17-2003-cv

United States Court of Appeals

for the

Second Circuit

CONNECTICUT FINE WINE AND SPIRITS, LLC, DBA 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.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

In conformance with Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiff-Appellant Connecticut Fine Wine & Spirits, LLC, d/b/a Total Wine & More states that it has no parent corporation and that no publicly held corporation owns any of its stock or membership interests.

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INTRODUCTION

The Connecticut Liquor Control Act, Conn. Gen. Stat. § 30-1, *et seq.*, contains a comprehensive regime of price controls for wine, spirits and beer. Three aspects of the Act, taken together, authorize and mandate industry-wide horizontal and vertical price fixing among alcohol wholesalers and retailers in Connecticut: (1) a "post and hold" requirement, under which every wholesaler must publish (or post) its "case" and "bottle" prices monthly so competitors can review and match those prices, and then maintain (or hold) those prices for a full month; (2) a minimum bottle retail price scheme, in which wholesalers, through their posted-and-held "bottle" prices, control not only their own prices but set minimum prices for retailers as well, and thereby create a fixed, minimum-profit margin for all retailers; and (3) a quantity discount ban, which ensures that the posted-and-held "case" and "bottle" prices are *always* the governing price, even for bulk purchases.

Plaintiff Connecticut Fine Wine & Spirits, LLC, d/b/a Total Wine & More ("Total Wine"), owns four retail beverage stores in Connecticut. It filed this action because these interrelated aspects of the Liquor Control Act constitute anticompetitive "hybrid" restraints that mandate industry-wide horizontal and vertical price fixing in violation of the Sherman Antitrust Act, 15 U.S.C. § 1. 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' posted case and minimum bottle prices. JA 21-31. One practical result is that retailers in Connecticut do not compete on price, and consumers are deprived of the benefits of price competition. The District Court erroneously determined that the Connecticut price controls are not facially inconsistent with the Sherman Act, and dismissed Total Wine's complaint for declaratory and injunctive relief. This Court should reverse that judgment and remand for further proceedings on Total Wine's Sherman Act preemption claims.

STATEMENT OF JURISDICTION

Total Wine challenged these hybrid restraints as preempted by the Sherman Act, 15 U.S.C. § 1, and thus the District Court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337. The District Court dismissed the Complaint and entered final judgment for the Defendant- and Intervenor-Appellees on June 6, 2017. JA 173. Total Wine filed a timely notice of appeal on June 26, 2017. JA 174. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. This appeal is from a final judgment that disposes of all parties' claims.

ISSUES PRESENTED

1. In dismissing Counts One (for preemption based on horizontal price fixing) and Two (based on vertical price fixing), as to all three challenged aspects of the Liquor Control Act, did the District Court err in considering itself bound to

analyze the challenged statutes in isolation, without reference to the ways in which they interrelate and create horizontal and vertical price restraints?

2. Did the District Court err in failing to consider, or permit any discovery on, the actual market impact of the horizontal and vertical price fixing alleged in the Complaint?

3. Did the District Court err in holding that the quantity discount ban was a "unilateral" restraint beyond the reach of the Sherman Act?

4. Does the Sherman Act preempt the three challenged interrelated requirements of the Liquor Control Act that (i) authorize or compel private parties to engage in horizontal price fixing ("post and hold"); (ii) mandate that wholesalers post and hold both case and bottle prices – thereby establishing fixed minimum retail price floors and creating a statewide system of vertical price restraints; and (iii) expressly prohibit wholesalers from offering quantity discounts to retailers?

STATEMENT OF THE CASE

Total Wine filed its complaint on August 23, 2016. JA 16-31. Defendants moved to dismiss, as did five industry Intervenors who not only are the chief beneficiaries of the anticompetitive regime, but who conceded below that the "purpose" of the challenged statutes is to "prevent . . . competition." ECF No. 66-

1 at 8.[1] The District Court (the Honorable Janet C. Hall) granted the motion to dismiss. JA 133-72 (memorandum opinion); JA 173 (judgment). *See Connecticut Fine Wine & Spirits, LLC v. Harris*, No. 3:16-CV-1434 (JCH), -- F. Supp. 3d. --, 2017 WL 2453029 (D. Conn. June 6, 2017) (reported decision). Total Wine timely filed a notice of appeal. JA 174.

A. Background

When Prohibition ended with the ratification of the Twenty-First Amendment in 1933, most states drafted new legislation to govern the emerging marketplace. Some states, like Pennsylvania, took over the retail function themselves. Others, like Connecticut, returned the retail function to private industry, but adopted varying forms of regulation to address perceived concerns that had animated the Prohibition movement. Some of these concerns feel anachronistic today, like the fear of "tied houses" (where a brewer like Guinness owned pubs that could sell only Guiness beer), and other forms of market consolidation. To address these concerns, many states, including Connecticut, adopted a "three-tier" system for distribution of alcoholic beverages (with separately licensed manufacturers, wholesalers, and retailers).

[1] Citations to "ECF" refer to the District Court docket, Case 3:16-cv-01434-JCH (D. Conn.).

Total Wine's preemption complaint does not involve the three-tier system as such, but that system helps explain the interrelated price control statutes that Total Wine has challenged. All retail sales of alcoholic beverages in Connecticut go through three sequential transactions in the three-tiered system: (1) from a "tier 1" manufacturer (a distillery, winery, brewer, or importer) to the "tier 2" distributor or wholesaler; (2) from the wholesaler to "tier 3" retailer (a package store that sells alcohol for off-premises consumption or a bar or restaurant that sells alcohol for on-premises consumption); and (3) from the retailer, bar, or restaurant to the consumer. This action challenges three interrelated laws that, collectively, authorize and/or mandate horizontal and vertical collusion by wholesalers and retailers to increase alcohol prices in Connecticut.

B. The Challenged Provisions

The United States is a free market economy in which the prices for goods and services are ordinarily determined by the laws and forces of supply and demand, free from government intervention, price-setting monopolies, or other price interference. This bedrock economic principle applies in most industries in the United States, where market participants determine what products are produced, how, when and where they are made, and at what price they are sold. Most businesses not only set their own prices at all levels of the supply chain, but can and often do change them at any time to compete for business or respond to

changes in supply or demand. This is essential to a viable and efficient economy. It is equally important to consumers who should not be forced to pay artificially inflated prices for goods and services.

Connecticut regulates the pricing of alcoholic beverage sales differently. Manufacturers and wholesalers, the top and middle "tiers" of the distribution chain, are allowed to operate like cartels with almost exclusive control over the prices retailers can charge customers for their alcoholic beverage products.[2]

The starting point for the price-control regime is the "post and hold" provisions codified at Conn. Gen. Stat. § 30-63(c) and Conn. Reg. 30-6-B12(b). There are three aspects of the regime: the "post," the "match," and the "hold." On a "monthly basis" (the 20th day of the month for beer, the 27th for wine and spirits), every manufacturer and wholesaler must "**post**" two prices for each product to be sold that month: a bottle price (or can price for beer), and a case price. Conn. Gen. Stat. § 30-63(c). After the posting deadline, any other manufacturer or wholesaler may, within four days, "amend" its own posted prices to "**meet a lower price** posted by another manufacturer or wholesaler." *Id.* (emphasis added). Once the price for each product has been posted (or amended to match a lower price), that price "shall be the **controlling price**" for the next

[2] These factual allegations, drawn from Total Wine's Complaint, must be accepted as true, with all reasonable inferences drawn in Appellant's favor. *Fulton v. Goord*, 591 F.3d 37, 43 (2d Cir. 2009).

month. *Id.* (emphasis added). That is, wholesalers are compelled by the statute to fix their prices to the posted price for an entire month.

A key aspect of the post-and-hold regime is that wholesalers set not only their own (case) prices for sales to Connecticut retailers, but also set the minimum prices for *retail* sales of bottles and cans to consumers. As a result, retailers have no independent control over the prices they can charge. *See* JA 22 (Compl. ¶¶ 30-31).

The statutory pricing mechanism governing retailers is somewhat convoluted, but its effect is clear: the Act mandates that wholesalers post and hold for at least 30 days their case prices to retailers, and also set the minimum retail prices that consumers must pay for a bottle of wine or spirits. Under § 30-68m(b), "No retail permittee shall sell alcoholic liquor at a price below his or her cost." Conn. Gen. Stat. § 30-68m(b). Subsection (a)(1), in turn, provides a definition of "cost" that is untethered from any ordinary meaning of the term. Instead, "cost" is defined as "the posted bottle price" plus a small charge for "shipping or delivery . . . paid by the retail[er]." The posted bottle price, in turn must be *at least* equivalent to the posted case price paid by the retailer divided by the number of bottles in a case plus "an amount that is not less than" between two and eight cents per bottle.[3]

[3] For bottles less than 200 milliliters in size the markup is 2 cents. For bottles between 200 and 500 ml. the markup is 4 cents, and for most bottles of wine or spirits (greater than 500 ml.) the markup is 8 cents.

Conn. Gen. Stat. § 30-68m(a)(3). These minimum markups apply across the board, to all products, whether a $10 bottle of whisky or a $200 bottle of champagne.[4] There is no cap, however, on how much wholesalers can require retailers to mark up their products by manipulating the difference between their posted case prices and posted minimum bottle prices.

