

**IN THE SUPREME COURT
OF THE UNITED STATES**

Tri-State Zoological Park of Western Maryland, Inc.,
Animal Park, Care & Rescue, Inc., and Robert L. Candy

Petitioners,

v.

People for the Ethical Treatment of Animals, Inc.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

APPENDIX TO SUPPLEMENTAL BRIEF IN
SUPPORT OF
PETITION FOR WRIT OF CERTIORARI

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
–Southern Division–**

PEOPLE FOR THE ETHICAL
TREATMENT OF ANIMALS, INC.,

Plaintiff

–v–

TRI-STATE ZOOLOGICAL PARK OF
WESTERN MARYLAND, INC., *et al.*,

Defendants.

Case No. PX 17–2148

**PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC.’S MOTION
FOR ATTORNEYS’ FEES AND COSTS**

Pursuant to 16 U.S.C. § 1540(g)(4), Federal Rule of Civil Procedure 54(d), Local Rule 109.2, and this Court’s April 17, 2020, Letter Order, ECF No. 212, Plaintiff People for the Ethical Treatment of Animals, Inc. (“PETA”) respectfully moves this Court for an award of attorneys’ fees, expert witness’ fees, and nontaxable costs and expenses in the following amounts:

Attorneys’ Fees: \$ 1,267,076

Expert Witness Fees: \$44,545.27

Nontaxable Costs and Expenses: \$38,940.39

This motion is supported and more fully described by the accompanying memorandum and the supporting documentation required by Local Rule 109.2(b) and Appendix B thereto.

Date: March 8, 2021
Baltimore, Maryland

Respectfully submitted,

[/s/ Adam B. Abelson](#)

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Treatment of Animals, Inc.*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

PEOPLE FOR THE ETHICAL TREATMENT
OF ANIMALS, INC.,

Plaintiff,

vs.

TRI-STATE ZOOLOGICAL PARK OF WESTERN
MARYLAND, INC., et al.,

Defendant.

CASE NO. PX-17-cv-2148

TRANSCRIPT OF PROCEEDINGS - MOTIONS HEARING
BEFORE THE HONORABLE PAULA XINIS
UNITED STATES DISTRICT JUDGE
FRIDAY, JUNE 28, 2019; 1:00 P.M.
GREENBELT, MARYLAND

A P P E A R A N C E S

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A P P E A R A N C E S
(continued)

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1 suffices after the fact for that purpose, we obviously
2 disagree.

3 MR. YOUNG: I don't have it in front of me the
4 disclosure that we sent them but, I mean --

5 THE COURT: Can I ask an unrelated question while
6 we're doing this volley? The ESA, the Endangered Species Act,
7 does it have an attorney's fee provision?

8 MR. HASBUN: Your Honor, it has a -- I think it has a
9 prevailing party provision that is discretionary with the
10 court.

11 THE COURT: And that applies whether an organization
12 or an individual is suing a state, a sanctuary, a zoo? In
13 other words -- because I couldn't find the actual provision,
14 but I was curious as to why a zoo which proclaims not enough
15 money to hire experts who can do the heavy lifting would ever
16 be able to absorb the kinds of attorney's fees that we're
17 talking about now in the event that PETA prevails. So I wanted
18 to make sure I understood how that attorney's fee provision
19 works and make sure Mr. Candy understands it.

20 Because this is -- again, this is not the way that we
21 conduct ourselves in civil litigation. This is not trial by
22 ambush. And after I've been reviewing just stacks of documents
23 about what I thought were the issues, I'm now being told, no,
24 no, no, it's not at all what the motions are titled. Now
25 Mr. Candy is an expert.

1 MR. YOUNG: I think we did disclose him as such, and
2 they chose not to take a third deposition. I think we did
3 disclose the subject areas, but I don't have it in front of me.
4 So I'm not going to say that we necessarily did.

5 And I don't know why -- given that, I don't believe it's
6 our obligation to produce a report when the rule does not say
7 that a hybrid expert has to produce a report.

