STATE OF WISCONSIN CIRCUIT COURT VILAS COUNTY

KRIST OIL COMPANY,
303 Seiden Road
Iron River, MI 49935

SUMMONS

ROBERT LOTTO
1657 Cormier Rd.
Green Bay, WI 54313

Plaintiffs,

-vs-

Case No. 16-CV-
Case Code: 30701
Case Type: Declaratory Judgment

STATE OF WISCONSIN,
c/o Brad Schimel, Attorney General,
17 W. Main Street
Madison, WI 53707,

and

BEN BRANCEL, Secretary,
Wisconsin Department of Agriculture, Trade and Consumer Protection
2811 Agriculture Drive
Madison, WI 53708,

Defendants.

THE STATE OF WISCONSIN

To each person named above as a Defendant:

You are hereby notified that the Plaintiffs named above have filed a lawsuit or other legal action against you. The Complaint, which is attached, states the nature and basis of the legal action.

Within 45 days of receiving this Summons, you must respond with a written answer, as that term is used in Chapter 802 of the Wisconsin Statutes, to the Complaint. The court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is: **Clerk of Circuit Court, Vilas County, 330 Court Street, Eagle River, WI 54521**, and to the Wisconsin Institute for Law & Liberty, Plaintiffs' attorneys, whose address is: **1139 E. Knapp Street, Milwaukee, WI 53202**.

You may have an attorney help or represent you.

If you do not provide a proper answer within 45 days, the court may grant judgment against you for the award of money or other legal action requested in the Complaint, and you may lose your right to object to anything that is or may be incorrect in the Complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

WISCONSIN INSTITUTE FOR LAW & LIBERTY
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COMPLAINT

Plaintiffs, Krist Oil Company and Robert Lotto, through their counsel, Wisconsin Institute for Law & Liberty, as and for their complaint against Defendants, State of Wisconsin and Ben Brancel, allege as follows:

INTRODUCTION

1. This civil rights lawsuit challenges the constitutionality of Wis. Stat. §100.30, Wisconsin's Unfair Sales Act. That statute, commonly known as the Minimum Markup Law, requires retailers and wholesalers to charge more than the competitive price for the products that they sell. As a direct and necessary result, the Minimum Markup Law also requires Wisconsin consumers to pay more than the competitive price for the products they buy. This lawsuit seeks to vindicate the right of Wisconsin businesses to serve their customers free of anticompetitive, arbitrary, and irrational government regulation. This lawsuit also seeks to vindicate the right of

Wisconsin consumers to purchase products at the most competitive price, free from arbitrary and irrational government regulations that drive up prices.

2. Plaintiff Krist Oil Company owns and operates convenience stores and gasoline stations throughout Northern Wisconsin and the Upper Peninsula of Michigan. Krist Oil believes that its business objectives are best served by providing consumers of gasoline with the best product at the lowest possible prices. The same is true with respect to other products Krist Oil sells in connection with its convenience store operations. The company is able to freely pursue its business strategy in Michigan, which does not control the prices it can charge. But it is not able to do so in Wisconsin. The Minimum Markup Law imposes entirely arbitrary and unreasonable restrictions on retail prices, making it impossible for Krist Oil to offer its Wisconsin customers the best products at the lowest possible prices.

3. Krist Oil's right to serve its customers by engaging in a lawful business in the manner of its choosing is protected by the Wisconsin Constitution – in particular by its guarantees of equal protection and due process of law. The Minimum Markup Law arbitrarily, irrationally, and unduly restricts the economic liberty guaranteed by the Wisconsin Constitution and thereby harms both Wisconsin businesses and Wisconsin consumers. It is therefore invalid and unenforceable.

4. Plaintiff Robert Lotto is a Wisconsin citizen and resident of Green Bay. Mr. Lotto regularly purchases gasoline in the Green Bay area. Mr. Lotto desires to purchase gasoline at the lowest possible price and searches for the lowest priced gasoline he can purchase. Mr. Lotto is harmed by the Wisconsin law since it requires him to pay a price for gasoline that is higher than what the competitive price would be if Wisconsin's Minimum Markup Law were not in place. Mr. Lotto is a consumer of other products subject to the Minimum Markup Law as well. Just as in the case of gasoline, the Wisconsin Minimum Markup Law has the effect of forcing him to pay higher prices for such products than the prices that would prevail in a truly competitive market.

