STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY
BRANCH 01

LANDMARK CREDIT UNION,

THIRD PARTY PLAINTIFF,

Case No. 2008CV010292

Vs

CHARLOTTE VARA, ET AL,

DEFENDANT AND THIRD PARTY PLAINTIFF,

VS

BOYLAND AUTO GROUP III, LLC, ET AL,

THIRD PARTY DEFENDANTS.

**DECISION AND FINAL ORDER
DENYING MOTION TO COMPEL ARBITRATION
AND
DENYING MOTION TO STAY DISCOVERY**

I. BACKGROUND

This case involves a lawsuit about the sale and repossession of a vehicle. On April 8, 2008, Landmark Credit Union brought this action against Charlotte Vara to recover possession of a 2005 Chrysler Crossfire that was in default. Vara answered alleging that Landmark has engaged in fraud and had violated the Federal Trade Commission Preservation of Claims and Defenses Act. Vara also counterclaimed against Landmark and a third party defendant, Boyland Honda and its employees who had sold Vara the vehicle. Vara's claim allege violations of the Wisconsin Consumer Act, common law negligence, Wis. Stat. § 100.18 regarding fraudulent representation, misrepresentation, failure to disclose under Wis. Stat. §218.0142, violations of the Motor Vehicle Sales

Practices, Unconscionable Practices, and violation of the Truth in Lending Act. Specifically, Vara alleges that Boyland Honda engaged in fraud and misrepresentation in the sale of the vehicle including altering her monthly income from $777.76 to $2750 to exceed its actual value, rejecting Vara's request for copies of the documents, and making knowingly false threats against Vara in attempting to collect payments.

Boyland filed an answer denying the allegations and alleging that Vara represented her income to be higher than alleged at the time of transactions and that the vehicle purchase documents speak for themselves. Boyland then filed a motion to compel arbitration and stay discovery pending arbitration. Boyland argues that Vara executed the following arbitration agreement in relation to the purchase:

> "I understand and agree that any claim, controversy or dispute between the parties, including but not limited to those arising out of relating to my purchase of the vehicle and including those based on or arising from any statute, constitution, regulation, ordinance, rule or any alleged tort, shall be determined by final and binding arbitration in accordance with the then effective arbitration rules of arbitration service of Milwaukee, Inc., or the then effective commercial arbitration rules of the American Arbitration Association. Notwithstanding the foregoing, either party shall be entitled to exercise (before an arbitration claim has been filed, during arbitration, or after its conclusion) any one of more of the following remedies (1) setoff; (2) self-help repossession; (3) application to any court having jurisdiction thereof for the issuance of any provision process remedy described in Rule 79-85 of the Wisconsin Rules of Civil Procedure (or the corresponding statutory remedies under federal law). The exercise of any such remedy shall not constitute a waiver of such party's right to require arbitration of any claim or dispute."

(Disclosure Statement and Arbitration Agreement, May 31, 2007) (The above portion is in capitalized letters in the original. For easier reading, the Court has changed the entire clause to lower case letters, except where appropriate).

II. POSITION OF THE PARTIES

Boyland's Position

Boyland argues that the issues to be determined on the motion to compel arbitration, essentially the unconscionability of the arbitration agreement, do not require further discovery and that Vara's discovery requests go beyond the issue of unconscionability. In support of its motion to compel arbitration, Boyland argues that the agreement is governed by the Federal Arbitration Act (FAA) which provides that written arbitration agreements shall be enforceable. Furthermore, Boyland asserts that Wisconsin court have recognized that arbitration is to be supported and is presumptively valid. Boyland also argues that the arbitration agreement is applicable to Vara's claims against Boyland's employees.

At the outset of the argument at the hearing, Boyland indicated that the issue is whether there is a legitimate credible issue as to the making of the contract. Boyland answer the inquiry "no" and cites that there is no dispute in the record that Vara signed the contract. The one page disclosure statement laying out the compelling arbitration requirement by inference was part of the package of contact documents provided to Vara. The errors contained in the arbitration clause – an arbitrator that is not in existence, a Civil Rule that is illusory, and conditions and option terms for other remedies before and after arbitration – does not render the arbitration agreement unenforceable.

