No. 13-55

IN THE

Supreme Court of the United States

TOLL BROS., INC., *et al.*,

Petitioners,

v.

MEHDI NOOHI, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents Mehdi Noohi and Soheyla Bolouri respectfully oppose the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case filed by Petitioners Toll Bros., Inc., *et al.* (hereinafter collectively "Toll Brothers").

STATEMENT OF THE CASE

This case was brought in March 2011 by Mr. Noohi and Ms. Bolouri, a married couple living in Howard County, Maryland, based upon Toll Brothers' refusal to refund the $77,000 in deposits Respondents had paid in 2008 towards the $1,006,975 purchase price of a never-constructed home after Toll Brothers' captive mortgage broker, TBI Mortgage Company, denied their application for a loan and they were unable to obtain approval for a mortgage from any other lender despite their best faith efforts and through no fault of their own. Respondents assert claims for breach of contract, breach of the duty of good faith and fair dealing, unjust enrichment, and unfair and deceptive trade practices. In addition, having discovered similar treatment of hundreds of other potential buyers, they assert claims on behalf of all others similarly situated and seek certification of a class of such homebuyers whose deposits Toll Brothers wrongfully has refused to return.[1]

1. From 2006 through 2009, Toll Brothers' largest source of profits was derived, not through sales of homes they built, but through retaining deposits towards the purchase of homes which they never built. Based upon its SEC filings, Toll Brothers made $106.2 million by keeping deposits from prospective buyers who never got to closing and, in many cases, where Toll Brothers had incurred no actual damages associated with the cancellation of the contracts.

The form "Agreement of Sale" signed by the parties required the "Buyer" (*i.e.*, Respondents) to "in good faith make a truthful and complete application to TBI Mortgage [a subsidiary of Toll Brothers] and any other lender of Buyer's choosing" and to do so "within 14 days" of execution of the Agreement of Sale, referred to as the "Mortgage Application Period." (D. Ct. Dkt. 5-2, Ex. 1 ("Agreement of Sale") at § 4.) Respondents did so. Specifically, the day after signing the Agreement, they submitted an application to TBI Mortgage Company. (D. Ct. Dkt. 1 ("Complaint") ¶ 39.) TBI rejected the application. (*Id.*) Toll Brothers then directed them to another mortgage broker, First Preferred Financial, Inc. (Complaint ¶ 40.) First Preferred initially sent Respondents a "Mortgage Loan Commitment" letter indicating they could arrange a mortgage from North Star Lending. (Complaint ¶ 41.) Weeks later, however, First Preferred denied Respondents' application after determining that North Star Lending was not a "national chartered bank" and that no other loan products were available in light of the new Maryland law prohibiting stated income loans (Complaint ¶ 42), which had just become effective. Over the course of several months, Respondents submitted mortgage applications to other lenders, but they were never approved for a mortgage. (Complaint ¶¶ 38-43, 49-50.)

If Respondents were not "approved for a mortgage" within 60 days, the Agreement of Sale permitted Toll Brothers (identified as "Seller") to "extend the mortgage application approval process until such time as" either (a) Respondents submitted another application, at no fee, to a lender chosen by Toll Brothers, or (b) Toll Brothers "declares the Agreement null and void in which event all

sums paid on account of the purchase price and extras shall be returned to Buyer ….” (Agreement of Sale § 4.) Respondents advised Toll Brothers of their inability to obtain approval for a mortgage and repeatedly requested that Toll Brothers return their deposits, but Toll Brothers refused to declare the Agreement of Sale null and void, insisted on keeping the agreement open, and refused to return the deposit money. (Complaint ¶ 51.)

Toll Brothers claims that Respondents’ receipt of the initial “Mortgage Loan Commitment” letter from First Preferred made their deposit subject to forfeiture in the event the sale did not proceed to closing, irrespective of the reason and even if they never actually obtained a mortgage. But the Agreement of Sale only permits Toll Brothers to retain deposits when the buyer defaults in performing an obligation under the Agreement. (§ 7(a).) The Agreement does not obligate the buyer to obtain approval for a mortgage; it only requires that the buyer make good faith efforts to do so. (*See* § 4.) Indeed, the Agreement expressly contemplates the scenario where a buyer “is not approved for a mortgage within 60 days” and, under such circumstances, requires Toll Brothers either to extend the process so as to make one additional mortgage application on the buyer’s behalf, or to declare the Agreement null and void and return all sums paid in deposit. (§ 4.)

