UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

PIT ROW INC., et al.,

Plaintiffs,

v. Case No. 20-C-738

COSTCO WHOLESALE CORPORATION,

Defendant.

DECISION AND ORDER

Plaintiffs, twelve corporate entities that own and operate retail gas stations located in Green Bay, Wisconsin, brought this action against Defendant Costco Wholesale Corporation, alleging Costco violated the Wisconsin Unfair Sales Act, Wis. Stat. § 100.30, by selling regular unleaded motor vehicle fuel below the cost to the retailer. The court has jurisdiction over the action pursuant to 28 U.S.C. § 1332. This matter comes before the court on Costco's motion for summary judgment and Plaintiffs' motion for class certification. For the following reasons, Costco's motion for summary judgment will be granted, Plaintiffs' motion for class certification will be denied as moot, and the case will be dismissed.

BACKGROUND

Costco operates members-only warehouse clubs throughout the United States. Def.'s Proposed Findings of Fact (DPFOF) ¶ 1, Dkt. No. 68. Its members-only warehouse business is predicated on bringing high-quality products to its members at the lowest possible cost. *Id.* ¶ 2. Costco offers members a wide array of products and services, including pharmacies, optical centers, hearing-aid centers, travel agency services, food courts, groceries, service stations, and

gas stations. Like many businesses, Costco has an interest in convincing its members to buy from Costco more frequently, including gasoline. *Id.* ¶ 4. When members join Costco, they provide a variety of information including an address-of-record which they can update from time-to-time. *Id.* ¶ 7. Costco opened a warehouse at 2355 Costco Way, Bellevue, Wisconsin (the Bellevue Costco) on October 17, 2013. *Id.* ¶ 3. It also opened a warehouse at 5401 Integrity Way, Appleton, Wisconsin (the Appleton Costco) on November 7, 2015. *Id.* ¶ 8.

Plaintiffs are the owners and operators of gas stations and convenience stores in the greater Green Bay area. *Id.* ¶ 9. Membership is not required to purchase gas from Plaintiffs' stations. *Id.* ¶ 11. Plaintiffs filed the instant action asserting that Costco violated the Unfair Sales Act on 263 days between October 1, 2019, and December 31, 2020, at the Bellevue Costco by selling regular unleaded motor vehicle fuel below the cost to the retailer. *Id.* ¶ 10. Costco asserts that it did not violate the Unfair Sales Act on any of the alleged violation dates because its pricing conformed with the express terms of the Act.

LEGAL STANDARD

Summary judgment is appropriate when the moving party shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). In deciding a motion for summary judgment, the court must view the evidence and make all reasonable inferences in the light most favorable to the non-moving party. *Johnson v. Advocate Health & Hosps. Corp.*, 892 F.3d 887, 893 (7th Cir. 2018) (citing *Parker v. Four Seasons Hotels, Ltd.*, 845 F.3d 807, 812 (7th Cir. 2017)). The party opposing the motion for summary judgment must "submit evidentiary materials that set forth specific facts showing that there is a genuine issue for trial." *Siegel v. Shell Oil Co.*, 612 F.3d 932, 937 (7th Cir. 2010) (citations omitted). "The nonmoving party must do more than simply show that there is some

metaphysical doubt as to the material facts." *Id.* Summary judgment is properly entered against a party "who fails to make a showing to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." *Austin v. Walgreen Co.*, 885 F.3d 1085, 1087–88 (7th Cir. 2018) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

ANALYSIS

Costco argues that it did not violate the Unfair Sales Act on any of the alleged violation dates because its pricing conformed with the express terms of the Act. Wisconsin's Unfair Sales Act prohibits "[a]ny sale of any item of merchandise either by a retailer, wholesaler, wholesaler of motor vehicle fuel or refiner, at less than cost as defined in this section with the intent or effect of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor . . . ." Wis. Stat. § 100.30(3). The Act establishes formulas for determining the minimum lawful selling price in relation to the retailer's cost. *See* § 100.30(2)(am). It affords a private cause of action to any "person who is injured or threatened with injury as a result of a sale" in violation of the Act. § 100.30(5m). In proving a violation, "evidence of any sale of any item of merchandise . . . at less than cost as defined in this section shall be prima facie evidence of intent or effect to induce the purchase of other merchandise, or to unfairly divert trade from a competitor, or to otherwise injure a competitor." § 100.30(3). The district attorney or the Department of Agriculture, Trade, and Consumer Protection (DATCP) may also bring actions for forfeiture or injunctions, and the DATCP may issue special orders against violators. § 100.30(4)–(5).