Vara's Position

In her affidavit, Vara alleges that she is a 69 year old retiree with minimal understanding of the English language. Specifically, Vara swears in her affidavit that she was born in Hungary, moved to Germany as a child and went to school until she was 13 or 14. At the time she left school to support her family working as an assistant to a kindergarten teacher in Germany. Vara moved to the Untied States at 17 and has not had

any schooling, training or education instructions beyond classes for her U.S. citizenship test. Until 1993, Vara worked as a maid, dishwasher, prep cook, and seamstress and did laundry at a restaurant. In 1993, Vara sustained an injury which left her unable to work. Since then, her sole income is derived from social security disability benefits totaling $777.76. Furthermore, Vara alleges that she has problems reading English and has always required help in filing out job or credit applications. Vara also has blindness in her left eye and requires glasses for her other eye.

Vara alleges that she went with friends on three occasions to the dealership to help them select a car but was made to sign agreements as a co-signer and ultimately as the sole purchaser. Despite this fact, Vara alleges that she has never had a driver's license or ever driven a car. In fact, Vara pays a friend $40 to give her rides when necessary. Vara alleges that Boyland did not allow her to read, review or keep a copy of the purchase agreement. Further, Vara alleges that no one explained and she did not know the meaning of arbitration when she executed the agreement.

Vara asks this Court to legally find the arbitration agreement unconscionable, and if not, she then urges this court to allow discovery in order for Vara to establish her unconscionability claim. She argues that discovery would be necessary because the circumstances, specifically Boyland's policies, surrounding the formation of the agreement still need to be developed to ensure an informed decision. Vara cites legal precedent including that from the Seventh Circuit, in *Champ v. Siegel Trading Co.*, 55 F.3d 269, 276 (7th Cir. 1995), that a district court may order discovery on matters relevant to the existence of a valid arbitration agreement.

In its brief opposing the motion to compel arbitration, Vara attacks the arbitration agreement in several ways: The arbitration agreement is invalid because no valid offer or acceptance occurred and no consideration was received: The arbitration agreement is unconscionable: And the arbitration agreement violates the Wisconsin Consumer Act and is therefore void.

At the hearing on the motion to compel arbitration, Vara offers the Jones case as a blueprint for this Court to deny the motion to compel arbitration. Vara argues that Boyland's claim of cost savings via arbitration is not support by the operation of this arbitration clause or the particularized facts of this case in which Vara has a right to parallel suits in the judicial system against other parties. Vara further urges the Court to consider that the inquiry begins with a legitimate contract formation issue; the one-page disclosure statement containing the arbitration agreement language is not numbered and is separate from the purchase agreement; the purchase contract does not refer to this page; it is questionable whether it needs to have "consideration" of its own; a choice of the arbitrator listed therein is illusory; the cited Wisconsin Rules of Civil procedure does not exist; Boyland has agreed now at the hearing to NOT follow remedies and offers its in court "redrafting" as a cure.

Boyland's Reply Brief

Boyland argues that Vara has not met her burden. Boyland actually reframes Vara's argument (that Boyland did not allow her to read the documents and therefore this leads to a finding that the agreement should be deemed unconscionable) with its own version that Vara believes that because she did not read the agreement it is unenforceable. Boyland further offers the proposition in a substantial portion of its reply brief that a

contract is valid even if a party failed by its own negligence to read it. Boyland does not refute the allegation, in either its affidavits or by argument, that Vara was deprived by Boyland employees of the opportunity to review. Boyland does argue that Vara could have gone to any of Boyland's competitors despite the take-it-or-leave-it contract, thereby resulting in a balancing out of the two's bargaining power.

Boyland argues that its arbitration agreement is evenly balanced because it is administered through a well established arbitration organization; that either party could use the exceptions in the arbitration agreement regarding repossession; that self-help repossession in the arbitration agreement is excisable because it might be contrary to Wisconsin law; and that Boyland is not seeking to use any of the exceptions contained in the arbitration agreement in this case.

