APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT

Docket No. 17-2003-cv
August Term, 2017

CONNECTICUT FINE WINE AND SPIRITS, LLC, d/b/a,
TOTAL WINE & MORE,

Plaintiff-Appellant,

v.

COMMISSIONER MICHELLE H. SEAGULL,
DEPARTMENT OF CONSUMER PROTECTION,
JOHN SUCHY, DIRECTOR, DIVISION OF LIQUOR CONTROL,

Defendants-Appellees,

WINE & SPIRITS WHOLESALERS OF CONNECTICUT, INC.,
CONNECTICUT BEER WHOLESALERS ASSOCIATION, INC.,
CONNECTICUT RESTAURANT ASSOCIATION,
CONNECTICUT PACKAGE STORES ASSOCIATION, INC.,
BRESCOME BARTON, INC.,

Intervenors-Defendants-Appellees.[*]

Appeal from the United States District Court
for the District of Connecticut (Janet Hall, Judge)

Argued: February 1, 2018
Decided: February 20, 2019
Amended: July 29, 2019

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[*] The Clerk of Court is respectfully directed to amend the official caption in this case as set forth above.

OPINION

Before: Pooler, Sack, Circuit Judges, and Engelmayer,[**] District Judge.

PAUL A. ENGELMAYER, District Judge:

Connecticut Fine Wine and Spirits, d/b/a Total Wine & More ("Total Wine") appeals from a judgment of the United States District Court for the District of Connecticut (Janet C. Hall, District Judge) dismissing its complaint against the Connecticut Department of Consumer Protection ("DCP") and the Director of the Connecticut Division of Liquor Control ("DLC"). Total Wine claimed that certain statutory and regulatory provisions that govern the distribution and sale of alcoholic beverages in Connecticut, and which often result in common retail-level pricing across the state for particular such beverages, are preempted by federal antitrust law. For the reasons that follow, we hold that these laws are not preempted. We therefore affirm.

BACKGROUND

A. Connecticut's Laws Regarding Alcohol Distribution and Sale

Like many other states, Connecticut heavily regulates the distribution and sale of alcoholic beverages within its borders. The state's Liquor Control Act prohibits the sale of alcoholic beverages in a manner that fails to comply with that statute. *See* Conn. Gen. Stat. § 30-74(a).

[**] Judge Paul A. Engelmayer, of the United States District Court for the Southern District of New York, sitting by designation.

At issue here are three sets of provisions under Connecticut statutes and regulations that bear on the price at which alcoholic beverages may lawfully be sold: "post-and-hold" provisions; minimum retail pricing provisions; and provisions prohibiting price discrimination and volume discounts.[1] These, in tandem, establish the method by which alcoholic beverage prices are set by the manufacturer, the wholesaler, and the retailer.

The three sets of provisions at issue are as follows:

Post-and-hold provisions: Connecticut's "post and hold" provisions require state-licensed manufacturers, wholesalers, and "out-of-state permittees" (together, "wholesalers") to post a "bottle price" and a "case price" each month with the DCP for each alcoholic product that the wholesaler intends to sell during the following month. (For beer, the wholesaler must post a "can price.") Posted prices are then made available to industry participants. During the four days after the posting of the prices, wholesalers may "amend" their posted prices to "match" competitors' lower prices—specifically, "to meet a lower price posted by another wholesaler with respect to alcoholic liquor bearing the same brand or trade name." Those amended prices, however, may not be "lower than those [prices] being met." Wholesal-

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[1] Total Wine challenges the following provisions: (1) section 30-63 of the Connecticut General Statutes and section 30-6-B12 of the Regulations of Connecticut State Agencies (referred to here as the "post-and-hold" provisions); (2) sections 30-68m(a)(1) and 30-68m(b) of the Connecticut General Statutes (the "minimum retail price" provisions); and (3) sections 30-63(b), 30-68(k), and 30-94(b) of the Connecticut General Statutes and section 30-6-A29(a) of the Regulation of Connecticut State Agencies (the "price discrimination prohibition" provisions). In the ensuing discussion, the Court reproduces the central provisions.

ers are obligated to "hold" their prices at the posted price (amended or not) for a month. These post-and-hold provisions—variations of which are found in many states—are the heart of the Connecticut regulatory regime that Total Wine challenges.[2]

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[2] Section 30-63(c) of the Connecticut General Statutes provides:

> For alcoholic liquor other than beer, each manufacturer, wholesaler and out-of-state shipper permittee shall post with the department, on a monthly basis, the bottle, can and case price of any brand of goods offered for sale in Connecticut, which price when so posted shall be the controlling price for such manufacturer, wholesaler or out-of-state permittee for the month following such posting. On and after July 1, 2005, for beer, each manufacturer, wholesaler and out-of-state shipper permittee shall post with the department, on a monthly basis, the bottle, can and case price, and the price per keg or barrel or fractional unit thereof for any brand of goods offered for sale in Connecticut which price when so posted shall be the controlling price for such brand of goods offered for sale in this state for the month following such posting. Such manufacturer, wholesaler and out-of-state shipper permittee may also post additional prices for such bottle, can, case, keg or barrel or fractional unit thereof for a specified portion of the following month which prices when so posted shall be the controlling prices for such bottle, can, case, keg or barrel or fractional unit thereof for such specified portion of the following month. Notice of all manufacturer, wholesaler and out-of-state shipper permittee prices shall be given to permittee purchasers by direct mail, Internet web site or advertising in a trade publication having circulation among the retail permittees except a wholesaler permittee may give such notice by hand delivery. Price postings with the department setting forth wholesale prices to retailers shall be available for inspection during regular business hours at the offices of the department by manufacturers and wholesalers until three o'clock p.m. of the first business day after the last day for posting prices. A manufacturer or wholesaler may amend such manufacturer's or wholesaler's posted price for any

Minimum-retail-price provisions: Connecticut's minimum-retail-price provisions require that retailers sell to customers at or above a statutorily defined "[c]ost." "Cost," however, is not defined as the retailer's actual cost. Instead, generally, a retailer's "[c]ost" for a given alcoholic beverage, is determined by adding the posted bottle price—as set by the wholesaler—and a markup for shipping and delivery. The post-and-hold provision, because it supplies the central component of the "[c]ost" at which the retailer may sell its product, thus largely dictates the price at which Connecticut retailers must sell their alcoholic products.[3]

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month to meet a lower price posted by another manufacturer or wholesaler with respect to alcoholic liquor bearing the same brand or trade name and of like age, vintage, quality and unit container size; provided that any such amended price posting shall be filed before three o'clock p.m. of the fourth business day after the last day for posting prices; and provided further such amended posting shall not set forth prices lower than those being met. Any manufacturer or wholesaler posting an amended price shall, at the time of posting, identify in writing the specific posting being met. On and after July 1, 2005, all wholesaler postings, other than for beer, for the following month shall be provided to retail permittees not later than the twenty-seventh day of the month prior to such posting. All wholesaler postings for beer shall be provided to retail permittees not later than the twentieth day of the month prior to such posting.

[3] Section 30-68m of the Connecticut General Statutes provides, in pertinent part:

(a) For the purposes of this section:

(1) "Cost" for a retail permittee means (A) for alcoholic liquor other than beer, the posted bottle price from the wholesaler plus any charge for shipping or delivery to the retail permittee's place of business paid by the retail permittee in addition to the posted price, and (B) for beer,

Plaintiffs allege that wholesalers will occasionally lower their posted case prices for a given month, without lowering posted bottle prices, during what are called "off-post" months. Although retailers buy almost exclusively by the case, their prices remain fixed by the minimum-retail-price provisions, which are keyed to bottle prices.

Price discrimination/volume discounts: Finally, Connecticut bans volume discounts and other forms of price discrimination. Wholesalers must sell a given product to all retailers at the same price. Wholesalers may not offer discounts to retailers who are high-volume purchasers.[4]

> the lowest posted price during the month in which the retail permittee is selling plus any charge for shipping or delivery to the retail permittee's place of business paid by the retail permittee in addition to the price originally paid by the retail permittee;
>
> (b) No retail permittee shall sell alcoholic liquor at a price below his or her cost.

Relatedly, Section 30-68m(a)(C) defines "bottle price" as:

> [the] price per unit of the contents of any case of alcoholic liquor, other than beer [which] shall be arrived at by dividing the case price by the number of units or bottles making up such case price and adding to the quotient an amount that is not less than the following: A unit or bottle one-half pint or two hundred milliliters or less, two cents; a unit or bottle more than one-half pint or two hundred milliliters but not more than one pint or five hundred milliliters, four cents; and a unit or bottle greater than one pint or five hundred milliliters, eight cents.

[4] Section 30-68k of the Connecticut General Statutes provides:

> No holder of any wholesaler's permit shall ship, transport or deliver within this state or any territory therein or sell or offer for sale, to a purchaser holding a permit for the sale of alcoholic liquor for on or off premises consumption, any

While multiple policy interests have been asserted in support of these provisions, they (particularly the post-and-hold and minimum-retail-price provisions) commonly have been justified as means of guarding against escalating price wars among alcohol retailers that may lead to excessive consumption. *See Slimp v. Dep't of Liquor Control*, 239 Conn. 599, 687 A.2d 123, 129 (1996) (noting "legislature's concern that artificial inducements to purchase liquor will result in increased consumption"); *Eder Bros. v. Wine Merchants of Conn., Inc.*, 275 Conn. 363, 880 A.2d 138, 147 (2005) (noting that "price wars among retail dealers" for liquor "may induce persons to purchase, and therefore consume, more liquor than they would if higher prices were maintained"); *Eder Bros.*, 880 A.2d at 147–48 (noting

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> brand of alcoholic liquor, including cordials, as defined in section 30-1, at a bottle, can or case price higher than the lowest price at which such item is then being sold or offered for sale or shipped, transported or delivered by such wholesaler to any other such purchaser to which the wholesaler sells, offers for sale, ships, transports or delivers that brand of alcoholic liquor within this state.

Similarly, Section 30-63(b) of the Connecticut General Statutes provides:

> No manufacturer, wholesaler or out-of-state shipper permittee shall discriminate in any manner in price discounts between one permittee and another on sales or purchases of alcoholic liquors bearing the same brand or trade name and of like age, size and quality, nor shall such manufacturer, wholesaler or out-of-state shipper permittee allow in any form any discount, rebate, free goods, allowance or other inducement for the purpose of making sales or purchases. Nothing in this subsection shall be construed to prohibit beer manufacturers, beer wholesalers or beer out-of-state shipper permittees from differentiating in the manner in which their products are packaged on the basis of on-site or off-site consumption.

that "the cutthroat competition" characteristic of price wars "is apt to induce the retailers to commit such infractions of the law as selling to minors and keeping open after hours in order to withstand the economic pressure"). These provisions (particularly the price-discrimination provision) have also been justified as guarding against favoritism within the liquor industry and protecting smaller retailers. *See Slimp*, 687 A.2d at 129. Unsurprisingly, countervailing arguments have also been made, including ones noting the anticompetitive nature of these price restraints.

B. Total Wine's Complaint

Total Wine is the largest retailer of wine and spirits in the United States. Headquartered in Bethesda, Maryland, Total Wine, with its affiliates, owns and operates wine and liquor stores in 21 states.

In December 2012, Total Wine opened a retail beverage store in Norwalk, Connecticut, its first such store in the state. Since then, Total Wine has opened additional stores, in Milford, Manchester, and West Hartford, Connecticut.

On August 23, 2016, Total Wine filed suit against Jonathan Harris, the Commissioner of the DCP, and John Suchy, Director of the DLC, in their official capacities.[5] Seeking injunctive and declaratory relief, it brought a facial challenge to the three sets of statutory and regulatory provisions reviewed above governing the distribution and sale of alcoholic beverages in Connecticut: (1) the post-and-hold provisions, (2) the minimum-retail-price provisions, and (3) the price-discrimination and volume-discount-prohibition provi-

[5] Michelle H. Seagull replaced Jonathan Harris as Commissioner of the DCP on May 1, 2017.

sions. Total Wine alleged that these provisions bring about *per se* violations of § 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, and so are preempted by that statute.

Total Wine's claim was that the Connecticut regulatory scheme eliminates incentives for alcoholic beverage wholesalers to compete on the basis of price and invites wholesalers to maintain prices "substantially above what fair and ordinary market forces would dictate." App. at 19, Compl. ¶ 16. Total Wine further claimed that Connecticut's regulations inhibit meaningful price competition at the retail level.

Specifically, Total Wine claimed, the regulations, in two ways, bring about prices that exceed those that a competitive market would produce.

First, it argued, the post-and-hold provisions—and the opportunity they give wholesalers to match a lower price during the forthcoming month for a given product with no risk of sparking a price war—reduce any wholesaler's incentive to be the first to reduce price. The post-and-hold provisions, Total Wine argued, effectively bring about horizontal price fixing. As it put the point on appeal: "If a wholesaler were to drop its price on a particular product, its competitors would know immediately (from having seen the posted price), and would have four days to match the posted price." Appellant Br. at 8–9. Even if the wholesaler who had been the first to reduce its price still wished to set a price beneath its competitors, Total Wine noted, it would then be required to "hold the lower price for an entire month—during which it would have no compet-

itive advantage because its competitors would be charging the same price."[6] *Id.* at 9.

Second, Total Wine argued, Connecticut's system precludes retailers from competing on the basis of cost. Fundamentally, Total Wine noted, the minimum-retail-price provision is keyed to a definition of "[c]ost" that turns not on the retailer's actual cost but on the price charged to the retailer by the wholesaler. This, Total Wine argued, prevents a high-volume, lower-average-cost retailer such as itself from attracting customers by offering discounts enabled by its lower-cost structure. This result is exacerbated, Total Wine alleged, by a practice in which wholesalers often engage: They set high minimum bottle prices, and then lower the case prices for the product without making corresponding reductions to the bottle price. While retailers (who buy almost exclusively by the case) take advantage of the reduced case price and buy larger quantities during months where the case price is lower, this, Total Wine alleged, does not benefit the consumer because retailers are required to sell the product at a margin fixed by the higher minimum bottle price, which has effectively been set by the wholesaler. In this manner, Total Wine alleged, "wholesalers effectively control both retail price and retailers' profit margins," and retailers like Total Wine that wish to use their business efficiencies to reduce the prices offered to consumers are blocked from doing so. App. at 20, Compl. ¶ 17.

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[6] Total Wine's claim that the Connecticut regulations promote horizontal price fixing was substantially developed in its briefs on the motion to dismiss and further refined on appeal. Its Complaint overwhelmingly focused instead on its claims as to vertical price fixing. We conclude, however, that the Complaint satisfactorily pled both theories.

The end result, Total Wine alleged, is a market without meaningful price competition: "Competing wholesalers for the same brands routinely set the same bottle and case prices down to the penny, month after month, with each wholesaler exactly tracking its competitors'. . . case prices." *Id.*, Compl. ¶ 19. In other words, Total Wine argued, the regulatory scheme promotes vertical price fixing. Total Wine's complaint attached data tables reflecting that, over long periods, leading wholesalers often have charged the same amount for each alcoholic beverage product—*e.g.*, Bombay Sapphire, Grey Goose, Jose Cuervo Gold—and have adjusted prices in lockstep. These prices, Total Wine claimed, exceed those which a competitive market would produce: Citing a study, Total Wine alleged that Connecticut's regulatory scheme "result[s] in retail prices for wine and spirits in Connecticut that are as much as 24% higher than prices offered for identical products in the surrounding states." *Id.*, Compl. ¶ 18.

Finally, Total Wine alleged, the Connecticut regulatory scheme does not entail active supervision by any state agency or instrumentality. Wholesalers post and retailers charge the prices they see fit, it alleged, without any review or intervention by regulators, save where a lawsuit has been brought claiming noncompliance with the state's regulations.

C. The Motion to Dismiss

On October 14, 2016, the defendants moved to dismiss. They were supported in this motion by five

intervenors, four of which were trade associations and the fifth of which was a liquor distributor.[7]

On June 6, 2017, the district court, following argument, granted the motion to dismiss. *See Conn. Fine Wine & Spirits, LLC v. Harris*, 255 F. Supp. 3d 355 (D. Conn. 2017). Analyzing the challenged provisions separately,[8] the district court applied as to each the first step in the two-step framework used to assess claims of preemption by § 1 of the Sherman Act in this Circuit.[9] As a threshold matter, the court inquired whether the restraints are unilateral ("imposed by the government. . . to the exclusion of private control") and hence immune from preemption by § 1, or hybrid (imposed by both the government and by granting "private actors a degree of regulatory control over competition") and hence capable of preemption. *Id.* at 364. Then, the court inquired whether the challenged provision brought about facially, or *per se*, unlawful restraints on trade, in

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[7] These were: the Wine & Spirit Wholesalers of Connecticut ("WSWC"), the Connecticut Beer Wholesalers Association ("CBWA"), the Connecticut Restaurant Association ("CRA") and the Connecticut Package Stores Association ("CPSA") (collectively, "the trade associations"), as well as Brescome Barton, Inc. ("Brescome" and, with the trade associations, "intervenors").

[8] The district court stated that separate consideration of each challenged provision was required (1) under principles of federalism, (2) because each provision presented distinct analytic issues under principles of antitrust preemption, and (3) because Connecticut's general rule of statutory construction provides that the invalidity of some sections of a statute should not invalidate the statute as a whole. *See Conn. Fine Wine & Spirits*, 255 F. Supp. 3d at 366–67; Conn. Gen. Stat. § 1-3.

[9] The district court dismissed Total Wine's claims at the first step of the preemption analysis and neither the defendants nor any of the intervenors have argued that Total Wine's claims should be dismissed at the second step.

which case they are preempted, or restraints that are subject to rule of reason scrutiny, in which case they are not. *Id.*

As to the post and hold restraint, the district court held that it is a hybrid restraint, but that the conduct it brings about is not *per se* unlawful, and so is subject to rule of reason analysis. *Id.* at 371. Therefore, it is not preempted. *Id.* The district court relied on *Battipaglia v. New York State Liquor Authority*, 745 F.2d 166 (2d Cir. 1984), in which we upheld New York State's post-and-hold provision as similarly not preempted.

As to the minimum resale price restraint, the district court held that it too was hybrid, but that it also implicated only the rule of reason, not condemnation *per se*. *Id.* at 373. The district court held that this provision imposed a vertical restraint. And, it noted, recent Supreme Court cases, in particular *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 127 S.Ct. 2705, 168 L.Ed.2d 623 (2007), have held that courts are to apply rule of reason, not *per se*, analysis to vertical restraints, meaning that this provision is not facially preempted. *Id.* at 378.

Finally, the district court held that Connecticut's provisions forbidding price discrimination amounted to a unilateral restraint on trade, imposed solely by the state and not involving private conduct. *Id.* That was because these provisions "simply prohibit[ ] liquor wholesalers from charging different prices to different retailers," and do not "grant[ ] private actors a degree of regulatory authority over competition." *Id.* at 379. Thus, it held that these provisions, too, are not preempted. *Id.* at 380.

Accordingly, the district court upheld all challenged aspects of Connecticut's alcoholic beverage regulatory regime.

On June 26, 2017, Connecticut Fine Wine appealed.

DISCUSSION

This case presents questions of preemption: Does § 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, which makes illegal "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce," preempt the challenged provisions of Connecticut's Liquor Control Act?

We begin by reviewing the two key precedents that frame the § 1 preemption inquiry: *Rice v. Norman Williams Co.*, 458 U.S. 654, 102 S.Ct. 3294, 73 L.Ed.2d 1042 (1982), and *Fisher v. City of Berkeley, California*, 475 U.S. 260, 106 S.Ct. 1045, 89 L.Ed.2d 206 (1986). Then, because the analysis differs by provision, we review serially the three sets of challenged provisions. We first address the minimum-resale-price restraint and then the prohibition on price discrimination. We last address the post-and-hold provisions, which are the primary focus of plaintiffs' challenge. None of the provisions, we hold, are preempted.[10]

A. Principles of Preemption Under § 1: *Rice and Fisher*

The Supreme Court's decisions in *Rice* and *Fisher* frame the § 1 preemption inquiry.

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[10] While we address the three areas separately here, we have also considered them in tandem. The outcome is the same: considered separately or as a whole, the provisions are not preempted. We therefore do not reach the question of which analysis would have been the right one had the difference been determinative.

1. *Rice*: The Requirement That the State Law "Mandate or Authorize," or "Place Irresistible Pressure" on Private Parties to Bring About, a *Per Se* Violation of § 1

In *Rice*, the Court held that the preemption inquiry under § 1 requires courts to

> apply principles similar to those which we employ in considering whether any state statute is pre-empted by a federal statute pursuant to the Supremacy Clause. As in the typical pre-emption case, the inquiry is whether there exists an irreconcilable conflict between the federal and state regulatory schemes. The existence of hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute. A state regulatory scheme is not pre-empted by the federal antitrust laws simply because in a hypothetical situation a private party's compliance with the statute might cause him to violate the antitrust laws. A state statute is not preempted by the federal antitrust laws simply because the state scheme might have an anticompetitive effect.

458 U.S. at 659, 102 S.Ct. 3294 (citations omitted). Rather, the Court held, "[a] party may successfully enjoin the enforcement of a state statute only if the statute on its face irreconcilably conflicts with federal antitrust policy." *Id.* In other words, for a state statute to be preempted by § 1, the statute must bring about conduct that would require *per se* condemnation under § 1:

> Our decisions in this area instruct us, therefore, that a state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct

> that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under § 1 of the Sherman Act when the conduct contemplated by the statute is in all cases a *per se* violation. If the activity addressed by the statute does not fall into that category, and therefore must be analyzed under the rule of reason, the statute cannot be condemned in the abstract. Analysis under the rule of reason requires an examination of the circumstances underlying a particular economic practice, and therefore does not lend itself to a conclusion that a statute is facially inconsistent with federal antitrust laws.

Id. at 661, 102 S.Ct. 3294.

Applying these principles, the Rice Court upheld the codes at issue: California Alcoholic Beverage Control provisions which prohibited a licensed importer from importing any brand of distilled spirits for which it was not a designated importer. These, the Court explained, would not give rise in all instances to *per se* illegal conduct. *Id.* at 661–62, 102 S.Ct. 3294.

2. *Fisher*: The Requirement of Concerted Action

In *Fisher*, the Court identified a related hurdle that a claim of preemption by § 1 must clear. At issue was a rent stabilization law enacted by the City of Berkeley, California, that placed strict controls on certain classes of real property rented for residential use. The ordinance required landlords to adhere to the prescribed rent ceilings; violators were subject to civil and criminal penalties. 475 U.S. at 262–63, 106 S.Ct. 1045.

A group of landlords sued the city, arguing that the ordinance was a traditional—and *per se* invalid—form of fixing prices.

The Supreme Court rejected that argument. Sherman Act § 1, it noted, can be violated only by collective action: "unreasonable restraints of trade effected by a 'contract, combination . . . , or conspiracy' between separate entities." *Id.* at 266, 106 S.Ct. 1045 (quoting *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984)). But, the Court held, Berkeley's unilateral imposition of rent control did not amount to agreement or "concerted action." *Id.* The Court acknowledged that, had the Berkeley landlords banded together to fix rental prices in the absence of an ordinance, their action would have been a *per se* violation of the Sherman Act. *Id.* But the fact that the price-fixing ordinance resulted from the city acting unilaterally, not the landlords acting concertedly, saved it from preemption:

> A restraint imposed unilaterally by government does not become concerted-action within the meaning of the [Sherman Act] simply because it has a coercive effect upon parties who must obey the law. The ordinary relationship between the government and those who must obey its regulatory commands whether they wish to or not is not enough to establish a conspiracy. Similarly, the mere fact that all competing property owners must comply with the same provisions of the Ordinance is not enough to establish a conspiracy among landlords. Under Berkeley's Ordinance, control over the maximum rent levels of every affected residential unit has been unilaterally removed from the owners of these properties and given to the Rent Stabilization Board.

Id. at 267, 106 S.Ct. 1045. In sum, the challenged rent control laws could exist, alongside § 1, because "the rent ceilings imposed by the Ordinance and maintained by the Rent Stabilization Board have been unilaterally imposed by government upon landlords to the exclusion of private control." *Id.* at 266, 106 S.Ct. 1045. As the Court put the point: "There is no meeting of the minds here." *Id.* at 267, 106 S.Ct. 1045.

The Supreme Court in *Fisher* was careful to limit its holding to unilateral action by a government entity. It recognized that a governmentally imposed restraint on trade that enforces private pricing decisions would be a "hybrid restraint" that fulfills the Sherman Act's "concerted action" requirement. The Court explained:

> Not all restraints imposed upon private actors by government units necessarily constitute unilateral action outside the purview of § 1. Certain restraints may be characterized as 'hybrid,' in that nonmarket mechanisms merely enforce private marketing decisions. *See Rice*, 458 U.S. at 665 [102 S.Ct. 3294] (Stevens, J., concurring in the judgment). Where private actors are thus granted "a degree of private regulatory power," *id.* at 66 [665] n.1 [102 S.Ct. 3294], the regulatory scheme may be attacked under § 1."

Id. at 267–68, 106 S.Ct. 1045.

