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

COORS BREWING COMPANY, Plaintiff, v. JUAN CARLOS MENDEZ-TORRES, Defendant.	Civil No.:06-2150(DRD)

OMNIBUS OPINION AND ORDER

I. PROCEDURAL HISTORY

The history of the instant case is tumultuous, spanning five years and encompassing a reversal and remand by the First Circuit, and a subsequent abrogation by the Supreme Court of the United States. *See* Coors Brewing Co. v. Mendez-Torres, 562 F.3d 3 (1st Cir. 2009), *abrogated by* Levin v. Comm. Energy, Inc., – U.S. –, 130 S.Ct. 2323 (2010) (expressly abrogating the First Circuit's opinion in the instant case).

The Court referred this complicated case (Docket No. 160) to Chief Magistrate Judge Justo Arenas for his recommendation. In this most recent *Report and Recommendation* (Docket No. 167), he set forth a detailed and precise recounting of the lengthy procedural history in the instant case, as well as several related cases of importance to the present action, which the Court hereby **ADOPTS** and **INCORPORATES BY REFERENCE**. Thus, in the interests of brevity and readability, the Court begins by recounting only the portions of

this turbulent and litigation-fraught procedural history which are necessary for the purposes of the instant opinion.

For decades,[1] the Commonwealth of Puerto Rico has implemented an excise tax on beer, distinguishing between brewers who produce more than 31 million gallons annually ("large brewers") and those who produce less than 31 million gallons annually ("small brewers") in establishing tax rates. When this distinction between small and large brewers first arose, the United States Brewers Association ("USBA")[2] filed suit both in state and federal fora. *See* U.S. Brewers P.R. ("U.S. Brewers P.R."), 9 P.R. Offic. Trans. 605 (P.R. 1980); *see also* U.S. Brewers Ass'n v. Cesar-Perez, 455 F.Supp. 1159 (D.P.R. 1978), *remanded* 592 F.2d 1212 (1st Cir. 1979) ("U.S. Brewers"), *cert. denied* 100 S.Ct. 64 (1979), *abrogated by* Mendez-Torres, 562 F.3d 3, *abrogated by* Levin, 130 S.Ct. 2323. Eventually, in 1980, the state court suit found itself in the Puerto Rico Supreme Court. *See* U.S. Brewers P.R., 9 Offic. Trans. 605. The Puerto Rico Supreme Court reviewed the constitutionality of the tax, as well as its validity under the Federal Relations Act, ultimately determining on the merits of the case that the tax

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[1] As noted by the First Circuit, in 1978, Puerto Rico adjusted the excise tax on beer to distinguish between small and large brewers, taxing each category at a different rate per gallon. Coors Brewing, 562 F.3d at 6. Previously, all brewers and wine makers were taxed at the same rate. United States Brewers Ass'n v. Sec'y of the Treas. of the Commonwealth of Puerto Rico, 9 P.R. Offic. Trans. 605 (1980).

[2] Plaintiff's predecessor, the Adolph Coors Company, was a member of the USBA.

was, in fact constitutional. Id.

The federal suit also proceeded beyond the trial court level to seek appellate review. *See* U.S. Brewers, 592 F.2d 121. Initially the District Court ruled that the Butler Act did not "preclude the enjoinment of a Commonwealth's tax where a clear violation of [the Federal Relations Act] is established, and where there exists no plain, speedy and efficient remedy in the local forums." 455 F.Supp. at 1162. Upon appeal, the plaintiffs/appellants asserted that the Butler Act[3] did not bar federal jurisdiction to their suit challenging the state beer excise tax as they did not seek to prevent the collection of a tax. 592 F.2d at 1214. The Court of Appeals for the First Circuit disagreed, stating that "it might well be proper to apply the Butler Act beyond its literal terms to encompass [a] suit to enjoin enforcement of a tax exemption." Id. Ultimately, however, the Court of Appeals based their decision to remand so that the District Court might dismiss for want of jurisdiction upon "considerations which underlie . . . the Butler Act, 'equity practice, . . . principles of federalism . . . and the imperative need of a State to administer its own fiscal operations." Id. (citations omitted).

Some time later, in 2002, Puerto Rico enacted Act No. 69,

[3] The Butler Act reads: "[n]o 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 District Court of the United States for Puerto Rico." 48 U.S.C. §872.

which amended the beer tax, increasing the large brewer tax above the traditional rate, which was never in excess of $0.55 greater than the tax imposed upon small brewers. Under Act No. 69, large brewers paid $4.05 in excise taxes and small brewers paid only $2.15. *See* P.R. Laws Ann. tit. 13 §9574. This new law provided for four gradational steps between brewers who produced between 9 million and 31 million gallons of beer annually and included an exemption for companies who brewed more than 9 million gallons, but less than 31 million gallons, allowing them to pay the lowest tax rate for the first 9 million gallons.

After entry of Act 69, the Puerto Rico Association of Beer Importers[4] filed suit in Puerto Rico Superior Court, although shortly thereafter, Coors withdrew its claims without prejudice. Mendez-Torres, 562 F.3d at 6 (outlining the procedural history of P.R. Ass'n of Beer Imps. v. Puerto Rico ("Beer Importers"), 2007 TSPR 92 (P.R. 2007), *cert. denied* 128 S.Ct. 1649 (2008), for which the Court finds no official translation).[5] Ultimately, the Puerto Rico Superior Court dismissed the action, and this dismissal was upheld by the Puerto Rico Supreme Court. Id.

After it withdrew from the Puerto Rico Superior Court case, Coors then filed a challenge to the beer tax in the U.S. District Court for the District of Columbia. Coors Brewing Co. v. Calderon,

[4] Coors is an affiliate of this organization.

[5] A translation of this case may be found at Docket No. 47.

225 F.Supp. 2d 22, 23 (D.D.C. 2002). The District Court eventually dismissed the action for lack of jurisdiction under the Butler Act, citing the First Circuit's concern in U.S. Brewers with principles of equity and federalism in reaching its determination. Calderon, 225 F.Supp. 2d at 25-26 (citing U.S. Brewers, 592 F.2d at 1215). Upon appeal, a settlement was reached under which Coors agreed that the District Court's judgment "determines with finality the Court's lack of jurisdiction but is without prejudice to the substantive claims that the Court lacked jurisdiction to address." Mendez-Torres, 562 F.3d at 6.

In 2004, the Puerto Rico legislature amended the beer excise tax, again retaining the graduated taxation scheme ("challenged statute" or "special exemption"). Id. at 10. Subsequently, in 2006, Coors Brewing Company ("Coors" or "Plaintiff") filed the instant action, attacking the validity of the graduated beer tax. Specifically, Coors alleges that the special exemption for small brewers is invalid and unenforceable for violating both the Federal Relations Act and the Commerce Clause of the United States Constitution.[6]

The Secretary of the Treasury for the Commonwealth of Puerto Rico ("Secretary" or "Defendant") subsequently filed a motion to dismiss in which he alleged that this Court lacks subject matter

[6] U.S. CONST. art. I, §8, cl. 3.

jurisdiction under the Tax Injunction Act[7] and the Butler Act. Further, Defendant alleged that collateral estoppel and/or claim preclusion prevented the Court from deciding the case, as litigation in the state courts was ongoing. Finally, Defendant asserted that the stipulations agreed to in Calderon had a preclusive effect on this Court's jurisdiction. Ultimately, the Court declined to dismiss on res judicata grounds, instead relying upon the Rooker-Feldman doctrine, the Butler Act and the preclusive effect of the Calderon case and related stipulations to dismiss Plaintiff's federal claims with prejudice.

However, upon appeal to the First Circuit, that Court of Appeals disagreed with the District Court's decision, reversing the same and remanding the case. Mendez-Torres, 562 F.3d at 23. The Honorable Chief Magistrate Judge Justo Arenas has provided an extremely thorough and detailed account of the intricacies of that opinion in his *Report and Recommendation*; accordingly, the Court shall merely outline the First Circuit's decision and highlight the salient points therein.