Boyland argues that Vara has not proven that there is a substantial likelihood that she will be required to bear the costs of arbitrations. As part of their argument, Boyland refers to AAA's rules providing waiver where the party's annual gross income falls below 200% income and that the AAA maintains a list of pro bono arbitrators. Boyland admits that the AAA does not guarantee waiver or pro bono arbitrators, but that they will make every effort to do so. Boyland does not address whether these AAA rules apply where the dispute is arbitrated under the commercial verses consumer arbitrations rules of the AAA.

Finally, Boyland argues that the WCA does not prohibit arbitration of claims as it does not guarantee a judicial forum for adjudication of such claims. Even if the WCA did prohibit arbitration, Boyland argues, that the FAA would preempt the WCA on the matter.

III. ANALYSIS

A. MOTION TO COMPEL ARBITRATION

1. The *Jones* Case - Wisconsin Law Regarding Arbitration Clauses

The Wisconsin Supreme Court enumerated the standard of unconscionability of arbitration clauses in *Wisconsin Auto Title Loans v. Jones,* 2006 WI 53, 290 Wis. 2d 514, 714 N.W.2d 155. In *Jones,* the court reviewed whether the arbitration provision in a loan agreement between lender and the borrower was unconscionable and, therefore, unenforceable. The court affirmed the trial court's holding that the arbitration agreement was unconscionable, as well as his order denying the motion to stay judicial proceedings and compel arbitration. *Id.* at ¶¶ 2-4, 290 Wis. 2d at 521, 714 N.W.2d at 159. In doing so, the court noted that its analysis on unconscionability is not preempted by the Federal Arbitration Act. *Id.* at ¶ 79, 290 Wis. 2d at 556-557, 714 N.W.2d at 176-177.

The court determined that challenges to the validity of an arbitration provision are to be decided by the courts, even if the arbitration clause provides that the validity of the clause is to be decided in arbitration. Specifically, the court stated, "The validity of a contract provision involves determinations of fact and law." *Id.* at ¶ 25, 290 Wis. 2d at 529, 714 N.W.2d at 163.

In reviewing the validity of an arbitration clause, the court begins with the following legal principles (1) contract law is based upon the freedom of contract, which acts to protect the justifiable expectations of parties to an agreement without governmental interference; (2) arbitration provisions are presumed to be valid in Wisconsin, although it may be invalid for the same reasons as any other contract provision; (3) a contract provision is invalid if it is unconscionable; and (4) the party

seeking to invalidate a provision in a contract has the burden of proving facts to support a court's legal conclusion that the provision is invalid. *Id.* at ¶¶ 27-30, 290 Wis. 2d at 530-532, 714 N.W.2d at 163-164.

In order for a court to declare that a contract provision is invalid on grounds of unconscionability, the court must determine that the contract provision is both procedurally and substantively unconscionable. *Id.* Of course, defining "unconscionable" is an imprecise science. In *Jones*, the court quotes the definition found in *Willston on Contracts*, "[t]he principle is one of prevention of oppression or unfair surprise and not of disturbance of allocation of risks because of superior bargaining power." *Id.* at ¶ 32, 290 Wis. 2d at 533, 714 N.W.2d at 165 (internal citation omitted). In other words, unconscionability may be viewed "as the absence of meaningful choice on the part of one of the parties, together with contract terms that are unreasonably favorable to the other party." *Id.*

A determination of unconscionability requires a court to look at both procedural and substantive unconscionability on a case-by-case basis. *Id.* at ¶ 31, 290 Wis. 2d at 532, 714 N.W.2d at 164. The court need not find an equal proportion, as an excess of one form of unconscionability may compensate for a smaller quantum of the other. *Id.* Moreover, the presence of one form of unconscionability does not end the analysis. Even if an arbitration provision is procedurally unconscionable, a court may enforce the provision if it is not substantively unconscionable. *Id.* at ¶ 59, 290 Wis. 2d at 546-547, 714 N.W.2d at 171.

Procedural Unconscionability

In order to determine procedural unconscionability, the court must examine the formation of the contract and seek whether there was a "real and voluntary meeting of the minds" of the contract parties. *Id.* at ¶ 34, 290 Wis. 2d at 534, 714 N.W.2d at 165. The *Jones* court enumerated the following, non exclusive, factors for a court to consider:

> [A]ge, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms would have been permitted by the drafting party, and whether there were alternative providers of the subject matter of the contract.

