

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE**

ASSOCIATION TO PRESERVE AND)
PROTECT LOCAL LIVELIHOODS, *et al.*)
))
Plaintiffs,)
))
PENOBSCOT BAY AND RIVER PILOTS)
ASSOCIATION,)
))
Plaintiff-Intervenor,)
))
v.)
))
TOWN OF BAR HARBOR, a municipal)
corporation of the State of Maine,)
))
Defendant,)
))
CHARLES SIDMAN,)
))
Defendant-Intervenor.)
_____)

Civil Action No. 1:22-cv-416-LEW

**PLAINTIFF-INTERVENOR PENOBSCOT BAY AND RIVER PILOTS
ASSOCIATION’S RESPONSE IN OPPOSITION TO MOTION TO STRIKE**

On October 27, 2023, Plaintiff-Intervenor Penobscot Bay and River Pilots Association (the “Pilots”) filed their Reply Brief [ECF No. 199], along with three exhibits:

1. The Bar Harbor Town Council agenda packet for October 17, 2023, which is available to the public on the Town’s public website (Exhibit 1) (“Agenda”), and which, in relevant part, contains a proposed new ordinance and proposed amendments to the Bar Harbor Port and Harbor Code that are described under the heading “Rulemaking to Implement and Enforce Town Code § 125-77(H) (Disembarking persons from cruise ships on, over, or across any property located within the Town of Bar Harbor)”;¹ and
2. Website captures, retrieved October 18, 2023, from the public websites for Holland

¹ The Agenda, while lengthy, was submitted in its entirety simply for sake of completeness. The referenced portions of the Agenda are confined to pages 33-46—the draft proposed ordinance and draft code amendments. These drafts are the Town’s first published attempt to codify regulations that will interpret “persons” as “passengers”—a possible future action upon which Defendants place emphasis as part of their defense of the Ordinance, particularly their defense to preemption of the Ordinance under 33 C.F.R. parts 104 and 105. Town Post-Trial Brief [ECF No. 196] (“T. Br.”) at 13-16.

America Line and Norwegian Cruise Lines, showing (as a snapshot in time) the published cruise line itineraries for the Canada & New England region with departure dates in May to October 2025, for Holland American Line (Exhibit 2), and June to August 2025 for Norwegian Cruise Lines (Exhibit 3) (“Cruise Website Captures” and together with the Agenda, the “Exhibits”).

These Exhibits were proffered in direct response to positions taken by Defendant Town of Bar Harbor (the “Town”) and Defendant-Intervenor Charles Sidman (“Sidman” and with the Town, “Defendants”) in their post-trial briefs. The Exhibits reinforce, but are not essential to, arguments that the Pilots advanced and fully supported in their opening brief.

On November 1, Defendants jointly moved to strike the Exhibits and related, limited arguments in the Pilots’ Reply Brief. Defendants contend that the Pilots rely on the Agenda to advance an “entirely new” argument but fail to acknowledge that this “new” argument responds directly to the Town’s assertion of regulatory authority over federal anchorage grounds in its post-trial brief. Defendants object to the Exhibits on grounds of authenticity and timing but do not suggest that their authenticity is genuinely in dispute or acknowledge that all documents (including the Agenda, which is the Town’s document) were created well after discovery and trial. Defendants’ protestations do not warrant the relief Defendants seek.

The Pilots request that the Court deny Defendants’ Motion in full.

A. The Pilots’ Reply Brief does not raise “new” arguments.

Defendants complain that the Pilots’ Reply Brief raises an “entirely new” argument. Principally, Defendants assert that the Pilots rely on the Agenda to argue that “the Town requiring that cruise ships make reservations with the local harbormaster, or the harbormaster assigning ships to one of the federal anchorages, is unconstitutional.” Mot. at 2.

The Pilots consistently have argued that the Ordinance is an unlawful assertion of local

control over vessel operations at federally designated anchorages in Frenchman Bay.² The Pilots contend that the Ordinance’s “restrictions and penalties will affect vessel routing decisions, require changes in embarkation and disembarkation operations at the vessel while lying in federal anchorages, and require cruise vessels to ‘work around’ Bar Harbor’s barriers to operations in Frenchman Bay.” Pilots Post-Trial Brief [ECF No. 190] (“Pilot Br.”) at 11. They contend that the Ordinance “regulates the anchoring of vessels incident to the vessels’ operations.” *Id.* at 12. The Pilots have maintained that if “cruise vessels do not come to Bar Harbor, they will not anchor in Frenchman Bay.” *Id.* at 4.