The Act carves out nine exceptions where the "provisions of this section shall not apply." Wis. Stat. § 100.30(6)(a). Costco asserts that, for certain days in dispute, it set its price by matching the "existing price of a competitor" in accordance with Wis. Stat. § 100.30(6)(a)7. As relevant here, the Act does not apply to sales at retail or sales at wholesale where the "price of merchandise

is made in good faith to meet an existing price of a competitor and is based on evidence in the possession of the retailer, wholesaler, wholesaler of motor vehicle fuel or refiner in the form of an advertisement, proof of sale or receipted purchase, price survey or other business record maintained by the retailer, wholesaler, wholesaler of motor vehicle fuel or refiner in the ordinary course of trade or the usual conduct of business." Wis. Stat. § 100.30(6)(a)7. The Act defines "an existing price of a competitor" as "a price being simultaneously offered to a buyer for merchandise of like quality and quantity by a person who is a direct competitor of the retailer . . . from whom the buyer can practicably purchase the merchandise." § 100.30(2)(cj). If a retailer lowers the price of motor vehicle fuel in good faith to meet an existing price of a competitor, the retailer must submit to the DATCP "notification of the lower price before the close of business on the day on which the price was lowered." § 100.30(7)(a). Failure to comply with the Act's requirements creates a "rebuttable presumption" that the retailer did not lower the price to meet the existing price of a competitor. § 100.30(7)(b). If the retailer does comply with these requirements, however, the retailer is immune from liability. § 100.30(7)(c). In this case, Costco asserts that, for each of the 263 dates in dispute, it either sold gas at or above the minimum markup price as set forth in Wis. Stat. § 100.30(2)(am)1m.c. or set its price by matching the "existing price of a competitor" in accordance with Wis. Stat. § 100.30(6)(a)7.

A. Minimum Markup Price

Costco asserts that, for 25 of the alleged violation dates[1], it did not violate the Act because it sold gas at or above the minimum markup price as set forth in Wis. Stat. § 100.30(2)(am)1m.c.

[1] The 25 days at issue are February 29, 2020; March 1, 2020; March 2, 2020; March 3, 2020; March 4, 2020; March 5, 2020; March 6, 2020; March 7, 2020; March 8, 2020; March 9, 2020; March 11, 2020; March 12, 2020; April 14, 2020; April 15, 2020; June 26, 2020; June 27, 2020; June 28, 2020; June 29, 2020; June 30, 2020; September 2, 2020; September 3, 2020; October 9, 2020; October 11, 2020; October 14, 2020; and October 17, 2020.

Plaintiffs concede that for seven of the 25 days, Costco's price was above the minimum markup calculation and therefore withdraw their claims for March 3, 2020, March 5, 2020, and March 7 through 12, 2020. But Plaintiffs assert that for the other 18 days in question, Costco was pricing below the statutory minimum mark-up price. To support their assertion, Plaintiffs rely on calculations prepared by GCS – Grand Central Station, one of the plaintiffs in this case, as part of its regular business operations. Plaintiffs maintain that, on the 18 days in question, GCS's calculations reveal that Costco priced its fuel below the minimum markup calculation. Costco counters that GCS relied on the terminal price for the wrong dates in multiple instances and used a "rack price published by Axxis Petroleum that uses a 10:30 a.m. price—rather than the price called for by the statute." Def.'s Reply Br. at 14, Dkt. No. 113. The parties have not provided the court with the information necessary to make a determination on this issue. On the current record, the court is unable to conclude as a matter of law that Costco did not violate the Act by pricing its fuel below the minimum markup calculation. Therefore, Costco's motion for summary judgment on this basis is denied.

B. Existing Price of a Competitor

Costco also asserts that, for the other 238 days at issue, it set its price by matching the "existing price of a competitor" in accordance with Wis. Stat. § 100.30(6)(a)7. More specifically, the Bellevue Costco matched the price being offered by a BP gas station located in Kaukauna, Wisconsin (Kaukauna BP) and matched the actual five-cent discounted price being offered to the customers of two Marathon gas stations located in Green Bay, Wisconsin under their rewards program. The court will address the arguments relevant to each gas station in turn.

1. Kaukauna BP Gas Station

Plaintiffs challenge Costco's price matching against the Kaukauna BP, arguing that the Kaukauna BP is not the Bellevue Costco's "direct competitor." They assert that the DATCP has "already concluded that the Kaukauna BP is not Costco's direct competitor." Pls.' Br. at 7, Dkt. No. 90. On February 25, 2020, the DATCP sent Costco Wholesale a "warning letter" in which it concluded that a number of Costco warehouses located in the state of Wisconsin violated Wis. Stat. § 100.30(3) on certain occasions. Dkt. No. 48-2. As part of the letter, the DATCP indicated that the Kaukauna BP was not a direct competitor of the Bellevue Costco. *Id.* at 5. Plaintiffs maintain that this court should give the DATCP's determination great weight.