Id. However, disparity in bargaining power alone is not necessarily sufficient to establish such procedural unconscionability; rather there must be gross inequality of bargaining party for this factor to be especially important. *Id.* at ¶49, fn 42, 290 Wis. 2d at 541-542, 714 N.W.2d at 169 (internal citations omitted).

Applying the above stated standard to the case in *Jones,* the court found that the arbitration agreement was procedurally unconscionable. The court first confirmed the validity of the first seven of the nine findings of fact the circuit court made regarding *procedural* unconscionability: (1) the borrower obtained a loan from lender using his automobile as collateral; (2) the loan agreement contained various conditions and requirements; (3) the loan was not repaid to lender's satisfaction; (4) lender is experienced in the business of supplying loans for which title to an automobile is provided as collateral; (5) lender is experienced in drafting loan agreements; (6) lender was in a position of greater bargaining power than the borrower; (7) the loan agreement was presented to the borrower in a "take-it-or-leave-it" manner; (8) the borrower was unemployed and needed the funds; and (9) the terms of the arbitration agreement were not explained to the borrower. *Id.* at ¶ 43, 290 Wis. 2d at 540, 714 N.W.2d at 168. The

court noted that the borrower did not provide any evidence (i.e. affidavit) of his financial situation, but that it was reasonable for the circuit court to draw inferences based on the record that he was as indigent, needed money, and was in a weak bargaining position. *Id.* at ¶ 50, 290 Wis. 2d at 541, 714 N.W.2d at 169. The court also noted that the "take-it-or-leave-it" manner of the contract was akin to an adhesion contract, which is a valid type of contract. *Id.* at ¶¶52-54, 290 Wis. 2d at 543-545, 714 N.W.2d at 170-171. While the court held that eighth and ninth findings of fact were not supported by evidence in record and could not be reasonably inferred therein, the court held that first through seventh findings of fact were supported by the evidence and were sufficient to affirm the lower courts' conclusion of law that there was a quantum of procedural unconscionability. *Id.* at ¶ 57, 290 Wis. 2d at 546, 714 N.W.2d at 171.

Substantial Unconscionability

In order to determine substantive unconscionability, the court must address the fairness and reasonableness of the contract provision at issue on a case-by-case basis. *Id.* at ¶ 35, 290 Wis. 2d at 535, 714 N.W.2d at 166. In performing this analysis, the court focuses on the one-sidedness, unfairness, unreasonableness, harshness, overreaching, or oppressiveness of the provision at issue. *Id.* at ¶ 59, 290 Wis. 2d at 547, 714 N.W.2d at 169.

Applying the above stated standards to the case in *Jones*, the court found that the arbitration agreement was substantively unconscionable. The key sentence in the arbitration agreement stated:

> Any and all disputes, controversies or claims (collectively, "claims" or "claim"), whether preexisting, present or future, between the BORROWER and LENDER, or between BORROWER and any of LENDER's officers, directors, employees,

> agents, affiliates, or shareholders, arising out of or related to this Agreement (*save and except the LENDER's right to enforce the BORROWER's payment obligations in the event of default, by judicial or other process, including self-help repossession*) shall be decided by binding arbitration under the FAA.

Id. at ¶ 15, 290 Wis. 2d at 523, 714 N.W.2d at 160 (*emphasis* added by court; capitalization in original).

In evaluating the *substantive* unconscionability of the arbitration provision, the court focused on the "save and except" provision that protected from binding arbitration lender's "right to enforce the borrower's payment obligations in the event of default, by judicial or other process, including self-help repossession." *Id.* at ¶ 61, 290 Wis. 2d at 547, 714 N.W.2d at 172. The court noted that the arbitration provision allows lender to bring a replevin action in circuit court and to go to circuit court to enforce the borrower's payment obligations in the event of default. *Id.* at ¶ 64, 290 Wis. 2d at 548, 714 N.W.2d at 172. Comparatively, the borrower's only adjudicative remedy was arbitration.