The final challenged aspect of the Act is its ban on discounts, whether for quantity or any other reason. Section 30-68k requires wholesalers to sell every bottle, can and case of liquor to any retailer at the same price, regardless whether the retailer buys 1 case or 1,000 cases. Similarly, § 30-63(b) prohibits wholesalers and manufacturers from offering any "discount, rebate, free goods, allowance or other inducement for the purpose of making sales or purchases," as well as from "discriminat[ing] . . . in price discounts."[5]

C. The Purpose And Effect Of The Challenged Statutes

These provisions, on their face, eliminate any incentive for wholesalers to compete on price. If a wholesaler were to drop its price on a particular product, its

[4] The statute provides one token gesture at competition: as of May 2012, a retailer may sell "one beer item" or "one item of alcoholic liquor" below its statutory "cost" – but even then, retailers may only discount below their artificial "minimum bottle cost" by ten percent. Conn. Gen. Stat. § 30-68m(c); 2012 Conn. Legis. Serv. P.A. 12-17 (H.B. 5021).

[5] *See also* Conn. Gen. Stat. § 30-94(a) (prohibiting "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").

competitors would know that immediately (from having seen the posted price), and would have four days to match the posted price. The wholesaler who first dropped its price would then be required to "hold" the lower price for an entire month – during which it would have no competitive advantage, because its competitors would be charging the same price.

These incentives are not just theoretical. If a wholesaler sells a (12-bottle) case of Acme pinot noir for $240 and sets the bottle price at $25, virtually every retailer in the state will sell Acme at $25 per bottle. Retailers cannot seek a lower price from a competing wholesaler, because the wholesale prices have been coordinated through the post-and-hold regime. Retailers *could* sell Acme for more than $25, but the wholesaler has already established an above-market profit margin for the retailer (in this example, the $25 minimum retail price less the $20 wholesale price per bottle, yielding a profit margin of $5, or 25%). As a result, the retail market for Acme pinot noir becomes fixed at $25 per bottle throughout the state. Retailers cannot reduce their costs or affect minimum bottle prices by purchasing in large quantities. And efficient retailers like Total Wine have no advantage through economies of scale. Competition plays no role in pricing; and Connecticut consumers pay grossly inflated above-market prices for every bottle of wine or spirits they purchase.

In short, as set forth in Total Wine's Complaint, there is simply no price competition among Connecticut wholesalers, and no effective price competition among Connecticut retailers. "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." JA 20 (Compl. ¶ 19).

The tables attached to the Complaint (JA 24-31) make this eminently clear. They set forth, as to twenty-two illustrative name brand products, each wholesaler's posted case price offered to retailers ("cost/bottle") and its posted minimum bottle price to consumers ("Min bottle"), from December 2015 to July 2016. JA 24-25. For each of the products listed, each wholesaler set *exactly* the same case and bottle price every month. When one wholesaler increased its minimum bottle retail price, the competing wholesaler(s) increased their own posted "bottle" prices the same month, by the same amount, and then adhered to that increased retail price.

The anticompetitive effect of this across-the-board horizontal and vertical price fixing mandated by the statute is illustrated vividly by a practice among wholesalers known as "on-post" and "off-post" pricing. JA 19-20 (Compl. ¶ 17). After several months holding case prices steady ("on-post"), all wholesalers simultaneously reduce ("off-post") their *case* prices – the prices at which

wholesalers sell to retailers. But they keep the minimum *bottle* prices as high, or nearly as high, as they were before the simultaneous drop in case prices. That means not only that the post-and-hold statute requires horizontal fixing of the case and bottle prices posted by the wholesalers, but also that the wholesalers effectively control not only retailers' prices, but also their profit margins.[6]

In addition to mandating horizontal price fixing, the challenged statutes also mandate industry-wide vertical price restraints by requiring that wholesalers post not only the case prices at which they sell to retailers, but also the minimum "bottle" prices that create a floor for retail sales to consumers. *See* JA 19-20 (Compl. ¶ 17). Every aspect of the statutory scheme is mandatory. This mandatory pricing regime creates irresistible pressure on wholesalers to collude not only with other wholesalers to keep case prices high, but also with retailers

[6] For example, all three Connecticut wholesalers who sold Bombay Gin maintained the identical minimum bottle price of $29.99 for a 1.75 liter bottle between December 2015 and July 2016. But the case prices varied over time, being offered by all three wholesalers at $29.91 per bottle in most of those (on-post) months but being reduced to an identical level of $26.08 per bottle in February and May 2016. Retailers who purchased their supply of Bombay Gin in those two off-post months were guaranteed a profit margin of at least $3.91 per bottle. But consumers never saw any benefit from the wholesalers' uniform reduction in case prices during the two off-post months because the posted minimum bottle price remained fixed at $29.99. The examples drawn from the case and bottle prices for 1.75 liter bottles of Jameson's Whiskey are even more extreme, with the identical posted case and bottle prices from four separate wholesalers guaranteeing to retailers profit margins of between $9.08 and $14.08 on a $44.99 to $49.99 minimum bottle retail price during some of those months. *See* JA 24 (Complaint, Table 1).

who want to keep retail prices artificially high, whether because they are inefficient or they desire unreasonably large profit margins. The statutes also prohibit more efficient retailers like Total Wine from taking advantage of economies of scale in purchasing and from passing along any cost savings to consumers.

A recent study of the regulatory price control 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 fifty states, resulted in retail prices for wine and spirits that are as much as 24 percent higher than prices offered for identical products in the surrounding states. *Id.* ¶ 18; *see* An Act Ensuring the Regional Competitiveness of Connecticut's Liquor Prices, Conn. S.B. 00014, 2016 Sess., Public Hearing Testimony of Distilled Spirits Council of the United States[7] and Jay Hibbard[8] (Feb. 23, 2016).

D. Total Wine's Claims

There are more than 100 retail alcoholic beverage stores operating in approximately 20 states under the "Total Wine & More" name. JA 17 (Compl. ¶ 7). Total Wine opened its first Connecticut store, in Norwalk, in December 2012, and since then has opened three more stores, in Milford, Manchester, and

[7] Available at https://www.cga.ct.gov/2016/GLdata/Tmy/2016SB-00014-R000223-Distilled%20Spirits%20Council%20of%20the%20United%20States.-TMY.PDF.

[8] Available at https://www.cga.ct.gov/2016/GLdata/Tmy/2016SB-00014-R000223-Jay%20Hibbard,%20%20V.P.%20Government%20Relations-TMY.PDF.

West Hartford. *Id*. (Compl. ¶ 8). Total Wine & More stores are committed to offering the nation's best selection of alcoholic beverages, and to having the most competitive prices on wine, spirits, and beer. *Id*. (Compl. ¶ 7). Since the first Total Wine & More store opened in Delaware in 1991, the stores have received numerous awards and recognitions not only for their broad selection of products and expertly trained wine associates, but also for their low everyday prices. JA 18 (Compl. ¶ 10).

Total Wine has not, however, been able to provide Connecticut consumers with the full benefit of lower prices. *Id*. (Compl. ¶ 11). Instead, as discussed above, the three challenged statutes authorize, indeed mandate, that wholesalers control retail prices. Some products are sold exclusively by a single wholesaler; others are sold by multiple wholesalers (so-called "duals"). As to both categories, however, "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." JA 19 (Compl. ¶ 16).

The Complaint alleges that the challenged statutes are preempted by the Sherman Antitrust Act because they mandate and/or authorize horizontal price fixing (Count One) and industry-wide vertical price fixing (Count Two). The Complaint principally seeks a declaratory judgment that the challenged statutes and regulations are void, and an injunction prohibiting their continued

enforcement. JA 23 (Compl. ¶ 34). The named defendants were Jonathan A. Harris, the Commissioner of the Department of Consumer Protection,[9] and John Suchy, the Director of the Division of Liquor Control, who together are responsible for enforcing the challenged statutes and implementing regulations. JA 16-17 (Compl. ¶¶ 2-3).

Defendants filed a motion to dismiss under Federal Rule 12(b)(6). JA 32-33. Four industry associations intervened: 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 "Intervenors"). The Intervenors filed a joint motion to dismiss. JA 34-36. Another Intervenor, the state's largest wholesaler, Brescome Barton, Inc., was also granted intervention, and filed its own motion to dismiss on December 7, 2016. JA 37-39.

E. The District Court's Ruling

After hearing oral argument (JA 40-132), the District Court granted the defendants' and intervenors' motions to dismiss. The District Court agreed that the challenged statutes, at least in part, constitute "hybrid restraints," *i.e.*, they are laws that "grant[] private actors a degree of regulatory control over competition."

[9] Mr. Harris has since been succeeded in office by Michelle H. Seagull, who was appointed as Commissioner of the DCP on May 1, 2017. *See* Fed. R. App. P. 43(c)(2).

