

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

**AMERICAN SOCIETY FOR THE
PREVENTION OF CRUELTY TO
ANIMALS, et al.,**

Plaintiffs,

v.

FELD ENTERTAINMENT, INC.,

Defendant.

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Case No. 03-2006 (EGS/JMF)

**THE ELEPHANT HUSBANDRY RESOURCE GUIDE IS ADMISSIBLE AS A
LEARNED TREATISE, OR IN THE ALTERNATIVE, PURSUANT TO
THE RESIDUAL HEARSAY EXCEPTION**

John M. Simpson (D.C. Bar #256412)
Joseph T. Small, Jr. (D.C. Bar #926519)
Lisa Zeiler Joiner (D.C. Bar #465210)
Lance L. Shea (D.C. Bar #475951)
Michelle C. Pardo (D.C. Bar #456004)
Kara L. Petteway (D.C. Bar #975541)

FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 662-0200
Facsimile: (202) 662-4643

Counsel for Defendant Feld Entertainment, Inc.

The Elephant Husbandry Resource Guide (DX 2) (“Resource Guide”) is the authoritative text for training, handling, breeding, feeding, tethering and husbandry of elephants in captivity. The Resource Guide was compiled by forty-nine contributing authors and reviewers, and after thorough review and comment, was published in 2004.¹ *See* Ex. 1 hereto (“Preface”). The authors and reviewers represent a cross-section of the elephant community; included are not only defendant’s experts (Kari Johnson, Gary Johnson, Gary Jacobson, Mike Keele and Dr. Dennis Schmitt), but also plaintiffs’ expert Colleen Kinzley, one of her colleagues at the Oakland Zoo, Dr. Karen Emmanuelson, and the veterinarian at The Elephant Sanctuary, Dr. Susan Mikota, which is the facility run by plaintiffs’ expert Carol Buckley. *See id.*

Only half of the population of captive elephants in North America are housed in AZA institutions, while the other half “are owned by circuses, non-AZA zoos, private individuals, sanctuaries, and corporations.” *See* Ex. 1. As Ms. Johnson testified on March 4 and 5, 2009, prior to the publication of the Resource Guide in 2004, there were *no* comprehensive guidelines governing the 50 percent of captive elephants in non-AZA institutions, such as the elephants owned by FEI and the elephants housed in Ms. Buckley’s sanctuary (as well as the lone elephant housed at FFA/HSUS’s Black Beauty Ranch). The purpose of the Resource Guide was to fill this void by “address[ing] the husbandry issues faced by all elephant managers, handlers and owners represented by these different types of facilities.” *Id.* To that end, the American Zoo and Aquarium Association (“AZA”), the Elephant Managers Association (“EMA”) and the International Elephant Foundation (“IEF”) published this comprehensive document which encompasses “the established standards of the United States Department of Agriculture (USDA), Elephant Managers Association (EMA), American Association of Zoos and Aquariums (AZA), and the International Elephant Foundation (IEF) as they apply to elephants.” *See* Ex. 1.

¹ The Resource Guide was first published in 2004 and that version is current to-date.

While only half of the captive elephants are housed in AZA facilities, it is these standards and these standards only upon which plaintiffs seek to rely: The AZA standards (PWC 74) were admitted into evidence during plaintiffs' case-in-chief and Ms. Kinzley opined on them. *See* Tr. Transcript 2/18/09 (afternoon session) (2:35 p.m.) at 74-77. The entire picture, however, is encompassed by the Resource Guide, which not only includes the AZA standards *but also addresses standards for the 50 percent of captive elephants which are not housed in zoos.*² To admit one set of standards or guidelines into the evidentiary record, particularly those that do not apply to FEI elephants, without admitting the other guidelines that are recognized by elephant managers from non-AZA institutions and owners, including the elephant managers at FEI, would be unfairly prejudicial to FEI and, more importantly, would not provide the Court with the guidelines that apply to a significant portion of elephants managed in captivity.

The Resource Guide was based on a thorough editing and review process,³ and its contents are based not only on practical experience by a cross-section of elephant managers,⁴ but also on a number of scientific articles and studies.⁵

I. THE RESOURCE GUIDE IS A LEARNED TREATISE

The Resource Guide is authoritative, trustworthy and was relied upon by not only Ms. Johnson, but also by a number of other of defendant's experts in reaching their opinions. It is

² Indeed, as illustrated by the March 5, 2009 testimony of Ms. Johnson, portions of the Resource Guide include "boxes" specifically referencing AZA standards, while at the same time providing guidelines tailored to non-AZA institutions. *See* Ex. 2 hereto (Excerpt on "Leg Restraints").

³ The concept for the Resource Guide was developed by the steering committee of the AZA's elephant Taxon Advisory Group ("TAG") / Species Survival Plan ("SSP"). No one from Feld Entertainment was involved in the project at that time.

⁴ Contributing authors and reviewers to this publication include veterinarians, researchers, and elephant managers and handlers from circuses, zoos, and independent owners (such as Kari Johnson at Have Trunk Will Travel). *See* Ex. 1, "Preface".