It is defensive wishcasting by Defendants to suggest that the Ordinance is not prohibitory, that it will not prevent vessels from conducting primary operations in the federal anchorages, or that vessels are “free” to anchor in Frenchman Bay despite being essentially forbidden from engaging in the only conduct (disembarking passengers) that brings them to Bar Harbor. Thus, in their opening brief, the Pilots argued that the Ordinance deprives cruise vessels of the unfettered use of anchorages that have been designated by the U.S. Coast Guard in exercise of its plenary federal authority to “establish anchorage grounds for vessels in all harbors, rivers, bays, and other navigable waters of the United States whenever it is manifest ... that the maritime and commercial interests of the United States require such anchorage grounds for safe navigation.”

33 U.S.C. § 471; Pilot Br. at 16-17. The Pilots argued:

The Ordinance ... makes it operationally impossible for a larger vessel to use these anchorages because it limits disembarkations from those vessels to 1,000 persons in the aggregate, a number far less than the capacity of the majority of cruise vessels calling at Bar Harbor. These vessels will not use the anchorages if they cannot disembark all their passengers (and crew) into Bar Harbor....

The Ordinance will deter use of the anchorages by mid-size and larger vessels, impose a non-federal preference for smaller vessels, and render the anchorages

² The Coast Guard’s designation of federal anchorages is but one explicit expression of the federal government’s generally preemptive plenary authority over maritime commerce, an authority the Town is not at liberty to invade.

largely unfit for their intended use. Anchorage designations are a federal prerogative that cannot be constrained by the imposition of conditions on use by localities. The Ordinance conflicts with federal law.

Pilot Br. at 17-18.³ Stated simply, the Pilots have always maintained that the Town lacks regulatory authority over the anchorages.

The Town **noted and responded** to this argument in its brief. The Town asserted that the Ordinance was not preempted by the Coast Guard's designation of anchorage grounds in Frenchman Bay because the Coast Guard's allowance of local authority over the "coordination" of the anchoring of vessels in the Frenchman Bay *anchorage grounds* was akin to the Coast Guard's suggestion that local laws may continue to apply to mariners' use of *special anchorage areas* in other parts of Maine. Town Post-Trial Brief [ECF No. 196] ("T. Br.") at 18.

The Pilots' Reply Brief directly addressed this assertion of expansive authority over the federal anchorages by the Town. *Compare* T. Br. at 18 to Pilots Post-Trial Reply Brief [ECF No. 199] ("Pilot R. Br.") at 19-20. The federal government's acknowledgement of Bar Harbor's past practice of recording vessel arrival reservations with the local harbormaster is not a grant of, or permission for, the exercise of regulatory authority over the anchorages and does not bestow upon the Town the authority to limit the use of the anchorages indirectly, by forbidding customary, commercially-reasonable use of the anchorages, any more than it encompasses the authority to exclude vessels directly. Pilot R. Br. at 19-20. The Town's position in its post-trial brief that it possesses such authority, and its actions subsequent to trial that reflect an intent to wield expansively this presumptuous claim of authority, are central to the issues that have been before the Court since the complaints were filed. The Agenda (Exhibit 1) did not spawn the Pilots' responsive arguments; the Town's post-trial brief did. The Pilots have not raised a new

³ The Pilots also argued that the Ordinance could very well violate state law if it were applied in a manner that prohibited the anchoring of vessels. Pilot Br. at 46 n.26.

argument.

Defendants also ask the Court to strike the Pilots' reference to the Cruise Website Captures.⁴ *See* Mot. at 2. These documents show a point-in-time snapshot (specifically, October 18, 2023) of the 2025 Canada/New England itinerary offerings for Holland America Line and Norwegian Cruise Lines. Each itinerary that offers a stop at Bar Harbor represents a scheduled call at Bar Harbor for the cruise line. These snapshots show steep drops in scheduled calls at Bar Harbor in 2025 as compared to these same cruise lines' scheduled calls at Bar Harbor in 2023.⁵ Pilot R. Br. at 27-28 n.49.

The comparison can be made just as well from (albeit less current) documents admitted into evidence at trial. According to Plaintiffs' Exhibit 007, Norwegian is scheduled to call at Bar Harbor 17 times in 2025—a 50 percent reduction from Norwegian's 36 scheduled calls in 2023. *Compare* PFF ¶ 267 to PX007 (PortCall Excerpt showing 17 entries for Norwegian for calls at Bar Harbor in 2025 between August 27, 2025 and October 23, 2025).⁶ According to Plaintiffs' Exhibit 007, Holland America is not scheduled to call at Bar Harbor at all in 2025⁷—a 100 percent reduction from Holland America's 25 scheduled calls in 2023. *Compare* PFF ¶ 267 to

⁴ Defendants do not assert that these arguments are “new” arguments.