JA 147 (quoting *Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38, 50 (2d Cir. 2010)). The District Court also concluded that the challenged statutes are not readily distinguishable from the New York statutes the Supreme Court held in *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987), were preempted under the Sherman Act. *See, e.g.*, JA 150, 159 (explaining that the Connecticut laws at issue here, and the New York statutes and regulations invalidated in *324 Liquor*, are "remarkably similar"). The District Court, however, reached four principal conclusions that led it to grant the motions to dismiss.

First, the District Court held it was precluded from considering whether the statutes *taken together* "authoriz[e] or compel[] private parties to engage in anticompetitive behavior." *324 Liquor*, 479 U.S. at 345 n.8. The court acknowledged that "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." JA 144. But it considered itself constrained to examine each challenged provision independently, even though the statutes as a practical matter are inextricable, the anticompetitive impact of each is exacerbated by the others, and the Supreme Court in *324 Liquor* invalidated substantively identical statutes because the effect of the "*complex* of statutory provisions and regulations [was] to permit wholesalers to maintain retail prices at artificially high levels." 479 U.S. at 340 (emphasis added).

Second, the District Court held that although the post-and-hold and minimum "bottle" price statutes constitute hybrid restraints, the quantity discount prohibition is a unilateral restraint, beyond the reach of the Sherman Act. It reached that conclusion even though the Supreme Court has held that where a state "neither establishes prices nor reviews the reasonableness of . . . price schedules," and instead simply "casts a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement," the statute is hybrid. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105-06 (1980).[10]

Third, the District Court expressly disregarded Total Wine's allegations of actual, widespread horizontal *and* vertical price-fixing, including Tables 1 and 2 attached to Plaintiff's Complaint, and dismissed this case at the outset, without permitting discovery to be taken. But as discussed below, evidence of the purpose and effect of the challenged statutes is relevant, indeed critical, to determining whether the hybrid restraints challenged here are preempted by the Sherman Act.

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[10] The "gauzy cloak" discussion in *Midcal* was in the context of whether the California statutes there were entitled to "antitrust immunity" under *Parker v. Brown*, 317 U.S. 341 (1943). *See* n.15, *infra*. But as the Ninth Circuit has explained, "there is such substantial overlap between the active supervision and hybrid inquiries that they effectively merge." *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 887-88 (9th Cir. 2008). "In the case of a facial challenge to a state regulation . . . a determination of whether a restraint is hybrid will largely answer the question of whether the state actively supervises the restraint." *Id.* at 888.

Fourth, the District Court held that, even though the post-and-hold and minimum retail price provisions are hybrid restraints, the Complaint did not plausibly allege that the challenged statutes authorize or compel horizontal or industry-wide vertical price fixing in *per se* violation of the Sherman Act. As to the horizontal price fixing alleged in Count One, the District Court dismissed that claim principally because it considered itself bound to do so by *Battipaglia v. New York State Liquor Authority*, 745 F.2d 166 (2d Cir. 1984). But *Battipaglia* was abrogated in 1987 by *324 Liquor*, is inconsistent with *Sugar Institute v. United States*, 297 U.S. 553 (1936), and has been criticized by the Fourth and Ninth Circuits. As to the vertical price fixing alleged in Count Two, the District Court dismissed that claim after inferring that *324 Liquor* was overruled *sub silentio* by *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 907 (2007), even though *Leegin* is inapposite on several levels. *See* JA 164-66.

SUMMARY OF ARGUMENT

Section 1 of the Sherman Act, 15 U.S.C. § 1, prohibits contracts, combinations, and conspiracies that "unreasonably" restrain trade. Although most cases arising under the Sherman Act involve purely private anticompetitive agreements, the Act also makes unlawful "hybrid" restraints where, as here, a state statute "authorize[s] or compel[s] private parties to engage in anticompetitive behavior." *324 Liquor*, 479 U.S. at 345 n.8.

Two key aspects of the District Court's analysis were correct: the post-and-hold and minimum bottle retail price provisions are hybrid restraints, and the post-and-hold provisions create horizontal price restraints. But the District Court's dismissal of both counts of the Complaint (Count One based on horizontal price fixing and Count Two based on vertical price fixing) was premised on several errors of law.

First, the District Court erred in concluding that the challenged provisions of the Liquor Control Act must each be analyzed separately. The challenged statutes are inextricably intertwined, and the Supreme Court has made clear in *324 Liquor*, *Midcal*, and other cases that closely related state statutes (including those controlling liquor and wine prices) should be considered together in deciding whether they are preempted by federal law. That is especially clear here, where the purpose and effect of the challenged statutes are unitary: to authorize and mandate horizontal price fixing, in order to keep retail prices artificially high.

Second, the District Court erred by disregarding, and thus effectively discrediting, Total Wine's concrete factual allegations that the statutes' purpose and effect has been to mandate and authorize state-wide horizontal and vertical price fixing. The anticompetitive purpose and effect of a statute is relevant to whether the statute is preempted. The District Court erred in granting dispositive relief without acknowledging the market impact of the challenged statutes and

without permitting Total Wine to pursue discovery and develop a fuller record on which the District Court (and this Court) could make the requisite findings fairly to assess the validity of its preemption claims.

Third, although the District Court correctly held that the post-and-hold and minimum bottle retail price provisions were hybrid restraints, it erred by concluding that the ban on discounts below the posted case prices (the quantity discount ban) was a unilateral restraint. Not only do Connecticut officials have absolutely no role in setting any prices for alcoholic beverages; the quantity discount ban exacerbates and enhances enforcement of the other regulatory provisions that the District Court correctly found were hybrid restraints.

Fourth, the District Court erred in holding that the Complaint does not state cognizable preemption claims as to the Act's post-and-hold and minimum bottle price provisions. (The District Court did not reach that issue as to the quantity discount prohibition or as to the statutes taken together.) But the Complaint alleges that each of the challenged provisions (whether viewed in isolation or taken together) authorize, mandate, contemplate or otherwise pressure 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. The District Court's holding was based on several errors of law, most fundamentally its misperception that this Court's opinion in *Battipaglia* bars Count One, and that

with respect to the industrywide vertical price fixing alleged in Count Two, the Supreme Court's controlling decision in *324 Liquor* has been implicitly overruled.

For these reasons, the judgment should be reversed and the case remanded for further proceedings.

ARGUMENT

I. Standard of Review

This Court reviews *de novo* a district court's dismissal under Rule 12(b)(6). *See, e.g.*, *Apotex Inc. v. Acorda Therapeutics, Inc.*, 823 F.3d 51, 59 (2d Cir. 2016). When reviewing a Rule 12(b)(6) dismissal, the Court accepts the factual allegations of the complaint as true, *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 5 (2010), and draws all reasonable inferences in plaintiff's favor, *Fulton*, 591 F.3d at 43.

A complaint survives a Rule 12(b)(6) motion when it "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The plausibility standard does not impose an across-the-board, heightened fact pleading standard, *Boykin v. KeyCorp*, 521 F.3d 202, 213 (2d Cir. 2008), or "require[ ] a complaint to include specific evidence [or] factual allegations in addition to those required by Rule 8." *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 119 (2d Cir. 2010). Rather, a claim "has facial plausibility

when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 120.

II. The Challenged Statutes Are Part Of A Unified Regulatory Scheme And Should Be Analyzed As Such.

The Complaint alleges that three aspects of Connecticut's Liquor Control Act are preempted by the Sherman Act. They are codified in separate subsections of the Act, but they are part of a unified regulatory scheme set forth in Part V of the Liquor Control Act. All wholesalers are required to post their monthly case and minimum bottle prices, and then upon reviewing their competitors' posted prices (and adjusting their own accordingly), to fix those prices for the entire next month. The prices they are required to post and hold are not only the case prices (at which they will sell to retailers that month) but also the so-called "minimum bottle" prices (which, with a fixed markup, will be the mandated minimum retail price offered to Connecticut consumers). All wholesalers must sell to all retailers at the same posted case prices. All retailers must sell to all Connecticut consumers at bottle prices that are not less than the posted and fixed minimum prices that prevail throughout the state. These interrelated provisions make Connecticut's alcohol pricing statute easily the most anticompetitive in the country.[11]

[11] In the District Court, one of the wholesaler intervenors, Brescome Barton, identified five jurisdictions with statutes it argued were similar: Delaware, New

The Defendants conceded below that all the challenged statutes boiled down to a single "basic prohibition – a single manufacturer must sell at the same price to every wholesaler and a single wholesaler must sell at the same price to every retailer" (ECF No. 38-1 at 5), and the Intervenors conceded that the challenged statutes had a "common purpose" (ECF No. 66-1 at 8). Moreover, the District Court's analysis made clear there is no coherent way to analyze Connecticut's "tripartite pricing mechanism," JA 135, *except* as a single pricing regime. It explained, for example, that although "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 "explicitly tie together the prices posted by wholesalers and those charged by retailers." JA 158. *See also* JA 159

York, Oklahoma, Vermont and Michigan. ECF No. 80-1 at 12 n.2. One of them (Delaware) put an end to mandatory "holds," discount bans, and minimum retail pricing, having abandoned the last of them in 1999 – in part based on concerns they "require[d] the posting and holding of prices *in violation of the Sherman Anti-Trust Act*." 4 Del. Code Regs. 29; 2 Del. Reg. Regs. 1538-41 (Mar. 1, 1999) (proposed rule) (emphasis added); 2 Del. Reg. Regs. 2160, 2162 (May 1, 1999) (adoption of rule and summary of comments). The minimum bottle pricing regime in New York was invalidated by *324 Liquor*, 479 U.S. at 343. Moreover, the current New York statute not only does not ban quantity discounts; it expressly authorizes them. N.Y. Alco. Bev. Cont. Law § 101-b(2)(a) (McKinney). The Oklahoma regulations Brescome Barton cited involve only price posting; they neither grant wholesalers control over retail prices nor forbid quantity discounts. Okla. Admin. Code 45:30-3-8. The Vermont regulations also do not grant wholesalers any control over retail prices. Vt. Admin. Code § 14-1-8(12) . As for Michigan, that state's law applies only to wholesale prices; wholesalers neither set nor hold retail prices. Mich. Admin. Code R. 436.1726.