As a result, the court found that that the arbitration agreement was far too broad and one-sided, and, therefore, substantively unconscionable. *Id.* at ¶ 66, 290 Wis. 2d at 549, 714 N.W.2d at 173. The court stated the "doctrine of substantive unconscionability limits the extent to which a stronger party to a contract may impose arbitration on the weaker party without accepting the arbitration forum for itself." *Id.* While the court acknowledged that other courts have accepted one-sided arbitration agreements, the court found that this one was overly one-sided rendering the arbitration provision substantively unconscionable.

2. Application of *Jones* to This Case

Preemption of the FAA in this Case

Regarding the merits of this case, this Court disagrees with Boyland's argument – that any effect of the WCA prohibiting arbitration is preempted by the FAA. It is true that the FAA takes precedence over the WCA under the supremacy clause of the U.S. Constitution. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (U.S. 1984). However, as *Jones* makes clear, such preemption does not occur when a court interprets the conscionability of an arbitration clause:

> Our application of state contract law to invalidate the arbitration provision at issue in the instant case is consistent with § 2 of the Federal Arbitration Act. Indeed, the United States Supreme Court has expressly stated that "[g]enerally applicable contract defenses, such as fraud, duress, or *unconscionability,* may be applied to invalidate arbitration agreements without contravening § 2...." Our contract law on unconscionability does not single out arbitration provisions. We therefore conclude that the Federal Arbitration Act does not preempt our unconscionability analysis.

Id. at ¶ 79 (*emphasis* in original).

Moreover, FAA preemption does not save an arbitration agreement that is unconscionable. In its reply brief, Boyland admits, "[u]nder the FAA, the Arbitration Provision is valid and enforceable unless it is unenforceable under a principle that is applicable to contracts generally." The Supreme Court has stated that "[s]tates may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of *any* contract.' 9 U.S.C. § 2 (emphasis added). What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause." *Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 281, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995) (internal citations omitted). Thus, it is clear that FAA preemption, if any exists, applies only when the arbitration agreement in itself conscionable.

The above quoted passage from *Jones* demonstrates that Wisconsin courts have applied the same standard of analysis. Further, Wis. Stat. § 402.302 provides a similar statutory basis for a court to find as a matter of law that a contract is unenforceable (in whole or just a provision) if it is unconscionable.[1] As such, this Court may review the merits of the conscionability of the arbitration agreement.

Unconscionability in this Case

Procedural Unconscionability

Vara's procedural unconscionability claim does not merely depend on this Court's sympathy for her situation. Looking at *Jones*, it appears courts have given considerable protection for borrowers in Vara's situation. Using the fairly borrower friendly analysis in *Jones*, this Court must consider factors such as Vara's age (69), education (no education in America and about a junior high education in Germany), intelligence (moderate), business acumen and experience (minimal to none, and further hampered by her poor eye-sight and elementary understanding of the English language), relative bargaining power (minimal), who drafted the contract (Boyland), whether the terms were explained to the weaker party (which Vara alleges it was not and that she was refused information when asked of which Boyland makes no showing that this is not true), whether alterations in the printed terms would have been permitted by the drafting party (highly unlikely), and whether there were alternative providers of the subject matter of the contract (no particularized information was contained on this point in the pre hearing briefs; at the hearing the parties offered differing interpretations of this factor – for

[1] "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." Wis. Stat. § 402.302(1).

example, Vara argued that no other dealer would have extended a consumer with her personal profile and $778 per month income a car loan with a tag of nearly $29,000; while Boyland argued that the emphasis is on the availability of other dealers and the fact that Boyland did not hold a monopoly over this product verses whether she qualifies for a loan at some other dealer). *Jones* at ¶ 34, 290 Wis. 2d at 534-535, 714 N.W.2d at 165-166.

Essentially, Vara claims that she was told by Boyland employees to sign forms she did not understand, knowing that she did not have a sufficient grasp of the English language and that she was unsophisticated in such dealings. She posits that these problems also meant that she (Vara) could not have asked Boyland for additional information about arbitration.

