

STATE OF WISCONSIN CIRCUIT COURT VILAS COUNTY
BRANCH 1

KRIST OIL COMPANY, et al.,

Plaintiffs,

v.

Case No. 16CV0117
Declaratory Judgment: 30701

BEN BRANCEL, Secretary,
Wisconsin Department of
Agriculture, Trade and Consumer
Protection,

Defendant,

and

WISCONSIN PETROLEUM MARKETERS
AND CONVIENCE STORE ASSOCIATION,

Intervenor-Defendant.

**AMENDED ANSWER TO DEFENDANT BEN BRANCEL TO
PLAINTIFFS' COMPLAINT**

Defendant Ben Brancel (“Defendant”), in his official capacity, by his undersigned attorneys, hereby answers Plaintiffs’ Complaint and asserts the following defenses:

INTRODUCTION

1. Defendant states that the allegations of paragraph 1 are legal conclusions to which no response is required. To the extent a response is required, Defendant denies the allegations.

2. Defendant states that he is without information sufficient to form a belief as to the truth or falsity of the allegations in the first six sentences of paragraph 2. Defendant denies the allegations in the last sentence of paragraph 2.

3. Defendant states that the allegations in the first sentence of paragraph 3 are legal conclusions to which no response is required. To the extent a response is required, Defendant denies the allegations. Defendant denies the remaining allegations in paragraph 3.

4. Defendant states that he is without information sufficient to form a belief as to the truth or falsity of the allegations of the first three sentences of paragraph 4. Defendant denies the allegations in the fourth sentence of paragraph 4. Defendant states that he is without information sufficient to form a belief as to the truth or falsity of the allegations of the fifth sentence of paragraph 4. Defendant denies the allegations in the sixth sentence of paragraph 4.

JURISDICTION AND VENUE

5. Defendant states that the allegations of paragraph 5 are legal conclusions to which no response is required. To the extent a response is required, Defendant denies the allegations.

6. Defendant does not dispute the jurisdiction of this Court over this case.

7. Defendant does not contest venue in this Court.

PARTIES

8. Defendant admits that Plaintiff Krist Oil Company is a Michigan corporation that is authorized to conduct business in Wisconsin. Defendant states that he is without information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph 8.

9. Defendant states that he is without information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 9.

10. Defendant denies the allegations in the first sentence of paragraph 10 and states that Wis. Stat. § 100.30 is constitutional in every respect. Defendant does not respond to remainder of paragraph 10 because Defendant State of Wisconsin is moving to dismiss the complaint.

11. Defendant admits the allegations of paragraph 11.

STATEMENT OF FACTS

The Plaintiffs

12. Defendant states that he is without information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 12.

13. Defendant states that he is without information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 13.

14. Defendants states that he is without information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 14.

15. Defendant states that he is without information sufficient to form a belief as to the truth or falsity of the allegations in the first and last sentences of paragraph 15. Defendant denies the allegations in the second and third sentences of paragraph 15.

16. Defendant denies the allegations in paragraph 16.

17. Defendant denies the allegations of paragraph 17.

18. Defendant denies the allegations of paragraph 18.

19. Defendant states that he is without information sufficient to form a belief as to the truth or falsity of the allegations in the first five sentences of paragraph 19. Defendant denies the allegations in the last sentence of paragraph 19.

THE MINIMUM MARKUP LAW

20. Defendant states that paragraph 20 contains characterizations of law to which no response is required. To the extent a response is required, Defendant states that Wis. Stat. § 100.30(3) speaks for itself and denies any characterization of the statute contrary to its express terms.

21. Defendant states that paragraph 21 contains characterizations of law to which no response is required. To the extent a response is required, Defendant states that Wis. Stat. § 100.30 speaks for itself and denies any characterization of the statute contrary to its express terms.

22. Defendant states that paragraph 22 contains characterizations of law to which no response is required. To the extent a response is required, Defendant states that Wis. Stat. § 100.30 speaks for itself and denies any characterization of the statute contrary to its express terms.

23. Defendant states that paragraph 23 contains characterizations of law to which no response is required. To the extent a response is required, Defendant states that Wis. Stat. § 100.30 speaks for itself and denies any characterization of the statute contrary to its express terms.

