No. 11-17995

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

WAYNE TALEFF, ET AL.,
Plaintiffs-Appellants,

v.

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

Appeal from the United States District Court
for the Northern District of California
Case No. 11-cv-02179-JW
The Honorable James Ware

APPELLEES' OPPOSITION TO APPELLANTS' REQUEST FOR JUDICIAL NOTICE

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INTRODUCTION

Appellees Southwest Airlines Co., Guadalupe Holdings Corp., and AirTran Holdings, Inc. (collectively, "Defendants" or "Appellees") respectfully request that the Court deny Appellants' Request for Judicial Notice of Exhibits C-K. The Request not only seeks to improperly expand the factual record by introducing evidence that was not before the district court, but it also asks the Court to take notice of facts asserted within the exhibits that are not proper subjects of judicial notice under Federal Rule of Evidence 201.

DISCUSSION

Appellants' Request Unjustifiably Expands the Factual Record

Appellants' Request asks the Court to take judicial notice of exhibits that were not submitted to the district court in this action. Each of these exhibits is a newspaper article (see, e.g., Exhibit K (USA Today article)), a magazine article (see, e.g., Exhibit G (Bloomberg Businessweek article)), or an internet article (see, e.g., Exhibit E (Cheapflights.com article)). Indeed, some of the exhibits (see Exhibit K) were not even in existence at the time the district court adjudicated Appellants' claim.

As a general matter, the record on appeal is confined to what was presented to the district court. Fed. R. App. P. 10(a) (defining the record on appeal as the copy of the docket, the transcript of the proceedings, and "the original papers and exhibits filed in the district court"). Indeed, this court has held that "[f]acts not

presented to the district court are not part of the record on appeal." Nat'l Wildlife Fed'n v. Burlington N. R.R., 23 F.3d 1508, 1511 n.5 (9th Cir. 1994). Evidence that is new that is presented for the first time on appeal will not be considered. See United States v. Waters, 627 F.3d 345, 355 n.3 (9th Cir. 2010) (finding that the appellant "must first present th[e] evidence to the district court before [the appellate court] may consider it"). Accordingly, new exhibits or evidence will be excluded if they are submitted on appeal for the first time. In United States v. Sanchez-Lopez, 879 F.2d 541 (9th Cir. 1989), this Court "decline[d] to consider [a] survey [for] resolving the issues presented in th[e] direct appeal" and it was therefore "stricken from the record." Id. at 548. Likewise, declarations submitted for the first time on appeal have also been stricken. See Krishner v. Uniden Corp. of Am., 842 F.2d 1074, 1077 (9th Cir. 1988). Furthermore, as here, where a party attempts to enlarge the record on appeal with newspaper articles, the appellate court should not consider them as evidence. See Trans-Sterling, Inc. v. Bible, 804 F.2d 525, 528 (9th Cir. 1986) (denying motion to enlarge record on appeal with newspaper article as inappropriate).

Appellees recognize that on rare occasions judicial notice may be taken of facts not preliminarily submitted to the district court. See Fed. R. Evid. 201(f). However, this is a narrow and rare exception, and "[j]udicial notice was never intended to permit such a widespread introduction of substantive evidence at the

appellate level, particularly when there has been absolutely no showing of special prejudice or need." Melong v. Micronesian Claims Comm'n, 643 F.2d 10, 12 n.5 (D.C. Cir. 1980) (emphasis added). The Sixth Circuit, for example, explained that a request for judicial notice of evidence submitted for the first time on appeal should be rejected unless "'special circumstances'" justified its consideration. Sigler v. Am. Honda Motor Co., 532 F.3d 469, 477 (6th Cir. 2008) (citation omitted). Here, Appellants have provided no such justification. Accordingly, the Request should be denied.

The Exhibits Are Offered To Establish Facts In Controversy

Furthermore, Rule 201 requires that courts only take judicial notice of facts that are "not subject to reasonable dispute." Fed. R. Evid. 201(b). Here, Appellants submit Exhibits C-K in their attempt at painting the airline industry as becoming increasingly anticompetitive – the very facts at the heart of the dispute. (See, e.g., Opening Br. at 45 ("Since the Southwest-AirTran merger closed, services to 15 cities once served by AirTran have been dropped."); id. at 46 ("Commuting US Airways workers previously could fly standby on Southwest at no cost through a reciprocal airline agreement that allowed Southwest employees to fly free on US Airways."); id. ("As of April 2, 2012, airlines had pushed through three industry wide fare increases since 2012."); id. at 47 ("American Airlines plans to slash 13,000 jobs to cut costs and terminate employee pension plans in

