No.

In the Supreme Court of the United States

TOLL BROS., INC., ET AL., PETITIONERS

v.

MEHDI NOOHI, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Arbitration Act preempts a state-law rule invalidating arbitration provisions, but not contracts more generally, that lack mutuality of obligation.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Toll Bros., Inc., a Pennsylvania corporation; Toll MD V Limited Partnership; and Toll Land Corp. No. 43. Petitioners Toll Bros., Inc., and Toll Land Corp. No. 43 are wholly owned indirect subsidiaries of Toll Brothers, Inc., a Delaware corporation. The general partner of petitioner Toll MD V Limited Partnership is Toll Land Corp. No. 43; the limited partner is Toll Mid-Atlantic LP Company, Inc., also a wholly owned indirect subsidiary of Toll Brothers, Inc. Toll Brothers, Inc., has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondents are Mehdi Noohi and Soheyla Bolouri.

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Toll Bros., Inc.; Toll MD V Limited Partnership; and Toll Land Corp. No. 43 respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-26a) is reported at 708 F.3d 599. The court of appeals' order denying rehearing (App., *infra*, 27a) is unreported. The order of the district court denying petitioners' motion to dismiss or stay the complaint pending arbitration (App., *infra*, 28a-43a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 2013. A petition for rehearing was denied on March 27, 2013 (App., *infra*, 27a). On June 13, 2013,

the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 10, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 2 of the Federal Arbitration Act (FAA), 9 U.S.C. 2, provides in relevant part:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT

"Congress enacted the FAA in response to widespread judicial hostility to arbitration." *American Express Co.* v. *Italian Colors Restaurant*, 133 S. Ct. 2304, 2308-2309 (2013). And that hostility to arbitration has stubbornly persisted even since the FAA's enactment, as lower courts not only devise rules presenting obstacles to arbitration but hold that the FAA does not preempt or displace those rules. In a series of recent cases, this Court has closely superintended the work of lower courts in this area, and it has not hesitated to reverse lower-court decisions that manifest a continued hostility to arbitration. In *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1746, 1753 (2011), the Court held that the FAA preempted one type of state-law rule presenting an obstacle to arbitration: a state-law rule invalidating, as unconscionable, waivers of the right to proceed on a classwide basis in certain consumer arbitration agreements. And in *Marmet Health Care Center, Inc.* v.

Brown, 132 S. Ct. 1201, 1203 (2012) (per curiam), and *Nitro-Lift Technologies, L.L.C.* v. *Howard*, 133 S. Ct. 500, 502-503 (2012) (per curiam), the Court held that the FAA preempted state-law rules prohibiting the arbitration of particular types of claims altogether.

This case involves yet another example of judicial hostility to arbitration: a state-law rule that invalidates arbitration provisions, but not contracts more generally, that lack mutuality of obligation. In the decision under review, the court of appeals—while explicitly acknowledging that this Court might reach a different result—held that Maryland's arbitration-only mutuality rule was not preempted by the FAA. Although labeled as a rule sounding in mutuality rather than unconscionability, the state-law rule at issue here, no less than the rule at issue in *AT&T Mobility*, is preempted by the FAA because it "singl[es] out arbitration provisions for suspect status." *Doctor's Associates, Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996). The court of appeals erred in applying that rule to override petitioners' express contractual right to arbitrate—with the result that respondents' suit, on behalf of a putative class of more than 3,000 individuals, is set to proceed in federal court. This Court should grant certiorari, hold that the FAA preempts the state-law rule at issue here, and reverse the court of appeals' judgment.

1. Petitioners are subsidiaries and affiliates of Toll Brothers, one of the Nation's largest builders of luxury homes. On February 24, 2008, respondents entered into a contract with petitioner Toll MD V Limited Partnership to purchase a new home in Glenelg, Maryland, for just over $1 million. As part of that transaction, respondents paid a deposit of approximately $77,000. The contract provided that respondents were required to obtain approval for a mortgage within 60 days; if they did not do so, petitioner was entitled either to extend the ap-

proval period or to terminate the contract. The contract further provided that, once respondents accepted a loan commitment from a lender, the subsequent termination or expiration of the commitment would not release them from their contractual obligations. App., *infra*, 3a-4a, 28a-33a; D. Ct. Dkt. 5-2, Ex. 1, at 1.

On April 24, 2008, respondents obtained a loan commitment from First Preferred Financial, Inc., which they accepted. On June 13, 2008, however, First Preferred Financial informed respondents that it would be unable to provide them with financing because of a recent Maryland law prohibiting "stated-income loans": *viz.*, loans made on applications in which the borrowers' income was "stated" but not verified. On July 24, 2008, respondents sought to back out of the contract and requested a refund of their deposit. Petitioners allegedly responded that, because respondents had accepted the loan commitment from First Preferred Financial, the subsequent termination of that commitment would not release them from their contractual obligations, and respondents were therefore obligated to perform. App., *infra*, 3a-5a, 30a-32a.

2. On March 3, 2011, respondents filed suit against petitioners in the United States District Court for the District of Maryland on behalf of a putative class of more than 3,000 home buyers. In the suit, respondents contended that petitioners and other Toll Brothers affiliates had breached their contracts with buyers by failing to return deposits when the buyers were unable to close on the homes. App., *infra*, 5a-6a, 34a.

Petitioners moved to dismiss or stay the complaint pending arbitration. App., *infra*, 5a-6a, 34a. In so doing, petitioners invoked the arbitration provision in respondents' contract. That provision states as follows:

ARBITRATION: Buyer,[1] on behalf of Buyer, and all permanent residents of the Premises, including minor children, hereby agree that any and all disputes with Seller, Seller's parent company or their subsidiaries or affiliates arising out of the Premises, this Agreement, the Home Warranty, any other agreements, communications or dealings involving Buyer, or the construction or condition of the Premises including, but not limited to, disputes concerning breach of contract, express and implied warranties, personal injuries and/or illness, mold-related claims, representations and/or omissions by Seller, on-site and off-site conditions and all other torts and statutory causes of action ("Claims") shall be resolved by binding arbitration in accordance with the rules and procedures of Construction Arbitration Services, Inc. ("CAS") or its successor or an equivalent organization mutually agreed upon by the parties. If CAS is unable to arbitrate a particular claim, then that claim shall be resolved by binding arbitration pursuant to the Construction Rules of Arbitration of the American Arbitration Association or its successor or an equivalent organization mutually agreed upon by the parties. In addition, Buyer agrees that Buyer may not initiate any arbitration proceedings for any Claim(s) unless and until Buyer has first given Seller specific written notice of each claim (at 250 Gibraltar Road, Horsham, PA 19044, Attn: Warranty Dispute Resolution) and given Seller a reasonable opportunity after such notice to cure any default, including the

[1] The contract defines "Buyer" as respondents; "Seller" as petitioner Toll MD V Limited Partnership; and the "Premises" as the Glenelg lot and home. See D. Ct. Dkt. 5-2, Ex. 1, at 1.

> repair of the Premises, in accordance with Home Warranty. The provisions of this paragraph shall be governed by the provisions of the Federal Arbitration Act, 9 U.S.C. §§ 1, et seq. and shall survive settlement.
>
> **BUYER HEREBY WAIVES THE RIGHT TO A PROCEEDING IN A COURT OF LAW (INCLUDING WITHOUT LIMITATION A TRIAL BY JURY) FOR ANY CLAIMS OR COUNTERCLAIMS BROUGHT PURSUANT TO THIS AGREEMENT. THE PROVISIONS OF THIS SECTION SHALL SURVIVE SETTLEMENT.**

Id. at 17a-19a (emphasis in original). In addition to signing the contract, respondents separately initialed each of the paragraphs of the arbitration provision to signify their consent. *Id.* at 4a.

In opposing petitioners' motion, respondents contended that the arbitration provision was invalid under the arbitration-only mutuality rule established by the Maryland Court of Appeals (the State's highest court) in *Cheek* v. *United Healthcare of Mid-Atlantic, Inc.*, 835 A.2d 656 (2003). See D. Ct. Dkt. 6, at 9. Specifically, respondents asserted that the arbitration provision was invalid under *Cheek* because it bound them, but not petitioners, to arbitrate their respective claims—and, for that reason, it was not supported by the mutual exchange of promises to arbitrate disputes. *Ibid.* In reply, in addition to disputing respondents' interpretation of the arbitration provision, petitioners contended, *inter alia*, that the Maryland arbitration-only mutuality rule was preempted by the FAA. See D. Ct. Dkt. 8, at 6-9.

3. The district court denied petitioners' motion. App., *infra*, 28a-43a. The court agreed with respondents that the arbitration provision bound them, but not peti-

tioners, to arbitrate their respective claims. *Id.* at 41a. Citing *Cheek*, the court reasoned that, under Maryland law, mutuality was "essential to the validity of an arbitration agreement." *Id.* at 39a. The court explained that, "[a]lthough the obligations need not be identical, each party must promise to arbitrate at least some types of disputes." *Id.* at 42a. Having determined that the arbitration provision bound only respondents to arbitrate their claims, the court concluded that the arbitration provision was unenforceable as a matter of Maryland law. *Ibid.*

4. The court of appeals affirmed. App., *infra*, 1a-26a. As a preliminary matter, the court of appeals agreed with the district court that the arbitration provision "binds only [respondents] to arbitration." *Id.* at 20a. The court therefore concluded that the arbitration provision was unenforceable as a matter of Maryland law under *Cheek*, which provided that, "for an arbitration provision to be valid, both parties [must] bind themselves to it." *Id.* at 22a.

As is relevant here, the court of appeals then held that *Cheek*'s arbitration-only mutuality rule was not preempted by the FAA. App., *infra*, 22a-25a. In so doing, the court rejected what it viewed as petitioners' "strongest contention": namely, that the *Cheek* rule "imposes a requirement on arbitration clauses (mutuality within the clause itself) that does not apply to other contract clauses." *Id.* at 23a (citation omitted). That contention, the court noted, "properly gives us pause." *Ibid.* The court of appeals correctly recognized that this Court "has long held that '[c]ourts may not * * * invalidate arbitration agreements under state laws applicable *only* to arbitration provisions.'" *Ibid.* (alterations in original) (quoting *Doctor's Associates, Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996)). The court of appeals also correctly noted that

this Court "has explained that '[b]y enacting § 2, * * * Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed upon the same footing as other contracts.'" *Ibid.* (alterations in original; internal quotation marks and citation omitted) (quoting *Doctor's Associates,* 517 U.S. at 687).

The court of appeals further acknowledged that, "[i]n a basic sense, the *Cheek* rule does single out an arbitration provision in a larger contract, and assess whether that provision binds both parties to arbitrate at least some claims." App., *infra*, 23a. The court nevertheless held that, although the *Cheek* rule required mutuality of obligation in arbitration provisions, it was not preempted because "all *Cheek* does is treat an arbitration provision like any stand-alone contract, requiring consideration" and "[l]ack of consideration is clearly a generally applicable contract defense." *Id.* at 23a-24a.

In holding that the *Cheek* rule was not preempted, the court of appeals distinguished each of this Court's recent cases on FAA preemption. Although the court of appeals conceded that, in *AT&T Mobility*, the Court was "concerned with ensuring, in general terms, that arbitration agreements are enforceable as written," it contended that *AT&T Mobility* "involved issues of classwide arbitration." App., *infra*, 22a-23a. And it asserted that the Court's analysis in *AT&T Mobility* "focused on the ways in which classwide procedures interfere with the informality of arbitration * * * as well as on the increased risks to defendants." *Id.* at 22a. Because "the *Cheek* rule neither increases formality nor risks to defendants," the court of appeals concluded, "[t]he primary concerns underlying [*AT&T Mobility*] are * * * inapplicable here." *Ibid.* And the court of appeals summarily distinguished *Marmet* and *Nitro-Lift Technologies* on the

ground that "[t]he *Cheek* rule does not bar the arbitration of entire categories of claims[,] * * * [n]or does it ignore an arbitration provision to gauge the enforceability of a different provision within the same contract." *Id.* at 24a.

