IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

COORS BREWING COMPANY,

Plaintiff,

v.

JUAN CARLOS MÉNDEZ-TORRES, Secretary of the Treasury Department of the Commonwealth of Puerto Rico,

Defendant

Civil 06-2150 (DRD) (JA)

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

This matter is before the court on a motion to dismiss filed by defendant Juan Carlos Méndez-Torres, in his official capacity as the Secretary of the Treasury of the Commonwealth of Puerto Rico ("Secretary"), on July 14, 2010. (Docket No. 144.) Plaintiff filed its opposition to the motion to dismiss on August 11, 2010. (Docket No. 151.) The matter was referred to me for report and recommendation on December 29, 2010. (Docket No. 160.) For the reasons set forth below, I recommend that the defendant's motion to dismiss be GRANTED.

I. PROCEDURAL HISTORY

The Commonwealth of Puerto Rico has long implemented an excise tax on beer.[1] This tax was initially directed to two categories of brewers, those producing

[1]The relevant provisions state:

more than 31 million gallons annually ("large brewer tax") and those producing less ("small brewer tax"). (Docket No. 51-2, at 6.) From its inception in 1969 until 2002, the large brewer tax and small brewer tax increased in tandem, and always maintained a $0.55 differential. (Id.) This changed in 2002, when Puerto Rico enacted Act No. 69, which increased the "large brewer tax." The 2002 law raised the large brewer tax from $2.70 per gallon to $4.05; the small brewers tax remained at $2.15. P.R. Laws Ann. tit. 13, § 9521(c)(2); P.R. Laws Ann. tit. 13

> An internal revenue tax shall be levied, collected and paid at one time on the following products that are in a warehouse or that have been or may be, in the future, distilled, rectified, produced, manufactured, imported or introduced to Puerto Rico at the following rate:
>
> . . .
>
> (c) Beer.
>
> . . .
>
> (2) On all beers, malt extract and other fermented or unfermented analogous products, whose alcohol content exceeds one and half percent (1 ½%) per volume, a tax of four dollars and five cents ($4.05) cents shall be paid per each gallon measured and a proportional tax at an equal rate on every fraction of gallon measured, except as provided in § 9574 of this title.

P.R. Laws Ann. tit. 13, § 9521 (1994), Internal Revenue Code, 1994, added as § 4002 on Sept. 4, 1998, No. 265, § 1; May 30, 2002, Law No. 69, § 1, effective 15 days after May 30, 2002.

§ 9574(a)(1). The new law also created four[2] gradational steps between 9 million

[2]The cited section provides:

> (a) In lieu of the tax fixed in clauses (2)and (3) of § 9521(c) of this title on all beer, malt extract and other fermented or unfermented analogous products whose alcohol content exceeds one and a half percent (1 ½ %) per volume referred to in clauses (2) and (3) of § 9521(c) of this title, that are produced or manufactured by persons whose total production, if any, of said products during their most recent tax year has not exceed thirty-one million (31,000,000) gallons measure, a tax shall be collected in the following manner:
>
> (1) Two dollars and fifteen cents ($2.15) per measured gallon produced, up to nine million (9,000,000) measured gallons.
>
> (2) Two dollars and thirty-six cents ($2.36) per measured gallon produced in quantities greater than nine million (9,000,000) but less than ten million (10,000,000).
>
> (3) Two dollars and fifty-seven cents ($2.57) per measured gallon produced in quantities greater than ten million (10,000,000) but less than eleven million (11,000,000).
>
> (4) Two dollars and seventy-eight cents ($2.78) per measured gallon produced in quantities greater than eleven million (11,000,000) but less than twelve million (12,000,000).
>
> (5) Two dollars and ninety-nine cents ($2.99) per measured gallon produced in quantities greater than twelve million [12,000,000] but less than thirty-one million (31,000,000).
>
> (b) Subject to the provisions of §§ 9575-9579 of this title, the benefits of this section shall apply for a person in any taxable year following the year in which the total production of the products described in this subsection, if any, has not exceeded thirty-one million (31,000,000) gallons measured.

and 31 million gallons. P.R. Laws Ann. tit. 13, § 9574(a). Thus, the parity between the highest and lowest categories, $0.55 apart for decades, now increased to a $1.90 differential. Additionally, Puerto Rico crafted a graduated exemption for those companies brewing less than 31 million gallons annually. (Docket No. 54, at 20-21, ¶ 89, citing Docket No. 56, Rec. at 977-981.) This exemption reverted those who brewed less than 31 million gallons to pay the lowest tax rate on their first 9 million gallons, even if total production exceeded 9 million gallons. (Id.)

Representing multiple brewers, including the plaintiff, the United States Brewers Association ("USBA") challenged this modified tax regime in the Puerto Rico courts. U.S. Brewers Ass'n v. Sec'y of the Treasury, 109 D.P.R. 456 (1980), 9 P.R. Offic. Trans. 605 (1980) ("U.S. Brewers P.R."). Although Coors' predecessor[3] was a member of the USBA, the plaintiff did not begin selling beer in Puerto Rico until 1991. (Docket No. 51-2, at 6.) The USBA also filed an action

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> (c) The benefits of this section shall also apply to the importers of the products described in this subsection whose producers meet the requirements established in subsection (b) of this section.

P.R. Laws Ann. tit. 13, § 9574 (1994), Internal Revenue Code, 1994, added as § 4023 on Sept. 4, 1998, No. 265, § 1; May 30, 2002, No. 69 § 2; May 6, 2004, No. 108, § 1.

[3]The Adolph Coors Company. See Coors Brewing Co. v. Méndez-Torres, 562 F.3d 3, 6 (1st Cir. 2009) ("Coors"), abrogated, 130 S. Ct. 2323 (2010).

in the United States District Court for the District of Puerto Rico, and upon losing, appealed to the First Circuit. U.S. Brewers Ass'n v. César Pérez, 455 F. Supp. 1159 (D.P.R. 1978), remanded, 592 F.2d 1212 (1st Cir. 1979) ("U.S. Brewers"), abrogated by Coors Brewing Co. v. Méndez-Torres, 562 F.3d 3 (1st Cir. 2009), abrogated by Levin v. Commerce Energy, Inc., 130 S. Ct. 2323 (2010). In that action, the USBA raised much the same argument that Coors argued on appeal in this case, namely, "that the Butler Act[4] did not bar federal jurisdiction over the challenge to the state tax law since the plaintiffs were not seeking to prevent the collection of a tax." Coors Brewing Co. v. Méndez-Torres, 562 F.3d at 6. While not relying on the Butler Act on its face, the First Circuit concluded that the action "was barred by 'considerations which underlie [the Tax Injunction Act and] the Butler Act,' namely 'equity practice, . . . principles of federalism . . . and the imperative need of a State to administer its own fiscal operations.'" Id. (quoting U.S. Brewers Ass'n, Inc. v. Pérez, 592 F.2d at 1214). The First Circuit remanded the case "to the district court so that it may dismiss the case for want of jurisdiction." U.S. Brewers Ass'n, Inc. v. Pérez, 592 F.2d at 1215. "Meanwhile, the Puerto Rico courts rejected the USBA's challenges on the merits." Coors

[4] 48 U.S.C. § 872.

Brewing Co. v. Méndez-Torres, 562 F.3d at 7 (citing U.S. Brewers Ass'n v. Sec'y of the Treasury, 109 D.P.R. 456 (1980), 9 P.R. Offic. Trans. 605 (1980)).

Following the 2002 amendments to the beer tax, the Puerto Rico Association of Beer Importers ("PRABI"), to which Coors was affiliated, filed suit in Puerto Rico Superior Court. Asoc. Importadores de Cerveza v. E.L.A., 171 D.P.R. 140 (2007) ("Beer Importers"). Shortly after filing the suit, Coors voluntarily dismissed its claims without prejudice. Coors Brewing Co. v. Méndez-Torres, 562 F.3d at 7. The Puerto Rico Superior Court ultimately dismissed the case, and the Puerto Rico Supreme Court upheld said dismissal on appeal. Id. (citing Asoc. Importadores de Cerveza v. E.L.A., 171 D.P.R. 140 (2007)).

Coors filed its own complaint in the same year, challenging the 2002 Amendment to the beer tax in the United States District Court for the District of Columbia. Coors Brewing Co. v. Calderón, 225 F. Supp. 2d 22, 23 (D.D.C. 2002) ("Calderón"). The district court dismissed the case on jurisdictional grounds. Id. at 25-27. Coors first appealed the ruling, and then settled the case before the appellate court ruled on the case. Coors Brewing Co. v. Méndez-Torres, 562 F.3d at 7.