JURISDICTION AND VENUE

5. Pursuant to Wis. Stat. §806.04, the Plaintiffs seek a declaration that Section 100.30 of the Wisconsin Statutes violates their due process rights under the Wisconsin Constitution and is therefore void and unenforceable.

6. This court has jurisdiction pursuant to Wis. Stat. §806.04(1) and (2).

7. Venue is proper pursuant to Wis. Stat. §801.50(3)(a), as the sole defendants are the State and state officers in their official capacity, and the Plaintiffs designate Vilas County as the venue.

THE PARTIES

8. Plaintiff Krist Oil Company is a Michigan corporation having its principal place of business at 303 Seiden Road, Iron River, Michigan 49935. Krist Oil is authorized to conduct business in the State of Wisconsin and operates numerous convenience stores and gasoline stations throughout the northern part of the State.

9. Plaintiff Robert Lotto is a Wisconsin citizen residing at 1657 Cormier Rd, Green Bay, WI. Mr. Lotto regularly purchases gasoline and other consumer products in Green Bay and surrounding cities and towns, including purchasing gasoline from Krist Oil.

10. Plaintiffs challenge the constitutionality of Wis. Stat. §100.30, a duly enacted statute of Defendant State of Wisconsin. The State of Wisconsin's address (care of the Attorney General) is 17 West Main Street, Madison, Wisconsin 53707.

11. Defendant Ben Brancel is the Secretary of the Wisconsin Department of Agriculture, Trade and Consumer Protection ("DATCP"). DATCP is the state agency responsible for the enforcement of Wis. Stat. §100.30, the statute challenged in this action. Defendant Brancel is sued in his official capacity. Defendant Brancel's offices are located at 2811 Agriculture Drive, Madison, Wisconsin 53708.

STATEMENT OF FACTS

The Plaintiffs

12. Krist Oil is an independent, family owned company based in Iron River, Michigan. The company operates as a distributor of gasoline and fuel oil, and operates over seventy convenience stores and retail gasoline stations under the Krist Oil name. Its retail

operations are located in the Upper Peninsula of Michigan and in Northern Wisconsin, including a convenience store and gasoline station in Eagle River, Wisconsin.

13. Krist Oil is not affiliated with any of the major gasoline companies. Its business plan is to operate independently, and it purchases its supplies of gasoline on the open market instead of being locked in to buying a single brand. This allows Krist Oil to buy gasoline at the cheapest price possible on a daily basis, giving it a competitive advantage over many of its competitors who lack that flexibility.

14. Krist Oil's business model also results in a lower overhead than many if not all of its competitors. It does not pay franchise or any similar fees to major oil companies. In contrast to many of its competitors, it operates its own fleet for the transportation of products from refineries or other sources to its retail outlets across its market area.

15. With these advantages, Krist Oil could and would profitably sell gasoline and other products in Wisconsin at prices lower than the prices required by Wisconsin's Minimum Markup Law. Both Krist Oil and its customers would benefit if it were free to do so. Customers benefit from the lowest possible prices, and Krist Oil benefits if it can attract new customers and increase its market share. Both Krist Oil and its customers have enjoyed the benefits of aggressive competition in Michigan, where the company is free to charge the lowest prices for its products that it chooses to charge.

16. In addition to preventing Krist Oil from charging truly competitive prices in the State of Wisconsin, the Minimum Markup Law imposes undue and unnecessary compliance costs on the company's Wisconsin operations. Krist Oil must devote considerable employee time to surveying posted regional prices to determine whether the prices it charges comply with the Minimum Markup Law. It must also prepare and file numerous documents with DATCP such as notices that it is meeting competitors' prices.

