

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202</p>	<p style="text-align: center;"><b>COURT USE ONLY</b></p>
<p>PLAINTIFFS: <b>Anthony Lobato</b>, as an individual and as parent and natural guardian of <b>Taylor Lobato</b> and <b>Alexa Lobato</b>; <i>et al.</i> vs.  DEFENDANTS: <b>The State of Colorado</b>; <i>et al.</i></p>	
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<p style="text-align: center;"><b>PLAINTIFF-INTERVENORS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO TAKE JUDICIAL NOTICE IN CONSIDERATION OF DEFENDANTS' COMBINED RESPONSE TO PLAINTIFFS AND PLAINTIFF-INTERVENORS' MOTIONS TO STRIKE AFFIRMATIVE DEFENSES</b></p>	

Plaintiff-Intervenors Armandina Ortega, *et al.*, respectfully submit this Response in Opposition to Defendants' Motion to Take Judicial Notice in Consideration of Defendants' Response to Plaintiffs and Plaintiff-Intervenors' Motions to Strike Affirmative Defenses under Colorado Rule of Civil Procedure ("C.R.C.P.") 12(f).

**I.**  
**Introduction and Background**

Plaintiff-Intervenor parents and their minor children, who are "at risk," low-income, and English Language Learner students in Colorado public schools, challenge the constitutionality of the public finance system in Colorado, seeking injunctive and declaratory relief against the current inadequate and irrational school funding scheme. *See* Plf-Intvs.' Am. Compl. in Intervention ("Complaint") at 4-5. Defendants filed their Answer to Complaint in Intervention ("Answer") raising a series of affirmative defenses. *See* Answer at 13-14. The affirmative defenses are short and nondescript, employing generic, boilerplate language devoid of any facts, legal argument and merit. *Id.* Accordingly, on October 4, 2010, Plaintiffs and Plaintiff-Intervenors moved separately pursuant to C.R.C.P. 12(f) and the Court's Scheduling Order to strike four of Defendants' affirmative defenses, including but not limited to the failure to join all necessary and indispensable parties. Plfs.' Mot. to Strike at 9; Plf.-Intvs.' Mot. to Strike at 8.

Defendants filed their Combined Response to Plaintiffs and Plaintiff-Intervenors' Motions to Strike Affirmative Defenses on November 2, 2004. That same month, on November 24, 2010, Defendants filed their Unopposed Motion to Take Judicial Notice in Consideration of Defendants' Combined Response to Plaintiffs and Plaintiff-Intervenors' Motions to Strike Affirmative Defenses ("First Motion"). In their First Motion, Defendants requested that the Court take judicial notice that on November 16, 2010, the Douglas County School District RE-1 Board of Education (the "Douglas School Board") passed a resolution declaring that its interests were not represented by the individuals and 21 school district Plaintiffs that have joined in the *Lobato v. State of Colorado* case (the "First Resolution"). *See* Defs.' First Mot. at 2 and Attach. A. Plaintiff-Intervenors did not oppose the filing of the resolution itself, but did object to the characterization of the claims in the resolution by Defendants and reserved further objections to the substance of the resolution. *See id.* (Certificate of Conference). Plaintiff-Intervenors filed their reply in support of their Motion to Strike on November 24, 2010.

More than two months later, on January 28, 2011, Defendants filed a second Motion to Take Judicial Notice in Consideration of Defendants' Response to Plaintiffs and Plaintiff-Intervenors' Motions to Strike Affirmative Defenses ("Second Motion"). In their Second Motion, Defendants requested that the Court take judicial notice that on January 18, 2011, the Douglas School Board passed a resolution declaring that it "strongly supports the efforts of the State of Colorado in its defense of the *Lobato v. State of Colorado* case, because a dismissal of the case will best serve the needs of the students, families, and taxpayers of the Douglas County School District". *See* Defs.' Second Mot. at 2 and Attach. A (the "Second Resolution").

Unlike the First Motion which occurred during the briefing period and was limited to having the Court take notice that its interests were not represented by Plaintiffs and Plaintiff-Intervenors, the present motion serves no additional purpose other than to conflate the issues before the Court and abuse the narrow use of judicial notice. As demonstrated below, Defendants' Second Motion is untimely and improper and Plaintiff-Intervenors respectfully request that the Court deny the motion.

## **II.** **Legal Argument**

### **A. Defendants' Second Motion is Untimely and Prejudices Plaintiff-Intervenors**

Pursuant to the Colorado Rules of Civil Procedure, Defendants had thirteen days, including the three-day service period permitted by the Rules, to respond to Plaintiff-Intervenors' Motion to Strike. C.R.C.P. 12(a). Although Defendants obtained an unopposed extension of time to file their response on November 4, 2010, Defendants did not seek or obtain leave of court for additional time to file their Second Motion, nor do Defendants cite to any facts justifying the cause for the undue delay. Plaintiff-Intervenors replied to Defendants' response on November 24, 2010 and since that day, the briefing has been closed on the motion. Moreover, the Colorado Rules of Civil Procedure do not provide an opportunity for surreply or supplemental evidence while the Court's decision on a Rule 12(f) Motion is pending. Defendants' Motion is therefore not only untimely, but a thinly veiled attempt to circumvent their time constraints set forth by the Rules by providing supplemental evidence and argument in support of their opposition to Plaintiff-Intervenors' Motion to Strike.