At the outset of its opinion, the First Circuit determined that the preclusive effect of the Calderon stipulations was correctly "assessed through the lens of issue preclusion[,]" and then found that the 2004 amendment to the tax was "immaterial" and would not "defeat issue preclusion." Id. at 9-10.

[7] 28 U.S.C. §1341.

The Court of Appeals subsequently addressed Plaintiff's argument that the Supreme Court's case of Hibbs v. Winn, 542 U.S. 88, 124 S.Ct. 2276 (2004), represented an intervening change in controlling law. Mendez-Torres, 562 F.3d at 12. When undertaking its analysis of this argument, the First Circuit expressly overrode its previous ruling in U.S. Brewers, finding that Hibbs resulted in a restricted application of the comity principles underlying the Butler Act and, accordingly, found that neither the Butler Act nor unadorned principles of comity barred the instant suit. Id. at 16-18. Consequently, the First Circuit found no jurisdictional bar and addressed the Calderon stipulations, disagreeing with this Court's opinion that they barred Plaintiff from re-litigating the issue of subject matter jurisdiction in the instant case. Id. at 12-13.

The Court of Appeals then proceeded to address the effect of the Butler Act on the Court's jurisdiction in the instant case, determining that, in light of its reading of Hibbs, the Act did not prevent the Court from exercising subject matter jurisdiction as Plaintiff seeks to invalidate an exemption which would result in taxes being raised rather than eliminated. Id. at 14-16.

The First Circuit subsequently addressed the Defendant's assertion that the principles of comity which the appellate court relied upon in U.S. Brewers would dictate dismissal in the instant case. Id. at 16-18. The Court of Appeals first recognized that,

absent the Supreme Court's decision in Hibbs, U.S. Brewers would still control. Id. at 16. However, relying upon its earlier reading of Hibbs as indicating a new, restricted application of comity principles, the appellate court rejected Defendant's argument. Id. at 17-18. The Court of Appeals ended its opinion by also rejecting the District Court's reliance upon the Rooker-Feldman doctrine and U.S. Brewers P.R., stating that Coors was not a party to that case and that it was also not sufficiently represented in that action "so as to be precluded in this action" for the doctrine to apply. Id. at 19-22.

Following the remand, on June 26, 2009, Plaintiff renewed (Docket No. 96) a previously-filed motion for summary judgment (Docket Nos. 51, 52 & 54). Subsequently, the parties filed a joint status report (Docket No. 121) on December 23, 2009, which provided in part that "[t]he parties have agreed to hold all other proceedings in abeyance until the Court rules on the Motion for Summary Judgment."

On March 16, 2010, Defendant requested relief (Docket No. 136) from an agreement severely limiting the scope of discovery regarding privity as set forth in the joint status report. Shortly thereafter, Plaintiff vehemently objected (Docket No. 139).

On June 1, 2010, the legal landscape of the instant case changed drastically, however, with the Supreme Court's unanimous

opinion[8] in Levin v. Commerce Energy, Inc., 130 S.Ct. 2323. That case abrogated the First Circuit's opinion in the instant case, as the Supreme Court found that, even in the wake of Hibbs, the reach of comity is significantly more expansive than the First Circuit (and Seventh and Ninth Circuits, along with the Sixth Circuit, which had rendered the previous Levin decision) presumed. *See* id. at 2335-36. The Supreme Court clarified that the footnote in Hibbs upon which the First and Sixth Circuits erroneously relied in declining to dismiss for comity reasons, in fact "did not. . . recast the comity doctrine." Id. at 2235. The Levin court then proceeded to state that a "confluence of factors", specifically the request to review a "commercial matter over which [the state] enjoys wide regulatory latitude[,]" which rendered heightened judicial scrutiny inapplicable; the use of a challenge to a tax scheme to improve competitive position; and the preferable position of state courts, rather than federal courts, to adjudicate the matter "demand deference to the state adjudicative process." Id. at 2236.

Shortly thereafter, on July 14, 2010, Defendant filed a motion to dismiss (Docket No. 144) in light of the Supreme Court's decision in Levin. Defendant argues that, following the Levin decision, the Court need no longer follow the abrogated First Circuit opinion in the instant case under either the law of the

[8] There were no dissenters in this case, although Justices Kennedy, Alito and Thomas, joined by Scalia filed concurring opinions.

case doctrine or *stare decisis*. Accordingly, Defendant asserts that, following Levin, this Court should refrain from entertaining the instant challenge to a state taxation scheme as it does not employ a classification subject to heightened scrutiny or which impinges on a fundamental right.

In its response, Plaintiff first asserts that, under the terms of the stipulations contained within the joint status report, the Court must resolve its motion for summary judgment prior to addressing Defendant's motion to dismiss. Additionally, Plaintiff asserts that, as evidenced by the joint status report, "Defendant has voluntarily chosen to submit the resolution of the merits of Coors' claim to the Court." Further, Plaintiff avers that, even under Levin, dismissal based upon principles of comity is inappropriate in the instant case as the Puerto Rico state courts would not provide adequate redress in the instant case based upon their previous rulings. Finally, Plaintiff avers that it is speculative whether Puerto Rico state courts will follow federal constitutional rule regarding the instant challenge based upon the alleged disfavor with which the Puerto Rico state courts view the importance of legislative history in constitutional challenges.

On December 29, 2010, the Court referred (Docket No. 160) the pending motion to dismiss and all other related pending motions to Chief Magistrate Judge Justo Arenas for entry of his *Report and Recommendation* in the instant case. On February 10, 2011,

Magistrate Judge Arenas entered the same (Docket No. 167). *See* Coors Brewing Co. v. Mendez-Torres, No. 06-2150, 2011 WL 499140 (D.P.R. Feb. 10, 2011). In this lengthy and exhaustive document, the Magistrate Judge first identified as a gateway issue Plaintiff's contention that the stipulations entered into by the parties continue to bind them, as it determines whether the Court must resolve the pending motion for summary judgment or the motion to dismiss first. After reviewing the applicable jurisprudence regarding stipulations, the Magistrate Judge concluded that the Defendant entered knowingly into the stipulations and may not be released from them at this time. Thus, Magistrate Judge Arenas recommended that the Court address the pending motion for summary judgment before the motion to dismiss, pursuant to the terms of the stipulations.

The Magistrate Judge then identified the constitutional challenges under the dormant Commerce Clause enumerated by Plaintiff in its motion for summary judgment. He separated the challenges into four categories in order to analyze them: facial discrimination; discriminatory intent; legislative history; and discriminatory effect. The Magistrate first addressed the facial discrimination challenge, determining that no language exists in the challenged statute imposing the excise tax which qualifies as facially discriminatory.

Subsequently, Magistrate Judge Arenas addressed Plaintiff's

assertions of discriminatory intent and effect. He first reviewed the statutory language and challenged statute's statement of purpose to determine that the "statute and its progeny were designed to protect small businesses from the potentially debilitating effect of steep excise taxes." The Magistrate then reviewed the legislative history, upon which Plaintiff heaped much weight in its motion for summary judgment. Upon this review, he determined that, while some members of the legislature expressed that they intended to protect the local brewery, Cervecería India, with the legislation, that subsection of the legislature did not represent the entire legislature. Further, he found that protection of a local business was "at most an incidental purpose" that did not justify heightened scrutiny and that Puerto Rico has not shifted the costs of doing business to other states.

Having found no facial discrimination or discriminatory purpose in the challenged statute, the Magistrate Judge proceeded to determine whether the statute indeed created a discriminatory effect. He noted that Plaintiff proffers market data to support its contention that Cervecería India has experienced significant growth at the expense of competitors' market share. However, the Magistrate Judge found that the case upon which Plaintiff relied to show the unconstitutionality of the special exemption, Bacchus Imps., Ltd. v. Dias, 468 U.S. 263, 104 S.Ct. 3049 (1984) was easily distinguishable from the instant case. Ultimately, Chief

Magistrate Judge Arenas found that a reasonable fact-finder could not conclude that the challenged statute has a substantial discriminatory effect as, by Plaintiff's own admission, Cervecería India's production was forecasted to increase, putting it in a higher tax bracket along with similarly-sized out-of-state producers.