Based upon Vara's affidavit, it is reasonable for the Court to infer that Boyland employees were at least aware of some of Vara's difficulties including her lack of language skills, her inability to see and her inability to fill out applications without help. Vara further alleges, without submission to the contrary from Boyland, that the employees did not let Vara review or even take home the papers she signed. From Vara's affidavit, it is reasonable for this court to infer that Boyland employees pressured her and that Boyland employees would not have followed up with her regarding any questions she had about arbitration.

Although there appears to be a disparity in bargaining power, such disparity must resemble a gross inequality. *Id.* at ¶49, fn 42, 290 Wis. 2d at 541-542, 714 N.W.2d at 169. Unlike the borrower in *Jones*, Vara provided this Court evidence of her circumstances via affidavit.

Boyland on the other hand argues that this case is distinguishable from Jones; there is no evidence of desperation; her interest rate was not the high APR of the Jones' consumer; she was buying the car for someone else; there were other dealers across town; she signed what every consumer signs a form contract; and she was versed in business dealings. Thus, this Court need not draw inferences above what is on the record. Given the nearly identical, if not more dire circumstances as the borrower in *Jones*, this Court finds that there is a quantum of procedural unconscionability

Whether the procedural unconscionability is overwhelming in a particular case is up to the court's discretion. Although Vara's dilemma was not entirely unavoidable, (i.e. She could have walked away from the deal and looked at other options as she did not personally require use of the vehicle), there are numerous allegations leading to this Court's conclusion that the procedural unconscionability is overwhelming. In Vara's case, the circumstances are nearly identical, if not more severe, to that of the borrower in *Jones*. Thus, the Court concludes that there is a sufficient level of procedural unconscionability for this Court to proceed with the substantive unconscionability analysis.

Substantive Unconscionability

The presence of procedural unconscionability does not end the analysis. Even if this Court holds that the arbitration provision is procedurally unconscionable, this Court may enforce the provision if it is not substantively unconscionable. In order to determine substantive unconscionability, the Court must address the fairness and reasonableness of the contract provision at issue on a case-by-case basis. *Id.* at ¶ 35, 290 Wis. 2d at 535, 714 N.W.2d at 166. In performing this analysis, the court focuses on the one-sidedness,

unfairness, unreasonableness, harshness, overreaching, or oppressiveness of the provision at issue. *Id.* at ¶ 59, 290 Wis. 2d at 547, 714 N.W.2d at 169. At first glance, the arbitration provision in this case is almost identical, if not more severe on the buyer, than the provision in *Jones.* Accordingly, the provision seems sufficient to qualify as unconscionable.

In *Jones*, the arbitration provision allowed specific lenders' claims to go through Courts while relegating all of the borrowers' claims to arbitration. Here, the arbitration agreement constructively does the same. For comparative purposes, the arbitration clause from *Jones* and the one in Vara's case are as follows:

Jones Arbitration Clause	**Boyland-Vara Arbitration Clause**
Any and all disputes, controversies or claims (collectively, "claims" or "claim"), whether preexisting, present or future, between the BORROWER and LENDER, or between BORROWER and any of LENDER's officers, directors, employees, agents, affiliates, or shareholders, arising out of or related to this Agreement (*save and except the LENDER's right to enforce the BORROWER's payment obligations in the event of default, by judicial or other process, including self-help repossession*) shall be decided by binding arbitration under the FAA. *Id.* at ¶ 15, 290 Wis. 2d at 523, 714 N.W.2d at 160 (*emphasis* added by court; capitalization in original).	"I understand and agree that any claim, controversy or dispute between the parties, including but not limited to those arising out of relating to my purchase of the vehicle and including those based on or arising from any statute, constitution, regulation, ordinance, rule or any alleged tort, shall be determined by final and binding arbitration in accordance with the then effective arbitration rules of arbitration service of Milwaukee, Inc., or the then effective commercial arbitration rules of the American Arbitration Association. Notwithstanding the foregoing, either party shall be entitled to exercise (before an arbitration claim has been filed, during arbitration, or after its conclusion) any one of more of the following remedies (1) setoff; (2) self-help repossession; (3) application to any court having jurisdiction thereof for the issuance of any provision process remedy described in Rule 79-85 of the Wisconsin Rules of Civil Procedure (or the corresponding statutory remedies under federal law). The exercise of any such remedy shall not constitute a waiver of such party's right to require arbitration of any claim or dispute." (emphasis added)

