UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CONNECTICUT FINE WINE & SPIRITS, LLC.	:	CIVIL ACTION NO.
Plaintiff,	:	
	:	3:16-cv-01434 (JCH)
v.	:	
JONATHAN A. HARRIS and JOHN SUCHY	:	
Defendants.	:	October 14, 2016

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Pursuant to Fed. R. Civ. P. 12(b)(6), Defendants Jonathan A. Harris, Commissioner of the Department of Consumer Protection, and John Suchy, Director of the Division of Liquor Control, both sued in their official capacity (collectively "Defendants"), by and through their attorney, George Jepsen, Attorney General of Connecticut, hereby submit this Memorandum of Law in support of the Motion to Dismiss of instant date.[1] For the reasons set forth below, Plaintiff has failed to state a claim upon which relief can be granted, and the complaint therefore must be dismissed.

[1] Plaintiff refers to "the Department of Consumer Affairs" in its Complaint. Compl., ¶¶ 12 & 15. No such Department exists in Connecticut. Defendants presume for purposes of this motion that Plaintiff intends to refer to the Connecticut Department of Consumer Protection.

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ORAL ARGUMENT REQUESTED
TESTIMONY NOT REQUIRED

I. The Challenged Laws

Alcohol distribution and sales in the State of Connecticut are subject to the provisions of the Liquor Control Act, Conn. Gen. Stat. §30-1 *et seq*. and related regulations[2]. The specific sections of the Act challenged by the Plaintiff include §30-63(c), known as the "post and hold" provision, §30-63(b), §30-68k and §30-94(b), precluding price discrimination by manufacturers and wholesalers, and §30-68m, prohibiting retail sales below cost. *See Compl.*, ¶ 14 (defining the "challenged provisions"). These sections read, in relevant part, as follows:[3]

a. Post and Hold

> [E]ach 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. . . . 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.

Conn. Gen. Stat. § 30-63(c).

b. Price discrimination

> 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.

Conn. Gen. Stat. § 30-63(b)

> 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

[2] The challenged regulations are Conn. Agencies Regs. §30-6-B12, which implements the post and hold requirement of Conn. Gen. Stat. §30-63(c), and Conn. Agencies Regs. 30-6-A29(a), which implements the price discrimination prohibition of Conn. Gen Stat. §§30-63(b), 68k and 94(b).

[3] Because the Complaint appears limited to pricing of wines and spirits, the similar provisions related to beer have not been set forth.

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. § 30-68k

A holder of a manufacturer's permit . . . or out-of-state shipper's permit . . . may offer and provide to the holder of a wholesaler's permit . . . a floor stock allowance or depletion allowance . . . . (2) the rate of percentage used to calculate any such allowance may not vary based on the quantity of alcoholic liquor. . . .

Conn. Gen. Stat. §30-94(b)

c. Minimum resale price

(a) (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 ….

(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. § 30-68m

II. The Challenged Provisions are Unilateral Restraints Imposed by the State of Connecticut and May Not be Preempted.

Section 1 of the Sherman Act provides that, "[e]very contract, combination ... or conspiracy, in restraint of trade ... is hereby declared to be illegal." 15 U.S.C. § 1. Notably, the Sherman Act requires an agreement among competitors. A state law that unilaterally restrains competition is not preempted by the Sherman Act. As the Supreme Court stated in *Fisher v. City of Berkeley*, 475 U.S. 260, 264–65 (1986),

> the function of government may often be to tamper with free markets, correcting their failures and aiding their victims . . . . [Thus,] a state statute is not pre-empted by the federal antitrust laws simply because the state scheme may have an anticompetitive effect. We have therefore held that a state statute should be struck down on pre-emption grounds 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. (citing *Rice v. Norman Williams Co.*, 458 U.S. 654, 659-61 (1982)). The Second Circuit clearly defined the issue in *Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38, 56 (2d Cir. 2010)("*Freedom IV*"), holding that "what is centrally forbidden is state licensing of *arrangements between private parties* that suppress competition, *not state directives* that by themselves limit or reduce competition." (emphasis added). Here, the challenged provisions represent unilateral state action that cannot be preempted.