The court of appeals concluded by "not[ing] * * * the gravity of the issue presented." App., *infra*, 25a. As the court put it, petitioners "ask[] us to overturn a decision of the high court of one of the 50 states—relying on our Constitution's Supremacy Clause." *Ibid.* Relying on the fact that this Court had never specifically addressed a state-law rule of the type at issue here, the court of appeals declined to reach that conclusion. *Ibid.* The court of appeals recognized that "[t]he Supreme Court may eventually hold that the FAA preempts such a rule," but it asserted that "doing so now would require an extension of existing precedent." *Ibid.*

5. The court of appeals subsequently denied rehearing. App., *infra*, 27a.

REASONS FOR GRANTING THE PETITION

This Court has established that the Federal Arbitration Act "places arbitration agreements on equal footing with all other contracts," *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440, 443 (2006), and that any state-law that "singl[es] out arbitration provisions for suspect status" is therefore preempted, *Doctor's Associates, Inc.* v. *Casarotto*, 517 U.S. 681, 687 (1996). The state-law rule at issue here 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. Because Maryland's arbitration-only mutuality rule violates the FAA's bedrock "equal footing" principle, the court of appeals erred by holding that the rule was not preempted by the FAA.

The Court should grant certiorari in order to review, and reverse, that holding. In fact, the Fourth Circuit's decision is so plainly inconsistent with the Court's previous decisions on the scope of FAA preemption that the Court may wish to consider the possibility of summary reversal.

A. The Court Of Appeals' Decision To Invalidate The Parties' Arbitration Provision Under The Maryland Arbitration-Only Mutuality Rule Conflicts With This Court's Decisions

1. Section 2 of the FAA provides that arbitration provisions are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. Section 2 "reflect[s] both a liberal federal policy favoring arbitration, and the fundamental principle that arbitration is a matter of contract." *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1745 (2011) (internal quotation marks and citation omitted). Consistent with those principles, the Court has construed the FAA to require that arbitration provisions be enforced according to their terms—and, of particular relevance here, that arbitration agreements be placed on "equal footing" with other types of contracts. *Id.* at 1745-1746.

To be sure, the savings clause of Section 2—"save upon such grounds as exist at law or in equity for the revocation of any contract"—leaves intact "generally applicable contract defenses, such as fraud, duress, or unconscionability." *AT&T Mobility*, 131 S. Ct. at 1746 (citation omitted). In order to come within the savings clause, however, a state-law rule must truly be "generally applicable"; a rule that "singl[es] out arbitration provisions for suspect status" is not saved from preemption under the FAA. *Doctor's Associates*, 517 U.S. at 687; see *AT&T Mobility*, 131 S. Ct. at 1746, 1748.

2. In a series of recent cases, this Court has applied those principles and confirmed the breadth of the FAA's preemptive force. Most notably, in *AT&T Mobility*, the Court held that the FAA preempted California's rule invalidating, as unconscionable, waivers of the right to proceed on a classwide basis in certain consumer arbitration agreements. See 131 S. Ct. at 1750. The Court explained that the rule "interfere[d] with arbitration" to the extent it permitted parties to demand class arbitration, and, on that basis, the rule was "inconsistent with the FAA." *Id.* at 1750-1751.

In the wake of *AT&T Mobility*, this Court summarily vacated two lower-court decisions that invalidated arbitration provisions under state-law rules manifesting a similar hostility to arbitration. In *Marmet Health Care Center, Inc.* v. *Brown*, 132 S. Ct. 1201 (2012) (per curiam), the Court summarily vacated a lower-court decision that applied a state-law rule prohibiting arbitration of wrongful-death and personal-injury claims against nursing homes. See *id.* at 1203. The Court explained that, because the state-law rule at issue was a "categorical rule prohibiting arbitration of a particular type of claim," the lower-court decision was inconsistent with the "clear instruction in the precedents of this Court," and the state-law rule was therefore preempted. *Id.* at 1204. Similarly, in *Nitro-Lift Technologies, L.L.C.* v. *Howard*, 133 S. Ct. 500 (2012), the Court summarily vacated a lower-court decision that had bypassed an uncontested arbitration provision to resolve the validity under state law of another contractual provision. See *id.* at 502-503. The Court reasoned that the lower-court decision "disregard[ed] this Court's precedents on the FAA," which "hold that the FAA forecloses precisely this type of 'judicial hostility towards arbitration.'" *Id.* at 503 (quoting *AT&T Mobility*, 131 S. Ct. at 1747).

Even before *AT&T Mobility*, moreover, this Court had already made clear that the FAA preempts state-law rules that single out arbitration provisions for differential treatment—whether by restricting parties' ability to limit the issues subject to arbitration, see *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); to limit the persons with whom a party will arbitrate its disputes, see *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1773 (2010); or to agree on rules governing the arbitration, see *Volt Information Services, Inc.* v. *Board of Trustees of Leland Stanford University*, 489 U.S. 468, 479 (1989). The Court even held that the FAA preempts a state-law rule that imposes different *procedural* requirements on arbitration provisions from those imposed on contracts more generally: the Court invalidated a state law requiring arbitration provisions, but not other types of contractual provisions, to be typed in capital letters on the first page of the contract. See *Doctor's Associates*, 517 U.S. at 687. The Court explained that "[c]ourts may not * * * invalidate arbitration agreements under state laws applicable *only* to arbitration provisions" and that "state legislation requiring greater information or choice in the making of agreements to arbitrate than in other contracts is preempted." *Ibid.* (citation omitted).

3. The state-law rule at issue here is no less hostile to arbitration than the state-law rules invalidated in this Court's previous decisions on the scope of FAA preemption. The rule at issue here originates from the Maryland Court of Appeals' decision in *Cheek* v. *United Healthcare of Mid-Atlantic, Inc.*, 835 A.2d 656 (2003), which, as applied here, stands for the proposition that an arbitration provision must contain a "mutual obligation" to arbitrate: in other words, "for an arbitration provision to be valid, both parties [must] bind themselves to it."

App., *infra*, 17a, 22a; see *Cheek*, 835 A.2d at 665 (stating that, for an arbitration provision to be valid, there must be "a mutual exchange of promises to arbitrate" (citation omitted)).

Although the doctrine of "mutuality of obligation" was at one time a familiar principle of contract law, that doctrine is now "largely [a] dead letter[]." *Doctor's Associates, Inc.* v. *Distajo*, 66 F.3d 438, 451 (2d Cir. 1995) (citing 1A Arthur L. Corbin, *Corbin on Contracts* § 152, at 3 (1963)). Like other States, Maryland has long since abandoned that doctrine in the context of contracts more generally. In *Tyler* v. *Capitol Indemnification Insurance Co.*, 110 A.2d 528 (1955), the Maryland Court of Appeals upheld an option contract that lacked mutuality of obligation, reasoning that "the mere fact that the option prevents the mutual promises from being coextensive does not prevent both promises from being binding according to their respective terms." *Id.* at 530 (quoting 1 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 141 (rev. ed. 1936)). In later decisions, the Maryland Court of Appeals has consistently adhered to the view that mutuality of obligation is generally not required as a matter of contract law. See *Questar Builders, Inc.* v. *CB Flooring, LLC*, 978 A.2d 651, 673 (2009); *Acme Markets, Inc.* v. *Dawson Enterprises, Inc.*, 251 A.2d 839, 847 (1969); *Messina* v. *Moeller*, 133 A.2d 75, 76-77 (1957). Maryland courts have therefore followed the prevailing rule that, "[i]f the requirement of consideration is met, there is no *additional* requirement of * * * 'mutuality of obligation.' " Restatement (Second) of Contracts § 79 (1981) (emphasis added).

When considered together with *Cheek*, the foregoing cases demonstrate that Maryland has preserved the doctrine of "mutuality of obligation" only in the context of

arbitration provisions. While some Maryland cases cite *Cheek* in passing, we have been unable to find a single case in which a court has actually applied the *Cheek* rule to invalidate a contract outside the arbitration context.[2]

Accordingly, Maryland's *Cheek* rule "singl[es] out arbitration provisions for suspect status," *Doctor's Associates, Inc.*, 517 U.S. at 687, by subjecting those provisions, and only those provisions, to the otherwise obsolete mutuality requirement—with the result that it affords a party seeking to avoid arbitration with a "defense[] that appl[ies] only to arbitration." *AT&T Mobility*, 131 S. Ct. at 1746. The practical effect of the court of appeals' decision, moreover, is to invalidate an arbitration provision because it limits the parties' agreement to arbitrate to claims asserted by one party—despite the settled principle that the FAA preempts state-law rules that restrict parties' ability to limit the issues subject to arbitration, see *Mitsubishi Motors*, 473 U.S. at 628, or the persons with whom a party will arbitrate its disputes, see *Stolt-Nielsen*, 130 S. Ct. at 1773. The court of appeals' decision simply cannot be reconciled with this Court's previous decisions on the scope of FAA preemption, and the Court's intervention is therefore warranted.

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[2] To be sure, at one point in its opinion, the court of appeals suggested that the *Cheek* rule could be upheld because it merely requires an arbitration provision to be supported by some form of consideration. See App., *infra*, 23a-24a. That statement, however, cannot be read in isolation: the court of appeals' own description of *Cheek*, and *Cheek* itself, make clear that the *Cheek* rule specifically requires that the consideration take the form of mutual obligations. See *id.* at 17a, 22a; *Cheek*, 835 A.2d at 665. For the reasons stated in the text, federal law prohibits application of such a mutuality requirement solely to arbitration provisions.

B. Unlike The Court Of Appeals, Other Lower Courts Have Uniformly Refused To Apply The Doctrine Of 'Mutuality Of Obligation' To Invalidate Arbitration Provisions

As a result of the court of appeals' outlying decision, Maryland stands alone as the only State with an arbitration-only mutuality rule that remains in effect.

1. Courts across the country have consistently rejected efforts to resurrect the "mutuality of obligation" doctrine as a basis for invalidating arbitration provisions. For example, the New York Court of Appeals held that, as a matter of New York law, "[i]f there is consideration for the entire agreement that is sufficient; the consideration supports the arbitration option, as it does every other obligation in the agreement." *Sablosky* v. *Edward S. Gordon Co.*, 535 N.E.2d 643, 646 (1989). "Since it is settled that the validity of an arbitration agreement is to be determined by the law applicable to contracts generally," the court continued, "there is no reason for a different mutuality rule in arbitration cases." *Ibid.*

Similarly, the Eighth Circuit, applying Oklahoma law, concluded that "mutuality of obligation is not required for arbitration clauses so long as the contract as a whole is supported by consideration." *Barker* v. *Golf U.S.A., Inc.*, 154 F.3d 788, 792 (1998), cert. denied, 525 U.S. 1068 (1999). The court cited "the trend established by decisions holding that consideration for a contract as a whole covers the arbitration clause." *Ibid.* (citations omitted). And the Second Circuit reached the same conclusion under Connecticut law, explaining that, "when determining the parties' intent in the arbitration clause,

we must read the contract as a whole." *Distajo*, 66 F.3d at 452 (citation omitted).[3]

Notably, many of the courts that have rejected efforts to resurrect the "mutuality of obligation" doctrine have done so out of concern that an arbitration-only mutuality rule would be preempted by the FAA. In *Distajo*, the Second Circuit reasoned that such a rule "might risk running afoul" of the "strong federal policy favoring arbitration." 66 F.3d at 453. And in *Barker*, the Eighth Circuit quoted that very language in reaching the same conclusion. See 154 F.3d at 793. Another court has explained that such a rule would "assign[] a suspect status to arbitration agreements" and thereby "fl[y] in the face of *Doctor's Associates*, where the Supreme Court of the United States explicitly stated that '[c]ourts may not * * * invalidate arbitration agreements under state laws applicable only to arbitration provisions.'" *Ex parte McNaughton*, 728 So. 2d 592, 598-599 (Ala. 1998) (alterations in original; citation omitted), cert. denied, 528 U.S. 818 (1999).

