UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, et al.,	)	
Plaintiffs,	)	
v.	)	**Civ. No. 03-2006 (EGS/JMF)**
FELD ENTERTAINMENT, INC.,	)	
Defendant.	)	

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MEMORANDUM IN SUPPORT OF ADMISSION OF THE ELEPHANT HUSBANDRY RESOURCE GUIDE (DX 2) AS A LEARNED TREATISE, OR IN THE ALTERNATIVE, PURSUANT TO THE RESIDUAL HEARSAY EXCEPTION

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THE ELEPHANT HUSBANDRY RESOURCE GUIDE IS UNRELIABLE, UNTRUSTWORTHY, AND INADMISSIBLE.

The Elephant Husbandry Resource Guide ("EHRG") is an advocacy piece compiled and published while this litigation was pending by, inter alia, five of defendant's six experts and four of defendant's own employees. See DX 2 at 6.[1] According to defendant's expert Kari Johnson, this "guide" is simply a collection of materials assembled without any particular methodology or underlying scientific principles. See Trial Tr. 3/5/09 a.m. session 75:17-24 (explaining that the "methodology" ""was people that knew about each subject that would write it and then everybody else would you know give their input" and that the "scientific principles" were "just what everybody knew"). In addition, in sharp contrast to the kind of materials that are normally admitted as "learned treatises," such as authoritative textbooks, none of the sections of this "guide" are even attributed to a particular author; rather, the entire EHRG is simply identified as compiled by forty-nine "contributing authors and reviewers." DX 2 at 6.

Moreover, unlike the USDA standards issued under the Animal Welfare Act ("AWA"), and the American Zoological and Aquarium Association ("AZA") Standards – to which defendant raised no objection, see Trial Tr. 2.18.09 p.m. session 77:02-06 – and which (a) are actual binding and enforceable "standards" and (b) were in effect long before this litigation began, see Trial Tr. 3/5/09 a.m. 80:02-09, none of the "guidelines" contained in the EHRG are binding on anyone. Id. 76:4-6.[2]

[1] Two of defendant's experts are also full time employees of defendant.

[2] In light of this testimony – and especially in light of the fact that defendant did not object to the admission of the AZA standards and the fact that defendant itself identified the AZA standards as an exhibit, see Def.'s Am. Pre-Trial Statement (DE 391) at 40 (listing the AZA standards as DX 236) – there is no merit whatsoever to defendant's contention that it will be "unfairly prejudic[ed]" by the exclusion of th EHRG because the AZA standards have been admitted. Indeed, numerous other "guidelines" for managing elephants in captivity exist,

Indeed, although FEI self-servingly asserts that the EHRG was needed to fill a "void" in the standards that apply to all elephants managers, Def.'s Mem. at 2, all such entities who exhibit elephants for any purpose must comply with the AWA and all USDA implementing regulations, and, as Ms. Johnson herself admitted, there certainly is nothing that prohibits those entities from also complying with the standards that have been established by the AZA and that have been in place much longer. Trial Tr. 3/4/09 p.m. 37:1-2. In fact, the EHRG itself states that it "recognize[s] the established standards of the United States Department of Agriculture (USDA), Elephants Managers Association, American Association of Zoo and Aquariums (AZA), and the International Elephant Foundation (IEF), as they apply to elephants." DX 2 at 6 (emphasis added).

In this regard, it is important to emphasize that although the AZA apparently provided some funding for the authors of the EHRG, see id. at 5, it also went out of its way to make sure that it was not viewed as endorsing any "guidelines" included in the publication that differ from those required by the AZA as generally accepted husbandry standards. On the contrary, the AZA made sure that its standards were included in shaded boxes that appear throughout the document.[3]

Nor does the fact that plaintiffs' expert Colleen Kinzley submitted a chapter on the hand-raising of elephant calves, or that it cites to publications authored by actual experts in the field, transform the EHRG into a "learned treatise." On the contrary, as Ms. Kinzley explained during her

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including the "Best Practices" that were developed by numerous scientists and lawyers and that were published in a book by Tufts University. See Expert Report of Dr. Ros Clubb, Pls.' WC Ex. 113 at 63; Expert Report of Carol Buckley, Pls.' WC Ex. 113 at 35; see also Ex. 1.

[3] Thus, for example, although some exhibitors of elephants, including defendant, only give the elephants water twice a day – and hence the elephants are completely dependent on their human caretakers for water, the AZA standards provide that "[e]lephants must have access to clean, fresh, drinking water." See DX 2 at 54 (shaded box for AZA standard) (emphasis added).

trial testimony, she has never read the EHRG in its entirety and does not agree with much of it. Trial Tr. 2/18/09 p.m. 92:14-16, 93:1-3. As she further explained at trial and at her deposition, she drafted her chapter independently and was not involved in preparing other portions of the document. Id. 92:14-16; Kinzley Dep. 91:25-92:11 (9/5/08) (Ex. 2).

