on the merits of all claims submitted to the tribunal and denied all of ALSS's claims with prejudice.