Although Wisconsin courts had previously deferred to administrative agencies' conclusions of law, *see Harnischfeger Corp. v. LIRC*, 196 Wis. 2d 650, 539 N.W.2d 98 (1995), in 2018, the Wisconsin Supreme Court left its "deference doctrine behind" by declaring that it would no longer give "great weight" deference to the legal conclusions of administrative agencies. *Tetra Tech EC Inc. v. Wis. Dep't of Revenue*, 2018 WI 75, ¶¶ 83–84, 382 Wis. 2d 496, 914 N.W.2d 21 ("Today, the core judicial power ceded by our deference doctrine returns to its constitutionally-assigned residence. Henceforth, we will review an administrative agency's conclusions of law under the same standard we apply to a circuit court's conclusions of law—de novo."). The Wisconsin legislature has since codified the *Tetra Tech* court's decision, directing that, "[u]pon review of an agency action or decision, the court shall accord no deference to the agency's interpretation of law." Wis. Stat. § 227.57(11). In light of *Tetra Tech* and Wis. Stat. § 227.57, the court concludes that the DATCP's February 25, 2020 warning letter to the Bellevue Costco is neither dispositive nor subject to deference.

Plaintiffs argue that, even if the court does not find the DATCP's determination dispositive, the Kaukauna BP is not a "direct competitor" of the Bellevue Costco because of the geographic distance between the two stations. They assert that the Kaukauna BP is not located in the "Green Bay urban area;" there is a gap in development between the Green Bay area and Kaukauna; and the Kaukauna BP is 24 miles away from the Bellevue Costco, 10 miles farther away than any other gas station that the Bellevue Costco price matches, and 17 miles outside of Costco's default radius for gas-station price matching. Pls.' Br. at 15. They contend that, even though the Kaukauna BP is located closer to the Appleton Costco than the Bellevue Costco, the Appleton Costco does not consider the Kaukauna BP to be a "direct competitor" for price matching purposes.

Whether the Kaukauna BP is the Bellevue Costco's "direct competitor" requires that the court construe the provisions of Wis. Stat. § 100.30. Under Wisconsin law, "[t]he primary goal of statutory interpretation is to determine the legislature's intent." *Peters v. Menard, Inc.*, 224 Wis. 2d 174, 185, 589 N.W.2d 395 (1999). The search for legislative intent begins with the plain language of the statute. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." *Id.* (citation omitted). In addition, statutory language "is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.* ¶ 46 (citation omitted). "Where statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation." *Id.* (citation omitted). If a statute is ambiguous, however, "the reviewing court turns to the scope, history, context, and purpose of the statute." *Id.* ¶ 48 (internal quotation marks and citation omitted).

The Unfair Sales Act not only creates a private cause of action for persons who are injured or threatened with injury as a result of a sale or purchase of motor vehicle fuel in violation of Wis. Stat. § 100.30(3), it also provides that the DATCP or a district attorney may commence an action on behalf of the state to recover a forfeiture of not less than $50 nor more than $500 for the first violation and not less than $200 nor more than $2,500 for each subsequent violation. *See* Wis. Stat. § 100.30(4), (5m). Because violators of the Unfair Sales Act are subject to substantial fines and forfeitures, the Act is penal in nature and must be strictly construed. *See Liberty Loan Corp. & Affiliates v. Eis*, 69 Wis. 2d 642, 649, 230 N.W.2d 617 (1975). As the Wisconsin Supreme Court has explained: "A law providing for a forfeiture is a penal law. Where its purpose is uncertain the language should be read strictly to soften its severity. Otherwise the result would be unreasonably harsh." *Id.* "[T]he rule of strict construction of penal statutes does not apply," however, "unless a statute is ambiguous, and it cannot be used to circumvent the purpose of the statute." *State v. Kittilstad*, 231 Wis. 2d 245, 267, 603 N.W.2d 732 (1999). With these principles in mind, the court begins its analysis of the statutory language.

The Unfair Sales Act does not define "direct competitor." When a statute does not define a term, courts examine "the ordinary meaning of the term." *Orion Flight Servs., Inc. v. Basler Flight Serv.*, 2006 WI 51, ¶ 24, 290 Wis. 2d 421, 714 N.W.2d 130 (citation omitted). The Wisconsin Court of Appeals considered the definition of "direct competitor" in the context of the Unfair Sales Act in *Go America L.L.C. v. Kwik Trip, Inc.*, 2006 WI App 94, 292 Wis. 2d 795, 715 N.W.2d 746. There, the issue before the court was whether an out-of-state retailer is a "direct competitor" within the meaning of Wis. Stat. § 100.30(6)(a)7. After acknowledging that the Act did not define "competitor" or "direct competitor," the court turned to a dictionary to determine the common meaning of the words. *Go America*, 292 Wis. 2d 796, ¶ 16 (citing *Kopke v. A.*