(explaining that the court's analysis of whether the post-and-hold provisions are hybrid "informs [its] efforts to answer the question of whether the minimum retail price provisions are best characterized as a unilateral or hybrid restraint").

Nonetheless, the District Court determined that it was precluded from considering whether the statutes *taken together* "authoriz[e] or compel[] private parties to engage in anticompetitive behavior." *324 Liquor*, 479 U.S. at 345 n.8. JA 144-47. Instead, Judge Hall considered herself bound by her view of antitrust principles and federalism concerns to analyze the challenged statutes "individually." JA 145. The District Court's reasoning in this regard does not withstand scrutiny.

First, as a practical matter, these statutes are inextricably intertwined. The post-and-hold statute explicitly requires the posting of both case and minimum bottle prices. The "bottle price" posting requirement ***sets*** the minimum retail price, because it is that price (plus a fixed markup for "shipping or delivery"), when posted by the wholesalers, that sets the price floor for retail consumers. And the quantity discount ban is simply the legislature's reiteration that the posted case prices really are the minimum wholesale prices; no discounts are permitted, whether for bulk purchases or for any other reason.[12]

[12] The District Court's reliance on Connecticut's general severability statute, Conn. Gen. Stat. § 1-3 (*see* JA 146) is not persuasive for largely the same reasons: it does not apply where, as here, challenged statutes are "mutually connected and

Second, as discussed in section III, *infra*, courts must consider the purpose and effect of statutes challenged under the Sherman Act, and the purpose and effect of these statutes is unitary: to authorize and mandate horizontal price fixing, in order to keep retail prices artificially high. JA 20 (Compl. ¶ 19). And their economic effect – retail prices as much as 24% higher than in surrounding states, JA 20 (Compl. ¶¶ 18-19) – is also unitary; each aspect of the challenged statutes reinforces and contributes to the anticompetitive effect of the others.

Third, the Supreme Court has repeatedly done precisely what the District Court considered itself precluded from doing here: analyzing closely related statutes together in deciding whether they are preempted by federal law. The *324 Liquor* Court, for example, invalidated substantively identical statutes because the effect of the "*complex* of statutory provisions and regulations [was] to permit wholesalers to maintain retail prices at artificially high levels." 479 U.S. at 340 (emphasis added). Similarly, in *Midcal*, the wine distributor plaintiff challenged several interrelated statutes, involving "fair trade contracts," price posting, and minimum wholesale prices. 445 U.S. at 99. The Supreme Court analyzed as a single "threshold question" whether California's "plan for wine pricing" violated

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dependent on [each other]." *Payne v. Fairfield Hills Hosp.*, 215 Conn. 675, 685 (1990); *see also Burton v. City of Hartford*, 127 Conn. 80, 91 (1956) (presumption of separability created by separability clause overcome when rent control provisions of ordinance were dependent on validity of eviction controls).

the Sherman Act. *Id.* at 102. *See also Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98-99, 104-06 (1992) (analyzing as a unit over a dozen different statutory provisions, some related to "public safety" and others to "occupational safety," in deciding whether they were preempted by the Occupational Safety and Health Act of 1970).

Fourth, although the District Court cited "federalism principles" as "counsel[ing] in favor of addressing the statutes in turn," it simply does not follow that federalism is "best given effect" by addressing each provision of state law separately. JA 145. A state statute is preempted by the Sherman Act only when 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." *Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982). Because preemption is limited to those cases in which there is truly such an "irreconcilable conflict," federalism concerns are addressed in the preemption analysis itself. *Id.* at 659. The question whether particular state statutes are sufficiently interrelated in their purpose and effect so that they must be analyzed together is a separate question.

Fifth, the District Court reasoned that each statute must be analyzed in isolation because of the "framework by which the court analyzes antitrust preemption claims," as it "makes little sense, for example, to conceive of the post-

and-hold provisions as having vertical effect." JA 146. To be sure, many preemption cases involve only horizontal *or* vertical price fixing. But there is nothing about the "framework" for analyzing Sherman Act preemption claims that *requires* that each interrelated provision of a challenged statute be analyzed in isolation. For example, if a statute mandates or authorizes horizontal price fixing, it is preempted, even if the same statute *also* mandates or authorizes vertical price fixing. The latter mandate, which viewed alone might dictate "rule of reason" analysis, obviously does not purge the former mandate of its *per se* illegality. *See Toys "R" Us, Inc. v. Federal Trade Comm'n*, 221 F.3d 928, 930 (7th Cir. 2000) (holding that an anticompetitive arrangement among a dominant supplier and multiple retailers was subject to *per se* scrutiny, even though it had both horizontal and vertical elements, because the "essence of the agreement network [the supplier] supervised was horizontal").

In short, the District Court erred in analyzing the challenged statutes in isolation. The Complaint states preemption claims based both on horizontal and vertical price fixing because these statutes are inextricably intertwined, and because the anticompetitive pricing regime they implement creates both horizontal and vertical price restraints.

III. The District Court Erred In Disregarding the Complaint's Allegations Concerning the Purpose and Effect of the Challenged Statutes.

As stated above, the Complaint makes concrete factual allegations that the statutes' ***purpose*** was to mandate and authorize horizontal and vertical price fixing, and that their ***effect*** has been precisely that: wholesalers set the same bottle and case prices down to the penny, month after month, resulting in significantly higher retail prices for Connecticut consumers. The District Court concluded it could ignore those well-pleaded allegations because "whether or not private parties are actually colluding has no import in the preemption analysis, which focuses [exclusively] on the text and face of the statutes at issue." JA 140. *See also* JA 138 n.6 ("Arguments as to the harm inflicted on consumers by this scheme are more appropriately directed to Connecticut's executive and legislative branches of government."). But the Supreme Court has made clear that courts **must** consider the purpose and effect of state statutes challenged under the Sherman Act.

Purpose. The core preemption question, as described below (§ V, *infra*) and articulated in *Rice*, 458 U.S. at 661, is whether the state statute (1) "mandates," "authorizes," or "contemplates" conduct "that necessarily constitutes a violation of the antitrust laws in all cases," and/or (2) "places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute." The purpose for which a statute was enacted is inseparable from those questions.

Total Wine's Complaint includes concrete allegations that the Connecticut legislature not only "contemplated" that wholesalers and retailers would act horizontally and vertically to fix prices. Total Wine alleges that the very purpose of the statutes was to "impel wholesalers to combine, conspire and agree, either tacitly or expressly, to fix and maintain wholesale and retail prices," and to thereby permit wholesalers to fix and maintain those retail prices "at levels substantially above what market forces would dictate." JA 19-20 (Compl. ¶¶ 16, 19). By disregarding and thus effectively discrediting those well-pled allegations, the District Court turned *Twombly*, 550 U.S. at 544, on its head.

Effect. The Complaint alleges that the effect of the statutes has been two-fold: First, "[c]ompeting 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." JA 20 (Compl. ¶ 19). Second, "retail prices for wine and spirits in Connecticut . . . are as much as 24% higher than prices offered for identical products in the surrounding states." JA 20 (Compl. ¶¶ 18-19).

While the District Court felt compelled to ignore these critical allegations, the Supreme Court has made clear that the practical effect of a statute, including whether "private parties are actually colluding," is critical to determining whether a challenged statute in fact "authoriz[es] or compel[s] private parties to engage in

anticompetitive behavior." *324 Liquor*, 479 U.S. at 345 n.8. The *324 Liquor* Court held that the New York statutes at issue were facially invalid in part because the evidence revealed that the "effect" of the statute was that wholesalers were in fact "set[ting] retail prices" and thereby "guarantee[ing] retailers large markups, sometimes in excess of 30 percent." *Id*. at 340. *See also Gade*, 505 U.S. at 107 ("[P]re-emption analysis cannot ignore the effect of the challenged state action on the pre-empted field."). Although the fact that a state statute "*might* have an anticompetitive effect," standing alone, does not state a preemption claim, *Rice*, 458 U.S. at 659 (emphasis added), the actual anticompetitive effect of a statute is *relevant* to a plaintiff's preemption claim that the statute authorizes or mandates anticompetitive conduct. *See 324 Liquor*, 479 U.S. at 340. In dismissing the Complaint at the outset of the case, the District Court prevented Total Wine from even pursuing discovery of those anticompetitive effects.