⁵ The Resource Guide includes a seventeen-page "reference" section. *See* Ex. 3 hereto. Included among the numerous references are two articles by plaintiffs' expert Gail Laule and several articles by plaintiffs' expert Dr. Joyce Poole.

therefore admissible as substantive evidence. F.R.E. 803(18) (“To the extent ... relied upon by [an] expert witness in direct examination, statements contained in published treatises, books, periodicals or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or the admission of the witness ...”).

Ms. Johnson, a contributing author and reviewer, testified as to how the Resource Guide was compiled and edited, and also testified that professionals in the field of elephant training, care, maintenance and husbandry consider it to be authoritative. *Costantino v. Herzog*, 203 F.3d 164, 171 (2d Cir. 2000) (2d Cir. 2000) (“[T]rial judges must first determine that the proffered treatise is ‘trustworthy ... as viewed by professionals in the [relevant] field.’”). This is not a case where defendant seeks to admit a publication without laying a proper foundation as to the reliability and authoritativeness of that publication. *Cf. United States v. Norman*, 415 F.3d 466, 473-74 (5th Cir. 2005) (defendant failed to proffer any foundation for learned treatise); *Schneider v. Revici*, 817 F.2d 987, 991 (2d Cir. 1987) (same). To the contrary, Ms. Johnson repeatedly testified that prior to the Resource Guide’s publication, no comprehensive publication existed that standardized and compiled all aspects of elephant husbandry and management outside of the AZA zoo standards. *See* Testimony of K. Johnson (3/4/09 & 3/5/09) (transcript pending).

Ironically, while plaintiffs now seek to argue that the Resource Guide is unreliable “advocacy piece” generated in response to this litigation, that allegation is specious at best; the testimony of their own expert indicates that even the AZA distributes the Resource Guide to all of its member institutions. Tr. Transcript 2/18/09 (morning session) (10:24 a.m.) at 92 (testimony of Colleen Kinzley); *see Costantino*, 203 F.3d at 172 (training video distributed by the American College of Obstetricians and Gynecologists a learned treatise). This theory is also

particularly dubious in light of the fact that plaintiffs' own expert, Ms. Kinzley, included the chapter that she wrote for the Resource Guide on her CV. It is highly unlikely that Ms. Kinzley would have included her contribution to the Resource Guide on her own CV if it was generated and published to allegedly support FEI's litigation defense. *See* PWC 113G (first publication on CV, "AZA Elephant Husbandry Manual").⁶

Plaintiffs' post-hoc, unsupported argument is not reason to exclude the Resource Guide as untrustworthy. M. Graham, *Federal Practice & Procedure: Evidence* § 7059 ("The burden of establishing that the authority is reliable is upon the party offering the item. ***The burden is easily satisfied.***") (emphasis added); Weinstein's *Federal Evidence* § 803.23[4] (2d ed. 1997) (citation omitted) ("Since the object of [Rule 803(18)] is to make valuable information available to the trier of fact, trial judges should not insist on a quantum of proof ... that the proponent cannot meet."). Ms. Johnson, as well as testimony from several of plaintiffs' own witnesses, provide an extensive foundation for the admissibility of this document, which satisfies FEI's burden and qualifies the Resource Guide, at a minimum, for the learned treatise exception to the hearsay rule. *See* F.R.E. 803(18).

II. THE RESOURCE GUIDE IS ADMISSIBLE AS RESIDUAL HEARSAY

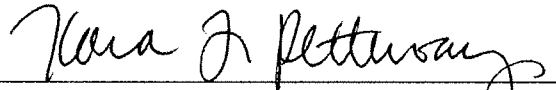
Alternatively, the Resource Guide should be admitted into evidence substantively because it meets the requirements of the residual hearsay exception, just as this Court admitted (over hearsay objections) PWC 156-159 (studies on stereotypies) and permitted Drs. Hart and Clubb to read from and opine on them. Not only is the Resource Guide reliable, trustworthy, evidence of a material fact (*i.e.*, generally accepted practices for elephants in captivity), and more probative than any other available evidence, it also is "very important and very reliable" such

⁶ Additional testimony will show that the Resource Guide was in development for years before this litigation was filed.

that it is the *best evidence to prove the defendant's point* and there is no other evidence available that would have the same influence.” *United States v. Libby*, 475 F. Supp. 2d 73, 79 (D.D.C. 2007) (Walton, J.) (emphasis added). In addition, all of defendant’s experts who have relied or will rely on the Resource Guide are contributing authors and reviewers of it; plaintiffs thus will have the ability to cross-examine each of them on the document on their reliance on it—the primary purpose of the hearsay rule. *See Sec. & Exh. Comm’n v. First City Fin. Corp.*, 890 F.2d 1215, 1225 (D.C. Cir. 1989).

Dated this 5th day of March, 2009.

Respectfully submitted,



John M. Simpson (D.C. Bar #256412)

Joseph T. Small, Jr. (D.C. Bar #926519)

Lisa Zeiler Joiner (D.C. Bar #465210)

Lance L. Shea (D.C. Bar #475951)

Michelle C. Pardo (D.C. Bar #456004)

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