The heart of the Liquor Control Act is the prohibition against price discrimination effectuated by Conn. Gen. Stat. §§30-63(b), 30-68k, and 30-94(b). As the Connecticut Supreme Court noted in *Slimp v. Department of Liquor Control*, 239 Conn. 599 (1996),

> The legislature was concerned that there be no favoritism, i.e., no discrimination, in the liquor industry in Connecticut. Section 30-63(b) serves this purpose because it prohibits discrimination in "any manner in price discounts between one permittee and another."

Id.[4] Sections 30-68k and 30-94(b) further reinforce the 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, without discounts for volume purchases. Thus, in Connecticut, small retailers receive their supplies from a wholesaler at the same price as large retailers. Plaintiffs do not like this arrangement for obvious reasons, but the laws reflect a deliberate choice by the Connecticut General Assembly in furtherance of a legitimate state interest.[5] More importantly, the price discrimination provisions are a flat prohibition on seller behavior by the State. They do not require or permit any choice, agreement or conspiracy by the manufacturers, wholesalers or retailers; all must equally abide by the law. Accordingly, the price discrimination provisions are the precisely the type of unilateral restraint protected by the *Fisher* Court, which noted that

> [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. 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

Fisher v. City of Berkeley, 475 U.S. 260, 267 (1986)

The minimum retail price provision of Conn. Gen. Stat. §30-68m is a similarly mechanistic exercise of government power that does not admit of exception and does not require or permit any choice, agreement or conspiracy among or between wholesalers and retailers. It is, rather, a simple mathematical exercise. The bottle price of the alcohol is posted by each wholesaler for the liquor it sells to retailers and the shipping charges are a known quantity for

[4] A federal court should accord "respectful consideration and great weight to the views of the state's highest court" with respect to questions regarding the meaning, intent and operation of state law. *Battipaglia v. New York State Liquor Auth*., 745 F.2d 166, 177 (2d Cir. 1984)(citing *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938)).

[5] The Liquor Control Act provisions also reflect the more general legislative concern about price discrimination by manufacturers or wholesalers found in Conn. Gen. Stat. §35-45(a)("No person engaged in commerce, in the course of such commerce, either directly or indirectly, shall discriminate in price between different purchasers of commodities of like grade and quality. . ."); *cf.* 15 U.S.C. §13 (Robinson-Patman Act)

each particular retailer. A retailer may not sell at a price below that cost (with the one item per month exception to allow loss-leading), but it can sell for any price above that cost that the consumer market will bear. The law requires no communication or agreement between a wholesaler and a retailer or between and among retailers as to either the bottle price that is posted by a wholesaler or the ultimate retail price at which a consumer buys that product. Accordingly, it is unilateral state action within the meaning of *Fisher* and may not be preempted.

The "post and hold" provision, Section 30-63(c), is the key to effectuating both the price discrimination and the minimum retail price proscriptions. As the Connecticut Supreme Court described it,

> the price posting statute, also serves this purpose (preventing discrimination). It requires manufacturers, wholesalers, and out-of-state sellers to post the price at which they will sell their product for the following month and to sell the product at that price for that month. It does not control the price posted by the sellers, but only requires them to sell their product at the posted price to all their customers, large or small.

Slimp v. Dep't of Liquor Control, 239 Conn. 599, 611, 687 A.2d 123, 129 (1996). Unless a particular wholesaler's price is posted publicly, neither the retailers nor the Division of Liquor Control will be able to determine whether that wholesaler is granting volume discounts or otherwise failing to sell its product at the same price to all retailers, large or small. Similarly, the minimum retail price unilaterally imposed by the State can only be determined by reference to the posted bottle price. Without a posted price that remains in effect for a defined period, a retailer is unable to conform its conduct to the requirements of the law. Nor can the Division of Liquor Control detect violations.

As the court in *Slimp* noted, the post and hold provision does not compel any particular wholesaler to post any particular price (although wholesalers are subject to their own below cost sales prohibition, Conn. Gen. Stat. §30-68*l*). It requires only that a wholesaler post the price to

retailers and hold it for thirty days, which helps ensure that the price discrimination provisions can be effective, because small retailers can be assured that a wholesaler's posted price won't be momentarily lowered just to accommodate a favored large retailer. The post and hold provision does not require any communication or agreement among or between the wholesalers or between a wholesaler and a retailer or a wholesaler and a manufacturer. Wholesalers may, but are not required to, price-follow down, but they may not amend to a higher price if their competitor has posted a higher price.