17. The Minimum Markup Law permits Krist's rivals to submit baseless complaints about Krist's legitimate, low prices to state enforcement authorities whenever they believe it is in their interest to discourage vigorous price competition. Thus, the company is forced to spend time and money to justify the lawful but low prices it charges. In order to protect itself from such complaints, it is forced to monitor the prices charged by its rivals and in many cases to file forms with the State that justify its pricing decisions and document its costs. This is a waste of resources that would otherwise be devoted to the business. The Minimum Markup Law thus

increases the cost of doing business in Wisconsin and harms both retailers and Wisconsin consumers like Robert Lotto.

18. And worse, the Minimum Markup Law permits inefficient competitors to file lawsuits alleging that Krist Oil's prices are too low. They have done so on at least two occasions. Although these lawsuits are without merit, Krist Oil must spend time and money to defend them. And their purpose is obvious – to discourage the company from engaging in legitimate competition by charging the lowest possible prices. Spurious lawsuits of this kind also drive up the costs of doing business in Wisconsin and thus harm retailers and Wisconsin consumers like Robert Lotto.

19. Plaintiff Robert Lotto is a Wisconsin citizen and consumer, residing in Green Bay. Mr. Lotto is retired. He regularly purchases gasoline in Green Bay and surrounding cities and towns. Mr. Lotto regularly searches for the lowest priced gasoline that he can purchase. He purchases other consumer products as well, and also desires and attempts to obtain those products at the lowest possible prices. Mr. Lotto is harmed by the Wisconsin law since it requires him to pay a price for gasoline and other consumer products that are higher than what the competitive price would be if Wisconsin's Minimum Markup Law were not in place.

The Minimum Markup Law

20. Wis. Stat. §100.30(3) prohibits (with minor exceptions, such as for liquidation sales) "any sale of any item of merchandise" by a retailer or a wholesaler at "less than cost as defined by this section, with the intent or effect of inducing the purchase of other merchandise or of unfairly diverting sales from a competitor." Because that section also provides that evidence of any sale below cost as defined in the statute is prima facie evidence of the prohibited intent or effect, the statute effectively prohibits each and every sale of any item of merchandise below cost, regardless of its effect on competition.

21. For most retailers and wholesalers, cost is defined as the actual invoice cost for the item of merchandise in question, adjusted to reflect trade discounts, excise taxes and costs incurred for transportation and other charges not reflected on the invoice. Sales below invoice cost may be permitted if replacement cost, as defined by the statute, is actually less than invoice cost. *See* Wis. Stat. §100.30(2). The rules are different for retailers and wholesalers of tobacco, alcohol, and gasoline.

22. For retail sellers of tobacco and alcohol, cost means invoice or replacement cost as generally defined by the statute, plus a "markup to cover a proportionate part of the cost of doing business." For these retailers the minimum markup required is 6% of their invoice or replacement costs. For wholesalers the minimum markup is 3% of their invoice or replacement cost. *See* §§100.30(2)(am)1, 100.30(c).

23. The statutory prohibitions are even more complex for retailers, wholesalers and refiners of gasoline. For retail sales, the statute requires a minimum markup of 6% over invoice or replacement cost, or a markup of 9.18% over the average posted terminal price at the nearest terminal (to the place of retail sale) as specified by the law, regardless of where the gasoline sold was actually purchased. Minimum markups in specified percentages are also required for wholesalers and refiners of gasoline, depending upon the manner in which they are doing business.

24. In effect, the Minimum Markup Law places a hidden tax on all Wisconsin consumers. And unlike normal taxes, which at least in theory are spent by the government in ways that benefit the public as a whole, this hidden tax goes straight into the pockets of businesses in the form of a guaranteed profit over their costs, regardless of their ability to run their businesses efficiently. It represents nothing more than a transfer of wealth from consumers to business owners who are not forced to compete for business.