24. Defendant denies the allegations in paragraph 24.

History

25. Defendant denies the allegations of paragraph 25.

26. Defendant admits that Wisconsin passed its minimum markup law in 1939. Defendant denies the remaining allegations in paragraph 26.

27. Defendant denies the allegations in paragraph 27.

28. Defendant denies the allegations in paragraph 28.

29. Defendant denies the allegations in paragraph 29.

30. Defendant admits that the Minimum Markup Law was intended to prevent the threat of predatory pricing and that one form of predatory pricing consists of larger retailers charging prices below their costs in order to drive smaller rivals out of the market, but denies any implication that this is the sole intent of the Minimum Markup Law or that the Minimum

Markup Law only applies to this form of predatory pricing. The plain language of the Minimum Markup Law prohibits businesses of any and all sizes from selling below cost based on the policy, stated in Wis. Stat. § 100.30(1), that “[t]he practice of selling certain items of merchandise below cost in order to attract patronage is generally a form of deceptive advertising and an unfair method of competition in commerce.”

31. With respect to the first sentence of paragraph 31, Defendant admits that Wisconsin “was not alone in passing legislation” like the minimum markup law, but denies that these law were necessarily a “respon[se] to falling prices.” Defendant states that he is without information sufficient to form a belief as to the truth or falsity of the allegations in the second sentence in paragraph 31. Defendant states that the third sentence of paragraph 31 contains characterizations of law to which no response is required. To the extent a response is required, Defendant denies these allegations and states that the complaint quotes a dissenting opinion that does not state the law of the State of Wisconsin; that the Wisconsin Supreme Court’s decision in *State v. Ross*, 259 Wis. 379 (1951) speaks for itself; and the Defendant denies any characterization contrary to the majority opinion in the case.

32. Defendant denies the allegations of paragraph 32.

Modern Economic Understanding and Jurisprudence

33. Defendant denies the allegations of the first sentence of paragraph 33. Defendant states that the allegations in the second sentence of paragraph 33 are characterizations of law to which no response is required. To the extent a response is required, Defendant denies these allegations and states that the United State Supreme Court's interpretation of the standard for proving a violation of 15 U.S.C. § 1 in *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) is irrelevant to the constitutionality of Wis. Stat. § 100.30, which has repeatedly withstood challenges to its constitutionality. Defendant states that the allegations in the third sentence of paragraph 33 are characterizations of law to which no response is required. To the extent a response is required, Defendant denies these allegations and states that the interpretation of Chapter 133 of the Wisconsin Statutes is irrelevant to the constitutionality of Wis. Stat. § 100.30, which has repeatedly withstood challenges to its constitutionality. Defendant denies the remaining allegations in paragraph 33.

34. Defendant admits the allegations in the first sentence of paragraph 34 and affirmatively alleges that "low prices" do not mean prices below cost. Defendant denies the allegations in the second sentence of paragraph 34. Defendant states that the allegations in the third sentence of

paragraph 34 are characterizations of law to which no response is required. To the extent a response is required, Defendant denies these allegations and states that the Wisconsin Supreme Court's interpretation of the standard for proving a violation of Wis. Stat. § 133.03 in *Conley Publishing Group, Ltd. v. Journal Communications, Inc.*, 2003 WI 119, 265 Wis. 2d 128, 665 N.W.2d 879 are irrelevant to the constitutionality of Wis. Stat. § 100.30, which has repeatedly withstood challenges to its constitutionality.

35. Defendant states that the allegations in paragraph 35 are characterizations of law to which no response is required. To the extent a response is required, Defendant denies these allegations and states that the United States Supreme Court's interpretation of the standard for proving a violation of 15 U.S.C. § 13(a) in *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) is not relevant to the constitutionality of Wis. Stat. § 100.30, which has repeatedly withstood challenges to its constitutionality.

36. Defendant states that the allegations in paragraph 36 are characterizations of law to which no response is required. To the extent a response is required, Defendant denies these allegations and states that the United States Supreme Court's interpretation of the standard for proving a violation of 15 U.S.C. § 13(a) in *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) is not relevant to the constitutionality of

Wis. Stat. § 100.30, which has repeatedly withstood challenges to its constitutionality.