II. PRESENT CASE

A. District Court

In 2006, Coors filed the present action in the United States District Court for the District of Puerto Rico, again attacking the beer tax discrepancy. (Docket No. 1.) Coors sought a declaratory judgment finding that the special exemption was invalid and unenforceable, as it violated both Section 3 of the Federal Relations Act, 48 U.S.C. § 741(a), and the Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3. (Docket No. 1, at 3-4, ¶ 11.) The Secretary filed a motion to dismiss with prejudice on January 29, 2007, alleging that this court lacked subject matter jurisdiction under both the Butler Act, 48 U.S.C. § 872, and the Tax Injunction Act, 28 U.S.C. § 1341. (Docket No. 13, at 17.) The Secretary additionally alleged that collateral estoppel and/or claim preclusion prevented the court from deciding the case, as there was ongoing litigation in the Puerto Rico state courts. (Docket No. 13, at 7-13, ¶ III(A).) The defendant further contended that the stipulations agreed to in the Calderón case had a preclusive effect on this court's jurisdiction. (Id. at 5.)

The district court then referred the matter to me for report and recommendation. (Docket No. 40.) I filed my report and recommendation on July 13, 2007, recommending that this court dismiss the action. (Docket No. 48, at 1.) The court adopted my recommendation in part, although it decided to dismiss the action on grounds other than those recommended. (Docket No. 77,

at 26.) The district court found that the action was barred not by res judicata but by several independent procedural barriers, including the Rooker-Feldman doctrine[5], the Butler Act[6], and the preclusive effect of Calderón and the resulting stipulations flowing therefrom. The district court ultimately entered judgment dismissing Coors' federal claims with prejudice. (Docket No. 78.)

B. First Circuit

On appeal, Coors argued that dismissal was improper, and stressed four arguments. First, that this case is not bound by the same factual nexus as the case in Calderón. Coors Brewing Co. v. Méndez-Torres, 562 F.3d at 9-10. Coors' action in Calderón challenged the 2002 Amendments, whereas the case at bar challenged the 2004 Amendments. Id. at 10. Second, the plaintiff alleged that an intervening change of law, the United States Supreme Court case Hibbs v. Winn, 542 U.S. 88 (2004), limited the preclusive effect of the earlier judgment. Coors Brewing Co. v. Méndez-Torres, 562 F.3d at 10. Third, the Butler Act was

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[5]See, e.g., Lance v. Dennis, 546 U.S. 459, 464 (2006) (Rooker-Feldman doctrine confined to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.") (quoting Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284 (2005)); (Docket No. 77, at 8-9.)

[6]48 U.S.C. § 872 ("No suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Puerto Rico shall be maintained in the United States District Court for the District of Puerto Rico.")

not a bar to its requested relief because it did not seek to decrease the tax it pays, but rather, sought to increase the taxes other companies paid. Id. at 13. Finally, that there was not perfect identity of cause between the instant action and U.S. Brewers, (P.R.), as the USBA brought that action, which did not include Coors. Id. at 20.

i. Calderón

The First Circuit began its review by considering whether any preclusive effect Calderón carried in claim preclusion or res judicata. To the court's dismay, "[n]either the district court's opinion nor the parties' arguments on appeal are consistent as to which preclusion doctrine they rely upon." Coors Brewing Co. v. Méndez-Torres, 562 F.3d at 8. To the court, this was a significant omission. Id. ("As it turns out, the distinction becomes important in this case.") Dismissal for lack of subject matter jurisdiction does not trigger claim preclusion, but it is fatal for issue preclusion. See Muñiz Cortes v. Intermedics, Inc., 229 F.3d 12, 14 (1st Cir. 2000). Because the Calderón court did not decide any of Coors' claims on the merits, the First Circuit concluded "that the preclusive effect of the Calderón judgment must be assessed through the lens of issue preclusion rather than claim preclusion." Coors Brewing Co. v. Méndez-Torres, 562 F.3d at 9.

Having decided that issue preclusion is the correct filter for the Calderón stipulations, the court addressed Coors' two arguments against preclusion. First, Coors argued that the 2004 amendments to the beer excise tax, discussed above, contained a different factual predicate than the Calderón action, which attacked the 2002 beer excise tax. Coors Brewing Co. v. Méndez-Torres, 562 F.3d at 9-10. The court determined that the 2004 amendments were "immaterial" as to Coors' subject matter jurisdiction arguments, and thus irrelevant. Because "[a]n immaterial change is not sufficient to defeat issue preclusion[,]" the court would not follow Coors' lead. Coors Brewing Co. v. Mendez Torres, 562 F.3d at 10.

ii. Hibbs

Next, the plaintiff-appellant argued that there was an intervening change in controlling law, i.e., the United States Supreme Court case Hibbs v. Winn. Hibbs v. Winn, 542 U.S. 88 (2004). The court's analysis of Hibbs is crucial to subsequent appeal to the Supreme Court.[7] The First Circuit disagreed with the district court's conclusion on the Calderón stipulations, "that the decision of the jurisdiction issue . . . precluded consideration of that issue in this suit[,]" and continued its analysis. Coors Brewing Co. v. Méndez-Torres, 562 F.3d at 12.

[7]Discussed at length below at 42-45.

Having determined that Hibbs precluded any jurisdictional bar, the court addressed the effect of the stipulations in Calderón. The court did not accept the district court's position that Coors is barred from relitigating the issues because of its stipulation to the Calderón action's dismissal. Coors Brewing Co. v. Méndez-Torres, 562 F.3d at 12-13. It found that "[t]he stipulation is not a settlement agreement[,]" and that "Coors did not promise never to bring another suit." Id. at 12. All that Coors stipulated to was withholding any *additional* litigation *in that case*. Thus, the court concluded "that neither the Calderón stipulation nor judgment is a bar to this action." Id. at 13. Having decided that there was no jurisdictional bar to hearing the case, the court moved on to the substantive issues.

iii. Beer Importers

The court also considered whether the "Rooker-Feldman doctrine" served to bar this case based upon the Puerto Rico state court decision in U.S. Brewers (P.R.). Coors Brewing Co. v. Méndez-Torres, 562 F.3d at 19. But because "Coors was not a party to the action in U.S. Brewers (P.R.)," and because "Coors is not attacking the state court judgment, but simply seeking to raise a challenge to the same exemption previously upheld in U.S. Brewers (P.R.)[,]" the court rejected the applicability of the "Rooker-Feldman doctrine." Id. The First Circuit then went

on to conclude that because Coors was not a party in U.S. Brewers (P.R.), it "conclude[d] that the prior judgment . . . does not provide a basis for granting the Secretary's motion to dismiss." Coors Brewing Co. v. Méndez-Torres, 562 F.3d at 21. The court premised its position on not having sufficient evidence to conclude that Coors' predecessor approved their trade association USBA to represent its interests. Id. For similar reasons, the court found that Beer Importers did not preclude the case. Id. at 22 ("the Secretary has failed to meet his burden of showing sufficient privity between Coors and [its exclusive distributer in Puerto Rico]").

iv. The Butler Act

Having found that neither res judicata nor issue preclusion barred relitigation in this case, the court next considered the issue of subject matter jurisdiction itself. Specifically, the court addressed whether Coors had a claim under the Butler Act. The Butler Act prevents a party, attempting to restrain the collection of taxes, from seeking relief in the United States District Court for the District of Puerto Rico. Coors argued on appeal that since it did not seek to decrease its own taxes,[8] the Butler Act was no bar to its requested relief. Coors

[8]Claims under the Tax Injunction Act are barred if such "relief that would diminish state revenues, even if such relief is the remedy least disruptive of the state legislature's design." Levin v. Commerce Energy, Inc., 130 S. Ct. at 2334.

Brewing Co. v. Méndez-Torres, 562 F.3d at 13. The court then juxtaposed this case with the Hibbs case. Through its twin analysis of the Tax Injunction Act ("TIA") and the Butler Act[9], the court followed the Hibbs Court's lead and distinguished the case. Because the plaintiff was not trying to reduce its tax obligations, but rather was trying to invalidate a distinction in the law providing tax breaks to competitors, it served to *raise* taxes. Coors Brewing Co. v. Méndez-Torres, 562 F.3d at 14. The court concluded: "Thus, this case is more like Hibbs than Hill[10]; rather than eliminate a potential source of revenue, the relief Coors requests would simply eliminate a tax law affording preferential tax treatment to certain taxpayers. Accordingly, we conclude that under Hibbs, Coors's action is not barred by the Butler Act." Id. at 16.

v. Comity

Finally, the court considered the issue of comity. The Secretary contended that the principles of comity barred Coors' action. Coors Brewing Co. v. Méndez-Torres, 562 F.3d at 16. In support, the defendant relies on U.S. Brewers. That court concluded that principles of comity "would be 'ill-served' by the 'technical

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[9]The Butler Act and the Tax Injunction Act "have been construed *in pari materia*." Pleasures of San Patricio, Inc. v. Méndez-Torres, 596 F.3d 1, 5 (1st Cir. 2010) (quoting United Parcel Serv., Inc. v. Flores-Galarza, 318 F.3d 323, 330 n.11 (1st Cir. 2003)).