History

25. The Minimum Markup Law was passed as a protectionist measure intended to protect small businesses from the competition offered by larger and more efficient rivals. During the 1920s and 1930s, the small and highly specialized retailers that had been the hallmark of the United States economy during the previous century were slowly being displaced by larger establishments – chain stores such as the Great Atlantic & Pacific Tea Company and department stores such as Gimbel Brothers in Milwaukee. By offering their customers a wider variety of goods and services at lower prices – something that consumers plainly wanted – these new kinds of firms posed a real and continuing threat to smaller and more specialized retailers. After 1929, the competitive threat to small business was exacerbated by the Great Depression, which was characterized by falling prices. The Great Depression thus put further pressure on small and inefficient firms – firms that did not have the resources to deal with persistent deflation.

26. Rather than competing on the merits, endangered businesses turned to the government for help in the form of price controls. They claimed, without much support, that their larger rivals could engage in predatory pricing – charging prices below their costs in order to put them out of business. After the United States Supreme Court struck down a federal minimum markup law as violating the Commerce Clause of the U. S. Constitution, small business trade associations turned to the States. They pushed the States, with considerable success, to do what the federal government could not do – enact laws like the Minimum Markup Law. The intent of these laws was clear: To protect smaller retailers from larger, more innovative firms that could survive lower prices and thus threaten their smaller rivals. *See* Waxman, *Wisconsin's Unfair Sales Act – Unfair to Whom*, 66 MARQ. L. REV. 293 (Winter 1983). Many of the states, including Wisconsin, passed these minimum markup laws during the 1930s.

27. Although protectionist legislation intended to freeze and preserve an inefficient status quo in a dynamic economy may protect some companies from competition over the short term, it is rarely successful in preventing innovation and change. A&P eventually became the largest retailer in the world. It pioneered the development of the large, self-service grocery store and by 1950 operated more than 4,000 of these "supermarkets." By 1930 Gimbel Brothers, founded in Milwaukee as one of the first "department" stores, operated seven large metropolitan stores nationwide including stores in New York and Philadelphia, where it founded the original Thanksgiving Day Parade. Innovation led to the creation and success of similar large and integrated firms in Wisconsin and across the United States.

28. Consumers benefited from the lower prices offered by these new businesses, and customers liked the convenience of shopping at supermarkets and department stores. It was both arbitrary and entirely irrational for the State of Wisconsin (and other states) to attempt to protect the losers in a dynamic, competitive economy – the kind of economy that the State has said it wants and the kind of economy that benefits its citizens. It is noteworthy that A&P and Gimbel's, thought to be the unstoppable juggernauts of the new economic paradigm that the Minimum Markup Law was intended to forestall, themselves eventually fell victim to newer, larger, and even more efficient competitors like Walmart and Costco. Far from destroying small businesses, modern digital behemoths like Amazon and Ebay have facilitated their growth by creating new marketplaces in which to sell their goods.

29. Consumers benefit from such economic innovation. And they are inevitably harmed by protectionist legislation that attempts to stand in the way. In the case of the Minimum Markup Law, Wisconsin citizens are forced to protect inefficient firms by paying them prices that are higher than the prices that would prevail in a truly competitive market.

30. As noted above, the Minimum Markup Law was ostensibly intended to prevent the threat of "predatory" pricing – the danger that mass merchandisers would charge prices below their costs to drive smaller rivals out of the market and increase their market power. *See* Waxman, *supra*, at 296.

31. The State of Wisconsin was not alone in passing legislation that attempted to respond to falling prices. Falling prices were thought by many at the time to be the problem that characterized, and perhaps even caused, the Great Depression. "Statutes similar [to the Minimum Markup Law] in context and effect were adopted by a considerable number of states during the 1930s, when the country was much concerned over generally and consistently declining prices." *State v. Ross*, 259 Wis. 379, 388 (1951) (Gehl J., dissenting).

32. Legislators at the time appeared to believe (or at least to say that they believed) that falling prices were the result of predatory pricing by larger firms and that by stopping sales below costs they could cure the Great Depression. After all, "[t]he predatory price-cutter is one of the oldest and most familiar villains in our economic folklore." Roland H. Koller, *The Myth of Predatory Pricing: An Empirical Study*, 4 ANTITRUST L. AND ECON. REV 105 (Summer 1971). Modern economic understanding demonstrates that they were wrong. The fear of price predation is exactly what one would expect from folklore – it is based on myth and irrationality, not on evidence.

