

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO

TROPICAL CHILL CORP., ET AL.,

Plaintiffs,

v.

HON. PEDRO R. PIERLUISI URRUTIA,  
IN HIS OFFICIAL CAPACITY AS  
GOVERNOR OF THE  
COMMONWEALTH OF PUERTO RICO,  
ET AL.,

Defendants.

Civil No. 21-1411 (RAM-MEL)

**Urgent Motion for Leave to Supplement Amended Complaint and to Shorten  
Response Deadline**

The plaintiffs, Tropical Chill Corp. (Tropic Chill), Eliza Llenza, Yasmin Vega, and Rene Matos (collectively, "Plaintiffs") respectfully seek urgent leave under Federal Rule of Civil Procedure 15(d) to file the tendered supplemental pleading to their amended complaint. Plaintiffs, considering the time constraints discussed below, also move this Court to shorten the deadline to respond to this motion by seven days, so a response would be due November 26 (which we recognize is the day after Thanksgiving, but it shouldn't take that long).

On Monday, the governor of Puerto Rico issued Executive Order No. 2021-075 (EO 075). The EO 075's purpose is to consolidate all the provisions currently in effect against COVID-19 into one giant executive order. In doing so, it also explicitly repeals Executive

Orders 062, 063, and 064, which the amended complaint challenged. Although the violations to Plaintiffs' individual rights continue just like before, the EOs mentioned in the amended complaint are technically no longer in effect; EO 075 has supplanted them. Meanwhile, in light of Wednesday's status conference, the evidentiary hearing is set to start in less than three weeks, on December 6.

Federal Rule of Civil Procedure 15(d) provides:

On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

Rule 15(d) seeks to "ensure that the amended rule would give the court broad discretion in allowing a supplemental pleading so that plaintiffs would not be needlessly remitted to the difficulties of commencing a new action even though events occurring after the commencement of the original action have made clear the right to relief." *U.S. ex rel. Gadbois v. PharMerica Corp.*, 809 F.3d 1, 5 (1st Cir. 2015) (cleaned up). Not surprisingly, then, "courts customarily have treated requests to supplement under Rule 15(d) liberally." *Id.* at 7 (citations omitted). At bottom, says the First Circuit, this Court "must weigh the totality of the circumstances." *Id.* (citation omitted).

This case is an ideal candidate for Rule 15(d) supplementation. For one thing, it protects Plaintiffs from a potential and dilatory—though ultimately futile—motion to

dismiss for lack of jurisdiction on mootness grounds. *See Cortes-Ramos v. Martin-Morales*, 956 F.3d 36, 44 (1st Cir. 2020) (holding that “a supplemental pleading under Rule 15(d) may be allowed to cure even jurisdictional defects”) (cleaned up). For another, it helps center the analysis on the relevant circumstances and data as of November 15, 2021, after the amended complaint’s filing and when the now-challenged EO 075 was issued. This in turn goes to the justification of the alleged indefinite compelling government interest vis-à-vis the alleged individual-rights violations.

More to the point, this request has none of the “idiosyncratic factors” flagged by the First Circuit as reasons to deny motions to supplement. *Gadbois*, 809 F.3d at 7. The tendered supplemental pleading reference events that occurred *after* the filing of the amended complaint. *See id.* (noting that “a motion to supplement may be denied where the referenced events occurred before the filing of the original complaint”). Indeed, it relates to newly arising facts that occurred after the filing of the amended complaint.

Nor would this request unduly delay the resolution of this case. *See id.* That’s because it’s timely and does not affect the legal theories at play. And the evidentiary hearing before Magistrate Judge Lopez is set to start on December 6. But if Plaintiffs had to seek leave and file a second amended complaint, the proceedings would be disturbed. *See Equal Empl. Opportunity Commn. v. New Mexico, Dept. of Corrections*, CV 15-879, 2017 WL 6001752, at \*7 (D.N.M. Dec. 4, 2017) (“A supplemental pleading will be less disruptive at this phase in the litigation because an amendment triggers various obligations and

deadlines on the part of the defendant.”). Similarly, this request would not prejudice the Defendants, who, as explained below, need not even respond to plaintiffs’ short and predictable tendered supplemental pleading. Plaintiffs, after all, are filing this motion because of Defendants’ own actions, and the lion’s share of the supplemental pleading is a recitation and rebuttal of the EO No. 075, which Defendants drafted.

In short, Plaintiffs have shown good cause for the requested supplementation. There are no reasons that cut against this motion, and given its ample discretion, this Court should summarily allow Plaintiffs to file the tendered supplemental pleading.