We have previously read *Rice* and *Fisher* to constitute the first step in a two-step inquiry to decide whether a statute is preempted by § 1. *See, e.g.*, *Freedom Holdings Inc. v. Spitzer*, 357 F.3d 205, 223 (2d Cir. 2004).[11]

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[11] In cases in which alcoholic-beverage laws are claimed to be preempted by § 1, states have sometimes additionally defended by asserting state action immunity, which is the second step in

B. Connecticut's Minimum-Retail-Price Provisions

The Court applies these principles, first, to the minimum-retail-price provisions. As noted, these provisions (*e.g.*, Conn. Gen. Stat. § 30-68m) dictate the relationship between the liquor prices set by wholesalers and those set by retailers.

In *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 107 S.Ct. 720, 93 L.Ed.2d 667 (1987), the Supreme Court considered a similar New York statute, which "impose[d] a regime of resale price maintenance on all New York liquor retailers" and required them to charge at least 112% of the wholesaler's posted bottle price. *Id.* at 337, 341, 107 S.Ct. 720. The Supreme Court classified the New York statute, under Fisher, as a hybrid restraint. *Id.* at 345 n.8, 107 S.Ct. 720 (describing provisions as having granted "'private actors. . . a degree of private regulatory power'") (quoting *Fisher*, 475 U.S. at 268, 106 S.Ct. 1045). Then, applying the *Rice* framework, the Court found the statute was "inconsistent with § 1" because it authorized *per se* violations of § 1 under precedents that, "'since the early years of national antitrust enforcement,'" had so treated resale price maintenance agreements. *Id.* at 341, 107 S.Ct. 720 (quoting *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984)). Hence, the New York statute was preempted. *Id.* at 343, 107 S.Ct. 720.

The Supreme Court's classification in *324 Liquor* of the minimum-retail-price restraints as hybrid, and hence capable of preemption by § 1, binds the Court

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our Circuit's two-step preemption inquiry, and immunity derived from the Twenty First Amendment to the U.S. Constitution. Connecticut has not raised such defenses in connection with this appeal.

here. The New York statute there is substantively identical to the Connecticut statute here. And the hybrid classification in *324 Liquor* remains good law. *See Freedom Holdings*, 357 F.3d at 223–24 (noting that *324 Liquor* found a hybrid arrangement based on limited private acts: "the individual determinations of each wholesaler as to what bottle price to post").

The same, however, cannot be said for the Supreme Court's application of *Rice* in *324 Liquor*. The Court's premise, that the New York statute mandated *per se* violations of § 1, has been overtaken by a change in antitrust law. In 2007, the Supreme Court, culminating a line of decisions, held that rule of reason—and not *per se*—analysis applies to all vertical restraints. *See Leegin*, 551 U.S. at 882, 127 S.Ct. 2705. *Leegin* overruled *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed. 502 (1911), the precedent cited by *324 Liquor* as the fount of the doctrine that vertical price fixing arrangements are *per se* illegal. *See 324 Liquor*, 479 U.S. at 341, 107 S.Ct. 720. Henceforth, the Supreme Court stated, "vertical price restraints are to be judged by the rule of reason." *Leegin*, 551 U.S. at 882, 127 S.Ct. 2705. Justifying the doctrinal change, the Court explained that "it cannot be stated with any degree of confidence that resale price maintenance 'always or almost always tend[s] to restrict competition and decrease output,'" *id.* at 894, 127 S.Ct. 2705 (quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723, 108 S.Ct. 1515, 99 L.Ed.2d 808 (1988)), noting that *Leegin* capped a gradual doctrinal move "away from *Dr. Miles*' strict approach," *id.* at 900, 127 S.Ct. 2705.

In light of *Leegin*, *324 Liquor*'s holding that minimum-retail-price provisions constitute a *per se* violation of antitrust laws in all cases, 479 U.S. at 343, 107

S.Ct. 720, is, necessarily, no longer good law. The need to analyze vertical pricing arrangements under the rule of reason means that § 1 cannot preempt as *per se* unlawful even a statute that overtly mandates such arrangements. *See Rice*, 458 U.S. at 658, 102 S.Ct. 3294 ("If the activity addressed by the statute . . . must be analyzed under the rule of reason, the statute cannot be condemned in the abstract. Analysis under the rule of reason requires an examination of the circumstances underlying a particular economic practice, and therefore does not lend itself to a conclusion that a statute is facially inconsistent with the federal antitrust laws.").

We therefore hold that Connecticut's minimum-retail-price provisions, compelling as they do only vertical pricing arrangements among private actors, are not preempted under § 1.[12]

C. Connecticut's Provisions Prohibiting Price Discrimination

The Court next considers Connecticut's provisions prohibiting price discrimination. These provisions, as noted, require that wholesalers sell a given alcoholic product to all retailers at the same price.

For two reasons, we hold that these provisions are not preempted.

First, as the district court recognized, these provisions impose a unilateral restraint. They leave each wholesaler at liberty to choose the price it will charge

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[12] Total Wine alternatively attempts to characterize minimum-retail-price provisions such as Connecticut's as impelling horizontal price-fixing. For the reasons given by the district court, this characterization is wrong. *Conn. Fine Wine & Spirits*, 255 F. Supp. 3d at 375.

all retailers for a product while prohibiting each from charging different prices to different retailers. Although limiting a wholesaler's range of motion, this provision does not grant any private actor "a degree of regulatory control over competition." *Freedom Holdings Inc. v. Cuomo*, 624 F.3d 38, 50 (2d Cir. 2010). Rather, like the rent cap set by the Berkeley municipality in Fisher, it is a restraint "imposed by government . . . to the exclusion of private control." *Id.* (citing *Fisher*, 475 U.S. at 266, 106 S.Ct. 1045). Such a restraint does not implicate the concerns of concerted activity animating § 1.

Second, the price restraint worked by § 30-68k is purely vertical in operation. It limits the ability of a wholesaler that has already charged one retailer a given price to charge another retailer a different price. Therefore, even if this provision could be viewed as a hybrid, rather than a unilateral, price-fixing provision, after *Leegin*, it would no longer implicate a category of conduct that remains *per se* unlawful. While its impact may be to harmonize prices at a retail level of beverages sold by a common wholesaler, the provision does not mandate—or even incent—collaboration among horizontal competitors. For this separate reason, under *Rice*, it is not preempted by § 1.

D. Connecticut's Post-and-Hold Provisions

The Court finally considers the post-and-hold provisions, described above. On the question whether § 1 preempts these provisions, the parties primarily dispute whether, as the district court held, *Battipaglia*, 745 F.2d 166, which rejected a claim that § 1 preempted a New York liquor-pricing statute, is controlling here.

1. Review of *Battipaglia*

In *Battipaglia*, decided after *Rice* and before *Fisher*, a divided panel of this Court, per Judge Friendly, upheld a New York statute whose price restraint components governing the sale of liquor were strikingly similar to those at issue here. The New York law contained post-and-hold provisions that obliged wholesalers to file monthly price schedules with the state liquor authority by the fifth day of the preceding month, *Id.* at 168 (citing N.Y. Alco. Bev. Cont. § 101-b(3)(b)), and authorized wholesalers to amend their filed schedules "to meet lower competing prices and discounts 'provided such amended prices and discounts are not lower and discounts are not greater than those to be met,'" *id.* (quoting N.Y. Alco. Bev. Cont. Law § 101-b(4)). The New York law also contained price-discrimination and minimum-retail-price provisions that constrained sales prices at the retail level. *See id.* (citing N.Y. Alco. Bev. Cont. § 101-b(2)).

In the relevant portion of its analysis,[13] *Battipaglia* held that the challenged post-and-hold provisions were not preempted. It noted that these provisions "do not compel any agreement" among wholesalers. *Id.* at 170. Rather, the Court stated: "The schedules required to be filed by the wholesalers are their individual acts."

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[13] *Battipaglia* addressed two other issues not presented here. It discussed—but did not resolve—whether, if the New York law were in conflict with § 1, it was nonetheless insulated from attack by the "state action" doctrine of *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). *See Battipaglia*, 745 F.2d at 176–77. And it addressed whether, if the New York law were in conflict with § 1, the state's important policy interests warranted deference under § 2 of the Twenty-First Amendment. *Id.* at 177–79 (holding that, on the case record, such deference was warranted).

Id. And the *Battipaglia* plaintiffs (a liquor store owner and a wholesaler) had not alleged that "any agreement among the wholesalers" arose as a result of these laws. *Id.*

Battipaglia addressed and rejected two arguments the plaintiffs had made for preemption.

First, the Court distinguished *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), which, like *324 Liquor*, had held preempted a state statute that "created a resale price maintenance system for wine." *Battipaglia*, 745 F.2d at 170; *see also id.* at 171 (describing California statute as having forced "all persons at various levels of the chain of distribution. . . .to establish identical prices fixed by the brand owner for each brand of wine" and stating that this type of "vertical control" was impermissible under § 1). In contrast, the Court stated, New York's post-and-hold provisions "plainly are not a resale price maintenance scheme." *Id.* at 172. And, the Court again noted, the New York law did not constrain wholesalers, each of which "is completely free to file whatever price schedule he desires." *Id.* As Judge Friendly put the point: "*Midcal* simply did not deal with a statute like New York's which merely requires wholesalers to post and adhere to their own unilaterally determined prices and nothing more." *Id.*

Second, the Court addressed the argument that the post-and-hold law gave rise to a *per se* violation of § 1 because (1) it "forces each wholesaler to inform other wholesaler[s] of its prices and then to adhere for a month to them (or a lowered price meeting that of a competitor filed within three days)" and (2) "if this had been done pursuant to an agreement [among wholesalers], the agreement would have constituted a violation

of § 1." *Id.* Rejecting this argument, the Court reiterated that § 1 "is directed only at joint action and does not prohibit independent business actions and decisions." *Id.* (internal citations omitted).

The Court then paused on the conceptual issue of whether, to be preempted by § 1, a state law must compel an actual agreement among competitors. The Court described as "appealing" the reasoning that:

> Section 1 requires an agreement, state compulsion of individual action is the very antithesis of an agreement, and the argument that an agreement could have been inferred if the wholesalers had voluntarily done what they been compelled to do is simply too 'iffy.'

Id. at 173.[14] At the same time, the Court acknowledged "some force" to the counterargument: that "a statute compelling conduct which, in its absence, would permit the inference of an agreement unlawful under § 1 is inconsistent with that section." *Id.* In the end, the Court stated, there was no need to resolve this conceptual issue. That was because the New York law did not meet the *Rice* standard for preemption. *Id.*

Rice, the Court emphasized, had held that "[a] state regulatory scheme is not pre-empted by the federal antitrust laws simply because in a hypothetical situation a private party's compliance with the statute

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[14] As support for this view, the Court cited a district court decision finding against preemption and rejecting the argument that "simply because the statute compelled individual actions which, if taken pursuant to an agreement, might have constituted a violation," the statute was preempted. *Id*. at 173 (quoting *U.S. Brewers Ass'n, Inc. v. Healy*, 532 F. Supp. 1312, 1329–30 (D. Conn.), *rev'd on other grounds*, 692 F.2d 275 (2d Cir. 1982), *aff'd*, 464 U.S. 909, 104 S.Ct. 265, 78 L.Ed.2d 248 (1983)).

might cause him to violate the antitrust laws." *Id.* at 174 (quoting *Rice*, 458 U.S. at 659, 102 S.Ct. 3294). Rather, under *Rice*, a state law could be "condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute." *Id.* (quoting *Rice*, 458 U.S. at 661, 102 S.Ct. 3294). New York's statute did not do that, the Court stated, because the only conduct that it compelled—"the exchange of price information" among competitors—does not "constitute a violation of the antitrust laws in all cases." *Id.* at 174. Such an exchange might or might not signify an agreement among them. *See id.* at 175 ("[T]he dissemination of price information is not a *per se* violation of the Sherman Act." (quoting *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 113, 95 S.Ct. 2099, 45 L.Ed.2d 41 (1975) (internal citations omitted)). That the post-and-hold law might result in common wholesaler pricing did not support inferring an agreement either, the Court stated. Absent "plus factors" signifying an agreement, "conscious parallelism" among competitors did not equate to an agreement. *Id.* (citations omitted).

The *Battipaglia* Court concluded:

> Section 101-b thus does not mandate or authorize conduct that necessarily constitutes a violation of the antitrust laws in all cases. New York wholesalers can fulfill their obligations under the statute without either conspiring to fix prices or engaging in consciously parallel pricing. So, even more clearly, the New York law does not place irresistible pressure on a private party to violate the antitrust laws in order to comply with it. It requires

> only that, having announced a price independently chosen by him, the wholesaler shall stay with it for a month.

Id. (internal quotation marks omitted).

In dissent, Judge Winter faulted Judge Friendly's majority opinion for dwelling on the "post" component of New York's law and paying too little heed to the law's "hold" component. Were competitors to enter into an agreement to hold their prices in place for 30 days, he observed, such a private agreement would be horizontal price fixing and *per se* illegal. *See* 745 F.2d at 179–80 (Winter, J., dissenting). The Fourth and Ninth Circuits, the only two circuit courts to address similar laws, have sided with Judge Winter. Each has emphasized that the statutory requirement of adherence to posted prices, were it adopted by private agreement, would be *per se* illegal price fixing. *See Costco Wholesale Corp. v. Maleng*, 522 F.3d 874 (9th Cir. 2008) (holding Washington provisions preempted by § 1); *Miller v. Hedlund*, 813 F.2d 1344 (9th Cir. 1987) (holding Oregon provisions not exempt from § 1 and remanding the case to the district court for a determination whether the Twenty First Amendment shielded the challenged regulations); *TFWS, Inc. v. Schaefer*, 242 F.3d 198, 210 (4th Cir. 2001) (holding Maryland provisions preempted by § 1, while reserving on whether, under the Twenty First Amendment, Maryland's regulatory interests with respect to alcohol trumped federal interest under the Sherman Act); *see also* 1 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 217, at 388–89 & nn.45–53 (4th ed. 2013) (reviewing reported decisions, including lower court decisions in each direction).

2. *Battipaglia* Controls Here

We find *Battipaglia* controlling authority here.

Connecticut's post-and-hold provisions are substantially identical to the New York post-and-hold provisions upheld in that case. Total Wine does not contend otherwise. Both sets of provisions required the wholesaler to set and publicly file a price that it is going to charge the retailer; both provided a brief time window in which wholesalers may match a lower price set by a competitor; and both required the wholesaler to hold that price for one month.

Further, as the above discussion reflects, the Court in *Battipaglia* considered at length the § 1 preemption question in the face of similar arguments to those Total Wine makes here. The Court applied the controlling standards, from Rice, to these provisions. The Court held that the post-and-hold provisions did not "mandate or authorize conduct 'that necessarily constitutes a violation of the antitrust laws in all cases'" or "place[ ] irresistible pressure on a private party to violate the antitrust laws in order to comply" with it. *Id.* at 175 (quoting *Rice*, 458 U.S. at 661, 102 S.Ct. 3294). Those are the questions presented here.

Finally, Total Wine has not identified any later precedent of the Supreme Court or this Court that fairly calls *Battipaglia's* vitality into question.

Total Wine argues that *324 Liquor* and our decision in *Freedom Holdings*, 357 F.3d at 223 (Winter, J.) are such precedent. A footnote in *324 Liquor* suggested that a statute need not bring about an actual agreement between private parties to be preempted by § 1. *See 324 Liquor*, 479 U.S. at 345–46 n.8, 107 S.Ct. 720 (rejecting New York's defense that provisions at issue had not yielded a "contract, combination, or conspiracy

in restraint of trade"). *Freedom Holdings* picked up on that footnote to suggest, in a footnote of its own, that "an actual 'contract, combination, or conspiracy' need not be shown for a state statute to be preempted by the Sherman Act." *See* 357 F.3d at 223 n.17 (Winter, J.) (citing *324 Liquor*, 479 U.S. at 345–46 n.8, 107 S.Ct. 720). Total Wine argues, on account of these statements, that these decisions vitiate *Battipaglia*.

For three reasons, they do not.

First, *Freedom Holdings* itself distinguished *Battipaglia* and treated it as good law. *Freedom Holdings* recognized that, although the *Battipaglia* majority had discussed whether a state law must give rise to an actual agreement for § 1 to preempt it, *Battipaglia* ultimately did not resolve nor rule on the basis of that conceptual issue. Rather, *Battipaglia* had relied on its application of the Rice standard to New York's post-and-hold provision. *See id.* (recognizing that *Battipaglia* "did not reach the question" whether "a private contract, combination, or conspiracy" must be shown for Sherman Act preemption to occur (internal citation omitted)).

Second, to the extent that *Freedom Holdings* and *324 Liquor* opine on whether the state law at issue must give rise to an actual private agreement for there to be preemption, these cases are readily distinguished factually because they involved express or readily implied agreements. *Freedom Holdings* involved an express contract among horizontal competitors—a "Master Settlement Agreement" among major tobacco manufacturers pursuant to which the challenged New York legislation had been enacted. *Freedom Holdings*, 357 F.3d at 208. Its discussion of whether the state law must give rise to such an agreement was, therefore, *dicta*. *See id.* at 224 ("Even if a 'contract' among

private parties is required in the first step of preemption analysis, therefore, it exists in the present matter."). As for *324 Liquor*, it addressed vertical restraints affecting a wholesaler-retailer relationship. In that context, the wholesaler and each of its retailers were in privity and necessarily had an agreement to buy from and/or sell to each another. They entered into these agreements against the backdrop (and presumably with the knowledge) of the price-fixing term that state law would supply. In fact, every Supreme Court case to hold state liquor laws preempted by § 1, has done so on the ground that these laws either mandated or authorized forms of then *per se* unlawful vertical price-fixing arrangements between wholesalers and retailers. *See*, *e.g.*, *Midcal*, 445 U.S. 97, 100 S.Ct. 937 (California law mandated resale price maintenance among wholesaler and its retailers); *324 Liquor*, 479 U.S. 335, 107 S.Ct. 720 (same as to New York law); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed. 1035 (1951) (same as to Louisiana law per an interpretation of § 1 as amended by the now-repealed Miller-Tydings Act). Of course, as noted earlier, the application of preemption doctrine to vertical price fixing arrangements has been overtaken by *Leegin*'s removal of vertical restraints from *per se* condemnation.

Third, and finally, two post-*Battipaglia* decisions of the Supreme Court, each involving claims of horizontal price-fixing, lend support to Judge Friendly's reasoning in finding against preemption. One, *Fisher*, discussed earlier, does so by narrowing the scope of state action within § 1's preemptive reach. The other, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), does so by underscoring the limited scope of private conduct capable of *per se* violating § 1.

Fisher, as noted, upheld Berkeley's rental-cap ordinance in the face of a § 1 preemption claim that it brought about horizontal price fixing. The Supreme Court recognized that "[h]ad the owners of residential rental property in Berkeley voluntarily banded together to stabilize rents in the city," that concerted activity would have worked a *per se* violation of § 1. *Fisher*, 475 U.S. at 266, 106 S.Ct. 1045. But, the Court emphasized, more was required. There needed to be concerted action. "A restraint imposed unilaterally by government does not become concerted-action within the meaning of the statute simply because it has a coercive effect upon parties who must obey the law." *Id.* at 267, 106 S.Ct. 1045. "[T]he mere fact that all competing property owners must comply with the same provisions of the Ordinance is not enough to establish a conspiracy among landlords." *Id.*

This requirement is significant here. We do not take issue with the holding of the district court here that, given the participation that a post-and-hold law requires of each wholesaler in connection with the posting component, Connecticut's law, viewed as a whole, qualifies as hybrid under *Fisher*.[15] But we doubt that such a law mandates or authorizes "concerted action" among the wholesalers subject to it. Particularly as to the "hold" component of the law that was the basis of the *Battipaglia* dissent, Connecticut's prohibition on altering prices for a 30-day period is a purely negative restraint. It does not call for any private action, let

[15] In finding that the statute grants private actors "a degree of private regulatory power" so as to qualify as hybrid, *Fisher*, 475 U.S. at 268, 106 S.Ct. 1045, the district court relied on 324 Liquor, which had held hybrid a resale-price maintenance law with similar price-posting features. *See Conn. Fine Wines & Spirits*, 255 F. Supp. 3d at 369.

alone concerted action. *See Hertz Corp. v. City of New York*, 1 F.3d 121, 127 (2d Cir. 1993) (finding hybrid, but upholding, city statute that "eliminate[d] an element of price competition" among rental-car industry competitors); *cf. Flying J, Inc. v. Van Hollen*, 621 F.3d 658, 662-63 (7th Cir. 2010) ("[I]t is only when a state law *mandates* or *authorizes* collusive conduct that it is preempted by federal antitrust law." (citing *Fisher*, 475 U.S. at 265, 106 S.Ct. 1045)). *Fisher*'s emphasis on the need for concerted action reinforces that Judge Friendly was right both to focus on the posting, rather than the holding, component of New York's post-and-hold law, and to find the law non-preempted.

As to *Twombly*, although it is more commonly cited for its articulation of pleading standards, the Court in its substantive discussion homed in on the discrete evil prohibited by § 1. "§ 1 of the Sherman Act does not prohibit [all] unreasonable restraints of trade." *Twombly*, 550 U.S. at 553, 127 S.Ct. 1955. It prohibits "only restraints *effected by a contract, combination, or conspiracy*." *Id.* (emphasis added). The Court explained, therefore, that in § 1 cases, "[t]he crucial question is whether the challenged anticompetitive conduct stem[s] from independent decision or from an agreement." *Id.* (internal citations omitted). Even conscious parallel acts based on competitors' mutual recognition of "shared economic interests" are not "'in [themselves] unlawful.'" *Id.* at 553-54, 127 S.Ct. 1955 (quoting *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227, 113 S.Ct. 2578, 125 L.Ed.2d 168 (1993)); *see also United States v. Apple, Inc.*, 791 F.3d 290, 315 (2d Cir. 2015) ("[P]arallel behavior that does not result from an agreement is not unlawful even if it is anticompetitive."). In other words, under § 1, that conscious parallel conduct can create an equally uncompetitive market to parallel conduct achieved by

agreement is of no moment. The gravamen of § 1 is an agreement among competitors.

On this basis, *Twombly* upheld the dismissal of a complaint that alleged consciously parallel decisions among recently deregulated telecommunications carriers not to compete in one another's (horizontal) regional markets. The complaint had not alleged actual agreement among the carriers, and its allegations were consistent with "natural" and "unilateral" behavior by each carrier, as each had good reason to appreciate that its self-interest lay in forebearing from initiating competition. *See* 550 U.S. at 564, 566, 127 S.Ct. 1955; *see also id.* at 568, 127 S.Ct. 1955 ("[The carriers] doubtless liked the world the way it was, and surely knew the adage about him who lives by the sword. Hence, a natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing.")

Twombly's reasoning resonates here because, under a post-and-hold law, there is a "natural" explanation—independent of any agreement or coordination among liquor wholesalers—for these competitors to arrive at common monthly product prices. Such a law authorizes a wholesaler, during the four days after initial posting, to match a competitor's lower price, with such prices then held for a month. Under these circumstances, the law itself invites and facilitates conscious parallelism in pricing. It puts in public view each competing wholesaler's price quotes. And it authorizes, but it does not oblige, wholesalers during a defined window unilaterally to match (or parallel) a competitor's lower price as the "held" price for the coming month. Nothing about this arrangement requires, anticipates, or incents communication or col-

laboration among the competing wholesalers. Quite the contrary: A post-and-hold law like Connecticut's leaves a wholesaler little reason to make contact with a competitor. The separate, unilateral acts by each wholesaler of posting and matching instead are what gives rise to any synchronicity of pricing. To mirror *Twombly*: "[A] natural explanation for the noncompetition alleged," *id.* at 568, 127 S.Ct. 1955, is that the state-regulated wholesalers are independently making pricing decisions within a framework aimed at avoiding price wars that invites them, before being held to a price for a month, to match that of their competitors. A post-and-hold law, therefore, does not implicate the evil against which § 1 guards: an agreement to unreasonably restrain trade. It would make little sense to preempt a state statute which facilitates parallel conduct that parties can legally undertake on their own under § 1.

Under these circumstances, we do not find reason to conclude that *Battipaglia* has been, *sub silentio*, overruled. If anything, its reasoning has been fortified by intervening decisions like *Fisher* and *Twombly*. *Battipaglia* therefore controls Total Wine's challenge to Connecticut's post-and-hold provisions. *See United States v. Moore*, 949 F.2d 68, 71 (2d Cir. 1991) (prior opinions of a Second Circuit panel bind future panels "in the absence of a change in the law by higher authority" or a ruling by the en banc Court). Any application to revisit *Battipaglia* is beyond this panel's authority. *Battipaglia* remains good—and persuasive—law.

CONCLUSION

For the reasons above, we affirm the decision below. We hold that the challenged provisions of Connecticut law governing liquor pricing are not preempted by § 1 of the Sherman Act.

APPENDIX B

UNITED STATES DISTRICT COURT,
DISTRICT OF CONNECTICUT

Civil Action No. 3:16–cv–1434 (JCH)

CONNECTICUT FINE WINE & SPIRITS, LLC,

Plaintiff,

v.

JONATHAN A. HARRIS *et al.*,

Defendants.