If the Court chooses to grant Defendants' untimely Motion, Plaintiff-Intervenors would be prejudiced. An order granting Defendants' Second Motion would open the door to Defendants filing unlimited supplemental evidence. In fact, the Second Motion is clearly an attempt to respond to Plaintiff-Intervenors' reply, wherein Plaintiff-Intervenors assert that their claims would not harm other nonparty school districts. *See* Plf.-Intervenor's Reply at 4. In addition, Plaintiff-Intervenors would be prejudiced in time and resources by having to depose the nonparty school district representatives and secure documents related to the resolution in order to respond to the hearsay and purported claims and facts embedded in the resolution. The parties are deep into discovery in this case and the scarce resources of the parties should not be redirected to address untimely submissions. Accordingly, Plaintiff-Intervenors respectfully urge the Court to deny Defendants' motion for being untimely.

### **B. Judicial Notice of the Resolution is Improper.**

Trial courts may take judicial notice of facts "not subject to reasonable dispute" that are "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." C.R.E. 201(b). Examples include taking notice of a calendar date, an applicable term of office, or an unquestioned law of mathematics. *See Prestige Homes, Inc. v. Legouffe*,

658 P.2d 850, 853 (Colo. 1983) (*en banc*); *see also* C.R.E. 201 committee comment. This rule “has traditionally been used cautiously in keeping with its purpose to bypass the usual fact finding process *only when the facts are of such common knowledge* that they cannot reasonably be disputed.” *Prestige Homes*, 658 P.2d at 853 (emphasis added).

“Judicial notice is an adjudicative device that alleviates the parties' evidentiary duties at trial, serving as a substitute for the conventional method of taking evidence to establish facts.” *York v. AT&T*, 95 F.3d 948, 958 (10th Cir. 1996). Judicial notice is appropriate when the nature of the truth of certain facts “are not properly the subject of testimony, or which are universally regarded as established by common knowledge”, in other words, “facts [that] are not subject to reasonable dispute.” *Meredith v. Beech Aircraft, Inc.*, 18 F.3d 890, 895 (10th Cir. 1994). On the other hand, if the fact must be established through the presentation of evidence, courts should not take judicial notice of the fact. *Id.*

Here, the Second Resolution is devoid of any facts that are “universally established by common knowledge.” *Id.* Rather, the Second Resolution is rife with disputed facts and erroneous interpretations of the claims in this lawsuit. *See* Defs.’ Attach. A. The Second Resolution even goes one step further, speculating as to how a court or legislature will respond to a ruling favorable to the claimants by, for example, implementing injunctive orders that will strip local school boards of local control—this, despite Plaintiff-Intervenors’ express claim that the current funding system violates their right to exercise meaningful local control under article IX, section 15 of the Colorado Constitution. *Compare id.* to Plf.-Intvs.’ Am. Compl., ¶¶ 102-104 at 17-18. Defendants should not be allowed to wedge into the record such disputed arguments and facts that run contrary to the limited purpose of Colorado Rule of Evidence 201(b) under the guise of a resolution.

And although a court may take judicial notice of facts contained in public records, not all public records are automatically judicially noted. For example, the court generally may not take judicial notice of municipal ordinances or resolutions that are not cited in the complaint. *See City of Pueblo v. Murphy*, 189 Colo. 559, 542 P.2d 1288 (Colo. 1975). Courts are similarly precluded from taking judicial notice of the county zoning resolutions or any rules and regulations adopted pursuant thereto. *See E& G Inc. v. San Miguel County Bd. of Comm’r*, 541 P.2d 86, 88 (Colo. App. 1975) (not selected for official publication).

Defendants fail to cite a single case in which a Colorado court took judicial notice of a school board resolution. *See* Defs.’ Mot. at 2 (citing *People v. Stanley*, 170 P.3d 782 (Colo. App. 2007) (judicial notice of a public official’s term of office) (citing *Larsen v. Archdiocese of Denver*, 631 P.2d 1163, 1164 (Colo. App. 1981) (judicial notice of term of public office); *Lovato v. Johnson*, 617 P.2d 1203, 1204 (Colo. 1980) (judicial notice that judge was a “magistrate” under Utah law); *People ex rel. Flanders v. Neary*, 113 Colo. 12, 16, 154 P.2d 48, 50 (1944) (judicial notice of district attorney's term of office); *Disabled Rights Action Committee v. Las Vegas Events, Inc.*, 375 F.3d 861, 866 n. 1 (9th Cir.2004) (judicial notice of state agency's contract with private entity); *Vento v. Colo. Nat'l Bank*, 985 P.2d 48, 52 (Colo. App. 1999) (judicial notice of court's records in related proceeding)); *see Walker v. Van Laningham*, 248

P.3d 391, 397 (Colo. App. 2006) (judicial notice of animal control ordinance referenced in complaint against parties and parties' previous animal cruelty convictions).