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[3] Other lower courts have rejected similar efforts to invalidate arbitration provisions, whether under the doctrine of "mutuality of obligation" or the related doctrine of "mutuality of remedy." See, *e.g.*, *Soto* v. *State Industrial Products, Inc.*, 642 F.3d 67, 76-77 (1st Cir. 2011) (Puerto Rico law); *Wilson Electrical Contractors, Inc.* v. *Minnotte Contracting Corp.*, 878 F.2d 167, 168 (6th Cir. 1989) (Ohio law); *Ex parte McNaughton*, 728 So. 2d 592, 599 (Ala. 1998) (Alabama law), cert. denied, 528 U.S. 818 (1999); *Willis Flooring, Inc.* v. *Howard S. Lease Construction Co. & Assocs.*, 656 P.2d 1184, 1185 (Alaska 1983) (Alaska law); *Avid Engineering, Inc.* v. *Orlando Marketplace Ltd.*, 809 So. 2d 1, 4 (Fla. Dist. Ct. App. 2001) (Florida law); *Kalman Floor Co.* v. *Jos. L. Muscarelle, Inc.*, 481 A.2d 553, 560 (N.J. Super. Ct. App. Div. 1984) (New Jersey law), aff'd, 486 A.2d 334 (N.J. 1985); *Dan Ryan Builders, Inc.* v. *Nelson*, 737 S.E.2d 550, 552 (W. Va. 2012) (West Virginia law).

2. Other than Maryland, only two States, Arizona and Arkansas, have purported to apply an arbitration-only mutuality rule—and, in each of those States, the rule has been held to be preempted by the FAA. In *EEOC* v. *Cheesecake Factory, Inc.*, Civ. No. 08-1207, 2009 WL 1259359 (D. Ariz. May 6, 2009), a federal district court concluded that it was irrelevant under Arizona law whether an arbitration provision imposed mutual obligations; in so doing, it refused to apply a "state law requirement of separate consideration for arbitration clauses" on the ground that "the FAA applies state law only to the extent that it is not hostile to arbitration." *Id.* at *4 & n.1. Courts applying Arizona law have followed that reasoning in rejecting claims that an arbitration provision was invalid, either because it lacked mutuality or because it lacked consideration more generally. See, *e.g.*, *Diversified Roofing Corp.* v. *Pulte Home Corp.*, Civ. Nos. 12-1880 & 12-2177, 2012 WL 6628962, at *4-*5 (D. Ariz. Dec. 19, 2012); *Coup* v. *Scottsdale Plaza Resort, LLC*, 823 F. Supp. 2d 931, 951-952 (D. Ariz. 2011).

Similarly, in *Enderlin* v. *XM Satellite Radio Holdings, Inc.*, Civ. No. 06-32, 2008 WL 830262 (E.D. Ark. Mar. 25, 2008), a federal district court held that "Arkansas law requiring mutuality within the arbitration paragraph itself is preempted by the FAA because it places the arbitration clause on unequal footing with other contract terms that do not each have to be mutual." *Id.* at *10. The Eighth Circuit subsequently noted that, in holding that the FAA preempted Arkansas's arbitration-only mutuality rule, "*Enderlin* did not make new law; it merely correctly applied existing law." *Southeastern Stud & Components, Inc.* v. *American Eagle Design Build Studios, LLC*, 588 F.3d 963, 967 (8th Cir. 2009).

C. The Question Presented Is An Exceptionally Important One That Warrants The Court's Review

1. The question presented in this case is of considerable practical as well as legal significance. To begin with, the arbitration provision at issue here is a standard one in the form contract that petitioners and their affiliates use with home buyers not just in Maryland, but in many other jurisdictions. In fact, courts across the country, applying the laws of other States, have routinely compelled arbitration under contracts containing the same arbitration provision. See, *e.g.*, *Hudson Tea Buildings Condo Ass'n* v. *Block 268, LLC*, No. L-5338-11, 2013 WL 1802860, at *4-*5 (N.J. Super. Ct. App. Div. Apr. 29, 2013) (per curiam) (New Jersey law); *Riehl* v. *Toll Brothers III, L.P.*, No. MON-L-3090-05, 2006 WL 1331148, at *4-*5 (N.J. Super. Ct. App. Div. May 17, 2006) (New Jersey law); *Arakelian* v. *N.C. Country Club Estates L.P.*, Civ. No. 08-5286, 2009 WL 4981479, at *12 (D.N.J. Dec. 18, 2009) (North Carolina law); *Guffy* v. *Toll Brothers Real Estate, Inc.*, No. M2003-01810-COA-R3-CV, 2004 WL 2412627, at *7 (Tenn. Ct. App. Oct. 27, 2004) (Tennessee law); *Bramow* v. *Toll VA, L.P.*, 67 Va. Cir. 56, 60-61 (2005) (Virginia law); *Ahern* v. *Toll Brothers, Inc.*, 55 Va. Cir. 18, 21-25 (2001) (Virginia law). If the court of appeals' decision is allowed to stand, petitioners and their affiliates would be forced either to alter the arbitration provision in their form contract across the board, or to create a distinct version of the arbitration provision for situations where Maryland law would apply, if they wished to retain the ability to arbitrate disputes with their customers in the future.

Moreover, petitioners are far from the only commercial entities that enter into contracts with non-mutual arbitration provisions. See *Distajo*, 66 F.3d at 451-453 (citing numerous cases that involved arbitration provi-

sions lacking mutuality). Those provisions are quite common; in fact, at least two of this Court's most recent cases on FAA preemption involved arbitration provisions that were not reciprocal in some respect. See *Marmet*, 132 S. Ct. at 1203 (noting that the arbitration provision at issue "requir[ed] the parties to arbitrate all disputes, other than claims [by the nursing home] to collect late payments owed by the patient"); *AT&T Mobility*, 131 S. Ct. at 1744 (noting that the contract at issue "authorized AT&T to make unilateral amendments, which it did to the arbitration provision on several occasions"). Each of those arbitration provisions would have been invalid under Maryland's arbitration-only mutuality rule.

2. If allowed to stand, the court of appeals' decision in this case will encourage plaintiffs (and their lawyers) to engage in the very sort of forum shopping that the FAA itself was designed to avoid. See *Southland Corp.* v. *Keating*, 465 U.S. 1, 15 (1984). Plaintiffs with similar arbitration provisions who wish to avoid arbitration will no doubt seek to take advantage of the court of appeals' decision by invoking Maryland's arbitration-only mutuality rule. And plaintiffs who are able to proceed under Maryland law will potentially be able to pursue their claims in court not only on their own behalf, but on behalf of a class (as respondents seek to do here)—even if the arbitration provision does not contemplate class proceedings (as is the case here). See *Stolt-Nielsen*, 130 S. Ct. at 1775-1776. Plaintiffs may be able to proceed in court on behalf of a class even where the claims of some class members would be governed by the laws of other States if litigated individually, under cases that hold (erroneously, in petitioners' view) that the law of one State can apply to the claims of an entire class if the State has a sufficient interest in the litigation. See, *e.g.*, *Pecover* v. *Electronic Arts, Inc.*, Civ. No. 08-2820, 2010 WL 313212,

at *19-*22 (N.D. Cal. Dec. 21, 2010); *In re Mercedes-Benz Tele Aid Contract Litig.*, 257 F.R.D. 46, 69 (D.N.J. 2009). It is hard to imagine an outcome more antithetical either to the intent of the parties or to the letter and spirit of the FAA.

3. Finally, this Court's review is sorely needed because lower courts continue to react to this Court's decisions in the arbitration area with almost open defiance, evincing the same hostility to arbitration that led Congress to enact the FAA in the first place. To be sure, in the decision under review, the court of appeals acknowledged this Court's recent decisions on the scope of FAA preemption. The court of appeals, however, proceeded to confine those decisions to their facts—and, while recognizing that this Court might hold that the FAA preempts Maryland's arbitration-only mutuality rule, explicitly shifted the burden to this Court to do so. See App., *infra*, 25a.

This Court should not countenance such a maneuver. The mere fact that the state-law rule at issue here is labeled one of mutuality, rather than unconscionability, is of no moment. Ironically, before *AT&T Mobility*, many lower courts sought to avoid the Court's earlier decisions on the scope of FAA preemption by cloaking their hostility to arbitration in the guise of state-law principles of "unconscionability." See Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 Buffalo L. Rev. 185, 186-187 (2004). In *AT&T Mobility*, of course, the Court rejected those efforts. Maryland's *Cheek* rule has the same effect as the state-law rule that the Court invalidated in *AT&T Mobility*. Both rules single out arbitration provisions for differential treatment, and, in so doing, permit parties to circumvent their agreements to arbitrate. As it did in *AT&T Mobility*—and subsequently in *Marmet* and *Ni-*

tro-Lift Technologies—the Court should grant review and hold that the lower court erred by applying a state-law rule that is preempted by the FAA.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider the possibility of summary reversal; in the alternative, the Court should set the case for briefing and oral argument.

Respectfully submitted.

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JULY 2013

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12-1261
(1:11-cv-00585-RDB)

MEHDI NOOHI, individually and on behalf of all others similarly situated; SOHEYLA BOLOURI, individually and on behalf of all others similarly situated,
Plaintiffs-Appellees
v.
TOLL BROS., INC., for itself and all others similarly situated; TOLL LAND CORP. NO. 43, for itself and all others similarly situated; TOLL MD V LIMITED PARTNERSHIP, for itself and all others similarly situated, Defendants-Appellants

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Argued: December 4, 2012
Decided: February 26, 2013

Before KING, SHEDD, and DAVIS, Circuit Judges.

OPINION

DAVIS, Circuit Judge:

In this putative class action, prospective luxury home buyers allege that a real estate development company unlawfully refused to return deposits when the prospective buyers could not obtain mortgage financing. The named Plaintiffs-Appellees are Mehdi Noohi and Soheyla Bolouri ("Plaintiffs"), a husband and wife; De-

fendants-Appellants are Toll Bros., Inc., a real estate development company, and several of its subsidiaries (collectively, "Toll Brothers"). Plaintiffs contracted with a subsidiary of Toll Bros., Inc., for the construction of a luxury home in Maryland. The Agreement of Sale ("the Agreement") required that Plaintiffs seek approval of a mortgage, and included an arbitration provision. Though Plaintiffs received a "Mortgage Loan Commitment" letter from at least one lender that was later rescinded, and though several other of their mortgage applications were all denied, Toll Brothers sought to keep $77,008 in Plaintiffs' deposits.

Plaintiffs sued Toll Brothers individually and on behalf of a class of other prospective buyers who allegedly lost deposits to Toll Brothers in a similar manner. The district court denied Toll Brothers' motion to dismiss or stay the suit pending arbitration, finding that the Agreement's arbitration provision lacked mutuality of consideration under Maryland law because it required only the buyer—but not the seller—to submit disputes to arbitration. Toll Brothers appealed.

For the reasons that follow, we hold that this appeal is properly before us under 9 U.S.C. § 16(a), and that the Agreement's arbitration provision is unenforceable for lack of mutual consideration under Maryland law.

I.

We begin by setting out the facts Plaintiffs have alleged, which we take as true for purposes of this appeal, *see Hill v. Peoplesoft USA, Inc.,* 412 F.3d 540, 543 (4th Cir. 2005), although "the decision to deny [a] motion for stay and to compel arbitration is reviewed de novo," *Patten Grading & Paving, Inc. v. Skanska USA Bldg., Inc.*, 380 F.3d 200, 204 (4th Cir. 2004) (citing *MicroStrategy, Inc. v. Lauricia,* 268 F.3d 244, 250 (4th Cir. 2001)). *See*

also Johnson v. Circuit City Stores, 148 F.3d 373, 377 (4th Cir. 1998).

A.

Toll Brothers, a publicly traded real estate development company, sells luxury residences in a number of states, including Maryland. One of Toll Brothers' subsidiaries, TBI Mortgage Company ("TBI Mortgage"), provides mortgage banking primarily to buyers of Toll Brothers homes. Other subsidiaries contract with individual home buyers for the purchase of newly constructed or planned homes. One such subsidiary, Toll Land Corp. No. 43, is the General Partner in Toll MD V Limited Partnership, with whom Plaintiffs contracted to purchase a home.