Signed 06/06/2017

Janet C. Hall, United States District Judge

RULING RE: MOTIONS TO DISMISS

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I. INTRODUCTION

Plaintiff Connecticut Fine Wine & Spirits, LLC ("Total Wine") instituted this action against defendants Jonathan A. Harris, Commissioner of the Connecticut Department of Consumer Protection, and John Suchy, Director of the Connecticut Division of Liquor Control (collectively, the "state defendants"), in their official capacities. Compl. (Doc. No. 1) at 1. Total Wine alleges that certain state statutory and regulatory provisions governing the distribution and sale of alcoholic beverages are preempted by federal antitrust law.[1] *See id.* ¶¶ 28, 33. Total Wine seeks declaratory and injunctive relief. *See id.* ¶ 34.

Four trade associations—the Wine & Spirit Wholesalers of Connecticut ("WSWC"), Connecticut Beer Wholesalers Association ("CBWA"), Connecticut Restaurant Association ("CRA"), and Connecticut Package Stores Association ("CPSA") (collectively, the "trade associations")—filed Motions to Intervene (Doc. Nos. 27, 30, 39, 47). The court granted the motions, *see* Ruling (Doc. No. 62) at 2, as well as a subsequent Motion to Intervene (Doc. No. 69) filed by Brescome Barton, Inc. ("Brescome" and, with the trade associations, "intervenors"), *see* Order (Doc. No. 75).

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[1] The "challenged provisions" Total Wine alleges are preempted by the Sherman Act are: (1) section 30–63 of the Connecticut General Statutes and section 30–6–B12 of the Regulations of Connecticut State Agencies ("post and hold provisions"); (2) sections 30–68m(a)(1) and 30–68m(b) of the Connecticut General Statutes ("minimum retail price provisions"); and (3) sections 30–63(b), 30–68k, and 30–94(b) of the Connecticut General Statutes and section 30–6–A29(a) of the Regulations of Connecticut State Agencies ("price discrimination prohibition provisions"). *See* Compl. ¶¶ 12–14.

Harris and Suchy filed a joint Motion to Dismiss, *see generally* Mot. to Dismiss ("State Defs. Mot.") (Doc. No. 38), as did the trade associations, *see generally* Mot. to Dismiss by Wine & Spirits Wholesalers of Conn., Conn. Beer Wholesalers Ass'n, Conn. Rest. Ass'n, & Conn. Package Stores Ass'n ("Trade Ass'ns Mot.") (Doc. No. 66). Brescome filed an additional Motion to Dismiss. *See generally* Def. Brescome Barton, Inc.'s Mot. to Dismiss ("Brescome Mot.") (Doc. No. 80). Each Motion to Dismiss relies on Federal Rule of Civil Procedure 12(b)(6). *See* State Defs. Mot. at 1; Trade Ass'ns Mot. at 1; Brescome Mot. at 1. Total Wine filed a consolidated opposition to the Motions, *see generally* Pl.'s Consolidated Opp'n to Defs.' & Intervenors' Mots. to Dismiss ("Opp'n" or "Opposition") (Doc. No. 82), and the state defendants and intervenors replied in a timely manner, *see generally* State Defs.' Reply Mem. in Supp. of Mot. to Dismiss ("State Defs. Reply") (Doc. No. 84); Intervenors' Joint Reply in Supp. of their Mots. to Dismiss ("Intervenors Reply") (Doc. No. 85). The court heard oral argument on the pending Motions on May 18, 2017.

For the reasons set forth below, the Motions to Dismiss are GRANTED.

II. BACKGROUND[2]

A. Connecticut's Liquor Marketplace

The sale of alcoholic beverages in Connecticut is prohibited, except as permitted by Connecticut's Liquor Control Act. Conn. Gen. Stat. § 30–74(a). "Connecticut

[2] For the purposes of ruling on the pending Motions to Dismiss, the court accepts as true all well-pled facts in the Complaint. *See Simon v. KeySpan Corp.*, 694 F.3d 196, 201 (2d Cir. 2012). The facts included here are limited to those necessary to rule on the pending Motions.

has what may be characterized as a tripartite pricing mechanism establishing the method by which liquor prices are set by the manufacturer, . . . the wholesaler[,] and the retailer." *Serlin Wine & Spirit Merchs., Inc. v. Healy*, 512 F.Supp. 936, 937–38 (D. Conn. 1981). Most relevant here are three sets of requirements: the post and hold provisions, minimum retail price provisions, and price discrimination prohibition.

First, Connecticut's post and hold provisions require state-licensed manufacturers and wholesalers to post a "bottle price" and a "case price" each month with the Department of Consumer Protection. *See* Compl. ¶ 12. Posted prices are then made available to industry participants, who may, and often do, amend their own postings to match competitors' lower prices. *See id.* ¶¶ 12, 16. Once these prices are finalized, the manufacturer or wholesaler must maintain its posted prices for the following month.[3] *See id.* ¶ 12.

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[3] Section 30–63(c) of the Connecticut General Statutes sets forth the post and hold requirement as follows:

> For alcoholic liquor other than beer, each manufacturer, wholesaler and out-of-state shipper permittee shall post with the department, on a monthly basis, the bottle, can and case price of any brand of goods offered for sale in Connecticut, which price when so posted shall be the controlling price for such manufacturer, wholesaler or out-of-state permittee for the month following such posting. On and after July 1, 2005, for beer, each manufacturer, wholesaler and out-of-state shipper permittee shall post with the department, on a monthly basis, the bottle, can and case price, and the price per keg or barrel or fractional unit thereof for any brand of goods offered for sale in Connecticut which price when so posted shall be the controlling price for such brand of goods offered for sale in this state for the month following such posting. Such manufacturer, wholesaler and out-of-state shipper permittee may also post additional prices for such

Second, the minimum retail price provisions require that retailers sell to customers at or above a statuto-

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> bottle, can, case, keg or barrel or fractional unit thereof for a specified portion of the following month which prices when so posted shall be the controlling prices for such bottle, can, case, keg or barrel or fractional unit thereof for such specified portion of the following month. Notice of all manufacturer, wholesaler and out-of-state shipper permittee prices shall be given to permittee purchasers by direct mail, Internet web site or advertising in a trade publication having circulation among the retail permittees except a wholesaler permittee may give such notice by hand delivery. Price postings with the department setting forth wholesale prices to retailers shall be available for inspection during regular business hours at the offices of the department by manufacturers and wholesalers until three o'clock p.m. of the first business day after the last day for posting prices. A manufacturer or wholesaler may amend such manufacturer's or wholesaler's posted price for any month to meet a lower price posted by another manufacturer or wholesaler with respect to alcoholic liquor bearing the same brand or trade name and of like age, vintage, quality and unit container size; provided that any such amended price posting shall be filed before three o'clock p.m. of the fourth business day after the last day for posting prices; and provided further such amended posting shall not set forth prices lower than those being met. Any manufacturer or wholesaler posting an amended price shall, at the time of posting, identify in writing the specific posting being met. On and after July 1, 2005, all wholesaler postings, other than for beer, for the following month shall be provided to retail permittees not later than the twenty-seventh day of the month prior to such posting. All wholesaler postings for beer shall be provided to retail permittees not later than the twentieth day of the month prior to such posting.

Conn. Gen. Stat. § 30–63(c). Section 30–6–B12 of the Regulations of Connecticut State Agencies further clarifies these requirements. *See, e.g.*, Conn. Agencies Regs. § 30–6–B12(d) (allowing amendments to posted price schedules to correct "obvious typographical errors").

rily defined "cost." *See id.* ¶ 13. Generally, a retailer's "cost" for a given alcoholic beverage is determined by adding the posted bottle price—as set by the wholesaler—and a markup for shipping and delivery.[4] *See id.* Wholesalers occasionally lower their posted case prices for a given month, without lowering posted bottle prices, during what are referred to as "off-post" months. *See id.* Although retailers buy almost exclusively by the case, their prices remain fixed by the minimum retail price provisions, which reference posted bottle prices, rather than posted case prices. *See id.*

Finally, wholesalers must sell a given product to all retailers at the same price.[5] *See id.* ¶ 14. Specifically,

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[4] Section 30–68m(b) of the Connecticut General Statutes sets forth the mandate that "[n]o retail permittee shall sell alcoholic liquor at a price below his or her cost." "Cost" is in turn defined as follows:

> (A) for alcoholic liquor other than beer, the posted bottle price from the wholesaler plus any charge for shipping or delivery to the retail permittee's place of business paid by the retail permittee in addition to the posted price, and (B) for beer, the lowest posted price during the month in which the retail permittee is selling plus any charge for shipping or delivery to the retail permittee's place of business paid by the retail permittee in addition to the price originally paid by the retail permittee . . . .

Conn. Gen. Stat. § 30–68m(a)(1).

[5] Section 30–68k of the Connecticut General Statutes provides:

> No holder of any wholesaler's permit shall ship, transport or deliver within this state or any territory therein or sell or offer for sale, to a purchaser holding a permit for the sale of alcoholic liquor for on or off premises consumption, any brand of alcoholic liquor, including cordials, . . . at a bottle, can or case price higher than the lowest price at which such item is then being sold or offered for sale or shipped, transported or delivered by such wholesaler to any other such purchaser to which the wholesaler sells, offers for sale,

wholesalers may not offer discounts to retailers who are high volume purchasers. *See* Compl. ¶ 14.

No Connecticut agency or instrumentality actively supervises the price posting and matching processes. *See id.* ¶ 21. Rather, manufacturers and wholesalers are left to post prices as they see fit, without review by the state. *See id.*

B. Total Wine

Total Wine owns and operates four retail beverage stores in Connecticut. Compl. ¶ 1. It holds package store permits for its four retail locations. *See id.* ¶ 9. Total Wine strives "to offer[ ] the nation's best selection of alcoholic beverages, and to hav[e] the lowest prices on wine, spirits, and beer." *See id.* ¶ 7. Total Wine alleges that the challenged provisions prevent it from using its "efficiencies" to reduce the prices at which it sells to consumers. *See id.* ¶¶ 17, 22. It has not lowered its prices below its "cost," for fear of being subject to civil and criminal penalties. *See id.* ¶ 22; *see also id.* ¶ 15 (discussing penalties for violations of

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ships, transports or delivers that brand of alcoholic liquor within this state.

Similarly, manufacturers and wholesalers are prohibited from:

(1) "discriminat[ing] in any manner in price discounts between one permittee and another on sales or purchases of alcoholic liquors bearing the same brand or trade name and of like age, size and quality," or (2) "allow[ing] in any form any discount, rebate, free goods, allowance or other inducement for the purpose of making sales or purchases."

Conn. Gen. Stat. § 30–63(b).

Section 30–94(b) of the Connecticut General Statutes and section 30–6–A29(a) of the Regulations of Connecticut Agencies further limit the ability of participants in Connecticut's liquor market to offer discounts to their customers.

Liquor Control Act).[6] As Total Wine acknowledged at oral argument, its antitrust preemption claims are facial challenges.

III. LEGAL STANDARDS

A. Motions to Dismiss: Rule 12(b)(6)

In ruling on a Motion to Dismiss, the court "accept[s] all factual claims in the complaint as true and draw[s] all reasonable inferences in the plaintiff's favor." *Simon v. KeySpan Corp.*, 694 F.3d 196, 201 (2d Cir. 2012) (citing *Famous Horse Inc. v. 5th Ave. Photo Inc.*, 624 F.3d 106, 108 (2d Cir. 2010)). "[T]he court, in judging the sufficiency of the complaint, must accept the facts alleged and construe ambiguities in the light most favorable to upholding the plaintiff's claim." *Doe v. Columbia Univ.*, 831 F.3d 46, 48 (2d Cir. 2016). However, the court need not "accept conclusory allegations or legal conclusions masquerading as factual conclusions." *Faber v. Metro. Life Ins. Co.*, 648 F.3d 98, 104 (2d Cir. 2011) (quoting *Rolon v. Henneman*, 517 F.3d 140, 149 (2d Cir. 2008)). Instead, "[t]o survive dismissal, the plaintiff must provide the grounds upon which his claim rests through factual allegations sufficient to raise a right to relief above the speculative

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[6] The court notes that Total Wine's Complaint includes several allegations that suggest the Connecticut liquor regime is unfair to consumers. *See, e.g.*, Compl. ¶ 17 ("Under this anticompetitive regime, a retailer like Total Wine & More cannot use its market and business efficiencies to reduce the prices offered to consumers."). Whether or not the statutory and regulatory scheme implemented by the State of Connecticut is wise is not a question for this court. Rather, the court can only be asked to determine whether the challenged provisions are preempted by federal law. Arguments as to the harm inflicted on consumers by this scheme are more appropriately directed to Connecticut's executive and legislative branches of government.

level." *Lanier v. Bats Exch., Inc.*, 838 F.3d 139, 150 (2d Cir. 2016) (quoting *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007)). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions . . . ." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (quotation marks and citations omitted).

B. Sherman Act Preemption of State Statutes

Section 1 of the Sherman Act provides that "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal." 15 U.S.C. § 1. The Supreme Court has made clear that, "[i]n determining whether the Sherman Act pre-empts a state statute, [courts] apply principles similar to those . . . employ[ed] in considering whether any state statute is pre-empted by a federal statute pursuant to the Supremacy Clause." *Rice v. Norman Williams Co.*, 458 U.S. 654, 659, 102 S.Ct. 3294, 73 L.Ed.2d 1042 (1982).[7] "[T]he party asserting preemption must demonstrate an 'irreconcilable conflict' between the challenged statute and the Sherman Act. Such a conflict will be found only 'when the conduct contemplated by

[7] The parties agree that *Norman Williams* provides at least part of the framework governing the court's analysis. *See* Mem. of Law in Supp. of Mot. to Dismiss ("State Defs. Mem. in Supp.") (Doc. No. 38–1) at 7; Joint Mem. of Law by Wine & Spirits Wholesalers of Conn., Conn. Beer Wholesalers Ass'n, Conn. Rest. Ass'n, & Conn. Package Stores Ass'n in Supp. of their Mot. to Dismiss ("Trade Ass'ns Mem. in Supp.") (Doc. No. 66–1) at 10; Brescome Barton, Inc.'s Mem. of Law in Supp. of its Mot. to Dismiss ("Brescome Mem. in Supp.") (Doc. No. 80–1) at 4; Opp'n at 11.

the statute is in all cases a *per se* violation' of the antitrust laws." *Freedom Holdings v. Cuomo* ("*Freedom Holdings IV*"), 624 F.3d 38, 49–50 (2d Cir. 2010) (quoting *Norman Williams*, 458 U.S. at 659, 661, 102 S.Ct. 3294). "A state regulatory scheme is not preempted by the federal antitrust laws simply because in a hypothetical situation a private party's compliance with the statute might cause him to violate the antitrust laws," nor is it preempted solely because "the state scheme might have an anticompetitive effect." *Norman Williams*, 458 U.S. at 659, 102 S.Ct. 3294. As the state defendants pointed out at oral argument, *see* Hr'g Tr. (Doc. No. 89) at 11:6–11:10, whether or not private parties are actually colluding has no import in the preemption analysis, which focuses on the text and face of the statutes at issue.

Ordinarily, "a two-step inquiry guides analysis of" claims that state statutes are preempted by the Sherman Act. *Freedom Holdings IV*, 624 F.3d at 49. At the first step, the court must determine whether the state statutes "mandate or authorize a *per se* antitrust violation." *Id.* at 50 (quotation marks and citation omitted). Then, "[e]ven if plaintiffs showed that the challenged statutes mandate or authorize a *per se* antitrust violation, those laws might still be saved from preemption by the doctrine of state action immunity, if the anti-competitive conduct is both clearly articulated and affirmatively expressed as state policy and actively supervised by the [s]tate itself." *Id.* (internal quotation marks and citations omitted). Neither the defendants nor any of the intervenors have suggested at this time that Total Wine's claims should be dismissed at the second step of this analysis. *See* Opp'n at 12 n.4 (discussing the second step—so-called *Parker* immunity—and defendants' failure to raise it as grounds for dismissal). Similarly, neither the defend-

ants nor the intervenors have suggested at this time that any of the challenged provisions might be saved by the Twenty-first Amendment. *Cf. Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 901–04 (9th Cir. 2008) (discussing permissibility of Washington's post and hold provisions under Twenty-first Amendment). Therefore, the court's analysis in this Ruling focuses solely on the first step of the above inquiry: determining whether the state statutes "mandate or authorize a *per se* antitrust violation." *Freedom Holdings IV*, 624 F.3d at 49 (quotation marks and citation omitted).

In determining whether there is an irreconcilable conflict between the state and federal statutes, the court must determine whether the challenged state statutes qualify as unilateral or hybrid restraints. "[R]estraints 'unilaterally imposed by government . . . to the exclusion of private control' do not violate the antitrust laws." *Freedom Holdings IV*, 624 F.3d at 50 (quoting *Fisher v. City of Berkeley, Cal.*, 475 U.S. 260, 266, 106 S.Ct. 1045, 89 L.Ed.2d 206 (1986)); *see also Fisher*, 475 U.S. at 267, 106 S.Ct. 1045 (characterizing unilateral restraints as "outside the purview of § 1" of Sherman Act). "Where, however, state law does not regulate unilaterally but, rather, grants private actors a degree of regulatory control over competition, the statute may be preempted as a 'hybrid' restraint on trade." *Freedom Holdings IV*, 624 F.3d at 50 (citing, *inter alia*, *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 345–46 & n.8, 107 S.Ct. 720, 93 L.Ed.2d 667 (1987)).

If the statute qualifies as a hybrid restraint, the court then must determine whether the conduct envisioned by the statute constitutes a *per se* violation of the Sherman Act, or instead would receive rule of reason scrutiny. *See Norman Williams*, 458 U.S. at 661, 102 S.Ct. 3294. "[A] state statute, when consid-

ered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute." *Id.* In other words, if a state statute "mandates or authorizes conduct" that is a *per se* violation of the Sherman Act, it is preempted; however, if the "activity addressed by the statute does not fall into that category, and therefore must be analyzed under the rule of reason, the statute cannot be condemned in the abstract." *Id.* (noting that rule of reason analysis "requires an examination of the circumstances underlying a particular economic practice, and therefore does not lend itself to a conclusion that a statute is facially inconsistent with federal antitrust laws").

The trade associations insist that the court must invert the analytical framework set out above and instead consider whether the state statutes constitute a unilateral restraint only after determining that they "present a potential *per se* violation in all cases." Trade Ass'ns Mem. in Supp. at 13.[8] The trade associations cite only one case—from the Sixth Circuit—in support of this assertion. *See id.* (citing *Tritent Int'l Corp. v. Kentucky*, 467 F.3d 547, 555, 559 (6th Cir. 2006)). The

[8] The state defendants—who also ask the court to uphold the challenged provisions—appear to disagree with the trade associations' argument that the court can only determine if the challenged statutes are unilateral or hybrid restraints after evaluating whether they are *per se* violations of the Sherman Act. *See* State Defs. Mem. in Supp. at 4 ("The Challenged Provisions are Unilateral Restraints Imposed by the State of Connecticut and May Not be Preempted."), 7 ("Federal Preemption May Not be Founded Upon Conduct Analyzed Under a Rule of Reason Standard.").

trade associations' argument on this point is unconvincing for at least three reasons.

First, it makes little sense to reach the question of whether a given restraint would be a *per se* violation of the Sherman Act before determining whether or not it is unilateral and thus entirely outside the scope of federal antitrust law.

Second, whatever the law may be in the Sixth Circuit, the trade associations' preferred analytical framework is not mandated by relevant Second Circuit precedent. *See Freedom Holdings IV*, 624 F.3d at 52–53 (characterizing issue of whether "challenged statutes are unilateral acts of a state falling outside of federal antitrust law" as "the threshold question at trial"); *Freedom Holdings, Inc. v. Spitzer* ("*Freedom Holdings I*"), 357 F.3d 205, 223–26 (2d Cir. 2004) (concluding that complaint sufficiently alleged that challenged statutes were hybrid restraints, before addressing other aspects of "the first question[:] whether the scheme alleged to have been created . . . would constitute a *per se* violation of federal antitrust law if brought about by an agreement among private parties").

Third, notwithstanding the Sixth Circuit's interpretation of Supreme Court precedent as requiring "that the *Rice* preemption analysis—that is, whether the state statute at issue mandates or authorizes unlawful anticompetitive behavior—must precede the analysis under the hybrid-restraint theory," other circuit courts have reached the opposite conclusion. *See, e.g.*, *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 892–96 (9th Cir. 2008) (determining first that Washington's post and hold law was hybrid restraint, and then that it was *per se* violation of Sherman Act); *TFWS, Inc. v. Schaefer* ("*TFWS I*"), 242 F.3d 198, 207 (4th Cir. 2001) ("Our analysis under [section] 1 has two steps. We first

decide whether the regulatory system at issue is a 'unilateral restraint' or a 'hybrid restraint.' Second, if it is a hybrid restraint, we must decide whether it involves a *per se* violation of [section] 1." (citations omitted)). The Ninth and Fourth Circuits offer a more persuasive reading of the relevant Supreme Court precedent in this regard.

In sum, therefore, the court's preemption analysis has two steps. First, the court must determine whether the challenged statutes impose unilateral or hybrid restraints. If they impose unilateral restraints, they are not preempted, and the court's inquiry is at an end. However, if the state statutes are hybrid restraints, the court must determine whether they are *per se* violations of the Sherman Act, and thus preempted, or subject to rule of reason analysis and not preempted.

IV. DISCUSSION

Before engaging in the preemption analysis outlined above, the court must first determine whether the challenged provisions are to be analyzed individually and in turn, or collectively. The defendants and intervenors made clear at oral argument that they believe the statutes should be evaluated separately, while Total Wine urged the court to read them together. Here, there can be little doubt that the three challenged sets of provisions function, at least to some extent, together to effectuate the legislature's policy goals. *See* Trade Ass'ns Mem. in Supp. at 8 ("The common purpose of this trio of alcohol beverage pricing statutes is to preclude wholesalers from discriminating in prices among retailers."); Opp'n at 1 ("[T]hree aspects of the [Liquor Control] Act, taken together, serve to effectively compel industry-wide horizontal and vertical price fixing among alcohol wholesalers

and retailers in Connecticut . . . ."). However, several factors inform the court's conclusion that the challenged statutes should be analyzed individually rather than collectively.

First, federalism principles undergirding the preemption doctrine counsel in favor of addressing the statutes in turn. "In determining whether the Sherman Act pre-empts a state statute, [federal courts] apply principles similar to those which [they] employ in considering whether any state statute is pre-empted by a federal statute pursuant to the Supremacy Clause." *Norman Williams*, 458 U.S. at 659, 102 S.Ct. 3294. Federal courts frequently note that, while they do not hesitate to find state law preempted when the Supremacy Clause so requires, their analysis includes "due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy." *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 316, 101 S.Ct. 1784, 68 L.Ed.2d 114 (1981) (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 243, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959)). "[B]ecause the States are independent sovereigns in our federal system, [federal courts] have long presumed that Congress does not cavalierly pre-empt state law causes of action." *Wurtz v. Rawlings Co., LLC*, 761 F.3d 232, 238 (2d Cir. 2014) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996)). In this case, the caution with which federal courts properly approach claims that state laws should be struck down as preempted is best given effect by addressing each provision separately. In doing so, the court will give "due regard" for the policy judgments of the people of the state of Connecticut by addressing the provisions indi-

vidually, in an effort to strike down no more of state law than is required by the Supremacy Clause.

Moreover, the framework by which the court analyzes antitrust preemption claims requires that the court classify the challenged provisions as unilateral or hybrid restraints, and, if hybrid, whether they are horizontal or vertical restraints, subject to *per se* scrutiny or a rule of reason analysis. Application of the Second Circuit and Supreme Court precedents cited by all parties in this case is impossible if the court is required to evaluate the entire corpus of challenged provisions together. It makes little sense, for example, to conceive of the post-and-hold provisions as having vertical effect, whereas the minimum retail price provisions clearly do have vertical effect. Total Wine's suggested way to resolve this issue—by concluding that the combination of statutes are hybrid, horizontal *and* vertical restraints, subject to *per se* scrutiny—is unconvincing. The antitrust preemption analysis outlined above is more appropriately performed on each challenged provision in turn, with the court determining whether each one conflicts with the Sherman Act.

These two justifications for analyzing the challenged provisions separately are further buttressed by the fact that the Connecticut legislature has codified its preference that the invalidity of certain portions of state statutes should, as a general matter, not infect other portions of that statute. Conn. Gen. Stat. § 1–3 ("If any provision of any act passed by the general assembly or its application to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of such act."). "To overcome the presumption of severability, a party must show that the portion declared invalid is 'so mutually connected and dependent on the remainder of the

statute as to indicate an intent that they should stand or fall together' and that the interdependence is such that the legislature would not have adopted the statute without the invalid portion." *Payne v. Fairfield Hills Hosp.*, 215 Conn. 675, 685, 578 A.2d 1025 (1990) (quoting *State v. Menillo*, 171 Conn. 141, 145, 368 A.2d 136 (1976)). Relatedly, the challenged provisions are each codified in separate sections or subsections of the Connecticut General Statutes, *see supra* at Part II.A, further supporting the view that the challenged provisions should be analyzed separately.

Thus, the court concludes, in light of federalism concerns animating preemption analyses as well as the necessity of categorizing the challenged provisions for the antitrust inquiry the court must undertake here, that the challenged provisions should be addressed individually, rather than collectively.