Toll Brothers, however, contends that language in Section 4 of the Agreement of Sale stating that “termination or expiration of [a] mortgage commitment after it is received, for any reason, shall not release Buyer from its obligations under the Agreement.” (§ 4.) But this language does not say that a buyer’s deposit is forfeited

upon the termination or expiration of a "mortgage commitment" (much less where, as here, an initial commitment is terminated before the buyer actually is "approved for a mortgage"); it only says that the buyer is still subject to the other terms of the Agreement. Those terms do not include an obligation to obtain a mortgage, but only to make good faith efforts to get "approved for a mortgage" during the Mortgage Application Period—obligations with which Respondents fully complied. Toll Brothers thus attempts to write additional obligations into the Agreement so as to justify its refusal to refund Respondents' deposits, which consist of a substantial portion of their life savings.

Toll Brothers moved to dismiss Respondents' Class Action Complaint and Jury Demand on the basis of Section 13 of the Agreement of Sale between the parties, which Toll Brothers' contended required arbitration. However, the United States District Court for the District of Maryland concluded that the purported arbitration provision contained only unilateral, one-sided promises by the "Buyer" and, therefore, was unenforceable for lack of mutual consideration. Toll Brothers took an interlocutory appeal from this decision and the Fourth Circuit affirmed. Toll Brothers then sought rehearing *en banc*, but none of the active or senior judges on the Fourth Circuit requested a poll and Toll Brothers' motion was denied. Toll Brothers then sought a stay of the mandate from the Court of Appeals, which the original three-judge panel promptly refused. Toll Brothers then sought a stay from this Court pending the filing and disposition of the instant Petition, which the Chief Justice denied.

REASONS FOR DENYING THE PETITION

I. In an Attempt to Create the Appearance of Error, Petitioners Misstate the Holdings of *Cheek* and the District Court and Court of Appeals in this Case

The principal thrust of Toll Brothers' Petition is that the Maryland case law relied upon by the District Court and the Court of Appeals in holding the arbitration provision unenforceable is preempted by the Federal Arbitration Act because it "singles out arbitration provisions by requiring those provisions, but not contracts more generally, to contain mutuality of obligation—*i.e.*, to bind both sides to arbitrate their respective claims." (Petition at 9.) Toll Brothers characterizes *Cheek v. United Healthcare of Mid-Atlantic, Inc.*, 835 A.2d 656 (Md. 2003) as "stand[ing] for the proposition that an arbitration provision must contain a 'mutual obligation' to arbitrate" and proceeds to contrast *Cheek* with authority generally recognizing that mutuality of obligation is not required to make a contract enforceable so long as the requirement of consideration is met. (Petition at 12-14.)

This argument suffers from two immediately-obvious flaws. First, the contract law doctrine relied upon both in *Cheek* and by the District Court and Court of Appeals in this case is not mutuality of *obligation*, but rather mutuality of *consideration*. In *Cheek*, the Court of Appeals of Maryland held that "the arbitration agreement in the present case is unenforceable for lack of consideration"—not lack of mutual obligation. 835 A.2d at 669. *Cheek* held that an arbitration agreement, like any other agreement, must be supported by mutual consideration and that, because it is severable and independently enforceable from

any larger agreement within which it may be found, the mutual consideration to support the agreement must be found within its four corners. Under the facts of *Cheek*, the only arguable consideration within the arbitration agreement itself was the parties' mutual promises to arbitrate, but because one party had the unilateral right to "alter, amend, modify, or revoke the [Arbitration] Policy at its sole and absolute discretion at any time with or without notice," that party's promise was illusory leaving the agreement without mutual *consideration*. *Id.* at 662.

