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

COORS BREWING COMPANY,
Plaintiff,

v.

JUAN CARLOS MENDEZ-TORRES,
SECRETARY OF THE TREASURY
DEPARTMENT OF THE
COMMONWEALTH OF PUERTO RICO
Defendant.

CIVIL NO. 06-2150 (DRD)

MOTION REQUESTING DISMISSAL IN LIGHT OF CONTROLING AUTHORITY RECENTLY ISSUED BY THE SUPREME COURT OF THE UNITED STATES

TO THE HONORABLE COURT:

COMES NOW defendant, the Secretary of Treasury of the Commonwealth of Puerto Rico ("the Secretary") and respectfully states and prays as follows:

I. Introduction

In an unanimous decision issued recently, (see Levin v. Commerce Energy, Inc. 560 U.S. ___ (2010), 2010 WL 2160787, (June 1, 2010), the United States Supreme Court concluded that traditional comity principles require that federal courts refrain from entertaining challenges to state taxation schemes that—as the one in controversy in this case— do not employ classifications subject to a heightened scrutiny or which impinge on fundamental rights. The Court makes clear that this must be the practice of the federal courts, even if the relief requested would not reduce the claimant's tax burden

and would not decrease the state's tax collections. In reaching this decision, the Supreme Court abrogated the rationale which had been found dispositive by several circuit courts —including the Court of Appeals for the First Circuit in reversing the dismissal of the instant case (Coors Brewing Co. v. Mendez-Torres, 562 F.3d 3 (1st Cir. 2009))— that the comity doctrine was only applicable to instances where federal court action would reduce, rather than increase, the state's tax- revenue collections.

As explained in detail below, the facts in Levin and this case are indistinguishable in all pertinent aspects. More specifically, the arguments made by Plaintiffs in Levin to attempt to avoid the application of the Tax Injunction Act ("TIA"), as well as of traditional principles of comity, are identical to those offered by Coors in this case, and to those found dispositive by the First Circuit. The Supreme Court, however, rejected this approach, and squarely concluded that the comity doctrine not only bars cases in federal court where a plaintiff questions as discriminatory a state tax and seeks its invalidation, but to all cases in which there is more than one alternative remedy which can be provided in order to eradicate such discrimination. This material change in the law requires that this Honorable Court dismiss the instant action.

II. Discussion:

This case has a long and complex factual and procedural history, commencing in 1978 when Puerto Rico enacted Act 37 of July 13, 1978 ("Act 37"), which provided for a lower excise tax rate for beer manufactured by small breweries. Rather than repeating

this background, the Secretary refers this Court to the detailed recitation of said history made by the Court of Appeals for the First Circuit in its decision reversing dismissal of this case. See, Coors Brewing Co. v. Méndez-Torres, 562 F.3d 3, 6-8 (1st Cir. 2009).

It is important, nonetheless, to discuss at length and in detail the facts and circumstances leading up to the First Circuit's decision reversing this Court's Opinion and Order dismissing the Complaint in this case, as well as the subsequent decision of the Supreme Court in Levin, since the Secretary is hereby asking for the dismissal of this case in light of Levin's unequivocal holding. We begin with the Motion to Dismiss filed by the Secretary on January 29, 2007, and the Opinion and Order dismissing the case issued by this Honorable Court on September 30, 2007.

1. The Opinion and Order of the District Court dismissing the Complaint:

In support of his Motion to Dismiss filed on January 29, 2007 (Dkt. 13), the Secretary made several arguments, including *res judicata*, Butler Act and general principles of federalism and comity. With respect to the Butler Act and the comity doctrine, the Secretary relied heavily on the First Circuit's decision in United States Brewer Association v. Pérez, 592 F.2d 1212 (1st Cir. 1979), where the First Circuit refused to invalidate Act 37 because "it would disrupt the orderly collection and administration of state taxes, US Brewers, 592 F.2d at 1214, and therefore, held that "[s]ound equity practice and concerns of federalism ... bar both the injunctive relief and declaratory relief sought by appellants". Id at 1215. In opposing the Motion to Dismiss,

Coors argued that the decision of the U.S. Supreme Court in Hibbs overruled U.S. Brewers and defeated the Secretary's arguments based on the Butler Act and on principles of comity and federalism. (Dkt. 26)

