

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

<p><b>TROPICAL CHILL CORP., et al.</b></p> <p><b>Plaintiffs</b></p> <p><b>v.</b></p> <p><b>HON. PEDRO R. PIERLUISI URRUTIA, et al.</b></p> <p><b>Defendants</b></p>	<p><b>CIVIL NO. 21-1411 (RAM/MEL)</b></p>
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**RESPONSE TO MOTION FOR JUDICIAL NOTICE**

**TO THE HONORABLE COURT:**

**COMES NOW** the Department of Justice of the Commonwealth of Puerto Rico, on behalf of Defendants, without waiving any right or defense arising from Title III of PROMESA and the Commonwealth's Petition under said Title or under this case, and without submitting to the Court's jurisdiction, represented by the undersigned counsel and respectfully states and prays as follows:

1. On December 14, 2021, Plaintiffs filed a "Motion for Judicial Notice," in which they moved the Court "to take judicial notice of the facts set forth below for purposes of the evidentiary hearing and for rendering the report and recommendation ordered by the presiding judge at ECF No. 56" (Docket No. 83 at 1). The motion contains eighteen (18) paragraphs of "adjudicative facts-in the order of vaccination, cases, new admissions, hospitalizations, positivity rates, and deaths related to Covid-19-that comply with Rule 2019(b)." Id. at 3.

2. At the outset, Plaintiffs acknowledged that "...in hindsight, perhaps this motion should have been filed before the commencement of the evidentiary hearing" (Docket No. 83 at 2). They candidly admitted that "the plaintiffs in good faith had planned to file it right after the hearing-to provide the benefit of both updated statistics and charts, which may in turn guide this Magistrate

Judge in accessing and assessing the *latest* Covid-19 related data from the websites of both federal and local governments.” Id. at 2 (underlined emphasis added).

3. On the legal grounds to be set forth in this motion, Defendants oppose Plaintiffs’ request for judicial notice. Mainly, (i) they failed to comply with the Court’s specific directions regarding their request; and (ii) the motion fails to comply with the legal requirements spelled out in relevant case law for the Court to grant the remedy requested therein.

4. As to Defendants’ first ground for opposition, some chronology is in order. On November 2, 2021, Judge Arias Marxuach referred Plaintiffs’ Motion for Preliminary Injunction to Magistrate Judge López (Docket No. 56). Magistrate López, in turn, scheduled a status conference (Docket No. 62). At the Status Conference held on November 17, 2021, the court scheduled a preliminary injunction evidentiary hearing to begin on December 6, 2021 (Docket No. 68). The hearings began as scheduled with Plaintiffs presenting their case (Docket No. 76). On December 9, 2021, at the fourth day of evidentiary hearings, when Defendants had already begun to present their first witness, Dr. Iris M. Cardona, Plaintiffs brought to the Court’s attention, **for the first time**, their intention to move the Court to take judicial notice of certain facts. The Court then directed Plaintiffs to file their motion as soon as possible, showing clear concerns about its timeliness, **and to confer with Defendants before filing the motion**. Plaintiffs went on to file the motion on December 14, 2021, after Defendants concluded the direct examination of their last witness, Dr. Rafael Irizarry, admitting that no conferring took place with Defendants (Docket No. 83).

5. In a footnote to their motion, Plaintiffs attempted to explain and/or justify their omission, claiming time constraints, since the evidentiary hearing was already under way. In addition, they acknowledged that Defendants had already refused to stipulate many of the facts that they were

proposing for judicial notice, in light of which the attempt to reach stipulations in the middle of the evidentiary hearing “would have been hopeless in any event” (Docket No. 83, n. 1).<sup>1</sup>

6. Plaintiffs admittedly did not confer with Defendants before filing their Motion for Judicial Notice, failing to comply with the Court’s Order to that effect. Plaintiffs have failed to justify their failure to comply with the Court’s unequivocal directive to consult with counsel for Defendants before filing their motion. Instead, they unilaterally assumed the consultations would have been a “hopeless” endeavor, choosing not to comply with the Court’s Order, in an issue on which the Court has wide discretion. “The U.S. District Court, which is the first line of fire in our judicial system, has the necessary experience to take the initiative to manage its docket in an effective and reasonable way. The Judges of the United States District Courts have discretion in applying their many years of experience.” *Acevedo-Garcia v. Vera-Monroig*, 204 F.R.D. 26, 30 (D.P.R. 2001), *aff’d sub nom. Acevedo-Garcia v. Monroig*, 351 F.3d 547 (1st Cir. 2003). Plaintiffs’ failure to comply with the manner in which the Court explicitly ordered their request to be handled justifies the Court to deny their motion.