One last wrinkle. This Court need not order Defendants to “plead to the supplemental pleading,” Fed. R. Civ. P. 15(d), but Defendants may do so. *See New Mexico, Dept. of Corrections*, 2017 WL 6001752, at \*7 (“NMDC is permitted, but not required, to respond to EEOC’s supplemental pleading.” (citing Fed. R. Civ. P. 15(d)). In any case, Plaintiffs respectfully request that the deadline for the optional response be set for Friday, December 3 (or earlier), because the evidentiary hearing in this case begins the following Monday. *See* Fed. R. Civ. P. 15(d) (“The court *may* order that the opposing party plead to the supplemental pleading *within a specified time.*”) (emphases added). By parity of reasoning and given this request’s straightforward and focused nature, Plaintiffs have no option but to request that the deadline to respond to this motion be shortened to seven days. Otherwise, it will not be fully briefed for the hearing. *See, e.g., McLaurin v. Terminix Intl. Co., LP*, 13 F.4th 1232, 1242 (11th Cir. 2021) (“courts routinely set scheduling

deadlines for parties to raise claims or defenses that are shorter than the applicable statute of limitations.”).

**Conclusion**

For the above reasons, and because Plaintiffs have shown good cause, Plaintiffs respectfully request that this Court (1) summarily grant this motion and thus allow them to file the tendered supplemented pleading to their amended complaint; or (2) expedite this motion by giving Defendants seven days to respond; and (3) set an optional deadline to plead before the commencement of the evidentiary hearing.

Dated: November 19, 2021

Respectfully submitted,

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UNITED STATES DISTRICT COURT  
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TROPICAL CHILL CORP.; ELIZA  
LLENZA; YASMIN VEGA; AND RENE  
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HON. PEDRO R. PIERLUISI URRUTIA,  
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GOVERNOR OF THE  
COMMONWEALTH OF PUERTO RICO,  
HON. CARLOS R. MELLADO LÓPEZ,  
IN HIS OFFICIAL CAPACITY AS  
SECRETARY OF HEALTH OF THE  
COMMONWEALTH OF PUERTO RICO,

Defendants.

Civil No. 21-1411 (RAM-MEL)

JURY TRIAL DEMANDED

**Tendered Rule 15(d) Supplemental Pleading**

The plaintiffs, Tropical Chill Corp., Eliza Llenza, Yasmin Vega, and Rene Matos, in accordance with this Court's order granting leave, respectfully tender this supplemental pleading pursuant to Federal Rule of Civil Procedure 15(d) to supplement their amended complaint at ECF No. 35.

1. On November 15, 2021, the governor of Puerto Rico issued Executive Order No. 2021-075 (EO 075).
2. The EO 075's stated purpose is to consolidate all the provisions currently in effect because of COVID-19.

3. As a result, the challenged Executive Orders 062, 063, 064, which the amended complaint collectively refers to as the “Rolling EOs,” have been repealed. EO 075, however, does not affect Health Regulation 138-A, which remains in full force as alleged in the amended complaint.
4. But because EO 075 consolidates the provisions of EOs 062–064, Plaintiffs’ grievances remain the same, and all the claims alleged in the amended complaint are incorporated here.
5. Tropical Chill is still incurring economic losses from being forced to operate at 50% of its capacity because it does not want to discriminate against customers based on vaccination status.
6. Plaintiff Vega, for her part, is still being compelled to either betray her faith by being complicit in the Government’s vaccination scheme which goes against her religious beliefs or being subject to six months jailtime and a \$5,000 fine, which, with EO 075, may increase up to one year jail and \$10,000 for repeated offenses.
7. And Plaintiffs Vega, Llenza, and Matos are still not allowed to go into restaurants, beauty salons, gyms, and other commercial establishments without submitting a negative COVID test result within 72 hours, which tests are not readily available or easily accessible to the public.

8. As with the previous Rolling EOs, EO 075 is indefinite, and it contains no set of goals or metrics to evaluate when infringing the public's individual rights will no longer be necessary.
9. Further, the government's "interest" is even less compelling now—it's not even rational—and its overinclusive restrictions are more irrational.
10. In imposing a fine of \$10,000 for a second violation through EO 075, the governor once again exceeded his authority. The EO invokes Act No. 81-1912, which provides for criminal penalties for violations of the Act itself, or violations of regulations issued by the Health Secretary under the Act. It does not, however, provide for criminal penalties for violations of executive orders.
11. EO 075 reiterates that we are in a "State of Emergency," but according to the Puerto Rico Health Dept. COVID-19 Dashboard (COVID-19 Dashboard), since October 8, 2021, the daily 7dMA of confirmed cases has been below 3 cases per 100K. As of November 16, 2021, it was 1.7 confirmed cases (7dMA) per 100K. At the same time, the daily confirmed cases (7dMA) were 82 cases (2.5 cases per 100,000 people) on October 8, 2021. And on November 16, 2021, there were 55 cases (1.7 cases per 100K), representing a mere 0.0016% of our total population. Moreover, the daily average of confirmed cases (7dMA), from October 8 to November 16, 2021, is 69 cases (2.1 cases per 100K).<sup>1</sup>