Hartrodt S.R.L., 2001 WI 99, ¶ 16, 245 Wis. 2d 396, 629 N.W.2d 662). The court noted that a recognized dictionary definition of "competitor" is "one selling or buying goods or services in the same market as another." *Id.* (quoting MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 235 (10th ed. 1999)). The court held that "[t]here is nothing in the plain language of the statute or the common meaning of competitor that limits competitors to those in the same state." *Id.*

Just like the court in *Go America*, this court begins by consulting MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1999) to determine the common and ordinary meaning of the phrase "direct competitor." As the *Go America* court observed, "competitor" is defined as "one selling or buying goods or services in the same market as another." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 235. The dictionary further defines "market" as a "geographical area of demand for commodities or services." *Id.* at 712. Though Plaintiffs argue that a "direct competitor" must be within a certain distance of the retailer, nothing in the plain language of the statute or the common meaning of "competitor" or "market" limits the definition of "direct competitor" in the way that Plaintiffs suggest.

Plaintiffs assert that adopting Costco's interpretation of the statute would lead to absurd results because Costco could price match gas stations located significantly farther away than Kaukauna. A court interpreting a statute must "seek to avoid a truly absurd or unreasonable result." *Hamilton v. Hamilton*, 2003 WI 50, ¶ 39, 261 Wis. 2d 458, 661 N.W.2d 832 (citation omitted). The Wisconsin Supreme Court has observed that an absurd result may arise where "an interpretation would render the relevant statute contextually inconsistent or would be contrary to the clearly stated purpose of the statute." *State v. Grunke*, 2008 WI 82, ¶ 31, 311 Wis. 2d 439, 752 N.W.2d 769 (citations omitted). Here, the absence of a geographic restriction to define a direct competitor does not give rise to an absurd or unreasonable result.

The Unfair Sales Act was intended to "protect small businesses from being run out of business by the predatory pricing practices of large competitors." *Orion Flight Servs., Inc.*, 277 Wis. 2d 819, ¶ 1; *see also Gross v. Woodman's Food Market, Inc.*, 2002 WI App 295, ¶ 62, 259 Wis. 2d 181, 655 N.W.2d 718 ("The prohibition of sales below statutory cost that have the effect of inducing the purchase of other merchandise, unfairly diverting trade from a competitor, or otherwise injuring a competitor has a real and substantial relationship to the purpose of the statute, which is to prevent the economic harms that result from such sales." (citing Wis. Stat. § 100.30(1)). Consistent with this purpose, the Act generally prohibits Wisconsin motor vehicle fuel retailers from selling motor vehicle fuel at a price below cost. Wis. Stat. § 100.30(3). But the legislature has also chosen to create nine exceptions to this general prohibition. § 100.30(6)(a). One of those exceptions allows a retailer to match "the existing price of a competitor" as long as the "buyer can practicably purchase the merchandise" from the competitor. §§ 100.30(2)(cj); 100.30(6)(a)7.

Costco argues that the Kaukauna BP is its direct competitor because the Bellevue Costco has hundreds of customers living within a two-mile radius of the Kaukauna BP who purchased gas from the Bellevue Costco during the relevant time period. It maintains that, even though hundreds of Kaukauna customers purchased gas from the Bellevue Costco, there were hundreds more who purchased goods from the warehouse that did not purchase gas from the Bellevue Costco's gas station. Costco asserts that its Kaukauna customers can "practicably purchase" their gas from the Kaukauna BP or the Bellevue Costco and that Costco has a legitimate interest in competing with the Kaukauna BP for those purchases.

The statute does not contain a proximity limitation when describing a "direct competitor," and the court "will not read extra words into a statute to achieve a specific result." *Responsible Use of Rural & Arg. Land (RURAL) v. Public Serv. Comm'n of Wis.*, 2000 WI 129, ¶ 37, 239 Wis.

2d 660, 619 N.W.2d 888 (internal quotation marks and citation omitted). The court trusts that, had the legislature intended to limit the scope of the "direct competitor" exception, it would have done so; the court cannot second guess the legislature's drafting decisions. *See State ex rel. Assoc. Indem. Corp. v. Mortensen*, 224 Wis. 398, 401, 272 N.W. 457 (1937) (noting that courts cannot rewrite statutes to substitute the "judgment of the court for that of the Legislature as to what is sound or absurd"). The ambiguity of the phrase "direct competitor" used by the legislature, the legislature's rejection of more clear language, and the penal nature of the Unfair Sales Act, all weigh in favor of Costco's interpretation. The court concludes that a "direct competitor" as used in the Unfair Sales Act is not limited to a gas station located within a certain distance of the retailer. "To the extent the court's application of [the statute] represents an unintended and undesired result, the legislature may rectify the situation in new legislation." *Hamilton*, 261 Wis. 2d 458, ¶ 49.