Cheek does not address the issue of what kinds or what extent of consideration would suffice to make the agreement enforceable; it only holds that there must be consideration (of some type) from both parties and that consideration must be reflected within the four corners of the severable agreement. The mutuality of obligation doctrine posits that where mutual promises serve as consideration for an agreement, they must be coextensive. *See Tyler v. Capitol Indemnification Ins. Co.*, 110 A.2d 528, 530 (Md. 1955). But nothing in *Cheek* or any case applying it holds that an arbitration agreement only can ever be enforceable if consideration comes in the form of mutual, identically-corresponding promises. To the contrary, "[m]utuality … does not require an exactly even exchange of identical rights and obligations between the two contracting parties," at least so long as there is not an oppressive imbalance in the promises exchanged. *Walther v. Sovereign Bank*, 872 A.2d 735, 748-49 (Md. 2005) (an "arbitration agreement …, which includes exceptions to that agreement that enable [a party] … to pursue certain judicial remedies …, is not made unconscionable where [the other party is] not provided with identical exceptions to the arbitration agreement").

In this case, as in *Cheek*, the analysis focuses on the Seller's lack of *any* promise to arbitrate because the arbitration provision contains no other potentially arguable source of consideration. *See Noohi v. Toll Bros., Inc.*, 708 F.3d 599, 611 (4th Cir. 2013) ("[T]he issue here is the same as in *Cheek*—whether the arbitration agreement is supported by any consideration at all."). Both the District Court (*see* App. at 38a-39a) and the Court of Appeals (*see* App. at 23a-24a) noted that consideration can come in various forms and need not be identical. The courts' analysis necessarily centered on Toll Brothers' promise to arbitrate (or lack thereof) not because mutuality of obligation was required, but instead because an inferred mutual promise to arbitrate was the only possible consideration to be found. The courts below correctly concluded that the arbitration provision is a wholly one-sided agreement which clearly and unambiguously (a) requires only home *buyers*—and not Toll Brothers—to agree that their disputes "shall be resolved by binding arbitration"; (b) obligates *only buyers* to comply with certain preliminary conditions before initiating an arbitration proceeding; and (c) calls upon *only buyers* to waive the right to proceed in a court of law. At no point does the Agreement of Sale speak of any agreement by Toll Brothers to do the same or to waive any of its rights. The purported arbitration agreement thus lacked mutual *consideration*.

Further, Toll Brothers' attempt to refashion both *Cheek* and this case into "mutuality of obligation" cases is a new argument not advanced either to the District Court or to the Court of Appeals below (or, for that matter, in its application for a stay of the Court of Appeals' mandate). Granting certiorari on that basis thus would be inappropriate.

II. Maryland Law Is Neither Hostile Nor Uniquely-Applicable to Arbitration Agreements

Toll Brothers repeatedly refers to *Cheek* and its progeny as Maryland's "arbitration-only mutuality rule" and claims that it is "hostile" to arbitration. These assertions simply are incorrect. Contrary to Toll Brothers' contentions, the rule applied in *Cheek* is not required solely of arbitration provisions, but rather applies to all contract provisions which are severable and independently enforceable. Indeed, it is the severability of the arbitration provision in *Cheek*—not its connection to arbitration—which serves as the basis of the Maryland Court of Appeals' requirement that the consideration be contained within the four corners of the purported arbitration agreement. *See* 835 A.2d at 665-69.

Toll Brothers claims that "the *Cheek* rule" has not been applied "to invalidate a contract outside the arbitration context." (Petition at 14.) This carefully-phrased statement is misleading as *Cheek* certainly has been cited and relied upon outside the arbitration context. Indeed, one of the cases cited by Toll Brothers in the paragraph immediately preceding this statement does exactly that. In *Questar Builders, Inc. v. CB Flooring, LLC*, 978 A.2d 651 (Md. 2009), the Court of Appeals of Maryland relied upon *Cheek* to reject one party's interpretation of a termination provision in a construction subcontract which would have given it the ability to terminate at any time for any reason whatsoever, explaining that, if this interpretation were accepted, "the Subcontract would be illusory under this Court's opinion in *Cheek* …." *Id.* at 673-74. While it might be true, strictly speaking, that the *Questar Builders* court did not apply *Cheek* "to invalidate a contract" (Petition at

14), it did apply *Cheek* to reject a proffered interpretation of a contract provision on the basis that, if accepted, it would render the contract invalid.