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<sup>1</sup> Puerto Rico Health Department COVID-19 Dashboard, Casos, <https://covid19datos.salud.gov.pr/#casos>



12. In the same vein, COVID-19-related hospitalizations have been decreasing since their latest peak, on August 26, 2021, when we had 515 adult beds (approximately 7.3% utilization) and currently, November 17, 2021, there are 38 adult beds (approximately 0.5% utilization). The daily average of adult hospitalizations, from October 8 to November 17, 2021, is 63 adult beds (approximately 0.9% utilization).<sup>2</sup> And according to the CDC, the 7dMA of new COVID-19 hospital admissions has been decreasing since their latest peak of 33 new admissions on August 23, 2021, to 9 new admissions as of November 16, 2021. The daily average of new hospital admissions with confirmed COVID-19 (7dMA), from October 8 to November 16, 2021, is 4.5 new admissions.<sup>3</sup>
13. The overall “Inpatient Beds in Use for Covid-19” in the United States, as of November 19, 2021, is 6.58% and in Puerto Rico is 0.59%, and the overall “ICU Beds in Use for Covid-19” in the U.S. is 15.04% and in Puerto Rico is 1.26%, according to the HHS Protect Inpatient Dashboard. That is Puerto Rico’s “Inpatient Beds in Use for COVID-19” is 11x less for overall and 15x less for ICU patients.<sup>4</sup>
14. Our daily deaths related to COVID-19 (7dMA), according to the COVID-19 Dashboard, continue to decrease dramatically and are at 0.3 deaths as of November

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<sup>2</sup> Puerto Rico Health Department COVID-19 Dashboard, *Sistema de Salud*, [https://covid19datos.salud.gov.pr/#sistemas\\_salud](https://covid19datos.salud.gov.pr/#sistemas_salud)

<sup>3</sup> CDC, New Hospital Admissions (By Jurisdiction, Select Jurisdiction: Puerto Rico), <https://covid.cdc.gov/covid-data-tracker/#new-hospital-admissions>

<sup>4</sup> HHS, *HHS Protect Inpatient Bed Dashboard*, <https://protect-public.hhs.gov/pages/hospital-utilization>

16, 2021. The daily average of deaths related to COVID-19 (7dMA), from October 8 to November 16, 2021, is 1.7. Indeed, for the first time since March 20, 2020, Puerto Rico has had over 70 consecutive days of the 7dMA of confirmed cases below 100 and over 45 consecutive days below 2% of adult beds hospitalizations.<sup>5</sup>

15. The foregoing leading and lagging parameters demonstrate that, on a sustained basis, Puerto Rico is at the lowest level of viral spread it has ever had. This clear empirical evidence, coupled with the availability of a vaccine for those willing to take it, shows that Puerto Rico's indefinite "State of Emergency" is no longer tenable.

16. What is more, EO 075's language contradicts any so-called "State of Emergency." For example, EO 075 recognizes that the daily average of confirmed cases is at 63 and that hospitalizations consist of 52 adults and 3 minors, which represents 1% of available beds. As to intensive care units, EO 075 points to 9 adults and 1 minor hospitalized. Statistically, this represents 1% of the adults and the minors. "Deaths also have been significantly reduced," says the EO 075.

17. EO 075 also recognizes that Puerto Rico is the jurisdiction with the most people vaccinated against COVID-19 in the United States and the Americas. It cites CDC data that more than 93.2% of people over the age of 12 have at least one dose. On

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<sup>5</sup> Puerto Rico Health Department COVID-19 Dashboard, *Defunciones*, <https://covid19datos.salud.gov.pr/#defunciones>

the other hand, approximately 83.2% of people older than 12 years have been fully vaccinated. And it recognizes that, with 74.2% of its total population fully vaccinated, Puerto Rico is the U.S. jurisdiction with the highest percentage of totally vaccinated people. But there is no legitimate or rational interest in forcing less than 10% of the adult population to succumb to vaccination.