On February 17, 2008, Plaintiffs made an "initial reservation deposit" of $5,000. On February 24, 2008, they entered into the Agreement with Toll MD V to purchase a preconstruction home in Glenelg, Maryland, for $1,006,975. Plaintiffs made an additional deposit of $45,348 and later deposited another $26,660. By February 28, 2008, the deposit total had reached $77,008.

The Agreement contained a number of relevant provisions. Section 2 of the Agreement provided that Toll Brothers would hold the deposit until it was either refunded or forfeited by Plaintiffs. Section 4 dealt with mortgage application obligations, and directed Plaintiffs to complete the mortgage approval process within 60 days. In order to do so, Plaintiffs agreed to make a good-faith, "truthful and complete application to TBI Mortgage and any other lender of [their] choosing," accept a loan commitment, and comply with all terms imposed by the lender. Compl. ¶ 35; J.A. 49.[1] Plaintiffs agreed "to be

[1] Citations to the "J.A." refer to the Joint Appendix filed by the parties in this appeal.

responsible for and bear the risk of meeting all terms and conditions" of the loan commitment, and the Agreement further provided that "the termination or expiration of the mortgage commitment after it is received, for any reason, shall not release [them] of [their] obligations under the Agreement." J.A. 49. If Plaintiffs were not approved for a mortgage after 60 days, Toll Brothers could either extend the mortgage application period in order to submit a mortgage request on behalf of Plaintiffs, or declare the Agreement "null and void" and refund Plaintiffs their deposit. Compl. ¶ 36; J.A. 49. Section 13 of the Agreement comprised an arbitration provision, and Plaintiffs initialed under each of its paragraphs.

Plaintiffs applied to TBI Mortgage on February 25, 2008, but their application was rejected. On Toll Brothers' recommendation, Plaintiffs then applied for a mortgage with First Preferred Financial, Inc., which provided them with a "Mortgage Loan Commitment" letter for $906,275 on April 24, 2008. Though Plaintiffs accepted the letter, First Preferred Financial informed Plaintiffs on June 13, 2008, that it could no longer provide them with financing in light of a recent Maryland law prohibiting "stated income" loans. Plaintiffs also sought to secure a mortgage from GMAC, but were unsuccessful.

On July 24, 2008, Plaintiffs sent a letter to Toll Brothers, informing them that they were unable to secure a mortgage, and demanding a refund of their deposit pursuant to the Agreement of Sale. On August 21, 2008, Toll Brothers responded to Plaintiffs by asserting that the First Preferred Financial commitment letter, although now terminated, had satisfied the mortgage contingency and Plaintiffs were still obligated to perform under the Agreement. The response further stated that Toll Brothers would retain Plaintiffs' deposit if they did not submit additional mortgage applications and proceed

to closing. Specifically, the letter suggested that Plaintiffs contact APEX Funding Group.

On August 27, 2008, Plaintiffs wrote to Toll Brothers, stating that they would continue to work to receive a mortgage. On September 22, 2008, APEX Funding Group gave Plaintiffs a loan commitment letter but then declined to approve them for a mortgage. Plaintiffs also sought mortgage approvals from other lenders, but were unable to secure financing.

Plaintiffs further allege that Toll Brothers has neither begun construction on the lot in question, nor incurred expenses toward the construction of the home. Plaintiffs claim that because Toll Brothers refused to refund their deposits after the failure of their repeated good-faith attempts to secure a mortgage, Toll Brothers breached the Agreement.

B.

Plaintiffs sued, filing a class action complaint against Toll Brothers on March 3, 2011, on behalf of themselves and home buyers around the country who they alleged lost their deposits in a similar manner. Federal jurisdiction was founded on the Class Action Fairness Act; the complaint asserted an amount in controversy of over $5 million, and at least one member of the putative class is a citizen of a different state from one of the defendants. *See* 28 U.S.C. § 1332(d)(2). The complaint contained four causes of action: (1) breach of contract; (2) breach of the duty of good faith and fair dealing; (3) unjust enrichment; and (4) unfair and deceptive trade practices, in violation of Md. Code Ann., Commercial Law § 13-301 *et seq.*

Toll Brothers filed a motion to dismiss or stay Plaintiffs' complaint pending arbitration based on the Agreement's arbitration provision, Section 13. After a hearing,

the district court issued an order and memorandum opinion denying the motion. *See Noohi v. Toll Bros., Inc.*, 2012 WL 273891 (D. Md. Jan. 30, 2012). The court noted that state contract formation law determines the validity of arbitration agreements, and that under Maryland law as articulated in *Cheek v. United Healthcare of Mid-Atlantic, Inc.*, 835 A.2d 656 (2003), an arbitration provision is treated as a severable contract that must be supported by adequate consideration. After determining that the arbitration provision required only Plaintiffs—but not Toll Brothers—to submit disputes to arbitration, the court relied on *Cheek* to hold that Section 13 of the Agreement was unenforceable for lack of consideration. The court did not, however, address the possibility that the rule set forth in *Cheek* was preempted under *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), which held that the Federal Arbitration Act ("FAA") preempted California's judicial rule regarding the unconscionability of class arbitration waivers in consumer contracts. Toll Brothers appealed.

II.

Plaintiffs first argue that we lack jurisdiction over this interlocutory appeal from the district court's denial of Toll Brothers' motion to dismiss or stay pending arbitration.

As we recently reiterated, "[c]ourts of appeal ordinarily may review only final decisions of district courts." *Rota-McLarty v. Santander Consumer USA, Inc.*, 700 F.3d 690, 696 (4th Cir. 2012). *See also* 28 U.S.C. § 1291. "Although [a] district court's order denying [a] motion to compel arbitration and stay proceedings is not a final decision, we may nevertheless exercise appellate jurisdiction if the order falls within an exception to the final judgment rule established by the FAA." *Rota-McLarty*, 700 F.3d at 696.

Under the FAA, courts must stay any suit "referable to arbitration" under an arbitration agreement, where the court has determined that the agreement so provides, and one of the parties has sought to stay the action. 9 U.S.C. § 3. Under 9 U.S.C. § 16(a)(1)(A), an "appeal may be taken from" an order "refusing a stay of any action under" 9 U.S.C. § 3. In short, a party may appeal the denial of a motion to stay an action concerning a matter that a written agreement has committed to arbitration. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 86 (2000) (holding that § 16(a)(3) "preserves immediate appeal of any 'final decision with respect to an arbitration,' regardless of whether the decision is favorable or hostile to arbitration"). *See also Am. Cas. Co. of Reading, Pa. v. L-J, Inc.*, 35 F.3d 133, 135 (4th Cir. 1994) (abrogated on other grounds by *Green Tree*, 531 U.S. at 89.)

Plaintiffs acknowledge the above principles but argue that because Toll Brothers' motion was primarily a motion to dismiss, and a motion to dismiss is not an appealable "final decision," § 16(a)(1)(A) is inapplicable. In other words, according to Plaintiffs, for Toll Brothers' motion to be immediately appealable, the motion must seek only a stay.

This overly formal argument fails for at least two reasons. First, Toll Brothers moved "to dismiss *or stay*," not simply to dismiss. *See* Defs.' Mem. in Supp. of Mot. to Dismiss or Stay Pls.' Compl. Pending Arbitration at 1 (hereinafter, "Defs.' Mot. to Dismiss or Stay") (emphasis added); J.A. 35. The motion's conclusion specifically requested that the court "dismiss, or in the alternative stay, Plaintiffs' Complaint pending arbitration between Plaintiffs and Defendants." Defs.' Mot. to Dismiss or Stay at 11; J.A. 45. As noted above, under § 16(a)(1)(A), a party may appeal the denial of a motion to stay federal

proceedings pending arbitration; at least to the extent that an appeal concerns the denial of a motion to stay, the fact that the motion also seeks dismissal does not affect its appealability.

Second, in assessing whether a motion adequately invoked the FAA, "the proper inquiry focuses on substance rather than nomenclature." *Rota-McLarty,* 700 F.3d at 698. Thus, "we look to whether a motion evidences a clear intention to seek enforcement of an arbitration clause rather than on whether it adhered to a specific form or explicitly referenced §§ 3 or 4." *Id.* Though Toll Brothers never sought to have the district court compel arbitration, its entire brief focused on the enforceability of the arbitration provision. Toll Brothers thus indicated a "clear intention to seek enforcement" of that provision.[2]

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[2] In *Choice Hotels International, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707, 709–10 (4th Cir. 2001), we held that "[n]otwithstanding the terms of § 3, . . . dismissal is a proper remedy when all of the issues presented in a lawsuit are arbitrable." In *Hooters of America, Inc. v. Phillips*, 173 F.3d 933, 937 (4th Cir. 1999), however, we had previously noted that "[w]hen a valid agreement to arbitrate exists between the parties and covers the matter in dispute, the FAA commands the federal courts to stay any ongoing judicial proceedings, 9 U.S.C. § 3, and to compel arbitration, *id.* § 4." As we recently pointed out, "[t]here may be some tension between our decision in *Hooters*—indicating that a stay is required when the arbitration agreement 'covers the matter in dispute'—and *Choice Hotels*—sanctioning dismissal 'when all of the issues presented . . . are arbitrable.'" *Aggarao v. MOL Ship Mgmt. Co., Ltd.*, 675 F.3d 355, 376 n.18 (4th Cir. 2012). In *Aggarao*, we went on to note that this potential tension mirrors a circuit split:

> Our sister circuits are divided on whether a district court has discretion to dismiss rather than stay an action subject to arbitration. *Compare Cont'l Cas. Co. v. Am. Nat'l Ins. Co.*, 417 F.3d 727, 732 n.7 (7th Cir. 2005) ("[T]he proper course of action when a party seeks to invoke an arbitration clause is to stay the proceedings pending arbi-

This Court therefore has jurisdiction over the instant appeal.

III.

We next examine whether the district court correctly held that the arbitration provision in Section 13 of the Agreement was unenforceable for lack of mutual consideration under *Cheek*.

Toll Brothers makes the following arguments in support of its view that the court erred in so holding: (1) the arbitration provision was supported by the consideration underlying the Agreement as a whole; (2) the arbitration provision binds both parties to arbitration, and the district court failed to resolve ambiguities in favor of arbitration when it held otherwise; (3) *Cheek* is distinguishable on its facts; and (4) *Cheek* is inconsistent with the Supreme Court's holding in *Concepcion* because it singles out arbitration provisions by imposing on them a requirement inapplicable to other contract provisions.

Plaintiffs make the following arguments in support of the district court's holding: (1) under Maryland law, mutual consideration must exist in the arbitration provision itself; (2) the arbitration provision here unambiguously binds only Plaintiffs, leaving no ambiguities to interpret in favor of arbitration; (3) *Cheek*'s facts do not render it

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tration rather than to dismiss outright."), with *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992) ("The weight of authority clearly supports dismissal of the case when all of the issues raised in the district court must be submitted to arbitration.").

Aggarao, 675 F.3d at 376 n.18. In *Aggarao*, however, we "need[ed] not resolve this disagreement" because the issues raised by the plaintiff were not all subject to arbitration, and thus dismissal was inappropriate. *Id.* Similarly here, Toll Brothers' motion was appealable irrespective of *Choice Hotels* for the reasons discussed above. We therefore again decline to "resolve this disagreement."

distinguishable; and (4) neither *Concepcion* nor other recent Supreme Court cases abrogate *Cheek*'s requirement that an arbitration provision contain mutual consideration. We think Plaintiffs have the more persuasive arguments.

A.

"We review de novo a district court's determination on arbitrability of a civil action." *Aggarao v. MOL Ship Mgmt. Co., Ltd.*, 675 F.3d 355, 365 (4th Cir. 2012). "At the same time, we give due regard to the federal policy favoring arbitration and resolve 'any doubts concerning the scope of arbitrable issues . . . in favor of arbitration.'" *Hill v. Peoplesoft USA, Inc.*, 412 F.3d 540, 543 (4th Cir. 2005) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25 (1983)).