Moreover, the *Cheek* rule actually is neutral to arbitration. It neither favors nor disfavors it, and it can apply to either require or preclude arbitration in a given case depending upon the facts and circumstances. For instance, while the Fourth Circuit applied *Cheek* so as to invalidate an arbitration provision in this case, the same court relied upon *Cheek* in reaching the opposite outcome in *Hill v. Peoplesoft USA, Inc.*, 412 F.3d 540 (4th Cir. 2005). In *Hill*, a six-page arbitration agreement between the plaintiff and the defendant expressly spoke in terms of "the parties" both agreeing to submit disputes to arbitration, but a separate "Internal Dispute Solution" program promulgated by the defendant as a company policy purported to permit the defendant "to 'change' the program 'without notice.'" 412 F.3d at 542. The plaintiff in *Hill* argued that this rendered the apparent promises in the arbitration agreement illusory. Relying on *Cheek*, however, the Fourth Circuit explained that its analysis was confined to "the four corners of the separate Arbitration Agreement" and it was not permitted to go beyond the language of that agreement to determine whether any of the promises therein were illusory. *Id.* at 544; *see also Noohi*, 708 F.3d at 612-13 (noting "*Cheek* can just as readily be viewed as *encouraging* arbitration by requiring that both parties to an arbitration agreement bind themselves to arbitrate at least some categories of claims.") (emphasis in original).

III. The Court of Appeals' Decision Is Not in Conflict with This Court's Precedents or the Decisions of Other Courts of Appeal

Nothing in the District Court or the Court of Appeals' opinions conflicts with this Court's decisions requiring that "courts must place arbitration agreements on an equal footing with other contracts and enforce them according to their terms." *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1745-46 (2011). To the contrary, that is exactly what both lower courts did: they treated the purported arbitration provision here just as they would any other severable contract under Maryland law and found it unenforceable for want of mutual consideration.

Unlike this Court's prior precedents in the area of FAA preemption, the arbitration provision at issue in this case is not unenforceable due to the inclusion of class action waivers or class arbitration waivers in the Agreement of Sale (indeed, the Agreement of Sale contains no such waivers) nor does it involve an outright prohibition of arbitration of certain types of claims or in certain kinds of contractual relationships, rely on state public policy justifications, or treat arbitration agreements differently from any other kind of agreement. Instead, the purported arbitration agreement in this case is unenforceable under Maryland law because it fails to comply with one of the most basic principles of contract formation—it lacks mutual consideration.

Toll Brothers highlights the Court of Appeals' note of "pause" at one point in its opinion and presents this as if it suggests a broad uncertainty with its rejection of Toll Brothers' preemption arguments. (*See* Petition at 7.)

But read in context the Court of Appeals' "pause" was in reference not to Toll Brothers' general arguments under *Concepcion* (which it had no trouble rejecting), but to one specific argument that attempted to create the appearance of a unique rule for arbitration *provisions* vis-à-vis other provisions within the same agreement. *Noohi*, 708 F.3d at 612. Specifically, Toll Brothers had argued to the Court of Appeals that the purported arbitration provision was singled out as having to be mutual while other *provisions* of the Agreement of Sale requiring Respondents to make a deposit and requiring Toll Brothers to build a home were not.[2] But neither of these provisions is severable and independently enforceable. Toll Brothers' argument thus missed the point of the holding in *Cheek*: the severable nature of the provision at issue. Indeed, after noting its initial "pause," the Court of Appeals recognized upon close analysis "that all *Cheek* does is treat an arbitration provision like any stand-alone contract, requiring consideration. Lack of consideration is clearly a generally applicable contract defense." 708 F.3d at 612.