The stark, horizontal uniformity of the Connecticut wholesalers' posted case prices to retailers and their posted minimum bottle prices that retailers must set as a floor for sales to consumers is further illustrated in the tables attached to the Complaint. JA 24-31. This evidence of horizontal uniformity is not just a plausible allegation (though that is all it needs to be at this stage); the clear evidence of uniform pricing across the entire statewide alcoholic beverage industry

establishes that the mandatory effect of *all* of the challenged statutes is horizontal (and vertical) price fixing.[13]

In short, the District Court could not resolve Total Wine's preemption claims, whether at the pleading stage or otherwise, without taking into account the actual purpose, and the effects in the marketplace, of the challenged statutes. The Complaint stated concrete, plausible allegations as to both the purpose and effect of the statutes. The District Court erred in granting dispositive relief without having permitted Total Wine to pursue discovery and develop a further record on which the District Court (and this Court) will be able to make the requisite findings to assess fairly and completely Total Wine's preemption claims. For these reasons alone, this Court should reverse the judgment below and remand for further proceedings.

IV. The Quantity Discount Ban, Like The Other Challenged Aspects of the Act, Is A Hybrid Restraint.

Broadly speaking, there are three categories of anticompetitive restraints: (1) "purely private restraint[s]," *Rice*, 458 U.S. at 665 (Stevens, J., concurring), such as agreements to fix prices, *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006), or to boycott a particular competitor, *United States v. General Motors Corp.*, 384 U.S.

[13] These facts also are relevant to whether the challenged statutes are unilateral or hybrid restraints, which, among other things, turns on the "degree of discretion" that is exercised by "private actors" in setting prices. *Costco*, 522 F.3d at 890.

127, 140, 143-46 (1966); (2) purely "unilateral" action by states or local governments "to the exclusion of private control," which is beyond the reach of the Sherman Act, *Fisher v. City of Berkeley, California*, 475 U.S. 260 (1986); and (3) "[h]ybrid restraints," *Rice*, 458 U.S. at 665 (Stevens, J., concurring), which are "state laws authorizing or compelling private parties to engage in anticompetitive behavior." *324 Liquor*, 479 U.S. at 345 n.8.

As the Intervenor-Appellees conceded below, "[t]he core feature" of a hybrid restraint is that it "requires or permits" *private parties* to dictate prices, "which the state merely "enforce[s]." ECF No. 66-1 at 14 (citing *Fisher*, 475 U.S. at 267-69). On three occasions, the Supreme Court has "held that hybrid price-fixing restraints are prohibited by the Sherman Act." *See Rice*, 458 U.S. at 666 (Stevens, J., concurring) (citing *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951) and *Midcal*, 445 U.S. 97). *See also 324 Liquor*, 479 U.S. at 342-43 (decided after *Rice*).

The District Court properly held that two aspects of Connecticut's "tripartite" price control regime – the post and hold rules, and the minimum bottle retail price provisions – constitute hybrid restraints. This conclusion, as the District Court explained, was mandated by *324 Liquor*, which held that New York statutes that were "remarkably similar" to the statutes challenged here were hybrid restraints. JA 150, 159. After all, public officials in Connecticut play no role

whatsoever in setting wholesale or retail prices for alcoholic beverages. Instead, Connecticut law empowers liquor wholesalers not only to set the prices at which they sell to retailers (through posted case prices), but also to establish a minimum price floor below which retailers are prohibited from selling to their customers (through posted "bottle" prices).[14] But as to the prohibition on quantity discounts, the District Court concluded it was analogous to the City of Berkeley's rent-control ordinance at issue in *Fisher*, which granted ongoing authority to a local board to set pricing in the form of maximum rents, and which the Supreme Court held to be a unilateral restraint. *See* JA 168-69. The District Court erred because the ordinance in *Fisher* was fundamentally different from the quantity discount ban at issue here. This Court should follow the Fourth Circuit's holding in *TFWS, Inc. v. Schaefer*, 242 F.3d 198, 208 (4th Cir. 2001) ("*TFWS I*"), that a substantively identical quantity discount ban constituted a hybrid restraint.

The District Court acknowledged that the quantity discount prohibitions grant no authority whatsoever to government authorities to set prices. Instead, "wholesalers *may choose* what price they will charge all retailers." JA 169

[14] The District Court also properly observed that although in a purely private antitrust case a plaintiff must prove "an actual agreement to fix or control prices," this Court "ma[de] clear . . . that no actual agreement needs to be pleaded or shown for a plaintiff to succeed on a preemption claim." JA 156-57 n.11 (citing *Freedom Holdings I*, 357 F.3d at 223 n.17). *See also 324 Liquor*, 479 U.S. at 345 n.8 (holding that no "contract, combination . . . or conspiracy" need be pleaded or proven when challenging a hybrid restraint).

(emphasis in original). But having considered itself precluded from considering the interrelated effects of the challenged statutory provisions, and because wholesalers "are prohibited from charging different prices" to different retailers, the District Court concluded that the discount ban is a "unilateral" government-imposed restraint beyond the reach of the Sherman Act. JA 169 (quoting *Freedom Holdings IV*, 624 F.3d at 50) (alteration omitted). This conclusion was wrong, for two reasons.

First, the "*Fisher* doctrine" only applies where a state or local government imposes restraints "unilaterally" and "to the *exclusion* of private control." 475 U.S. at 266.[15] A statute is "unilateral" ***only*** if it allows "no degree of discretion" to

[15] Under the *Fisher* doctrine, a state or local government that has engaged in "unilateral" conduct is held not to *violate* the Sherman Act – that is, such conduct is beyond the reach of the Sherman Act. There is a related *immunity* doctrine, known as "state action" immunity or "*Parker*" immunity (for the case *Parker v. Brown*, 317 U.S. 341 (1943)). Under that doctrine, even if a state governmental actor has violated the Sherman Act, he or she is "immune" from liability where (1) the challenged anticompetitive restraint was "clearly articulated and affirmatively expressed as state policy" and (2) the policy was "actively supervised by the State itself." *Midcal*, 445 U.S. at 105 (1980). In this case, the Defendants and Intervenors did not assert *Parker* immunity as a basis for dismissal – and for good reason, because the State of Connecticut is not involved in setting, regulating or monitoring the prices set by the manufacturers and wholesalers, as the "active supervision" element requires. *See North Carolina State Bd. of Dental Examiners v. F.T.C.*, 135 S. Ct. 1101, 1112 (2015) ("The active supervision requirement demands, *inter alia*, 'that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.'") (quoting *Patrick v. Burget*, 486 U.S. 94, 101 (1988)); *Midcal*, 445 U.S. at 105-106 (no *Parker* immunity because the state did not "establish[] prices," "review[] the reasonableness" of prices, or "monitor market

be exercised by "private actors." *Costco*, 522 F.3d at 890. To be sure, a state statute can be a unilateral restraint even if private parties are the ones setting prices. In *Fisher*, the Berkeley rent control board set maximum rents; it did not set rents for particular properties. 475 U.S. at 262. But the quantity pricing provisions here are fundamentally unlike the maximum-rent rules in *Fisher*. The Berkeley rent control board had its hands on the pricing levers in the local market for rental housing. The ordinance required that the board "hold regularly scheduled meetings," Berkeley Mun. Code § 13.76.060(H), during which it not only decided the default maximum rent for all landlords in the city, but also adjudicated *ad hoc* petitions for "special adjustment[s] of a particular rent ceiling." 475 U.S. at 267. "[C]ontrol over the maximum rent levels of every affected residential unit ha[d] been unilaterally removed from the owners of those properties and given to the Rent Stabilization Board." *Id.*

In contrast, Connecticut officials have absolutely no role to play in setting any prices for alcoholic beverages. Not only is there no "*exclusion* of private control," *Fisher*, 475 U.S. at 266; if anything there is an exclusion of *public* control. *Compare, e.g.*, *F.T.C. v. Ticor Title Ins. Co.*, 504 U.S. 621, 639 (1992) ("This case involves horizontal price fixing under a vague *imprimatur* in form and

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conditions"; instead, it "simply authorize[d] price setting and enforce[d] the prices established by private parties").

agency inaction in fact. No antitrust offense is more pernicious than price fixing. . . . We do not have before us a case in which governmental actors made unilateral decisions without participation by private actors.").

Second, the quantity discount prohibition is a hybrid restraint because it is inextricably intertwined with the post-and-hold and minimum retail price provisions, as explained above. A quantity discount ban has no meaningful effect unless it is linked to a fixed base price; if the seller can vary base prices at will (*i.e.*, discriminate in pricing), discounts and discount bans are superfluous. A quantity discount ban will have an effect in the marketplace only when, as here, a seller and a buyer are prohibited by state law from bargaining over price. In states with post-and-hold laws, this anticompetitive effect is magnified because the discount ban is linked to base prices that are inflexible.

As the Fourth Circuit explained in two separate appeals in *TFWS*, a volume discount ban that operates in conjunction with a post-and-hold provision is "part of the hybrid restraint because it reinforces the post-and-hold system by making it even more inflexible." *TFWS I*, 242 F.3d at 209. "For instance, the volume discount ban facilitates self-policing among market participants because departures from established prices are readily recognizable." *TFWS, Inc. v. Franchot*, 572 F.3d 186, 193 (4th Cir. 2009) (*"TFWS II*").