[10]Discussed below at 42-43, ¶ V(A).

distinction' between restraining the imposition of a lower rate on small brewers and a direct challenge to plaintiffs' higher rate." Coors Brewing Co. v. Méndez-Torres, 562 F.3d at 16 (quoting U.S. Brewers Ass'n, Inc. v. Pérez, 592 F.2d at 1214-15). Standing alone, the court's decision in U.S. Brewers would control; but the court wrestled with what effect, if any, Hibbs had on the precedent. Coors Brewing Co. v. Mendez Torres, 562 F.3d at 16.

The court considered the circuit split on the effect of a footnote in Hibbs. The footnote read: "[T]his Court has relied upon 'principles of comity,' . . . to preclude original federal-court jurisdiction only when plaintiffs have sought district-court aid in order to arrest or countermand state tax collection." Hibbs v. Winn, 542 U.S. at 107 n.9. Several circuits had, in light of Hibbs, determined that scope of the comity bar had been limited. Based on the above footnote, these circuits concluded that "comity does not bar federal courts from hearing suits seeking to invalidate state tax laws that afford preferential tax treatment to third parties where such challenge would not arrest state revenue generation." Coors Brewing Co. v. Méndez-Torres, 562 F.3d at 18. In other words, these circuits took the confluence of factors in Hibbs, discussed below at 42-45, and crafted a general principle out of it. Other circuits did not read the Hibbs footnote in this light. They continued to cite the First Circuit case U.S. Brewers even after Hibbs. Coors

Brewing Co. v. Méndez-Torres, 562 F.3d at 17. Because the Hibbs Court itself cited U.S. Brewers, recognizing that U.S. Brewers was not based on the Butler Act, but on principles of comity, and quoted U.S. Brewers' admonition against ordering a state to collect a tax not authorized by its legislature, they believed U.S. Brewers still controlled. For example "the Fourth Circuit has relied on U.S. Brewers, even after Hibbs, to refuse jurisdiction over a challenge to a state tax regime's allegedly preferential treatment." Coors Brewing Co. v. Méndez-Torres, 562 F.3d at 17 (citing DIRECTV, Inc. v. Tolson, 513 F.3d 119, 126-28 (4th Cir. 2008)).

The First Circuit chose not to follow what other circuits had perceived as a guide post, a footnote in Hibbs that quoted U.S. Brewers. The court rejected the Fourth Circuit's belief that the footnote implicitly condoned the result in U.S. Brewers. Coors Brewing Co. v. Méndez-Torres, 562 F.3d at 17. Rather, the court "read the [Supreme] Court's citation to U.S. Brewers simply as an acknowledgment of a related case, and not as an endorsement of its result." Coors Brewing Co. v. Mendez Torres, 562 F.3d at 17-18. The court drew strength from a Sixth Circuit case, Levin v. Commerce Energy, 554 F.3d 1094 (6th Cir.), cert. granted, 130 S. Ct. 496 (2009), rev'd and remanded, 130 S. Ct. 2323 (2010), that it felt supported their conclusion. Coors Brewing Co. v. Méndez-

Torres, 562 F.3d at 18. The First Circuit thus ruled that U.S. Brewers was no longer good law, and found that "Hibbs effected a change in the law such that neither the Butler Act nor related principles of comity serve to bar Coors's complaint." Id. In other words, the court felt that Hibbs created a new avenue to federal jurisdiction under the TIA when a party seeks to invalidate a state statute that would have the net effect of raising taxes. The First Circuit thus joined the Sixth, Seventh and Ninth Circuits in holding that Hibbs sharply limited the scope of the comity bar. The First Circuit "remanded [the case] for further proceedings consistent with [its] opinion." Coors Brewing Co. v. Méndez-Torres, 562 F.3d at 23.

C. Remand

Following remand, the parties began to prepare for trial once more. The plaintiff filed the joint status report on December 23, 2009. (Docket No. 121.) Several of the provisions were directed to a pending summary judgment motion. (Docket No. 21, at 2-3, ¶¶ 4-5, ¶¶ 9-13.) In particular, paragraph thirteen provides that "[t]he parties have agreed to hold all other proceedings in abeyance until the Court rules on the Motion for Summary Judgment." (Id. at 3, ¶ 13.) The motion in question is Coors' motion for summary judgment, Docket No. 96, filed on June 26, 2009, renewing the previous motion submitted to the district court,

Docket No. 51. Coors raised issues in these motions not considered by this court in its ruling.

The defendant filed a motion to be relieved from the discovery agreement. (Docket No. 136.) The Secretary alleged that Coors "breached its prior agreement on discovering all data related to the privity issue." (Docket No. 136, at 2, ¶ 3.) The defendant asked that the court "set aside the previously agreed to limitation of discovery[,]" and allow the Secretary "to conduct full discovery on the issues of privity and market share[.]" (Docket No. 136, at 5, ¶ 9.) This court was "inclined" to grant the request, but compelled Coors to first file a response. (Docket No. 138.) The plaintiff did so, filing its opposition on March 22, 2010. (Docket No. 139.)

D. Levin v. Commerce Energy, Inc.

These issues went unresolved however. On June 1, 2010, the United States Supreme Court handed down Levin v. Commerce Energy, Inc., which expressly abrogated the First Circuit's holding on appeal. Levin v. Commerce Energy, Inc., 130 S. Ct. at 2330 ("Levin"). The Levin decision reexamined the interplay between comity and the Supreme Court's prior decision in Hibbs, discussed below at 42-45. The Supreme Court held:

> We have had no prior occasion to consider, under the comity doctrine, a taxpayer's complaint about allegedly

> discriminatory state taxation framed as a request to increase a competitor's tax burden. Now squarely presented with the question, we hold that comity precludes the exercise of original federal-court jurisdiction in cases of the kind presented here.

Levin v. Commerce Energy, Inc., 130 S. Ct. at 2332-33.

The Supreme Court went on to explain that comity is "[m]ore embracive than the TIA," as states use taxation to sustain their systems of government, and therefore restrains the federal courts from hearing cases that might "risk disrupting state tax administration." Id. at 2328. The Court couched its decision upon the notion that federal courts are ill-equipped to remedy an unconstitutional state tax scheme. Id. at 2334. Even where judicial interference would result in *increasing* state tax revenues, the Supreme Court urged restraint. Failing to heed would result in solutions considerably deviated "from what the [state legislature] would have willed." Id. at 2335. Because state courts are not bound by the TIA, they are better suited to craft a tax scheme, and may be "more familiar with state legislative preferences." Id. at 2336.

Thus, the Levin decision resolved the circuit split. The Supreme Court resolved the footnote interpretation,[11] clarifying that comity is more expansive that the Hibbs footnote suggested. Id. at 2335-36. The decision in Hibbs did not

[11]See below at 44-45.

"recast the comity doctrine"; rather, it was a "confluence of factors" that were sufficient in the aggregate to overcome comity's constraints, and allow plaintiff a federal forum. Levin v. Commerce Energy, Inc., 130 S. Ct. at 2335-36. The holding in Levin is therefore that, absent some combination of factors[12] that would justify a federal forum, comity generally dictates that challenges to state tax schemes belong in state court. Id. at 2336.

E. Current

On remand, the Secretary filed a motion to dismiss on July 14, 2010, in light of the Levin holding. (Docket No. 144, at 3.) The defendant further argued that Levin now invoked *stare decisis* and *law of the case*, which preclude inconsistent rulings. (Id. at 11-14, ¶ 4.)

Coors filed its response in opposition on August 11, 2010. (Docket No. 151.) The plaintiff argued that the stipulations the parties agreed to, Docket No. 121, preclude this court from ruling on the Secretary's motion to dismiss until the summary judgment motion is adjudicated. (Docket No. 151, at 5-6, ¶ III(A)). Specifically, paragraph thirteen of the stipulation, requires both parties to withhold any additional action until the pending renewed motion for summary was decided, and at present undecided. (Id.) Coors further alleges that there is no legal or

[12]See below at 43-45.

equitable basis for dismissing this lawsuit. (Id. at 6-9.) The plaintiff points to the joint status report as evidence that "Defendant has voluntarily chosen to submit the resolution of the merits of Coors' claims to this Court." (Docket No. 151, at 7.) Coors claims that it would not have an adequate method of redress in the Puerto Rico courts, saying that any hearing on the matter would amount to a "preprinted rejection slip." (Id. at 11.)