⁵ The websites provide dynamic information. Published cruise offerings change if the cruise lines add or delete itineraries and sail dates. A search conducted today may yield different results than those obtained on October 18, 2023. For instance, as of November 3, 2023, Norwegian's website shows new cruise itineraries for sale in the Canada and New England Region for August-October 2025. With these added itineraries, Norwegian is scheduled to call at Bar Harbor 18 times in 2025—a 50 percent reduction from 2023. PFF ¶ 267; *see* PX 007 (showing 17 scheduled calls). Whenever accessed, cruise lines' published itineraries in the Canada/New England region for the 2025 cruise season, which are publicly accessible and readily verified through an internet search, provide a useful comparison to evidence of historical cruise visitation and cruise vessel calls at Bar Harbor in the record.

⁶ Both Norwegian and Holland America testified that they engage in long-term itinerary planning, with itineraries set and released for sale 24 to 30 months before the sail date. PX 191.05; PX 192.09. Itineraries with sail dates 24 months from now would be leaving their first port in November 2025, which is too late to call at Bar Harbor. *See* PFF ¶ 74 (peak cruise season is September and October); PFF ¶ 188 (November calls eliminated under Memoranda of Agreement between Town and cruise lines). Thus, it is very likely that the itineraries on sale now are the only itineraries that these cruise lines will run in the region in 2025.

⁷ The significance of this cannot be over-emphasized. Holland America has been calling at Bar Harbor for more than 23 years. PX 191.07. Holland America will no longer call at Bar Harbor if it cannot discharge its full complement of passengers (which it cannot do if the Ordinance is enforced). PX 191.09; PFF ¶¶ 281-82. Juan Kuryla, of Norwegian, and Adam Goldstein offered similar testimony. PX 192.14; Tr. 12-Jul. at 181:23-182:10.

PX007 (PortCall Excerpt showing no entries for Holland America for calls at Bar Harbor in 2025 and no entries for calls at any other port in Maine).⁸ These comparisons reinforce what has been established through testimony and documents—cruise lines will not call at Bar Harbor with the Ordinance in place. PFF ¶¶ 267, 281-82.

The Ordinance effectively bars cruise calls at Bar Harbor. Its prohibitory effect is *not* a new revelation. It is not just a theory. T. Br. at 30 (cruise lines are free to operate as they choose and “may continue to call at Bar Harbor”); Sidman Post-Trial Memorandum [ECF No. 197] (“S. Mem.”) at 11 (similar).⁹ It is a certainty supported by record evidence, not just by post-trial scheduling decisions reflected in the Cruise Website Captures (Exhibits 2 and 3).

B. Defendants’ objections provide no basis for striking the Exhibits.

Defendants ask the Court to strike the Exhibits because they have not been authenticated. Mot. at 2. Authenticity objections are appropriate only where a document’s authenticity is genuinely in dispute. *See Fenje v. Feld*, 301 F. Supp. 2d 781, 789 (N.D. Ill. 2003), *aff’d*, 398 F.3d 620 (7th Cir. 2005) (“Even if a party fails to authenticate a document properly ... the opposing party is not acting in good faith in raising such an objection if the party nevertheless knows that the document is authentic.”) (internal citations omitted); *Pohl v. MH Sub I, LLC*, 332 F.R.D. 713, 717 (N.D. Fla. 2019) (plaintiff did not provide good-faith basis to challenge authenticity of WayBack Machine evidence); *Kunkel v. Dill*, No. 1:09-CV-00686-LJO, 2012 WL 761247, at *14 (E.D. Cal. Mar. 7, 2012) (“[L]ack of proper authentication is an appropriate objection where a document's authenticity is genuinely in dispute.”), *report and recommendation adopted*, No. 1:09-CV-00686-LJO, 2012 WL 1856499 (E.D. Cal. May 21, 2012).

⁸ Mr. Grigsby testified that Holland America did not have Bar Harbor on its schedules after 2024. PX 191.13. Defendants had the opportunity to cross-examine Mr. Grigsby on this point during his deposition.

⁹ Sidman acknowledged that the Initiative (now the Ordinance) would “get rid of the biggies.” PFF ¶ 240. The Town predicted that the Initiative would result in a 95 percent reduction in passenger visits on the assumption that cruise ships would not call at Bar Harbor if they could not disembark all their passengers. *Id.* ¶¶ 283-84.