In fact, the only case cited by Defendants that involves school board documents, *Gardner v. Miami-Yoder Sch. Dist. JT-60*, No. 10-cv11530, 2010 WL 4537951 (D. Colo. Nov. 3, 2010), is inapposite to the present case on its face. *Gardner* involved judicial notice of a school board policy regarding grounds maintenance, and the school board's maintenance and position employment records of the plaintiff, who was a former employee of the school district. *See id.* at \*1. They were referenced in the amended complaint and formed the basis of the plaintiff's breach of contract claims against the school district. *See id.* at \*4. Here, the Second Resolution bears none of these characteristics.

Similarly, the court in *Gardner* stated that the court could only take notice of school board "policies *relevant* to the current claims. . . ." *Gardner*, No. 10-cv-11530, 2010 WL 4537951 \*3 (emphasis added); *see also United States v. Ahidley*, 486 F.3d 1184, 1192 n.5 (10th Cir. 2007); *Vester v. Asset Acceptance, L.L.C.*, No. 08-cv-1957, 2009 WL 2940218 \*11 (D. Colo. 2009) (denying motion for judicial notice due to lack of relevance to any issue in pending case). The Court has already taken judicial notice of the Douglas School Board's resolution that its interest were not represented.

In their Second Motion, Defendants request that the Court take judicial notice that the Douglas School Board passed a resolution that district families, students, and taxpayers are not served by the present lawsuit. *See* Defs.' Second Mot. at 2. Defendants premise their argument with a reference to the joinder argument in their response to Plaintiff-Intervenors' Motion to Strike, stating that absent districts may be adversely affected by the lawsuit and should be joined. *See* Defs.' Second Mot. at 1. As a result, Defendants seem to request not only judicial notice that the Douglas School Board *passed* the Second Resolution, as they claim in the Second Motion, but they also encourage the Court to take judicial notice of the truth of the resolution's contents. Such judicial notice falls outside the scope of C.R.E. 201 and is prohibited by Colorado law. *See, e.g., One Hour Cleaners v. Indus. Claim Appeals Office*, 914 P.2d 501, 505 (Colo. App. 1995) (citing *Gilbert v. State*, 218 Cal. App. 3d 234, 266 Cal. Rptr. 891 (1990) (judicial notice of documents goes to authenticity and contents of documents, not to truth of their contents)).

The unfounded, inaccurate, and highly speculative statements of both disputed facts and questions of law concerning the lawsuit include the following:

- "[I]f Plaintiffs prevail in their lawsuit, the Colorado courts will likely enter remedial orders and injunctions that will have the effect of supplanting the unique role of local Boards of Education in overseeing the establishment, funding, and maintenance of public schools and the public finance system."

- “A court-ordered and supervised system of public schools and school finance as demanded by Plaintiffs would subvert the principle of local control embodied in Article IX, Section 15 of the Colorado Constitution.”
- “A court-ordered and supervised system of public schools and school finance as demanded by Plaintiffs would subvert the separation of powers doctrine embodied in Article III of the Colorado Constitution.”
- “If the Defendants, the State of Colorado, et al., prevail in dismissing the lawsuit, decisions as to the establishment, maintenance and funding systems of the public schools will properly remain in the hands of the elected state and local representatives of the people.”

Defs.’ Attach. A.

Not only are these statements ill-suited for judicial notice, it is also unclear how these and similar statements in the Second Resolution are relevant to Plaintiff-Intervenors’ claims, since they are pure conjecture. In fact, their purported legal conclusions concerning the separation of powers and lack of justiciable issues run counter to the decision of the Supreme Court of Colorado in this case. *See Lobato v. Colorado*, 218 P.3d 358 (Colo. 2009).

Judicial notice of the statements contained in the Second Resolution would lead to absurd results. For example, the Douglas School Board, or any other school board for that matter, could pass future resolutions making findings of fact regarding the case, and judicial notice of those resolutions would automatically convert those statements into conclusive facts. The Court should decline Defendants’ invitation down this slippery path and deny Defendants’ motion.

### **III. Conclusion**

For the reasons foregoing reasons, Plaintiff-Intervenors urge this Court to deny Defendants’ Motion to Take Judicial Notice in Consideration of Defendants’ Response to Plaintiffs and Plaintiff-Intervenors’ Motions to Strike Affirmative Defenses.

DATED: February 10, 2011

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

This is to certify that I have duly served the within Response in Opposition to Defendants' Motion to Take Judicial Notice in Consideration of Defendants' Response to Plaintiffs and Plaintiff-Intervenors' Motions to Strike Affirmative Defenses upon all parties herein by electronically filing through LexisNexis courtlink or by depositing copies of same in the United States mail, first-class postage prepaid, this 10<sup>th</sup> of February, 2011 addressed as follows:

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