

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

TROPICAL CHILL CORP. *et al.*

Plaintiffs,

v.

HON. PEDRO R. PIERLUISI URRUTIA *et al.*

Defendants.

Civil No. 21-1411 (RAM/MEL)

**OPPOSITION TO PLAINTIFFS' REQUEST FOR LEAVE TO FILE A SECOND
SUPPLEMENTAL PLEADING**

TO THE HONORABLE COURT:

COMES NOW, the Department of Justice of Puerto Rico (hereinafter "DOJPR"), representing Defendants, without waiving any right or defense arising from Title III of *Puerto Rico Oversight, Management and Economic Stability Act* ("PROMESA"), 48 U.S.C. §§2101 *et seq.*, the Commonwealth's Petition under said Title or under this case, without submitting to the Court's jurisdiction, and through the undersigned attorney, very respectfully **STATES** and **PRAYS** as follows:

I. INTRODUCTION

On November 19, 2021, Plaintiffs requested leave to file a first supplemental pleading under Rule 15 (d) of the Federal Rules of Civil Procedure (Docket No 65). This, in response to the Executive Order No. 2021-075 ("EO 075") issued by the Governor of Puerto Rico, which consolidated Executive Orders Nos. 062, 063, and 064.¹

¹ Prior to the enactment of EO 075, Plaintiffs challenged the constitutionality of Executive Orders Nos. 062, 063, and 064.

On November 23, 2021, this Honorable Court granted their request and ordered Plaintiffs to amend the complaint but later, on December 1, 2021, the Court reconsidered and granted Plaintiffs' leave to supplement the pleadings (*See*, Docket Nos. 66, 74).

After the *Preliminary Injunction* evidentiary hearings ended, on December 22, 2021, Plaintiffs filed a *Motion for Leave and for Extension of Time to File Second Supplemental Pleading under Fed. R. Civ. P. 15(d)* (Docket No. 90). As to their request to supplement, Plaintiffs argued that because the issuance of the Executive Order No. 2021-081 ("EO 081") by the Governor of Puerto Rico imposed even stricter restrictions than EO 075, EO 081 should be added to the *Amended Complaint*. *Id.*

Consequently, on December 23, 2021, Defendants filed a *Notice of Intent and Motion for Extension of time to File Opposition to Plaintiffs' Request at Docket No. 90* (Docket No. 93). On December 27, 2021, this Honorable Court granted Defendants until January 5, 2022, to file said opposition (Docket No. 96). On that same date, Plaintiffs filed *Motion Submitting Tendered Second Supplemental Pleading under Fed. R. Civ. P. 15(d)* (Docket No. 95).

Plaintiffs already asked, and the Court granted, to supplement their *Amended Complaint* as a result of the issuance of EO 075. As such, Plaintiffs' request is a futile exercise that will cause undue delay in the resolution of the instant case. Moreover, due to the nature of the Covid-19 virus, the pandemic is still ongoing. This fact will likely prompt the Governor of Puerto Rico to continue to take precautionary actions as needed to protect and safeguard the citizens of Puerto Rico. Plaintiffs' pretention of supplementing their allegations whenever a new EO is issued will cause Defendants undue prejudice and for this reason, their request should be denied.

II. ANALYSIS

Motions to supplement a pleading are governed by Federal Rule of Civil Procedure 15(d), which provides that:

[o]n 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.

Fed.R.Civ.P. 15(d).

“[T]he court may permit a party to serve a supplemental pleading setting forth transactions, occurrences or events which have happened since the date of the pleading sought to be supplemented.” *United States v. Russell*, 241 F.2d 879, 882 (1st Cir. 1957). A supplemental pleading must allege facts “connect[ed] ... to the original pleading.” *Quarantino v. Tiffany & Co.*, 71 F.3d 58, 66 (2d Cir. 1995). In addition, a supplemental pleading “is designed to obtain relief along the same lines, pertaining to the same cause, and based on the same subject matter or claim for relief, as set out in the original complaint”. *United States v. Russell*, 241 F.2d 882.