Finally, Respondents note that in addition to the Fourth Circuit, two other circuits also have concluded that a state-law contract formation rule requiring mutuality of consideration is not preempted by the FAA, even when applied in the context of an arbitration agreement. *See Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 170 (5th Cir. 2004); *Hull v. Norcom, Inc.*, 750 F.2d 1547, 1551 (11th Cir. 1985). No other circuit has issued an opinion containing binding precedent in

2. Toll Brothers appears to have discarded this argument in its Petition, substituting instead its re-characterization of *Cheek* as a selective application of the mutuality of obligation doctrine.

the form of a contrary holding on this precise point. Moreover, several other courts of appeal have invalidated unilateral and/or illusory arbitration agreements on state law unconscionability grounds. *See Dumais v. Am. Golf Corp.*, 299 F.3d 1216, 1219-20 (10th Cir. 2002) (invalidating contract's arbitration agreement as illusory because it allowed "one party the unfettered right to alter the arbitration agreement's existence or its scope"); *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 315-16 (6th Cir. 2000) (ability to choose nature of forum and alter arbitration agreement without notice or consent renders arbitration agreement illusory); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 939 (4th Cir. 1999) (among other reasons, employer's ability to modify rules "in whole or in part" without notice to employee renders arbitration agreement illusory); *see also Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1133 (7th Cir. 1997) (Cudahy, J., concurring) (handbook provision allowing employer to change arbitration agreement at will renders agreement illusory).

As contrary authority, Toll Brothers cites to two district court cases and *dicta* from an Eighth Circuit opinion. (Petition at 17.) This is hardly basis for a conclusion of a significant difference of opinion among the lower courts. Indeed, while the district court in *Enderlin v. XM Satellite Radio Holdings, Inc.*, No. 06-32, 2008 WL 830262 (E.D. Ark. Mar. 25, 2008), found Arkansas law similar to Maryland's preempted by the FAA, at least two other district judges in Arkansas have not found that same law preempted. *See Jackson v. Hino Motors Mfg. USA, Inc.*, No. 3:07CV00104, 2008 WL 4425300 (E.D. Ark. Sept. 25, 2008) (holding arbitration agreement unenforceable where nothing in it obligated one party to arbitrate anything

and denying motion to dismiss or compel arbitration); *Diversicare Leasing Corp. v. Nowlin*, No. 11-CV-1037, 2011 WL 5827208 (W.D. Ark. Nov. 18, 2011) (discussing and applying Arkansas case law on mutuality of obligation in arbitration agreements and ultimately enforcing agreement not because rule was preempted, but because agreement did impose mutual obligations).

Accordingly, neither the District Court nor the Court of Appeals erred in their decisions rejecting Toll Brothers' attempts to compel arbitration and Toll Brothers has not identified any clear, abiding circuit-split which might warrant this Court's involvement in the matter or the reversal of any of the clear, well-reasoned, and unanimous decisions issued by lower courts.

IV. The Flaw in Petitioners' Form Agreement of Sale Is Easily Avoidable

Toll Brothers claims that the question presented by its Petition is "exceptionally important" and that if the Court of Appeals decision is allowed to stand, it will be forced to alter its form agreements or create special agreements for Maryland and other arbitration agreements will be threatened. (Petition at 18-20.) But the unenforceability of the arbitration provision in Toll Brothers' Agreement of Sale is a problem entirely of its own making which is easily fixed. All Toll Brothers has to do is change the agreement to read "Buyer *and* Seller agree" or that "*the parties* agree" as opposed to simply stating that "Buyer agrees." Toll Brothers could even utilize the passive voice and simply state that "it is agreed." To this point, Toll Brothers repeatedly has represented to the Court that it intended to bind itself to the arbitration provision

in the same manner buyers were bound and that it has treated the Agreement of Sale as if it did. This is not enough to render the agreement enforceable, but if that is Toll Brothers' position then it should have no objection to changing its agreement to reflect what it claims is its desire and intention. However strong the federal policy in favor of arbitration, it plainly does not contemplate the imposition of an arbitration agreement in the absence of something as basic as mutual consideration. Simply requiring that arbitration agreements abide by state law pertaining to consideration supporting any contract presents no meaningful obstacle to arbitration.

CONCLUSION

For the foregoing reasons, Respondents oppose the Petition for a Writ of Certiorari.

Respectfully submitted,

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