I. Because It Is Not a "Reliable Authority," The EHRG Is Not A "Learned Treatise."

Because defendant has not – and cannot – establish the EHRG as a "reliable authority," it does not qualify as a "learned treatise." The "learned treatise" exception to the hearsay rule permits statements to be "read into evidence" (but not "received as exhibits") if they are "contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a **reliable authority** by the testimony or admission of the witness or by other expert testimony or by judicial notice," Fed. R. Evid. 803(18) (emphasis added), and defendant has the burden of establishing that the EHRG is a "reliable authority" within the meaning of Rule 803(18), Maggipinto v. Reichman, 481 F. Supp. 547, 550 (E.D. Pa. 1979). As the Eighth Circuit has held:

> A treatise is defined by Merriam-Webster's Collegiate Dictionary (11th ed.) as "a systematic exposition or argument in writing including a methodical discussion of the facts and principles involved and conclusions reached." [The district court abused its discretion by taking judicial notice of an article as a learned treatise where the article did] not include any "methodical discussion of the facts and principles involved." . . . Given the limited depth of the article and the author's and publisher's [commercial] interests, there is no basis upon which [to] conclude that the [article was] trustworthy in the nature of an authoritative treatise.

Baker v. Barnhart, 457 F.3d 882, 891-92 (8th Cir. 2006).

The EHRG possesses none of the assurances of trustworthiness associated with learned treatises. "First, authors of treatises have no bias in any particular case. Second, they are acutely aware that their material will be read and evaluated by others in their field, and accordingly feel a

strong pressure to be accurate." In re Welding Fume Prods. Liability Litig., 534 F. Supp. 2d 761, 765 (N.D. Ohio 2008) (quoting 2 McCormick on Evidence § 321 (6th ed. 2006)) (emphasis added in In re Welding); see also Barnhart, 457 F.3d at 891.

Neither of these assurances exist in the instant case. First, the authors of this document, defendant's employees and experts, are plainly biased. The document was put out by International Elephant Foundation – which defendant sits on the board of, Trial Tr. 3/4/09 p.m. 92: 10-25; 93:1-5 – "'with a view toward litigation. . . .[Thus,] a probability of bias exists which undermines the logic supporting the admission of this material in evidence as an exception to the rule against hearsay.'" In re Welding, 534 F. Supp. 2d at 765 (citation omitted). Second, the "pressure to be accurate" so as to protect ones reputation as a writer is significantly – if not entirely – diminished by the fact that the document is not attributed in whole or part to any individual authors.

Moreover, while it is true that in certain instances standards that actually govern practices can be learned treatises, the exception does not stretch so far as to encompass nonbinding recommendations. See Grossheim v. Freightliner Corp., 974 F.2d 745, 753-54 (6th Cir. 1992) (district court properly excluded a proffered exhibit, which included the "recommendations" of an industry groups, as hearsay; court properly concluded that the learned treatise exception was inapplicable because a "'nonbinding recommendation is not admissible as a standard'" and there was no evidence that the proffered document "constituted anything more than a recommended practice" (emphasis added)).

II. Nor Does The EHRG Fall Within The Scope Of The Residual Exception.

Defendant waived its ability to rely upon the residual exception to the hearsay rule by failing to conform to its express notice requirement. See Fed. R. Evid. 807; see also, e.g., United States v.

Cooper, 91 F. Supp. 2d 79, 81 (D.D.C. 2000) (requiring notice of intent to rely on the residual exception to the hearsay rule three days prior to the start of trial).

Furthermore, because the EHRG does not fall within the learned treatise exception because it is not reliable, then it is certainly not admissible pursuant to the residual exception. See Barry v. Trustees of Int'l Ass'n Full-Time Salaried Officers & Employees of Outside Local Unions & Dist. Counsel's (Iron Workers) Pension Plan, 467 F. Supp. 2d 91, 103 (D.D.C. 2006) (The determination of whether a statement is sufficiently trustworthy for the purposes of Rule 807 "'depends [ ] heavily upon a judgment of reliability.'" (citations omitted)). As this court recently explained:

> This Circuit has made clear that this provision is more residual than catchall, meaning that it is meant to pick up the residue of reliable and probative hearsay evidence not otherwise admissible, and is not meant to catch all of the arguably admissible evidence that rightly does not fit within the existing categories.

U.S. ex rel. Miller v. Bill Harbert Int'l Const., Inc., No. 95-1231, 2007 WL 842079, at *3 (D.D.C. Mar. 16, 2007) (citing United States v. Washington, 106 F.3d 983, 1001 (D.C. Cir. 1997)) (emphasis added).

Again, the EHRG does not possess "equivalent circumstantial guarantees of trustworthiness." Fed. R. Evid. 807. Defendant's bald and self-serving assertion that the EHRG is "reliable" and "trustworthy" does not make it so.[4] The D.C. Circuit has made clear that the residual exception to the hearsay rule is "extremely narrow and require[s] testimony to be 'very important and very reliable,'" and that the proponent "bears a heavy burden to come forward with indicia of both

[4] Defendant has failed to cite case law supporting admission of the EHRG under the residual exception. In contrast, plaintiffs' admitted scientific articles published in peer-reviewed journals pursuant to Richardson v. Richardson-Merrell, Inc., 649 F. Supp. 799, 802 n.9 (D.D.C. 1986), judgment aff'd 857 F.2d 823 (D.C. Cir. 1988) (scientific "studies which appeared in peer-reviewed professional journals were admitted into evidence under" the residual exception to the hearsay rule).

trustworthiness and probative force," Washington, 106 F.3d at 1001-02 (citation omitted) (emphases added).

Respectfully submitted,

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