Modern Economic Understanding and Jurisprudence

33. Modern developments in economic theory and more rigorous empirical study of the problem have shown that actual price predators exist only in rare and unusual circumstances. "Predatory pricing schemes are rarely tried, and even more rarely successful." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986). And, although very rare if not impossible, a true predatory pricing scheme would already be unlawful under Wisconsin's antitrust law. *See* Wis. Stat. ch. 133. A blanket prohibition of all sales below some arbitrary measure of "cost" is neither necessary nor appropriate to prevent truly predatory pricing. The Minimum Markup Law was thus enacted to prevent a problem that almost certainly did not exist

in 1939 and that in any event would already have been illegal in Wisconsin. All it does is protect inefficient firms from more effective competitors, "saving" the citizens of Wisconsin from the dire threat of lower prices. In effect, it guarantees higher prices now in order to avoid the remote and nearly impossible threat of higher prices in the future.

34. Low prices are good for consumers. Charging prices below cost may not be a viable business strategy over the long term, but some market conditions and strategic business considerations make such prices entirely appropriate, rather than predatory. As the Wisconsin Supreme Court has noted, "allegations of predatory pricing . . . levelled against a competitor who is merely selling at lower prices than its competitors but who has legitimate business interests for this pricing strategy" are not consistent with the Legislature's intent to make free and open competition the fundamental economic policy of the State of Wisconsin. *Conley Publishing Group, Ltd. v. Journal Communications, Inc.*, 265 Wis. 2d 128, 149 (2003).

35. The United States Supreme Court explained the very limited circumstances in which allegedly predatory pricing should genuinely be a matter of economic concern in *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). Adopting and endorsing well-established economic theory, the Court ruled that low prices – even prices below some appropriate measure of costs – benefit consumers. Prices below costs risk harm to consumers only where there is a dangerous probability that the alleged predator will succeed in forcing its rivals out of business and will thereafter be in a position to charge monopoly prices. "Recoupment is the ultimate object of an unlawful predatory scheme; it is the means by which a predator profits from predation. Without it, predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced . . . . [U]nsuccessful predation is in general a boon to consumers." *Id.* at 224.

36. In other words, prices below costs are not an evil in themselves. To the contrary, even such artificially low prices benefit consumers. They are a matter of economic concern only if the predator's conduct creates a dangerous probability that it will achieve sufficient market power to recoup its losses by overcharging those same consumers after its rivals have been put out of business. Thus, "[e]vidence of below-cost pricing is not alone sufficient to permit an inference of probable recoupment and injury to competition." *Id.* at 226. "[I]n order to recoup their losses, [predators] must obtain enough market power to set higher than competitive prices, and then must sustain those prices long enough to earn in excess profits what they earlier gave up

in below-cost prices." *Id.* at 225-26 (quoting *Matsushita*, 475 U.S at 590-91). The impossibility of recoupment in most competitive markets is the reason why predatory pricing schemes are vanishingly rare. In markets where barriers to entry are not high (as is the case in most markets), any negative effect of below cost pricing is even less.

37. Thus, as the Federal Trade Commission has explained, "[c]onsumers are harmed only if below-cost pricing allows a dominant competitor to knock its rivals out of the market and then raise prices to above-market levels for a substantial time. A firm's independent decision to reduce prices to a level below its costs does not necessarily injure competition and, in fact, may simply reflect particularly vigorous competition." *See* www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/predatory-or-below-cost.