There are two substantive problems, among others, with the agreement in this case. First, the "save and except" clause from *Jones* is constructively replicated by the "notwithstanding" provision in this case. The court in *Jones* noted that the "save and except" provision was overly one-sided because the "save and except" provision protected lender's "right to enforce the borrower's payment obligations in the event of

default, by judicial or other process, including self-help repossession" from arbitration without affording borrower the same right. *Id.* at ¶ 61, 290 Wis. 2d at 547, 714 N.W.2d at 172. The court stated the "doctrine of substantive unconscionability limits the extent to which a stronger party to a contract may impose arbitration on the weaker party without accepting the arbitration forum for itself." *Id.* at ¶ 66, 290 Wis. 2d at 549, 714 N.W.2d at 173. As a result, the court found that that the arbitration agreement was far too broad and one-sided, and, therefore, substantively unconscionable. *Id.* at ¶ 66, 290 Wis. 2d at 549, 714 N.W.2d at 173.

This case presents a constructively similar, and just as one-sided, arbitration agreement. While Boyland argues that the judicial process involving replevin, repossession and set-offs is available to Vara as well, it is a misstatement of the arbitration agreement. The agreement only provides that the either of the parties can seek "one of more of the following remedies (1) setoff; (2) self-help repossession; (3) application to any court having jurisdiction thereof for the issuance of any provision process remedy described in Rule 79-85 of the Wisconsin Rules of Civil Procedure (or the corresponding statutory remedies under federal law).[2]" First, the arbitration agreement does not provide that the parties can involve the judicial process regarding these claims but only that they can ***seek these specific remedies***. Second, the court cannot surmise any reasonable or likely scenario whereby the buyer is the party seeking these remedies in a court of law. Thus, the agreement constructively provides remedies to Boyland that it does not provide to Vara. These remedies are identical to the ones in

[2] The court should note that there Wisconsin does not have "Rule 79-85 of the Wisconsin Rules of Civil Procedure" and that the corresponding Federal Rules deal with records kept by the clerk, stenographic transcripts, general applicability of the federal rules, jurisdiction and venue, judge's directives, forms, and title.

Jones. The one-sidedness of the available remedies in the agreement in *Jones* was sufficient for a finding of substantive unconscionability and is likewise sufficient in this case. While this finding alone would be sufficient for a finding of substantive unconscionability, there is an additional flaw. The Court views it as a problematic that the provision provides for commercial arbitration rules under the American Arbitration Association (AAA). There seems to be no logical reasoning for this and it deprives Vara of the right to pursue a consumer claim, as opposed to a commercial claim, with the AAA. Moreover, a review of the AAA rules on commercial arbitration reveal that the AAA fee for such arbitration is almost six hundred dollars more than in a regular consumer claim. While the AAA itself charges $375 in fees for consumer claims, the applicable fee for this commercial claim is $950. (although at the hearing Vara argued that the costs are undeterminable and could go into the thousands of dollars). While the AAA states that it would apply the consumer fee in a regular case, this arbitration agreement specifies the commercial rules. Implicitly, even the AAA recognizes that it would be unfair to hold a consumer to the commercial rules and costs. However, the fact that the arbitration agreement contains what is likely another flaw in the terms; it further indicates a degree of substantive unconscionability in addition to the above noted one-sidedness.

3. Conclusion

This arbitration agreement is sufficiently procedurally and substantively unconscionable for this Court to invalidate the arbitration agreement. The facts surrounding this case are similar enough to *Jones* to indicate procedural unconscionability. A parallel "save and except" clause in this arbitration agreement

create a similar quantum of substantive unconscionability. A clause subjecting the arbitration to the commercial rules also creates a quantum of substantive unconscionability. Accordingly, this Court enters an order denying Boyland's motion to compel arbitration on the grounds of unconscionability.