> [A] wholesaler who notices a low retail price for a competitor's product has all the information needed to

> report a violation: the filed wholesale price ***and the knowledge that the retailer cannot have received a discount***. The challenged regulations allow private businesses to set prices, mandate price-filing and price-holding, and allow industry players to facilitate detection of would-be price cutters – especially in a state like Maryland where just two wholesalers control 85%-90% of the liquor market. In short, the two provisions at issue together grant private actors the tools to engage in coordinated pricing, and so constitute hybrid – not unilateral – restraints.

Id. (emphasis added).

As in Maryland, the wholesale liquor market in Connecticut is consolidated. According to some of the Intervenors, just six companies, organized as the Wine & Spirits Wholesalers of Connecticut ("WSWC"), control over 85 percent of the wine and spirit distribution market in Connecticut, ECF No. 27 at 1, and that does not even include Brescome Barton, which professes to be "the largest wholesaler of wine and spirits" in the state, ECF No. 74 at 1. And just eight entities, organized as the Connecticut Beer Wholesalers Association, control approximately 75 percent of the entire malt beverage distribution market in the state. ECF No. 30-1 at 5. Thus, as in *TFWS*, there is no plausible way to extricate the quantity discount ban from the post-and-hold regime for purposes of determining whether either or both in combination constitutes a hybrid restraint.

For these reasons, each of the challenged aspects of the Connecticut Liquor Control Act constitutes a hybrid restraint.

V. The Complaint States a Valid Sherman Act Preemption Claim.

A hybrid restraint is preempted by the Sherman Act where "there exists an irreconcilable conflict between the federal and state regulatory schemes." *Rice*, 458 U.S. at 659. Such a conflict arises whenever a statute (1) "mandates," "authorizes," or "contemplates" conduct "that necessarily constitutes a violation of the antitrust laws in all cases," and/or (2) "places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute." *Id.* at 661. *See also Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 225 (2d Cir. 2004) ("*Freedom Holdings I*") (explaining that if "conduct contemplated" by a statutory scheme "would be a *per se* Sherman Act violation if done by private agreement," the statute is preempted).[16]

The Complaint alleges that each of the challenged provisions authorizes, mandates, contemplates 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. The District Court's holding to the contrary

[16] This Court heard several subsequent appeals in *Freedom Holdings*, which involved the statutes that implemented the tobacco master settlement agreement ("MSA"). Ultimately the plaintiffs' claims failed, because (a) the MSA statutes were unilateral, and (b) in any event, the governmental defendants were entitled to *Parker* immunity. *Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38, 52-63 (2d Cir. 2010). But this Court's holding in *Freedom I* has never been disturbed: a complaint states a hybrid restraint preemption claim where the "conduct contemplated" by the statute "would be a *per se* Sherman Act violation if done by private agreement." *Freedom I*, 357 F.3d at 225.

as to the post-and-hold and minimum bottle price provisions (it did not reach that question as to the quantity discount prohibitions or as to the statutes taken together) was based on several errors of law. Most significantly, the District Court erred by holding that this Court's opinion in *Battipaglia* bars Total Wine's horizontal-restraint preemption claim (Count One), and that when considering a statutory scheme that imposes industrywide vertical price fixing (Count Two), *324 Liquor* has been implicitly overruled.

A. Count One States A Valid Preemption Claim Based On Horizontal Price Fixing.

Horizontal price fixing is *per se* illegal. *Leegin* , 551 U.S. at 893 (2007) (citing *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006), and *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58 n.28 (1977)). *See also Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980) ("A horizontal agreement to fix prices is the archetypal example" of a practice that is "unlawful *per se*."). And for good reason: it "would always or almost always tend to restrict competition." *Leegin*, 551 U.S. at 886 (quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988)). "When firms in a market are able to coordinate their pricing and production activities, they can increase their collective profits and reduce consumer welfare by raising price and reducing output." *Costco*, 522 F.3d at 896 (citing John E. Lopatka & William H. Page, *State Action and the Meaning of Agreement Under*

the Sherman Act: An Approach to Hybrid Restraints, 20 Yale J. Reg. 269, 311 (2003)).

Because it is settled that horizontal price fixing has always been deemed *per se* illegal under the Sherman Act, the question whether Count One states a plausible preemption claim should have been simple: Taking as true the allegations in the Complaint, do the statutes (whether considered together or in isolation) "mandate," "authorize," or "contemplate" horizontal price fixing or place "irresistible pressure" on wholesalers to fix their prices to those of their competitors?

Starting with the post-and-hold provisions, even taken in isolation, the answer clearly is "yes," a conclusion mandated by the Supreme Court's holding in *324 Liquor* that "[m]andatory *industrywide* resale price fixing" – which, as noted above, is precisely what is accomplished by a post-and-hold regime – is a *per se* violation of § 1 of the Sherman Act. 479 U.S. at 342 (emphasis added). The statutory scheme here is indistinguishable from the New York statutes the *324 Liquor* Court held were preempted. Wholesalers were required to post both "case" and "bottle" prices, as part of a "complex of statutory provisions and regulations" the purpose and effect of which was "to permit wholesalers to maintain retail prices at artificially high levels." *Id.* at 338, 340. Such "[m]andatory industrywide resale price fixing is virtually certain to reduce interbrand competition as well as

intrabrand competition, because it prevents manufacturers and wholesalers from allowing or requiring retail price competition." *Id.* at 342.

The District Court recognized that the Connecticut statutes at issue here are indistinguishable from the New York statutes invalidated in *324 Liquor*. *See, e.g.*, JA 159 ("Connecticut's minimum retail price provisions are remarkably similar to the New York statute challenged in that case."); JA 163 ("*324 Liquor*. . . held that similar arrangements were *per se* violations of the Sherman Act."). But it concluded it was free to disregard *324 Liquor*'s holding as to Count One, based on the following reasoning:

> *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. 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.

JA 155-56.

But the New York statute the Supreme Court held to be preempted was *not* a purely "vertical restraint." The Court made clear that part of the irreconcilable conflict between the New York statute and the Sherman Act was that the former mandated "*industrywide* resale price fixing." 479 U.S. at 342; *see J.A.J. Liquor Store, Inc. v. New York State Liq. Auth.*, 479 N.E.2d 779, 783 (N.Y. 1985)

(decision of the New York Court of Appeals below in *324 Liquor*, describing the statutory scheme in more detail, including its post-and-hold provisions). By "industrywide" the Supreme Court was referring to price fixing *among* competitors – the alcohol wholesalers in New York State. *Id.* That is horizontal price fixing, which is *per se* illegal today, just as it was when the Court decided *324 Liquor*. *See Catalano*, 446 U.S. at 649-50 ("[T]here is a plain distinction between the lawful right to publish prices and terms of sale, on the one hand, and an agreement among competitors limiting action with respect to the published prices, on the other."); *id.* at 648 ("[A]n agreement to eliminate discounts . . . falls squarely within the traditional *per se* rule against price fixing.").

To be sure, the *324 Liquor* Court also held that, insofar as the New York post-and-hold and minimum retail price provisions mandated vertical price restraints, those vertical restraints further rendered the statute preempted. *Id.* at 342-43. The Court had no reason to explicitly distinguish between the horizontal and vertical aspects of the industry-wide price fixing that was mandated by the New York statute because, at the time, *both* types of price fixing were *per se* illegal. But any vertical-restraint aspect of the Court's analysis was not necessary to its holding. And even if those portions of the opinion – presumably what the District Court was referring to as the "context[]" (JA 156) – were undermined by *Leegin* (which is addressed below in § V.B, *infra*), any subsequent developments

in the law with respect to vertical restraints has no effect on *324 Liquor*'s holding with respect to the horizontal aspects of New York's post-and-hold and minimum retail price statutes.

Having concluded that *324 Liquor* was not controlling, the District Court decided that dismissal of Count One was required by the opinion of the panel majority in this Court's 1984 decision in *Battipaglia*. The District Court also erred in following *Battipaglia.*

First, *Battipaglia* was overruled by *324 Liquor* in several ways. A central premise of *Battipaglia's* analysis was that a state statute is preempted only where it "compel[s] an[] agreement." 745 F. 2d at 170. *See also id.* at 173 ("Section I [of the Sherman Act] requires an agreement."). But *324 Liquor* held that there need not be a "contract, combination . . . , or conspiracy" (*i.e.*, an actual private agreement) for a hybrid restraint to be preempted by the Sherman Act.[17] The

[17] *324 Liquor* involved a liquor retailer's facial challenge to a New York minimum resale price statute that was functionally identical in its purpose and effect to the Connecticut minimum bottle price statute at issue here. 479 U.S. at 340. The plaintiff neither alleged nor proved any actual agreement, whether horizontal or vertical, among other industry participants. *Id.* at 342. But the Court explained that no "contract, combination . . . or conspiracy" need be pleaded or proven when challenging a hybrid restraint. *Id.* at 345 n.8. That is because "the federal antitrust laws pre-empt state laws authorizing or compelling private parties to engage in anticompetitive behavior." *Id.* There also was no evidence of an "agreement" in *Midcal*, yet there as well the Supreme Court held that the state laws were hybrid restraints that were preempted by the Sherman Act. *Midcal*, 445 U.S. at 103. *See also Miller v. Hedlund*, 813 F.2d 1344, 1349 (9th Cir. 1987) ("While it is true that there is no agreement or concerted activity among the wholesalers, it can not be

Battipaglia majority also suggested that it saw the preemption analysis as a balancing test in which New York's interest in "deal[ing] with the subject of intoxicating liquor" was weighed against "the federal commerce power." *Id.* at 169. *See id.* at 170 ("We hold that the challenged sections of New York's Alcoholic Beverage Control Law are not in direct conflict with § 1 of the Sherman Act *but that if they were, the interests of New York are entitled to prevail*.") (emphasis added). There is no way to reconcile that balancing test with the Supreme Court's subsequent decision in *324 Liquor*.