8 THE COURT: No, but you do have to -- you have to
9 give sufficient notice under Rule 26 as to the areas of expert
10 testimony and the bases therefore.

11 MR. YOUNG: I don't have it in front of me. So I
12 can't say what exactly was disclosed.

13 THE COURT: Well, then at this point I'm not going to
14 accept Mr. Candy as an expert.

15 MR. YOUNG: Okay.

16 THE COURT: And allow these statements in as part of
17 his expert opinion. If you wish for me to reconsider it later,
18 you can do so. Again, as long as the motion has legs, not
19 wasting my time.

20 MR. YOUNG: I certainly don't think we ambushed
21 anyone, Your Honor. I mean --

22 THE COURT: Well, no, but I --

23 MR. YOUNG: -- I think we were very --

24 THE COURT: You see the point --

25 MR. YOUNG: -- were very clear.

1 THE COURT: -- though is PETA is saying, listen, long
2 after discovery is over when we have filed the very robust
3 motion for summary judgment, after we've been taken around and
4 around and around about issues that we've already discussed
5 with regard to the experts that you have offered up, now we
6 hear Mr. Candy is an expert in these areas because his
7 affidavit says so, but that's long after discovery is closed.

8 MR. YOUNG: But we made the disclosure, though. We
9 disclosed that he would be --

10 THE COURT: Well, that's the part that I don't know
11 because I don't have what you say is the initial disclosure.
12 So until I see that, I can't compare it to the affidavit to
13 say, okay, PETA was on notice.

14 MR. HASBUN: Your Honor, just so that we're all on
15 the same page, the rule for hybrid experts, if I recall
16 correctly off the top of my head, requires a summary of --

17 THE COURT: Correct.

18 MR. HASBUN: -- the topics and what the opinion is.

19 THE COURT: Right. Yeah, you don't get out of doing
20 that.

21 MR. HASBUN: And my only point is I don't believe we
22 received that.

23 THE COURT: Right.

24 MR. HASBUN: We will confirm that for the Court.

25 THE COURT: But, you see, that's going to be the

1 difference maker. If you didn't receive that notice, then this
2 affidavit is just more of the same. It's after discovery is
3 closed.

4 MR. HASBUN: That's my point.

5 THE COURT: And now we've got to deal with whether
6 the -- in the light most favorable to the Zoo, PETA wins, now
7 we have what should have been provided during the course of
8 discovery. If the Zoo did disclose it, now I can consider,
9 perhaps, whether Mr. Candy, in the alternative, can be offered
10 as an expert.

11 But right now I have nothing to give me any assurance that
12 the disclosure was made. So I can only take this motion at ECF
13 119 on its face, which is assuming Mr. Candy is only a fact
14 witness, the paragraphs are stricken. And so that's where I
15 am.

16 MR. YOUNG: Your Honor, I think I've located it.
17 The -- what we said under expert witnesses in our -- it's
18 titled Expert Witness Disclosure, Summary, and Supplemental
19 Information. What we said was: "The defendants hereby
20 designate the following witnesses as experts pursuant to FRCP
21 26(a)(2), and, in summary, state, one: Robert L. Candy is a
22 party to the case and, therefore, it does not require that he
23 produce a report; however, in summary, he is qualified to
24 testify as an expert by virtue of 16 years or more of study and
25 work experience in zookeeping and animal husbandry, including

1 the keeping, feeding, and breeding of lions, tigers, and
2 lemurs.

3 "He has visited dozens of zoos and has attended training
4 conferences on the care and handling of big cats. He has read
5 widely in the field of zookeeping and has successfully kept a
6 zoo for at least fifteen years involving the care of dozens of
7 animals including several species of primates and several
8 species of big cats.

9 "He has worked closely with USDA inspectors and several
10 veterinarians on developing the best care plans for the
11 animals, including the lemurs, lions, and tigers. He
12 frequently consults with and discusses zookeeping with other
13 local zoos, including the Catoctin Zoo, The Maryland Zoo, and
14 Natural Bridge Zoo.