4. Other Legal Arguments and Issues Relating to Arbitration Clause

The Wisconsin Consumer Act does not summarily prohibit arbitration. *See County of La Crosse v. WERC,* 182 Wis.2d 15, 513 N.W.2d 579 (1994) (claim for arbitration regarding violations of collective bargaining agreement not barred by WCA exclusive remedy provision). Vara argues that the WCA exists to safeguard consumer rights and that Wisconsin goes further than any other State in the nation to liberally construe these rights, and explicitly prohibits against waiver of these rights. Boyland argues that the Federal Arbitration Act trumps the WCA. Even so, the FAA allows a court to refuse to enforce an arbitration agreement if it finds that the terms are unconscionable. In light of this Court's conclusions that this agreement is procedurally and substantively unconscionable, the Court need not consider these additional arguments under the FAA or WCA.

B. MOTION TO COMPEL AND MOTION TO STAY DISCOVERY ON THE ISSUE OF UNCONSCIONABILITY

Because the facts alleged in affidavits and briefs are sufficient for a find on unconscionability, there is no need to address Vara's motion to compel discovery and Boyland's motion to stay discovery on the issue of unconscionability. The Court notes that there is no clear Wisconsin case law on whether a party is entitled to discovery to develop the issue of unconscionability.

Furthermore, different jurisdictions have come to differing conclusions, with a greater majority favoring discovery. *Blair v. Scott Specialty Gases,* 283 F.3d 595, 608 (3rd Cir.2002) (where the court read prior case law as establishing the right of a claimant to invoke discovery procedures in a pre-arbitration proceeding to assist the claimant in meeting her burden of showing the likelihood of prohibitive costs being imposed on the claimant); *Pleasants v. American Exp. Co.*, 541 F.3d 853 (8th Cir. 2008) (holding that the District Court's error, if any, in limiting discovery on procedural matters was harmless where the arbitration agreement was not substantively unconscionable and the proposed discovery related only to procedural unconscionability); s*ee also the unpublished decision in American Bankers Life Assur. Co. of Fla. v. Moore*, 2006 WL 1666710 (N.D.Miss.,2006) (where the Court stated that the party did not require discovery in order to demonstrate unconscionability, lack of consideration and non-disclosure because the party was a party to the contract at issue, was present at the formation of the contract, and is in possession of copies of the contracts the party signed); *Baugher v. Dekko Heating Technologies,* 202 F.Supp.2d 847, 849-50 (N.D.Ind.2002) (denying motion to dismiss or compel arbitration pending limited discovery on unconscionability of arbitration agreement with cost-splitting provision applied to plaintiff's FMLA claim against former employer because information was needed on costs of arbitration and plaintiff's ability to pay to determine whether provision prevented plaintiff from effectively vindicating federal statutory rights in arbitral forum); *American Bankers Ins. Co. of Florida v. Milsap*, 350 F.Supp.2d 730 (S.D.Miss. 2004)(holding that party has no need for discovery in this court relative to a matter, unconscionability of the claim, that is to be addressed to the arbitrator); *Jackson v. Culinary School of Washington*, 788 F.Supp. 1233

(D.D.C.1992) (holding that any determination regarding the enforceability of this choice-of-forum clause is premature because plaintiffs have not been afforded an opportunity for discovery on the issues of unconscionability); and *Gregory Lumber Co. v. U.S.*, 9 Cl.Ct. 503, 529 (Cl.Ct.1986) (holding that it is appropriate that to award plaintiff limited discovery relative to the unconscionability issue).

Vara correctly argues that full discovery is available because arbitration is considered a separate claim. Boyland argues and this Court agrees that it has all the facts necessary to make an informed and reasoned decision on unconscionability. Both parties have had an opportunity to submit briefs and affidavits on the issue, and present arguments to the Court.

ORDER

Therefore, on the basis of the record, and the law, this Court hereby enters the following orders: DENYING Boyland's Motions to Compel Arbitration; DENYING Boyland's Motion to Stay discovery on the issue of unconscionability and DENYING Vara's Motion to Compel discovery on the issue of unconscionability.

Dated at Milwaukee, Wisconsin this 27th day of February 2009.

BY THE COURT:

Judge Maxine A. White