Second, even if *Battipaglia* were still good law, it did not involve mandatory fixing of both wholesale prices and retail price floors as the Connecticut statutes do here. The New York statute at issue in *Battipaglia* required wholesalers to post and hold their prices to retailers, but the wholesalers' posted schedules "ha[d] no controlling effect on retail prices," because the New York Court of Appeals previously had declared unconstitutional the provision that "prohibited retail sales at a price less than that established in a retail price schedule." 745 F.2d at 172. *Battipaglia* is further distinguishable because it arose on summary judgment, not a motion to dismiss, and even after discovery the plaintiffs did not have any

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ignored that the challenged regulations facilitate the exchange of price information and require adherence to the publicly posted prices. In other words, the state compels activity that would otherwise be a per se violation of the Sherman Act."); *Costco*, 522 F.3d at 893 (same); *see TFWS I*, 242 F.3d at 214 (Luttig, J., concurring).

evidence that the challenged statute "had an anticompetitive effect." *Id.* at 172. In fact, Judge Friendly expressly *distinguished* a California case where there was a "record showing" such an effect. *Id.* at 172 & n.10 (citing *Lewis-Westco & Co. v. Alcoholic Beverage Control Appeals Board*, 136 Cal. App. 3d 829 (1982)). Here, by contrast, the District Court refused to acknowledge Total Wine's concrete allegations that the challenged statutes have pervasive and dramatic anticompetitive effects. *See* § III, *supra*.

Third, *Battipaglia* was an opinion rendered by a divided panel, and time has shown that it was wrongly decided. The District Court suggested as much. JA 155 ("[T]his court might be inclined to agree with the analysis of [dissenting] Judge Winter."). Because *324 Liquor* abrogated the relevant portions of *Battipaglia*, this Court need not reach the question whether *Battipaglia* was correctly decided in 1984. But the overwhelming opinion of courts and commentators is that *Battipaglia* not only reached the wrong outcome; it did so based on faulty reasoning, by conflating the mere *sharing* of pricing data among private parties with a state statute that required competitors not only to post their prices, but allowed them to adjust their own prices to meet competitors' price moves, and then required them to *hold* their posted prices for a fixed period of time.

As the District Court noted, "in reaching its conclusion that the New York law was not a *per se* violation of the Sherman Act" the *Battipaglia* court

"[c]uriously . . . 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." JA 154. As discussed above, it is not the "posting" aspect of the post-and-hold requirement that is fatal from an antitrust perspective; retailers and wholesalers in many industries typically publish their prices. It is the "holding" aspect that is pernicious, and that violates the Sherman Act – and it is this aspect of the New York statute that, as the District Court properly observed, the *Battipaglia* court did not "grappl[e] with." *Id.*

Judge Winter recognized in his *Battipaglia* dissent that the mandatory one-month "hold" in the New York statute moved the challenged regime from rule of reason analysis to *per se* analysis, because agreements to adhere to announced prices have long "been uniformly held illegal without regard to [their] reasonableness." 745 F.2d at 179 (Winter, J., dissenting) (citing *Sugar Inst.*, 297 U.S. at 601 (1936)). The leading antitrust treatise also has criticized the majority opinion in *Battipaglia* for the same reasons, and concluded that Judge Winter's dissent was a more accurate statement of the law following *Midcal*. "Given the great danger that agreements to post and adhere will facilitate horizontal collusion, the dissent's position [in *Battipaglia*] is more consistent with *Midcal*." 2 Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW, ¶ 217b2 (2016).

Indeed, where post-and-hold statutes have been challenged, they have almost universally been struck down. The two other Courts of Appeals that have considered whether a mandatory pricing "hold" is subject to *per se* or rule of reason analysis both rejected the *Battipaglia* majority's holding, and instead have agreed with Judge Winter. *Costco*, 522 F.3d at 895-96; *TFWS I*, 242 F.3d at 209. As the Fourth Circuit explained in *TFWS I*:

> Under Maryland's post-and-hold system, liquor wholesalers post prices and adhere to them for thirty days after they are in effect. Moreover, with respect to new brands and sizes, competing wholesalers may match the prices of the posting wholesaler before the posted prices go into effect. **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.** There is, we recognize, a "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." *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 649–50 (1980) (per curiam). This distinction makes one thing obvious: agreements to adhere to previously announced prices are unlawful per se. *See Sugar Institute v. United States*, 297 U.S. 553, 581 (1936) (noting that "steps taken to secure adherence, without deviation, to prices and terms . . . announced" violate § 1). Again, **Maryland's post-and-hold pricing scheme mandates the exchange of price information by wholesalers through public posting and dissemination, and it requires adherence to the publicly announced prices. The Maryland system thus mandates activity that is essentially a form of horizontal price fixing, which has been called "the paradigm of an unreasonable restraint of trade."** *N.C.A.A. v. Board of Regents of the University of*

> *Oklahoma*, 468 U.S. 85, 100 (1984). Maryland's post-and-hold regime is subject to § 1 as a hybrid restraint, and we hold that it is illegal per se.

242 F.3d at 209 (emphases added). The post and hold statute in Connecticut is not distinguishable in any way from the Maryland provisions that were held in *TFWS* to violate the Sherman Act. *See also, e.g.*, *TFWS II*, 572 F.3d at 188 (affirming district court's judgment that the statutes were preempted); *Costco*, 522 F.3d at 904 (Washington post-and-hold statute is preempted as a *per se* restraint of trade); *Hedlund*, 813 F.2d 1344 (9th Cir. 1986) (Oregon post-and-hold statute for liquor wholesalers preempted by the Sherman Act as a *per se* unlawful hybrid restraint); *Canterbury Liquors & Pantry v. Sullivan*, 999 F. Supp. 144 (D. Mass. 1998), *appeal dismissed*, 158 F.3d 51 (1st Cir. 1998) (Massachusetts price posting statute for liquor wholesalers was preempted as a per se violation of the Sherman Act); *Anheuser-Busch, Inc. v. Goodman*, 745 F. Supp. 1048, 1057 (M.D. Pa. 1990 (invalidating Pennsylvania statute requiring beer wholesalers to post and hold their prices).

For these reasons, even analyzing the Connecticut post-and-hold statute in isolation (which it should not be), and even if the Court were to disregard Total Wine's well-pled allegations of fact regarding Connecticut wholesalers' actual parallel pricing (which it cannot), Count One states a claim on which relief can be

granted, and the District Court's judgment dismissing that preemption claim based on horizontal price fixing should be reversed.

The error of dismissing Count One becomes even more apparent in light of the Complaint's allegations regarding the impact of the minimum bottle price provisions and the quantity discount ban. Both extend and reinforce the anticompetitive aspects of the post-and-hold provisions. The quantity discount ban makes clear that wholesalers are prohibited from charging, and retailers are prohibited from paying, less than the posted "case" price. And the minimum bottle price rules make clear that retailers are, in fact, required to charge their customers at least the marked-up posted and held "bottle" price determined by the wholesalers. These three statutes contemplate, authorize and mandate industrywide, horizontal price fixing.[18]

And that remains the case even if the statutes are analyzed in isolation. But as explained above, this Court should not analyze each aspect of the Connecticut pricing regime separately and ignore the purpose and effect of the other challenged provisions – just as it cannot disregard the Complaint's concrete allegations that the challenged statutes do in fact result in uniform wholesale prices industry-wide. *See* §§ II-III, *supra*. The post and hold, minimum bottle price, and quantity

[18] There are "vertical" aspects of these provisions as well, which also render the statutes preempted under Count Two, for the reasons discussed below (§ V.B, *infra*).

discount provisions are inextricably intertwined, and together they mandate horizontal price fixing among wholesalers, which is *per se* illegal.

For these reasons, Count One states a cognizable preemption claim based on horizontal price fixing, and the District Court's judgment dismissing that claim should be reversed.