III. Stipulations

A gateway issue on remand concerns the validity of the stipulation entered into by the parties. (Docket No. 121.) The plaintiff alleges that the terms of the provision preclude this court from ruling on the Secretary's motion to dismiss. (Docket No. 151, at 5-6, ¶ III(A).) Specifically invoked is the provision stating "[t]he parties have agreed to hold all other proceedings in abeyance until the Court rules on the Motion for Summary Judgment." (Docket No. 121, at 3, ¶ 13.) The plaintiff filed the referenced summary judgment motion on June 26, 2009, shortly after the First Circuit remanded the case, and which motion remains undecided. (Docket No. 96.) The defendant does not respond to this argument in detail, claiming that "plaintiff's request . . . to take notice of Documents 121, 136 and 139 is a camouflaged attempt to resubmit its request for leave to file

excess number of pages regarding its opposition to defendant's motion to dismiss." (Docket No. 162, at 2, ¶ 2.)

That is not all plaintiff's request seeks to accomplish. Plaintiff wishes that the defendant be "bound by his commitments and this Court's order." (Docket No. 151, at 6, ¶ III(A).) That the Supreme Court issued a ruling favorable to the Secretary does not exonerate him of his commitments under the joint agreement. If the agreement is determined to be binding, it has the effect of precluding this court from ruling on the defendant's motion until the prior motion for summary judgment is adjudicated.

"Stipulations 'eliminate the need for proving essentially uncontested facts,' thus husbanding scarce judicial resources." Cabán Hernández v. Philip Morris USA, Inc., 486 F.3d 1, 5 (1st Cir. 2007) (quoting Gómez v. Rivera Rodríguez, 344 F.3d 103, 120 (1st Cir. 2003)). "It is apodictic that [they] should be read with an eye toward effectuating the parties' manifested intentions." Dedham Water Co. v. Cumberland Farms Dairy, Inc., 972 F.2d 453, 462 (1st Cir. 1992.) (citing Washington Hosp. v. White, 889 F.2d 1294, 1299 (3d Cir. 1989)). Stipulations entered into with clean hands are given due deference. See TI Fed. Credit Union v. DelBonis, 72 F.3d 921, 928 (1st Cir. 1995); see also Stafford v. Crane, 382 F.3d 1175, 1180 (10th Cir. 2004) (court is "reluctant to relieve parties from the

benefits, or detriments of their stipulations"); Waldorf v. Shuta, 142 F.3d 601, 616 (3d Cir. 1998) ("[i]t is a well-recognized rule of law that valid stipulations entered into freely and fairly, and approved by the court, should not be lightly set aside"). Absent a justifiable reason to extricate from the contract, discussed below, a party may only do so when manifest injustice is the likely outcome. See TI Fed. Credit Union v. DelBonis, 72 F.3d at 928; Waldorf v. Shuta, 142 F.3d at 617-18 (discussing factors other courts have used in determining manifest injustice, include "effect of the stipulation on the party seeking to withdraw," "the effect on the other parties," "the occurrence of intervening events since the parties agreed to the stipulation," and "whether evidence contrary to the stipulation is substantial") (citations omitted).

Stipulations generally consider either questions of fact or questions of law. Questions of fact are generally abided by courts. See Gander v. Livoti, 250 F.3d 606, 609 (8th Cir. 2001) ("stipulations by the parties regarding questions of fact are conclusive"); TI Fed. Credit Union v. DelBonis, 72 F.3d at 928 (quoting Saviano v. Comm'r of Internal Revenue, 765 F.2d 643, 645 (7th Cir. 1985) ("parties to a lawsuit are free to stipulate to factual matters"). Questions of law, however, belong to the court's discretion. Gander v. Livoti, 250 F.3d at 609; TI Fed. Credit Union v. DelBonis, 72 F.3d at 928.

The joint stipulations must be considered through this framework. The parties entered into the agreement, and it is evident on its face that the joint status report was made with the pending summary judgment motion in mind. A full seven of the fourteen[13] provisions consider summary judgment, among them, considerations for the Secretary's opposition, a reply and a surreply. (Docket No. 121, at 3, ¶ 9-10.) Though the Secretary almost immediately sought relief from the stipulations, Docket No. 136, and the court was "inclined" to grant relief, Docket No. 138, the matter remained unadjudicated. Nor did the defendant attempt to invalidate the stipulations as a challenge to the motion for summary judgment. As this was after the First Circuit remanded the case, and before the Supreme Court abrogated its ruling, the plaintiff had the upper hand. And though the defendant could not have reasonably expected the Supreme Court to intervene, he must consider both sides of the double-edged sword before agreeing to stipulations. The Secretary did not object to the stipulations at any great length. Nor will the defendant suffer any manifest injustice from having the summary judgment motion decided first.

For those reasons, I recommend the court bind the defendant to the stipulations the parties agreed to in their joint status response. I further

[13]Though there are thirteen paragraphs, there are two paragraph fours. (Docket No. 121, at 2.)

recommend that the pending motion for summary judgment be adjudicated before considering the pending motion to dismiss.

IV. Summary Judgment

The plaintiff renewed its motion for summary judgment on June 26, 2009. (Docket No. 96.) Coors filed its initial motion on July 30, 2007. (Docket No. 51.) The defendant did not file a motion in opposition. In addition to reiterating its previous arguments, discussed *supra*, Coors makes the additional argument that the First Circuit's reversal of June 3, 2009 carries weight in this case. As the Supreme Court expressly abrogated the First Circuit's ruling in Levin, this argument is moot.

A. Factual Background

Puerto Rico has allegedly been protecting the local beer industry for decades. Facially, the plaintiff submits that the legislative record evidences a clear intent to protect Puerto Rico's sole brewing company, Cervecería India. Coors points to several instances of legislative, judicial and executive comments that the state of the local beer industry was such that "[t]he local beer industry [was] . . . being displaced by imported beer." (Docket No. 51-2, at 20, quoting Docket No. 54, at 2, ¶ 5.) The $.55 tax differential that separated "large" and "small" brewers was "patently discriminatory." (Docket No. 51-2, at 21.)

When this initial bifurcated tax system failed as a "sufficient competitive advantage for local brewers[,]" Puerto Rico allegedly stepped in again. (Docket No. 51-2, at 21.) In spite of the protections already afforded it, Cervecería India continued to lose market share. (Id.) Coors asserts that the 2002 Amendments to Law No. 37 were the result of aggressive lobbying efforts by Cervecería India. (Id.) The 2002 Amendments had the effect of raising the differential between the lowest and highest tax classifications from $.55 to $1.90, an increase in excess of 345%. Again, the plaintiff points to the legislative record as confirmation "that the 2002 amendments were motivated by a desire to insulate Cervecería India from the rigors of interstate competition." (Docket No. 51-2, at 22.)

Coors also submits that the 2004 Amendments are purposefully discriminatory against off-island brewers. (Docket No. 51-2, at 22-23.) Until 2004, only two of the sixteen beer manufacturers in the Puerto Rico market produced less than nine million gallons annually, one of which was Cervecería India. However, as a result of Cervecería India's strong growth in FY 2003, production increased to more than 9 million gallons. (Docket No. 54, at 20, ¶ 85.) This would result in a considerable tax increase for the company. As written, Law No. 37 and its 2002 Amendment did not allow for a graduated tax increase,

instead requiring that a producer falling into whichever category had to pay tax on the entirety of that amount.

Coors concludes that "the legislative record is replete with statements by key legislators, lobbyists, and politicians that prove the Special Exemption was crafted in order to shield Cervecería India from interstate competition." (Docket No. 51-2, at 23.) "That the legislature strategically included a neutral 'official statement of purpose' in the statute does not change this result." (Id.) Coors concludes that "[a] pretextual official statement of purpose cannot shield the Commonwealth from the natural consequences of its unconstitutional actions." (Id. at 25.)

As mentioned, the Secretary did not file a response in opposition to either the initial motion for summary judgment, Docket No. 51, or the renewed motion for summary judgment, Docket No. 96.

B. Standard of Review

Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a)[14]; Meléndez v. Autogermana, Inc., 622 F.3d 46, 49

[14]"Rule 56 was amended, effective December 1, 2010. The standard for granting summary judgment now appears in subsection (a), but remains

(1st Cir. 2010). The intention of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). "Once the moving party has properly supported [its] motion for summary judgment, the burden shifts to the nonmoving party, with respect to each issue on which [it] has the burden of proof, to demonstrate that a trier of fact reasonably could find in [its] favor." Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 52 (1st Cir. 2000) (quoting DeNovellis v. Shalala, 124 F.3d 298, 306 (1st Cir. 1997)); Cruz-Claudio v. García Trucking Serv., Inc., 639 F. Supp. 2d 198, 203 (D.P.R. 2009.)

"[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986); see also Carrol v. Xerox Corp., 294 F.3d 231, 236-37 (1st Cir. 2002) (quoting J. Geils Band Employee Benefit Plan v. Smith Barney Shearson, Inc., 76 F.3d 1245, 1251 (1st Cir. 1996)) ("'[N]either conclusory allegations [nor] improbable inferences' are sufficient to defeat summary judgment.")