Finally, the Magistrate Judge noted that Plaintiff "reserve[d] the right later to seek summary judgment on the ground that . . . the purported local benefits of the Special Exemption are clearly outweighed by the burdens it imposes on out-of-state brewers." Although Plaintiff did not further elaborate on this theory, the Magistrate addressed the matter anyways, finding that the benefits of the tax scheme outweighed any burdens. Accordingly, the Magistrate Judge found that Plaintiff had failed to show that summary judgment in its favor was appropriate and recommended that the Court deny the pending motion for brevis disposition.

Thus, having abided by the stipulation which mandates disposition of the summary judgment prior to addressing other pending motions, the Magistrate Judge then turned to the pending motion to dismiss which the Court had referred to him. He first outlined the First Circuit's previous decision in the instant case, noting where this opinion was overruled by the Supreme Court's

decision in Levin.[9] As the pending motion to dismiss represents a challenge to the Court's subject matter jurisdiction in the instant case, the Magistrate Judge set forth the standard of review applicable as that of Rule 12(b)(1) of the Federal Rules of Civil Procedure. He then addressed the applicability of the "Levin exception" factors, determining that none of the factors are present in the instant case.

Finally, Magistrate Judge Arenas addressed Plaintiff's argument that the state courts of Puerto Rico cannot provide an adequate remedy due to the *stare decisis* effect of the Beer Importers case. The Magistrate Judge first reviewed the decision of the Puerto Rico Supreme Court in that case, determining that it was not a *pro forma* rejection of the constitutional challenge to the current statute's predecessor, but rather presented a holistic view of the issues. Finally, the Magistrate Judge recommended that the Court reject Plaintiff's assertions that the available state remedies are inadequate, stating that: "Contrary to the plaintiff's claims, the Puerto Rico courts have addressed similar cases substantively, taking care to provide strong support for their decisions." Ultimately, Magistrate Judge Arenas noted that Plaintiff's remaining claims were all hinged upon a finding that the challenged statute is unconstitutional and recommended their

[9] Specifically, Magistrate Judge Arenas stated that: "The two relevant holdings [overruled by the Supreme Court] concerned the applicability of the Butler Act and, through *in pari materia* extension, the Tax Injunction Act, as well as the principles of comity."

dismissal along with the dismissal of Plaintiff's constitutional challenge.

On February 17, 2011, Plaintiff filed its objections to the Magistrate Judge's *Report and Recommendation* (Docket No. 168). Therein, it asserts that Chief Magistrate Judge Arenas erred when he recommended that the Court deny its pending motion for summary judgment. Plaintiff primarily protests the Magistrate Judge's failure to provide more weight to evidence that some legislators evinced the desire to protect Cervecería India as an express rationale for passing the contested legislation. Plaintiff asserts that, if the Magistrate Judge had afforded this evidence more weight, he would have concluded that the historical background and legislative record shows a discriminatory intent. In setting forth this argument, Plaintiff places great emphasis on a recent First Circuit case, Family Winemakers v. Jenkins, 592 F.3d 1 (1st Cir. 2010),[10] which it asserts supports a finding that the challenged excise tax is unconstitutional. Further, Plaintiff objects to the Magistrate's finding that the tax does not have a discriminatory effect on out-of-state brewers, again placing primary emphasis on the First Circuit's decision in Family Winemakers. Thus, Plaintiff asserts that the beer excise tax has both a discriminatory purpose and effect and, accordingly, that the Magistrate Judge should have

[10] Plaintiff has placed emphasis on this case since its publication, as evidenced by its supplemental motion to the Court (Docket No. 125), filed only days after the First Circuit published Family Winemakers.

granted its motion for summary judgment.

Plaintiff also objects to the Magistrate Judge's recommendation that the Court grant Defendant's motion to dismiss, alluding to its previous argument that the state has voluntarily submitted itself to the federal forum, thus rendering Levin irrelevant. Further, Plaintiff again asserts that the "Puerto Rico Supreme Court will almost certainly refuse to evaluate Coors' claims based on its rote application of *stare decisis*" and that the Puerto Rico courts shall not consider legislative history in rendering a determination on the merits. Thus, Plaintiff asserts that dismissal for comity reasons is inappropriate in the instant case.

On March 3, 2011, Defendant filed his response to Plaintiff's objections (Docket No. 170).[11] Therein, Defendant contests Plaintiff's assertions that the stipulations reached between the parties constitute an implicit waiver of the Court's review of

[11] Concurrently with this filing, Defendant filed a motion for leave to file excess pages (Docket No. 169), which the Court subsequently granted (Docket No. 175).

The following day, Plaintiff filed a motion to strike (Docket No. 171) the response as an untimely objection and for failure to comply with the page limit imposed by the applicable rules of civil procedure. Acting out of an abundance of caution, the Court **DENIES** this request as to any materials contained in the filing which constitute a response to Plaintiff's objections. However, the Court shall not consider any material which constitutes separate objections raised by Defendant as any such objections are untimely. Further, the Court shall not consider any material filed as attachments to the response which was not properly set forth before the Magistrate, as this material is now untimely. The Court specifically refuses to consider pages 36 through 38 of the response, as the sections of legal argument contained therein do not directly relate to either the Magistrate Judge's *Report and Recommendation* or Plaintiff's objections thereto and as the Court should not address any matter that was not timely filed before the purview of the Magistrate Judge. *See e.g.* Fireman's Ins. Co. of Newark, New Jersey v. Todesca Equip. Co., 310 F.3d 32, 38 (1st Cir. 2002).

subject matter jurisdiction.

Further, Defendant contests Plaintiff's assertion that the Magistrate Judge erred in recommending that Plaintiff's motion for summary judgment be denied. Defendant notes that Plaintiff's objections fail to account for the history and stated purpose of the tax and disregards the federal statute upon which the state tax was modeled, which has also been mimicked by other states.

II. REFERRAL TO THE MAGISTRATE JUDGE

The Court may refer dispositive motions to a United States Magistrate Judge for a Report and Recommendation pursuant to 28 U.S.C. §636(b)(1)(B). *See also* FED.R.CIV.P. 72(b); *see also* Local Rule 72(a); *see also* Matthews v. Weber, 423 U.S. 261, 96 S.Ct. 549 (1976). An adversely affected party may contest the Magistrate's Report and Recommendation by filing its objections. FED.R.CIV.P. 72(b). Moreover, 28 U.S.C. §636(b)(1), in pertinent part, provides that

> any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate.

"Absent objection, . . . [a] district court ha[s] a right to assume that [the affected party] agree[s] to the magistrate's recommendation." Templeman v. Chris Craft Corp., 770 F.2d 245, 247

(1st Cir. 1985), *cert denied*, 474 U.S. 1021 (1985). Additionally, "failure to raise objections to the Report and Recommendation waives that party's right to review in the district court and those claims not preserved by such objections are precluded upon appeal." Davet v. Maccarone, 973 F.2d 22, 30-31 (1st Cir.1992); *see also* Henley Drilling Co. v. McGee, 36 F.3d 143, 150-51 (1st Cir. 1994) (holding that objections are required when challenging findings actually set out in a magistrate's recommendation, as well as the magistrate's failure to make additional findings); *see also* Lewry v. Town of Standish, 984 F.2d 25, 27 (1st Cir. 1993)(stating that "[o]bjection to a magistrate's report preserves only those objections that are specified"); *see also* Borden v. Sec. of H.H.S., 836 F.2d 4, 6 (1st Cir. 1987)(holding that appellant was entitled to a de novo review, "however he was not entitled to a de novo review of an argument never raised").