38. Economic experts and the courts have pointed out as well the danger associated with a blanket prohibition of sales below costs. Such a rule could, and most likely would, have the unintended effect of discouraging legitimate price competition. Consumers benefit from vigorous price competition, and the law would stifle such benefits if "it forbade price cuts any time a firm knew that its cuts would impose hardship on any competitor or even force its exit from the market." 3 PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 722, at 271. Given that predatory pricing is exceedingly rare, the more serious risk is that an arbitrary statutory standard will erroneously condemn vigorous competition and discourage firms from cutting their prices in circumstances where consumers will benefit. "[C]utting prices in order to increase business often is the very essence of competition. Thus, mistaken inferences [of predation] . . . are especially costly." *Matsushita*, 475 U.S at 594. Courts "must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition." *Barry Wright Corp. v ITT Grinnell Corp.*, 724 F. 2d 227, 234 (1st Cir. 1983).

39. The Wisconsin Supreme Court endorsed the economic reasoning that underpins and informs *Brooke Group* as well as other federal cases on predatory pricing in its *Conley Publishing* decision. Sales below costs, in and of themselves, are not inevitably predatory or anticompetitive. To the contrary, they may reflect nothing more than vigorous and effective competition – competition that benefits consumers and accords with the fundamental economic policy of the State of Wisconsin. Sales below costs become predatory only when they evidence a sustained and likely successful campaign to drive rivals out of business – and even then only in

those markets where the predator could be assured of achieving and maintaining market power over the long run.

The Minimum Markup Law Is Irrational and Arbitrary and Has No Real and Substantial Relationship to a Legitimate State Policy

40. These economic principles establish without question that the Wisconsin Minimum Markup Law is irrational and entirely arbitrary in purpose and effect. It bears no real or substantial relation to any legitimate public purpose. It does not foster vigorous price competition, but instead restricts the operation of free and unfettered markets in ways that cause prices to be higher, to the detriment of Wisconsin consumers. It is more restrictive than necessary to achieve any legitimate purpose, and it prevents Wisconsin businesses from exercising their constitutional right to operate their businesses and earn their living in an otherwise lawful manner. It not only fails to further its alleged justifications, it works contrary to them.

41. It is irrational to impose restrictions on the right to earn a living and the liberty of businesses and consumers that is not only very unlikely to achieve the benefits it seeks but is very likely to harm them. As both the United States Supreme Court and the Wisconsin Supreme Court have recognized, lower prices do not harm consumers and do not undermine competition. It is irrational to force higher prices now to protect against future higher prices that are highly unlikely to occur.

42. Even were this not intrinsically so, the justification for the Minimum Markup Law is flawed. First, in some circumstances the statute prohibits sales that may be above the appropriate measure of costs, sales that the federal courts have said should be presumptively legal for purposes of competition policy. The statute focuses on individual sales of a particular product at a particular point in time. With some exceptions, sales below "invoice cost" are prohibited by the act. But individual sales of individual products by a retailer like Walmart or Target that carries hundreds or even thousands of products cannot possibly represent a sustained effort to drive their rivals out of business. Prices that are below invoice cost for a particular product could, for most retailers, be well <u>above</u> some other economically appropriate measure of their overall costs over their multiple product lines. By applying a uniform and economically

irrational definition of cost to individual transactions, the minimum markup act chills legitimate competition and prohibits individual transactions which would benefit consumers.

43. Second, there may be entirely legitimate competitive circumstances in which a firm may wish to sell below its costs in limited circumstances – to a particular customer, in a particular area, or during a relatively short period of time. Those kinds of sales may, and likely do, represent nothing more than an effort to gain market share or fend off some new initiative from a competitor. "Loss leaders," for example, are a popular and ordinary form of promotion that involve advertised sales of a particular product at an unusually low price. Retailers use loss leaders to attract new customers and they represent an attractive investment in goodwill. Accepting a lower profit margin or even a loss on sales of selected items to attract new customers is a classic and accepted means of vigorous competition – much like other marketing ploys, *e.g.*, free gifts, free samples, visiting celebrities, etc. – that may also make certain isolated transactions unprofitable. From the perspective of the customer, such aggressive and selected discounting is desirable because it results in lower prices. Yet in Wisconsin, the use of this procompetitive marketing strategy is prohibited. Such a prohibition is not necessary to prevent predatory pricing, which would require a comprehensive campaign of artificially low prices over a sustained period of time, and which in any event would be a violation of Wisconsin's antitrust law.