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substantively the same." Del Toro Pacheco v. Pereira, --- F.3d. ----, 2011 WL 347131, at *3 n.6 (1st Cir. Jan. 31, 2011) (citing Fed. R. Civ. P. 56 advisory committee's note).

> An issue is "genuine" if the evidence of record permits a rationale factfinder to resolve it in favor of either party. See Medina-Muñoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990). A fact is "material" if its existence or nonexistence has the potential to change the outcome of the suit. See Martínez v. Colón, 54 F.3d 980, 984 (1st Cir. 1995).

Borges ex rel. S.M.B.W. v. Serrano-Isern, 605 F.3d 1, 5-6 (1st Cir. 2010).

The nonmoving party must produce "specific facts showing that there is a genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)); see also López-Carrasquillo v. Rubianes, 230 F.3d 409, 413 (1st Cir. 2000); Amira-Jabbar v. Travel Servs., Inc., 726 F. Supp. 2d 77, 84 (D.P.R. 2010).

C. Discussion[15]

> Our Constitution "was framed upon the theory that the peoples of the several states must sink or swim together." Thus, this Court has consistently held that the Constitution's express grant to Congress of the power to "regulate Commerce . . . among the several States," contains "a further, negative command, known as the dormant Commerce Clause," that "create[s] an area of trade free from interference by the States." This negative command prevents a State from "jeopardizing the welfare of the Nation as a whole" by "plac[ing] burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear."

[15]As an initial aside, the dormant Commerce Clause equally applies to Puerto Rico. Starlight Sugar, Inc. v. Soto, 253 F.3d 137, 142 (1st Cir. 2001).

Am. Trucking Ass'ns, Inc. v. Michigan Pub. Serv. Comm'n, 545 U.S. 429, 433 (2005) (internal citations omitted).

"The dormant Commerce Clause sets two complementary boundaries for states' regulatory powers over commerce. On one hand, states cannot interfere with Congress's constitutional authority over interstate commerce by enacting laws that seriously impede interstate commerce, even when Congress has not acted." IMS Health Inc. v. Mills, 616 F.3d 7, 27 (1st Cir. 2010) (citing Dep't of Revenue v. Davis, 553 U.S. 328, 337-38 (2008)). "On the other hand, states 'retain authority under their general police powers to regulate matters of legitimate local concern, even though interstate commerce may be affected.'" Id. (quoting Maine v. Taylor, 477 U.S. 131, 138 (1986)). "Further, in fields traditionally subject to state regulation, federal courts 'should be particularly hesitant to interfere with [states'] efforts under the guise of the Commerce Clause." Id. (quoting United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 344 (2007)).

"Heightened scrutiny applies when a law 'discriminates against interstate commerce' in purpose or effect." Keystone Redevelopment Partners, LLC v. Decker, --- F.3d ----, 2011 WL 43707, at *17 (3d Cir. Jan. 7, 2011) (quoting C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994)). Coors alleges that

Law No. 37 and its amended progeny violate the Commerce Clause facially and in effect. "An assertion that the Commerce Clause invalidates a particular statutory scheme presents a facial challenge to that statute." IMS Health Inc. v. Ayotte, 550 F.3d 42, 63 (1st Cir. 2008) (citing United States v. Nascimento, 491 F.3d 25, 41 (1st Cir. 2007) (distinguishing facial and as-applied Commerce Clause challenges to federal law)). "[I]n evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state court or enforcement agency has proffered." Id. (quoting McGuire v. Reilly, 386 F.3d 45, 58 (1st Cir. 2004)). Whenever possible, "state statutes should be presumed to govern only conduct within the borders of the enacting state[,]" and "[these] statutes should be given a constitutional as opposed to an arguably unconstitutional interpretation whenever fairly possible." Id. (citations omitted).

The dormant Commerce Clause applies to alcohol shipments as well. Freeman v. Corzine, --- F.3d ----, 2010 WL 5129219, at *7 (3d Cir. 2010). "[U]nless the state 'show[s] that the "discrimination is demonstrably justified,"' statutes regulating alcohol that discriminate against interstate commerce must be invalidated." Id. (quoting Granholm v. Heald, 544 U.S. 460, 492 (2005)). "State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent." Freeman v. Corzine,

2010 WL 5129219, at *7 (citing Granholm v. Heald, 544 U.S. at 489); cf. Family Winemakers of Cal. v. Jenkins, 592 F.3d 1, 5 (1st Cir. 2010).

D. Analysis

i. Facial Discrimination

Coors alleges that the special exemption statutes are facially discriminatory. The plaintiff attempts to amalgamate the two pillars of statutory discrimination, facial discrimination and discriminatory effect. (Docket No. 51-2, at 19.) Coors asserts that a "legion" of cases establishes that "a purposefully discriminatory law is unconstitutional whether it expressly declares the intent to favor local business at the expense of out-of-state competitors or 'aspire[s] to reap some of the benefits of tariffs by other means.'" (Id.) Another term of this definition is "discriminatory intent," and is addressed below. For a statute to be facially discriminatory, that discrimination must be contained in the language of the statute. The statute states in its relevant section:

> (c) The benefits of this section shall also apply to the importers of the products described in this subsection whose producers meet the requirements established in subsection (b) of this section.

P.R. Laws Ann. tit. 13, § 9574(c).

As the prescribed methods of categorizing the beer companies all relate to beer *production*, and not place of origin, it cannot be successfully argued that the

statute is facially discriminatory. Thus, I consider whether any evidence of discriminatory intent exists.

ii. Discriminatory Intent

The plaintiff also alleges that the respective statutes were crafted with a discriminatory intent in mind, namely the protection of the local beer industry. Coors offers two arguments: first, that the legislative history surrounding the inception of Law No. 39 illustrates that the driving reason for said statute was the protection of Cervecería India; second, that the effect caused by the statute evidences a discriminatory effect in favor of local brewers. (Docket No. 51-2, at 20, 28.) The latter argument is allegedly supported by the market data before and after the passage of the statutes.

To prevail on an argument of discriminatory intent and/or effect, Coors must show that the challenged state statute has extraterritorial effects that adversely affect economic production (and hence interstate commerce) in other states, thereby forcing "producers or consumers in other States [to] surrender whatever competitive advantages they may possess." Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 580 (1986) (citing Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 528 (1935); Schwegmann Bros. Giant Super Mkt. v. La. Milk Comm'n, 365 F. Supp. 1144 (M. La. 1973)); see Grant's Dairy–Me., LLC v.

Comm'r of Me. Dep't of Agric., Food & Rural Res., 232 F.3d 8, 19 (1st Cir. 2000); cf. Family Winemakers of Cal. v. Jenkins, 592 F.3d at 5. A statute's intent can be inferred from the statutory language and its statement of purpose. The relevant portion of the statute's statement of motives reads:

> The tax measures established through this Act should not affect other areas of the economic basis of our Island. Thus, in the case of beer, the mechanism approved by the Supreme Court of Puerto Rico in *U.S. Brewers Association v. Secretario de Hacienda,* 109 D.P.R. 456 (1980) is used to guarantee that industries of less production may continue their operation without any alteration. In those cases, as their productive capacity increases, and as a result thereof, its financial stability, their responsibility before the public treasure shall also gradually increase. **In view of this, it is the public policy of the Commonwealth to promote that small industries that produce beer do not suffer the burden of the new tax until their annual production and financial capacity justify it.**

Act No. 69, H.B. 2244 (Conference) of the 14th Session of the 1st Legislature of Puerto Rico (Approved May 30, 2002), http://www.oslpr.org/download/en/2002/0069.pdf (emphasis added); P.R. Laws Ann. tit. 13, § 9521 (2007).

The statute and its progeny were designed to protect small businesses from the potentially debilitating effect of steep excise taxes. The Puerto Rico legislature delineated "large brewer" category as such because it felt that brewers of that magnitude could afford the tax. The "classes" created here are of production level

and, indirectly, revenue generated. The classes are *not* those producing beer inside or outside of Puerto Rico. The Puerto Rico legislature's conduct did not rise to the level of "discriminatory intent" in crafting the statutory exemptions.

iii. Legislative History

Coors asserts that the beer excise tax "was motivated by the 'reality' that 'imported beer in the last years ha[d] been substituting the locally produced beer' and that this trend had led to a 'crisis' in which '[t]he local beer industry [was] . . . being displaced by imported beer." (Docket No. 51-2, at 20, quoting Docket No. 54, at 2, ¶ 5.) Cervecería India, reeling from three consecutive years of net losses, could not weather higher taxes. Politicians bemoaned the potential loss of jobs in Puerto Rico. Additionally, significant lobbying efforts on the part of Cervecería India led to the 2004 amendment.