Simply put, the post and hold provision is unilaterally imposed by the State[6] and designed to effectuate the two other unilateral State restraints of the price discrimination and minimum resale price provisions. As unilateral restraints, none of these three provisions can be preempted by the Sherman Act. Accordingly, the Complaint fails to state a claim upon which relief can be granted and the case must be dismissed.

III. Federal Preemption May Not be Founded Upon Conduct Analyzed Under a Rule of Reason Standard.

This is a federal preemption case seeking to enjoin enforcement of state law. (Compl., ¶¶ 28 & 33). As the Supreme Court noted in *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982)

> 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 a 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

[6] Defendants are aware that *TFWS, Inc. v. Schaefer*, 242 F.3d 198, 210 (4th Cir. 2001) and *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874 (9th Cir. 2008), found post and hold provisions in Maryland and Washington to be hybrid restraints. However, Defendants believe that both decisions are founded on a misreading of Footnote 8 in *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987), which simply assumed (Defendants believe incorrectly) that the private parties had been granted a degree of regulatory power. See discussion at pp. 11-12 and note 6 *infra*.

> scheme might have an anticompetitive effect. 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 making clear that this standard means only *per se* violations may support a preemption claim, as conduct reviewed under a rule of reason standard may not in all cases violate the Sherman Act and is therefore not an irreconcilable conflict, the Supreme Court stated 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.

Rice v. Norman Williams Co., 458 U.S. 654, 661 (1982) (emphasis added).

Plaintiff here alleges two operative counts: 1) Count One -- "Horizontal price-fixing among wholesalers" as a consequence of the "post and hold" requirement (Complaint ¶¶ 16 and 26); and 2) Count Two – "vertical price-fixing and resale price maintenance" as a consequence of the "price discrimination" and "minimum resale price" provisions. (Complaint ¶¶ 17, 30 and 31). Both counts allege conduct that under controlling law is to be evaluated under the rule of reason, and which therefore cannot be preempted by the Sherman Act under the standard laid down in *Rice v. Norman Williams*.

In *Battipaglia v. New York State Liquor Authority*, 745 F.2d 166 (2d Cir. 1984) (Friendly, J.), the Second Circuit had the opportunity to consider a "post and hold" alcohol regulatory regime in New York that was virtually identical to the Connecticut statutes at issue here. Specifically, New York alcohol wholesalers were required to post prices at which they would

sell to retailers and adhere to them for one month. After posting with the state, the prices became publicly available to other wholesalers. Within three days, any wholesaler could reduce its posted price to match that posted by another wholesaler. The court first grappled with the question of whether a government mandate could take the place of "contract, conspiracy or combination" that would be required for the conduct to violate §1 of the Sherman Act. (discussed further below). Ultimately, the Second Circuit found it unnecessary to answer that question, because it found that the conduct required by the post and hold regulations would not constitute a per se violation. As the court noted

> [a]pplication of the *Norman Williams* standard calls for affirmance here even if we were to accept arguendo the contention 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. 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. . . . [The post and hold law] does not mandate or authorize conduct "that necessarily constitutes a violation of the antitrust laws in all cases." New York wholesalers can fulfill all of their obligations under the statute without either conspiring to fix prices or engaging in "conscious 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 should stay with it for a month.

Battipaglia , 745 F.2d at 174–75 (internal quotes and cites omitted). Accordingly, in the Second Circuit, to the extent liquor post and hold laws are challenged as alleged violations of the Sherman Act, they are to be evaluated under a rule of reason standard and therefore cannot be preempted. Count One therefore must be dismissed for failure to state a claim upon which relief can be granted.

Count Two here alleges vertical price fixing and resale price maintenance. As the Supreme Court made clear in *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 907 (2007), all "[v]ertical price restraints are to be judged according to the rule of reason."

Accordingly, Count Two must be dismissed for failure to state a claim upon which relief can be granted. Both counts failing to state claims upon which relief can be granted, the Complaint must be dismissed.