18. Further undermining the government's proclamation of a State of Emergency, from January 21, 2020 to November 18, 2021, Puerto Rico's "case rate per 100,000" is 5,852 cases, making it the lowest of any state or territory (including New York City and the District of Columbia) surpassed only by the Marshall Islands, Palau, and Mariana Islands. And in the "Last 7 days" period, November 12–18, 2021, Puerto Rico has been listed last in "case rate per 100,000", with 27.6 cases, barring only Marshall Islands and American Samoa, which list 0 cases.<sup>6</sup>

19. In Puerto Rico, according to the CDC, the "death rate per 100,000" related to COVID-19 as of November 18, 2021 was 102, listing it 51<sup>st</sup> of 58 states and territories (including New York City and the District of Columbia). In the last 7 days, Puerto Rico is listed 53<sup>rd</sup> of 58 with 0.2 deaths, with only the Virgin Islands, Marshall

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<sup>6</sup> Cases, Deaths and Testing (View: Cases, Time Period: Since Jan 21, 2020 and Last 7 Days, Metric: Rate per 100,000), *Data Table for Case Rate by State/Territory*, [https://covid.cdc.gov/covid-data-tracker/#cases\\_casesper100k](https://covid.cdc.gov/covid-data-tracker/#cases_casesper100k)

Islands, Palau, Mariana Islands, and Florida (which has no vaccine mandates) listing 0 deaths.<sup>7</sup>

20. No city, state, or territory in the United States currently has a vaccine mandate as broad, punitive, and restrictive as EO 075.
21. EO 075 alleges that each infected unvaccinated person could become seriously ill, become hospitalized, end up in the ICU, or die. But it does not differentiate among age groups. And multiple scientific studies, as well as the CDC and the WHO, have argued that the COVID-19 virus impacts more seriously those who are 60 years or older and/or patients with chronic health preconditions. According to Puerto Rico's COVID-19 Dashboard, since the pandemic started in March 2020, people over 60 years represent approximately 17% of the total cases and 75% of the total deaths while people 59 years or younger represent approximately 83% of the total cases and 24% of the total deaths.<sup>1,5</sup>
22. More than 82% of people 60 years or older—who according to empirical data in Puerto Rico demonstrates, have thrice more risk of “being seriously ill, being hospitalized, being in intensive care, dying” than people 59 years old or younger—are fully vaccinated.<sup>8</sup> Moreover, others within this age group have acquired natural

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<sup>7</sup> CDC, Cases, Deaths and Testing (View: Deaths, Time Period: Since Jan 21, 2020 and Last 7 Days, Metric: Rate per 100,000), *Data Table for Death Rate by State/Territory*, [https://covid.cdc.gov/covid-data-tracker/#cases\\_deathsper100k](https://covid.cdc.gov/covid-data-tracker/#cases_deathsper100k)

<sup>8</sup> Puerto Rico Health Department COVID-19 Dashboard, *Vacunacion*, <https://covid19datos.salud.gov.pr/#vacunacion>

immunity. And a significant portion of the remaining 18% within this age group, which includes people with natural immunity and people who cannot get vaccinated due to medical reasons, do not represent a threat to our health care system. This makes the continuation of the mandate useless—providing no additional benefit to society or the “common good”—all while infringing on Plaintiffs’ constitutional rights.

23. Moreover, when considering that the vaccine does not prevent contracting or transmitting the virus, the cost-benefit ratio of these mandates is negative.
24. Citing no scientific study, however, the EO 075 incorrectly alleges that scientific studies explain that unvaccinated people, together with the transmission of the disease, can create a suitable environment for the development of new variants that may be equal to or worse than the Delta. But according to the scientific study “Rates of SARS-CoV-2 transmission and vaccination impact the fate of vaccine-resistant strains,” published by *Nature* on July 30, 2021, “the highest risk of resistant strain establishment occurs when a large fraction of the population has already been vaccinated but the transmission is not controlled . . . the establishment of a resistant strain at that time may lead to serial rounds of resistant strain evolution with

vaccine development playing catch up in the evolutionary arms race against novel strains.”<sup>9</sup>

25. Without including any reference to the “scientific studies,” EO 075 also wrongly alleges that unvaccinated people are the most significant contributors to community transmission of COVID-19. It also incorrectly alleges that unvaccinated people are much more likely to transmit the virus. Indeed, the most recent CDC-funded study, published on November 19, 2021, “Transmission potential of vaccinated and unvaccinated persons infected with the SARS-CoV-2 Delta variant in a federal prison, July-August 2021,” concludes that there are “no significant differences detected in duration of RT-PCR positivity or in duration of culture positivity among fully vaccinated participants versus those not fully vaccinated.” Moreover, it concludes that “clinicians and public health practitioners should consider vaccinated persons who become infected with SARS-CoV-2 to be no less infectious than unvaccinated persons.”<sup>10</sup>