Defendants imply, but do not claim directly, that the Exhibits may not be what they purport to be or that the Pilots have misrepresented their nature or content. Defendants do not deny that the Town created the Agenda or that the Agenda is published on the Town's website. Defendants do not assert that the copy of the Agenda attached to the Pilots' Reply Brief differs from the version of the same Agenda available on the Town's website. Defendants do not argue that the Cruise Website Captures are something other than the itineraries that Holland America and Norwegian presented to the public on October 18, 2023. If Defendants truly are concerned that these documents are not what they purport to be, Defendants should say so;¹⁰ they cannot hide behind generalized, unsupported objections. *In re Zofran (Ondansetron) Prod. Liab. Litig.*, No. 1:15-MD-2657-FDS, 2019 WL 4980310, at *15 n.17 (D. Mass. Oct. 8, 2019) (“[I]n the absence of any actual specific objection to any specific document, the Court will not strike any document on that basis.”); *see Joseph v. Lincare, Inc.*, 989 F.3d 147, 157 (1st Cir. 2021) (party's authentication challenge should have been rejected where party never suggested that documents were not authentic); *United States v. Blanchard*, 867 F.3d 1, 8-9 (1st Cir. 2017) (distinguishing cases where objection to authentication was premised on possibility that “the evidence in question ... was subject to falsification”); *Castagna v. W. Mifflin Area Sch. Dist.*, No. 2:18-CV-00894, 2020 WL 2557231, at *2 (W.D. Pa. May 20, 2020) (objection to correspondence for lack of authentication meritless where party made no assertion that subject correspondence was not received); *Kunkel*, 2012 WL 761247, at *15 (“If Defendants genuinely disputed the authenticity of any of these records, they could have made specific objections as to those records. Notably, they did not and their bare objection to Plaintiff's prison records for lack of proper authentication is overruled.”).

¹⁰ Defendants had the opportunity to substantiate their objections in the Motion to Strike, but they did not. Defendants should not be permitted to correct that error on reply.

Should Defendants genuinely dispute the authenticity of the Exhibits, the Court can easily dispose of their objection. There is competent evidence within the Exhibits themselves to establish their authenticity. *See* Fed. R. Evid. 901(b)(4). The Agenda is publicly available on the Town’s website. The Town’s website is maintained by the Town, a municipal (government) entity, and, presumably, the Town’s website is a source whose accuracy cannot reasonably be questioned. All one need do is visit the Town’s website¹¹ and download a copy of the Agenda to see that the Agenda is exactly what it purports to be—the Town’s Meeting Agenda for its October 17, 2023 Town Council meeting. *See Xiao Wei Yang Catering Linkage in Inner Mongolia Co. Ltd v. Inner Mongolia Xiao Wei Yang USA, Inc.*, No. 15-CV-10114-DJC, 2017 WL 507211, at *4 (D. Mass. Feb. 6, 2017) (concluding that “information presented in [an online] database—including shareholder investment information, foreign investment information and enterprise asset status—is of the type one would expect to find on a public government database ... [and] may be properly authenticated pursuant to the standard under Rule 901”); *U.S. E.E.O.C. v. E.I. DuPont de Nemours & Co.*, No. CIV. A. 03-1605, 2004 WL 2347559, at *2 (E.D. La. Oct. 18, 2004) (authenticity established for website printout which contained internet domain address and date on which it was printed, and where court accessed the website using the domain address and verified that the webpage printed exists at that location). Moreover, the Agenda, like other Town meeting agendas, is maintained on a government website and thus is presumptively authentic and self-authenticating under Rule 902(5). *Id.* (noting applicability of Rule 902(5)); *Qiu Yun Chen v. Holder*, 715 F.3d 207, 212 (7th Cir. 2013) (“A document posted on a government website is presumptively authentic if government sponsorship can be verified by visiting the website itself.”); *Hawkes v. BSI Fin., Inc.*, 444 F. Supp. 3d 260, 267 (D. Mass. 2020)

¹¹ The Pilots provided the website URL where the Agenda can be located in their Reply Brief. Pilot R. Br. at 20 n.38.

("[I]n the absence of any evidence to the contrary, it is undisputed that the document is a screenshot from the USPS website and therefore a self-authenticating 'official publication' within the meaning of Rule 902(5).").

The Cruise Website Captures may be authenticated in a similar manner. Both exhibits indicate, on the first page, the capture URL, date and time of page load and capture, and capture tool, among other information. The cruise line websites are publicly available and accessible; anyone can obtain the cruise lines' current cruise offerings by searching these websites. These websites are maintained by the cruise lines, commercial entities who are not parties to this case.

Defendants also argue that the Exhibits should be disregarded because they were not previously disclosed or produced in discovery. All the Exhibits post-date the close of trial. The Pilots cannot produce in discovery documents that do not exist.