The Court, in order to accept unopposed portions of the Magistrate Judge's Report and Recommendation, needs only satisfy itself that there is no "plain error" on the face of the record. *See* Douglass v. United Servs. Auto, Ass'n, 79 F.3d 1415, 1419 (5th Cir. 1996)(*en banc*)(extending the deferential "plain error" standard of review to the un-objected to legal conclusions of a magistrate judge); *see also* Nettles v. Wainwright, 677 F.2d 404, 410 (5th Cir. 1982)(en banc)(appeal from district court's acceptance of un-objected to findings of magistrate judge reviewed

for "plain error"); *see also* Nogueras-Cartagena v. United States, 172 F.Supp. 2d 296, 305 (D.P.R. 2001)(finding that the "Court reviews [unopposed] Magistrate's Report and Recommendation to ascertain whether or not the Magistrate's recommendation was clearly erroneous")(adopting the Advisory Committee note regarding FED.R.CIV.P. 72(b)); *see also* Garcia v. I.N.S., 733 F.Supp. 1554, 1555 (M.D.Pa. 1990)(finding that "when no objections are filed, the district court need only review the record for plain error").

Thus, the Court shall review Chief Magistrate Judge Arenas' *Report and Recommendation* for plain error as to the sections to which Plaintiff has raised no objections and *de novo* as to all objected-to portions. Upon such a review of the Magistrate's extremely well-reasoned *Report and Recommendation*, the Court **ADOPTS** and, as set forth below, **INCORPORATES** the same **BY REFERENCE**. The Court elaborates below.

III. STIPULATIONS

As aptly noted by the Magistrate Judge, a threshold issue to the Court's inquiry is whether the stipulations contained in the joint status report[12] shall be upheld. If the Court agrees with the Magistrate Judge's recommendation that the Court uphold the stipulations, then it must resolve Plaintiff's motion for summary judgment before proceeding to the merits of Defendant's motion to

[12] Of particular importance is the parties'stipulation agreeing that the Court shall hold in abeyance all other matters until the summary judgment is resolved.

dismiss. Ultimately, this decision could prove fatal to Defendant's defense, as, if the Court were to grant Plaintiff's motion, the instant case would close in favor of Plaintiff without ever reaching the jurisdictional issue.[13]

However, neither party has objected to the Magistrate Judge's recommendation that the Court uphold the stipulations[14] which require the Court to rule on the motion for summary judgment prior to any other pending matter. Accordingly, the Court must only review the Magistrate's recommendation as to the stipulations for plain error.

Upon such review, the Court agrees with Magistrate Judge Arenas' statement that the Levin decision does not "exonerate [Defendant] from his commitments under the joint agreement."

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[13] Under any other circumstances, the Court would not consider the pending Plaintiff's motion for summary judgment prior to addressing the pending motion to dismiss pursuant to an abstention for comity reasons. This is particularly true as the Court reads Levin as imposing a duty on federal district courts to dismiss actions which fall within Levin's purview as expeditiously as possible in order to allow challengers and those defending state statutes to develop and seek a determination regarding their cases in state courts at the earliest possible junction. *See* Levin, 130 S.Ct. at 2230 (discussing the importance of abstention in order to allow the "States and their institutions [to be] left free to perform their separate functions in separate ways").

[14] Although not directly resolved in the Magistrate Judge's *Report and Recommendation*, the Court understands that the rationale by which the Magistrate determined that the Court should uphold the stipulations as to the motion for summary judgment would apply with equal force to Defendant's request to extend discovery regarding privity (Docket No. 136) limited by a stipulation entered in the same joint status report. Accordingly, although the Court previously indicated that it might be inclined to grant a request relating to discovery regarding privity (Docket No. 138), given Plaintiff's subsequent objection (Docket No. 139) and the Magistrate Judge's well-reasoned recommendation regarding this parallel matter, the Court is now inclined to **DENY** the request. However, for the reasons stated below, this request becomes **MOOT** upon entry of the instant *Opinion and Order*.

Further, the Court agrees that, where no justifiable reason to set aside a stipulation exists, the Court should only do so where good cause exists, particularly where a manifest injustice would occur if the Court upheld the stipulation. *See* Caban Hernandez v. Philip Morris U.S.A., Inc., 486 F.3d 1, 6 (1st Cir. 2007) ("Once a party has entered into a stipulation, however, that party is not at liberty to renege unilaterally . . . without leave of court, which ordinarily will not be granted absent a showing of good cause."); *see also* Chao v. Hotel Oasis, 493 F.3d 26, 31-32 (1st Cir. 2007) *see also* TI Fed. Cred. Union v. DelBonis, 72 F.3d 921, 928 (1st Cir. 1995)(providing that manifest injustice is an acceptable reason for the Court to refuse to uphold a stipulation). Defendant has not set forth any showing of good cause for which the stipulation should be set aside. Indeed, as the Magistrate Judge correctly found, Defendant has not shown that he will "suffer any manifest injustice from having the summary judgment motion decided first."

As the Magistrate Judge stated, at the time when the summary judgment was renewed, Plaintiff "had the upper hand" as it had just emerged as the victor at the appellate level and Defendant should have considered the "double-edged sword" before entering into the stipulation. Further, Defendant entered no timely objection to the Magistrate's recommendation that the Court enforce the stipulation and address the motion for summary judgment first. Thus, although

the result could potentially harm Defendant if the Court were to grant Plaintiff's request for summary judgment before considering his motion to dismiss, he shall be held to his word, and the Court shall address the summary judgment first.

IV. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Noting that Defendant never opposed Plaintiff's motion for summary judgment, either when it was first filed in 2007 or when it was renewed in 2009, the Magistrate Judge proceeded to address Plaintiff's legal and factual arguments. First, the Magistrate Judge summarily dismissed as moot Plaintiff's argument that the First Circuit's previous opinion carries weight in the instant case, as Levin abrogated that opinion. *See* 130 S.Ct. at 2235-36. Neither party has contested this determination and the Court agrees with the Magistrate Judge's concise disposition of this argument; as a matter of law, this argument must fail. *See* id. Thus, the Court, like the Magistrate before it, shall move quickly forward to address Plaintiff's other arguments for brevis disposition of its constitutional challenge.

A. FACTUAL BACKGROUND

When analyzing a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party, in this case favoring Defendant. *See* Vera v. McHugh, 622 F.3d 17, 26 (1st Cir. 2010); *see also* Agusty-Reyes v. Dept. of Edu., 601 F.3d 45, 48 (1st Cir. 2010); *see also* Cadle Co. v. Hayes, 116 F.3d

957, 959-60 (1st Cir. 1997). However, while the Court "draw[s] all reasonable inferences in the light most favorable to [the non-moving party] . . . we will not draw *unreasonable* inferences or credit bald assertions, empty conclusions or rank conjecture." Vera, 622 F.3d at 26 (internal quotations and citation omitted); *see also* Ayala-Gerena v. Bristol Meyers-Squibb Co., 95 F.3d 86, 95 (1st Cir. 1996). Further, the Court will not consider hearsay statements nor allegations presented by parties that do not properly provide specific reference to the record. *See* D.P.R.Civ.R. 56(e)("The [C]ourt may disregard any statement of fact not supported by a specific citation to record material properly considered on summary judgment. The [C]ourt shall have no independent duty to search or consider any part of the record not specifically referenced."); *see also* Morales v. A.C. Orssleff's EFTF, 246 F.3d 32, 33 (1st Cir. 2001) (finding that, where a party fails to buttress factual issues with proper record citations, judgment against that party may be appropriate); *see also* Garside v. Osco Drug, Inc., 895 F.2d 46, 50 (1st Cir. 1990)("Hearsay evidence, inadmissible at trial, cannot be considered on a motion for summary judgment.") Both the Magistrate Judge and the Court in the instant *Opinion and Order* have recited the relevant facts with this standard in mind.

As an initial matter, the Court notes that Plaintiff has raised no objections to the Magistrate Judge's recitation of the

properly-supported and uncontested material facts presented in its motion for summary judgment. Accordingly, the Court, having reviewed the same for plain error, and finding none, **ADOPTS** them and **INCORPORATES** them herein **BY REFERENCE**. Only for the sake of completeness does the Court reiterate the facts relevant to the present inquiry below.

Plaintiff alleges that Puerto Rico has protected the local beer industry, specifically Cervecería India, the island's sole brewing company, for decades. Plaintiff submits that the legislative record of the challenged statute evidences a legislative intent to protect Cervecería India, citing legislative, judicial and executive comments expressing concern that the "local beer industry [was] . . . being displaced by imported beer." Further, Plaintiffs point to the original $0.55 tax differential separating large brewers from small brewers, claiming that this differential is "patently discriminatory."