Section 2 of the FAA, its "primary substantive provision," *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24, makes agreements to arbitrate "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2.

> Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.

Moses H. Cone Mem'l Hosp., 460 U.S. at 24. Under this federal substantive law, "courts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms." *Concepcion*, 131 S. Ct. at 1745 (internal citations omitted).

However, § 2 also permits arbitration agreements to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. "This saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 131 S. Ct. at 1746 (citation omitted).

Applying the above framework, the Supreme Court has

> held that parties may agree to limit the issues subject to arbitration, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), to arbitrate according to specific rules, [*Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479, (1989)], and to limit *with whom* a party will arbitrate its disputes, [*Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 130 S. Ct. 1758, 1773 (2010)].

Concepcion, 131 S. Ct. at 1748–49 (emphasis in original). In *Concepcion*, the Supreme Court further prohibited courts from altering otherwise valid arbitration agreements by applying the doctrine of unconscionability to eliminate a term barring classwide procedures. *Id.* at 1750–53.

The Maryland case at the center of this appeal is *Cheek v. United Healthcare of Mid-Atlantic, Inc.*, 835 A.2d 656 (2003). In *Cheek*, the plaintiff was presented with an offer of employment conditioned on acceptance of the employer's arbitration policy. *Id.* at 657–58. That policy left to the employer the unilateral right to "alter,

amend, modify, or revoke the [p]olicy at its sole and absolute discretion at any time with or without notice." *Id.* at 658. The plaintiff accepted the offer of employment on the employer's terms, but was terminated about seven months later. *Id.* He then filed suit in Maryland state court, alleging a number of state-law violations. *Id.* at 659. The employer filed a "Motion to Dismiss and/or Compel Arbitration and Stay" the suit, which the trial court granted. *Id.* The Court of Appeals of Maryland (which granted certiorari prior to any proceedings in the intermediate appellate court) agreed with the plaintiff's argument that the employer's unfettered discretion to change the arbitration agreement rendered its promise to arbitrate illusory, and that the agreement was therefore unenforceable for lack of consideration. *Id.* In reaching that conclusion, the court viewed the arbitration agreement as severable from the underlying employment relationship, and limited its assessment of consideration to the four corners of the agreement itself. *Id.* at 665.

B.

1.

Toll Brothers' first argument is that the arbitration provision in the Agreement is enforceable because it was supported by the consideration underlying the Agreement as a whole. To assess that argument, we must first determine what law applies. "The Supreme Court has directed that we 'apply ordinary state-law principles that govern the formation of contracts'" when assessing whether the parties agreed to arbitrate a matter. *Hill,* 412 F.3d at 543 (quoting *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 944 (1995)). *See also Rota-McLarty,* 700 F.3d at 699 ("The question of whether an enforceable arbitration agreement exists . . . is a matter of contract interpretation governed by state law, which

we review de novo."). Maryland generally follows the "lex loci contractus" principle, under which "the law of the jurisdiction where the contract was made controls its validity and construction." *Kramer v. Bally's Park Place, Inc.*, 535 A.2d 466, 467 (1988). The Agreement was executed in Maryland between Toll Brothers' Maryland subsidiary—Toll MD V Limited Partnership—and Plaintiffs, who resided in Maryland at the time it was executed. The Agreement also references numerous provisions of Maryland law. For example, Section 17 references the "Maryland Homeowners Association Act," Section 19 references "Section 8-402.2 of the Real Property Article of the Annotated Code of Maryland," and Section 20 references "§ 17-404 of the Business Occupations and Professions Article of the Annotated Code of Maryland." J.A. 52–53. We therefore look to Maryland law.

As already discussed, that law was set forth in *Cheek*. There, after a thorough analysis discussing cases that reached conflicting conclusions, Maryland's highest court specifically rejected the notion that consideration for an underlying contract can serve as consideration for an arbitration provision within that contract. *See Cheek*, 835 A.2d at 667 ("We disagree with cases from other jurisdictions that determine that consideration for an underlying contract also can serve as consideration for an arbitration agreement within the contract, even when the arbitration agreement is drafted so that one party is absolutely bound to arbitrate all disputes, but the other party has the sole discretion to amend, modify, or completely revok[e] the arbitration agreement at any time and for any reason."). The court reasoned that to do otherwise would require "straying into the prohibited morass of the merits of the claims" by looking to the parties' obligations (and their potential breach) underlying the lawsuit itself. *Id.* at 665. That merits inquiry "could eclipse the role of the arbitrator, should a valid agree-

ment exist, and therefore run afoul of strong Federal and Maryland policies favoring arbitration as a viable method of dispute resolution." *Id.* at 668. In other words, where it is asserted that a dispute is bound to arbitration, the role of courts is limited to determining the enforceability of an arbitration provision; "straying" into areas outside that provision is an impermissible encroachment on the arbitrator's authority. *Cf. Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967) (holding that courts may adjudicate claims of "fraud in the inducement of the arbitration clause itself—an issue which goes to the 'making' of the agreement to arbitrate"—but may not "consider claims of fraud in the inducement of the contract generally").

There are two published Fourth Circuit cases that cite *Cheek*. The first is *Hill v. Peoplesoft USA, Inc.*, 412 F.3d 540 (4th Cir. 2005).[3] In *Hill*, this Court examined the enforceability of an arbitration agreement under Maryland law. There, an employee suing her employer had previously signed a separate arbitration agreement consisting of a six-page document detailing both parties' arbitration obligations. *Id.* at 542. We noted that under Maryland law, a court examining "whether an arbitration agreement is a valid contract" is limited to "the language of the arbitration agreement itself." *Id.* at 543. Because the arbitration agreement was a separate contract, however, we did not confront the specific issue of what to do when an arbitration agreement is contained within a larger contract. Rather, we held that the district court erred in looking outside the arbitration agreement to an "internal dispute solution" program that the employer reserved the right to change without notice; be-

[3] Inexplicably, Toll Brothers fails to cite *Hill* in either its opening or reply brief. Given the fact that *Hill* is one of only two published Fourth Circuit cases to cite *Cheek*, this failure is glaring.

cause the arbitration agreement itself clearly bound both parties to arbitration, it was supported by adequate consideration. *Id.* at 543–44.

The second Fourth Circuit case that cites *Cheek* is *Dan Ryan Builders, Inc. v. Nelson*, 682 F.3d 327 (4th Cir. 2012), a case involving facts strikingly similar to those Plaintiffs have alleged here. In *Dan Ryan Builders*, the defendant builder constructed a new home in West Virginia for the plaintiff buyer. The contract contained an arbitration provision purportedly binding both parties, but giving the builder "the right to seek arbitration *or* to file an action for damages if [the buyer] 'fail[ed] to settle on the Property within the time required under [the] Agreement.'" *Id.* at 327 (emphasis in original, first alteration added). The buyer sued, arguing "that the arbitration provision was unenforceable as a matter of law because it was not supported by mutual consideration, notwithstanding the fact that the contract as a whole was supported by adequate consideration." *Id.* at 328. The district court agreed and dismissed the builder's motion to compel arbitration. *Id.* Because "the parties' contract [was] governed by West Virginia law," and there was no West Virginia law directly controlling, this Court certified the following question to the West Virginia Supreme Court of Appeals: "Does West Virginia law require that an arbitration provision, which appears as a single clause in a multi-clause contract, itself be supported by mutual consideration when the contract as a whole is supported by adequate consideration?" *Id.* at 327.[4] Relevant here, however, is this Court's assumption

[4] The West Virginia court later answered this question in the negative, holding that "West Virginia's law of contract formation only requires that a contract as a whole be supported by adequate consideration." *Dan Ryan Builders, Inc. v. Nelson*, No. 12-0592, 737 S.E.2d 550, 552–53, 2012 WL 5834590, at *2 (W. Va. Nov. 15, 2012). The West Virginia court also noted, however, that mutuality of obli-

that state law was controlling on the issue of whether the consideration underlying the contract could support an arbitration provision.[5] *See also infra* pp. 24a-25a & n. 7.

In the face of clear Maryland law that consideration for an arbitration provision must be in the provision itself, Toll Brothers argues that we may look outside that provision. Its arguments are not persuasive. First, Toll Brothers cites a string of cases that it claims have rejected challenges to arbitration clauses on mutuality grounds where the underlying contract is supported by adequate consideration. But, as Plaintiffs point out, all of those cases are based on the law of states other than Maryland. Because the relevant inquiry depends on Maryland law, cases based on the law of other states are inapposite.

Second, Toll Brothers cites an unpublished district court opinion from New Jersey, *Arakelian v. N.C. Country Club Estates Limited Partnership,* 2009 WL 4981479 (D.N.J. Dec. 18, 2009), that enforced an arbitration provision contained in an agreement with Toll Brothers similar to the provision at issue here. Not only does *Arakelian* apply North Carolina law, however, but it

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gation may be considered as a factor in unconscionability analysis. *Id.* at 557–58, 2012 WL 5834590, at *7. In light of the West Virginia court's conclusions, the *Dan Ryan Builders* Court recently vacated the district court's holding as to mutuality, and remanded for further proceedings as to unconscionability. *Dan Ryan Builders, Inc. v. Nelson*, No. 11-1215, 2013 WL 323284 (4th Cir. Jan. 29, 2013).

[5] *Dan Ryan Builders* also discussed the unpublished case of *Howard v. King's Crossing, Inc.*, 264 Fed. Appx. 345 (4th Cir. 2008) (per curiam), which Plaintiffs cite and the district court relied on. Of course, *Howard* was an unpublished—and therefore nonprecedential—opinion, and nothing the *Dan Ryan Builders* Court said about it (and nothing we might say about it here) would elevate its holding to binding precedent.

does not even examine the issue of consideration, instead focusing its analysis on the plaintiffs' unconscionability argument and which Toll Brothers subsidiaries were bound by the arbitration provision. 2009 WL 4981479, at *7–*13. The reasoning in that case is similarly inapposite.

In short, we apply Maryland law to determine the validity of the arbitration provision in the Agreement. Under Maryland law as articulated in *Cheek*, an arbitration provision must be supported by consideration independent of the contract underlying it, namely, mutual obligation. Under Maryland law, therefore, the validity of the arbitration provision in the Agreement drafted and employed by Toll Brothers must satisfy that requirement, an issue to which we now turn.

2.

Toll Brothers' first fallback argument is that the arbitration provision is supported by consideration within the provision itself because it binds both parties to arbitration. Plaintiffs argue, and the district court held, that the clause binds only Plaintiffs. The arbitration provision reads as follows:

> 13. ARBITRATION: Buyer, on behalf of Buyer, and all permanent residents on the Premises, including minor children, hereby agree that any and all disputes with Seller, Seller's parent company or their subsidiaries or affiliates arising out of the Premises, this Agreement, the Home Warranty, any other agreements, communications or dealings involving Buyer, or the construction or condition of the Premises including, but not limited to, disputes concerning breach of contract, express and implied warranties,

personal injuries and/or illness, mold related claims, representations and/or omissions by Seller, on-site and off-site conditions and all other torts and statutory causes of action ("Claims") shall be resolved by binding arbitration in accordance with the rules and procedures of Construction Arbitration Services, Inc. ("CAS") or its successor or an equivalent organization mutually agreed upon by the parties. If CAS is unable to arbitrate a particular claim, then that claim shall be resolved by binding arbitration pursuant to the Construction Rules of Arbitration of the American Arbitration Association or its successor or an equivalent organization mutually agreed upon by the parties. In addition, Buyer agrees that Buyer may not initiate any arbitration proceeding for any Claim(s) unless and until Buyer has first given Seller specific written notice of each claim (at 250 Gibraltar Road, Horsham, PA 19044, Attn: Warranty Dispute Resolution) and given Seller a reasonable opportunity after such notice to cure any default, including the repair of the Premises in accordance with the Home Warranty. The provisions of this paragraph shall be governed by the provisions of the Federal Arbitration Act, 9 U.S.C. §§ 1, et seq. and shall survive settlement.