7. Were the court to entertain Plaintiffs’ motion, Defendants posit the motion does not meet the requirements as set under Rule 201 of the Federal Rules of Evidence. As such, it should be denied. Fed.R.Evid. 201 provides:

**(a) Scope.** This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

**(b) Kinds of Facts That May Be Judicially Noticed.** The court may judicially notice a fact that is not subject to reasonable dispute because it:

**(1)** is generally known within the trial court’s territorial jurisdiction; or

**(2)** can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

**(c) Taking Notice.** The court:

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<sup>1</sup> Plaintiffs knew since October 22, 2021, more than one month before the date they filed their Motion for Notice, which of their proposals Defendants had declined to stipulate, because on that date the parties jointly filed a set of stipulations (Docket No. 51). Plaintiffs could have presented evidence during the hearings to establish what they wanted to prove through the Motion for Notice.

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) **Timing.** The court may take judicial notice at any stage of the proceeding.

(e) **Opportunity to Be Heard.** On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(f) **Instructing the Jury.** In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

8. Ordinarily, Rule 201 “is applied with *some stringency*, because accepting disputed factual propositions about a case not tested in the crucible of trial is a sharp departure from standard practice” *U.S. v. Hoyt Cinemas Corp.*, 380 F.3d. 558, 570 (1st Cir. 2004)(emphasis added); *Rivera v. Marriott International, Inc.*, 456 F.Supp.3d. 330, 337 (D.P.R. 2020). This rule requires that the noticed fact not be subject to reasonable dispute and that it be so either on the basis of general knowledge within the territorial jurisdiction of the trial court or because it is capable of being determined by an assuredly accurate source. See, *Hoyt Cinemas Corp.*, *supra*. Such facts must exist “in the *unaided memory of the populace*; if the fact is one that a reasonable person would not know from memory but would know where to find, it falls within subdivision (2), not (1).” *Rivera v. Marriott International*, *supra*, (referring to Rule 201 of the Federal Rules of Evidence)(emphasis added).

9. The effect of judicial notice is “to deprive a party of the opportunity to use rebuttal evidence, cross-examination, and argument to attack contrary evidence and thus a Court must be cautious when determining that a fact is beyond controversy under Rule 201(b).” *Rivera v. Marriott International*, 456 F. Supp. 3d at 338. Under these standards, Plaintiffs’ motion should be denied.

10. Plaintiffs’ proposed facts certainly come from official websites whose reliability is not subject to reasonable dispute; but they are proffered in support of their particular legal theory and factual narrative of the case which Defendants are fully entitled to dispute and in fact disputed during

the evidentiary hearings that took place earlier this month. Should these facts be considered by the Court as undisputed **at this stage of the proceedings**, when the evidentiary stage of their request for temporary relief concluded, it would deprive Defendants of the opportunity to present alternative facts or evidence to dispute their legal contentions and their factual theory of the case, or to place these undisputed facts in proper perspective, since they may not amount to the whole truth as to the particular proposition they seek to establish.

11. Plaintiffs admitted in their motion that some of the facts they proffered for the Court to take judicial notice of were proposed as stipulations to Defendants and rejected by them at the earlier stages of the proceedings. In fact, on October 22, 2021, the parties jointly submitted to the Court not only a set of stipulations, but a list of proposed stipulations by each party which the other party had rejected, **along with a brief explanation for such rejection** (Docket No. 51). Should it be necessary for Defendants to state their position as to each of Plaintiffs' proposed facts for the Court to take judicial notice, Defendants herein incorporate the contents of the joint motion and the grounds therein stated for each rejection.

12. Plaintiffs' contention that Defendants "are still free to invoke their right to be heard" (Docket No. 83, n. 1) is disingenuous at best, seeking to minimize their own failure to abide by Court directives and follow Court established procedures as to the timeliness of their request, after the evidentiary stage of their request for temporary relief.

13. On these grounds, failing to give Defendants a meaningful opportunity to rebut their proposed facts to be noticed, Plaintiffs' motion should be denied.

**WHEREFORE**, it is respectfully requested from this Honorable Court that Plaintiffs' Motion for Judicial Notice be denied.

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed a digital copy of this document with the Clerk of the Court, who will automatically notify of such filing to all parties officially registered in the CM/ECF System.

In San Juan, Puerto Rico, this 21st day of December, 2021.

**DOMINGO EMANUELLI HERNÁNDEZ**  
Secretary of Justice

**SUSANA PEÑAGARÍCANO-BROWN**  
Secretary in Charge of Litigation

**MARCIA PÉREZ-LLAVONA**  
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