Further, Plaintiff asserts that, when this tax system failed to provide a sufficient competitive advantage for Cervecería India, as it continued to lose market share, the Puerto Rico legislature once again acted. Along this vein, Plaintiffs state that the 2002 amendments occurred as the result of aggressive lobbying efforts by Cervecería India. As already stated above, these amendments raised the differential between the highest and lowest tax groups from $0.55 to $1.90, for an increase in excess of 345% over the original

differential. Plaintiff points to the legislative record as an indication "that the 2002 amendments were motivated by a desire to insulate Cervecería India from the rigors of interstate competition."

Plaintiff also submits facts which it asserts supports its contention that the 2004 amendments are purposefully discriminatory against all brewers located outside of Puerto Rico. First, Plaintiff notes that, until 2004, only two of the sixteen beer manufacturers active in the Puerto Rican market produced less than nine million gallons annually, thus finding themselves in the lowest tax bracket. One of these two manufacturers was Cervecería India. However, due to strong growth in fiscal year 2003, Cervecería India's production then increased to an amount in excess of nine million gallons, which would have resulted in a considerable increase in the excise tax owed by the company. Additionally, as already noted, the 2002 amendments did not allow for the graduated tax increase included in the 2004 amendments.

Coors also sets forth as evidence statements by legislators, lobbyists and politicians[15] which they allege show that the graduated tax, and particularly the exemption for the smallest brewers, "was crafted in order to shield Cervecería India from

[15] The Court notes that the Magistrate Judge did not present an in-depth list of the statements upon which Plaintiff rests this statement. However, Plaintiff also did not object to the factual recitation provided by the Magistrate and the Court finds the Magistrate Judge's recitation to be a proper summary of the relevant asserted undisputed facts. Accordingly, the Court sees no need to list each statement herein.

interstate competition." However, Plaintiff admits that the legislature included a neutral official statement of purpose with the statute, although it qualifies the statement as "strategic."

B. SUMMARY JUDGMENT STANDARD

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment should be entered where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED.R.CIV.P. 56(c); *see* Celotex Corp. v. Catrett, 477 U.S. 317, 324-325 (1986). Pursuant to the clear language of the rule, the moving party bears a two-fold burden: it must show that there is "no genuine issue as to any material facts;" as well as that it is "entitled to judgment as a matter of law." Veda-Rodriguez v. Puerto Rico, 110 F.3d 174, 179 (1st Cir. 1997). A fact is "material" where it has the potential to change the outcome of the suit under governing law. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505 (1986). A fact is "genuine" where a reasonable jury could return a verdict for the nonmoving party based on the evidence. Id. Thus, it is well settled that "the mere existence of a scintilla of evidence" is insufficient to defeat a properly supported motion for summary judgment. Id.

After the moving party meets this burden, the onus shifts to

the non-moving party to show that there still exists "a trial worthy issue as to some material facts." Cortes-Irizarry v. Corporacion Insular, 11 F.3d 184, 187 (1st Cir. 1997). However, failure to oppose a motion for summary judgment does not merit granting of the same as a sanction; the Court must still analyze the pending motion and determine that no genuine issue of material fact exists prior to granting brevis disposition. *See* De Jesus v. LTT Card Svcs., Inc., 474 F.3d 16, 20-21 (1st Cir. 2007).

At the summary judgment stage, the trial court examines the record "in the light most flattering to the non-movant and indulges in all reasonable references in that party's favor. Only if the record, viewed in this manner and without regard to credibility determinations, reveals no genuine issue as to any material fact may the court enter summary judgment." Cadle, 116 F.3d at 959-60 (emphasis ours). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." Reeves v. Sanderson Plumbing Prod., 530 U.S. 133, 150, 120 S.Ct. 2097 (2000)(quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51, 106 S.Ct. 2505 (1986)). Summary judgment is inappropriate where there are issues of motive and intent as related to material facts. *See* Poller v. Columbia Broad. Sys., 369 U.S. 470, 473, 82 S.Ct. 486 (1962)(summary judgment is to be issued "sparingly" in litigation "where motive and intent play leading roles"); *see also* Pullman-

Standard v. Swint, 456 U.S. 273, 288, 102 S.Ct. 1781 (1982)("[F]indings as to design, motive and intent with which men act [are] peculiarly factual issues for the trier of fact."); *see also* Dominguez-Cruz v. Suttle Caribe, Inc., 202 F.3d 424, 433 (1st Cir. 2000)(finding that "determinations of motive and intent . . . are questions better suited for the jury"). Conversely, summary judgment is appropriate where the nonmoving party rests solely upon "conclusory allegations, improbable inferences and unsupported speculation." Ayala-Gerena, 95 F.3d at 95.

C. THE CONSTITUTIONAL CHALLENGE

Plaintiff's constitutional challenge to the special exemption arises from an alleged violation of the dormant Commerce Clause.[16] The Commerce Clause of the Constitution provides Congress the power to "regulate Commerce . . . among the several States." U.S.CONST. art I, §8, cl. 3. From this affirmative grant of power, a negative counterpart stems, called the dormant Commerce Clause. Grant's Dairy-Maine, LLC v. Commissioner of Maine Dept. of Agriculture,

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[16] As the Magistrate Judge quoted,

> 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 creates an area of trade free from interference by the States.

Am. Trucking Ass'ns, Inc. v. Michigan Pub. Servs. Comm'n, 545 U.S. 429, 433, 125 S.Ct. 2419 (2005) (internal quotations omitted). The dormant Commerce Clause's mandate applies with equal force to Puerto Rico as to the fifty states. Starlight Sugar, Inc. v. Soto, 253 F.3d 137, 142 (1st Cir. 2001).

Food and Rural Resources, 232 F.3d 8, 18 (1st Cir. 2000). The dormant Commerce Clause[17] "strip[s] state governments of any authority to impede the flow of goods between states." Cherry Hill Vineyard, LLC v. Baldacci, 505 F.3d 28, 33 (1st Cir. 2007).

Under the dormant Commerce Clause, "a state regulation that discriminates against interstate commerce **on its face, in purpose, or in effect** is highly suspect and will be sustained only when it promotes a legitimate state interest that cannot be achieved through any reasonable nondiscriminatory alternative." Id. (emphasis ours). However, statutes "that regulate evenhandedly and only incidentally burden commerce are subjected to less searching scrutiny" under the balancing test set forth in Pike v. Bruce Church, 397 U.S. 137, 142, 90 S.Ct. 844 (1970). Cherry Hill, 505 F.3d at 33.

Thus, as the Magistrate Judge correctly identified, the Court's first inquiry must be whether the challenged beer excise tax is facially discriminatory, or discriminates either in purpose or effect. If the answer to this question is yes, then the Court will apply heightened scrutiny and "generally [strike] down the statute without further inquiry." Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579, 106 S.Ct. 573

[17] The dormant Commerce Clause was drafted by the Founders to "avoid the economic Balkanization that had prevailed under the Articles of Confederation, under which states had enacted rampant tariffs and other trade barriers at the price of national economic unity." IMS Health, Inc. v. Mills, 616 F.3d 7, 27 n. 24 (1st Cir. 2010) (internal quotation omitted).

(1986). Where discrimination is shown, only where the state then "demonstrate[s] that no reasonable nondiscriminatory regulation could achieve its [legitimate] objectives will the statute stand." Cherry Hill, 505 F.3d at 33.

1. FACIAL CHALLENGE

In his *Report and Recommendation*, the Magistrate Judge found that the challenged statute does not violate the dormant Commerce Clause on its face. Plaintiff does not object to this finding; rather it challenges the Magistrate's findings that the statute did not violate the Constitution in either purpose or effect. Accordingly, the Court only reviews Magistrate Judge Arenas' finding regarding the facial challenge for plain error.

In relevant part, the challenged legislation reads: "(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). Upon plain error review of this language,[18] the Court finds no such error in the Magistrate Judge's determination that the challenged statute does not violate the dormant Commerce Clause on its face. Accordingly, the Court **ADOPTS** the Magistrate Judge's analysis and conclusions regarding Plaintiff's facial challenge to the statute.