Plaintiffs argue that the Kaukauna BP cannot be considered a direct competitor of the Bellevue Costco because Kaukauna residents did not purchase sufficient amounts of fuel from the Bellevue Costco to qualify the Kaukauna BP as a direct competitor. As an initial matter, § 100.30(6)(a)7. does not contain a "sales volume threshold" to establish whether a gas station is a direct competitor of the retailer. *See Gross*, 259 Wis. 2d 181, ¶ 45 ("[W]e see nothing in the statutory language to indicate that the statute does not apply at all unless the seller intends to have or does have a particular market share."). Costco maintains that there were 699 Kaukauna-area customers who made purchases at the Bellevue Costco during the relevant time period. Of those 699 customers, 236 of those customers purchased gas from the Bellevue Costco but 463 did not. Def.'s Br. at 22, Dkt. No. 67. Though Plaintiffs dispute whether the Bellevue Costco members with Kaukauna mailing addresses actually reside in Kaukauna, they concede that there are 236

Bellevue Costco members with a Kaukauna address who purchased gas between October 1, 2019, and December 31, 2020. Pls.' Br. at 23.

Plaintiffs also assert that Costco has not presented declarations from Kaukauna-area customers stating that they would choose to buy fuel from the Kaukauna BP, rather than the Bellevue Costco, if the Kaukauna BP's price is lower. But the Unfair Sales Act does not require proof from the retailer that a consumer would buy fuel from the competitor at the lower price; it only requires that the consumer "can practicably purchase" gas from the competitor. *See* Wis. Stat. § 100.30(2)(cj). There is a significant number of Bellevue Costco members that "can practicably purchase" their gas from the Kaukauna BP or the Bellevue Costco. *Id.* For these reasons, the court concludes that Costco properly price-matched against the Kaukauna BP as a "direct competitor."

2. Green Bay Marathon Gas Stations

The Bellevue Costco also price-matched against two Green Bay Marathon gas stations. The Green Bay Marathon stations participate in Marathon's *MakeItCount* Rewards program, a national rewards program sponsored by Marathon Petroleum Company LP that allows consumers who enroll in the program to purchase gas for five cents per gallon less than the price posted on the Marathon station's signage. Marathon Petroleum reimburses the participating Marathon gas stations for the discounts given to consumers. On certain days, the Bellevue Costco matched the prices of the discounted price that Marathon rewards members would receive. Plaintiffs challenge the Bellevue Costco's matching of the discounted price being offered by the Green Bay Marathon gas stations because that price is lower than the price displayed on Marathon's signage.

The Unfair Sales Act defines the "existing price of a competitor" as "a price being simultaneously offered to a buyer . . . by a person who is a direct competitor of the retailer . . . and

from whom the buyer can practicably purchase the merchandise." Wis. Stat. § 100.30(2)(cj). Costco maintains that it is properly matching the five-cent discounted "price being simultaneously offered" by Marathon to buyers because the Act only requires that a retailer match "*a* price" being offered by a competitor; it does not require the retailer to match the competitor's "street price," "posted price," or "advertised price." *See id.* (emphasis added).

Plaintiffs claim that the Brown County Circuit Court "was confronted with a similar fact pattern as presented here" in *Pit Row v. Krist Oil Co.*, No. 14CV245 (Brown Cty., Wis.), and that the court's holding is dispositive. Pls.' Br. at 25. Plaintiffs assert that, in *Pit Row v. Krist Oil Co.*, the defendant "lowered its Ashwaubenon station's 'street price' to match the Shell Fuel Rewards Network rollback price offered to FRN members at a nearby locally-owned Shell station." *Id.* This assertion is disingenuous, however. In *Pit Row v. Krist Oil Co.*, the plaintiffs, owners and operators of various gas stations located in the Green Bay area, alleged that the defendant violated the Unfair Sales Act on 73 days by selling fuel below the statutorily permitted price. Dkt. No. 94-4 at 2. The defendant filed counterclaims against the plaintiffs, asserting that all the plaintiffs sold fuel below the statutorily required minimum on certain dates and that the plaintiffs' use of third-party credit card rewards programs allowed them to sell fuel below the statutorily required minimum price. *Id.* at 2–3. As relevant here, the plaintiffs moved for summary judgment on the defendant's claim that sales made incident to third-party sponsored rewards programs results in below-cost sales. *Id.* at 12. The state court did not address whether a retailer violates the Unfair Sales Act by lowering its street price to match a discounted price being offered by a competitor through a rewards program as Plaintiffs suggest. Rather, it considered whether sales made incident to third-party sponsored reward programs constitute below-cost sales that violate the Unfair Sales

Act and concluded they do not. *Id.* The Brown County Circuit Court's holding in *Pit Row v. Krist Oil Co.*, therefore, is not dispositive of the issue before the court.