> It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it. What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.

United States v. O'Brien, 391 U.S. 367, 384 (1968); see also Torres v. Delgado, 510 F.2d 1182, 1183 (1st Cir. 1975).

While it is true that for at least some of the legislature, protection for Cervecería India was an express rationale for passing the 2002 and 2004 Amendments, Coors lists only a handful of cases. They do not represent the entire legislature. And while the legislation's supporters may have believed that local benefits would flow from passage, this was at most an incidental purpose that does not justify the heightened scrutiny that must be given to discriminatory legislation under the dormant Commerce Clause. See Alliance of Auto. Mfrs. v. Gwadosky, 430 F.3d 30, 39 (1st Cir. 2005) (recognizing that incidental discriminatory purpose does not warrant strict scrutiny under the dormant Commerce Clause); Wine & Spirit Retailers, Inc. v. Rhode Island, 481 F.3d 1, 10-11 (1st Cir. 2007); cf. Family Winemakers of Cal. v. Jenkins, 592 F.3d at 13. Puerto Rico has not shifted the costs of doing business on to other states whose voters cannot affect its legislative choices, nor does the law "hand local businesses a victory they could not obtain through the political process." United Haulers Ass'n, Inc. v. Oneida-Herkimner Solid Waste Mgmt. Auth., 550 U.S. at 345. "[Puerto Rico's] political process produced this statute, and [Puerto Rico] voters can, if they disagree, reverse this policy." IMS Health Inc. v. Mills, 616 F.3d at 29.

iv. Discriminatory Effect

Failing to highlight facial discrimination or discriminatory intent, Coors may still obtain relief if it can prove evidence of a discriminatory effect of the statute. The plaintiff relies on market data for its assertion, highlighting the change in market share amongst the brewers doing business in Puerto Rico, changes it attributes to the increased taxes. Coors then juxtaposes the market share fluctuations of Puerto Rico at large with sales of beer on military installations in Puerto Rico. Even though Cervecería India had significant growth in Puerto Rico, at the expense of competitor's market share, sales at military installations, where the tax has never taken effect, have remained roughly the same. (Docket No. 54, at 23, ¶ 100.) The plaintiff relies on the United States Supreme Court case Bacchus Imports in support. Bacchus Imps., Ltd. v. Dias, 468 U.S. 263 (1984) ("Bacchus").

At issue in Bacchus was an excise tax enacted by Hawaii that exempted certain alcoholic beverages produced in that state. The exemption was for Hawaiian okolehao, a brandy distilled from an indigenous Hawaiian shrub, and pineapple wine, the only fruit wine manufactured in Hawaii during the relevant time, from its 20% excise tax on liquor at wholesale. Bacchus Imps., Ltd. v. Dias, 468 U.S. at 265. Appellants, liquor wholesalers, initiated protest proceedings after paying the taxes, and sought refunds for the entirety of their liquor tax

liabilities for the relevant years. Id. at 266. The Supreme Court rejected Hawaii's Commerce Clause and Twenty-first Amendments defenses, and found the excise tax was facially discriminatory. Id. at 274-76. The Court also held that the exemption had both the purpose and effect of discriminating in favor of local products. The Court further dismissed Hawaii's claim that helping "struggling" in-state industries was an adequate basis for its economic protectionism. Id. at 272-73; cf. Family Winemakers of Cal. v. Jenkins, 592 F.3d at 9 n.7. This purpose, to assist in-state industry, was "sufficient to demonstrate the state's lack of entitlement to more flexible approach permitting inquiry" into the Pike[16] analysis, weighing the burdens and benefits on interstate commerce. Bacchus Imps., Ltd. v. Dias, 468 U.S. at 270.

Coors would like this court to find a parallel between Hawaii's statute and the Puerto Rico statute. I believe that the court should decline such invitation. First, the Hawaiian statute in question protected the Hawaiian liquor industry *exclusively* by exempting several beverages produced only in Hawaii, including a nonexistent pineapple wine. Id. at 272. The statute in this case seeks only to ensure that companies classified as "small brewers," from whatever state, are shielded from what Puerto Rico considers a potentially crushing tax liability. P.R.

[16] See Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

Law No. 69. As the Puerto Rico Supreme Court correctly notes, this act of classifying in accordance with production levels achieves the purpose of "establish[ing] a system of scaled exemptions that would allow each company's tax liability to increase slowly as its economic stability grew." Asoc. Importadores de Cerveza v. E.L.A., 171 D.P.R. at 168, P.R. Offic. Trans. 92, at 17 (2007). According to Coors' own figures, Cervecería India's production was forecast to increase to nearly 14,000,000 gallons in 2007, which would put it in the second-highest tax bracket under section 9574. (Docket No. 54, at 21-22, ¶¶ 91-92.)

In sum, a reasonable fact-finder could not conclude on this record that either section 9521 or section 9574 has a substantial discriminatory effect by illustrating that any effect of these acts discriminates against out-of-state businesses while specifically exempting local businesses, in one way or another. Indeed, the fact that brewers from other states have qualified for the exemption, and still can, only further demonstrates the lack of discrimination. Any out-of-state beer producers who brew 14,000,000 gallons of beer and wish to distribute in Puerto Rico would join Cervecería India in paying the tax at the same rate. There is no evidence of discriminatory impact.

v. Excessive Burden

In a footnote, Coors "reserves the right later to seek summary judgment on the ground that, under the standard set forth in Pike, the purported local benefits of the Special Exemption are clearly outweighed by the burdens it imposes on out-of-state brewers." (Docket No. 51-2, at 16 n.2.) As excessive burden is the next step in the discrimination calculus, I will address this issue now.

Legislation "burdens commerce in a way that is 'clearly excessive in relation to the putative local benefits' to be derived therefrom." Cherry Hill Vineyard, LLC v. Baldacci, 505 F.3d 28, 33 (1st Cir. 2007) (quoting Wine & Spirits Retailers, Inc. v. Rhode Island, 481 F.3d at 11) (quoting Pike v. Bruce Church, 397 U.S. at 142)). Under the Pike "balancing test," "[l]aws that regulate evenhandedly and only incidentally burden commerce are subjected to less searching scrutiny," Cherry Hill Vineyard, LLC v. Baldacci, 505 F.3d at 33, and should be upheld unless their imposition on commerce "clearly outweigh[s]" their state or local benefits. Pike v. Bruce Church, Inc., 397 U.S. at 142; see IMS Health Inc. V. Mills, 616 F.3d at 42 n.51. "If a legitimate local purpose is found, then the question becomes one of degree . . . the extent of the burden that will be tolerated will . . . depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." Pike v. Bruce Church, Inc., 397 U.S. at 142.

Thus, we must place the "putative benefits" on one side of the scales, and the "burden to interstate commerce" on the other. Only when burden registers as "clearly excessive" do we challenge the regulation. See Pharm. Care Mgmt. Ass'n v. Rowe, 429 F.3d 294, 312 (1st Cir. 2005). As stated, the statutes were amended to provide a graduated tax liability to companies as their business production grew. The tax itself generated in excess of ten million dollars in revenue. A "flat-tax" at the highest rate could either depress production or put small businesses out of the Puerto Rico market altogether. The burden would presumably be that businesses might lower the volume of business done in Puerto Rico, or leave the market altogether. However, no evidence of any major beer manufacturers doing either is proffered. Beer production volume has increased in Puerto Rico from 2003 to 2006, evidencing no desire to exit the Puerto Rico market. (Docket No. 54, at 22, ¶ 96.)

The balancing of benefits and burdens of the tax statutory scheme decisively favors the former. Construing the evidence in the light most favorable to the Secretary, the record at best suggests an uncertain amount of lost revenue to large brewers. A claim under the dormant Commerce Clause cannot be based solely upon a showing that a challenged statute will cause individual out-of-state businesses to lose profits. Pharm. Care Mgmt. Ass'n v. Rowe, 429 F.3d at 313.

There is a presumption in favor of a legislation's constitutionality. See IMS Health, Inc. v. Ayotte, 550 F.3d at 63 (citing Arizonans for Official English v. Arizona, 520 U.S. 43, 78 (1997)). "As the Seventh Circuit wisely observed when confronted with a similar state statute lacking any built-in geographic restriction, it would make no sense to read the statute to regulate out-of-state transactions when the upshot of doing so would be to annul the statute." IMS Health, Inc. v. Ayotte, 550 F.3d at 64 (citing K-S Pharmacies, Inc. v. Am. Home Prod. Corp., 962 F.2d 728, 730 (7th Cir. 1992)). Coors has not provided any benefit in eliminating the Puerto Rico statute, nor has it illustrated any evidence of discrimination, facially, effectually or otherwise.

For those reasons, I recommend that plaintiff's motion for summary judgment be DENIED.