[18] Further, the legislation implementing the excise tax provides that: "Taxes shall be uniform and general for the products manufactured or produced abroad and introduced or imported into Puerto Rico as well as for those manufactured or produced in Puerto Rico." P.R. LAWS. ANN. tit. 13, §9522.

2. DISCRIMINATORY PURPOSE

After reviewing the evidence of legislative intent, or purpose, provided by the challenged statute's statement of purpose and legislative history, the Magistrate Judge concluded that the Plaintiff had failed to show discriminatory purpose. Plaintiff objects to this finding. Specifically, Plaintiff asserts that evidence that "key legislators" explicitly advocated the passage of the statute in order to protect Cervecería India from competition provided sufficient foundation to find that the challenged legislation was discriminatory in purpose and, accordingly, to find that it should be struck down as unconstitutional. The Court reviews the Magistrate Judge's recommendation *de novo*.

The bedrock principle of a "discriminatory purpose" claim is that "[p]arties challenging the validity of a state statute . . . must show that the statute was prompted by a discriminatory purpose." Wine and Spirits Retailers, Inc. v. Rhode Island, 481 F.3d 1, 12 (1st Cir. 2007). Thus, "the initial burden of establishing discrimination rests with the challenger." *See* Cherry Hill, 505 F.3d at 33 (noting that the challenger retains the burden in the context of a discriminatory effects challenge). "The words of a legislative body itself, written or spoken contemporaneously with the passage of a statute, are usually the most authoritative guide to legislative purpose." Id.

Two sources of legislative intent are presented to the Court

in the instant case: first, the Court may look to the statement of purpose issued by the Puerto Rico legislature; next, the Court may consider statements made by legislators regarding the beer excise tax. As correctly quoted by the Magistrate Judge, the relevant portion of the statement of purpose 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); P.R. LAWS ANN. tit. 13, §9521 (2007). A reading of the statement of purpose thus shows that the articulated intent of the legislature upon entry of the graduated tax into law was to protect small brewers from the unsustainable load that the higher tax might represent for them. Accordingly, the distinction enunciated by the legislature was one of size, not one of geographic location. Thus, the Court finds that this evidence weighs against a finding of legislative intent

to discriminate in favor of brewers located within Puerto Rico. *See* Wine and Spirits, 481 F.3d at 13 (finding that the articulated purpose of a challenged statute was not discriminatory).

Plaintiff has, however, set forth some evidence of discriminatory purpose in the form of statements made by legislators concurrent with the consideration and passing of the law. It is this evidence upon which Plaintiff bases its objection to the Magistrate Judge's determination that no discriminatory purpose was shown. The Court does not find that such evidence is entirely without weight; statements by legislators can indeed indicate discriminatory purpose. Family Winemakers v. Jenkins, 592 F.3d 1, 7 n. 4 (1st Cir. 2010).[19]

However, Plaintiff's arguments miss a crucial mark as they fail to acknowledge that, upon a motion for summary judgment, its burden is two-fold: it must labor under the "no genuine issue of material fact" standard of Rule 56; further, it bears the ultimate burden of proving discriminatory intent. *See* Wine and Spirits, 481

[19] Plaintiffs rest their arguments in large part upon Family Winemakers, arguing that the Court should follow the letter of this case to grant their motion for summary judgment. However, the Court is reluctant to blindly follow Family Winemakers at this time. In part, the Court's reluctance stems from its determination below that, based even solely upon factual evidence presented by Plaintiff, it cannot find that no genuine issue of material fact exists at this time, particularly where full discovery in the instant case never occurred. Further, the Family Winemakers court found a disparity between the challenged statute's asserted aims and the realities imposed, particularly present in the differences between federal definitions for "large" and "small" wineries and those imposed by the challenged law. *See* 592 F.3d at 15. Here, in contrast, the challenged legislation was modeled after similar tax classifications imposed by the federal government, as well as other states. Accordingly, the Court distinguishes the instant case from Family Winemakers at this time based upon crucial distinctions, both procedural and factual.

F.3d at 14-15; *see also* Grant's Dairy, 232 F.3d at 23-24 (discussing the heavy burden borne by a plaintiff who raises a constitutional challenge under the dormant Commerce Clause upon a motion for summary judgment, even where the defendant, rather than the plaintiff, is the moving party). Neither the Magistrate Judge nor the Court have altogether discounted legislators' statements provided by Plaintiff as evidence of discriminatory intent. Rather, the Court finds that these statements, particularly when weighed against the articulated statement of purpose issued by the legislature, are insufficient to carry Plaintiff's heavy burden to prevail on its motion for summary judgment. *See* United States v. O'Brien, 391 U.S. 367, 384, 88 S.Ct. 1673 (1968) ("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.") At best, a genuine issue of material fact exists as to the legislators' true purpose in enacting the legislation. Accordingly, the Court does not find that application of heightened scrutiny to the contested legislation is proper at this time based upon Plaintiff's discriminatory purpose theory. The Court accordingly **ADOPTS** the Magistrate Judge's *Report and Recommendation* as to potential discriminatory intent and the legislative history.

3. DISCRIMINATORY EFFECT

Plaintiff's final contention is that the beer excise tax is

discriminatory in effect. In support of this assertion, Plaintiff points to market data which, according to Plaintiff, demonstrates that market share between brewers doing business in Puerto Rico changed due to the excise tax. Plaintiff contrasts general market data for beer sales in Puerto Rico with sales at military installations, where the tax has never taken effect. Data supplied by Plaintiff shows that the comparative sales at military installations have remained approximately the same.

Upon reviewing Plaintiff's proffered evidence, the Magistrate Judge recommended that the Court not find discriminatory effect, particularly as out-of-state small brewers have qualified as members of the lowest tax bracket and as Cervecería India was forecasted to enter the second-highest tax bracket in 2007. Plaintiff objects to this recommendation, relying entirely on Family Winemakers[20] to support its claim that the statute has a discriminatory effect.

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[20] As stated above, the Court does not read Family Winemakers as mandating that the Court enter summary judgment in favor of Plaintiff in the instant case. While the Court would certainly include this case among the jurisprudence which it considered while reaching the ultimate issues in the instant case, the Court does not find it prudent to grant summary judgment in favor of Plaintiff in the instant case based solely upon that case, particularly prior to the culmination of full discovery..

Additionally, inasmuch as Plaintiff previously relied almost exclusively upon Bacchus Imps., Ltd. v. Dias, 468 U.S. 263, 104 S.Ct. 3049 (1984), previously, the Court also finds that it is wise to distinguish that case from the instant one. As accurately described by the Magistrate Judge, the Bacchus court found that a Hawaiian statute exempting a specialized fruit wine made in Hawaii from an excise tax had both the discriminatory purpose and effect where the state advanced a desire to help "struggling" in-state industries as its goal. Id. at 272. To the contrary, as already discussed, the Puerto Rican legislature had no such clear protectionist goal in enacting the challenged legislation. Further, no distinction is made in the instant case between a class of product made solely in Puerto Rico and a broader class made elsewhere.

It is well-settled that "[e]ven facially neutral laws enacted without discriminatory motive and in furtherance of legitimate local objectives may be discriminatory in effect (and, thus, [mandate heightened scrutiny] under the jurisprudence of the dormant commerce clause)." Cherry Hill, 505 F.3d at 33. "A state law is discriminatory in effect when, in practice, it affects similarly situated entities in a market by imposing disproportionate burdens on out-of-state interests and conferring advantages upon in-state interests." Family Winemakers, 592 F.3d at 10. Once again, the burden lies with the challenger. Cherry Hill, 505 F.3d 33.

Although Plaintiff has produced some evidence that Cervecería India's market share increased while larger brewers' market share decreased in areas where the tax applied, the Court is hesitant to find discriminatory effect based solely upon this showing. Brewers from other states may also qualify as small brewers and, indeed, have, during the relevant period. Further, according to the information provided by Plaintiff, Cervecería India was slated to join the second-highest tax bracket in 2007 and, accordingly, would pay the same, higher tax as all other similarly situated brewers hailing from the contiguous 48 states, Alaska and Hawaii.

