

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF THE ADMINISTRATIVE LAW JUDGES



In the Matter of

**BENCO DENTAL SUPPLY CO.,
a corporation,**

**HENRY SCHEIN, INC.,
a corporation, and**

**PATTERSON COMPANIES, INC.,
a corporation,**

Respondents.

Docket No. 9379

**RESPONDENTS' OPPOSITION TO COMPLAINT COUNSEL'S
WEBSITE EXHIBIT OBJECTIONS**

Using the Internet to access business information is commonplace, and has been for quite some time. Nearly everyone has virtually instantaneous access to online resources through a device in their pocket. When a web address or URL is typed into a web browser, everyone sees the same publicly available webpage, whether it is Google, Amazon, Yelp, or EBay. Webpages are thus “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” *See* 16 C.F.R. § 3.43(f); *see also* Fed. R. Evid. 201 (same). Yet Complaint Counsel takes the position that no webpages may be admitted at all, asserting some undefined concern over accuracy or veracity. Through blanket objections, Complaint Counsel effectively seeks the benefit of a motion *in limine* without actually filing one. Respondents oppose that attempt. Each of the websites on Respondents’ exhibit list indicates the source URL, which Complaint Counsel or the Court can easily enter into a browser. These are publicly available and unquestionably “capable of accurate and ready determination.” None of Complaint Counsel’s

objections have merit.

The Webpages Are Relevant. Over two-thirds of the websites on Respondents’ exhibit list are pages from the websites of various dental buying groups – the central focus of this case.¹ Through their websites, buying groups describe themselves to prospective dentist members and potential suppliers. For instance, they tell dentists and suppliers that the groups “do not require[] exclusive[] use of the [group’s] contracts” (RX2802) and that “there is no obligation to purchase under any agreement established by” the group. (RX2803) Dental groups’ medical counterparts – which Complaint Counsel’s expert cites in support of his opinions – hold themselves out very differently. They publicly announce that members must “agree[] **not** to purchase products that compete” with contracted suppliers (RX2795), and “must use 95% of [the contracted] products.” (RX2800). Buying groups’ public pronouncements related to their identifying characteristics, offerings, membership, and distributor partners are undeniably relevant to Complaint Counsel’s allegations.

Webpages Are Subject to Official Notice. There is also no basis for an authenticity objection. Courts across the country, and the Commission, have long recognized the admissibility of web pages. *E.g., In re California Naturel, Inc.*, 2016 FTC LEXIS 236 at *7 n.2 (F.T.C. 2016) (“Pursuant to 16 C.F.R. § 3.43(f), we take official notice of the content of California Naturel’s website....”); *see also, e.g., O’Toole v. Northrop Grumman Corp.*, 499 F. 3d 1218, 1225 (10th Cir. 2007) (“It is not uncommon for courts to take judicial notice of factual information found on the world wide web.”); *Pac. Overlander, LLC v. Kauai Overlander*, 2018 U.S. Dist. LEXIS 135567, at *6 (N.D. Cal. 2018) (“[I]n general, websites and their contents may be judicially noticed”);

¹ The remaining exhibits relied on by Respondents’ experts or pages from Respondents’ own websites, are indisputably relevant, and can be authenticated by Respondent witnesses to the extent necessary.

Coremetrics, Inc. v. AtomicPark.com, LLC, 370 F. Supp. 2d 1013, 1021 (N.D. Cal. 2005) (“[A]s is evident from AtomicPark’s website (of which the Court takes judicial notice...”)); *Patsy’s Italian Rest., Inc. v. Banas*, 575 F. Supp. 2d 427, 443 n.18 (E.D.N.Y. 2008) (“It is generally proper to take judicial notice of articles and Web sites published on the Internet.”), *aff’d*, 658 F.3d 254 (2d Cir. 2011).

The reliability of webpages is so well accepted that courts routinely admit past versions of them. *Marten Transp., Ltd. v. PlattForm Advert., Inc.*, 2016 U.S. Dist. LEXIS 57471, at *7 (D. Kan. 2016) (noting that “courts commonly take judicial notice of such sites” and collecting authorities); *see also, e.g., Pond Guy, Inc. v. Aquascape Designs, Inc.*, 2014 U.S. Dist. LEXIS 85504, at *9 (E.D. Mich. 2014) (“As a resource the accuracy of which cannot reasonably be questioned, the Internet Archive has been found to be an acceptable source for the taking of judicial notice.”).

Indeed, the practice of consulting websites with pertinent information is commonplace enough that *courts* have advised parties to consult the internet for relevant evidence:

[T]he parties are advised to acquaint themselves with the Wayback Machine. Other courts have taken judicial notice of the contents of web pages available through the Wayback Machine as facts that can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. ... I will follow that approach and do the same.”

See Walsh v. Teltech Sys., 2015 U.S. Dist. LEXIS 191349, at *3-5 n.2 (D. Mass. 2015).

The Webpages Are Not Inadmissible Hearsay. Complaint Counsel also asserts a hearsay objection. But that can only apply if Respondents seek to use a website for a hearsay purpose. For the most part, it is not Respondents’ intent to introduce websites for the truth of the matter asserted, but rather for the fact of how dental buying groups publicly represent themselves, their offerings,

and their membership requirements.² This is not hearsay, and is properly subject to official notice. *See City & Cty. of S.F. v. HomeAway.com, Inc.*, 21 Cal. App. 5th 1116, 1123 n.2 (Cal. Ct. App. 1st Dist. 2018) (“Here we may take judicial notice of HomeAway’s privacy policy not for its substantive truth but because the fact that this policy exists is evidence that HomeAway subscribers and customers were on notice of certain company policies...”). Even if Respondents do seek to use websites for the truth of the matter asserted, it is still admissible because it is “relevant, material, and bears satisfactory indicia of reliability so that its use is fair.” 16 C.F.R. § 3.43(b); *see also In re PolyPore Int’l, Inc.*, 2010 FTC LEXIS 62, at *6-7 (2010) (noting that hearsay evidence may be received in FTC proceedings).

* * * *

In the end, Complaint Counsel’s generalized concerns about whether pages printed from a website are, in fact, from the website are not well founded. Complaint Counsel has not identified any specific reason to deem the website exhibits as unreliable or inadmissible. During the meet and confers, we asked Complaint Counsel to identify the exhibits that they believed were not the websites they purported to be. That request was met with silence. The exhibits should be admitted.

Dated: October 10, 2018

Respectfully submitted,

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² Complaint Counsel cites websites for this very purpose in their opposition to Patterson’s Motion for Summary Decision. CC SOF ¶ 6.

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Docket No. 9379

STATEMENT REGARDING MEET AND CONFER
PURSUANT TO 16 C.F.R. § 3.22(g)

Respondents respectfully submits this Statement, pursuant to Rule 3.22(g) of the Federal Trade Commission's Rules of Adjudicative Practice.

Respondents have met and conferred in good faith with Complaint Counsel in an effort to reach a mutually acceptable agreement on the admissibility of websites. The parties have engaged in multiple phone conferences over the past week to discuss their respective positions, but the parties have been unable to come to an agreement.

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CERTIFICATE OF ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed documents that is available for review by the parties and the adjudicator.

October 10, 2018

By: /s/ Owen T. Masters
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Notice of Electronic Service

I hereby certify that on October 10, 2018, I filed an electronic copy of the foregoing Respondents' Opposition to Complaint Counsel's Website Objections, with:

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