BUYER HEREBY WAIVES THE RIGHT TO A PROCEEDING IN A COURT OF LAW (INCLUDING WITHOUT LIMITATION A TRIAL BY JURY) FOR ANY CLAIMS OR COUNTER-

> **CLAIMS BROUGHT PURSUANT TO THIS AGREEMENT. THE PROVISIONS OF THIS SECTION SHALL SURVIVE SETTLEMENT.**

J.A. 51 (emphasis in original). In the district court's view, this provision is "quite simply one-sided and onerous" because it

> mandates that buyers, or in this case Plaintiffs, promise to (1) submit all disputes against seller to binding arbitration, (2) notify Defendants of each claim before they initiate arbitration proceedings, (3) give Defendants a reasonable opportunity to cure the default, and (4) waive the right to proceed in a court of law. . . . Conversely, Defendants do not make any promises to Plaintiffs in this provision. The clause does not state "Buyer and Seller," or even "the parties" and thus does not impose any obligations on the Defendants. It only refers to "Buyers" and their obligations.

Noohi, 2012 WL 273891, at *6.

Toll Brothers disagrees with the district court's interpretation of the provision. In Toll Brothers' view, the provision

> provides that "Buyer . . . hereby agree[s] that any and all disputes with Seller . . . shall be resolved by binding arbitration[.]" The arbitration provision does not apply only to "Buyer's disputes" or disputes "against Seller." Rather, it applies to "any and all disputes" and disputes "with Seller." The

> Agreement of Sale does not state that disputes initiated by Seller will be in a court of law or that disputes raised by Seller will be treated differently. It states that "any and all disputes with Seller" will be resolved in arbitration. When Seller signed the Agreement of Sale, it agreed to be bound by this provision.

Toll Brothers' Br. 13 (alterations in original; citation to J.A. omitted).

We agree with the district court that the provision binds only Plaintiffs to arbitration, and thus lacks mutuality of consideration. First, as Plaintiffs point out, all the subject and verb pairings relate to the buyer's obligations (i.e., buyer agrees, buyer waives, etc.); nowhere does the provision state that "Buyer and Seller agree," or the passive "it is agreed." Second, the provision adds additional procedures that only the buyer must perform prior to initiating arbitration, such as giving the seller written notice of each claim and an opportunity to cure any default. Third, all the types of claims given as examples in the provision are claims that the buyer would bring against the seller. Fourth, the capitalized, bolded paragraph at the end of the provision states that only the buyer, but not the seller, waives the right to a court proceeding "FOR ANY CLAIMS *OR COUNTERCLAIMS* BROUGHT PURSUANT TO THIS AGREEMENT." J.A. 51 (emphasis added). This provision "expressly contemplat[es] that [court] claims could be brought by Seller (which would be a necessary prerequisite to Buyer's assertion of a counterclaim) but that even in such an event, and even though Seller may bring the claim in court, Buyer may not assert any counterclaim in that forum." Pls.' Br. 27. These interpretive guides, rooted as they are in reasonable and longstanding grammatical,

linguistic and "plain language" principles, make clear that the provision did not bind Toll Brothers to arbitration.

Because the arbitration provision unambiguously binds only the buyer, there is no ambiguity to interpret by application of a presumption in favor of arbitration.[6]

3.

Toll Brothers' second fallback argument attempts to distinguish *Cheek* on its facts, pointing out that the arbitration provision in *Cheek* was illusory because one party could revoke its promise to arbitrate at any time, whereas the issue here is whether one party has bound itself at all. This argument warrants little discussion, as the distinction Toll Brothers draws is one without a difference; the point is that in both cases, the "agreement" is illusory and lacks consideration. Similarly, Toll Brothers' reliance on *Holloman v. Circuit City Stores, Inc.*, 894 A.2d 547 (Md. 2006), does not further its argument. That case held that the *Cheek* rule did not apply where an arbitration agreement permitted one party to modify the agreement on 30 days' notice, among various other restrictions on altering the agreement. *Id.* at 592. Unlike in *Holloman*, the issue here is the same as in *Cheek*—whether the arbitration agreement is supported by any consideration at all.

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[6] Even if there were an ambiguity, however, the presumption in favor of arbitration does not apply to questions of an arbitration provision's validity, rather than its scope. *Granite Rock Co. v. Int'l Brotherhood of Teamsters*, 130 S. Ct. 2847, 2857–58 (2010) (explaining that the presumption in favor of arbitrability does not apply where there are questions as to the enforceability of the arbitration agreement). *See also Gove v. Career Sys. Dev. Corp.*, 689 F.3d 1, 6 n. 2 (1st Cir. 2012) ("However, this presumption of arbitrability applies only to the scope of an arbitration agreement, not its validity.").

4.

Toll Brothers' final fallback argument is that the *Cheek* rule is preempted by the FAA.

The Supremacy Clause provides, in relevant part, that "the Laws of the United States . . . shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. A state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" is preempted by the Supremacy Clause. *Hines v. Davidowitz,* 312 U.S. 52, 67 (1941). *See also Concepcion,* 131 S. Ct. at 1753.

In *Concepcion,* 131 S. Ct. at 1740, the Court held that the FAA preempted California's judicial rule (known as the *Discover Bank* rule) regarding the unconscionability of class arbitration waivers in consumer contracts. Under the *Discover Bank* rule, class waivers in consumer arbitration agreements were deemed unconscionable if (1) the waiver was in an adhesion contract, (2) disputes between the parties would likely have involved small amounts of damages, and (3) the party with inferior bargaining power alleged a deliberate scheme to defraud. *Id.* at 1746. In concluding that the FAA preempted that rule, the Court's analysis focused on the ways in which classwide procedures interfere with the informality of arbitration—one of its chief benefits—as well as on the increased risks to defendants. *Id.* at 1751–52.

But the *Cheek* rule neither increases formality nor risks to defendants; it merely requires that for an arbitration provision to be valid, both parties bind themselves to it. The primary concerns underlying *Concepcion* are therefore inapplicable here.

It is true that the Court in *Concepcion* was also concerned with ensuring, in general terms, that arbitration agreements are enforceable as written, including "*with*

whom a party will arbitrate its disputes." *Id.* at 1748–49 (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1773 (2010) (emphasis in original)). But both *Concepcion* and *Stolt-Nielsen* involved issues of classwide arbitration; when the Court stated that parties may specify "with whom" they choose to arbitrate, the point was that they may, under the FAA, choose to arbitrate with an *individual* rather than a *class.* The Supreme Court has never held that the FAA preempts state law rules requiring that arbitration provisions themselves contain consideration (i.e., that they not be illusory), and it would require a substantial extension of existing precedent to do so here.

Perhaps, Toll Brothers' strongest contention is that the *Cheek* rule "imposes a requirement on arbitration clauses (mutuality within the clause itself) that does not apply to other contract clauses." Reply Br. 4. This contention properly gives us pause. The Supreme Court has long held that "[c]ourts may not . . . invalidate arbitration agreements under state laws applicable *only* to arbitration provisions." *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (emphasis in original). The Court has explained that "[b]y enacting § 2, . . . Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'" *Id.* (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)).

In a basic sense, the *Cheek* rule does single out an arbitration provision in a larger contract, and assess whether that provision binds both parties to arbitrate at least some claims. But on closer inspection, we are persuaded that all *Cheek* does is treat an arbitration provision like any stand-alone contract, requiring consideration. Lack of consideration is clearly a generally applica-

ble contract defense. The *Cheek* rule does not bar the arbitration of entire categories of claims. *See Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012) (per curiam) (holding that West Virginia's prohibition against predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes was preempted by the FAA). Nor does it ignore an arbitration provision to gauge the enforceability of a different provision within the same contract. *See Nitro-Lift Technologies, L.L.C. v. Howard*, 133 S. Ct. 500 (2012) (per curiam) (reversing, as inconsistent with the FAA, the Oklahoma Supreme Court's invalidation of a non-competition agreement on public policy grounds, where that agreement contained a valid arbitration clause).

Moreover, we are not persuaded that *Cheek* disfavors arbitration; *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.

In any event, this Court has recognized *Cheek*'s vitality as recently as this year, noting that "[u]nder Maryland contract law, an arbitration provision must contain a mutually coextensive exchange of promises to arbitrate, regardless whether the contract as a whole is supported by adequate consideration." *Dan Ryan Builders*, 682 F.3d at 329–30 (citing *Cheek*, 835 A.2d at 665).[7] In *Hill*, a

[7] Indeed, we may be bound by circuit precedent to reject Toll Brothers' preemption contention. In *Dan Ryan Builders*, the home-builder-appellant argued vigorously to this Court that a rule such as Maryland's mutuality of obligation requirement for arbitration provisions in a multi-provision contract was flatly preempted under the FAA. *See, e.g.*, Dan Ryan Builders' Reply Br. 1 ("It Is Irrelevant Whether State Law Would Require Mutuality of Obligation in an Arbitration Provision Contained Within a Larger Contract Which Is Supported by Mutual Consideration. Federal Law Imposes No Such Requirement and Preempts Conflicting State Law."). Accordingly,

2005 case, this Court applied *Cheek* to *uphold* an arbitration agreement, holding that the agreement itself bound both parties to at least some claims, and it was error to look outside the agreement to invalidate it. 412 F.3d at 543–44. Neither case questioned whether *Cheek* was preempted by longstanding Supreme Court precedent.

C.

We note here the gravity of the issue presented. Toll Brothers asks us to overturn a decision of the high court of one of the 50 states—relying on our Constitution's Supremacy Clause—despite the fact that the United States Supreme Court has never held that Congress, in enacting the FAA, intended to preempt states from requiring mutual consideration in an arbitration provision. This we decline to do. The Supreme Court may eventually hold that the FAA preempts such a rule, but doing so now would require an extension of existing precedent—and abrogation of our own. We also note that Toll Brothers

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the *Dan Ryan Builders* Court clearly had before it for consideration the question of whether mutuality of obligation was the kind of state law principle that survives the preemptive force of the FAA. This Court effectively rejected the preemption argument by addressing *Marmet*, determining that it was not controlling, and thereafter certifying to the Supreme Court of Appeals of West Virginia the question of whether West Virginia requires mutuality of obligation in an arbitration provision that is a part of a larger contract. *See Dan Ryan Builders*, 682 F.3d at 328–30. "A federal court's certification of a question of state law to that state's highest court is appropriate when the federal tribunal is required to address a novel issue of local law which is determinative in the case before it." *Grattan v. Bd. of Sch. Commissioners of Baltimore City*, 805 F.2d 1160, 1164 (4th Cir. 1986) (emphasis added; citation omitted). In short, had the *Dan Ryan Builders* panel perceived any merit in the homebuilder-appellant's preemption contention, it would not have certified the question of the arbitration provision's enforceability to the Supreme Court of Appeals of West Virginia—particularly not in a case in federal court on the basis of diversity jurisdiction.

could easily have avoided this serious constitutional question—one implicating federalism and state sovereignty, as well as the constitutional right to a jury trial—by adding just a few words to the arbitration provision,[8] binding itself to arbitration in the way it now contends it intended all along.[9] *See supra* pp. 17a-21a (describing Toll Brothers' "first fallback argument").

IV.

For the reasons set forth, we conclude that this Court has jurisdiction over Toll Brothers' appeal, and that the district court correctly held that the arbitration provision was unenforceable for lack of mutual consideration. The judgment of the district court is therefore

AFFIRMED.

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[8] Further, the Agreement's numerous references to Maryland law refute Toll Brothers' counsel's assertion at oral argument that, in his understanding, "the contract is in fact a uniform contract" all over the country. Toll Brothers clearly took into account some Maryland law when drafting the Agreement; it simply neglected to take into account other Maryland law, as articulated in *Cheek*, by including consideration within the arbitration provision.

[9] Because we conclude that the arbitration provision in the Agreement lacks validity under Maryland law, we do not reach Plaintiffs' alternative arguments.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12-1261
(1:11-cv-00585-RDB)

MEHDI NOOHI, individually and on behalf of all others similarly situated; SOHEYLA BOLOURI, individually and on behalf of all others similarly situated,
Plaintiffs-Appellees
v.
TOLL BROS., INC., for itself and all others similarly situated; TOLL LAND CORP. NO. 43, for itself and all others similarly situated; TOLL MD V LIMITED PARTNERSHIP, for itself and all others similarly situated, Defendants-Appellants

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ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge King, Judge Shedd and Judge Davis.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

MEHDI NOOHI, SOHEYLA BOLOURI, *et al.*,
Plaintiffs,
v.
TOLL BROS., INC, *et al.*, Defendants.