A. Post and Hold Provisions

First, the court turns to the post and hold provisions. For the reasons set forth in detail below, the court concludes: (1) that Total Wine has plausibly alleged that the post and hold provisions are a hybrid restraint, but (2) that the Complaint does not plausibly allege, under controlling Second Circuit law, that post and hold provisions constitute *per se* violations of the Sherman Act. Therefore, Total Wine's claims that the post and hold provisions are preempted are dismissed.

1. Unilateral or Hybrid Restraint

As noted above, *see supra* Part III.B, unilateral restraints are "imposed by government . . . to the exclusion of private control," *Freedom Holdings IV*, 624 F.3d at 50 (quoting *Fisher*, 475 U.S. at 266, 106 S.Ct. 1045), while hybrid restraints "grant[ ] private actors a degree of regulatory control over competition," *id.*

"[T]he federal antitrust laws may preempt state laws that authorize or compel private parties to engage in anticompetitive behavior." *Freedom Holdings I*, 357 F.3d at 223–24 (discussing *324 Liquor*, 479 U.S. at 345–46 & n.8, 107 S.Ct. 720). "As Judge Boudin of the First Circuit has artfully noted, '[w]hat is centrally forbidden is state licensing of arrangements between private parties that suppress competition—not state directives that by themselves limit or reduce competition.'" *Costco Wholesale Corp.*, 522 F.3d at 889 (quoting *Mass. Food Ass'n v. Mass. Alcoholic Beverages Control Comm'n*, 197 F.3d 560, 566 (1st Cir. 1999)).

Given the somewhat opaque language that characterizes the definitions of unilateral and hybrid restraints, the best way to determine how to classify the provisions at issue in this case would appear to be by comparison with the provisions at issue in *Fisher v. City of Berkeley, Cal.*, 475 U.S. 260, 106 S.Ct. 1045, 89 L.Ed.2d 206 (1986), and *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 107 S.Ct. 720, 93 L.Ed.2d 667 (1987).[9] The

[9] The intervenors suggest that the court ignore *324 Liquor*. They argue that "*324 Liquor* was, in all respects relevant to this motion, abrogated by" *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 127 S.Ct. 2705, 168 L.Ed.2d 623 (2007), because *324 Liquor* "was decided at a time when resale price maintenance was still deemed per se unlawful under the Sherman Act . . . ." Intervenors Reply at 2. Accepting the intervenors' contention that "*Leegin* announced that a categorical rule of reason applied to *all* vertical restraints, and expressly overturned *Dr. Miles*," *id.* at 2, overturning *Dr. Miles* had no effect on the *324 Liquor* court's determination that the provisions there qualified as hybrid restraints, *see 324 Liquor*, 479 U.S. at 345 n.8, 107 S.Ct. 720. In the wake of the Court's opinion in *Fisher*—which was less than one year old when *324 Liquor* was decided—the Supreme Court could not have held the New York provisions at issue in *324 Liquor* were inconsistent with the Sherman Act absent a conclusion that they constituted a hybrid restraint. *See*

Supreme Court held that the ordinance discussed in *Fisher* was a unilateral restraint, 475 U.S. at 269–70, 106 S.Ct. 1045, while the statute analyzed in *324 Liquor* was a hybrid restraint, 479 U.S. at 345 n.8, 107 S.Ct. 720.

In *Fisher*, the challenged City of Berkeley ordinance "place[d] strict rent controls on all real property that [was] being rented or [was] available for rent for residential use in whole or in part, . . . establish[ing] a base rent ceiling reflecting the rents in effect at the end of May 1980." 475 U.S. at 262, 106 S.Ct. 1045 (quotation marks and citations omitted). A landlord who did not "adhere to the maximum allowable rent set under the Ordinance [could] be fined by the [Rent Stabilization] Board, sued by his tenants, or have rent legally withheld from him." *Id.* at 262–63, 106 S.Ct. 1045.

The Court distinguished the ordinance at issue in *Fisher* from the restraints it had previously determined were hybrid in *Schwegmann Brothers v. Calvert Distillers Corp*., 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed. 1035 (1951), and in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc*. ("*Midcal*"), 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). Unlike the hybrid restraints in *Schwegmann* and *Midcal*, Berkeley's ordinance "place[d] complete control over maximum rent levels exclusively in the hands of the Rent Stabilization Board. Not just the controls themselves but also the rent ceilings they mandate[d] [had] been unilaterally imposed on landlords by the city." *Fisher*, 475 U.S. at 269, 106 S.Ct. 1045.

Fisher, 475 U.S. at 267–68, 106 S.Ct. 1045 (contrasting hybrid restraints with "unilateral action outside the purview of § 1" of the Sherman Act).

By contrast, in *324 Liquor*, the Supreme Court invalidated parts of New York's liquor pricing system, having determined that the challenged provisions constituted a hybrid restraint. *See Freedom Holdings I*, 357 F.3d at 223–24 (discussing and interpreting *324 Liquor*). New York statutes required liquor wholesalers to "file, or 'post,' monthly price schedules with the State Liquor Authority," in which the wholesalers reported the bottle and case prices they would charge retailers. *See 324 Liquor*, 479 U.S. at 337–38, 107 S.Ct. 720. Retailers were not permitted to sell below "cost," which was statutorily defined by reference to the posted bottle price. *See id.* at 338–39, 107 S.Ct. 720. "Each wholesaler [set] its own 'posted' prices; [New York did] not control month-to-month variations in posted prices." *Id.* at 345, 107 S.Ct. 720. In *324 Liquor*, "[t]he only private acts involved were the individual determinations of each wholesaler as to what bottle price to post." *See Freedom Holdings I*, 357 F.3d at 224.

The post and hold provisions at issue here are remarkably similar to the statutes that the Supreme Court concluded constituted a hybrid restraint in *324 Liquor*. The Connecticut post and hold provisions, much like the New York statutes analyzed in *324 Liquor*, require wholesalers to post their prices which, in turn, set lower bounds on the prices to be charged by retailers. Unlike Berkeley's involvement in the rent-stabilization ordinance challenged in *Fisher*, Connecticut does not set the posted prices themselves, but merely "police[s] the *procedures* of posting and the adherence to the posted prices . . . which are left exclusively . . . within the control of the particular wholesaler." *See Costco Wholesale Corp.*, 522 F.3d at 894 (citing *Midcal*, 445 U.S. at 105, 100 S.Ct. 937, and *324 Liquor*, 479 U.S. at 345, 107 S.Ct. 720). The decision-making authority afforded to liquor wholesalers by Connecticut's post

and hold provisions is more than sufficient for those provisions to qualify as a hybrid restraint, in light of the hybrid restraint identified in *324 Liquor*.

The trade associations and Total Wine disagree as to the relevance of the Second Circuit's decision in *Battipaglia v. New York State Liquor Authority*, 745 F.2d 166 (2d Cir. 1984), to the question of whether the post and hold provisions are a hybrid restraint. On one hand, the trade associations claim that *Battipaglia* "analyzed New York's substantively identical post and hold statute as if the conduct at issue were unilaterally mandated by state statute." Trade Ass'ns Mem. in Supp. at 27. On the other hand, Total Wine disputes this characterization of *Battipaglia*, emphasizing that it was issued before *324 Liquor* and that, "even applying pre–*324 Liquor* law, *Battipaglia* effectively held that the post-and-hold statute at issue *was* hybrid, and not unilateral." Opp'n at 14 n.6 (citing *Battipaglia*, 745 F.2d at 172). Notably, the state defendants have not argued that *Battipaglia* is relevant to the question of whether the challenged provisions are hybrid or unilateral restraints. *See generally* State Defs. Mem. in Supp. at 6–7.

Total Wine comes closer to the mark: *Battipaglia* is, indeed, of little relevance in determining whether the post and hold provisions are a hybrid restraint. Judge Friendly—writing for the panel majority in *Battipaglia*—did not have reason to address the question directly, because the Supreme Court only adopted the unilateral and hybrid restraint construct two years after *Battipaglia*, in *Fisher*. *See Fisher*, 475 U.S. at 267–68, 106 S.Ct. 1045 (citing *Rice v. Norman Williams Co.*, 458 U.S. 654, 665–66 & n.1, 102 S.Ct. 3294, 73 L.Ed.2d 1042 (1982) (Stevens, J., concurring in judgment)). As such, and contrary to the trade associations'

argument, *see* Trade Ass'ns Mem in Supp. at 29, *Battipaglia* neither compels nor suggests a conclusion that the post and hold statute is a unilateral restraint.

Given the similarity between the statutory scheme at issue in *324 Liquor* and the Connecticut post and hold provisions at issue here, the court concludes that the post and hold provisions are best characterized as a hybrid restraint.

2. *Per Se* Violation or Rule of Reason Analysis

Total Wine's Complaint includes two counts. Count One alleges that the "challenged provisions facilitate and impel horizontal price-fixing among Connecticut wholesalers," and are preempted by the Sherman Act. *See* Compl. ¶ 25–28. Count Two alleges that "the challenged provisions facilitate and impel vertical price-fixing and resale price maintenance among Connecticut manufacturers, wholesalers, and retailers," and thus are preempted by the Sherman Act. *See id.* ¶ 29–33. Total Wine has made clear that these counts should be interpreted as they are most logically read: to raise claims that "*each* of the three challenged provisions authorizes, mandates or otherwise pressures industry participants to engage in horizontal price fixing (Count One) *and* industry-wide vertical price fixing (Count Two) . . . . Opp'n at 25 (second emphasis added).

Determinations of whether alleged Sherman Act violations will receive *per se* scrutiny or rule of reason analysis rely in large part on whether the challenged restraint relates to horizontal or vertical price fixing. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 888, 127 S.Ct. 2705, 168 L.Ed.2d 623 (2007) (noting that Supreme Court has "rejected the approach of reliance on rules governing horizontal restraints when defining rules applicable to vertical

ones"). In challenging the post and hold provisions as both horizontal and vertical restraints, Total Wine has alleged that liquor wholesalers collude with other wholesalers, on the one hand, and with manufacturers and retailers, on the other. Therefore, the court will separately analyze Total Wine's allegations that the post and hold provisions mandate or authorize horizontal and vertical price fixing.

a. Count One: Horizontal Price Fixing

The case law setting out the standard to be applied to Total Wine's allegations that the post and hold provisions mandate or authorize unlawful horizontal price fixing appears to this court as less than clear. Although the Second Circuit's ruling in *Battipaglia* is directly on point, Total Wine urges this court to read *324 Liquor* and *Freedom Holdings I* as implicitly abrogating *Battipaglia*. *See* Opp'n at 26–29. That invitation is not without some appeal. To determine whether *Battipaglia* remains good law—and whether the post and hold provisions are subject to rule of reason analysis under it, rather than a *per se* rule—a more detailed analysis of *Battipaglia* is necessary.

The post and hold provisions at issue in *Battipaglia* are substantively identical to Connecticut's post and hold provisions challenged in this case: liquor wholesalers had to file price schedules for their sales to retailers to which they then had to adhere for a month, although they were given an opportunity to amend their initial, posted prices to meet lower prices filed by competing wholesalers. *See Battipaglia*, 745 F.2d at 168. In the portion of the opinion relevant to this case, Judge Friendly, writing for a divided panel, held that New York's post and hold provisions were not in direct conflict with the Sherman Act. *See id.* at 174–75. As noted above, *see* Part IV.A.1, *supra*, Judge Friendly

did not perform the now-required analysis—originally set out in *Fisher*, 475 U.S. at 267–68, 106 S.Ct. 1045 (citing *Rice v. Norman Williams Co.*, 458 U.S. 654, 665–66 & n.1, 102 S.Ct. 3294, 73 L.Ed.2d 1042 (1982) (Stevens, J., concurring in judgment))—of whether the provisions were unilateral or hybrid restraints. Instead, the court grounded its holding that the plaintiff "failed to make out a case of facial invalidity" because New York's post and hold provisions were subject to rule of reason analysis, *see Battipaglia*, 745 F.2d at 174–75, in a determination that is now the second step of the antitrust preemption analysis, *see supra* Part III.B.

The *Battipaglia* court made clear several times in its opinion that it was aware of the New York law's requirements that wholesalers both post *and* hold to their announced prices. *See*, *e.g.*, *id.* at 175 ("[The New York statute] requires only that, having announced a price independently chosen by him, the wholesaler should stay with it for a month."). The court assumed *arguendo* that "an exchange of price information and price adherence compelled by a state are to be treated for the purpose of antitrust preemption analysis, as if they were voluntary." *Id.* at 174. It then concluded that the rule of reason nevertheless provided the appropriate analytical framework. *See id.* at 174. Curiously, in reaching its conclusion that the New York law was not a *per se* violation of the Sherman Act, the court relied on cases that applied rule of reason scrutiny to arrangements by which competitors only *shared* price information, rather than grappling with the additional complexity stemming from the state's requirement that wholesalers *hold* their posted prices. *See*, *e.g.*, *id.* at 174 ("The Supreme Court has never held that the exchange of price information, in the language of *Norman Williams*, 'necessarily constitutes a violation of the antitrust laws in all cases.'").

In dissent, Judge Winter acknowledged that "arrangements that merely call for the exchange of price information are subject to rule of reason, rather than *per se*, analysis." *Id.* at 179. However, he pointed out that, contrary to what one might believe based on the relevant portion of the majority opinion, "the challenged legislation not only mandates the exchange of price information but also requires adherence to publicly announced prices until thirty days after notice is given of a new price." *Id.* Agreements to adhere to announced prices had "been uniformly held illegal without regard to [their] reasonableness." *Id.* (citing *Sugar Inst. v. United States*, 297 U.S. 553, 601, 56 S.Ct. 629, 80 L.Ed. 859 (1936)). Indeed, other circuit courts to address this issue have agreed with Judge Winter. *See Costco Wholesale Corp.*, 522 F.3d at 895–896 ("The Supreme Court has held that an agreement to adhere to posted prices is a per se violation without regard to its reasonableness." (citing, *inter alia*, *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 649, 100 S.Ct. 1925, 64 L.Ed.2d 580 (1980); *Sugar Inst.*, 297 U.S. at 601, 56 S.Ct. 592)); *TFWS I*, 242 F.3d 198, 209 (4th Cir. 2001) ("If liquor wholesalers entered into private agreements to accomplish what is required (and allowed) under the Maryland scheme, a per se Sherman Act violation would result . . . . Maryland's post-and-hold regime is subject to § 1 as a hybrid restraint, and we hold that it is illegal per se."). Also in agreement is the leading antitrust treatise. *See* 1 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 217b2 (4th ed. 2013) ("Given the great danger that agreements to post and adhere will facilitate horizontal collusion, the dissent's position [in *Battipaglia*] is more consistent with [Supreme Court precedent].").

While this court might be inclined to agree with the analysis of Judge Winter, it is ultimately bound by the

Second Circuit's holding in *Battipaglia*. It cannot distinguish the statute in *Battipaglia* from the one at issue in this case in any meaningful way. This court thus concludes that the post and hold provisions are subject to rule of reason analysis, because Connecticut's post and hold provisions are in all material respects identical to those upheld by the Second Circuit in *Battipaglia*. They are therefore not preempted by the Sherman Act.

Total Wine argues, as it must, that the legal foundations supporting *Battipaglia* have been so eroded in the intervening years as to permit this court to reach a different conclusion than did Judge Friendly, in writing for the majority in *Battipaglia*. *See United States v. Moore*, 949 F.2d 68, 71 (2d Cir. 1991) (noting that "prior opinions of a panel of [the Second Circuit] are binding upon [future panels] in the absence of a change in the law by higher authority or . . . in banc proceeding[s] (or [their] equivalent) . . . "). However, neither *324 Liquor* nor *Freedom Holdings I*, both cited by Total Wine, undermines *Battipaglia*'s holding in the ways Total Wine suggests.

First, *324 Liquor* analyzed "a regime of resale price maintenance [imposed] on all New York liquor retailers" as a vertical restraint. *See* 479 U.S. at 341–42, 107 S.Ct. 720. Indeed, the Supreme Court's references to the dangers of "[m]andatory industrywide resale price fixing" are repeatedly contextualized by reference to the wholesaler–retailer relationship. This language has little, if any, relevance to the question of whether Connecticut's post and hold provisions, when viewed as horizontal restraints, are *per se* violations of the

Sherman Act.[10] Thus, *324 Liquor* simply does not overrule *Battipaglia*'s determination that post and hold provisions substantially identical to the ones at issue and analyzed as horizontal restraints are subject to rule of reason scrutiny.

Nor does *Freedom Holdings I* implicitly abrogate *Battipaglia*. Total Wine insists that framing the analysis as the court did in *Freedom Holdings I*—asking whether "[e]ach of the three challenged statutes 'contemplate[s]' conduct that, 'if done by private agreement,' would constitute horizontal price fixing"—provides adequate grounds for a conclusion that the post and hold provisions should be considered *per se* violations of the Sherman Act. *See* Opp'n at 26–29 (quoting *Freedom Holdings I*, 357 F.3d at 225).[11]

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[10] Total Wine suggests that the Ninth and Fourth Circuits have correctly understood *324 Liquor* as mandating a determination that post and hold provisions are horizontal restraints that constitute *per se* violations of the Sherman Act. *See* Opp'n at 28–29. Whatever the relevance of *324 Liquor* to other parts of those courts' decisions, neither opinion cited or referenced *324 Liquor* in determining that post and hold provisions are *per se* violations of the Sherman Act. *See Costco Wholesale Corp.*, 522 F.3d at 895–96*; TFWS, Inc. v. Schaefer* ("*TFWS I*"), 242 F.3d 198, 209–10 (4th Cir. 2001). As such, Total Wine's suggestion that *324 Liquor* was relevant to these determinations rings hollow.

[11] Total Wine is correct, however, that after *Battipaglia*, "the Supreme Court has made it clear that an actual 'contract, combination or conspiracy' need not be shown for a state statute to be preempted by the Sherman Act." *Freedom Holdings I*, 357 F.3d 205, 223 n.17 (citing *324 Liquor*, 479 U.S. at 345–46 n.8, 107 S.Ct. 720). Despite contrary suggestions from the defendants, *see, e.g.*, State Defs. Mem. in Supp. at 12 (discussing *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 907, 127 S.Ct. 2705, 168 L.Ed.2d 623 (2007)), subsequent Supreme Court decisions do not undermine the Second Circuit's interpretation of *324 Liquor* in *Freedom Holdings I*.

However, this language in *Freedom Holdings I* does not undermine *Battipaglia* because Judge Friendly assumed, without deciding, "that an exchange of price information and price adherence compelled by the state are to be treated, for the purpose of antitrust preemption analysis, *as if they were voluntary*," *i.e.* by private agreement. 745 F.2d at 174 (emphasis added). Far from undermining *Battipaglia*, *Freedom Holdings I* is consistent with it.

Thus, *Battipaglia* remains good law, insofar as the Second Circuit determined that post and hold provisions, as horizontal restraints, are subject to rule of reason analysis. Whether or not this court would reach a different conclusion if it were writing on a blank slate is immaterial: *Battipaglia* constitutes binding precedent. In light of the foregoing, the Complaint does not sufficiently allege that the post and hold provisions are horizontal restraints preempted by the Sherman Act.

Relatedly, the state defendants contend that Total Wine was required to plead "enough factual matter (taken as true) to suggest that an agreement was made," in the wake of *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). *See* State Defs. Mem. in Supp. at 14 (quoting *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955). However, *Twombly* was not a preemption case; rather, it involved allegations of wholly private antitrust violations, *see Twombly*, 550 U.S. at 550–51, 127 S.Ct. 1955. As such, *Twombly* is of limited relevance, apart from its elucidation of Rule 8's pleading standard. Total Wine does not dispute that "plaintiffs [must] plausibly plead, and prove, an actual agreement to fix or control prices" in antitrust cases related to private conduct. Opp'n at 21. *Freedom Holdings I*, by contrast, makes clear that no actual agreement needs to be pleaded or shown for a plaintiff to succeed on a preemption claim. *See* 357 F.3d at 223 n.17.

b. Count Two: Vertical Price Fixing

Next, the court addresses Total Wine's contention that the post and hold provisions authorize or compel vertical price fixing in violation of the Sherman Act. *See* Opp'n at 25 ("The Complaint alleged that *each* of the three challenged provisions authorizes, mandates or otherwise pressures industry participants to engage in horizontal price fixing (Count One) and industry-wide vertical price fixing (Count Two), both of which are *per se* illegal."). Notwithstanding Total Wine's insistence that the post and hold provisions can be interpreted as vertical restraints that are preempted by the Sherman Act, nothing in the Complaint plausibly supports such a claim.

Total Wine's Opposition makes clear that the touchstone of Count Two is vertical resale price maintenance. The cases to which Total Wine points the court relate to statutory schemes or private claims much like the minimum retail price provisions. *See*, *e.g.*, Opp'n at 33 (citing and discussing *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 107 S.Ct. 720, 93 L.Ed.2d 667 (1987), and *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 127 S.Ct. 2705, 168 L.Ed.2d 623 (2007)).

Total Wine attempts to bridge the gap between the post and hold provisions—most logically read as authorizing, if any, horizontal price-fixing—and the minimum retail price provisions—most logically read as authorizing, if any, vertical price-fixing—when it explains: "the minimum retail price provisions, especially in conjunction with the post-and-hold regime, create irresistible pressure on retailers to collude 'vertically' with wholesalers to decide what wholesalers should post as the minimum 'bottle' price in any given month." *See* Opp'n at 36. Even here, where Total

Wine comes closest to clarifying how the post and hold provisions might constitute a vertical restraint, its arguments are grounded in the minimum retail price provisions. This makes perfect sense, as the post and hold provisions by themselves contemplate no interaction between actors at different tiers of Connecticut's liquor market; the minimum retail price provisions, by contrast, explicitly tie together the prices posted by wholesalers and those charged by retailers.

Therefore, absent any plausible allegation that the post and hold provisions are vertical restraints, the court need not evaluate whether this restraint is subject to rule of reason analysis or is a *per se* violation of the Sherman Act. Insofar as Count Two articulates a claim relating to the post and hold provisions, it is dismissed.

B. Minimum Retail Price Provisions

Next, the court analyzes the minimum retail price provisions. Again, the court concludes that Total Wine has plausibly alleged that they are a hybrid restraint, but not that they are *per se* violations of the Sherman Act. As was the case with the post and hold provisions, Total Wine's claims challenging the minimum retail price provisions are dismissed for failure to state a claim.

1. Unilateral or Hybrid Restraint

The parties disagree as to whether the minimum retail price provisions qualify as a unilateral or hybrid restraint. *Compare* State Defs. Mem. in Supp. at 5, *and* Trade Ass'ns Mem. in Supp. at 25–26, *and* Brescome Mem. in Supp. at 13–15, *with* Opp'n at 16–17. To reiterate, unilateral restraints are "imposed by government . . . to the exclusion of private control," *Freedom Holdings IV*, 624 F.3d at 50 (quoting *Fisher*, 475 U.S.

at 266, 106 S.Ct. 1045), whereas hybrid restraints "grant[ ] private actors a degree of regulatory control over competition," *id.*

The court's discussion above summarized *Fisher*, 475 U.S. 260, 106 S.Ct. 1045, 89 L.Ed.2d 206 (1986), and *324 Liquor*, 479 U.S. 335, 107 S.Ct. 720, 93 L.Ed.2d 667 (1987), in some detail. *See supra* Part IV.A.1. Though the court does not repeat it here, that analysis informs the court's efforts to answer the question of whether the minimum retail price provisions are best characterized as a unilateral or hybrid restraint. The Supreme Court's decision in *324 Liquor* is of particular importance, as Connecticut's minimum retail price provisions are remarkably similar to the New York statute challenged in that case. The New York statute "impose[d] a regime of resale price maintenance on all New York liquor retailers." *324 Liquor*, 479 U.S. at 341, 107 S.Ct. 720. Connecticut's liquor retailers are similarly bound by the bottle prices posted by wholesalers. *See* Conn. Gen. Stat. § 30–68m(a)(1) (defining "cost" in part by reference to "bottle price").[12]

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[12] The intervenors contend that Connecticut's Liquor Control Act is not "functionally identical" to the New York scheme analyzed in *324 Liquor*, because the latter "allowed wholesalers to manipulate bottle prices untethered to any case prices, effectively controlling resale prices for the same month." *See* Intervenors Reply at 4 n.3. The portion of *324 Liquor* that the intervenors cite for this proposition, *see id.* (citing *324 Liquor*, 479 U.S. at 341, 107 S.Ct. 720), offers no support for their characterization of the scheme at issue in *324 Liquor*. Indeed, it appears that New York's scheme *did* tether bottle prices to case prices, at least to some extent, *see 324 Liquor Corp.*, 479 U.S. at 338, 107 S.Ct. 720 ("The [New York State Liquor Authority], however, has promulgated a rule stating that for cases containing 48 or fewer bottles, the posted bottle price multiplied by the number of bottles in a case must exceed the posted case price by a 'breakage' surcharge of $1.92." (citations omitted)), much like Connecticut's Liquor

There is no reason to believe that the portion of *324 Liquor* classifying New York's statute as a hybrid restraint, *see* 479 U.S. at 345 n.8, 107 S.Ct. 720, is no longer good law, even though its holding that the statute authorized *per se* violations of the Sherman Act has been overruled, *see infra* Part IV.B.2.b.