37. Defendant states that the allegations in paragraph 37 are characterizations of law to which no response is required. To the extent a response is required, Defendant denies these allegations and states that the Federal Trade Commission's summary of the United States Supreme Court's interpretation of the standard for proving a violation of 15 U.S.C. § 13(a) in *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) is not relevant to the constitutionality of Wis. Stat. § 100.30, which has repeatedly withstood challenges to its constitutionality.

38. Defendant denies the allegations in the first and second sentences of paragraph 38. Defendant denies the allegations in the third sentence of paragraph 38 and states that Wis. Stat. § 100.30 does not “forb[id] price cuts any time a firm knew that its cuts would impose hardship on a competitor or even force it to exit from the market.” Defendant denies the allegation in the fourth sentence of paragraph 38. Defendant states that the remaining allegations in paragraph 38 are characterizations of law to which no response is required. To the extent a response is required, Defendant denies these allegations and states that the United State

Supreme Court's interpretation of the standard for proving a violation of 15 U.S.C. § 1 in *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) and the First Circuit's interpretation of the standard for proving a violation of 15 U.S.C. § 2 in *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983) 879 are irrelevant to the constitutionality of Wis. Stat. § 100.30 which has repeatedly withstood challenges to its constitutionality.

39. Defendant states that the allegations in paragraph 39 are characterizations of law to which no response is required. To the extent a response is required, Defendant denies these allegations and states that the Wisconsin Supreme Court's interpretation of the standard for proving a violation of Wis. Stat. § 133.03 in *Conley Publishing Group, Ltd. v. Journal Communications, Inc.*, 2003 WI 119, 265 Wis. 2d 128, 665 N.W.2d 879 are irrelevant to the constitutionality of Wis. Stat. § 100.30 which has repeatedly withstood challenges to its constitutionality.

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

40. Defendant denies the allegations in paragraph 40.

41. Defendant denies the allegations in paragraph 41.

42. Defendant denies the allegations in paragraph 42.

43. Defendant denies the allegations in paragraph 43.

44. Defendant denies the allegations in paragraph 44.
45. Defendant denies the allegations in paragraph 45.
46. Defendant denies the allegations in paragraph 46.
47. Defendant denies the allegations in paragraph 47.
48. Defendant denies the allegations in paragraph 48.
49. Defendant denies the allegations in paragraph 49.

FIRST CLAIM FOR RELIEF

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

50. Defendant incorporates and re-alleges his responses to paragraphs 1–49.

51. Defendant states that paragraph 51 contains characterizations of law to which no response is required. To the extent a response is required, Defendant states that article I, section 1 speaks for itself, and denies any characterization of the provision contrary to its express terms.

52. Defendant states paragraph 52 contains characterizations of law to which no response is required. To the extent a response is required, Defendant denies the allegations.

53. Defendant denies the allegations in paragraph 53.
54. Defendant denies the allegations in paragraph 54.
55. Defendant denies the allegations in paragraph 55.

56. Defendant denies the allegations in paragraph 56.

57. Defendant denies the allegations in paragraph 57.

58. Defendant denies the allegations in paragraph 58.

SECOND CLAIM FOR RELIEF

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

59. Defendant incorporates and re-alleges his responses to paragraphs 1–58.

60. Defendant states that paragraph 60 contains characterizations of law to which no response is required. To the extent a response is required, Defendant states that article I, section 1 speaks for itself, and denies any characterization of the provision contrary to its express terms.

61. Defendant denies the allegations in paragraph 61.

62. Defendant denies the allegations in paragraph 62.

AFFIRMATIVE DEFENSES

1. That one or more of the plaintiffs lacks standing to bring this action.

2. That the plaintiffs have failed to state a claim on which relief can be granted.

3. To the extent the plaintiffs' request for "such other and further relief as the Court deems appropriate" includes a request for monetary relief or damages, that Secretary Brancel is protected by discretionary immunity.

WHEREFORE, Defendant demands judgment as follows:

1. Denying the declaratory and injunctive relief sought by the plaintiffs.

2. Dismissing the complaint on its merits and with prejudice as to all other causes of action.

3. Awarding defendant his costs and reasonable attorneys' fees.

Dated this 2nd day of June, 2017.

Respectfully submitted,

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