IV. Plaintiff Fails to Allege a Plausible Agreement to Fix Prices in Violation of the Sherman Act.

As noted above, in *Battipaglia v. New York State Liquor Authority*, 745 F.2d 166 (2d Cir. 1984), the Second Circuit considered New York's post and hold system. While it ultimately founded its decision on the fact that post and hold, even pursuant to private agreement, would not be a per se violation and therefore could not be preempted under the *Rice v. Norman Williams* standard, the court found "appealing" the argument 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 have been compelled to do is simply too 'iffy'". *Id*. at 173. The court emphatically rejected as "fallacious" the argument that *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97 (1980), should apply to the post and hold laws, *Battipaglia*, 745 F. 2d at 169, and cited with apparent approval the decision in *United States 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 (1983), which rejected a challenge to Connecticut's post and hold statute for beer (the analogous part of Conn. Gen. Stat. §30-63(c) for beer sales). *Battipaglia*, 745 F.2d at 172. In *Healy*, said the Second Circuit, Judge Blumenfeld had

> correctly distinguished *Midcal* as involving an implicit agreement for resale price maintenance and cited *Serlin Wine & Spirits Merchants, Inc. v. Healy*, 512 F.Supp. 936, 938 (D.Conn.1981), aff'd sub nom. *Morgan v. Division of Liquor Control*, 664 F.2d 353, 355 (2 Cir.1981). He then applied our holding in Modern *Home Inst. v. Hartford Accident & Indemnity Co.*, 513 F.2d 102, 108–09 (2 Cir.1975), that § 1 of the Sherman Act "is directed only at joint action" and "does

> not prohibit independent business actions and decisions," and ruled that the Connecticut statute did not violate § 1 simply because it compelled individual actions which, if taken pursuant to an agreement, might have constituted a violation.

Battipaglia , 745 F.2d at172; *see also id.* at n.9

Battipaglia should control here. The Supreme Court decision in *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987), is not to the contrary. *324 Liquor* struck down the New York liquor law with respect to minimum resale price, and may have initially seemed to answer the question of whether an actual agreement must be alleged and proved. *See Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 224 (2d Cir. 2004)("*Freedom I*")("since 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. *324 Liquor*, 479 U.S. at 345–46 n. 8"). However, a closer contextual reading of footnote 8 to *324 Liquor*, as well as subsequent developments in Supreme Court case law, suggests that it actually does not contradict *Battipaglia*.

In *324 Liquor*, the Court was in the midst of addressing whether New York was entitled to state action immunity with respect to its minimum resale price law under the doctrine laid down in *Parker v. Brown*, 317 U.S. 341 (1943). The Court concluded that there was no *Parker* immunity, because there was insufficient active supervision by the state. Footnote 8, at the end of that section, simply states "the same considerations lead us to reject appellee's contention that there is no contract combination or conspiracy in restraint of trade." 479 U.S. at 345–46 n. 8. The placement of the statement in that context is odd, and it is unclear whether this *dicta* applies to the *Parker* immunity claim—which the Court was discussing in that part of the opinion—or to the underlying preemption analysis that must be done before the *Parker* question is taken up. In any event, it is important to note that *324 Liquor* was heavily reliant on the *MidCal* analysis with

respect to vertical price fixing and the fact the New York law "imposes a regime of resale price maintenance" which "has been a per se violation of §1 of the Sherman Act." 479 U.S. at 342. [7] However, the Supreme Court subsequently held in *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 907 (2007), that "[v]ertical price restraints are to be judged according to the rule of reason." Therefore, to the extent, if any, that *324 Liquor* was inconsistent with *Battipaglia*, the Supreme Court has since moved in a direction consistent with *Battipaglia*.

Moreover, the Supreme Court has in recent years required that if the claim alleged is a §1 Sherman Act violation, the Plaintiff must allege sufficient specific facts to plausibly support the existence of an actual agreement, not the mere possibility of one. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (discussed further below); *Ashcroft v. Iqbal*, 556 U.S. 652 (2009). As the Second Circuit noted in *Battipaglia*, "the argument that an agreement could have been inferred if the wholesalers had voluntarily done what they have been compelled to do is simply too "iffy." 745 F.2d at 173. This change in the law was underscored by the Second Circuit in *Freedom IV*, 624 F.3d 38 (2d Cir. 2010), where the court noted with respect to *324 Liquor* and *MidCal* as well as its own prior decision in *Freedom I*, that "at the time these cases were decided, resale price maintenance was a *per se* violation of the Sherman Act. Recently, the Supreme Court . . . held that resale price maintenance agreements should be judged under the rule of