Nor do the cases cited by the trade associations compel a contrary determination. *See* Trade Ass'ns Mem. in Supp. at 26–27. In *Serlin Wine & Spirit Merchants, Inc. v. Healy*, 512 F.Supp. 936 (D. Conn. 1981), the court had no occasion to opine on whether the challenged liquor pricing scheme was a unilateral or hybrid restraint, because its ruling preceded both *Fisher* and *324 Liquor*. Those two cases—which are, of course, binding on this court—significantly altered the analytical framework courts apply when addressing Sherman Act preemption claims. Next, the Seventh Circuit's opinion in *Flying J, Inc. v. Van Hollen*, 621 F.3d 658 (7th Cir. 2010), explicitly distinguished the challenged motor vehicle fuel minimum markup from the liquor minimum markup ruled invalid in *324 Liquor*. The Seventh Circuit pointed out that, "[a]lthough New York's scheme [in *324 Liquor*] involved a minimum markup just like Wisconsin requires for motor vehicle fuel, the unique nature of New York's scheme authorized wholesalers to manipulate the prices to which the markup was applied." *Flying J*, 621 F.3d at 665 (citing *324 Liquor*, 479 U.S. at 348–

Control Act does, *see* Conn. Gen. Stat. § 30–68m(a)(3) (computing bottle price by adding "an amount that is *not less than*" a statutory minimum, to quotient determined by dividing case price by number of units or bottles). Therefore, to suggest that Connecticut's statutory regime meaningfully differs from New York's scheme analyzed in *324 Liquor* on the grounds that bottle prices in Connecticut are tethered to case price is not helpful.

50, 107 S.Ct. 720); *see also id.* at 666 ("The great vice of the New York scheme was . . . that the wholesalers could sell to the retailers at one price and force the retailers to apply the minimum markup to another." (citing *324 Liquor*, 479 U.S. at 345 n.6, 107 S.Ct. 720)). Clearly then, the Seventh Circuit's opinion in *Flying J* cannot be read to support a determination that Connecticut's minimum retail price provisions—which share the same "great vice" as New York's scheme—are a unilateral restraint.[13]

Because *324 Liquor* determined that a very similar statute was a hybrid restraint, the court concludes that Connecticut's minimum retail price provisions also constitute a hybrid restraint.

2. *Per Se* Violation or Rule of Reason Analysis

Having determined that the minimum retail price provisions are a hybrid restraint, the court must next determine whether they authorize or compel *per se* violations of the Sherman Act or instead qualify for rule of reason analysis. The court will again address Total Wine's claims that the minimum retail price provisions authorize or compel impermissible horizontal *and* vertical price fixing. *See* Opp'n at 25.

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[13] The final case cited by the trade associations—*Little Rock School District v. Borden, Inc.*, No. LR-76-C-41, 1980 WL 1882 (E.D. Ark. Aug. 5, 1980)—is easily distinguished. First, as was the case with *Serlin*, the court's opinion in *Little Rock School District* preceded both *Fisher* and *324 Liquor*. Second, like the markup scheme upheld in *Flying J*, the markup challenged in *Little Rock School District* did not allow "wholesalers [to] sell to the retailers at one price and force the retailers to apply the minimum markup to another," *Flying J*, 621 F.3d at 666. *See Little Rock Sch. Dist.*, 1980 WL 1882, at *1 ("[The] Arkansas statute establishe[d] that it is a criminal violation to price milk at less than cost plus four per cent." (citation omitted)).

a. Count One: Horizontal Price Fixing

Total Wine's Complaint alleges that the minimum retail price provisions "facilitate and impel horizontal price-fixing among Connecticut wholesalers and are hybrid, per se restraints of trade." *See* Compl. ¶ 26. Yet, as was the case with Total Wine's allegations that the post and hold provisions authorized or mandated vertical price fixing, *see supra* Part IV.A.2.b, Total Wine has not plausibly alleged that the minimum retail price provisions authorize or mandate *horizontal* price fixing.

The bulk of Total Wine's response to arguments for dismissal of the horizontal price fixing claim focuses, quite logically, on the post and hold provisions. There is comparatively little discussion of the minimum retail price provisions. *See generally* Opp'n at 25–32. Total Wine has not plausibly alleged that the minimum retail price provisions authorize or mandate any horizontal activity among wholesalers. The closest Total Wine comes to putting forth an explanation for its horizontal price fixing claim regarding the minimum retail price provisions is its argument that "it would be *per se* illegal for alcohol wholesalers in Connecticut to privately agree (a) to collectively set the prices, each month, at which they would sell their products to retailers, *and then hold (i.e. fix)* those prices, and not compete on price, for a full month; (b) *to also collectively set and hold minimum retail prices for those products* and (c) to refuse to afford volume-based discounts to any retailers." *See id.* at 26–27 (final emphasis added). It is clear that Total Wine's horizontal price fixing claim is grounded in the requirement that wholesalers "set and hold . . . prices," rather than the requirement that retailers refrain from selling their products below their statutorily defined "cost."

The minimum retail price provisions dictate the relationship between the prices set by wholesalers and retailers, but clearly do not mandate or authorize any horizontal activity by wholesalers. Total Wine's dogged claims to the contrary are unavailing: it has not plausibly alleged that the minimum retail price provisions mandate or authorize horizontal price fixing of any kind. As such, the court grants the defendants' and intervenors' Motions to Dismiss Count One, insofar as that count challenges the minimum retail price provisions.

b. Count Two: Vertical Price Fixing

Next, the court turns to Total Wine's claim that the minimum retail price provisions mandate or authorize vertical price fixing among manufacturers, wholesalers, and retailers. *See* Compl. ¶¶ 29–33.[14] The defendants and intervenors argue that the Supreme Court's opinion in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 127 S.Ct. 2705, 168 L.Ed.2d 623 (2007), mandates that this court apply rule of reason analysis to the challenged, vertical restraints. *See*, *e.g.*, State Defs. Reply at 5–6; Intervenors Reply at 2–4, 9–10. Total Wine retorts that *324 Liquor*—which held that similar arrangements were *per se* violations of the Sherman Act—remains good law, as *Leegin* did not overturn *324 Liquor* and thus does not govern the court's determination in this case. *See* Opp'n at 33–37.

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[14] Notwithstanding Total Wine's references to manufacturers in Count Two, the minimum retail price provisions operate only in the context of the relationships between wholesalers—who set the bottle price—and retailers—who are not permitted to sell below "cost." *See* Conn. Gen. Stat. §§ 30–68m(a)(1), 30–68m(a)(3), 30–68(b).

In *Leegin*, the Supreme Court held that its opinion in "*Dr. Miles [Medical Co. v. John D. Park & Sons Co*., 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed. 502 (1911)] should be overruled and that vertical price restraints are to be judged by the rule of reason." 551 U.S. at 882, 127 S.Ct. 2705. For nearly a century, *Dr. Miles* had mandated that resale price maintenance agreements were *per se* illegal, rather than subject to rule of reason analysis. *See id.* In overturning *Dr. Miles*, the Supreme Court remarked that "it cannot be stated with any degree of confidence that resale price maintenance 'always or almost always tend[s] to restrict competition and decrease output.'" *Id.* at 894, 127 S.Ct. 2705 (quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp*., 485 U.S. 717, 723, 108 S.Ct. 1515, 99 L.Ed.2d 808 (1988)). Moreover, "[t]he Court's treatment of vertical restraints has progressed away from *Dr. Miles*' strict approach . . . [and] from the opinion's rationales." *Id.* at 900, 127 S.Ct. 2705. The Supreme Court concluded with the broad pronouncement that "the Court's decision in *Dr. Miles* . . . is now overruled. Vertical price restraints are to be judged according to the rule of reason." *Id.* at 907, 127 S.Ct. 2705.

Despite this lack of equivocation in the Court's *Leegin* opinion, Total Wine suggests that *324 Liquor* still mandates a conclusion that the minimum retail price provisions are *per se* unlawful. *See* Opp'n at 33. Total Wine's attempts to buttress this argument are unpersuasive.

First, Total Wine believes that, because *Leegin* did not specifically mention *324 Liquor*, *324 Liquor* remains good law. *See id.* ("Nowhere in *Leegin* did the Supreme Court suggest it was overruling *324 Liquor*."). This justification for continuing to apply *324 Liquor* is entirely unconvincing. *Leegin* repeatedly made clear that

it overruled *Dr. Miles*. *See*, *e.g.*, 551 U.S. at 882, 900, 902, 907, 127 S.Ct. 2705. Though the Supreme Court did not explicitly note all of its prior decisions that relied on *Dr. Miles*—and explicitly note that those decisions were also overruled, insofar as they relied on *Dr. Miles*—it is absolutely clear that such holdings are no longer good law. *324 Liquor* explicitly relied on *Dr. Miles*, among other cases, as support for its starting premise that "[r]esale price maintenance [had] been a *per se* violation of § 1 of the Sherman Act 'since the early years of national antitrust enforcement.'" *324 Liquor*, 479 U.S. at 341, 107 S.Ct. 720 (quoting *Monsanto Co. v. Spray–Rite Svc. Corp.*, 465 U.S. 752, 761, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984)) (citing *Dr. Miles*, 220 U.S. at 404–09, 31 S.Ct. 376). This now-overruled premise was essential to the *324 Liquor* Court's conclusion that the New York statute it analyzed was *per se* illegal. *See id.* at 342–43, 107 S.Ct. 720 (discussing *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), which invalidated a California statute because "it *mandated* resale price maintenance, an activity that has long been regarded as a *per se* violation of the Sherman Act" (quoting *Rice v. Norman Williams Co.*, 458 U.S. 654, 659–60, 102 S.Ct. 3294, 73 L.Ed.2d 1042 (1982))). Therefore, *324 Liquor* does not bind this court to a determination that vertical resale price maintenance schemes are *per se* illegal.

Second, Total Wine asserts that *Leegin* is inapposite because "the leather manufacturer in *Leegin* was the only company at its 'tier' in the market that was a party to the price maintenance agreement. The agreement was *purely vertical*; there was not even a theoretical risk of horizontal collusion." Opp'n at 33. This attempt to distinguish *324 Liquor* from *Leegin* is, again, unconvincing.

Total Wine attempts to carve out exceptions to *Leegin*'s holding that "[v]ertical price restraints are to be judged according to the rule of reason," *see* 551 U.S. at 907, 127 S.Ct. 2705, for "industry-wide restraints" and for restraints with "both vertical *and* horizontal components," *see* Opp'n at 33–34. However, neither carve out has any basis in *Leegin*. Whatever the force of *324 Liquor*'s logic regarding the economic impact of "[m]andatory industrywide resale price fixing," *see* Opp'n at 34 (quoting *324 Liquor*, 479 U.S. at 341–42, 107 S.Ct. 720), *Leegin* makes clear that *324 Liquor*'s reliance on the holding in *Dr. Miles*—that vertical price restraints are *per se* illegal—is no longer valid. Similarly, in the portion of *Leegin* that Total Wine interprets as "[taking] pains to identify several facts that were *not* present" in *Leegin*, *see* Opp'n at 35 (citing *Leegin*, 551 U.S. at 897–98, 127 S.Ct. 2705), the Court was simply identifying factors for lower courts to consider when they undertook the rule of reason analysis that the Court mandated in that case, *see Leegin*, 551 U.S. at 897, 127 S.Ct. 2705 ("If the rule of reason were to apply to vertical price restraints, courts would have to be diligent in eliminating their anticompetitive uses from the market. This is a realistic objective, and certain factors are relevant to the inquiry."). There is thus no suggestion in *Leegin* that the Supreme Court's broad pronouncements should be limited to the facts of the case, or that this court should not apply rule of reason analysis to the minimum retail price provisions at issue here.

Nor do the lower court cases cited by Total Wine offer support for its contention that the minimum retail price provisions are *per se* unlawful. For example, the Seventh Circuit's opinion in *Toys "R" Us v. Federal Trade Commission*, 221 F.3d 928 (7th Cir. 2000), issued seven years before *Leegin*, actually undermines

Total Wine's invitation to distinguish "vertical price fixing that *also* involves horizontal collusion [as] fundamentally different from the type of agreement at issue in *Leegin*," *see* Opp'n at 35. In *Toys "R" Us*, the court's *very first words* noted that "antitrust laws . . . have long drawn a sharp distinction between contractual restrictions that occur up and down a distribution chain—so-called vertical restraints—and restrictions that come about as a result of agreements among competitors, or horizontal restraints." 221 F.3d at 930. Despite the fact that "[t]he agreements took the form of a network of vertical agreements between TRU and the individual manufacturers," *see id.*, the Seventh Circuit ultimately affirmed the FTC's conclusion "that the essence of the agreement network TRU supervised was horizontal," *see id.* at 936. Thus, the Seventh Circuit's conclusion did not rest on a classification of the vertical restraints as "inextricably tied" to the horizontal restraints. *See* Opp'n at 36. Rather, the Seventh Circuit fit the conspiracy in *Toys "R" Us*—which had both vertical and horizontal elements—into just one of those two categories: having determined that their "essence . . . was horizontal," the court then applied *per se* scrutiny to the arrangements. *See Toys "R" Us*, 221 F.3d at 936.[15]

Here, the court—much like the *Toys "R" Us* court—has classified the minimum retail price provisions as just one of the two types of restraints. The court determined that the Complaint did not plausibly allege

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[15] Similarly, though the conspiracy in *United States v. Apple Inc.*, 952 F.Supp.2d 638 (S.D.N.Y. 2013), had horizontal and vertical elements, the primary issue was the manner in which the "vertical actor [was] alleged to have participated in an unlawful *horizontal* agreement." *See* 952 F.Supp.2d at 690–91 (emphasis added).

that the minimum retail price provisions mandated or authorized horizontal price fixing, but rather that the provisions could be challenged regarding their vertical characteristics. *See supra* Parts IV.B.2.a & IV.B.2.b. However, in the wake of *Leegin*, these types of vertical restraints are subject to rule of reason scrutiny, *see Leegin Creative Leather Prods., Inc.*, 551 U.S. at 907, 127 S.Ct. 2705, and thus are not preempted. Therefore, Total Wine's Complaint fails to state a claim of vertical price fixing, with respect to the minimum retail price provisions. Insofar as Count Two challenges the minimum retail price provisions, it is dismissed.

C. Price Discrimination Prohibition

Finally, the court addresses the lawfulness of the price discrimination prohibition challenged by Total Wine. The price discrimination prohibition mandates that wholesalers sell a given product to all retailers at the same price. *See* Conn. Gen. Stat. § 30–68k. As described in the following discussion, the court concludes: (1) that Total Wine has not plausibly alleged that the price discrimination prohibition is a hybrid restraint, but is instead a unilateral restraint outside the scope of the Sherman Act; and (2) having determined that the price discrimination prohibition is a unilateral restraint, the court need not undertake the inquiry of whether it is *per se* illegal or would be subject to rule of reason analysis.

As was the case with each of the previously discussed provisions, the parties dispute whether the price discrimination prohibition is a unilateral or hybrid restraint. *Compare* State Defs. Mem. in Supp. at 4–5, *and* Trade Ass'ns Mem. in Supp. at 25–26, *and* Brecome Mem. in Supp. at 13–15, *with* Opp'n at 17–19. The court will not repeat its analysis of the frame-

work governing this question. *See supra* Part IV.A.1. That discussion is incorporated here by reference. Briefly, however, the relevant case law provides that unilateral restraints are those "imposed by government . . . to the exclusion of private control," *Freedom Holdings IV*, 624 F.3d at 50 (quoting *Fisher*, 475 U.S. at 266, 106 S.Ct. 1045), while hybrid restraints "grant[ ] private actors a degree of regulatory control over competition," *id.*

Again, the court believes this question is best approached by using the Supreme Court's decisions in *Fisher v. City of Berkeley, California*, 475 U.S. 260, 106 S.Ct. 1045, 89 L.Ed.2d 206 (1986), and *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 107 S.Ct. 720, 93 L.Ed.2d 667 (1987), as guideposts. Unlike the post and hold provisions and the minimum retail price provisions, the price discrimination prohibition is more like the restraint at issue in *Fisher* than the one analyzed in *324 Liquor*. The city ordinance upheld in *Fisher* set a ceiling, capping the rents that residential landlords could charge. *See* 475 U.S. at 262, 106 S.Ct. 1045. The court noted that Berkeley's ordinance "place[d] complete control over maximum rent levels exclusively in the hands of the Rent Stabilization Board. Not just the controls themselves but also the rent ceilings they mandate[d] [had] been unilaterally imposed on landlords by the city." *Fisher*, 475 U.S. at 269, 106 S.Ct. 1045. By contrast, in *324 Liquor*, wholesalers were obligated by statute to post their own monthly price schedules, but New York did not monitor or regulate those posted prices. *See 324 Liquor*, 479 U.S. at 345, 107 S.Ct. 720.

Here, the price discrimination prohibition does not "grant[ ] private actors a degree of regulatory control over competition," such that the prohibition is a hybrid restraint. *See Freedom Holdings IV*, 624 F.3d at 50

(citing, *inter alia*, *324 Liquor*, 479 U.S. at 345–46 & n.8, 107 S.Ct. 720). Instead, Connecticut simply prohibits liquor wholesalers from charging different prices to different retailers. Although wholesalers *may choose* what price they will charge all retailers, they are prohibited from charging different prices.

Total Wine is incorrect that the price discrimination prohibition is a hybrid restraint, let alone "a quintessential hybrid restraint." Opp'n at 17. In support of this contention, Total Wine first claims that, "[t]o constitute a unilateral restraint, a statute must lodge exclusive authority to set prices with public officials." Opp'n at 17–18 (citing *Midcal*, 445 U.S. at 105–06, 100 S.Ct. 937).[16] This statement is squarely at odds with *Fisher*, where the city ordinance bestowed on local officials the authority to set a ceiling on rents to be charged, but certainly did not lodge exclusive authority to *set* prices with them. *See Fisher*, 475 U.S. at 262–63, 106 S.Ct. 1045.

The Fourth Circuit's view that a similar price discrimination prohibition was inseparable from Maryland's post and hold provisions is also unpersuasive. *See* Opp'n at 18 (quoting *TFWS, Inc. v. Schaefer* ("*TFWS I*"), 242 F.3d 198, 209 (4th Cir. 2001); *TFWS, Inc. v. Franchot* ("*TFWS II*"), 572 F.3d 186, 193 (4th Cir. 2009)). Maryland apparently did not raise the issue of severance in its initial appeal. *See TFWS II*, 572 F.3d at 193. That being the case, the Fourth Circuit was bound in the later appeal by its conclusion in the first appeal that the price discrimination prohibi-

[16] The section of *Midcal* to which Total Wine cites offers no support for its assertion: Total Wine points the court to a section of the decision discussing *Parker* immunity, not the distinction between unilateral and hybrid restraints. *See Midcal*, 445 U.S. at 105–06, 100 S.Ct. 937.

tion was so wrapped up in the hybrid post and hold provisions as to also be a hybrid restraint. *See id.* at 193–94 ("Maryland presents its argument for severance of its volume discount ban as though for review in the first instance, and does not attempt to meet the high burden of showing that our holding in *TFWS I* was clearly erroneous and would work a manifest injustice."). By contrast, the state defendants here have raised the issue of severability in briefing their Motion to Dismiss. *See* State Defs. Reply at 3–4 ("[A] court must look at each specific state law separately . . . .").

As the state defendants point out, the challenged provisions "act separately and address different conduct." *See* State Defs. Reply at 4. The fact that the challenged provisions are all related does not mandate a conclusion that, having determined that two of them are hybrid restraints, the third is as well. *In Costco Wholesale Corp*., the Ninth Circuit was unpersuaded that other challenged provisions of Washington's liquor regulations needed to "be considered part-and-parcel of the posting scheme . . . ." 522 F.3d at 897–98. Indeed, relying in part on principles of severability, the court determined that the Washington provisions analogous to Connecticut's price discrimination prohibition were a unilateral restraint. *See id.* at 898–99.[17]

Ultimately, the fact that the challenged provisions govern related aspects of the liquor market does not render them analytically inseparable. Analyzing the

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[17] Admittedly, the Ninth Circuit's analysis relied in part on its conclusion that the post and hold provisions were preempted by the Sherman Act. *See Costco Wholesale Corp.*, 522 F.3d at 898. Most relevantly here, however, the Ninth Circuit did not view the challenged restraints as impossible to separate from one another, as Total Wine suggests the court should consider the challenged provisions in this case.

price discrimination prohibition on its own, the court concludes that Total Wine has not plausibly alleged that the prohibition is a hybrid rather than a unilateral restraint. That being the case, it need not proceed to the second step of the preemption analysis and decide whether the restraint is a *per se* violation of the Sherman Act: because the price discrimination prohibition is a unilateral restraint, it is entirely outside the scope of the Sherman Act. *See supra* Part III.B. Therefore, the state defendants' and intervenors' Motions to Dismiss Total Wine's challenge to the price discrimination prohibition are granted.

V. CONCLUSION

For the reasons set forth above, the Motions to Dismiss (Doc. Nos. 38, 66, 80) are GRANTED. Total Wine's challenges to the post and hold provisions and minimum retail price provisions are dismissed, because these provisions constitute hybrid restraints that receive rule of reason scrutiny and therefore cannot be preempted. Total Wine's claim that the price discrimination prohibition is preempted is also dismissed, because that provision is a unilateral restraint outside the scope of the Sherman Act.

SO ORDERED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 6th day of September, two thousand nineteen.

No. 17-2003

CONNECTICUT FINE WINE AND SPIRITS, LLC, d/b/a, TOTAL WINE & MORE,

Plaintiff-Appellant,

v.

COMMISSIONER MICHELLE H. SEAGULL, DEPARTMENT OF CONSUMER PROTECTION, JOHN SUCHY, DIRECTOR, DIVISION OF LIQUOR CONTROL,

Defendants-Appellees,

WINE & SPIRITS WHOLESALERS OF CONNECTICUT, INC., CONNECTICUT BEER WHOLESALERS ASSOCIATION, INC., CONNECTICUT RESTAURANT ASSOCIATION, CONNECTICUT PACKAGE STORES ASSOCIATION, INC., BRESCOME BARTON, INC.,

Intervenors-Defendants-Appellees.

Present: ROBERT A. KATZMANN, *Chief Judge*, JOSÉ A. CABRANES, ROSEMARY S. POOLER, PETER W. HALL, DEBRA ANN LIVINGSTON, DENNY CHIN, RAYMOND J. LOHIER, JR., SUSAN L. CARNEY, RICHARD J. SULLIVAN, JOSEPH F. BIANCO, MICHAEL H. PARK, *Circuit Judges.*

Following disposition of this appeal on February 20, 2019, an active judge of the Court requested a poll on whether to rehear the case *en banc*. A poll having been conducted and there being no majority favoring *en banc* review, rehearing *en banc* is hereby DENIED.

Richard J. Sullivan, *Circuit Judge*, joined by José A. Cabranes, Debra Ann Livingston, and Michael H. Park, *Circuit Judges*, dissents by opinion from the denial of rehearing *en banc*.

FOR THE COURT:

CATHERINE O'HAGAN WOLFE, CLERK

[SEAL]

/s/ Catherine O'Hagan Wolfe

APPENDIX D

UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT

No. 17-2003

CONNECTICUT FINE WINE AND SPIRITS, LLC, d/b/a,
TOTAL WINE & MORE,

Plaintiff-Appellant,

v.

COMMISSIONER MICHELLE H. SEAGULL,
DEPARTMENT OF CONSUMER PROTECTION,
JOHN SUCHY, DIRECTOR, DIVISION OF LIQUOR CONTROL,

Defendants-Appellees,

WINE & SPIRITS WHOLESALERS OF CONNECTICUT, INC.,
CONNECTICUT BEER WHOLESALERS ASSOCIATION, INC.,
CONNECTICUT RESTAURANT ASSOCIATION,
CONNECTICUT PACKAGE STORES ASSOCIATION, INC.,
BRESCOME BARTON, INC.,

Intervenors-Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of New York

September 6, 2019

Present: ROBERT A. KATZMANN, *Chief Judge*, JOSÉ A. CABRANES, ROSEMARY S. POOLER, PETER W. HALL, DEBRA ANN LIVINGSTON,

DENNY CHIN, RAYMOND J. LOHIER, JR., SUSAN L. CARNEY, RICHARD J. SULLIVAN, JOSEPH F. BIANCO, MICHAEL H. PARK, *Circuit Judges.*

OPINION

Richard J. Sullivan, *Circuit Judge*, joined by José A. Cabranes, Debra Ann Livingston, and Michael H. Park, *Circuit Judges*, dissenting from the denial of rehearing *en banc*:

Today our Court declines to reconsider *en banc* the panel's holding that Connecticut's "post-and-hold" alcohol pricing statute is consistent with Section 1 of the Sherman Act. Although that holding was clearly compelled by our prior decision in *Battipaglia v. New York State Liquor Authority*, 745 F.2d 166 (2d Cir. 1984), I believe we should have taken this opportunity to join federal courts across the country in rejecting *Battipaglia*'s majority opinion in favor of Judge Winter's forceful dissent in that case. As a result of this refusal to grant rehearing, we perpetuate a longstanding circuit split and continue to allow de facto state-sanctioned cartels of alcohol wholesalers to impose artificially high prices on consumers and retailers across all three states in our Circuit. That strikes me as an unfortunate consequence, particularly when the correct legal analysis has been staring us in the face for more than thirty-five years. Accordingly, I respectfully dissent from the denial of rehearing *en banc*.

