

No. 11-17995

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IN THE  
**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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WAYNE TALEFF., *et al.*  
*Plaintiffs-Appellants,*  
*v.*

SOUTHWEST AIRLINES CO., GUADALUPE HOLDINGS CORP., and  
AIRTRAN HOLDINGS, INC.,  
*Defendants-Appellees.*

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On Appeal from a Final Order of the  
United States District Court for the Northern District of California  
(Case No. 3:11-CV-2179-JW)

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**APPELLANTS' REQUEST FOR JUDICIAL NOTICE**  
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## INTRODUCTION

Appellants Wayne Taleff, *et al.* respectfully request that the Court take judicial notice of the following, copies of which are attached hereto as Exhibits A and C-K:

- Department of Justice Press Release, April 26, 2011, “Statement of Department of Justice Antitrust Division on Its Decision to Close Its Investigation of Southwest’s Acquisition of AirTran.” (Exhibit A)
- CBS DFW Article, March 1, 2012, “FAA Gives Final Approval for Southwest-AirTran Merger.” (Exhibit C)
- USA Today Article, January 20, 2012, “Southwest Announces Which AirTran Cities ‘Make the Cut.’” (Exhibit D)
- Cheapflights.com Article, July 28, 2011, “Southwest Cuts Several Routes.” (Exhibit E)
- Pittsburgh Tribune-Review, September 8, 2011, “Southwest Cuts to Pinch Employees.” (Exhibit F)
- Bloomberg Businessweek, April 2, 2012, “Forget Gas Prices—Air Fares are Getting More Painful.” (Exhibit G)
- Tulsa World, March 27, 2012, “Southwest Airlines Has No Plans for Furloughs, CEO Tells Workers.” (Exhibit H)
- Reuters.com, February 2, 2012, “Delta Says Unit Revenue Up, May Cut Jobs.” (Exhibit I)
- Dallas News, March 16, 2012, “Chicago Tribune: American CEO is Open to Merger, but Not Now.” (Exhibit J)
- USA Today, April 22, 2012, “American Merger Could Mean Higher Fares, Analysts Warn.” (Exhibit K)

Appellants make this request pursuant to Federal Rules of Evidence 201 and 402.

Judicial notice of Exhibits A and C-K is proper pursuant to Rule 201 because they contain facts that are easily verifiable and not subject to reasonable dispute and pursuant to Rule 402 because they are relevant to the issues in this case.

## DISCUSSION

### **Judicial Notice of Facts in Press Releases, Exhibit A**

Rule 201 permits the Court to take judicial notice of a fact “not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” *Ritter v. Hughes Aircraft Co.*, 58 F.3d 454, 458 (9<sup>th</sup> Cir. 1995); Fed.R.Evid. 201(b). Judicial notice of agency action is proper where the action is officially published and thus ascertainable and verifiable. *See Robert E. Jones, et al.*, Rutter Group Practice Guide: Federal Civil Trials and Evidence, § 8:849 (2010).

Judicial notice is proper under Federal Rule of Evidence 201 because the DOJ press release constitutes a fact that is easily verifiable

and not subject to reasonable dispute. The DOJ Press Release is officially-published by a federal agency and can be found on the internet at <http://www.justice.gov/opa/pr/2011/April/11-at-523.html>. (Exhibit A.)

The court should therefore take judicial notice of the attached press release and consider it in ruling on the present appeal. *See In re Network Associates, Inc. II Sec. Litig.*, No. C 00-4849, 2003 U.S. Dist. LEXIS 14442, at \*2 n.3 (N.D. Cal. March 25, 2003) (“Judicial notice is appropriate for...press releases...as they are ‘capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.’”); *Plevy v. Haggerty*, 38 F.Supp. 2d 816 (C.D. Cal. 1998) (taking judicial notice of, among other things, press releases.)

### **Judicial Notice of Facts in Exhibits C-K**

Judicial notice of Exhibits C-K is proper under Federal Rule of Evidence 201 because they constitute facts that are easily verifiable and not subject to reasonable dispute. Exhibits C-K are articles that contain facts from national and regional news publications that can be found on the internet at:

- <http://dfw.cbslocal.com/2012/03/01/faa-fives-final-approval-for-southwest-airtran-merger/> (Exhibit C)

- <http://travel.usatoday.com/flights/post/2012/01/southwest-announces-which-airline-cities-make-the-cut/608722/1> (Exhibit D)
- <http://news.cheapflights.com/airlines/southwest-cuts-several-routes/> (Exhibit E)
- <http://triblive.com/business/headlines/1118459-74/airways-philadelphia-southwest-pittsburgh-employees-seats-airline-based-cuts-flight> (Exhibit F)
- <http://www.businessweek.com/articles/2012-04-02/forget-gas-prices-air-fares-are-getting-more-painful> (Exhibit G)
- [http://www.tulsaworld.com/business/article.aspx?subjectid=45&articleid=20120327\\_498\\_E1\\_CUTLIN77996](http://www.tulsaworld.com/business/article.aspx?subjectid=45&articleid=20120327_498_E1_CUTLIN77996) (Exhibit H)
- <http://www.reuters.com/article/2012/02/02/us-delta-idUSTRE8111QG20120202> (Exhibit I)
- <http://aviationblog.dallasnews.com/archives/2012/03/chicago-tribune-american-ceo-i.html> (Exhibit J)
- <http://travel.usatoday.com/flights/story/2012-04-22/American-merger-could-mean-higher-fares-analysts-warn/54473796/1> (Exhibit K)

Judicial notice of Exhibits C-K is proper pursuant to Rule 402 because they are relevant to the issues in this case. Plaintiffs First Amended Complaint (“FAC”), which alleged anticompetitive effects of Defendants’ merger, was dismissed under Rule 12(b)(6). (II ER 93; FAC § 5.) The facts contained in Exhibits C-K, which are publically

available, demonstrate the “plausibility” of the anticompetitive effects alleged in Plaintiffs’ FAC.

Moreover, Courts have taken judicial notice of the type of information at issue in this request. *See Heliotrop Gen., Inc. v. Ford Motor Co.*, 189 F.3d 971, 981 (9th Cir. 1999) (Taking judicial notice of information contained in news articles); *Ieradi V. Mylan Laboratories, Inc.*, 230 F.3d 594, 597-598 (3rd Cir. 2000) (taking judicial notice of information contained in a newspaper article).

### CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Court take judicial notice of Exhibits A and C-K attached hereto.

May 8, 2012

s/ Joseph M. Alioto

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