Thus, the Court finds insufficient evidence of discriminatory effect to apply heightened scrutiny based thereupon at this time. The Court agrees with the Magistrate Judge's conclusion that "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." The Court thus **ADOPTS** the Magistrate Judge's *Report and Recommendation* as to this matter.

4. PIKE BALANCING TEST

As set forth above, the Court thus rejects Plaintiff's assertions that the special exemption is discriminatory on its face, in purpose, or in effect at this time. Where, as in the instant case,[21] "a statute has only indirect effects on interstate commerce and regulates evenhandedly" the Court should follow the balancing test set forth in Pike v. Bruce Church, Inc., 397 U.S. 127, 142, 90 S.Ct. 844 (1970), and "examine[] whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." Brown, 476 U.S. at 579.

The First Circuit has recognized that:

[21] While Plaintiff protests that the Magistrate Judge should not have addressed this portion of the analysis at this stage, the Court finds that, without this crucial final step, its analysis would be incomplete and, accordingly, shall address it as well, based upon the record before it, despite Plaintiff's failure to fully brief the issue previously. *See* Keystone Redevelopment Partners, LLC v. Decker, 631 F.3d 89, 107 (3d Cir. 2011) (stating that, where no finding of discriminatory purpose or effect is shown, and heightened scrutiny therefore does not apply, the Court should then employ the Pike balancing test to determine whether the challenged statute is properly struck down).

> the Pike test involves three separate steps. First, we are to evaluate the nature of the putative local benefits advanced by the statute. Second, we must examine the burden the statute places on interstate commerce. Finally, we are to consider whether the burden is 'clearly excessive' as compared to the putative local benefits.

Pharmaceutical Care Mgt. Assoc. v. Rowe, 429 F.3d 294, 312 (1st Cir. 2005). Upon the record as presently developed, the Court finds, on the "putative benefits" side of the scale, ten million dollars in tax revenue produced for Puerto Rico by the graduated excise tax, which allows companies to pay according to their economic capabilities in order to maximize revenue. The Court finds no evidence of countervailing burdens[22] to weigh against this benefit and, accordingly, cannot find that such burdens are "clearly excessive" as compared to the benefit to invalidate the special exemption. Accordingly, and particularly as the Court should always apply a presumption in favor of a legislation's constitutionality, the Court declines at this juncture to find that the challenged statute violates the dormant Commerce Clause. *See* IMS Health, Inc. v. Ayotte, 550 F.3d 42, 63 (1st Cir. 2008). Thus, the Court hereby **ADOPTS** the Magistrate Judge's *Report and Recommendation* and **DENIES** Plaintiff's pending motion for summary

[22] While the Magistrate Judge proffered an educated opinion about potential burdens, the Court declines to do so, instead limiting itself to the evidence provided in conjunction with the motion for summary judgment, particularly as Plaintiff bears the burden of showing that a burden is "clearly excessive" falls with the challenger to a statute. *See* Pharmaceutical Care Mgt. Assn., 429 F.3d at 313.

judgment.

V. DEFENDANT'S MOTION TO DISMISS

Following the Supreme Court's decision in Levin, Defendant moved for dismissal (Docket No. 144) of the instant case. Defendant argues that, because Levin abrogated the First Circuit's opinion in the instant case, the Court is no longer obligated to follow the First Circuit's previous determination regarding comity. Moreover, Defendant argues that, under Levin, the Court should dismiss the instant case for comity reasons.

Plaintiff opposed the motion to dismiss (Docket No. 151) shortly thereafter on several grounds. First, Plaintiff argues that, under the terms of the stipulations, the Court may not consider Defendant's motion to dismiss until after Plaintiff's motion for summary judgment is resolved.[23] Next, Plaintiff asserts that Defendant voluntarily submitted to this Court's jurisdiction by entering into stipulations with Plaintiff and by litigating in this forum. Plaintiff also avers that it would not obtain an adequate remedy if forced to litigate in the Puerto Rico state court system. Specifically, Plaintiff hypothesizes that the Puerto Rico courts will invoke *stare decisis* based upon the Puerto Rico Supreme Court's decision in Beer Importers. Plaintiff further argues that it is speculative whether the Puerto Rico state courts

[23] Because the Court has already resolved the motion for summary judgment above, the Court finds that this argument is at this time **MOOT**.

will choose to "follow the federal constitutional rule" as they will likely fail to consider legislative history in establishing discriminatory purpose. Additionally, Plaintiff argues that equitable concerns do not support dismissal at this late stage of the litigation and that, if the Court retains jurisdiction, it could certify the remedies question to the Puerto Rico Supreme Court.[24]

In his *Report and Recommendation*, Chief Magistrate Judge Arenas reviewed Levin's holding and its effect on the First Circuit's previous decision in detail, finding that Levin indeed fundamentally altered the landscape of the Court's comity inquiry. He then stated that "at this stage of the litigation, there are now two, and only two avenues for this court to retain the case." First, he identified what he termed the "Levin exception" factors, determining that the instant case did not represent one where an exception should generally apply.

Further, Magistrate Judge Arenas noted that, if Plaintiff's argument is correct and the state forum does not provide an adequate remedy, the Court may retain jurisdiction. However, upon

[24] The Court shall not create such a piecemeal case if it indeed decides that the Levin factors are met herein as it understands that Levin mandates abstention rather than mere deference in response to such comity concerns. Although Levin notes that, where the Supreme Court of the United States, upon review of a state-court decision, "finds a tax measure constitutionally infirm" that Court will allow the state court to decide the appropriate remedial effects, the Levin court specifically cautions against allowing a federal court to adjudicate a constitutional challenge on the merits, then send the case to a state court to decide the remedy. Levin, 130 S.Ct. at 2234.

an in-depth review of Beer Importers,[25] the Magistrate Judge concluded that the Supreme Court of Puerto Rico had conducted a comprehensive review of the applicability of the dormant Commerce Clause, drawing from state precedent, federal precedent and Puerto Rico policy concerns to determine that the dormant Commerce Clause indeed applied with equal force to Puerto Rico as to any State of the Union. The Magistrate Judge then noted that the Puerto Rico Supreme Court followed a similar constitutional analysis in Beer Importers to that which he performed while giving his recommendation regarding Plaintiff's motion for summary judgment. Thus, the Magistrate concluded that the Puerto Rico court system could provide Plaintiff with a "plain, speedy and efficient" remedy and, accordingly, that Levin should apply to bar the instant suit in federal court.

When Plaintiff objected (Docket No. 168) to the Magistrate Judge's recommendation, it focused on two areas. First, Plaintiff objects to the Magistrate Judge's failure to address its argument that Defendant has voluntarily submitted to this Court's jurisdiction. Then, Plaintiff objects to the Magistrate Judge's determination that the state court system would provide an adequate forum, simply asserting that the "Puerto Rico Supreme Court will

[25] The Court notes that, although the Magistrate Judge cites an official translation of this case in his *Report and Recommendation*, the citation provided by the Magistrate is faulty and the Court has been unable to locate an official translation by other means. Fortunately, a translation of the case is also found at Docket No. 47. Accordingly, the Court has used this translation in the instant analysis.

almost certainly refuse to evaluate Coors' claims based on its rote application of *stare decisis*" and that the Court refuses to consider legislative history.

Defendant subsequently responded to Plaintiff's objections (Docket No. 170). First, Defendant vehemently disagrees with Plaintiff's assertion that Defendant voluntarily submitted to the Court's jurisdiction by entering into the stipulations. Defendant notes that Plaintiff failed to cite any language under which Defendant expressed an intention or desire to voluntarily submit to the federal forum. Further, Defendant notes that the stipulations related entirely to the parameters of discovery relating to Plaintiff's motion for summary judgment after the First Circuit entered an unfavorable ruling regarding Defendant's first attempt to extract itself from this forum. Additionally, Defendant rebuts Plaintiff's assertion that the state court system cannot provide an adequate remedy, stating that Plaintiff's arguments are speculative at best, citing First Circuit jurisprudence which runs contrary to Plaintiff's assertions.