44. Third, the Act provides competitors with a means of enforcing price discipline on price cutting rivals. Inefficient competitors can complain to the State or file or threaten to file a lawsuit against their more aggressive competitors. The economic effect of the statute is to create a floor for pricing that many if not all market participants will tend to find attractive. The statute thus discourages price competition and protects inefficient firms. Interest groups representing all market participants tend to favor statutory schemes that protect such firms. That is why arbitrary, irrational and anticompetitive regulatory schemes like the Minimum Markup Law tend to persist long after it is obvious that their effect is pernicious.

45. Fourth, the Minimum Markup Law may facilitate actual or tacit collusion to fix prices at an artificially high level. Firms with low cost structures could use the minimum prices required to be charged by their higher cost rivals as a benchmark for such a scheme.

46. Fifth, even if the blanket ban on sales below costs were appropriate, the additional markup for sales of gasoline, alcohol, and tobacco required by the law is not. A guaranteed

minimum profit over the statutorily-defined "cost" of a product does absolutely nothing to prevent predatory pricing, which by definition is sustained sales at a **loss** in order to drive competitors out of business. The additional minimum markup requirements prohibit only profitable sales of less than 9.18% above invoice cost. The additional minimum markup bears no relation at all to preventing predatory pricing.

47. Sixth, the required mark-up on retail gasoline station sales of approximately 9% over the average posted terminal price, which under the statute is intended to represent retail stations' "cost of doing business," fails to represent such costs. Whether a retail station purchases gasoline for $2 per gallon, $3 per gallon, or $4 per gallon, its overhead and other costs of doing business are approximately the same. Yet under the statute, a retailer that buys gasoline for $2 is required to charge a markup of $0.18 to reflect its overhead costs, but a retailer who pays $4 is required to charge $0.36 to reflect exactly the same "costs of doing business." This makes no sense. The required 9% mark-up is effectively a fixed "tax" on retail gasoline sales that increases costs to consumers. It bears no substantial relationship to a retail gasoline station's true cost of doing business and is thus arbitrary and irrational.

48. Finally, specifically as to the sale of gasoline, tying the minimum retail price to the average price at a particular terminal based solely on the location of the retail sale is irrational. Retailers can, as Krist Oil does, buy gasoline at a lower price from a terminal farther away (even accounting for additional shipping costs). Furthermore, different brands of gasoline sell for different prices, even at the same terminal, so retailers may be paying less than the average price. The Minimum Markup Law prohibits retailers from using the actual price they pay to calculate their minimum price, even though if they could, the 9.18% markup would still result in selling the gasoline at a profit. Forcing retailers to use a price they did not actually pay as the equivalent of their invoice cost is irrational, as it does nothing to prevent predatory pricing.

49. Similarly, as applied to Krist Oil, the Minimum Markup Law works to mandate Krist sell gasoline at an arbitrary 9.18% above the average posted terminal price at the nearest terminal, when Krist could sell below that amount indefinitely, make a profit on each sale, increase overall revenue, and expand its business and market share. In other words, the law mandates an arbitrary mark-up on gas prices that has no effect other than to disadvantage the most efficient competitors while simultaneously increasing costs to consumers. This is irrational and serves only to harm consumers.

FIRST CLAIM FOR RELIEF

(Violation of Article I, Section 1 of the Wisconsin Constitution – Substantive Due Process)

50. Plaintiffs incorporate by reference the allegations above as if fully set forth herein.

51. The Due Process Clause of Article I, §1 of the Wisconsin Constitution provides in relevant part that "[a]ll people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness."

52. Since the earliest days of our State, the Wisconsin Supreme Court has recognized the right to earn a living as a fundamental right. *See State v. Benzenberg*, 101 Wis. 172 (1898) (Constitution protects right of a citizen to pursue his calling); *Taylor v. State*, 35 Wis. 298 (1874) (right to engage in business is a fundamental right under the Wisconsin Constitution); *Maxwell v. Reed*, 7 Wis. 582 (1859). In order to pass constitutional muster, economic regulation must have a "real [and] substantial relation" to the purported government objectives. *State ex rel. Zimmer v. Kreutzberg*, 114 Wis. 530, 90 N.W. 1098, 1102 (1902).