In Hibbs, Arizona taxpayers questioned a law which granted credits for contributions to organizations which provided assistance to children attending private schools, including religious schools. See, Hibbs, 542 U.S. at 92. Plaintiffs sought injunctive and declaratory relief alleging that, by permitting assistance to religious schools, the law breached the Establishment Clause. The defendant in Hibbs, the Director of Arizona's Department of Revenue, requested the dismissal of the Complaint arguing that it was barred by the Tax Injunction Act ("TIA"). A divided Supreme Court (5 to 4) rejected Defendant's argument concluding that the TIA barred suits in federal court only when a plaintiff contests his own tax liability or when state tax collections would be endangered by the relief sought. Id. at 106-108. Although the Defendant in Hibbs also argued that traditional principles of comity barred the suit as well, the Supreme Court "dispatched the Director's comity argument in a spare footnote ... [which stated] ":

> [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."

See, Levin, 2010 WL 2160787 at *9, *quoting*, Hibbs, 542 U.S. at 107 n.9 (internal citations omitted).

In its Opposition to the Motion to Dismiss, Coors argued that Hibbs was indistinguishable from this case because, as in Hibbs, Coors is not contesting its tax liability and because the relief sought would increase the tax burden of small breweries and, therefore, increase tax revenues. This, Coors argued, defeated the Secretary's Butler Act and comity doctrine arguments.

The Secretary countered this argument by distinguishing the facts in Hibbs to support its Butler Act argument. More importantly, the Secretary argued that Hibbs' ruling was based exclusively on the TIA. The Secretary added that Hibbs did not overrule US Brewers because the decision in that case was not grounded on the Butler Act but rather on "principles of federalism and the imperative need of a State to administer its own fiscal operations". (Dkt. 31) See also, U.S. Brewers, 592 F2d at 1214.

This Honorable Court recognized that the argument made by the Secretary was reasonable and, indeed, correctly hinted that Hibbs did not overrule U.S. Brewers. See Coors Brewing Co. v. Méndez Pérez, Civil No. 06-2150, Docket No. 77 at 14 (DRD) (unpublished). However, this Court concluded that there was no need to resolve this issue since "there are other procedural grounds that will dispose of the instant action" Id. at 18. On September 30, 2007, this Court dismissed the Complaint (Dkt. 78), and plaintiff appealed. See, Id. at 25.

2. The Decision of the Court of Appeals for the First Circuit:

In an opinion rendered on March 30, 2009, the Court of Appeals for the First Circuit reversed the Opinion and Order issued by this Honorable Court dismissing the Complaint in this case. See, Coors Brewing Co. v. Méndez-Torres, 562 F.3d 3 (1st Cir. 2009). The First Circuit first concluded that this suit is not barred by *res judicata*. See, Id. at 13. The Court then went on to discuss the Secretary's alternative arguments for dismissal: (i) Butler Act and (ii) general principles of comity.

With respect to the Butler Act, the First Circuit agreed with Coors' argument that the Butler Act does not deprive the District Court of jurisdiction because Coors does not seek to *decrease* its tax rate but rather, to *increase* the rate of small breweries. Coors Brewing Co., 562 F.3d at 14. Accordingly, the First Circuit concluded that neither the TIA nor the Butler Act would bar "Coors's action [because] Coors does not seek to lower the tax rate on itself" but rather to increase it on its competitors. Id.

Using the same rationale, the First Circuit also rejected the Secretary's argument that general principles of federalism and comity required the dismissal of the instant case as well. See, Coors Brewing Co., 562 F.3d at 18. The Court's underpinnings were surprisingly inconsistent with its previous holding in U.S. Brewers anchored on general principles of federalism and comity. See, Coors Brewing Co., 562 F.3d at 16. The First Circuit sided with the Sixth Circuit's approach in Commerce Energy v. Levin, 554 F.3d 1094 (6th Cir. 2009), *reversed by* Levin v. Commerce Energy, 560 U.S. --- (2010), 2010 WL 2160787 and held that "to permit the broad use of comity in a situation like this one,

'runs squarely against Hibbs' instruction that comity guts federal jurisdiction only when plaintiffs try to thwart tax collection'". Coors Brewing Co. 562 F.3d at 18, *quoting* Commerce Energy, 554 F.3d at 1099. The First Circuit specifically concluded that:

> The reasons provided by the Sixth Circuit, combined with our own analysis of Hibbs described above, lead us to conclude 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., 562 F.3d at 18.