Accordingly, the Court shall address the objected-to recommendations of the Magistrate Judge regarding the motion to dismiss *de novo*. However, as to the unobjected-to portions, the Court shall employ only plain error review. As a preliminary matter, the Court notes that the Magistrate Judge has provided an excellent summary of both the First Circuit opinion in the instant

case and the Supreme Court opinion in Levin and, accordingly, **ADOPTS** that portion of the *Report and Recommendation* and **INCORPORATES IT HEREIN BY REFERENCE** in order to supplement the summaries already provided by the Court above.

A. VOLUNTARY SUBMISSION

As an initial matter, the Court shall address Plaintiff's assertion that Defendant has voluntarily submitted to the Court's jurisdiction, which the Magistrate Judge did not directly address. In the instant case, Defendant has repeatedly moved to dismiss based, in part, on comity grounds (Docket Nos. 13 & 144). In fact, the stipulations upon which Plaintiff's argument is based were only entered into after the First Circuit remanded based upon its finding that comity concerns did not dictate dismissal of the instant action. Further, as Defendant correctly notes, those stipulations related to post-remand discovery and do not contain an express submission to the Court's jurisdiction. *See* American Jurisprudence Federal Courts §1098 (2d ed. 2011) (stating that abstention may be waived by the state's **express request** that the Court address a constitutional challenge on the merits).

Accordingly, the Court is reluctant to impute a voluntary submission to a state-party who has repeatedly requested that the Court abstain from exercising its jurisdiction based upon a document which was only entered after the First Circuit erroneously determined that principles of comity and the Butler Act did not

support dismissal of the instant action. Thus, the Court finds that Defendant did not voluntarily submit to the Court's jurisdiction and, consequently, finds that the Supreme Court's decision in Levin applies to the instant case.

B. APPLICATION OF LEVIN

In Levin, the Supreme Court abrogated the First Circuit's decision in the instant case, indicating that both the First Circuit and the Sixth Circuit had improperly applied the footnote in Hibbs as constricting the application of comity to TIA and, by extension, Butler Act cases. Levin, 130 S.Ct. at 2336. Ultimately, the Court identified three factors present in Levin which made comity-based abstention appropriate. Id. First, the challenged matter did not "involve any fundamental right or classification[26] that attracts heightened[27] judicial scrutiny." Id. Second, the challengers "endeavor[ed] to improve their competitive position." Id. Finally, the state courts were in a position to correct a violation and offer a remedy which federal courts could not provide. Id.

In the instant case, the Magistrate Judge correctly concluded that the challenged matter did not involve a fundamental right or

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[26] Inasmuch as the state's "regulatory latitude" is relevant to this part of the inquiry, the Court notes that the Twenty First Amendment provides the states with broad power to regulate liquor. *See* Granholm v. Heald, 544 U.S. 460, 488 125 S.Ct. 1885 (2005).

[27] Of course, "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification." Levin, 130 S.Ct. at 2333 (quoting Madden v. Kentucky, 309 U.S. 83, 88, 60 S.Ct. 406 (1940)).

classification that mandates heightened scrutiny. Plaintiff has not objected to this finding and the Court finds that the Magistrate's assessment of this factor is, indeed, correct. Further, Plaintiff has not challenged the Magistrate Judge's finding that Plaintiff seeks to improve its competitive position by instituting the instant suit. The Court also agrees with this finding as, in the instant case, Plaintiff bases its challenge in part upon its alleged loss of market position due to the challenged tax. Presumably, Plaintiff hopes to regain or improve that position by inducing the Court to strike down the special exemption for small brewers.

The only remaining debate, therefore, concerns whether the state courts of Puerto Rico can correct a violation and offer Plaintiff a remedy if such a correction is made. First, the Court notes that it finds little merit in Plaintiff's repeated assertion that the Puerto Rico court system will somehow improperly apply *stare decisis* to dismiss any case filed by Plaintiff. Plaintiff has not cited a single instance where the Puerto Rico Supreme Court has acted in such a manner and appears to base this assertion on nothing more than its own speculation and fears.

On the contrary, upon a review of the Supreme Court's decision in Beer Importers, the Court finds that the Magistrate Judge correctly characterized this opinion from the Supreme Court of Puerto Rico as "pithy" and "in-depth." Indeed, the Justices

therein analyzed state precedent, federal precedent, constitutional precedent and Puerto Rico policy in reaching their decisions. (Docket No. 47-2). Further, as noted by the Magistrate Judge, their analysis of the ultimate constitutionality issue in that case closely mirrors the Court's own. (Id.) Additionally, the Court finds that Plaintiff's contention that the Puerto Rico state courts will utterly fail to consider legislative history represents a gross mischaracterization, as the Beer Importers court explicitly addressed arguments regarding legislators' statements, applying precedent from the Supreme Court of the United States. Further, that court ultimately found, as this Court did, that the statement of purpose outweighed the statements made by a handful of legislators. (Id.)

This Court has nothing but the utmost respect for the Puerto Rico state court system and, in particular, the Puerto Rico Supreme Court and will not deny Defendant's request for dismissal based upon such a flimsy and unsupported attack on it.[28] The Levin Court specifically quoted an earlier opinion authored by Justice Breyer to emphasize the "special reasons justifying the policy of federal noninterference with state tax collection." 130 S.C.t at 2230 n.2. The Court finds it important to, once again, enunciate these

[28] The Court finds further support for its conclusion in recent First Circuit jurisprudence, where the Court of Appeals already determined that the state courts of Puerto Rico provide taxpayers with sufficient procedural safeguards to assure the requisite "plain, speedy, and efficient remedy" mandated by the TIA and, by extension, the Butler Act. *See* Pleasures of San Patricio, Inc. v. Mendez-Torres, 596 F.3d 1, 7-8 (1st Cir. 2010).

reasons in light of Plaintiff's arguments in opposition to the motion to dismiss.

> State tax agencies are organized to discharge their responsibilities in accordance with the state procedures. If federal declaratory relief were available to test state tax assessments, state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency. Moreover, federal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts.

Id. (quoting Perez v. Ledesma, 401 U.S. 82, 128 n. 17, 91 S.Ct. 674 (1971)(opinion concurring in part and dissenting in part)).

Accordingly, the Court finds that abstention for comity reasons is appropriate under Levin and shall **ADOPT** the Magistrate Judge's *Report and Recommendation* and **GRANT** Defendant's motion to dismiss Plaintiff's constitutional challenge accordingly. As Plaintiff's other claims require the Court to rule that the challenged legislation is, indeed, unconstitutional, the Court shall also dismiss those claims at this time. The instant action is therefore **DISMISSED WITHOUT PREJUDICE** so that Plaintiff may pursue its desired remedy within the state court system. The Court understands that the instant decision is appropriate as, in providing Plaintiff with a dismissal without prejudice so that

Plaintiff may pursue its desired remedy in the appropriate state court forum. Thus, both parties now retain the ability to develop their legal and factual arguments in full rather than via an early motion for summary judgment. The Court further understands that this outcome satisfies Levin's strong favor of a state court forum where state taxes are challenged. *See* 130 S.Ct. at 2330. Moreover, this underscores the Court's deep respect for the Puerto Rico state court system in general, and the Puerto Rico Supreme Court in particular.

VI. CONCLUSION

For the reasons set forth above, the Court hereby **DENIES** Plaintiff's motion to strike (Docket No. 171). Further, the Court **ADOPTS** the Magistrate Judge's well-reasoned *Report and Recommendation* (Docket No. 167) and therefore **DENIES** Plaintiff's resuscitated motion for summary judgment (Docket No. 96) and **GRANTS** Defendant's motion to dismiss (Docket No. 144). Judgement, therefore, shall be entered accordingly. Further, the Court **FINDS AS MOOT** Defendant's request for relief from stipulations (Docket No. 136).

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 30th day of March, 2011.

S/ DANIEL R. DOMINGUEZ
DANIEL R. DOMINGUEZ
U.S. District Judge