Rule 15(d) contains no standards at all to guide the district court's analysis; it merely authorizes the district court to permit service of a supplemental pleading “on just terms.” *U.S. ex rel. Gadbois v. PharMerica Corp.*, 809 F.3d 1, 7 (1st Cir. 2015). But “[i]n an effort to fill this vacuum and in keeping with the overarching flexibility of Rule 15, courts customarily have treated requests to supplement under Rule 15(d) liberally.” *Id.* “This liberality is reminiscent of the way in which courts have treated requests to amend under Rule 15(a)'s leave “freely give [n]” standard.” *Id.* Even though courts customarily have treated requests to supplement under Rule 15(d) liberally” “[t]his does not mean, however, that motions for supplementation should be granted automatically.” *Id.*

In addition, pursuant to Rule 15(d), the filing of a supplemental pleading is not available as a matter of right but, rather, is subject to the court's discretion. *U.S. ex rel. Gadbois.*, 809 F.3d 6. In the case of an application for leave to file a supplemental pleading, permission should be freely granted where such supplementation “will promote the economic and speedy disposition of the controversy between the parties, will not cause undue delay or trial inconvenience, and will not prejudice the rights of any other party.” *Bornholdt v. Brady*, 869 F.2d 57, 68 (2d Cir. 1989). Thus, “[w]here it appears that granting leave to amend is unlikely to be productive” or the amendment is futile, “it is not an abuse of discretion to deny leave to amend” or supplement the complaint. *Ruffolo v. Oppenheimer & Co.*, 987 F.2d 129, 131 (2d Cir. 1993).

Furthermore, and importantly, “leave to supplement may be withheld when the request would “unduly delay resolution of the case.” *U.S. ex rel. Gadbois*, 809 F.3d 7. This means that “a district court faced with a Rule 15(d) motion must weigh the totality of the circumstances, just as it would under Rule 15(a)”. *Id.* referring to *Palmer v. Champion Mortg.*, 465 F.3d 24, 30-31 (1st Cir.2006); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962) (noting that reasons not to permit Rule 15(a) amendment may include “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, [and] undue prejudice to the opposing party”); *The Hertz Corp. v. Enter. Rent-A-Car Co.*, 557 F. Supp. 2d 185, 192 (D. Mass. 2008) (“While Rule 15(d) is less permissive than Rule 15(a), a generous reading of Rule 15(d), at least in the early stages of litigation, is consistent with Rule 15(a)'s mandate that “[l]eave to amend is to be ‘freely given’ ... unless it would be futile, or reward, *inter alia*, undue or intended delay”).

III. DISCUSSION

Puerto Rico, as well as the rest of the world, is still under a public health emergency and the Governor of Puerto Rico must use all his constitutional powers to face the everchanging pandemic. This will, in all likelihood, lead to further modifications in the mandates as circumstances require. Depending on how this public health emergency evolves, the mandates may require modification. Therefore, it will be a futile exercise for Plaintiffs to request leave to supplement their pleadings as such Executive Orders are issued by the Governor of Puerto Rico in the safeguarding of Puerto Rico’s public health.

Likewise, this Court already exercised its discretion by allowing Plaintiffs to file an *Amended Complaint* and a *Supplemental Pleading* (Docket Nos. 35 and 67, respectively). Equally important, at this procedural stage, six days of evidentiary hearings of the challenged EO 075 have concluded and a Report and Recommendation will follow. In addition, the resolution of defendants’ *Motion to Dismiss for Failure to State a Claim* under Rule 12(b)(6) of the Federal Rules of Civil Procedure is still pending for resolution, which Plaintiffs have yet to oppose.

Granting Plaintiffs a second supplemental pleading, as requested, will be a futile exercise because mandates could be so changing as the Covid-19 pandemic worsens or improves. More so, Plaintiffs' second supplemental pleadings, if allowed, would be subject to dismissal under Rule 12(b)(6) of Federal Rule of Civil Procedure under the same arguments as previously argued. This second supplemental pleading will only serve to further delay the final disposition of this case because Plaintiffs' proposition to file a supplemental pleading in the wake of the issuing of the EO 081 does not change the legal controversies underlying Plaintiffs' claims.

Consequently, Plaintiffs' arguments that the Governor of Puerto Rico issued EO 081 and through it imposed stricter restrictions than the ones at the EO 075; that the violations are even more intense now; that section 10 of EO 075 is no longer in effect; and that EO 081 has supplanted it, do not constitute good cause regarding the typical application of Rule 15(d), as matter of law.

Finally, Plaintiffs' motion to supplement does not serve the main goal of Fed.R.Civ.Proc. 15(d), which is to promote judicial efficiency. Here, an economical and expeditious disposition of the parties' dispute will not be achieved by permitting Plaintiffs to supplement their pleading yet again. Accordingly, Defendants request that this Honorable Court deny Plaintiffs' request for leave to file a second supplemental pleading, order Plaintiffs to oppose Defendants' Motion to Dismiss at Docket No. 78 and strike from the record the *Tendered Second Supplemental Pleading* submitted at Docket No. 95.

WHEREFORE, it is respectfully requested from this Honorable Court to take notice of Defendants' Opposition to Plaintiffs' request for leave to file supplemental pleading and deny their request.

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

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 5th day of January 2022.

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Secretary of Justice

SUSANA PEÑAGARÍCANO-BROWN
Deputy Secretary in Charge of Litigation

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