I.

Connecticut's post-and-hold scheme contains three main components. First, alcohol wholesalers must share their prices with market participants on a monthly

basis (the "post"). Conn. Gen. Stat. § 30-63(c). Second, wholesalers have four days to adjust their posted prices, except that they cannot go below the lowest posted price. *Id.* Third, at the end of the price-adjustment period, wholesalers must adhere to their adjusted prices for one month (the "hold"). *Id*.

A divided panel of our Court upheld New York's nearly identical post-and-hold scheme in *Battipaglia*. Writing for the majority, Judge Friendly concluded that such a scheme did not mandate or authorize conduct that would be *per se* illegal had it been the subject of a private agreement. 745 F.2d at 173–75 (citing *Rice v. Norman Williams Co.*, 458 U.S. 654, 659–61, 102 S.Ct. 3294, 73 L.Ed.2d 1042 (1982)). In so concluding, Judge Friendly focused mainly on the post, observing that "[t]he Supreme Court has never held that the exchange of price information . . . 'necessarily constitutes a violation of the antitrust laws in all cases.'" *Id*. at 174 (quoting *Rice*, 458 U.S. at 661, 102 S.Ct. 3294).

That reasoning, however, failed to account for the *per se* illegality of the hold. As Judge Winter explained in dissent, a "requirement of adherence to announced prices has been uniformly held illegal without regard to its reasonableness." *Id*. at 179 (Winter, J., dissenting) (citing *Sugar Inst. v. United States*, 297 U.S. 553, 601, 56 S.Ct. 629, 80 L.Ed. 859 (1936) (explaining that "steps . . . to secure adherence, without deviation, to prices and terms . . . announced" are illegal)); *see also Catalano, Inc. v. Target Sales, Inc*., 446 U.S. 643, 649–50, 100 S.Ct. 1925, 64 L.Ed.2d 580 (1980) (per curiam) (recognizing the "plain distinction between the lawful right to publish prices . . . on the one hand, and an agreement among competitors limiting action with respect to the published prices, on the other").

In the years following our decision in *Battipaglia*, courts outside our Circuit have – without exception – rejected Judge Friendly's position and instead followed Judge Winter's dissent in striking down similar post-and-hold laws. *See Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 893 n.15, 894–96 (9th Cir. 2008) (noting that "Judge Friendly's antitrust analysis strangely failed to account for the New York requirement that posted prices be adhered to by wholesalers," and agreeing with Judge Winter's "pointed[ ] observ-[ation] in dissent" that a post-*and-hold* requirement was *per se* unlawful); *TFWS, Inc. v. Schaefer*, 242 F.3d 198, 209–10 (4th Cir. 2001) (noting that "*Battipaglia* has not been followed elsewhere" and concluding that it was "obvious" that "agreements to adhere to previously announced prices are unlawful *per se*"); *Canterbury Liquors & Pantry v. Sullivan*, 16 F. Supp. 2d 41, 47 (D. Mass. 1998) ("I am persuaded by the reasoning and statements of the Supreme Court to concur with . . . Judge Winter in this case."); *see also Miller v. Hedlund*, 813 F.2d 1344, 1348–51 (9th Cir. 1987) (holding Oregon's post-and-hold law preempted by the Sherman Act); *Beer & Pop Warehouse v. Jones*, 41 F. Supp. 2d 552, 560–62 (M.D. Pa. 1999) (similar). A leading antitrust treatise has also endorsed Judge Winter's position. *See* Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 217b2 (4th ed. 2013) ("Given the great danger that agreements to post and adhere will facilitate horizontal collusion, the dissent's position [in *Battipaglia*] is more consistent with [Supreme Court precedent].").

Despite this consensus, the panel opinion doubles down on *Battipaglia*, concluding that, "[i]f anything, its reasoning has been fortified by intervening decisions like *Fisher* [*v. City of Berkeley*, 475 U.S. 260, 106 S.Ct. 1045, 89 L.Ed.2d 206 (1986)] and [*Bell Atlantic*

Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)]." *Conn. Fine Wine & Spirits, LLC v. Seagull*, 932 F.3d 22, 39 (2d Cir. 2019) *as amended* (July 29, 2019). According to the panel, *Fisher* permits state post-and-hold laws unless they mandate or authorize actual "concerted action" among alcohol wholesalers. *Id*. at 38. Similarly, the panel likens alcohol wholesalers to the telecommunications carriers held to be engaging in lawful parallel conduct in *Twombly*. *Id.* at 38–39.

The panel's reasoning stretches *Fisher* and *Twombly* too far. In *Fisher*, the Supreme Court upheld a Berkeley ordinance that – unlike a post-and-hold law – unilaterally imposed rent ceilings upon landlords "to the exclusion of private control." 475 U.S. at 266, 106 S.Ct. 1045. In doing so, the Court distinguished such "unilateral" restraints, which are not subject to antitrust preemption, from "hybrid" restraints, which grant private actors "a degree of private regulatory power." *Id*. at 267–68, 106 S.Ct. 1045.

Although the panel opinion "do[es] not take issue" with the district court's classification of Connecticut's post-and-hold law as a hybrid restraint, it cites *Fisher* for the proposition that preemption is not warranted unless the statute in question authorizes or compels actual "concerted action" among private parties. *Conn. Fine Wine & Spirits, LLC*, 932 F.3d at 38. But again, *Fisher* requires no such thing. As the Supreme Court clarified only a year later in *324 Liquor Corp. v. Duffy*, a hybrid restraint may be attacked under *Fisher* even when "there is no 'contract, combination . . . , or conspiracy, in restraint of trade.'" 479 U.S. 335, 345 n.8, 107 S.Ct. 720, 93 L.Ed.2d 667 (1987) (quoting 15 U.S.C. § 1); *see also Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 223 n.17 (2d Cir. 2004) ("[S]ince our decision

in *Battipaglia*, the Supreme Court has made it clear that an actual 'contract, combination or conspiracy' need not be shown for a state statute to be preempted by the Sherman Act." (quoting *324 Liquor Corp*., 479 U.S. at 345 n.8, 107 S.Ct. 720)). Likewise, *Twombly* did not involve a hybrid restraint (or any state-imposed restraint for that matter), and I am aware of no case, other than the panel opinion in this case, extending *Twombly*'s antitrust holding to the special context of hybrid restraints.

Moreover, the panel opinion's overriding focus on concerted action overlooks the economic realities of a post-and-hold pricing scheme. The problem with Connecticut's law is not that it affirmatively compels wholesalers to collude in order to fix prices, but rather that it provides no incentive – or ability – for wholesalers to compete on price. *See Costco Wholesale Corp*., 522 F.3d at 896 (citing George Stigler, *A Theory of Oligopoly*, 72 J. Pol. Econ. 44 (1964)); *Miller*, 813 F.2d at 1349 ("Simply ending the analysis because of the lack of concerted activity among the wholesalers fails to take into account the presence and effect of the state's involvement in the matter."). Connecticut has imposed a scheme whereby wholesalers are encouraged to pick inflated prices for alcohol, knowing that they will always be able to match the price of a competitor. By contrast, a market entrant hoping to gain market share by lowering prices will inevitably be frustrated by the adjust-and-hold provisions of the statute, which will prevent the entrant from further reducing prices. Since wholesalers will never be punished for artificially high prices, or rewarded for market-based low prices, they are likely to eventually degenerate into a de facto cartel in which wholesalers vie to post the highest possible prices without fear of market reprisal.

As courts across the country have recognized, these are precisely the kinds of anticompetitive effects that doomed similar liquor laws under the Sherman Act. *See 324 Liquor Corp*., 479 U.S. at 342, 107 S.Ct. 720 (striking down liquor laws that were "virtually certain" to reduce competition and that may have "facilitat[ed] cartelization"); *Costco Wholesale Corp*., 522 F.3d at 896 ("State enforcement of adherence to privately set, supra-competitive prices is precisely the danger which the Supreme Court envisioned in crafting the hybrid and active supervision tests."); *TFWS, Inc*., 242 F.3d at 214 (Luttig, J., concurring) ("[T]he Maryland regulations before us are not materially different from the regulations in *324 Liquor* . . . ."). Thus, intervening Supreme Court case law has undermined, not fortified, *Battipaglia*'s holding.

II.

Of course, the mere fact that *Battipaglia* was wrongly decided does not, by itself, justify *en banc* review in this case. *En banc* rehearing is generally warranted only when (1) necessary to "secure or maintain uniformity of the court's decisions," or (2) the case "involves a question of exceptional importance." Fed. R. App. P. 35(a). But the latter condition is easily satisfied here.

First, this case perpetuates a circuit split between our Circuit and the Ninth and Fourth Circuits, *see Costco Wholesale Corp*., 522 F.3d at 894–96; *TFWS, Inc.*, 242 F.3d at 210; *Miller*, 813 F.2d at 1348–51, the exact kind of situation that the Federal Rules of Appellate Procedure contemplate as appropriate for *en banc* rehearing, *see* Fed. R. App. P. 35(b)(1)(B); *id*., Advisory Committee Notes (1998 Amendments) ("[A] situation that may be a strong candidate for a rehearing *en banc* is one in which the circuit persists in a conflict created by a pre-existing decision of the same circuit and no

other circuits have joined on that side of the conflict."). Indeed, the circuit split in this case is particularly well-suited for resolution by our *en banc* court in light of its longstanding duration (thirty-two years since the Ninth Circuit's contrary decision in *Miller v. Hedlund*), developments in Supreme Court case law since *Battipaglia* was decided thirty-five years ago, and the formidable collection of authorities now rejecting *Battipaglia*'s holding.[1] *See supra* at 121–22.

Second, post-and-hold laws impose serious and well-recognized harms on consumers and retailers across all three states in our Circuit. *See, e.g.*, James C. Cooper & Joshua D. Wright, *Alcohol, Antitrust, and the 21st Amendment: An Empirical Examination of Post and Hold Laws*, 32 Int'l Rev. L. & Econ. 379, 390 (2012) ("Our results suggest that constraining anti-trust enforcement [against post-and-hold regimes] . . . would result in lower consumer welfare for alcoholic beverage consumers with no offsetting reduction in social harms."); *see also* Christopher T. Conlon & Nirupama Rao, *The Price of Liquor is Too Damn High: Alcohol Taxation and Market Structure* 34 (NYU Wagner Research Paper No. 2610118, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2610118

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[1] Shortly before *Battipaglia* was decided, two state supreme courts ruled that their states' post-and-hold laws were unilateral restraints not subject to preemption under the Sherman Act. *See Intercontinental Packaging Co. v. Novak*, 348 N.W.2d 330, 337–38 (Minn. 1984); *Wine & Spirits Specialty, Inc. v. Daniel*, 666 S.W.2d 416, 418–19 (Mo. 1984). Like *Battipaglia*, those cases have not been followed elsewhere, and their reasoning has been undermined by the Supreme Court's subsequent development of the "hybrid restraint" classification in *Fisher* and *324 Liquor Corp*. – a classification that, as the panel opinion acknowledges, applies to Connecticut's post-and-hold law. *Conn. Fine Wine & Spirits, LLC*, 932 F.3d at 38.

(demonstrating "how [post-and-hold] legislation, which governs wholesale alcohol pricing in many states, acts as a device to facilitate collusion"). Although this case directly concerns only Connecticut's post-and-hold statute, similar laws also exist in New York and Vermont. *See* N.Y. Alco. Bev. Cont. Law § 101-b(4) (liquor and wine post-and-hold law); 14-1 Vt. Code R. § 8 (beer post-and-hold law).[2] Surely the widespread anticompetitive harms that post-and-hold laws inflict across our Circuit provide sufficient justification to merit revisiting *Battipaglia*, a case that has become an outlier over the last three and a half decades.

* * *

Members of our Court have frequently invoked the "virtues of restraint" – including judicial economy, collegiality, and "our Circuit's longstanding tradition of general deference to panel adjudication" – to counsel against *en banc* review, even where a case presents a question of exceptional importance. *United States v. Taylor*, 752 F.3d 254, 256 (2d Cir. 2014) (Cabranes, J., dissenting from the denial of rehearing *en banc*) (quotation marks and citations omitted). But while the propriety of assigning these "virtues" such significant

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[2] Unlike Connecticut's and New York's post-and-hold schemes, Vermont's scheme does not include an "adjust" provision under which wholesalers have a short period of time to match the lowest posted price before the hold takes effect. Nevertheless, while an adjust provision exacerbates the anti-competitive effects of post-and-hold laws, such laws are sufficiently anticompetitive on their own to violate the Sherman Act. *See Costco Wholesale Corp.*, 522 F.3d at 896 n.18 ("[The absence of an adjust provision] will not save the [post-and-hold] scheme from per se condemnation. That firms are not empowered immediately to alter their prices to meet a lower price or to adjust to a higher price does not alter the conclusion that in the long run, prices for beer and wine are more likely to be uniform and stable because of tacit collusion.")

weight may be fairly debated as a general matter, such considerations are hardly implicated under the unusual circumstances of this case, which turns on a 1984 split decision that has been undermined by intervening Supreme Court case law and roundly rejected by courts and commentators alike. Here, it would have been simple enough to grant *en banc* rehearing and largely adopt the reasoning of Judge Winter's prescient dissent in *Battipaglia*. Instead, we have chosen to leave in place a longstanding circuit split and to permit artificially high prices for alcohol consumers and retailers throughout our Circuit. Needless to say, I consider this a missed opportunity, and, for the reasons discussed above, I respectfully dissent.

APPENDIX E

Conn. Gen. Stat. § 30-63

Effective: June 5, 2019

§ 30-63. Registration of brands, fees. Posting and notice of prices. Brand registration of fortified wine. When departmental approval prohibited

* * *

(b) No manufacturer, wholesaler or out-of-state shipper permittee shall discriminate in any manner in price discounts between one permittee and another on sales or purchases of alcoholic liquors bearing the same brand or trade name and of like age, size and quality, nor shall such manufacturer, wholesaler or out-of-state shipper permittee allow in any form any discount, rebate, free goods, allowance or other inducement for the purpose of making sales or purchases. Nothing in this subsection shall be construed to prohibit beer manufacturers, beer wholesalers or beer out-of-state shipper permittees from differentiating in the manner in which their products are packaged on the basis of on-site or off-site consumption.

(c) For alcoholic liquor other than beer, each manufacturer, wholesaler and out-of-state shipper permittee shall post with the department, on a monthly basis, the bottle, can and case price of any brand of goods offered for sale in Connecticut, which price when so posted shall be the controlling price for such manufacturer, wholesaler or out-of-state permittee for the month following such posting. On and after July 1, 2005, for beer, each manufacturer, wholesaler and out-of-state shipper permittee shall post with the department, on a monthly basis, the bottle, can and case price, and the price per keg or barrel or fractional unit

thereof for any brand of goods offered for sale in Connecticut which price when so posted shall be the controlling price for such brand of goods offered for sale in this state for the month following such posting. Such manufacturer, wholesaler and out-of-state shipper permittee may also post additional prices for such bottle, can, case, keg or barrel or fractional unit thereof for a specified portion of the following month which prices when so posted shall be the controlling prices for such bottle, can, case, keg or barrel or fractional unit thereof for such specified portion of the following month. Notice of all manufacturer, wholesaler and out-of-state shipper permittee prices shall be given to permittee purchasers by direct mail, Internet web site or advertising in a trade publication having circulation among the retail permittees except a wholesaler permittee may give such notice by hand delivery. Price postings with the department setting forth wholesale prices to retailers shall be available for inspection during regular business hours at the offices of the department by manufacturers and wholesalers until three o'clock p.m. of the first business day after the last day for posting prices. A manufacturer or wholesaler may amend such manufacturer's or wholesaler's posted price for any month to meet a lower price posted by another manufacturer or wholesaler with respect to alcoholic liquor bearing the same brand or trade name and of like age, vintage, quality and unit container size; provided that any such amended price posting shall be filed before three o'clock p.m. of the fourth business day after the last day for posting prices; and provided further such amended posting shall not set forth prices lower than those being met. Any manufacturer or wholesaler posting an amended price shall, at the time of posting, identify in writing the specific posting being met. On and after July 1, 2005, all

wholesaler postings, other than for beer, for the following month shall be provided to retail permittees not later than the twenty-seventh day of the month prior to such posting. All wholesaler postings for beer shall be provided to retail permittees not later than the twentieth day of the month prior to such posting.

* * *

Conn. Gen. Stat. § 30-68k

§ 30-68k. Price discrimination prohibited

No holder of any wholesaler's permit shall ship, transport or deliver within this state or any territory therein or sell or offer for sale, to a purchaser holding a permit for the sale of alcoholic liquor for on or off premises consumption, any brand of alcoholic liquor, including cordials, as defined in section 30-1, at a bottle, can or case price higher than the lowest price at which such item is then being sold or offered for sale or shipped, transported or delivered by such wholesaler to any other such purchaser to which the wholesaler sells, offers for sale, ships, transports or delivers that brand of alcoholic liquor within this state.

* * *

Conn. Gen. Stat. § 30-68m

Effective: October 1, 2014

§ 30-68m. Retail permittees; sales below cost prohibited; exception

(a) For the purposes of this section:

(1) "Cost" for a retail permittee means (A) for alcoholic liquor other than beer, the posted bottle price from the wholesaler plus any charge for shipping or delivery to the retail permittee's place of business paid by the retail permittee in addition to the posted price,

and (B) for beer, the lowest posted price during the month in which the retail permittee is selling plus any charge for shipping or delivery to the retail permittee's place of business paid by the retail permittee in addition to the price originally paid by the retail permittee;

(2) "Retail permittee" means the holder of a permit allowing the sale of alcoholic liquor for off-premises consumption; and

(3) "Bottle price" means the price per unit of the contents of any case of alcoholic liquor, other than beer, and shall be arrived at by dividing the case price by the number of units or bottles making up such case price and adding to the quotient an amount that is not less than the following: A unit or bottle one-half pint or two hundred milliliters or less, two cents; a unit or bottle more than one-half pint or two hundred milliliters but not more than one pint or five hundred milliliters, four cents; and a unit or bottle greater than one pint or five hundred milliliters, eight cents.

(b) No retail permittee shall sell alcoholic liquor at a price below his or her cost.

(c) Notwithstanding the provisions of subsection (b) of this section, a retail permittee may sell one beer item identified by a stock-keeping unit number or one item of alcoholic liquor other than beer identified by a stock-keeping unit number below his or her cost each month, provided the item is not sold at less than ninety per cent of such retail permittee's cost. A retail permittee who intends to sell an item below cost pursuant to this subsection shall notify the Department of Consumer Protection of such sale not later than the second day of the month such item will be offered for sale.

Conn. Gen. Stat. § 30-94

Effective: June 9, 2017

§ 30-94. Gifts, loans and discounts prohibited between permittees. Tie-in sales. Floor stock allowance. Depletion allowance

(a) No permittee or group of permittees licensed under the provisions of this chapter, in any transaction with another permittee or group of permittees, shall directly or indirectly offer, furnish or receive any free goods, gratuities, gifts, prizes, coupons, premiums, combination items, quantity prices, cash returns, loans, discounts, guarantees, special prices or other inducements in connection with the sale of alcoholic beverages or liquors. No such permittee shall require any purchaser to accept additional alcoholic liquors in order to make a purchase of any other alcoholic liquor.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Case No. ___

CONNECTICUT FINE WINE & SPIRITS, LLC, d/b/a
TOTAL WINE & MORE
6600 Rockledge Drive
Bethesda, Maryland 21007,

Plaintiff,

v.

JONATHAN A. HARRIS, Commissioner
Department of Consumer Protection
165 Capitol Ave.
Hartford, CT 06106

JOHN SUCHY, Director
Division of Liquor Control
165 Capitol Ave.
Hartford, CT 06106

Defendants.

COMPLAINT

Plaintiff Connecticut Fine Wine & Spirits, LLC d/b/a Total Wine & More (hereinafter "Total Wine & More" or "Plaintiff"), hereby sues defendants Jonathan A. Harris, in his official capacity as Commissioner of the Connecticut Department of Consumer Protection, and John Suchy, in his official capacity as Director of the Connecticut Division of Liquor Control, for injunctive and declaratory relief and states:

1. Plaintiff is a Connecticut limited liability company with a principal place of business located in Bethesda, Maryland. Total Wine & More currently owns and operates four retail beverage stores in Connecticut, all doing business as Total Wine & More.

2. Defendant Jonathan A. Harris is the Commissioner of the Connecticut Department of Consumer Protection. Mr. Harris has a duty to enforce the provisions of Connecticut's Alcoholic Beverage Code. Plaintiff has sued Mr. Harris in his official capacity only, in order to challenge the unlawful pricing provisions cited herein.

3. Defendant John Suchy is the Director of the Division of Liquor Control. Mr. Suchy has a duty to enforce the provisions of Connecticut's Alcoholic Beverage Code, including the pricing provisions cited herein. Plaintiff has sued Mr. Suchy in his official capacity only, in order to challenge the unlawful pricing provisions cited herein.

JURISDICTION AND VENUE

4. This action arises under 15 U.S.C. §§ 1, 15, and 26 and 28 U.S.C. §§ 2201 and 2202.

5. This Court has jurisdiction over this action pursuant to 15 U.S.C. §§ 4 and 26 and 28 U.S.C. §§ 1331, 2201, and 2202.

6. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) because all defendants are residents of this State and district, and because a substantial part of the events or omissions giving rise to the claim occurred in this district.

ALLEGATIONS OF FACT

7. Total Wine & More is affiliated with other entities that together own and operate retail licensees of alcoholic beverages in approximately 21 states, all trading under the same name. The Total Wine & More affiliated companies, headquartered in Bethesda, Maryland, are the country's largest independent retailers of fine wine and spirits. Stores that operate under the Total Wine & More name are committed to offering the nation's best selection of alcoholic beverages, and to having the lowest prices on wine, spirits, and beer.

8. Plaintiff opened its first Connecticut store, in Norwalk, in December 2012. Since then Plaintiff has opened stores in Milford, Manchester, and West Hartford.

9. Total Wine & More holds Connecticut package store permits for its four operating locations for the benefit of each of its Connecticut stores and the Total Wine & More brand.

10. Since opening its first store in Delaware in 1991, the Total Wine & More brand has received a number of awards and recognition for its vast selection of products, combined with low everyday prices and expertly trained wine associates, including the beverage industry's national retailer of the year award in 2004, 2006, 2008, and 2014. Total Wine & More has endeavored, through the operation of its retail stores in Connecticut, to implement the Total Wine & More philosophy of offering the best prices, while also offering superior service with the best selection in clean, spacious, well-organized and customer friendly stores.

11. Total Wine & More has been prevented from offering the best prices by an anticompetitive regime

of statutes and regulations that intentionally promotes horizontal and vertical price-fixing by Connecticut wholesalers of alcoholic beverages.

12. Under Connecticut law, state-licensed manufacturers (vintners, distillers and national and international distribution firms) and state-licensed wholesalers of wine and spirits must post with the Department of Consumer Affairs, on a monthly basis, a "bottle price" and a "case price" for goods sold to retailers in Connecticut. The posted prices control the prices offered for the following month. All posted prices are distributed to industry participants, including manufacturers and wholesalers, and those participants may amend their own posted prices to meet a competitor's lower price. *See* Conn. Gen. Stat. § 30-63; Conn. Adm. Code § 30-6-B12.

13. Under Connecticut law, retailers like Total Wine & More are prohibited from selling their inventory at prices below the retailers' statutorily defined "cost," Conn. Gen. Stat. § 30-68m(b), which generally means, for wine and spirits, the posted "bottle price" from the wholesaler plus a markup for shipping and delivery. *See* Conn. Gen. Stat. §§ 30-68m(a)(1).

14. Under Connecticut law, wholesalers of alcoholic beverages are barred from offering volume discounts to retailers. *See* Conn. Gen. Stat. §§ 30-68k, 30-63(b); *see also id.* § 30-94(b); Conn. Adm. Code § 30-6-A29(a). The volume-discount ban facilitates and reinforces the mandatory price-posting laws, which themselves facilitate and impel vertical and horizontal price-fixing among manufacturers and wholesalers. (The statutes and regulations cited in paragraphs 12 through 14 are referred to as the "challenged provisions.")

15. Under Connecticut law, the retail sale of alcoholic beverages is prohibited except as permitted by the Liquor Control Act, including the challenged provisions. Conn. Gen. Stat. § 30-74. Any person or permittee who sells in violation of the Liquor Control Act may be liable for fines up to $1000 or imprisonment up to one year or both, unless the Act establishes a separate specific penalty. *Id.* § 30-113. In addition, the Department of Consumer Affairs has authority to suspend and revoke a retailer's permit for violations of the provisions of the Liquor Control Act. *Id.* § 30-55.

16. Connecticut manufacturers and wholesalers have used the challenged provisions of Connecticut law to fix and maintain prices at levels substantially above what fair and ordinary market forces would dictate. For example, wholesalers set bottle and case prices and share that information with each other through the state-mandated posting system, and then consistently coordinate their prices to match their competitors' posted prices, resulting in horizontal price-fixing at the wholesale level.