15 "Mr. Candy is expected to opine that large cats at
16 Tri-State Zoo are appropriately cared for and that the lemurs
17 when they were at Tri-State Zoo were appropriately cared for.

18 "He is expected to testify that there has been no harm or
19 harassment of the animals at the Zoo and that the Zoo is
20 presently in compliance with all requirements of the USDA
21 regulations governing zoos." [As read.]

22 That was sent to counsel along with an offer -- with
23 designations of the other experts and with an offer of taking
24 the depositions of all of them, including a third deposition of
25 Mr. Candy. They did take the depositions of the others. They

1 declined to take Mr. Candy's deposition pursuant to that
2 disclosure.

3 THE COURT: Okay. So now we've got the proffer that
4 the expert disclosure was made.

5 MR. HASBUN: Your Honor --

6 MR. YOUNG: Sorry. Just for the record, that was
7 July 9th I believe.

8 THE COURT: Of what, 2018?

9 MR. YOUNG: 2018.

10 MR. HASBUN: And, Your Honor, so then the question
11 then becomes then if all of the experts that were proffered by
12 Tri-State, including Dr. Simms, Dr. Duncan, and Darcey Bowen
13 were also hybrid experts, which is what he said repeatedly in
14 his response to our motions to exclude and that he wasn't
15 required to give us reports but he did so in an abundance of
16 caution, then I'm failing to see the linear logic in terms of
17 not doing the same for us with respect to Mr. Candy.

18 THE COURT: Yeah, I know, but the rule is if offered
19 as a hybrid, don't need to give a report. And he did disclose
20 in advance of discovery closing the areas of expertise. In
21 theory, a number of these statements actually fall within it.

22 Now, listen, it's thin, and I've got a real question as
23 to -- we'll get to the summary judgment motion for PETA, and
24 maybe we'll talk about how this looks if and when we have to go
25 to trial, because -- and just think about this as we march

1 through these. You have moved for summary judgment on a number
2 of different grounds for a "take" for the lion, the tigers, and
3 the lemurs -- now, I don't know whether you would agree that
4 it's mooted just because lemurs aren't there.

5 MR. HASBUN: We don't agree that it's mooted, Your
6 Honor.

7 THE COURT: So but here's my question: If I were to
8 find, in theory, I'd grant summary judgment as to a "take" as
9 to each category of animal on one ground, is there a need for
10 trial on the others if I were denying on the others? So, for
11 example, if I were to grant summary judgment for lack of
12 appropriate enrichment and that that constituted harassment
13 under the very specific definition of a "take," do I, should I,
14 is there a reason to have trial on lack of adequate veterinary
15 care, which would be an alternative or maybe an additional
16 ground?

17 How does it all work under this statute?

18 MR. HASBUN: Your Honor, what we -- so what we think
19 would -- we think that any one of these "takes" independent of
20 one another is significant and would require significant
21 remedy, including the transfer of the animals to a facility
22 that's not only willing but also has the resources and the
23 knowledge and the skill to actually take care of these exotic
24 creatures.

25 In terms of how it works, I mean, there is -- we would be

1 pleased to brief the issue, you know, to -- a lot of it I think
2 depends on what the Court actually finds in terms of which
3 "takes" have occurred. I mean, obviously, we're talking about
4 three different animals. We're talking about the lemurs,
5 tigers, and the lion.

6 So to the extent that the Court were to find summary
7 judgment and find a "take" occurred as to the tiger and the
8 lion -- or the lion -- sorry -- the lion and the lemur but not
9 the tigers, then, obviously, you know, we still care about the
10 remaining animal.

11 THE COURT: It's really breaking down in my mind now
12 not so much along the lines of animals but more on the grounds
13 of.

14 MR. HASBUN: That would transcend the animals?

15 THE COURT: Correct. So just from a 30,000 foot view
16 without, you know, having to fully decide this issue, I see
17 genuine issues of disputed fact on veterinary care but not as
18 much on adequate enrichment, adequate environment, and for some
19 adequate shelter. There is some -- some areas where there may
20 be disputed issues of fact.