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[7] The dissent in *TFWS, Inc. v. Schaefer*, 242 F.3d 198, 214 (4th Cir. 2001)(Luttig, J. dissenting) noted the following regarding footnote 8 in *324 Liquor*

> The Court's very brief textual and footnote treatment of the question of whether there was a "contract, combination ... or conspiracy in restraint of trade," bordered on the perfunctory. And the Court did not even attempt to compare and contrast the New York regulations with the various regulatory schemes at issue in *Fisher*, *Schwegmann*, and *Midcal*. It invoked its observation in *Fisher* that private actors had been granted a degree of private regulatory power, and it seemed thereafter simply to assume uncritically that private parties before them actually had been afforded a degree of private regulatory power of the kind that the Court said would be prohibited in *Fisher* and held was prohibited in *Schwegmann* and *Midcal*.

Id. (internal cites omitted).

reason." *Freedom IV*, 624 F.3d at 53 n. 15 (citing *Leegin*). The court also addressed the changed pleading standard required by *Twombly* and *Iqbal*, see *Freedom IV*, 624 F.3d at 51 n. 13, implicitly suggesting that had this standard been in effect at the time, the court may have dismissed the case earlier on the basis that "a restraint imposed unilaterally by the 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 it." *Id.* at 53.

Given the changes to the law wrought by the Supreme Court in *Leegin*, *Twombly* and *Iqbal*, as recognized by the Second Circuit in *Freedom IV*, the better analysis of the current state of the law is that unless an agreement among competitors is alleged with sufficient factual detail, the case is barred.[8]

Total Wine apparently recognizes this bar, as it alleges here that the liquor wholesalers "use the challenged provisions to enforce their agreements with manufacturers, other competing wholesalers, and with Connecticut retailers, to fix and maintain prices at the wholesale and retail level." (Complaint at ¶¶16-20) As evidence of the purported "agreements", Total Wine includes charts showing that the prices of various brands of liquor were the same from wholesaler to wholesaler. Simply put, Plaintiff's conclusory allegations fall woefully short of the requirements established by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)

In *Twombly*, the Supreme Court ruled that a complaint alleging a Sherman Act §1 violation failed to state a claim where it did not allege sufficient facts to support the existence of

[8] Defendants are aware that the Fourth Circuit held the Maryland post and hold regime to be a per se violation without showing agreement. *TFWS, Inc. v. Schaefer*, 242 F.3d 198, 210 (4th Cir. 2001), although it noted the Second Circuit's contrary conclusion in *Battipaglia*. *Id.* Defendants are also aware that the Ninth Circuit, relying at least in part on Judge Winters' dissent in *Battipaglia*, concluded that the post and hold regime imposed by the State of Washington was a per se violation of the Sherman Act. *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874 (9th Cir. 2008). With due respect to Judge Winter, Defendants believe that he elided the difference between the two separate legal questions of: a) whether a private agreement to post and hold prices would be a per se or rule of reason case and b) whether a government mandate can substitute for a alleging and proving that private agreement. It also should be noted that *Costco* makes no reference to *Leegin* or *Twombly*, even though both of those cases pre-date it.

an actual agreement, but rather sought to have the court infer the existence of the agreement from parallel conduct. The plaintiff had alleged that the existing telephone carriers had "compelling common motivation to thwart" competition and failed "to pursue attractive business opportunities . . . where they possessed substantial competitive advantages." On these bases, the plaintiff alleged an agreement on information and belief. However, the Supreme Court stated that Fed. R. Civ. P. 8(a)(2) requires "a short plain statement of the claim showing that the pleader is entitled to relief in order to give the defendant fair notice of what the claim is and the grounds upon which it rests." The "factual allegations must be enough to raise a right to relief above the speculative level." Applying this standard to Sherman Act §1 claims, the court held that "stating such claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." Under this standard, "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice." *Id.* at 556. Total Wine relies on precisely such an allegation and bare assertion here.