In short, using the same grounds and fully embracing the analysis of the Sixth Circuit in Commerce Energy, the First Circuit concluded that U.S. Brewers "is no longer good law" and that general principles of federalism and comity do not bar this case from federal court because Coors "does not seek to arrest tax collection". Coors Brewing Co., 562 F.3d at 18.

However, in Levin v. Commerce Energy, 560 U.S. ___ (2010), 2010 WL 2160787, the United States Supreme Court reversed the Sixth Circuit's decision in Commerce Energy and, concomitantly, rejected the rationale that the comity doctrine is *only* applicable where state tax revenue collection is to be thwarted by federal court. Coors Brewing Co. was, consequently, abrogated. A detailed discussion of this case follows.

3. The decision of the Supreme Court in Levin v. Commerce Energy, 506 U.S. (2010)

As noted earlier, the decision of the Supreme Court in Levin compels the dismissal of this case. At issue in Levin was the validity of Ohio's tax scheme to

distributors of natural gas. Under this scheme, local public utilities, known as LCDs, received three tax exemptions which independent distributors, known as IMs did not receive. The Plaintiff in Levin, a California corporation and an IM, filed suit in federal court questioning this tax scheme under commerce clause and equal protection grounds. Although the District Court concluded that the TIA did not bar the suit because Plaintiff, "like plaintiffs in Hibbs, were 'third parties challenging the constitutionality of [another's] tax benefit", Levin, 560 U.S. at ___, 2010 WL 2160787 at *5, it nonetheless dismissed the complaint "as a matter of comity". Id. The District Court supported its decision on its belief that the comity doctrine required that it dismiss the case because the relief sought by Plaintiff would call for the state of Ohio "to collect taxes which its legislature has not seen fit to impose ... which would draw federal judges into a particularly inappropriate involvement in a state's management of its fiscal operations". (Citations omitted). Id.

At this point it is important to highlight the significant similarities of Levin and the instant case. As in Levin, the Plaintiff in this case seeks to invalidate an allegedly discriminatory state tax structure which taxes it higher than its competitors. Also similar is the fact that, as here, the relief sought by Plaintiff in Levin would not have altered its tax responsibility but, rather, would have increased the tax rate of a competitor. Finally, as in this case, the constitutional attack in Levin was grounded on commerce clause.

As noted above, the Sixth Circuit reversed the decision of the District Court, and the Supreme Court then reversed. See, Levin, 554 F.3d 1094 (6th Cir. 2009), *reversed* Levin, 560 U.S. --- (2010), 2010 WL 2160787.

In reversing, the Supreme Court began its discussion by reiterating its long standing rule that "[c]omity's constraint has particular force when lower federal courts are asked to pass on the constitutionality of state taxation of commercial activity." Levin, 2010 WL 2160787 at *7. It went on to discuss the continued vitality of its long line of comity doctrine cases cautioning federal courts from intervening with state fiscal operations and taxation. Id. at *7-8.

The Supreme Court then rejected the Sixth Circuit's (and the First Circuit's) conclusion that Hibbs restricts the "comity compass", observing that Hibbs has a "more modest reach." Id. at *8. The Court further noted that Plaintiff in Levin (as Coors here) ingeniously did not seek to reduce its tax liability, because the TIA (the Butler Act here) stood on the way of such relief. Id. at *11. Rather, the Plaintiff in Levin (as Coors here) sought to "increase" its competitors' tax responsibility. The Court nevertheless rejected the notion that comity is not applicable when an increase in taxation is sought because this, presumably, will not affect the state's coffers. More specifically,

> "[w]ere a federal court to essay such relief [(increase the competitors tax)], however, the court would engage in the very interference in state taxation the comity doctrine aims to avoid. Cf. State Railroad Tax Cases, 92 U.S. 575, 614-615 (1876). Respondents' requested remedy, an order invalidating the exemptions enjoyed by LDCs, App. 20-21, may be far from what the Ohio Legislature would have willed. See supra, at 11. In

> short, if the Ohio scheme is indeed unconstitutional, surely the Ohio courts are better positioned to determine – unless and until the Ohio Legislature weighs in- how to comply with the mandate of equal treatment. See Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 817-818 (1989).
> Id.