V. Motion to Dismiss

A. Background

I now report on the Secretary's motion to dismiss. (Docket No. 144.) The Secretary argues stridently that the Levin decision has a dispositive effect on this case, and should result in dismissal. (Id. at 2.) The plaintiff submits several parries, the majority of which are contingent upon the question of whether the Levin exceptions, discussed below at 44-45, apply. As an initial matter, because

the plaintiff's motion for summary judgment will be considered and I recommend its rejection, its first argument might be rendered moot. The provision in the joint agreement requiring a stay of all proceedings until the summary judgment motion was decided upon, will soon be satisfied. Thus, the Secretary is free to pursue this motion.

As stated, the Levin Court expressly abrogated the First Circuit's holding in this case. The two relevant holdings concerned the applicability of the Butler Act and, through *in pari materia* extension, the Tax Injunction Act, as well as the principles of comity. Both were found by the First Circuit not to bar Coors from pursuing its case; both were ultimately overruled by the United States Supreme Court.

The First Circuit found the Butler Act & the Tax Injunction Act inapplicable to this case because the suit seeks to raise taxes, not reduce them. The appellate court concluded that "since the Butler Act is read in parallel to the TIA, and since it similarly only restricts the district courts from entertaining suits 'for the purpose of restraining the assessment or collection' of taxes of Puerto Rico, we read it, according to *Hibbs*, to only apply where plaintiffs seek to challenge taxes in a way that would reduce the flow of state tax revenue." Coors Brewing Co. v. Méndez-Torres, 562 F.3d at 14 (citing May Trucking Co. v. Oregon Dep't of Transp., 388

F.3d 1261, 1267 (9th Cir. 2004)). The court also drew support from juxtaposing Hibbs to the Tenth Circuit case Hill v. Kemp ("Hill"). In Hill, a group brought a First Amendment challenge against Oklahoma's statutory scheme for speciality license plates for automobiles, which expressly included "choose life," and "adoption creates families" plate options, both of which were easier to procure than license plates bearing messages in support of abortion rights. Hill v. Kemp, 478 F.3d 1236, 1239-40 (10th Cir. 2007). The defendants argued that the suit was barred by the Tax Injunction Act. Id. at 1239. The Tenth Circuit refrained from enjoining the state law on evidentiary grounds, as any decision would be based on economic speculation. Otherwise, "judges might be free to become second rate, supply-side economists, hazarding guesses that enjoining this or that revenue raising measure would help rather than hurt overall tax collections." Coors Brewing Co. v. Mendez Torres, 562 F.3d at 14 (citing Hill v. Kemp, 478 F.3d at 1250.) The First Circuit distinguished Hill from the instant case, as the remedy in that case was the economically uncertain action of elimination of a certain product "[that] might be genuinely hard to predict, [whereas] the elimination of a special tax exemption is much more likely to increase rather than decrease revenues." Coors Brewing Co. v. Méndez-Torres, 562 F.3d at 15. Ultimately, the

court found that "this case is more like Hibbs than Hill[,]" and concluded that the action was not barred by the Butler Act. Id. at 16.

Second, the First Circuit determined that comity had a restricted application in light of Hibbs. In so doing, it expressly overrode its earlier ruling in U.S. Brewers. Coors Brewing Co. v. Mendez Torres, 562 F.3d at 16. The court interpreted the "Hibbs footnote" to mean that comity did not bar the door to federal court, as such an invalidation would necessarily result in the repeal of a tax exemption that would raise tax revenue. Id. at 18. In concluding that "*Hibbs* effected a change in the law such that neither the Butler Act nor related principles of comity serve to bar Coors's complaint[,]" id., the court held:

> The Court did observe that *U.S. Brewers* was based on principles of comity related to the Butler Act, and not the TIA. But this observation cannot serve to save *U.S. Brewers* since the Butler Act is read analogously to the TIA and since the *Hibbs* Court also limited principles of comity under the TIA. In light of the surrounding discussion, and considering the earlier footnote limiting the scope of comity, we read the Court's citation to *U.S. Brewers* simply as an acknowledgment of a related case, and not as an endorsement of its result.

Coors Brewing Co. v. Mendez Torres, 562 F.3d at 17-18 (citation omitted).

The Supreme Court did not share this interpretation of Hibbs. Rather, the Court found that Hibbs had a more "modest reach." The footnote, Justice Ginsburg explained, was not meant to recast the comity doctrine, but was merely

intended to convey that Hibbs was a poor fit for comity. Levin v. Commerce Energy, Inc., 130 S. Ct. at 2335. Several idiosyncratic issues led to the Court to its decision in Hibbs: the statute at issue was for allegedly unconstitutional purposes; the party bringing suit was a third party, not directly affected; and the federal court was no less equipped to adjudicate the issue, as the only remedy, invalidation of the tax credit, would not violate the TIA. Levin v. Commerce Energy, Inc., 130 S. Ct. at 2335-36. Thus, the Court found that this amalgam of ad-hoc factors could be used to permit federal jurisdiction. Id. at 2336. The Court also maintained that "so long as state courts are equipped fairly to adjudicate[,]" federal courts should refrain from taking a case. Id. at 2334.

Thus, at this stage in the litigation, there are now two, and only two avenues for this court to retain this case. First, a confluence of Levin-like factors that would, in sum, permit jurisdiction. Or, a persuasive argument that the state court would not fairly and adequately adjudicate the case. I address each in turn.

B. Standard of Review

"Under Rule 12(b)(1), a defendant may move to dismiss an action against him for lack of federal subject matter jurisdiction." Rivera v. State Ins. Fund Corp., 410 F. Supp. 2d 57, 59 (D.P.R. 2006) (citing Fed. R. Civ. P. 12(b)(1)). "The party asserting jurisdiction has the burden of demonstrating its existence."

Id. (citing Skwira v. United States, 344 F.3d 64, 71 (1st Cir. 2003) (citing Murphy v. United States, 45 F.3d 520, 522 (1st Cir. 1995)). "Rule 12(b)(1) is a 'large umbrella, over-spreading a variety of different types of challenges to subject-matter jurisdiction,' including ripeness, mootness, the existence of a federal question, diversity, and sovereign immunity." Ivyport Logistical Servs., Inc. v. Caribbean Airport Facilities, Inc., 502 F. Supp. 2d 227, 230 (D.P.R. 2007) (quoting Valentín v. Hosp. Bella Vista, 254 F.3d 358, 362-63 (1st Cir. 2001)).

C. Discussion

i. Levin Exception

To reiterate, the "Levin Exception" factors are: (1) a statute's unconstitutional purpose, requiring heightened judicial scrutiny; (2) brought by a third-party; where (3) the federal courts are no less equipped to handle the case. Levin v. Commerce Energy, Inc., 130 S. Ct. at 2335-36. The Secretary argues that none of these elements are present. "Plaintiff allege[s] that a state's tax scheme is discriminatory because it favors some of its competitors, and does not seek to impact its tax liability but rather, to increase the tax burden of the competitors . . . [p]lainly said, this case contains all of the factors that the Levin court unanimously found to justify dismissal." (Docket No. 144, at 10.) The plaintiff does not address these issues in its reply brief. (Docket No. 151.) I

agree with the Secretary. None of the elements are present in this case. With the dormant Commerce Clause argument dismissed, Coors does not provide any constitutional arguments. Coors would be directly affected by any remedial action taken by this court. And its requested redress, repeal of a state tax statute, is an action far better adjudicated in the Puerto Rico courts. Thus, the Levin exceptions do not apply.

ii. Adequate State Remedy

Finally, this court may maintain jurisdiction if the state courts would not provide an adequate remedy. The plaintiff stresses this point heavily. "The Commonwealth courts do not provide Coors with an adequate forum for resolution of its federal claims . . . these courts will not provide Coors a 'full hearing and judicial determination at which [it] may raise any and all constitutional objections to the tax.'" (Docket No. 151, at 10.) The plaintiff alleges that adjudicating in the Puerto Rico courts would amount to "[a] pro forma process that leads to a predetermined result . . . . " (Id.) Coors goes on to allege that as a result of the 1978 Beer Importers P.R. case, the courts would in essence invoke *stare decisis* to preclude any future challenge, despite the fact that the 2002 and 2004 Amendments would render a different question before the courts. (Id. at 10-11.) "Thus, whether the 1978 version violated the dormant Commerce Clause would

have no bearing on whether it imposes an unconstitutional burden on commerce today." (Id. at 10.) Ultimately, the court's "wooden invocation of *stare decisis* as a justification for avoiding the merits of a dormant Commerce Clause challenge to the Special Exemption is essentially a 'preprinted rejection slip[,]' and, Coors alleges, "[any] dormant Commerce Clause challenges to the Special Exemption will not be considered on the merits in Puerto Rico courts but summarily rejected." (Id. at 11.)