In interpreting Wis. Stat. § 100.30(2)(cj), the court begins with an examination of the language of the statute. That section provides that "'[e]xisting price of a competitor' means a price being simultaneously offered to a buyer for merchandise of like quality and quantity by a person who is a direct competitor of the retailer, wholesaler, wholesaler of motor vehicle fuel or refiner and from whom the buyer can practicably purchase the merchandise." Wis. Stat. § 100.30(2)(cj). The plain language of the statute reveals that there is no restriction that limits a retailer to matching the posted or advertised price of a competitor. Courts "should not read into the statute language that the legislature did not put in." *State v. Matasek*, 2014 WI 27, ¶ 20, 353 Wis. 2d 601, 846 N.W.2d 811 (internal quotation marks and citation omitted). Allowing a retailer to prevent its competitors from matching its price by displaying one price on its signage while offering a lower price to its customers would defeat the purpose of the Act. In short, to comply with the Uniform Sales Act, a retailer is not required to match the price that a competitor posts or advertises on its signage. Instead, the retailer can match a price being simultaneously offered by a competitor to a buyer.

Next, Plaintiffs assert that Costco is not matching Marathon's price on the "same terms and conditions." Under the DATCP's regulations, "[a] price for merchandise meets an existing price of a competitor under s. 100.30(6)(a)7., Stats., only if the merchandise in question is sold on a day when the competitor's price is in effect and is offered under the same terms and conditions as the competitor's offer." Wis. Stat. ATCP § 105.009(1). Plaintiffs maintain that Marathon's rewards program limits the number of gallons that can be purchased at the discounted price. Although Plaintiffs cite a May 9, 2022 version of the Marathon *MakeItCount* Rewards brochure that

references a "Daily Loyalty Limit," during the relevant time period of October 2019 through December 2020, there was no limit on the amount of gas a Marathon customer could purchase through the rewards program. *See* Dkt. No. 69-20 at 3 ("Members SAVE 5¢ on fuel every day. No tiers or other qualifications. No restrictions on gallons or uses."). Plaintiffs also argue that the owner of the Marathon gas station is reimbursed by Marathon Petroleum Company LP for each discounted sale, whereas Costco does not receive a reimbursement for its discounted per-gallon price. But the fact that the Marathon gas stations are reimbursed by Marathon Petroleum Company LP does not change the terms and conditions of the merchandise being offered to the consumer. Plaintiffs further argue that, while consumers do not need to pay to enroll in the Marathon rewards program, consumers need to pay for a Costco membership. Costco's annual membership fee has an incremental impact on any Costco purchase and would result in a sale price less favorable than the Marathon sales price. The comparative increase in Costco's fuel price when dividing a Costco member's membership fee across all of his or her purchases does not violate the Act.

Finally, Plaintiffs argue that few customers take advantage of the Marathon rewards program. But the Marathon gas stations offer the rewards program to every consumer. The statute allows a retailer to match a price being simultaneously offered to a buyer, regardless of the number of consumers who take advantage of the offer. *See* Wis. Stat. § 100.30(2)(cj). The court concludes that Costco matched Marathon's discounted price on the "same terms and conditions" and did not violate the Unform Sales Act when it matched the five-cent discounted "price being simultaneously offered" by Marathon.

3. Pricing Records

Plaintiffs assert that on fifty days where the Bellevue Costco matched the existing price offered by a direct competitor, Costco did not file a notice with the DATCP at all or filed a notice

that contained false information. Pursuant to the Unfair Sales Act, a retailer may price merchandise in good faith to meet an existing price of a competitor if the price "is based on evidence in the possession of the retailer . . . in the form of an advertisement, proof of sale or receipted purchase, price survey or other business record maintained by the retailer." Wis. Stat. § 100.30(6)(a)6. If a retailer lowers in good faith the price of motor vehicle fuel "to meet an existing price of a competitor, the person shall submit to the department notification of the lower price before the close of business on the day on which the price was lowered in the form and the manner required by the department." § 100.30(7)(a). "Failure to comply" with the statute "creates a rebuttable presumption that the retailer . . . did not lower the price to meet the existing price of a competitor." § 100.30(7)(b).

As an initial matter, Plaintiffs argue that Costco failed to provide new notices to the DATCP on days following a price-matching reduction. That is, Plaintiffs contend that Costco should have provided a notice to the DATCP each day that it matched the price of a direct competitor, regardless of whether the Bellevue Costco maintained the reduced price for consecutive days. But the Uniform Sales Act only requires that a retailer submit a notice to the DATCP "before the close of business on the day on which the price was lowered," § 100.30(7)(a); it does not require that a retailer submit a notice on the days the retailer maintains a certain price.