January 30, 2012

MEMORANDUM OPINION

BENNETT, District Judge.

This is a breach of contract action for damages and other relief arising out of an Agreement of Sale ("the Agreement") signed by the parties for the purchase of a home. Mehdi Noohi and Soheyla Bolouri, husband and wife (collectively "Plaintiffs"), bring this action, individually and on behalf of all others similarly situated, against Toll Bros., Inc., and its wholly-owned subsidiaries and agents Toll Land Corp. No. 43 and Toll MD V Limited Partnership (collectively "Defendants") as well as all other similarly situated entities by or through which Toll Brothers markets and sells residential real estate properties within the United States and its territories. Plaintiffs seek damages equal to the amount of the $77,008 deposit withheld by Defendants even though the sales agreement never reached closing, along with compensatory, consequential and punitive damages. Additionally, Plaintiffs allege that from 2006 through 2009, Defend-

ants retained $106.2 million in customer deposits from similarly situated plaintiffs and therefore request that this Court certify a class action.

The parties' submissions have been reviewed and this Court held a hearing on January 23, 2012 pursuant to Local Rule 105.6. For the reasons that follow, Defendants Toll Brothers, Inc., Toll MD V Limited Partnership, and Toll Land Corp. No. 43's Motion to Dismiss or Stay Plaintiffs' Complaint Pending Arbitration (ECF No. 5) is **DENIED**.

BACKGROUND

Plaintiffs, Mehdi Noohi and Soheyla Bolouri, husband and wife, bring claims of breach of contract, breach of duty of good faith and fair dealing, unjust enrichment and unfair and deceptive trade practices in violation of Maryland law against Defendants. Specifically, Plaintiffs allege that Defendants have engaged in a "scheme to improperly retain" deposits paid by prospective home buyers despite their failure to obtain financing to pay for homes sold by the Defendants. Pls.' Compl. ¶ 1. In ruling on a motion to dismiss, the factual allegations in the plaintiffs' complaint must be accepted as true and those facts must be construed in the light most favorable to the plaintiff. *See, e.g., E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.,* 637 F.3d 435, 440 (4th Cir. 2011).

Toll Brothers is a publically traded residential and commercial real estate development company which sells luxury residences in detached and attached home communities, golf communities and urban low-, mid- and high-rise communities. Pls.' Compl. ¶¶ 14–15. Toll Brothers operates in about twenty states, including Maryland, and conducts business through its own "architectural, engineering, mortgage, title, land development and land sale, golf course development and management, home

security and landscape subsidiaries." *Id.* at ¶ 16. Toll Land Corp. No. 43 is one of its wholly-owned subsidiaries which contracts with individual home buyers for the purchase of newly constructed or to be constructed homes. *Id.* at ¶ 19. Toll Land Corp. No. 43 is the General Partner in Toll MD V Limited Partnership with whom Plaintiffs sought to purchase a home to be constructed in Glenelg, Maryland. *Id.* at ¶¶ 9, 25. TBI Mortgage Company is a Toll Brothers subsidiary which provides mortgages to Toll Brothers home buyers. *Id.* at ¶ 17. Plaintiffs have filed claims against Defendants individually and on behalf of a class of similarly situated home buyers.

a. Plaintiffs' Individual Claims

In 2008, Plaintiffs contracted to purchase a Hampton Versailles style home from Defendants to be built on Lot 58 of the community known as The Reserve at Triadelphia Crossing in Glenelg, Maryland. Pls.' Compl. ¶¶ 25. As required, on February 17, 2008, Plaintiffs made an initial reservation deposit of $5,000, and on February 24, 2008, they entered into an Agreement of Sale ("the Agreement") with Toll MD V for the purchase of the home in question for $1,006,975. *Id.* at ¶¶ 25–27. Upon signing the Agreement, Plaintiffs made an additional deposit of $45,348 and later deposited an additional $26,660 for "options ordered on the home." *Id.* at ¶¶ 29–30. In sum, by February 28, 2008, Plaintiffs had allegedly paid $77,008 to Toll Brothers for the purchase of their preconstruction home.

According to the Agreement, Defendants were to hold the deposit until it was to be refunded or forfeited by Plaintiffs. *Id.* at ¶ 32; *see also* Agreement of Sale, § 4 (ECF No. 5-2). The Agreement also directed Plaintiffs to complete the mortgage approval process within 60 days. *Id.* at ¶¶ 33–35. In order to do so, Plaintiffs agreed to

make truthful disclosures to lending companies, to immediately send copies of any notices to Defendants and accept a loan commitment as well as comply with all terms imposed by the lender. *Id.* at ¶ 35; *see also* Agreement of Sale, § 4 (ECF No. 5-2). In the event that Plaintiffs could not be approved for a mortgage after 60 days, the Agreement provided that the Defendants could (1) extend the mortgage application period in order to submit a mortgage request for Plaintiffs themselves, or (2) declare the Agreement "null and void" and refund Plaintiffs their deposit. *Id.* at 36; *see also* Agreement of Sale, § 4 (ECF No. 5-2).[1]

Plaintiffs allege that they complied with their obligations under the Agreement and submitted numerous mortgage applications which were all subsequently rejected. *Id.* at ¶ 38. Plaintiffs first applied to TBI Mortgage on February 25, 2008, but their application was rejected. *Id.* at ¶ 39. Then, upon Defendants' recommendation, Plaintiffs applied for a mortgage with First Preferred Financial, Inc. *Id.* at 40. On April 24, 2008, Plaintiffs allegedly received a loan commitment letter for

[1] Section 4 of the Agreement specifically provides that: ". . . Buyer shall furnish, within 5 days of any request, all information required by any Lender, Buyer acknowledges that Seller is relying on Buyer's information to determine to proceed with building the home. Buyer agrees immediately to send Seller copies of any notice from Buyer's lender(s) rejecting Buyer's loan application(s). If Buyer is not approved for a mortgage within 60 days of the date of Buyer's execution of this Agreement, Seller may extend the mortgage application approval process until such time as: (1) Seller submits another application on substantially the same terms described above to a lender chosen by Seller, with no additional application fee to Buyer, or (2) Seller declared this Agreement null and void in which event all sums paid on account of the purchase price and extras shall be returned to Buyer without interest, neither party shall have any further rights or liabilities hereunder . . ."

$906,275 which they accepted in compliance with the Agreement. *Id.* at ¶ 41. However, on June 13, 2008, First Preferred Financial informed Plaintiffs that it could no longer provide them with financing because it could not comply with a recent Maryland law prohibiting state income loans. *Id.* at ¶ 42. Then Plaintiffs allege that they also sought to obtain financing from GMAC but were unsuccessful. *Id.* at ¶ 43.

Following these repeated failures, Plaintiffs sent a letter to Defendants on July 24, 2008 informing them that they were unable to secure financing for the home purchase and requesting a refund of their deposit pursuant to the Agreement of Sale. *Id.* at ¶ 44. Defendants, however, allegedly responded that the First Preferred Financial commitment letter, although now terminated, had satisfied the mortgage contingency and that Plaintiffs were obligated to perform under the Agreement. *Id.* at ¶ 45. Plaintiffs claim that Defendants further instructed them to continue to apply for mortgages and specifically to contact APEX Funding Group. *Id.* at ¶¶ 46, 48. On September 22, 2008, APEX Funding Group gave Plaintiffs a loan commitment letter but thereafter denied to approve them for a mortgage. *Id.* at ¶ 49. Although Plaintiffs further sought mortgage approvals from other lenders, they were unable to secure financing. *Id.* at ¶ 50. Moreover, Plaintiffs allege that Defendants have neither begun construction on Lot 58 nor have they incurred expenses toward the construction of the home. *Id.* at ¶ 52. In light of Plaintiffs' repeated failures to secure financing and Defendants continued objections to refunding their deposits, Plaintiffs claim that Defendants breached the Agreement and improperly retained their moneys. *Id.* at ¶ 51.

b. Plaintiffs' Claims in Support of a Class Action

Additionally, Plaintiffs move this Court to certify a class action pursuant to Rules 23(b)(2) and (b)(3) of the Federal Rules of Civil Procedure on behalf of:

> "All home buyers or prospective home buyers, in the United States of America and its territories, that entered into an Agreement of Sale for the purchase of a home with Toll Bros., Inc. and/or any member of the class of defendants on or after January 1, 2004 who did not thereafter receive approval for a mortgage, and who have not received the return of their deposit(s)."

Pls.' Compl. at ¶ 58. Plaintiffs also seek to bring this lawsuit against a class of defendants to include: "[all] subsidiaries, agents, or other entities in which Toll Bros., Inc., directly or indirectly holds a controlling interest and which have entered into Agreements of Sale for homes in the United States of America and its territories on or after January 1, 2004." *Id.* at ¶ 59. In support of this request, Plaintiffs claim that Defendants "routinely enter into Agreements of Sale with prospective buyers" and fail to return their deposits when these buyers are unable to obtain a mortgage approval. *Id.* at ¶ 22. Particularly, Plaintiffs allege that from 2006 to 2009 "Toll Brothers retained $106.2 million in customer deposits where sales agreements never reached closing" and, that from 2007 through 2009, 3,030 prospective buyers were affected by such practices. *Id.* at ¶¶ 23, 60. Plaintiffs further contend that Defendants' policy of retaining deposits while "incurring no actual costs or damages associated with the cancellation of the sales contracts . . . [is] the largest source of [their] profits." *Id.* at ¶ 24. Finally, Plaintiffs claim that the class of plaintiffs and the class of defend-

ants are sufficiently numerous and dispersed throughout the United States that "joinder would be impractical" and that common questions of fact and law exist with respect to Plaintiffs claims as to the Agreements of Sale and Defendants' breach that a class certification is warranted. *Id.* at ¶¶ 60–62.[2]

c. Procedural Posture

In their Motion to Dismiss or Stay Plaintiffs' Complaint Pending Arbitration (ECF No. 5) Defendants contend that Section 13 of the Agreement of Sale is a mandatory arbitration clause which covers the causes of action brought by the Plaintiffs. Consequently, Defendants contend that Plaintiffs should not be permitted to bring this action before this Court. In response, Plaintiffs argue that the arbitration clause contained in the Agreement is unenforceable. On January 23, 2011, this Court held a hearing on Defendants' motion. While numerous issues were addressed by counsel, it was agreed that the sole issue with respect to the pending motion is the validity of the arbitration clause.[3]

STANDARD OF REVIEW

The Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1, *et seq.*, requires that "an agreement in writing to submit to arbitration an existing controversy arising out of such

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[2] During the January 23, 2012 hearing, counsel for Defendants admitted that Agreements of Sale similar to the one at issue in this case are used in all home purchase transactions.

[3] At the hearing on January 23, 2012, counsel for the Defendants acknowledged that the subject motion to dismiss was not based on any alleged deficiencies in stating the cause of action pursuant to any analysis under *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009). Counsel agreed that the sole issue is whether this action is barred by the arbitration clause.

a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* at § 2. The Supreme Court has recently noted that arbitration agreements "may be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT & T Mobility LLC v. Concepcion,* 563 U.S. ___, 131 S. Ct. 1740 (2011) (citing *Doctor's Associates, Inc. v. Casarotto,* 517 U.S. 681, 687 (1996)) (internal quotations omitted). The FAA also requires that a federal court stay any proceedings that present a controversy which the parties have agreed to arbitrate. *Id.* at § 3. Moreover, the FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."[4] *Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.,* 460 U.S. 1, 24–25 (1983).