D. Analysis

In Asoc. Importadores de Cerveza v. E.L.A., the Puerto Rico Supreme Court considered the constitutionality of Act No. 69 and amended sections 4002 and 4023, and whether they violated the dormant Commerce Clause. Asoc. Importadores de Cerveza v. E.L.A., 171 D.P.R. at 141-42, P.R. Offic. Trans. 92, at 2. The petitioners, the Puerto Rican Beer Importers Association, sought declaratory judgment against the Commonwealth, asking that Section 2 of Act No. 69, which grants a scaled tax exemption to producers not exceeding thirty-one million gallons annually, be declared unconstitutional. Id. The defendants moved for dismissal under the Puerto Rico Supreme Court's holding in U.S. Brewers, P.R.. Asoc. Importadores de Cerveza v. E.L.A., 171 D.P.R. at 142, P.R. Offic. Trans. 92, at 3. The Secretary alleged that the U.S. Brewers case resolved the controversy

at hand, and that no violation of the Constitution was involved. Id. This is essentially the same argument that Coors is making in the case at bar.

Although the Puerto Rico Supreme Court affirmed the rulings of the lower courts, it was not a *pro forma* rejection. Rather, it considered in-depth what applicability, if any, the dormant Commerce Clause held in Puerto Rico and, if so, whether Act No. 69 violated it. In a pithy decision, the Court analyzed the applicability from multiple angles, drawing from state precedent,[17] federal precedent,[18] constitutional precedent,[19] and Puerto Rico's own 'pros and cons' for

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[17]"[N]either our Constitution nor Public Law 600, nor the Federal Relations Act, states that said clause would apply to Puerto Rico and, therefore, it did not become part of the compact signed between the United States and Puerto Rico." Asoc. Importadores de Cerveza v. E.L.A., 171 D.P.R. at 155, P.R. Offic. Trans. 92, at 9.

[18]"[T]he First Circuit Court of Appeals has reiterated, without further explanation, that the Commerce Clause was applicable to Puerto Rico." Asoc. Importadores de Cerveza v. E.L.A., 171 D.P.R. at 158, P.R. Offic. Trans. 92, at 11.

[19]"There can surely be no doubt in anyone's mind that the United States–at least in trade commerce matters–enjoys broad powers to prevent what the United States Supreme Court has characterized as 'the tendencies toward economic Balkanization' and 'in the absence of an express provision excluding Puerto Rico from the application of the dormant Commerce Clause, there is *no* reason to believe that Congress authorized Puerto Rico to discriminate against interstate and foreign commerce.'" Asoc. Importadores de Cerveza v. E.L.A., 171 D.P.R. at 160-61, P.R. Offic. Trans. 92, at 12-13 (footnote omitted).

doing so.[20] Though the Court maintained that Puerto Rico has special status within the Union, and cited United States Supreme Court precedent that not all provisions of the Constitution apply to Puerto Rico, it nonetheless held:

> [W]e underscore the pronouncements of the First Circuit Court of Appeals in *Trailer Marine Transport Corp.*, that complete economic integration—the fundamental aim of the Commerce Clause–is as relevant to Puerto Rico as it is for any State of the Union. In other words, there are *no* valid legal grounds to argue that Puerto Rico–absent federal legislation–may discriminate against the products of other states, or against foreign products, in order to favor its own.

Asoc. Importadores de Cerveza v. E.L.A., 171 D.P.R. at 160, P.R. Offic. Trans. 92, at 12.

Having determined that Puerto Rico was subject to the dormant Commerce Clause, the Puerto Rico Supreme Court next analyzed the challenged statutes under it. They performed much the same analysis that I did above, considering the Puerto Rico legislature's intent, evidence of possible discriminatory intent, and the possible presence of facial discrimination. Asoc. Importadores de Cerveza v. E.L.A., 171 D.P.R. at 166, P.R. Offic. Trans. 92, at 16. They performed

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[20]Listing the "most convincing grounds against" and "most persuasive arguments in favor of" the application of the dormant Commerce Clause and, upon comparison, concluding that "the arguments favoring the application of the dormant Commerce Clause to Puerto Rico are more persuasive than those against it." Asoc. Importadores de Cerveza v. E.L.A., 171 D.P.R. at 155-156, 159, P.R. Offic. Trans. 92, at 9, 12.

substantially similar analysis of the plaintiff's proffered case in support, Bacchus Imps., Ltd. v. Dias. Asoc. Importadores de Cerveza v. E.L.A., 171 D.P.R. at 167-68, P.R. Offic. Trans. 92, at 17. The Puerto Rico Supreme Court similarly dismissed claims of facial discrimination outright. It also distinguished Bacchus on similar grounds. Asoc. Importadores de Cerveza v. E.L.A., 171 D.P.R. at 168-69, P.R. Offic. Trans. 92, at 17-18. The Court, in finding that Act 69 does not violate the dormant Commerce Clause, concluded that:

> 1) it has no discriminatory purpose; 2) it has no discriminatory effect; 3) it applies to an activity that has a substantial nexus to Puerto Rico; 4) it is fairly apportioned; 5) it is fairly related to services offered by the state; 6) it does not present a substantial risk of multiple taxation; and 7) it affects no possible interest of the federal government to maintain uniformity in international commerce. To conclude, we believe that both the Court of First Instance and the Court of Appeals *acted correctly* in dismissing the verified petition that led to this case."

Asoc. Importadores de Cerveza v. E.L.A., 171 D.P.R. at 171-72, P.R. Offic. Trans. 92, at 19.

Under the TIA and the principles of comity, as long as the state provides sufficient remedies, the taxpayer is prohibited from filing suit in federal court. See Tully v. Griffin, Inc., 429 U.S. 68, 73 (1976). A state remedy is plain, speedy and efficient if it is procedurally adequate. See Rosewell v. LaSalle Nat'l Bank, 450

U.S. 503, 512 (1981) (state remedy must meet minimal procedural requirements). A state need only provide a "full hearing and judicial determination" at which a taxpayer may raise any and all constitutional objections to the tax. Id. at 514; Esso Standard Oil Co. v.Freytes, 467 F. Supp. 2d 156, 168-69 (D.P.R. 2006).

There is nothing in the record that suggests that Coors would not receive a plain, speedy and efficient trial in the Puerto Rico court system. Contrary to the plaintiff's claims, the Puerto Rico courts have addressed similar cases substantively, taking care to provide strong support for their decisions. Nor did Coors give any evidence of current Puerto Rico case law that would indicate a decided lack of adjudicatory options in the state courts. Therefore, it is there that they must pursue their avenues of redress.

The plaintiff has three additional claims. All three first required that this court rule the legislation unconstitutional. As the court should decline to do so, all of Coors' remaining claims would be rendered moot.

VI. CONCLUSION

"In this circuit, we have [found] . . . exceptions to [the] *stare decisis* rule. The first exception applies when '[a]n existing panel decision [is] undermined by controlling authority, subsequently announced, such as an opinion of the Supreme

Court . . . . '" United States v. Rodríguez-Pacheco, 475 F.3d 434, 441 (1st Cir. 2007) (quoting Williams v. Ashland Eng'g Co., 45 F.3d 588, 592 (1st Cir. 1995)); United States v. Royal, 174 F.3d 1, 9-10 (1st Cir. 1999). The Levin decision is such an exception. Coors has failed to establish that the beer tax is constitutionally infirm. Nor has Coors proven that it can elude the statutory grasp of the Butler Act or, in the alternative, that it can challenge the statutes under one of the Levin exceptions. Finally, Coors' argument that the state court would provide an inadequate forum for its claims is unconvincing. As such, I recommend that the district court grant the defendant's motion to dismiss, Docket No. 144.

Under the provisions of Rule 72(d), Local Rules, District of Puerto Rico, any party who objects to this report and recommendation must file a written objection thereto with the Clerk of this Court within five (5) days of the party's receipt of this report and recommendation. The written objections must specifically identify the portion of the recommendation, or report to which objection is made and the basis for such objections. Failure to comply with this rule precludes further appellate review. See Thomas v. Arn, 474 U.S. 140, 155 (1985); Davet v. Maccorone, 973 F.2d 22, 30-31 (1st Cir. 1992); Paterson-Leitch Co. v. Mass. Mun. Wholesale Elec. Co., 840 F.2d 985 (1st Cir. 1988); Borden v. Sec'y of Health & Human Servs., 836 F.2d 4, 6 (1st Cir. 1987); Scott v. Schweiker, 702 F.2d 13, 14

(1st Cir. 1983); United States v. Vega, 678 F.2d 376, 378-79 (1st Cir. 1982); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603 (1st Cir. 1980).

At San Juan, Puerto Rico, this 10th day of February, 2011.

S/ JUSTO ARENAS
Chief United States Magistrate Judge