

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' REPLY  
IN SUPPORT OF REQUEST FOR JUDICIAL NOTICE

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## INTRODUCTION

Appellants Wayne Taleff, *et al.* respectfully request that the Court grant Appellants' Request for Judicial Notice of Exhibits A and C-K. Under Federal Rule of Evidence 201, judicial notice may be taken at any stage in the proceedings, including on appeal.

## DISCUSSION

### **Judicial Notice May be Taken at Any Stage in the Proceedings**

Judicial notice may be taken at any stage in the proceedings whether in the trial court or on appeal. Fed. R. Evid. 201(f). Appellees attempt to characterize the Appellants' Request as an improper attempt to expand the factual record, however, "an appellate court may take judicial notice of a fact for the first time on appeal." *Gustafson v. Cornelius Co.* (8th Cir.1983) 724 F.2d 7, 79.

### **Judicial Notice May be Taken to Aid in Determining "Plausibility"**

This court has recognized that judicial notice may be taken for the purpose of determining the plausibility of a claim. See *Castillo–Villagra v. INS*, 972 F.2d 1017, 1030 (9<sup>th</sup> Cir.1992) (noticing a State Department report to assist in determining the plausibility of the

petitioner's claim); See also *American-Arab Anti-Discrimination Committee v. Reno* (9th Cir. 1995) 70 F.3d 1045, 1069-1070.

Appellees argue that Appellants cannot under any circumstances plead enough facts to show that their claim is “plausible.” (Appellees’ Answering Brief at 11.) Judicial notice may be properly taken by this court to aid in determining the plausibility of Appellants’ claim.

### **Judicial Notice May be Taken of Recent Developments**

Appellees argue that some of the attached exhibits are post-trial court developments, however, this Court may take judicial notice of recent developments subsequent to the proceedings in the trial court. See *Hoxhallari v. Gonzales*, (2nd Cir. 2006) 468 F.3d 179, 186 n.5 (appellate court could take judicial notice of changes in the nature of the Albanian government between the time of the determination below and the present); *Matter of American Biomaterials Corp.* (3rd Cir. 1992) 954 F.2d 919, 922 (court could take judicial notice of subsequent guilty pleas of corporate officers to support trial court's finding that malfeasance prevented corporation from fulfilling its tax obligations); *U.S. v. An Undetermined Quantity of Drugs*, (7th Cir. 1978) 583 F.2d 942, 946 n. 3 (court could take judicial notice of a decision of an administrative

law judge that was not handed down until only nine days before the argument on appeal); *Rothenberg v. Security Management Co.*, (11th Cir. 1982) 667 F.2d 958, 961 n. 8 (appellate court is free to take judicial notice of subsequent developments in cases that are a matter of public record and relevant to the appeal).

### **Judicial Notice May be Taken of Newspaper Articles**

Finally, this Court has previously held that judicial notice may be taken of newspaper articles. *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**

Plaintiffs' First Amended Complaint ("FAC"), which alleged anticompetitive effects of Defendants' merger, was dismissed pursuant to Rule 12(b)(6). (II ER 93; FAC § 5.) The information in Exhibits C-K, which are publically available, demonstrate the "plausibility" of the anticompetitive effects alleged in Plaintiffs' FAC. For the foregoing

reasons, Appellants respectfully request that the Court grant Appellants' Request for Judicial Notice.

July 5, 2012

s/ Joseph M. Alioto

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