Plaintiffs also argue that Costco provided false notices to the DATCP. They maintain that Costco represented to the DATCP in its notice that it was matching the price of a direct competitor when in fact the Bellevue Costco's prices were higher than the listed competitor's price. Costco concedes that, while it inadvertently listed the wrong direct competitor in its DATCP notices on certain days, it accurately recorded the prices of the direct competitors it was matching in its

"Comp Shop Log" spreadsheet. It asserts that the Comp Shop Log demonstrates that the Bellevue Costco was meeting the existing price of fuel offered by a competitor in good faith.

Plaintiffs assert that the Comp Shop Log is "akin" to a price survey and that the log does not satisfy the requirements of Wis. Admin. Code ATCP § 105.009. Pls.' Br. at 5. That section provides that price surveys must contain "the name and address of the person conducting the survey; a description of the product being surveyed; the competitor's name, address, and selling price; the date and time of the survey; the date and time the wholesaler or retailer met a competitor's price; and any other elements the department requires." Wis. Admin. Code ATCP § 105.009(3)(a)–(f). Although the Comp Shop Log does not satisfy the requirements of Wis. Admin. Code ATCP § 105.009(3), it is clear that the Comp Shop Log is a "business record maintained . . . in the ordinary course" of Costco's business. Wis. Stat. § 100.30(6)(a)6. Citing *Pit Row v. Krist Oil Co.*, No. 14CV245 (Brown Cty., Wis.), Plaintiffs assert that Costco cannot cure the defects of a price survey by asserting that the Comp Shop Log is a business record maintained by the retailer. *See* Dkt. No. 94-4 at 8. But the court cannot ignore the words contained in the text of the statute. *Bostco LLC v. Milwaukee Metro. Sewerage Dist.*, 2013 WI 78, ¶ 55, 350 Wis. 2d 554, 835 N.W.2d 160 ("[C]ourts are not free to ignore the words or phrases chosen by the legislature." (citation omitted)). If the legislature had intended to limit retailers to relying only on advertisements, proof of sale or receipted purchase, or price surveys, it would not have included the "other business record" catchall. There is no dispute that the Comp Shop Log is a business record kept in the ordinary course of Costco's business. Therefore, Costco has established through its business records that it met the price offered by a direct competitor.

4. Good Faith

Finally, Plaintiffs assert that, to satisfy the "meeting competition defense," Costco must also establish that it "set gas prices in good faith to meet the existing prices of competitors" by rebutting "the presumption that it priced with the proscribed intent to divert trade or otherwise injure its competitors." Pls.' Br. at 28. But the statute does not create the separate obligation that Plaintiffs suggest. In this case, Costco presented documentary evidence that it matched its prices to those being offered by its direct competitors. There were no Wisconsin cases directly on point regarding the issues presented here, and Costco reasonably relied on the plain language of the Unfair Sales Act in setting its gas prices to those being offered by its direct competitors. In short, even if this court had determined that Costco did not match its prices based on those offered by a direct competitor, Costco acted with a reasonable, good-faith belief that its conduct was lawful.

C. Injured or Threatened with Injury

Costco also asserts that it is entitled to summary judgment because there is no evidence that any of the plaintiffs were injured or threatened with injury as a result of Costco's challenged pricing practices on any of the alleged violation dates. The Unfair Sales Act establishes a private cause of action for a "person who is injured or threatened with injury" as a result of a violation of Wis. Stat. § 100.30(3). *See* Wis. Stat. § 100.30(5m). Plaintiffs argue that it is Costco's burden to prove that Plaintiffs were not injured or threatened with injury. But as the Wisconsin Supreme Court held in *Heiden v. Ray's Inc.*, 34 Wis. 2d 632, 150 N.W.2d 467 (1967), the plaintiff has the burden to show injury or threat of injury.

In *Heiden*, the plaintiff alleged that three defendants made various sales of liquor at prices that were less than "cost" as defined by the Unfair Sales Act. 34 Wis. 2d at 634. The issue before the court was whether a plaintiff must prove damages or the threat of loss or injury to establish a

cause of action under the Unfair Sales Act. Construing the statutory language of the Unfair Sales Act that was in effect at the time of the decision (which is nearly identical to the current language of the statute), the court held that there is no presumption of loss or threat of injury to competitors from the fact that a retailer made a sale below cost and that a plaintiff must present evidentiary facts of past or threatened injury. *Id.* at 638–39. The court observed that the plaintiff's allegation of loss or threat of injury in that case was based on two assertions: (1) the plaintiff's belief that an "honest businessman" suffers a loss or threat of injury whenever there is a violation of the Unfair Sales Act and (2) a specific event on December 16, 1964, where a customer purchased a case of alcohol from defendants for $3.50 less than what the plaintiff could sell the case for. *Id.* It rejected the plaintiff's first assertion because it was "sheer speculation," not an evidentiary fact. *Id.* at 638. In addition, the court found that the loss of a single sale was not sufficient to establish a prima facie loss or threat of injury. *Id.* The court concluded that, because the plaintiff did not present evidentiary facts of harm or threatened injury, he did not establish his cause of action under the Unfair Sales Act. *Id.* at 639; *see also Gross*, 259 Wis. 2d 181, ¶ 39 (holding that the plaintiff's averments that he lowered his price on many occasions after finding that Woodman's was selling motor vehicle fuel at a price below the statutory minimum and that he lost revenue on those dates were admissible to establish injury to his business because they constituted "evidentiary facts" of which the plaintiff had personal knowledge).