17. Wholesalers also engage in vertical price-fixing by setting high "minimum bottle prices," derived from case prices during "on-post" months. Wholesalers typically lower their monthly case prices periodically throughout the year during regular "off-post" months, but without lowering the corresponding minimum bottle price or without lowering the bottle price in proportion to the lowered case price. Through this practice, wholesalers effectively control both retail price and retailers' profit margins. Wholesalers know that retailers buy almost exclusively by the case and that they will buy larger quantities during off-post months, but retailers then must sell off-post product at a margin the wholesaler has fixed through the arti-

ficially higher minimum bottle price. Under this anti-competitive regime, a retailer like Total Wine & More cannot use its market and business efficiencies to reduce the prices offered to consumers.

18. A recent study of the minimum bottle pricing regime in Connecticut, prepared on behalf of the Distilled Spirits Council of the United States ("DISCUS"), concluded that this regime, which is unique to Connecticut among all 50 states, resulted in retail prices for wine and spirits in Connecticut that are as much as 24% higher than prices offered for identical products in the surrounding states.

19. The challenged provisions facilitate and impel wholesalers to combine, conspire, and agree, either tacitly or expressly, to fix and maintain wholesale and retail prices in accordance with these practices. Total Wine & More sees evidence of price-fixing and resale price maintenance by wholesalers on a monthly basis. Competing wholesalers for the same brands routinely set the same bottle and case prices down to the penny, month after month, with each wholesaler exactly tracking its competitors' on-post and off-post case prices. Recent examples of these pricing patterns are presented in the attached Tables 1 and 2. The price-fixing by wholesalers, facilitated and impelled by the challenged provisions, constitutes a horizontal restraint of trade and a per se violation of the federal Sherman Act.

20. On information and belief, the challenged restrictions facilitate and impel wholesalers to combine, conspire, and agree with manufacturers and with Connecticut retailers to fix and maintain wholesale and retail prices for alcoholic beverages. On information and belief, wholesalers use the challenged provisions to enforce their agreements with manufactur-

ers, other competing wholesalers, and with Connecticut retailers, to fix and maintain prices at the wholesale and retail level.

21. No agency or instrumentality of the state of Connecticut actively supervises the posting, matching, and coordination of bottle and case prices among manufacturers and wholesalers of alcoholic beverages. Instead, state agents, including the defendants, allow manufacturers and wholesalers to utilize the challenged provisions to fix and maintain anticompetitive retail prices.

22. The challenged provisions and the practices they foster frustrate Total Wine & More's efforts to use its business efficiencies and economies of scale to deliver low prices to Connecticut consumers. Total Wine & More desires to reduce its prices to levels driven by market forces rather than the artificially high price levels created and maintained by anticompetitive regulation and wholesalers' price fixing, but it is unable to do so because of the artificially high "minimum bottle prices" mandated through the challenged provisions, and because of the threat that defendants will seek civil and criminal penalties were Total Wine & More to sell below its arbitrary "minimum bottle cost." Total Wine & More's inability to offer market-based, consumer-driven prices causes it to lose business to less efficient retailers, and harms consumers by causing significantly higher retail prices for alcoholic beverages to be offered throughout the state.

23. The principal purpose and effect of the challenged provisions is to fix and maintain prices to protect inefficient and politically well-connected participants in Connecticut's alcoholic beverage industry, and not to promote any legitimate state interest

defined by the core purposes of the 21st Amendment to the U.S. Constitution.

24. The challenged provisions have an adverse effect on interstate commerce in the alcoholic beverages industry.

COUNT ONE
(Sherman Act – Horizontal Price Fixing)

25. Plaintiff incorporates by reference paragraphs 1 through 24 above.

26. The challenged provisions facilitate and impel horizontal price-fixing among Connecticut wholesalers and are hybrid, per se restraints of trade.

27. Neither defendants nor any other state officials or agencies in Connecticut actively supervise the challenged provisions.

28. The challenged provisions are preempted by the federal Sherman Act, 15 U.S.C. § 1.

COUNT TWO
(Sherman Act – Vertical Price Fixing)

29. Plaintiff incorporates by reference paragraphs 1 through 28 above.

30. The challenged provisions facilitate and impel vertical price-fixing and resale price maintenance among Connecticut manufacturers, wholesalers, and retailers and are hybrid, per se restraints of trade.

31. Alternatively, the challenged provisions facilitate and impel vertical price-fixing and resale price maintenance among Connecticut manufacturers, wholesalers, and retailers and are hybrid, unreasonable restraints of trade.

32. Neither defendants nor any other state officials or agencies in Connecticut actively supervise the challenged provisions.

33. The challenged provisions are preempted by the federal Sherman Act, 15 U.S.C. § 1.

RELIEF

34. Plaintiff requests that the Court enter judgment in plaintiff's favor and against defendants:

a. Declaring that the challenged provisions of the Connecticut General Statutes and the Connecticut Administrative Code are void and of no force and effect;

b. Enjoining continued enforcement of the challenged provisions;

c. Awarding plaintiff its costs and attorney's fees pursuant to 15 U.S.C. § 15(a) and/or other applicable law; and

d. Granting such other relief as the Court deems just.

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TABLE 1

CT Wholesaler Wine Spirits | Minimum Retail and Best Costs on Key Items

Brand	Wholesaler	Dec-15 Min Bottle	Jan-16 Min Bottle	Feb-16 Min Bottle	Mar-16 Min Bottle	Apr-16 Min Bottle	May-16 Min Bottle	Jun-16 Min Bottle	Jul-16 Min Bottle	Dec-15 Cost/ Bottle	Jan-16 Cost/ Bottle	Feb-16 Cost/ Bottle	Mar-16 Cost/ Bottle	Apr-16 Cost/ Bottle	May-16 Cost/ Bottle	Jun-16 Cost/ Bottle	Jul-16 Cost/ Bottle
Absolut 1.75L	CDI	$ 29.98	$ 29.98	$ 29.98	$ 29.98	$ 29.98	$ 29.98	$ 29.98	$ 29.98	$ 29.90	$ 29.90	$ 23.90	$ 29.90	$ 29.90	$ 29.90	$ 23.90	$ 29.90
Absolut 1.75L	Hartley Parker	$ 29.98	$ 29.98	$ 29.98	$ 29.98	$ 29.98	$ 29.98	$ 29.98	$ 29.98	$ 29.90	$ 29.90	$ 23.90	$ 29.90	$ 29.90	$ 29.90	$ 23.90	$ 29.90
Bombay Gin 1.75L	CDI	$ 29.99	$ 29.99	$ 29.99	$ 29.99	$ 29.99	$ 29.99	$ 29.99	$ 29.99	$ 29.91	$ 29.91	$ 26.08	$ 29.91	$ 29.91	$ 26.08	$ 29.91	$ 29.91
Bombay Gin 1.75L	Brescome Barton	$ 29.99	$ 29.99	$ 29.99	$ 29.99	$ 29.99	$ 29.99	$ 29.99	$ 29.99	$ 29.91	$ 29.91	$ 26.08	$ 29.91	$ 29.91	$ 26.08	$ 29.91	$ 29.91
Bombay Gin 1.75L	Hartley Parker	$ 29.99	$ 29.99	$ 29.99	$ 29.99	$ 29.99	$ 29.99	$ 29.99	$ 29.99	$ 29.91	$ 29.91	$ 26.08	$ 29.91	$ 29.91	$ 26.08	$ 29.91	$ 29.91
Bombay Sapphire 1.75L	Brescome Barton	$ 34.99	$ 34.99	$ 34.99	$ 34.99	$ 34.99	$ 39.49	$ 39.49	$ 39.49	$ 34.91	$ 34.91	$ 34.91	$ 28.74	$ 34.74	$ 35.41	$ 39.41	$ 33.24
Bombay Sapphire 1.75L	CDI	$ 34.99	$ 34.99	$ 34.99	$ 34.99	$ 34.99	$ 39.49	$ 39.49	$ 39.49	$ 34.91	$ 34.91	$ 34.91	$ 28.74	$ 34.74	$ 35.41	$ 39.41	$ 33.24
Bombay Sapphire 1.75L	Hartley Parker	$ 34.99	$ 34.99	$ 34.99	$ 34.99	$ 34.99	$ 39.49	$ 39.49	$ 39.49	$ 34.91	$ 34.91	$ 34.91	$ 28.74	$ 34.74	$ 35.41	$ 39.41	$ 33.24
Burnett's Vodka 1.75L	Brescome Barton	$ 16.99	$ 16.99	$ 16.99	$ 16.99	$ 16.99	$ 16.99	$ 16.99	$ 16.99	$ 16.41	$ 13.74	$ 16.41	$ 13.74	$ 16.41	$ 13.74	$ 16.41	$ 13.74
Burnett's Vodka 1.75L	Hartley Parker	$ 16.99	$ 16.99	$ 16.99	$ 16.99	$ 16.99	$ 16.99	$ 16.99	$ 16.99	$ 16.41	$ 13.74	$ 16.41	$ 13.74	$ 16.41	$ 13.74	$ 16.41	$ 13.74
Captain Morgan Spiced Rum 1.75l	CDI	$ 26.65	$ 26.65	$ 26.65	$ 26.65	$ 26.65	$ 26.65	$ 26.65	$ 26.65	$ 25.74	$ 26.57	$ 21.74	$ 26.57	$ 25.74	$ 26.57	$ 21.74	$ 26.57
Captain Morgan Spiced Rum 1.75l	Brescome Barton	$ 26.65	$ 26.65	$ 26.65	$ 26.65	$ 26.65	$ 26.65	$ 26.65	$ 26.65	$ 25.74	$ 26.57	$ 21.74	$ 26.57	$ 25.74	$ 26.57	$ 21.74	$ 26.57
Captain Morgan Spiced Rum 1.75l	Eder Bros	$ 26.65	$ 26.65	$ 26.65	$ 26.65	$ 26.64	$ 26.65	$ 26.65	$ 26.65	$ 25.74	$ 26.57	$ 21.74	$ 26.57	$ 25.74	$ 26.57	$ 21.74	$ 26.57
Captain Morgan Spiced Rum 1.75l	Hartley Parker	$ 26.65	$ 26.65	$ 26.65	$ 26.65	$ 26.65	$ 26.65	$ 26.65	$ 26.65	$ 25.74	$ 26.57	$ 21.74	$ 26.57	$ 25.74	$ 26.57	$ 21.74	$ 26.57
Dewar's 1.75L	Brescome Barton	$ 36.99	$ 36.99	$ 36.99	$ 36.99	$ 36.99	$ 36.99	$ 36.99	$ 36.99	$ 36.91	$ 36.91	$ 36.91	$ 31.74	$ 36.91	$ 34.91	$ 36.91	$ 31.74
Dewar's 1.75L	CDI	$ 36.99	$ 36.99	$ 36.99	$ 36.99	$ 36.99	$ 36.99	$ 36.99	$ 36.99	$ 36.91	$ 36.91	$ 36.91	$ 31.74	$ 36.91	$ 34.91	$ 36.91	$ 31.74
Grey Goose 1.75L	Brescome Barton	$ 56.99	$ 56.99	$ 56.99	$ 56.99	$ 56.99	$ 56.99	$ 56.99	$ 56.99	$ 50.91	$ 56.91	$ 50.91	$ 56.91	$ 56.91	$ 50.91	$ 56.91	$ 53.91
Grey Goose 1.75L	CDI	$ 56.99	$ 56.99	$ 56.99	$ 56.99	$ 56.99	$ 56.99	$ 56.99	$ 56.99	$ 50.91	$ 56.91	$ 50.91	$ 56.91	$ 56.91	$ 50.91	$ 56.91	$ 53.91
Grey Goose 750ml	Brescome Barton	$ 27.76	$ 29.99	$ 29.99	$ 29.99	$ 29.99	$ 29.99	$ 29.99	$ 29.99	$ 27.68	$ 27.91	$ 29.91	$ 26.41	$ 29.91	$ 27.91	$ 29.91	$ 25.91
Grey Goose 750ml	CDI	$ 27.76	$ 29.99	$ 29.99	$ 29.99	$ 29.99	$ 29.99	$ 29.99	$ 29.99	$ 27.68	$ 27.91	$ 29.91	$ 26.41	$ 29.91	$ 27.91	$ 29.91	$ 25.91
Hennessy VS 1.75L	Brescome Barton	$ 64.99	$ 64.99	$ 64.99	$ 64.99	$ 66.99	$ 66.99	$ 66.99	$ 66.99	$ 64.91	$ 59.91	$ 64.91	$ 57.91	$ 66.91	$ 61.91	$ 66.91	$ 59.58
Hennessy VS 1.75L	CDI	$ 64.99	$ 64.99	$ 64.99	$ 64.99	$ 66.99	$ 66.99	$ 66.99	$ 66.99	$ 64.91	$ 59.91	$ 64.91	$ 57.91	$ 66.91	$ 61.91	$ 66.91	$ 59.58
Jack Daniels Black 1.75L	Allan S Goodman	$ 43.99	$ 43.99	$ 43.99	$ 43.99	$ 43.99	$ 43.99	$ 43.99	$ 44.99	$ 40.08	$ 43.91	$ 37.08	$ 43.91	$ 40.08	$ 43.91	$ 37.08	$ 44.91
Jack Daniels Black 1.75L	Eder Bros	$ 43.99	$ 43.99	$ 43.99	$ 43.99	$ 43.99	$ 43.99	$ 43.99	$ 44.99	$ 40.08	$ 43.91	$ 37.08	$ 43.91	$ 40.08	$ 43.91	$ 37.08	$ 44.91
Jameson Whiskey 1.75l	CDI	$ 49.99	$ 49.99	$ 44.99	$ 45.99	$ 49.99	$ 49.99	$ 49.99	$ 49.99	$ 49.91	$ 49.91	$ 35.91	$ 45.91	$ 49.91	$ 39.91	$ 49.91	$ 49.91
Jameson Whiskey 1.75l	Brescome Barton	$ 49.99	$ 49.99	$ 44.99	$ 45.99	$ 49.99	$ 49.99	$ 49.99	$ 49.99	$ 49.91	$ 49.91	$ 35.91	$ 45.91	$ 49.91	$ 39.91	$ 49.91	$ 49.91
Jameson Whiskey 1.75l	Eder Bros	$ 49.99	$ 49.99	$ 44.99	$ 45.99	$ 49.99	$ 49.99	$ 49.99	$ 49.99	$ 49.91	$ 49.91	$ 35.91	$ 45.91	$ 49.91	$ 39.91	$ 49.91	$ 49.91
Jameson Whiskey 1.75l	Hartley Parker	$ 49.99	$ 49.99	$ 44.99	$ 45.99	$ 49.99	$ 49.99	$ 49.99	$ 49.99	$ 49.91	$ 49.91	$ 35.91	$ 45.91	$ 49.91	$ 39.91	$ 49.91	$ 49.91
Jim Beam 1.75l	CDI	$ 31.99	$ 31.99	$ 31.99	$ 31.99	$ 32.99	$ 32.99	$ 32.99	$ 32.99	$ 31.91	$ 28.58	$ 31.91	$ 26.58	$ 32.91	$ 29.58	$ 32.91	$ 27.58
Jim Beam 1.75l	Brescome Barton	$ 31.99	$ 31.99	$ 31.99	$ 31.99	$ 32.99	$ 32.99	$ 32.99	$ 32.99	$ 31.91	$ 28.58	$ 31.91	$ 26.58	$ 32.91	$ 29.58	$ 32.91	$ 27.58
Johnnie Walker Black 750ml	Brescome Barton	$ 29.99	$ 35.99	$ 35.99	$ 35.99	$ 35.99	$ 29.99	$ 29.99	$ 35.99	$ 29.91	$ 35.91	$ 35.91	$ 33.20	$ 35.91	$ 26.99	$ 29.91	$ 33.20
Johnnie Walker Black 750ml	Allan S Goodman	$ 29.99	$ 35.99	$ 35.99	$ 35.99	$ 35.99	$ 29.99	$ 29.99	$ 35.99	$ 29.91	$ 35.91	$ 35.91	$ 33.20	$ 35.91	$ 26.99	$ 29.91	$ 33.20
Johnnie Walker Black 750ml	Eder Bros	$ 29.99	$ 35.99	$ 35.99	$ 35.99	$ 35.99	$ 29.99	$ 29.99	$ 35.99	$ 29.91	$ 35.91	$ 35.91	$ 33.20	$ 35.91	$ 26.99	$ 29.91	$ 33.20
Johnnie Walker Black 1.75l	Brescome Barton	$ 59.99	$ 67.99	$ 67.99	$ 67.99	$ 67.99	$ 59.99	$ 59.99	$ 59.99	$ 59.91	$ 67.91	$ 67.91	$ 63.62	$ 67.91	$ 55.08	$ 59.91	$ 59.91
Johnnie Walker Black 1.75l	Allan S Goodman	$ 59.99	$ 67.99	$ 67.99	$ 67.99	$ 67.99	$ 59.99	$ 59.99	$ 59.99	$ 59.91	$ 67.91	$ 67.91	$ 63.62	$ 67.91	$ 55.08	$ 59.91	$ 59.91
Johnnie Walker Black 1.75l	Eder Bros	$ 59.99	$ 67.99	$ 67.99	$ 67.99	$ 67.99	$ 59.99	$ 59.99	$ 59.99	$ 59.91	$ 67.91	$ 67.91	$ 63.62	$ 67.91	$ 55.08	$ 59.91	$ 59.91
Jose Cuervo Gold 1.75L	Brescome Barton	$ 34.99	$ 34.99	$ 34.99	$ 34.99	$ 34.99	$ 34.99	$ 34.99	$ 34.99	$ 29.74	$ 34.91	$ 34.91	$ 29.74	$ 34.91	$ 34.91	$ 29.74	$ 34.91
Jose Cuervo Gold 1.75L	Allan S Goodman	$ 34.99	$ 34.99	$ 34.99	$ 34.99	$ 34.99	$ 34.99	$ 34.99	$ 34.99	$ 29.74	$ 34.91	$ 34.91	$ 29.74	$ 34.91	$ 34.91	$ 29.74	$ 34.91
Jose Cuervo Gold 1.75L	Eder Bros	$ 34.99	$ 34.99	$ 34.99	$ 34.99	$ 34.99	$ 34.99	$ 34.99	$ 34.99	$ 29.74	$ 34.91	$ 34.91	$ 29.74	$ 34.91	$ 34.91	$ 29.74	$ 34.91
Macallan 12 Yr 750ml	Brescome Barton	$ 47.49	$ 48.99	$ 47.49	$ 48.99	$ 47.49	$ 48.99	$ 47.49	$ 51.33	$ 46.91	$ 48.91	$ 46.91	$ 48.91	$ 46.91	$ 48.91	$ 45.41	$ 51.25
Macallan 12 Yr 750ml	Hartley Parker	$ 47.49	$ 48.99	$ 47.49	$ 48.99	$ 47.49	$ 48.99	$ 47.49	$ 51.33	$ 46.91	$ 48.91	$ 46.91	$ 48.91	$ 46.91	$ 48.91	$ 45.41	$ 51.25
Maker's Mark 1.75L	Brescome Barton	$ 57.99	$ 57.99	$ 57.99	$ 57.99	$ 57.99	$ 57.99	$ 59.99	$ 59.99	$ 53.91	$ 55.91	$ 51.91	$ 57.91	$ 55.91	$ 57.91	$ 53.91	$ 57.91
Maker's Mark 1.75L	Allan S Goodman	$ 57.99	$ 57.99	$ 57.99	$ 57.99	$ 57.99	$ 57.99	$ 59.99	$ 59.99	$ 53.91	$ 55.91	$ 51.91	$ 57.91	$ 55.91	$ 57.91	$ 53.91	$ 57.91
Maker's Mark 1.75L	Eder Bros	$ 57.99	$ 57.99	$ 57.99	$ 59.99	$ 59.99	$ 59.99	$ 59.99	$ 59.99	$ 53.91	$ 55.91	$ 51.91	$ 57.91	$ 55.91	$ 57.91	$ 53.91	$ 57.91
Maker's Mark 1.75L	CDI	$ 57.99	$ 57.99	$ 57.99	$ 57.99	$ 57.99	$ 57.99	$ 59.99	$ 59.99	$ 53.91	$ 55.91	$ 51.91	$ 57.91	$ 55.91	$ 57.91	$ 53.91	$ 57.91
SKYY Vodka 1.75	Brescome Barton	$ 21.98	$ 21.98	$ 21.99	$ 21.99	$ 21.99	$ 21.99	$ 21.99	$ 21.99	$ 21.90	$ 20.40	$ 19.41	$ 21.91	$ 20.41	$ 17.91	$ 21.91	$ 19.41
SKYY Vodka 1.75	Hartley Parker	$ 21.98	$ 21.99	$ 21.99	$ 21.99	$ 21.99	$ 21.99	$ 21.99	$ 21.99	$ 21.90	$ 20.41	$ 19.41	$ 21.91	$ 20.41	$ 17.91	$ 21.91	$ 19.41
Smirnoff Vodka 1.75l	Brescome Barton	$ 19.98	$ 19.98	$ 19.98	$ 19.98	$ 19.98	$ 19.98	$ 19.98	$ 19.98	$ 18.57	$ 19.90	$ 16.28	$ 19.90	$ 18.57	$ 19.90	$ 15.98	$ 19.90
Smirnoff Vodka 1.75l	Eder Bros	$ 19.98	$ 19.98	$ 19.98	$ 19.98	$ 19.98	$ 19.98	$ 19.98	$ 19.98	$ 18.57	$ 19.90	$ 16.28	$ 19.90	$ 18.57	$ 19.90	$ 15.98	$ 19.90
Smirnoff Vodka 1.75l	Allan S Goodman	$ 19.98	$ 19.98	$ 19.98	$ 19.98	$ 19.98	$ 19.98	$ 19.98	$ 19.98	$ 18.57	$ 19.90	$ 16.28	$ 19.90	$ 18.57	$ 19.90	$ 15.98	$ 19.90
Tanqueray Gin 1.75L	Brescome Barton	$ 29.99	$ 29.99	$ 29.99	$ 29.99	$ 29.99	$ 29.99	$ 29.99	$ 29.99	$ 24.58	$ 29.91	$ 29.91	$ 24.58	$ 29.91	$ 29.91	$ 24.58	$ 29.91
Tanqueray Gin 1.75L	Eder Bros	$ 29.99	$ 29.99	$ 29.99	$ 29.99	$ 29.99	$ 29.99	$ 29.99	$ 29.99	$ 24.58	$ 29.91	$ 29.91	$ 24.58	$ 29.91	$ 29.91	$ 24.58	$ 29.91
Yellow Tail Chardonnay 1.5L	Brescome Barton	$ 11.99	$ 11.99	$ 11.99	$ 11.99	$ 11.99	$ 11.99	$ 11.99	$ 11.99	$ 8.99	$ 11.91	$ 10.16	$ 8.99	$ 10.16	$ 10.16	$ 8.99	$ 11.91
Yellow Tail Chardonnay 1.5L	Slocum	$ 11.99	$ 11.99	$ 11.99	$ 11.99	$ 11.99	$ 11.99	$ 11.99	$ 11.99	$ 8.99	$ 11.91	$ 10.16	$ 8.99	$ 10.16	$ 10.16	$ 8.99	$ 11.91
Duckhorn Merlot Napa 750ml	Slocum	$ 39.99	$ 39.99	$ 39.99	$ 39.99	$ 39.99	$ 44.99	$ 44.99	$ 44.99	$ 33.33	$ 37.33	$ 37.33	$ 33.33	$ 37.33	$ 37.33	$ 33.33	$ 37.33
Duckhorn Merlot Napa 750ml	Winebow	$ 39.99	$ 39.99	$ 39.99	$ 39.99	$ 39.99	$ 44.99	$ 44.99	$ 44.99	$ 33.33	$ 37.33	$ 37.33	$ 33.33	$ 37.33	$ 37.33	$ 33.33	$ 37.33