53. The Minimum Markup Law arbitrarily and irrationally prevents Plaintiff Krist Oil from charging appropriate and non-predatory prices in connection with its business and from freely operating an otherwise lawful business in a manner that is in its own best interest and the best interest of its customers. Wisconsin has no compelling, substantial, or legitimate government interest in regulating minimum prices, even prices below some measure of costs, except where such prices could result in an actual and persistent adverse effect on competition. The Minimum Markup Law is far more restrictive than necessary to prevent such injury, and therefore simply restricts legitimate and pro-competitive pricing in a way that is irrational, arbitrary, and oppressive.

54. The Minimum Markup Law prevents free and open competition in the markets in which Plaintiff Krist Oil does business. Absent the statutory prohibitions, Krist Oil would be free to charge lower prices, and would choose to do so. But for the law, Krist could and would sell gasoline below the mandatory 9.18% mark-up, and do so <u>at a profit</u> based on its business model and low overhead. Such sales would not qualify as predatory pricing, and the government has no interest in preventing such sales.

55. The Minimum Markup Law prevents Plaintiff Robert Lotto from reaping the benefits of free and open competition by forcing him to pay a higher price for gasoline than he

would, were the Law not in place. Specifically, the Law prevents Mr. Lotto from purchasing gasoline from Krist Oil at the most competitive price that Krist Oil would be willing to sell, were the Law not in place. The Minimum Markup Law has a similar and equally pernicious effect with respect to other consumer products, causing Mr. Lott and other Wisconsin citizens to pay higher prices than the prices that would prevail in a truly competitive market.

56. The Minimum Markup Law is arbitrary and irrational, in that in order to protect consumers from potential (and highly unlikely) artificially high prices in the future, it forces consumers to pay artificially high prices now. The law has the opposite effect of what it is purportedly trying to achieve, and it is irrational and arbitrary to continue to enforce it with that knowledge.

57. The Minimum Markup Law violates the Wisconsin Constitution's guarantee of due process in that it denies Wisconsin citizens the benefits of free and open competition, denies Wisconsin businesses the right to earn a living and engage in lawful commerce, and does not further any legitimate, substantial, or compelling governmental interest.

58. Plaintiffs have suffered harm as a result of the Minimum Markup Law.

SECOND CLAIM FOR RELIEF

(Violation of Article I, Section 1 of the Wisconsin Constitution – Equal Protection)

59. Plaintiffs incorporate by reference the allegations above as if fully set forth herein.

60. Article I, Section 1 of the Wisconsin Constitution also guarantees equal protection of the law.

61. The Minimum Markup Law creates irrational and arbitrary classifications. Businesses that sell gasoline must mark that product up 9.18%. Businesses that sell alcohol or tobacco must mark those products up 6%. Businesses that sell any other product only have to sell their products above "cost." There is no rational reason for forcing retailers to sell certain products at a specified percentage above "cost" when other products do not have the same requirements. There is no reasonable basis for those classifications and they serve no legitimate government purpose.

62. Plaintiffs have suffered harm due to the classifications created by the Minimum Markup Law.

WHEREFORE, Plaintiffs request that this Court:

A. Enter a declaratory judgment that the Minimum Markup Law violates the due process guarantee set forth in Article I, section 1 of the Wisconsin Constitution;

B. Enter a declaratory judgment that the Minimum Markup Law violates the equal protection guarantee set forth in Article I, section 1 of the Wisconsin Constitution;

B. Enter an order permanently enjoining Defendants from enforcing the provisions of the Minimum Markup Law;

C. Enter an order awarding Plaintiffs their reasonable costs and fees allowed by law; and

D. Enter an order granting Plaintiffs such other and further relief as the Court deems appropriate.

PLAINTIFFS HEREBY DEMAND A JURY OF 12 PERSONS ON ALL CLAIMS SO TRIABLE

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