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[4] Defendants bring this action under the FAA pursuant to the arbitration clause in the Agreement of Sale. However, while the FAA applies to diversity cases involving interstate commerce, *American Home Assurance Co. v. Vecco Concrete Construction*, 629 F.2d 961, 963 (4th Cir. 1980), state arbitration law governs transactions involving intrastate commerce. *See, e.g., Mortimer v. First Mount Vernon Indus. Loan Ass'n,* AMD-03-1051, 2003 WL 23305155, at *1–*2 (D. Md. May 19, 2003). The Maryland Uniform Arbitration Act ("MUAA") is the "state analogue to the FAA [and] Maryland courts rely on the federal FAA decisions when construing the MUAA." *Rota-McLarty v. Santander Consumer USA, Inc.*, WSQ-10-0908, 2011 WL 2133698, at *3 n.10 (May 26, 2011) (citing *Holmes v. Coverall N. Am., Inc.*, 649 A.2d 365, 368 (Md. 1994)). The MUAA also favors the enforcement of arbitration agreements which are "valid, enforceable, and irrevocable, except upon grounds that exist at law

Despite this presumption, agreements to arbitrate are fundamentally about private choice. "[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582 (1960). Federal courts have the authority to compel arbitration, but in making that determination this Court is mindful that its role is limited to determining the "question of arbitrability," or the "gateway dispute about whether the parties are bound by a given arbitration clause." *Howsam v. Dean Witter Reynolds, Inc.,* 537 U.S. 79, 84 (2002).

According to the United States Court of Appeals for the Fourth Circuit, a litigant can compel arbitration under the FAA if he can demonstrate "(1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect or refusal of the defendant to arbitrate the dispute." *Whiteside v. Teltech Corp.,* 940 F.2d 99, 102 (4th Cir. 1991). "Agreements to arbitrate are construed according to ordinary rules of contract interpretation, as augmented by a federal policy requiring that all ambiguities be resolved in favor of arbitration." *Gadson v. SuperShuttle Int'l,* AW-10-01057, 2011 WL 1231311, at *3 (D. Md. Mar. 30, 2011) (citing *Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc.,* 252 F.3d 707, 710 (4th Cir. 2001). Indeed, the Supreme Court has directed that questions relating to the "validity, enforceability, or revocability" of an arbitration

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or in equity for the revocation of a contract." *Rota-McLarty*, 2011 WL 2133698, at *3 (citing Md. Code Ann., Cts & Jud. Proc. § 3-206(a)) (internal quotations omitted).

agreement should be resolved according to state law, *Perry v. Thomas,* 482 U.S. 483, 493 n.9 (1987), while the FAA establishes the "federal substantive law of arbitrability." *Moses H. Cone Mem'l Hosp.,* 460 U.S. at 24; *see also Hill v. Peoplesoft USA, Inc..,* 412 F.3d 540 (4th Cir. 2005).

ANALYSIS

Defendants argue that this action should be dismissed or stayed pending arbitration because the Agreement of Sale ("the Agreement") signed between the parties includes a mandatory arbitration clause, Section 13. Plaintiffs, however, contend that the arbitration clause is unenforceable for lack of mutuality of consideration and that therefore they are entitled to bring this suit before this Court.[5]

Under the Federal Arbitration Act,[6] arbitration agreements are "valid, irrevocable and unenforceable, save upon such grounds as exist at law or equity for the revocation of any contract." 9. U.S.C. § 2. State contract formation law determines the validity of arbitration agreements. *AT&T Mobility LLC v. Concepcion,* 563 U.S. ___, 131 S. Ct. 1740, 1745–46 (2011); *Hill v. Peoplesoft USA, Inc.,* 412 F.3d 540 (4th 2005). In Maryland, "the law of the jurisdiction where the contract was made ["lex loci contractus"] controls its validity and con-

[5] Plaintiffs also argue that even if the arbitration provision is held to be enforceable, Defendants defaulted under Section 10(b) of the Agreement by failing to begin construction on the property within two years of the signing of the Agreement. Therefore, Plaintiffs argue that Section 7(c) allows them to bring "all claims" against Defendants in this Court. This Court does not reach this argument as it finds the arbitration provision to be unenforceable.

[6] The Maryland Uniform Arbitration Act employs similar language. Md. Code Ann., Cts & Jud. Proc. § 3-206(a).

struction." *Kramer v. Bally's Park Place, Inc.*, 535 A.2d 466, 467 (Md. 1988). As this case involves the issue of the validity of the arbitration agreement and because the contract was entered into by the parties in Maryland, Maryland law governs.

Under Maryland law, an agreement to arbitrate disputes is enforceable if it is a valid contract. *Hill*, 412 F.3d at 543; *see also Cheek v. United Healthcare of Mid-Atlantic, Inc.*, 835 A.2d 656, 661 (Md. 2003). Moreover, "an arbitration clause is a severable contract which is enforceable independently from the contract as a whole." *Holmes v. Coverall North America, Inc.*, 649 A.2d 365, 370 (Md. 1994); *see also Granite Rock Co. v. Int'l Broth. of Teamsters*, 561 U.S. ____, 130 S. Ct. 2847, 2858 (2010) (Under "the FAA . . . courts treat an arbitration clause as severable from the contract in which it appears and enforce it according to its terms unless the party resisting arbitration specifically challenges the enforceability of the arbitration clause itself."). To determine the validity of the arbitration agreement, Maryland courts look at the four-corners of an arbitration provision. *See Cheek*, 835 A.2d at 664–65; *see also Hill*, 412 F.3d at 543. As with any contract, the arbitration provision must be supported by adequate consideration in order to be valid and enforceable. *See Cheek*, 835 A.2d at 661.

In *Cheek* the Maryland Court of Appeals determined that the mutual exchange of promises to arbitrate disputes represented the necessary consideration in support of an arbitration agreement. *Cheek*, 835 A.2d at 665 ("each party has promised to arbitrate disputes arising from an underlying contract, and 'each promise provides consideration for the other.'" (quoting *Holmes*, 649 A.2d at 370)). *See also Rose v. New Day Financial, LLC*, WDQ-10-2761, 2010 WL 4103276 at *9 (D. Md. Sept. 9, 2011) (citing *Dieng v. College Park Hyundai*, DKC-2009-

0068, 2009 WL 2096076 at *3 (D. Md. July 9, 2009) (Under Maryland law "[i]n arbitration agreements, the exchanged promises to arbitrate constitute the consideration that forms the basis of the agreement."), and *Holloman v. Circuit City Stores, Inc.*, 894 A.2d 547 (Md. 2006) (quoting *Cheek*, 835 A.2d at 665)) ([M]utual promises to arbitrate act as an independently enforceable contract . . . [*i.e.*,] each party has promised to arbitrate disputes arising from an underlying contract, and 'each promise provides consideration for the other.'"). Therefore, under Maryland law mutuality of consideration is essential to the validity of an arbitration agreement.

Additionally, the Maryland Court of Appeals held in *Cheek* that where a party reserves the right to "alter, amend, modify or revoke" an arbitration agreement, the party makes an illusory promise and that where an illusory promise is involved, the arbitration agreement is unenforceable for lack of consideration. *Cheek*, 835 A.2d at 662, 669. In *Howard v. King's Crossing, Inc.*, 264 F. App'x 345 (4th Cir. 2008), applying the Court of Appeals' decision in *Cheek*, the Fourth Circuit held that an arbitration agreement imposing obligations and waivers on only one party was unenforceable. Although mutuality of consideration is required, identical mutuality need not exist between parties before an arbitration agreement can be deemed valid. *Whalter 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 including foreclosure, is not made unconscionable where [the other party is] not provided with identical exceptions to the arbitration agreement.").[7]

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[7] It is important to note that in *Whalter*, the arbitration clause read "the parties agree that any claim, dispute, . . . shall be resolved by binding arbitration . . ." *Id.* at 739.

In this case, Section 13 of the Agreement of Sale provides that:

> "13. ARBITRATION: Buyer, on behalf of Buyer, and all permanent residents on the Premises, including minor children, hereby agree that any and all disputes with Seller, Seller's parent company or their subsidiaries or affiliates arising out of the Premises, this Agreement, the Home Warranty, any other agreements, communications or dealings involving Buyer, or the construction or condition of the Premises including, but not limited to, disputes concerning breach of contract, express and implied warranties, personal injuries and/or illness, mold related claims, representations and/or omissions by Seller, on-site and off-site conditions and all other torts and statutory causes of action ("Claims") shall be resolved by binding arbitration in accordance with the rules and procedures of Construction Arbitration Services, Inc. ("CAS") or its successor or an equivalent organization mutually agreed upon by the parties. If CAS is unable to arbitrate a particular claim, then that claim shall be resolved by binding arbitration pursuant to the Construction Rules of Arbitration of the American Arbitration Association or its successor or an equivalent organization mutually agreed upon by the parties. In addition, Buyer agrees that Buyer may not initiate any arbitration proceeding for any Claim(s) unless and until Buyer has first given Seller specific written notice of each claim (at 250 Gibraltar Road, Horsham, PA

> 19044, Attn: Warranty Dispute Resolution) and given Seller a reasonable opportunity after such notice to cure any default, including the repair of the Premises in accordance with the Home Warranty. The provisions of this paragraph shall be governed by the provisions of the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.* and shall survive settlement. . . .
>
> BUYER HEREBY WAIVES THE RIGHT TO A PROCEEDING IN A COURT OF LAW (INCLUDING WITHOUT LIMITATION A TRIAL BY JURY) FOR ANY CLAIMS OR COUNTERCLAIMS BROUGHT PURSUANT TO THIS AGREEMENT, THE PROVISIONS OF THIS SECTION SHALL SURVIVE SETTLEMENT. . . ."

This provision is quite simply one-sided and onerous. It mandates that buyers, or in this case Plaintiffs, promise to (1) submit all disputes against seller to binding arbitration, (2) notify Defendants of each claim before they initiate arbitration proceedings, (3) give Defendants a reasonable opportunity to cure the default, and (4) waive the right to proceed in a court of law. (quotations omitted). Conversely, Defendants do not make any promises to Plaintiffs in this provision. The clause does not state "Buyer and Seller," or even "the parties" and thus does not impose any obligations on the Defendants. It only refers to "Buyers" and their obligations.

During the hearing, Defendants argued that the terms "with Seller, Seller's parent company or their subsidiaries or affiliates" were sufficient to indicate that the Seller also agreed to arbitrate. Moreover, Defendants

claimed that were they to instigate proceedings in court of law or equity, Plaintiffs would have the right to compel arbitration under the same Agreement.[8] However, as the Fourth Circuit clearly recognized in *Howard v. King's Crossing, Inc.,* one-sided arbitration provisions are unenforceable under Maryland law. 264 F. App'x 345 (4th Cir. 2008). In order for a contract, and therefore an arbitration clause to be valid under Maryland law, it must be supported by consideration. Although the obligations need not be identical, each party must promise to arbitrate at least some types of disputes. In this case, the arbitration clause only indicates that Plaintiffs agreed to submit their disputes against Defendants to arbitration and the clause itself is devoid of any indication that Defendants made a similar promise. As such, Section 13 of the arbitration agreement is unenforceable and Plaintiffs can proceed with this action in this Court. Thus, Defendants Motion to Dismiss or Stay Plaintiffs' Complaint Pending Arbitration is **DENIED**.

CONCLUSION

For the reasons stated above, Defendants Toll Brothers, Inc., Toll MD V Limited Partnership, and Toll Land Corp. No. 43's Motion to Dismiss or Stay Plaintiffs'

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[8] Defendants also refer this Court to the United States District Court for the District of New Jersey's decision in *Arakelian v. N.C. Country Club Estates Limited Partnership*, No. 08-5286, 2009 WL 4981479 (D.N.J. Dec. 18, 2009). In that case involving similar claims by a prospective home buyer against TBI Mortgage, the court enforced a similarly worded arbitration agreement and stayed the litigation pending arbitration. In making this determination, the court found that North Carolina law applied and that plaintiffs had failed to show that the arbitration agreement was procedurally and substantively unconscionable. This case is, therefore, distinguishable from the case at bar due to the express conditions for the formation of a valid contract imposed by Maryland law.

Complaint Pending Arbitration (ECF No. 5) is **DENIED**.

A separate Order follows.