2012.").) When one Circuit Court was directed to similar types of facts, it explained "the facts to which [the previously filed documents] related, being disputed in the very controversy under consideration, were not the sort of facts of which the referee was entitled to take judicial notice." In re Aughenbaugh, 125 F.2d 887, 890 (3d Cir. 1942). Here, too, the exhibits should be excluded as they are not the type of materials the Rule was intended to cover. Indeed, the "rule is designed to permit judicial recognition of material such as scientific data or historical fact that, although outside the common knowledge of the community, is nevertheless ascertainable with certainty without resort to cumbersome methods of proof." Melong, 643 F.2d at 12 n.5. Courts take judicial notice of things like "the boundaries of the nation," for example, or "the location of states." Weaver v. United States, 298 F.2d 496, 499 (5th Cir. 1962). Appellants' attempt at using judicial notice as a device for admitting evidence to prove the very facts in dispute in this action should not be countenanced.

The Exhibits Are Rank Hearsay

As noted above, all of Exhibits C-K are news articles of various sorts. Newspaper articles are "classic, inadmissible hearsay" under Federal Rules of Evidence 801 and 802. Roberts v. City of Shreveport, 397 F.3d 287, 295 (5th Cir. 2005); see also Barnes Found. v. Twp. of Lower Merion, 242 F.3d 151, 164 n.8 (3d Cir. 2001) (excluding newspaper articles). Among other things, newspaper

articles are inadmissible because their authors are not present for cross-examination, see Tilton v. Capital Cities/ABC, Inc., 905 F. Supp. 1514, 1544 (N.D. Okla. 1995) (excluding newspaper article while noting the opposing party's inability to cross-examine its author), aff'd, 95 F.3d 32 (10th Cir. 1996), and because they are "'not sworn or certified.'" Anderson v. Dall. Cnty., Tex., No. 3:05-CV-1248-G, 2007 U.S. Dist. LEXIS 28702, at *17 (N.D. Tex. Apr. 18, 2007) (citation omitted) (excluding newspaper article and noting evidentiary infirmities), aff'd, 286 F. App'x 850 (5th Cir. 2008). In Anderson, the district court elaborated on the unreliability of newspaper articles, stating that reporters' "job function is to report news provided by others" meaning that they "rarely have personal knowledge of the facts underlying their stories." Id. at *18.

Appellants' exhibits constitute the same type of inadmissible articles. Appellants provide no reason to break from this general rule since their articles constitute out-of-court statements that are being offered for the truth asserted within them – namely, that the airline market is becoming smaller and, under their theory, less competitive. See Achee v. Port Drum Co., 197 F. Supp. 2d 723, 730 n.5 (E.D. Tex. 2002) (finding that "the particular newspaper article cited [was] inadmissible hearsay because it [was] offered to prove when [defendant's] plant closed"). Even at summary judgment, newspaper articles will not be considered. See Dowdell v. Chapman, 930 F. Supp. 533, 541 (M.D. Ala. 1996) (granting

motion to strike newspaper articles). Indeed, courts have commented that newspaper articles are "almost always inadmissible." In re Leblanc, Nos. 77-505 et al., 1997 Bankr. LEXIS 61, at *4 (Bankr. E.D. La. Jan. 10, 1997), aff'd sub nom. United States v. LeBlanc (In re LeBlanc), No. 97-182-A, 1997 U.S. Dist. LEXIS 7803 (M.D. La. May 23, 1997). The very few circumstances in which newspaper articles are admitted despite being hearsay are not present here. Cf. Dall. Cnty. v. Commercial Union Assurance Co., 286 F.2d 388, 396-97 (5th Cir. 1961) (upholding admissibility of 58-year-old newspaper articles to illustrate the scope of the ancient doctrine exception); Bell v. Combined Registry Co., 397 F. Supp. 1241, 1246-47 (N.D. Ill. 1975) (newspaper articles received into evidence under Federal Rule of Evidence 803(16) for interpreting history), aff'd, 536 F.2d 164 (7th Cir. 1976). Accordingly, the Court should not take notice of Appellants' submitted exhibits because they are blatant hearsay.

CONCLUSION

For the foregoing reasons, this Court should deny Appellants' Request for Judicial Notice.

June 18, 2012

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit on June 18, 2012. A copy will be served on counsel of record by operation of the Court's electronic filing system.

Respectfully submitted,

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