26. Moreover, CDC and related scientific studies have said that “contacts were at highest risk of COVID-19 if they were exposed between 2 days before and 3 days

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<sup>9</sup> Nature, *Rates of SARS-CoV-2 transmission and vaccination impact the fate of vaccine-resistant strains*, <https://www.nature.com/articles/s41598-021-95025-3>  
medRxiv, *Transmission potential of vaccinated and unvaccinated persons infected with the SARS-CoV-2 Delta variant in a federal prison, July-August 2021*, <https://www.medrxiv.org/content/10.1101/2021.11.12.21265796v1>

after the index patient's symptom onset, peaking at day 0"<sup>11</sup>, that "there was no significant difference between the Ct values of samples collected from breakthrough cases and the other cases. This might mean that the viral load of vaccinated and unvaccinated persons infected with SARS-CoV-2 is also similar"<sup>12</sup> and that "initial viral load indicated by PCR Ct values was similar between vaccinated and unvaccinated patients with B.1.617.2."<sup>13</sup>

27. Puerto Rico went even lower in the already significant low number of tests being performed. According to the CDC, as of November 18, 2021, Puerto Rico, with 56,203.806 "cumulative tests performed per 100K" is listed last, 50 out of 50 of U.S. jurisdictions reported. And in "# tests performed last 30 days per 100K" with 3,897.08, Puerto Rico is sixth to last (ahead only of the U.S. Virgin Islands, Mississippi, Nebraska, Guam, and Oklahoma), listed 45 of 50, of U.S. jurisdictions reported.<sup>14</sup>

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<sup>11</sup> JAMA Internal Medicine, *COVID-19 Transmission Dynamics Among Close Contacts of Index Patients With COVID-19: A Population-Based Cohort Study in Zhejiang Province, China* (August 23, 2021), <https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2783099>

<sup>12</sup> CDC, *MMWR Outbreak of SARS-CoV-2 Infections, Including COVID-19 Vaccine Breakthrough Infections, Associated with Large Public Gatherings — Barnstable County, Massachusetts, July 2021*, <https://www.cdc.gov/mmwr/volumes/70/wr/mm7031e2.htm>

<sup>13</sup> medRxiv, *Virological and serological kinetics of SARS-CoV-2 Delta variant vaccine-breakthrough infections: a multi-center cohort study* (July 31, 2021), <https://www.medrxiv.org/content/10.1101/2021.07.28.21261295v1>

<sup>14</sup> CDC, *Cases, Deaths and Testing* (View: Tests Performed, Time Period: All Time, Metric: Rate per 100,000), *Data Table for Cumulative COVID-19 Nucleic Acid Amplification Tests (NAATs) Performed per 100k by State/Territory*, [https://covid.cdc.gov/covid-data-tracker/#cases\\_testsper100k](https://covid.cdc.gov/covid-data-tracker/#cases_testsper100k); CDC, *Cases, Deaths and Testing* (View: Tests Performed, Time Period: Last 30 Days, Metric: Rate per 100,000), *Data Table for COVID-19 Nucleic Acid Amplification Tests (NAATs) Performed in Last 30 Days per 100k by State/Territory*, [https://covid.cdc.gov/covid-data-tracker/#cases\\_testsper100k30day](https://covid.cdc.gov/covid-data-tracker/#cases_testsper100k30day)

28. Thus, the positivity rate continues to be a misleading and unreliable metric to assess the spreading of the virus or to justify measures like EO 075.

29. In any event, even with the significant low number of tests being performed, since September 23, 2021, and according to the Puerto Rico Health Dept. COVID-19 Dashboard, the positivity rate in Puerto Rico has rated “low” (4.81) by the Puerto Rico Department of Health, meaning on or below 4.9. The average positivity rate from September 23 to November 18, 2021 was 2.75. That is, the positivity rate has been at the “low” level for the past 55 days.<sup>15</sup>

30. In short, EO 075 is even less justified now than the Rolling EOs were in August-September.

For the reasons stated, this Court should deem the amended complaint as supplemented under Fed. R. Civ. P. 15(d).

Dated: November 19, 2021

Respectfully submitted,

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<sup>15</sup> Puerto Rico Health Department COVID-19 Dashboard, *Resumen Ejecutivo*, [https://www.salud.gov.pr/estadisticas\\_v2#resumen\\_ejec](https://www.salud.gov.pr/estadisticas_v2#resumen_ejec)



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