Here, Plaintiffs' threadbare allegations, and the price charts attached to the Complaint, establish nothing more than the parallel price following behavior that one would expect to occur in a "post and hold" regime. It is no different than the law requiring gasoline stations to post their prices on large signs, which competitors can see and change their own prices to match, and it is not illegal. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556-57 (2007) ("Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality."); *Arista Records LLC v. Doe*, 604 F.3d 110, 120 (2d Cir. 2010)("Because the T*wombly* complaint's factual allegations

described only actions that were parallel, and were doctrinally consistent with lawful conduct, the conclusory allegation on information and belief that the observed conduct was the product of an unlawful agreement was insufficient to make the claim plausible.")

In the instant case, the challenged provisions of the Liquor Control Act do not irreconcilably conflict with federal antitrust policy, because they do not require on their face that the wholesalers collude with each other to set the posted prices and do not permit them to do anything other than price match, which is not a violation of the Sherman Act. *See Twombly*, 550 U.S. at 554 ("Even conscious parallelism, a common reaction of firms in a concentrated market that recognize their shared economic interests and their interdependence with respect to price and output decisions is not in itself unlawful."); *cf. L.J. Zucca, Inc. v. Allen Bros. Wholesale Distributors*, No. CIV.A. 07-002 JJF, 2008 WL 2937253, at *3 (D. Del. July 29, 2008)(No per se violations of the Sherman Act, such as horizontal price fixing, can be found absent proof that conspiracy among competitors exists). Nor do the price discrimination provisions require or permit collective action by or among wholesalers or retailers. Rather, a single wholesaler must sell to all retailers at the same price. Similarly, the challenged minimum retail price provision does not require or permit wholesalers to collude with manufacturers or retailers as to the retail price of alcohol. All must simply follow state law and make a mechanistic calculation to determine the minimum price, a distinction recognized by the Second Circuit in *Morgan v. Div. of Liquor Control*, 664 F.2d 353 (2d Cir. 1981), which affirmed the district court's ruling that the Connecticut Liquor Control Act did not violate the Sherman Act, stating

> [u]nlike the California statute in *Midcal*, the Connecticut statutes do not authorize or compel private parties to enter contracts or combinations to fix prices in violation of §1 of the Sherman Act. . . . [T]o violate the Sherman Act, the contract, combination or conspiracy must reflect an agreement between independent businessmen. . . . It may appear that the Connecticut system permits beer and wine producers and shippers to establish resale prices. The automatic

> application of the statutory markup to the initial offering price would seem to allow those who set that price to determine ultimate resale prices by adjusting their offering price. But this result occurs only because the State has dictated the markups, not because any producers or shippers have formed a conspiracy or combination.

Id. at 355 and n. 2 (internal cites and quotes omitted)(affirming *Serlin Wine & Spirits Merchants v. Healy*, 512 F.Supp 936 (1981)).

Not only do the challenged statutes here not require or permit action in violation of the Sherman Act, the Plaintiff has not met the requirements of *Twombly* to allege sufficient facts to plausibly suggest any *actual* agreement among and between manufacturers, wholesalers and/or retailers. Plaintiff therefore fails to state a claim upon which relief can be granted and the case must be dismissed.[9]

DEFENDANTS

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[9] Plaintiffs indicate that if they prevail in this action they plan to seek attorney's fees and costs under 15 U.S.C. § 15(a). *Compl.*, p. 8. Although Plaintiffs' claim for attorney's fees and costs is not ripe—and Defendants believe it never will be ripe—because Plaintiffs are not (and should never be) prevailing parties, Defendants will point out that the Eleventh Amendment would bar any award of fees and costs in this action even if Plaintiffs did prevail. *See, e.g.*, *Maher v. Gagne*, 448 U.S. 122, 130 (1980) (declining "to reach the question whether a federal court could award attorney's fees against a State based on a statutory, non-civil-rights claim"); *Jackson v. Conn. Dep't of Public Health*, 2016 WL 3460304, at *13 (D. Conn. June 20, 2016) (appeal pending) (holding—based on post-*Maher* Supreme Court decisions—that the federal antitrust statutes do not, and cannot, strip states of their Eleventh Amendment immunity).

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of October 2016, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF system.

/s/ Gary M. Becker

Gary M. Becker