In this case, the Plaintiff alleged 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. This is precisely the scenario under which the Supreme Court has instructed lower courts to refrain from considering the controversy, inasmuch as state courts are better suited both to consider the issues in a manner that would avoid the federal constitutional question, and/or to craft the necessary or appropriate remedy. See, Id. at * 11. Plainly said, this case contains all of the factors that the Levin court unanimously found to justify dismissal. See: Id. at * 12 ("A confluence of factors in this case, absent in *Hibbs*, leads us to conclude that the comity doctrine controls here. First, respondents seek federal-court review of commercial matters over which Ohio enjoys wide regulatory latitude; their suit does not involve any fundamental right or classification that attracts heightened judicial scrutiny. Second, while respondents portray themselves as third-party challengers to an allegedly unconstitutional tax scheme, they are in fact seeking federal-court aid in an endeavor to improve their competitive position. Third, the Ohio courts are better positioned than their federal counterparts to correct any violation because they are

more familiar with state legislative preferences and because the TIA does not constrain their remedial options.") The case should therefore be dismissed on comity grounds.

4. Because of the decision of the U.S. Supreme Court case in Levin v. Commerce Energy, Inc. 560 U.S. ___ (2010), 2010 WL 2160787, the doctrines of "Law of the Case" and *"Stare Decisis"*, do not require that this Honorable Court follow the First Circuit's decision in this case concerning the comity doctrine:

Ordinarily, a district court is precluded from ignoring or otherwise acting inconsistently with prior, applicable precedent from the Circuit to which it belongs or the United States Supreme Court. Two doctrines fuel this general notion: "the law of the case doctrine" and *stare decisis*. Under the law of the case doctrine, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." Remexcel Managerial Consultants, Inc. v. Arlequín, 583 F.3d 45, 53 (1st cir. 2009). *Stare decisis*, in turn, has a broader scope and provides that previously decided cases and issues of law contained in final judgments are binding on all other (future) cases by the court that issued the decision or those "that owe obedience to that court". U.S. v. Rodríguez Pacheco, 475 F.3d 434, 441 (1st Cir. 2007) (quoting 3 J. Moore et al, Moore's Manual-Federal Practice and Procedure, section 30.10[1] (2006)). The doctrines are closely related. See, Cohen v. Brown, 101 F.3d 155, 168 n. 9 (1st Cir. 1996) (noting the relationship between the "law of the case" doctrine, *stare decisis*, collateral estoppel, and *res judicata* and stating that law of the case

doctrine has been described as being halfway between *stare decisis* and *res judicata*) (citations omitted).[1]

The above notwithstanding, both "the law of the case" and *stare decisis* doctrines have exceptions, that are applicable herein. See, Carpenters Local Union No. 26 v. U.S. Fidelity, 215 F.3d 136, 142 (1st Cir. 2000) (*stare decisis* "neither a straightjacket nor an immutable rule"); Northeast Utilities Services, Inc. v. F.E.R.C., 55 F.3d 686, 688 (1st Cir. 1995) (law of the case not a "straitjacket" and citing several Circuit cases for the proposition that the doctrine seeks to guide the Court's discretion and is grounded in good sense).

The law of the case doctrine does not bind a court if any of the following apply: "the ruling was made on an inadequate record or was designed to be preliminary; if there has been a material change in controlling law; if there is newly discovered evidence bearing on the question; and if it is appropriate to avoid manifest injustice." Naser Jewelers, Inc. v. City of Concord, N.H., 583 F.3d 17, 20 (1st Cir. 2008) (citing Arizona v. California, 460 U.S. 605, 618 (1983))(emphasis added). In turn, *stare decisis* is inapplicable if an existing decision "is undermined by controlling authority, subsequently announced, such as an opinion of the Supreme Court" or when "authority

[1] The relationship between all of these doctrines is particularly important in this case and with regards to this argument. As the Court may recall, the First Circuit's decision in the appeal of this case rested in part on the notion that it could ignore the precedent established in U.S. Brewers because of a change in intervening law. Coors Brewing Co. v. Méndez-Torres, 562 F.3d at 10-12. The same rationale which allowed the First Circuit to ignore its previous precedent in its decision in this case justifies that *stare decisis* and law of the case doctrines give way to the intervening change in the law explained herein.

that postdates the original decision, although not directly controlling, nevertheless offers a sound reason for believing that the former panel, in light of fresh developments, would change its collective mind". Rodríguez, 475 F.3d at 441-442 (citations omitted).