Finally, Defendants argue that the Exhibits cannot be considered because the trial record is closed. This, too, does not require exclusion of the Exhibits. It is well within the Court's discretion to take additional evidence on the request of a party or *sua sponte*. *Bistrain v. Levi*, 448 F. Supp. 3d 454, 483 (E.D. Pa. 2020) (court has discretion to take additional evidence on the request of a party or *sua sponte*); see *Zenith Radio Corp. v. Hazeltine Rsch., Inc.*, 401 U.S. 321, 331-32 (1971) (as cited in *Lussier v. Runyon*, 50 F.3d 1103, 1113 (1st Cir. 1995)); *Rivera-Flores v. Puerto Rico Tel. Co.*, 64 F.3d 742, 746 (1st Cir. 1995). This is especially true when the evidence is susceptible to judicial notice, which is the case here.¹²

Courts may take judicial notice of documents on government websites "on the ground that information contained therein is 'capable of accurate and ready determination by resort to

¹² Under Rule 201, the Court may take judicial notice on its own and must take judicial notice if a party requests it and the court is supplied with the necessary information. Fed. R. Evid. 201(c). The Court may take judicial notice at any time, even after trial. Fed. R. Evid. 201(d). To the extent such a request is necessary, the Pilots request that the Court take judicial notice of the Agenda and the Cruise Website Captures.

sources whose accuracy cannot reasonably be questioned.” *Lussier*, 50 F.3d at 1114 (declining to take judicial notice of information *not* contained in generally available government records and that *could not* be obtained by direct resort to any public record) (quoting *Massachusetts v. Westcott*, 431 U.S. 322, 323 n.2 (1977) (per curiam) (taking judicial notice of fishery licenses as reflected in the records of the Coast Guard's Merchant Vessel Documentation Division)); *Total Petroleum Puerto Rico Corp. v. Torres-Caraballo*, 672 F. Supp. 2d 252, 257 (D.P.R. 2009) (taking judicial notice of a trademark registration on U.S. Patent and Trademark Office website) (quoting in support *Poirier v. Educ. Credit Mgmt. Corp. (In re Poirier)*, 346 B.R. 585, 588 (Bankr. D. Mass.) (“[T]he fact that an agency report is ‘published’ on the world wide web does not affect the Court's ability to take judicial notice of the contents of that report.”); *see also* Fed. R. Evid. 201. Federal courts also may take judicial notice of website printouts that “are publicly accessible and are, thus, readily verified through an internet search.” *Piper v. Talbots, Inc.*, 507 F. Supp. 3d 339, 343 (D. Mass. 2020) (taking judicial notice of printouts from commercial websites where authenticity was not contested); *Reynolds v. Fed. Bureau of Prisons*, No. 5:20-CV-00753, 2022 WL 19548487, at *20 n.2 (S.D.W. Va. Dec. 20, 2022) (“Courts may take judicial notice of websites, including online retailers, which are publicly accessible and whose accuracy is not reasonably in doubt.”), *report and recommendation adopted sub nom. Reynolds v. Young*, No. 5:20-CV-00753, 2023 WL 2711724 (S.D.W. Va. Mar. 30, 2023), *aff'd*, No. 23-6346, 2023 WL 5561473 (4th Cir. Aug. 29, 2023). Thus, for all the reasons already discussed, the Court may take judicial notice of the Exhibits.

For the foregoing reasons, the Pilots respectfully request that the Court deny Defendants’ Motion in full, decline Defendants’ request for additional briefing, and determine what weight to give the Exhibits in the context of the Court’s merits decision in this case.

Dated: November 9, 2023

Twain Braden
Archipelago LLC
One Dana Street, 4th Floor
Portland, ME 04101
(207) 558-0102
tbraden@archipelagona.com

/s/ Kathleen Kraft

C. Jonathan Benner (*pro hac vice*)
Kathleen E. Kraft (*pro hac vice*)
Thompson Coburn LLP
1909 K Street N.W., Suite 600
Washington, D.C. 20006
(202) 585-6900 (main)
(202) 585-6969 (fax)
kkraft@thompsoncoburn.com
jbenner@thompsoncoburn.com

John Kingston (*pro hac vice*)
Thompson Coburn LLP
One U.S. Bank Plaza
St. Louis, Missouri 63101
(314) 552-6000 (main)
(314) 552-7000 (fax)
jkingston@thompsoncoburn.com

*Attorneys for Plaintiff-Intervenor Penobscot
Bay and River Pilots Association*

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of November, 2023, I caused the foregoing document to be served upon all counsel of record via the Court's CM/ECF system.

/s/ Kathleen E. Kraft