To support its claim that it was injured or threatened by injury as a result of Costco's fuel pricing, Plaintiff Tikapur Petroleum LLC has submitted a declaration of its corporate representative, Tark Ojha. Dkt. No. 99. Ojha asserts that, in 2017, he acquired the BP gas station located at 2409 Monroe Road, De Pere, Wisconsin, which is located near the Bellevue Costco. He states that from 2017 to 2020, his "general observation is that [his] gasoline sales and profits were

declining, and [he] believed this was attributable to Costco's low gas pricing and other stations in the Green Bay Market following Costco's pricing lead, driving prices generally down." *Id.* ¶ 5. Ojha asserts that various customers made statements to him and his staff questioning why the BP gas station's prices were higher than Costco's and that "at least one customer . . . would buy the bare minimum of gas at [the BP] station to get a free car wash, and then buy gas at Costco." *Id.* ¶¶ 6, 8. He states that he could not afford to price his gasoline at the price Costco was selling its fuel and that he ultimately shut down the BP gas station due to low fuel sales in November 2021. *Id.* ¶¶ 7, 10.

The other plaintiffs—Pit Row Inc., Nicolet Gas Inc., S&K Food Mart Inc., Bellevue Gas Inc., Everest Mart Inc., Badimaalika LLC, GCS Operations LLC, GCS Landing LLC, D&N Acquisition Inc., Main Street Mini Mart LLC, and Bay Petro LLC—have also attempted to support their allegations that they were injured or threatened with injury by Costco by submitting nearly identical declarations of their corporate representatives that state:

> During the period 2017-2020, my general observation is that my gasoline sales and profits were declining, and I believed this was attributable to Costco's low gas pricing and other stations in the Green Bay Market following Costco's pricing lead, driving prices generally down.
>
> From time to time, statements were made to me or my staff by various customers questioning why my station's gas prices were higher than Costco's.
>
> My station's gasoline profits diminished during the period of October 2019-December 2020.
>
> I am competing to attract fuel buyers, whether those buyers are Costco members or not and, just like Costco, I have an interest in convincing customers to stop and shop at my station more frequently, including to purchase gasoline.
>
> When Costco lowers its price, other gas stations in the Green Bay Market price-match Costco, such as Woodman's, Fleet Farm, and Krist, and a "chain reaction" is set off within the market, where other stations are then forced to not just compete with Costco's price, but with the price of local gas stations all of whom monitor and match Costco's price.

> If Costco is priced below the minimum markup – the lowest price at which all gas stations in the market should be pricing in competition with each other – I am put in the position of choosing to be at a higher price than Costco and those stations following Costco's lead (and risk losing gas buyers to others who are lower priced), or choose to lower my price to be competitive with these stations (and risk losing the higher profit on gas sales).

Dkt. Nos. 98, 100–04 at ¶¶ 5–10; *see also* Dkt. No. 105 at ¶¶ 6–10.

Plaintiffs' "general observations" and subjective "belief" that their declining sales and profits from 2017 to 2020 were attributable to Costco's "low gas pricing" are purely speculative and conclusory. Plaintiffs have not provided a link between a decline in sales or profits and Costco's gas prices. An affidavit that provides only speculation and is not supported by specific facts reflected in the record cannot defeat a summary judgment motion. *See Karazanos v. Navistar Int'l Transp. Corp.*, 948 F.2d 332, 337 (7th Cir. 1991). Because Plaintiffs have not presented evidentiary facts to establish that they suffered harm or were threatened with injury, Costco's motion for summary judgment will be granted.

D. Class Certification

Plaintiffs have filed a motion for class certification. Although motions for class certification are generally to be decided before summary judgment, a court may decide a defendant's dispositive motion without first ruling on a plaintiff's motion to certify a class. *See Collins v. Vill. of Palatine, Illinois*, 875 F.3d 839, 845 (7th Cir. 2017). In light of the disposition of Costco's motion for summary judgment, Plaintiff's motion for class certification is denied as moot.

CONCLUSION

For these reasons, Costco's motion for summary judgment (Dkt. No. 66) is **GRANTED** and Plaintiffs' motion for class certification (Dkt. No. 50) is **DENIED as moot**. The case is dismissed. The Clerk is directed to enter judgment accordingly.

SO ORDERED at Green Bay, Wisconsin this 30th day of March, 2023.

s/ William C. Griesbach
William C. Griesbach
United States District Judge