B. Count Two Also States A Preemption Claim, Because Industry-Wide Vertical Price Fixing Is Subject to Per Se Scrutiny.

While horizontal price fixing remains *per se* illegal in all cases, *Leegin* held that, at least in cases involving a single wholesaler that sets minimum retail prices, such vertical restraints are subject to the rule of reason. 551 U.S. at 898-99. In *324 Liquor*, the Court held that, due to *both* aspects of the conduct mandated by the New York statute (horizontal and vertical price fixing), the statute was preempted. As to the horizontal aspects of the posting and holding of minimum bottle prices, mandated by state law, the case remains controlling, as discussed above. As to vertical price fixing, *324 Liquor* squarely held that the hybrid, vertical retail price maintenance scheme mandated by the New York statutes at issue there – which are indistinguishable from the statutes and conduct at issue here – also was *per se* unlawful. 479 U.S. at 342-43. The District Court recognized this, but held that the vertical restraint aspect of *324 Liquor* was overruled *sub silentio* by *Leegin*. JA

164-66. Solely on that basis, the District Court dismissed Count Two of the Complaint. This was error, for two reasons.

First, "[i]t is [the Supreme] Court's prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). Nowhere in *Leegin* did the Supreme Court suggest it was overruling *324 Liquor*. *324 Liquor* was not even cited in *Leegin*. The *Leegin* Court did overrule *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), which had held that vertical price restraints are *per se* illegal under the Sherman Act, but that is not enough to render the vertical-restraint holding in *324 Liquor* bad law. Where "a precedent of this Court has direct application in a case," as *324 Liquor* does here, "the Court of Appeals should follow the case which directly controls" – even if the case "appears to rest on reasons rejected in some line of decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997). The District Court clearly erred in determining that *324 Liquor* had been overruled by *Leegin* without the Supreme Court having so decided.

Second, *Leegin* and *324 Liquor* addressed two fundamentally different types of vertical price restraints. *324 Liquor* involved a mandate that wholesalers not only post and hold their case prices to retailers, but also set minimum retail bottle prices for retailers to charge consumers – and that *all* wholesalers do so, industry-wide. The multiple-supplier aspect of *324 Liquor* not only meant that the statute mandated horizontal price fixing (*see* § V.A, *supra*), but also converted the type of

single-supplier retail price maintenance at issue in *Leegin* into something else entirely.

The leather manufacturer in *Leegin* was the only company at its "tier" in the market that was a party to the price maintenance arrangement. The agreement was *purely vertical*; there was not even a theoretical risk of horizontal collusion. As explained above, that could not be more different from the industry-wide restraints at issue here. *See TFWS II*, 572 F.3d at 191-92 (holding that *Leegin* had no effect on cases involving the horizontal price fixing created by Maryland's post-and-hold statute and quantity discount ban). Where, as here, an anticompetitive price restraint has both vertical *and* horizontal components, it remains subject to *per se* scrutiny. The Supreme Court made this distinction explicitly in *324 Liquor* itself:

> Our recent decisions recognize the possibility that a vertical restraint imposed by a *single* manufacturer or wholesaler may stimulate interbrand competition even as it reduces intrabrand competition. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51-52 (1977). Accordingly, we have held that concerted nonprice restrictions imposed ***by a single manufacturer*** are to be judged under the rule of reason. *Id.* at 59. We also have held that ***a single manufacturer*** may announce resale prices in advance and refuse to deal with those who fail to comply. *Monsanto Co. v. Spray-Rite Service Corp.* [465 U.S. 752, 761 (1984)]; *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). ***Neither of these qualifications to the* per se *rule applies in this case***. Section 101-bb directly restricts retail prices, and retailers are subject to penalties for failure to adhere to the resale price schedules. The New York statute, moreover, applies to *all* wholesalers and retailers of

> liquor. We have noted that industrywide resale price maintenance also may facilitate cartelization. *Continental T.V., Inc. v. GTE Sylvania Inc.*, *supra,* 433 U.S., at 51, n. 18. ***Mandatory industrywide resale price fixing is virtually certain to reduce interbrand competition as well as intrabrand competition, because it prevents manufacturers and wholesalers from allowing or requiring retail price competition.*** The New York statute specifically forbids retailers from reducing the minimum prices set by wholesalers.

324 Liquor, 479 U.S. at 341-42 (emphases added).

Before *Leegin*, the Court had held in *Dr. Miles* that *all* minimum-price agreements among manufacturers and distributors were *per se* illegal. In *Leegin*, the Court held that *Dr. Miles* had gone too far, because vertical minimum-price agreements *sometimes* have "pro-competitive effects," namely – and this is the crucial analysis – where they have the potential to "increase interbrand competition by facilitating market entry for new firms and brands." 551 U.S. at 891. The leather manufacturer in *Leegin*, for example, believed that its luxury belts could more effectively compete with other luxury belts if its retailers had a guaranteed margin to allow them to "provide customers more services, and make their shopping experience more satisfactory," and if its "brand image" was not associated with "discounting." *Id.* at 882-83. But that rationale breaks down entirely where, as here, a system of vertical price restraints – here minimum bottle prices – is complemented by horizontal price fixing across an entire industry within a state.

In concluding that the rule of reason should apply to *purely* vertical restraints, the Court in *Leegin* took pains to identify several facts that were *not* present in that case, including (1) where "many competing manufacturers" – as opposed to "a single manufacturer" – adopt a practice of resale price maintenance, and (2) where "there is evidence retailers were the impetus for a vertical price restraint," because in such cases "there is a greater likelihood that the restraint facilitates a retailer cartel or supports a dominant, inefficient retailer." 551 U.S. at 897-98. The Complaint here alleges facts supporting both of these distinguishing factors from *Leegin*. Connecticut's alcohol pricing regime obviously does not involve only a single wholesaler, but rather a relatively small number of wholesalers that distribute all of the alcoholic beverages sold in Connecticut. *See* § IV, *supra*. The Complaint also alleges that inefficient retailers, seeking to protect their unreasonably large profit margins, have played a critical role in preserving the anticompetitive regime. JA 21 (Compl. ¶ 20).

A Seventh Circuit case, *Toys "R" Us*, 221 F.3d at 928 , aptly illustrates why vertical price fixing that *also* involves horizontal collusion is fundamentally different from the type of agreement at issue in *Leegin*. In that case, Toys "R" Us ("TRU"), a dominant retailer, required its suppliers (toy manufacturers) to limit their distribution of products to "warehouse club stores" like Costco. There was a significant temptation for any given manufacturer to break ranks and grant full

distribution rights to the warehouse clubs. A "cheater" would lose the TRU relationship, but would have all the warehouse club business to itself. The only way for the manufacturers to avoid that risk – and make it worthwhile to join the vertical exclusivity agreement with TRU – was to enter into a horizontal agreement among themselves, in which they each agreed (horizontally) to enter (vertical) agreements with TRU. TRU's mandate thus induced the manufacturers to decide *as a group* to distribute only limited, less desirable products to warehouse club stores. *Id.* at 932. Although TRU was not a party to any agreement among other entities at its tier in the market, it "orchestrated a horizontal agreement" among the members of a *different* market tier: its suppliers. *Id.* Because TRU had orchestrated horizontal collusion, which "remain[s] illegal *per se*," TRU's conduct was itself subject to *per se* scrutiny. *Id.* at 936.

Here, *Leegin* is not controlling because, as in *Toys "R" Us* – and unlike in *Leegin* – the vertical price restraints at issue (principally between wholesalers and retailers) are inextricably tied to the horizontal price fixing mandated by the post-and-hold statute. Connecticut's minimum bottle price provisions, operating within the post-and-hold regime, create irresistible pressure on retailers to collude "vertically" with wholesalers to decide what wholesalers should post and hold as the minimum "bottle" price in any given month. *See* JA 21 (Compl. ¶ 20). But such vertical collusion only works to increase wholesalers' and retailers' collective

profits if the wholesalers are also *horizontally* colluding to post and "hold" the identical prices at which wholesalers sell to retailers, *i.e.*, case prices. *See also United States v. Apple Inc.*, 952 F. Supp. 2d 638, 690 (S.D.N.Y. 2013) ("*Per se* price-fixing agreements may also include those where a vertical player participates in and facilitates a horizontal conspiracy.").

In short, although vertical price-fixing agreements involving *a single manufacturer or supplier* and the retailers in a single chain of distribution are now subject to the rule of reason, *Leegin*, 551 U.S. at 898-99, it remains the law that coordinated price fixing that involves multiple suppliers, wholesalers and retailers – as alleged here – is *per se* illegal. *324 Liquor*, 479 U.S. at 342-43. This Court should also reverse the District Court's dismissal of Count Two of the Complaint.

CONCLUSION

For the foregoing reasons, the District Court's judgment dismissing Total Wine's complaint for failure to state a claim should be reversed, and the case remanded for further proceedings.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In conformance with Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the foregoing brief is in 14-point Times New Roman proportional font and contains 13,566 words. Accordingly, the brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and Local Rule 32.1(a)(4)(A).

Dated: August 22, 2017

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CERTIFICATE OF SERVICE

In conformance with Rule 25(d) of the Federal Rules of Appellate Procedure and Local Rule 25.1(h)(2), I hereby certify on this 22nd day of August, 2017, I caused the foregoing Brief of Plaintiff-Appellant Connecticut Fine Wine & Spirits, LLC to be filed electronically with the Clerk of the Court for the United States Court of Appeals for the Second Circuit through the appellate CM/ECF system, and through that filing to be served on all counsel of record.

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