21 So for me it's more -- and this is why it matters because
22 if Mr. Candy now has any legs as an expert, then we may have
23 some issues with regard to even the ones where I thought that
24 the evidence viewed most favorably to the Zoo was unrebutted in
25 PETA's favor.

1 So now - you see now it's getting a bit complicated. So I
2 want to sort of understand what is the most efficient way for
3 us to handle this. The reason I ask is this: If it was PETA's
4 position that granting on some grounds but denying on others
5 would not obviate the need for a trial because we still would
6 want -- wish to try these other areas to make the case as
7 strong as possible for the relief we're requesting, that's one
8 avenue; or, alternatively, you would say, no, Judge, if you
9 find a ground on which to grant summary judgment, then we're
10 moving to the remedy phase, and all of the other information
11 may be relevant to remedy, but we don't necessarily need to try
12 the case.

13 MR. HASBUN: Your Honor, may I consult with our
14 client?

15 THE COURT: Sure.

16 (Brief pause.)

17 MR. HASBUN: Your Honor.

18 THE COURT: Yep.

19 MR. HASBUN: So with respect to -- if the Court were
20 to find that a "take" had occurred with respect to each -- that
21 transcends all of the animals that are at issue and the remedy
22 -- the remedy that PETA is seeking from the outset of the case
23 is an injunction permanently enjoining Mr. Candy and his zoo
24 from ever owning these species again and also transferring them
25 to a facility like I said before that is willing, able, and has

1 the skill and knowledge to actually take care of these animals,
2 then to the extent that that is a remedy that the Court is
3 prepared to provide based on the "takes" that it may find have
4 occurred on summary judgment, then we don't -- we don't see the
5 need for a trial.

6 THE COURT: Has your client given any thought to --
7 while summary judgment is all fine and good, it's also less
8 bullet proof on appeal. And since this is a bench trial, this
9 Court can do it and would do it whenever you tell me you're
10 ready. We can streamline it. There is a lot of evidence I
11 already have. I feel like I know the case well enough to say
12 what I need to hear and what I don't. And given now that there
13 is this late-breaking issue that Mr. Candy is, in fact, an
14 expert, does it make sense, especially if you're asking for
15 this drastic remedy of never having these kinds of animals
16 again, to set this case in for a trial?

17 MR. HASBUN: I think so.

18 MR. YOUNG: Your Honor?

19 THE COURT: Yep.

20 MR. YOUNG: May I speak briefly on that issue -- and
21 I know we actually filed a motion way long time ago with Judge
22 Garvis raising some of the problematic interpretations of the
23 Endangered Species Act.

24 I think some of the difficulty is although regulatory
25 agencies and some courts have since taken a different view, I

1 think the statute itself was always just contemplated to apply
2 to wildlife in the wild. Now, I know that's not how --

3 THE COURT: Hasn't that ship sailed? We've already
4 discussed this, right?

5 MR. YOUNG: Well, but the difficulty is the relief
6 provided in the statute is so narrowly tailored to that end
7 that it doesn't really -- I don't think it even gets where PETA
8 wants to go with it.

9 THE COURT: But that is not before me, and you've
10 argued preemption. You've argued statutory interpretation.
11 We've ruled. As a matter of fact, I'm now going to have to
12 revisit standing because no doesn't mean no for the Zoo. So
13 I'm going to do that in a moment, but that is just not going to
14 hunt right now. Right?

15 So I'm dealing with whether there is a factual basis to go
16 forward and, frankly, my position is finding to the Zoo because
17 you're going to have an opportunity to defend not in the light
18 most favorable. It means PETA is going to have to hold their
19 own and prove that a "take" has occurred. So --

20 MR. YOUNG: I guess also the other point I would make
21 is that on summary judgment, without hearing further evidence,
22 it's difficult for the Court to know what the appropriate
23 relief would be even if --

24 THE COURT: Correct, which is why -- the answer that
25 PETA just gave is let's set this in for trial. So you two