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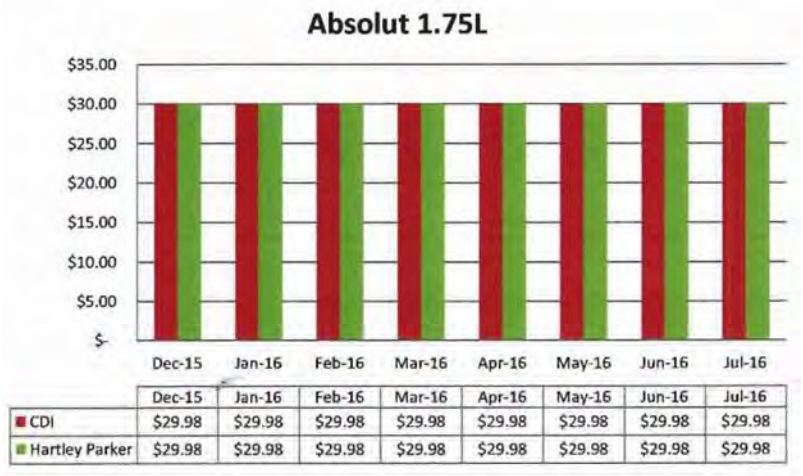
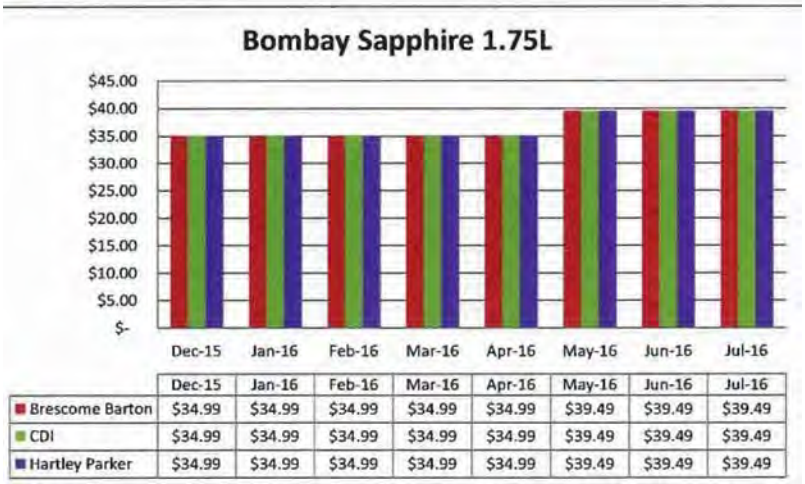
Table 2
CT Wholesaler Wine Spirits | Minimum Retail on Key Items

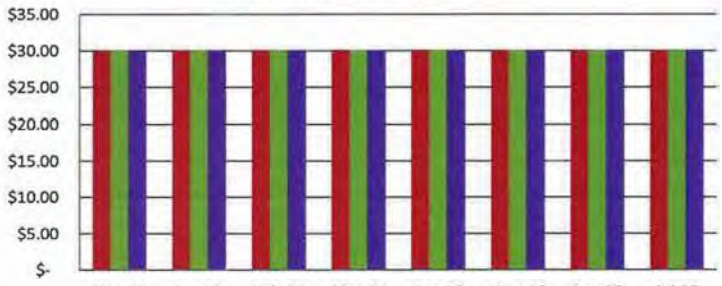


	Dec-15	Jan-16	Feb-16	Mar-16	Apr-16	May-16	Jun-16	Jul-16
CDI	$29.98	$29.98	$29.98	$29.98	$29.98	$29.98	$29.98	$29.98
Hartley Parker	$29.98	$29.98	$29.98	$29.98	$29.98	$29.98	$29.98	$29.98



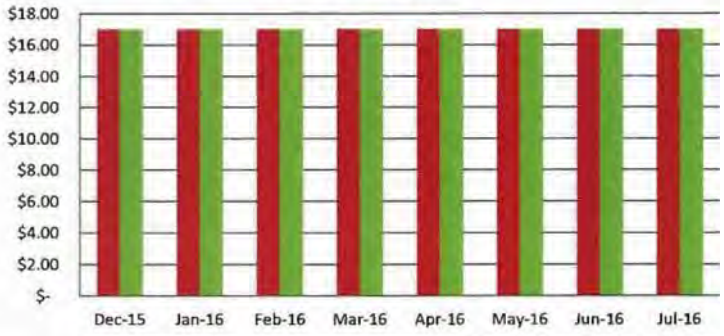
	Dec-15	Jan-16	Feb-16	Mar-16	Apr-16	May-16	Jun-16	Jul-16
Brescome Barton	$34.99	$34.99	$34.99	$34.99	$34.99	$39.49	$39.49	$39.49
CDI	$34.99	$34.99	$34.99	$34.99	$34.99	$39.49	$39.49	$39.49
Hartley Parker	$34.99	$34.99	$34.99	$34.99	$34.99	$39.49	$39.49	$39.49

Bombay Gin 1.75L



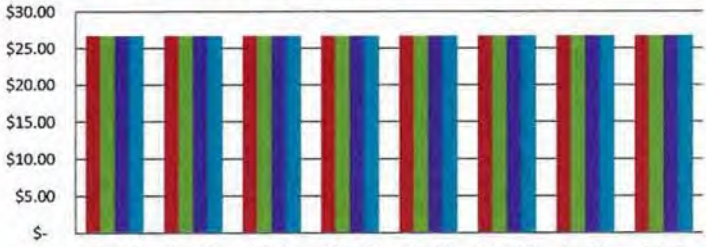
	Dec-15	Jan-16	Feb-16	Mar-16	Apr-16	May-16	Jun-16	Jul-16
CDI	$29.99	$29.99	$29.99	$29.99	$29.99	$29.99	$29.99	$29.99
Brescome Barton	$29.99	$29.99	$29.99	$29.99	$29.99	$29.99	$29.99	$29.99
Hartley Parker	$29.99	$29.99	$29.99	$29.99	$29.99	$29.99	$29.99	$29.99

Burnett's Vodka 1.75L



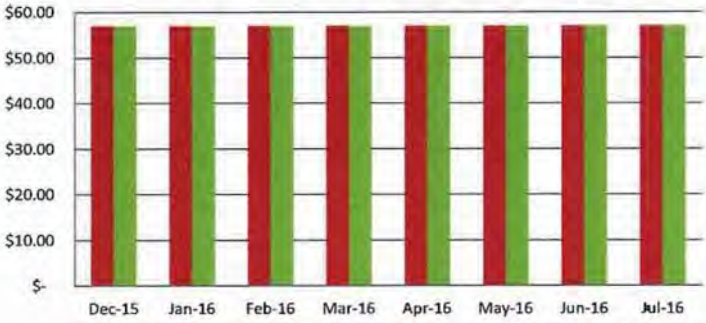
	Dec-15	Jan-16	Feb-16	Mar-16	Apr-16	May-16	Jun-16	Jul-16
Brescome Barton	$16.99	$16.99	$16.99	$16.99	$16.99	$16.99	$16.99	$16.99
Hartley Parker	$16.99	$16.99	$16.99	$16.99	$16.99	$16.99	$16.99	$16.99

Captain Morgan Spiced Rum 1.75l

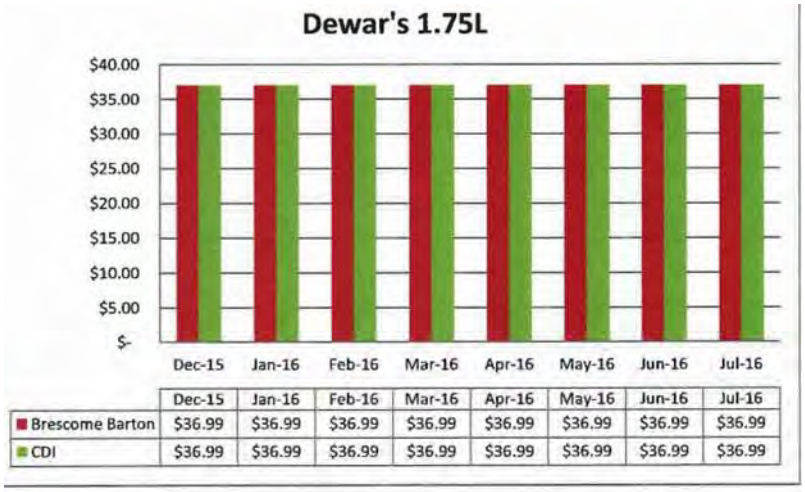


	Dec-15	Jan-16	Feb-16	Mar-16	Apr-16	May-16	Jun-16	Jul-16
CDI	$26.65	$26.65	$26.65	$26.65	$26.65	$26.65	$26.65	$26.65
Brescome Barton	$26.65	$26.65	$26.65	$26.65	$26.65	$26.65	$26.65	$26.65
Eder Bros	$26.65	$26.65	$26.65	$26.65	$26.64	$26.65	$26.65	$26.65
Hartley Parker	$26.65	$26.65	$26.65	$26.65	$26.65	$26.65	$26.65	$26.65

Grey Goose 1.75L



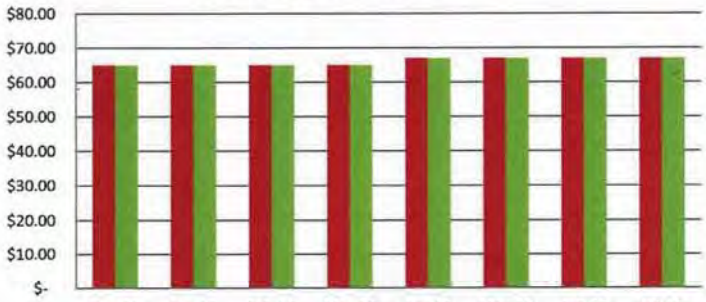
	Dec-15	Jan-16	Feb-16	Mar-16	Apr-16	May-16	Jun-16	Jul-16
Brescome Barton	$56.99	$56.99	$56.99	$56.99	$56.99	$56.99	$56.99	$56.99
CDI	$56.99	$56.99	$56.99	$56.99	$56.99	$56.99	$56.99	$56.99



	Dec-15	Jan-16	Feb-16	Mar-16	Apr-16	May-16	Jun-16	Jul-16
Brescome Barton	$36.99	$36.99	$36.99	$36.99	$36.99	$36.99	$36.99	$36.99
CDI	$36.99	$36.99	$36.99	$36.99	$36.99	$36.99	$36.99	$36.99

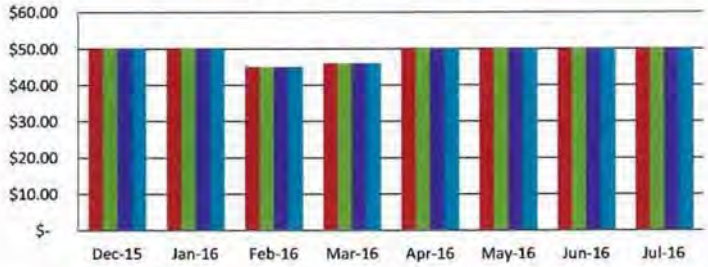
	Dec-15	Jan-16	Feb-16	Mar-16	Apr-16	May-16	Jun-16	Jul-16
Brescome Barton	$27.76	$29.99	$29.99	$29.99	$29.99	$29.99	$29.99	$29.99
CDI	$27.76	$29.99	$29.99	$29.99	$29.99	$29.99	$29.99	$29.99

Hennessy VS 1.75L



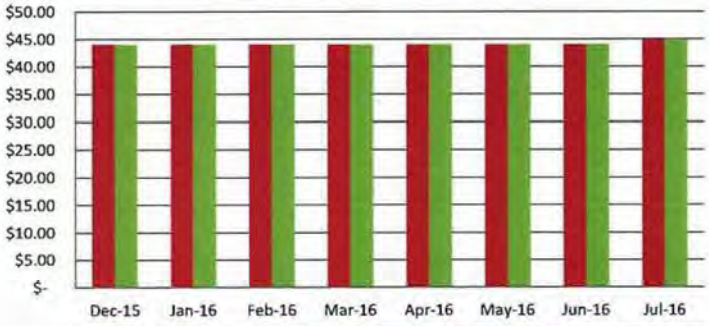
	Dec-15	Jan-16	Feb-16	Mar-16	Apr-16	May-16	Jun-16	Jul-16
Brescome Barton	$64.99	$64.99	$64.99	$64.99	$66.99	$66.99	$66.99	$66.99
CDI	$64.99	$64.99	$64.99	$64.99	$66.99	$66.99	$66.99	$66.99

Jameson Whiskey 1.75l



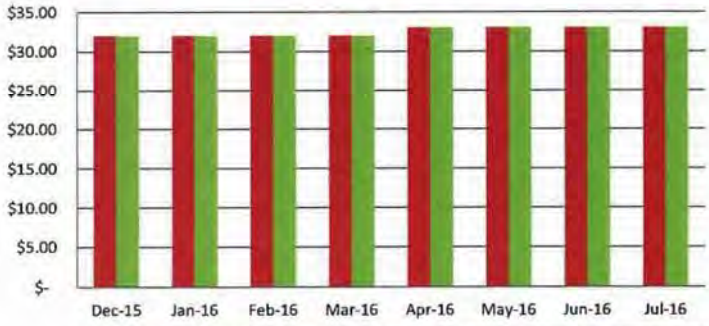
	Dec-15	Jan-16	Feb-16	Mar-16	Apr-16	May-16	Jun-16	Jul-16
CDI	$49.99	$49.99	$44.99	$45.99	$49.99	$49.99	$49.99	$49.99
Brescome Barton	$49.99	$49.99	$44.99	$45.99	$49.99	$49.99	$49.99	$49.99
Eder Bros	$49.99	$49.99	$44.99	$45.99	$49.99	$49.99	$49.99	$49.99
Hartley Parker	$49.99	$49.99	$44.99	$45.99	$49.99	$49.99	$49.99	$49.99

Jack Daniels Black 1.75L



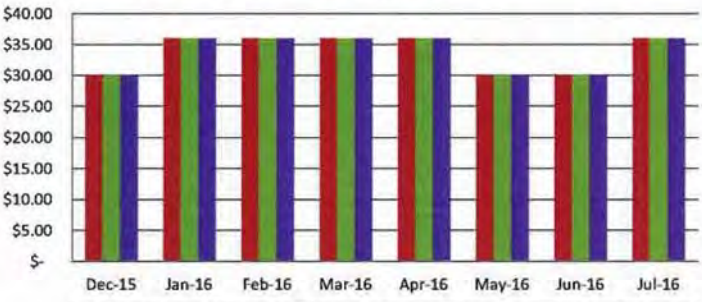
	Dec-15	Jan-16	Feb-16	Mar-16	Apr-16	May-16	Jun-16	Jul-16
Allan S Goodman	$43.99	$43.99	$43.99	$43.99	$43.99	$43.99	$43.99	$44.99
Eder Bros	$43.99	$43.99	$43.99	$43.99	$43.99	$43.99	$43.99	$44.99

Jim Beam 1.75l



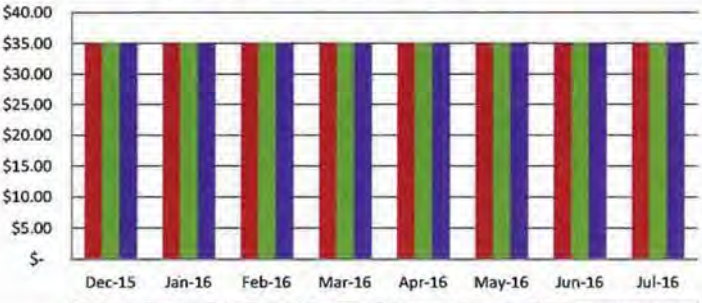
	Dec-15	Jan-16	Feb-16	Mar-16	Apr-16	May-16	Jun-16	Jul-16
CDI	$31.99	$31.99	$31.99	$31.99	$32.99	$32.99	$32.99	$32.99
Brescome Barton	$31.99	$31.99	$31.99	$31.99	$32.99	$32.99	$32.99	$32.99

Johnnie Walker Black 750ml



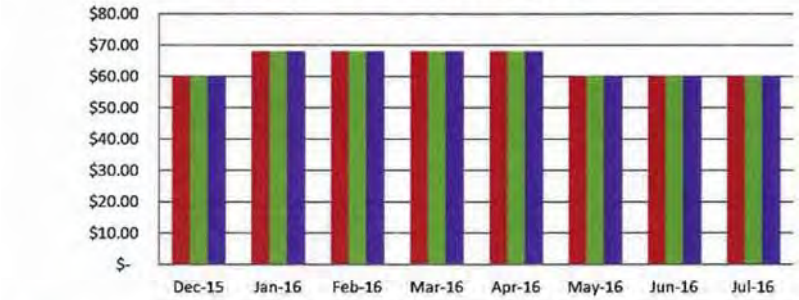
	Dec-15	Jan-16	Feb-16	Mar-16	Apr-16	May-16	Jun-16	Jul-16
Brescome Barton	$29.99	$35.99	$35.99	$35.99	$35.99	$29.99	$29.99	$35.99
Allan S Goodman	$29.99	$35.99	$35.99	$35.99	$35.99	$29.99	$29.99	$35.99
Eder Bros	$29.99	$35.99	$35.99	$35.99	$35.99	$29.99	$29.99	$35.99

Jose Cuervo Gold 1.75L



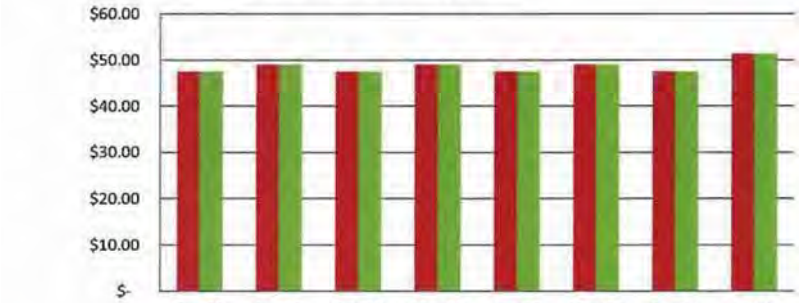
	Dec-15	Jan-16	Feb-16	Mar-16	Apr-16	May-16	Jun-16	Jul-16
Brescome Barton	$34.99	$34.99	$34.99	$34.99	$34.99	$34.99	$34.99	$34.99
Allan S Goodman	$34.99	$34.99	$34.99	$34.99	$34.99	$34.99	$34.99	$34.99
Eder Bros	$34.99	$34.99	$34.99	$34.99	$34.99	$34.99	$34.99	$34.99

Johnnie Walker Black 1.75l



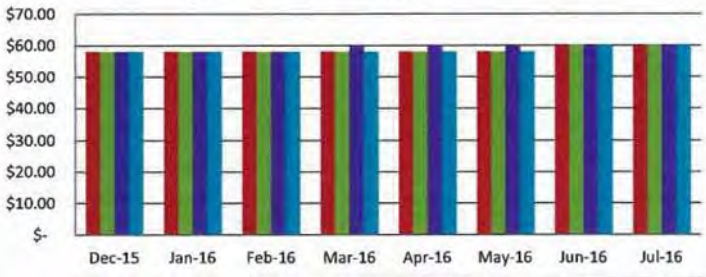
	Dec-15	Jan-16	Feb-16	Mar-16	Apr-16	May-16	Jun-16	Jul-16
Brescome Barton	$59.99	$67.99	$67.99	$67.99	$67.99	$59.99	$59.99	$59.99
Allan S Goodman	$59.99	$67.99	$67.99	$67.99	$67.99	$59.99	$59.99	$59.99
Eder Bros	$59.99	$67.99	$67.99	$67.99	$67.99	$59.99	$59.99	$59.99

Macallan 12 Yr 750ml



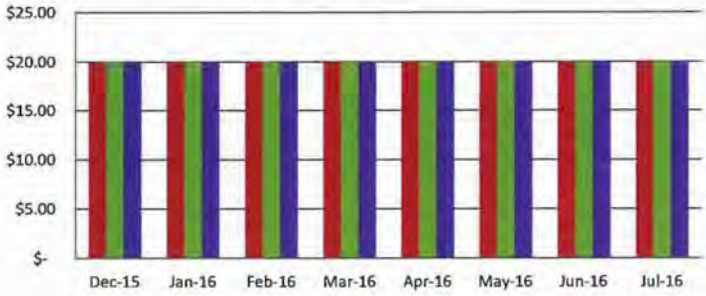
	Dec-15	Jan-16	Feb-16	Mar-16	Apr-16	May-16	Jun-16	Jul-16
Brescome Barton	$47.49	$48.99	$47.49	$48.99	$47.49	$48.99	$47.49	$51.33
Hartley Parker	$47.49	$48.99	$47.49	$48.99	$47.49	$48.99	$47.49	$51.33

Maker's Mark 1.75L



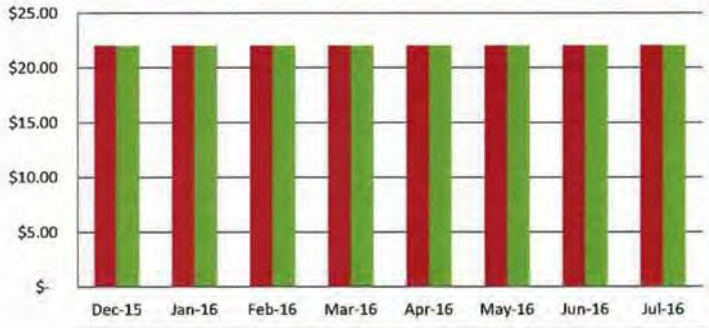
	Dec-15	Jan-16	Feb-16	Mar-16	Apr-16	May-16	Jun-16	Jul-16
Brescome Barton	$57.99	$57.99	$57.99	$57.99	$57.99	$57.99	$59.99	$59.99
Allan S Goodman	$57.99	$57.99	$57.99	$57.99	$57.99	$57.99	$59.99	$59.99
Eder Bros	$57.99	$57.99	$57.99	$59.99	$59.99	$59.99	$59.99	$59.99
CDI	$57.99	$57.99	$57.99	$57.99	$57.99	$57.99	$59.99	$59.99

Smirnoff Vodka 1.75l



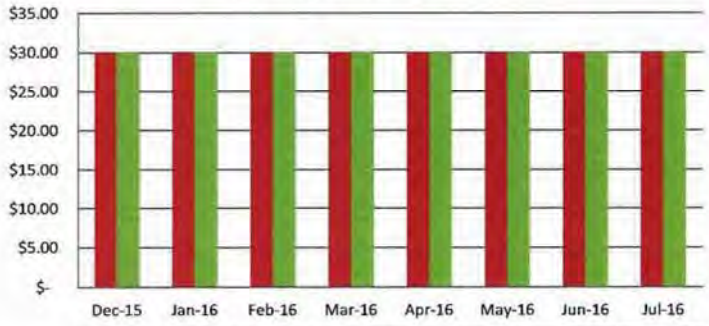
	Dec-15	Jan-16	Feb-16	Mar-16	Apr-16	May-16	Jun-16	Jul-16
Brescome Barton	$19.98	$19.98	$19.98	$19.98	$19.98	$19.98	$19.98	$19.98
Eder Bros	$19.98	$19.98	$19.98	$19.98	$19.98	$19.98	$19.98	$19.98
Allan S Goodman	$19.98	$19.98	$19.98	$19.98	$19.98	$19.98	$19.98	$19.98

SKYY Vodka 1.75



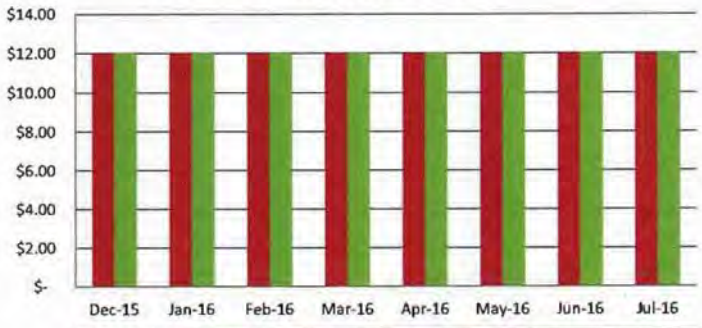
	Dec-15	Jan-16	Feb-16	Mar-16	Apr-16	May-16	Jun-16	Jul-16
Brescome Barton	$21.98	$21.98	$21.99	$21.99	$21.99	$21.99	$21.99	$21.99
Hartley Parker	$21.98	$21.99	$21.99	$21.99	$21.99	$21.99	$21.99	$21.99

Tanqueray Gin 1.75L



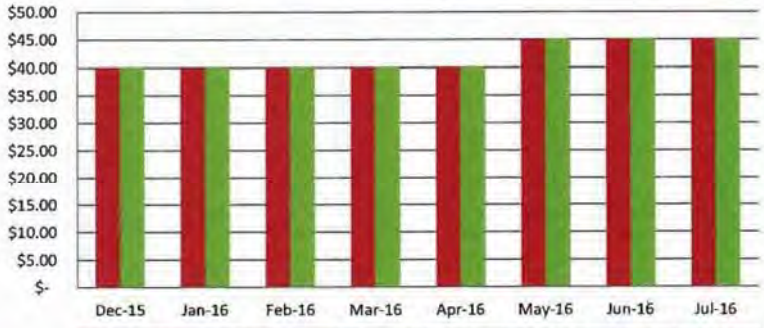
	Dec-15	Jan-16	Feb-16	Mar-16	Apr-16	May-16	Jun-16	Jul-16
Brescome Barton	$29.99	$29.99	$29.99	$29.99	$29.99	$29.99	$29.99	$29.99
Eder Bros	$29.99	$29.99	$29.99	$29.99	$29.99	$29.99	$29.99	$29.99

Yellow Tail Chardonnay 1.5L



	Dec-15	Jan-16	Feb-16	Mar-16	Apr-16	May-16	Jun-16	Jul-16
Brescome Barton	$11.99	$11.99	$11.99	$11.99	$11.99	$11.99	$11.99	$11.99
Slocum	$11.99	$11.99	$11.99	$11.99	$11.99	$11.99	$11.99	$11.99

Duckhorn Merlot Napa 750ml



	Dec-15	Jan-16	Feb-16	Mar-16	Apr-16	May-16	Jun-16	Jul-16
Slocum	$39.99	$39.99	$39.99	$39.99	$39.99	$44.99	$44.99	$44.99
Winebow	$39.99	$39.99	$39.99	$39.99	$39.99	$44.99	$44.99	$44.99