The First Circuit has applied these exceptions, recognizing that the Court need not rely on applicable precedent when there has been an intervening change in the law that affects the continued validity of the precedent in question. See, Eulitt ex rel Eulitt v. Maine Dep't. of Education, 386 F.3d 344, 348-350 (1st Cir. 2004) (recognizing that an issue as to which another panel had, years earlier, rendered an applicable decision had to be decided differently from the previous decision because intervening Supreme Court case law had changed the landscape on that legal issue); Carpenters Local Union No. 26, 215 F.3d at 141-145 (explaining that First Circuit precedent on particular ERISA issue had "fallen by the wayside"; the precedent relied heavily on earlier First Circuit case and the analysis used in that case had been indirectly called into question by two later Supreme Court cases).

Moreover, the First Circuit has expressly recognized that a district court may also act pursuant to the exceptions to the law of the case doctrine: **"We have, therefore, recognized that a district court may, as an exception to the law of the case doctrine, reexamine a previous ruling when 'controlling authority has since made a contrary decision of the law applicable to such issues....'"** CPC Intern. v. Northbrook Express & Surplus Ins. Co., 46 F.3d 1211, 1215 (1st Cir. 1995) (citing U.S. v. Rivera Martínez, 931

F.3d 148, 151 (1st Cir. 1991) (emphasis added). Indeed, in CPC Intern, the First Circuit upheld a District Courts' decision that departed from a First Circuit decision on appeal in that same case. Id at 1215-1217. The First Circuit found the District Court's change of course justified because of an intervening change in the applicable law. Id. It bears noting that other courts, within and without this Circuit, have recognized that district courts may also act pursuant to the recognized exceptions to *stare decisis* and the law of the case. See, U.S. v. Blue, 85 Fed. Appx. 905, 906 (4th Cir. 2004) (Unpub.)[2] ("We find that the district court properly declined to follow our mandate in *Gibson* in light of the Supreme Court's intervening decision in *Cotton*") (citation omitted); Bessette v. Avco Financial Svces., Inc., 279 B.R. 442, 453-454 (D.R.I. 2002) (recognizing that Supreme Court case issued after First Circuit affirmed dismissal of case constituted an intervening change of the law and proper exception to the law of the case, though ultimately maintaining end result of dismissal on different grounds).

The circumstances in this case are indistinguishable from those in CPC Intern. As shown above, the decision of the United States Supreme Court in Levin has unmistakably changed the applicable law and requires the dismissal of cases such as the instant one because of federalism and comity concerns. Therefore, as an exception to the doctrines of law of the case and *stare decisis*, this Honorable Court may (and should) follow the clear mandate of Levin and dismiss this case.

---

[2] Although this case was issued prior to January 1, 2007 and, thus, does not follow the stricture of Local Rule 32.1. of this Honorable Court, it is nonetheless cited as persuasive, rather than a precedent.

WHEREFORE, the Secretary hereby requests that this Honorable Court dismiss the instant case pursuant to the comity doctrine, as mandated by the Supreme Court of the United States in Levin v. Commerce Energy, Inc. 560 U.S. ___ (2010), 2010 WL 2160787, (June 1, 2010).

I HEREBY CERTIFY that on this same date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all participants and attorneys of record.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 14th day of July, 2010.

GUILLERMO SOMOZA-COLOMBANI
Secretary of Justice

GRISEL SANTIAGO-CALDERÓN
Deputy Secretary of Justice
In Charge of Litigation

WANDYMAR BURGOS-VARGAS
U.S.D.C. PR-Bar No. 223502
Acting Director of Legal Affairs
Office of General Litigation
Federal Litigation Division
wburgos@justicia.gobierno.pr

Vanessa Danette Bonano-Rodriguez
VANESSA DANETTE BONANO-RODRÍGUEZ
DEPARTMENT OF JUSTICE
OF THE COMMONWEALTH OF PUERTO RICO
P.O. Box 9020192
San Juan, PR 00902-0192
Tel. (787) 721-2900/5636 Exts. 2661/2647
Fax. (787) 723-9188
vbonano@justicia.gobierno.pr