Nos. 16-1624, 16-3147

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

TRACEY K. KUEHL, LISA K. KUEHL, KRISS A. BELL, NANCY A. HARVEY, JOHN T. BRAUMANN, ANIMAL LEGAL DEFENSE FUND,

Plaintiffs-Appellees/Cross-Appellants,

v.

PAMELA SELLNER, TOM SELLNER, CRICKET HOLLOW ZOO, INC.,

Defendants-Appellants/Cross-Appellees.

On Appeal from the United States District Court
for the Northern District of Iowa
Case No. C14-2034
Hon. Jon Stuart Scoles, Chief Magistrate Judge

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC. IN SUPPORT OF PLAINTIFFS-APPELLEES/CROSS-APPELLANTS AND IN SUPPORT OF REVERSAL OF THE ORDER DENYING ATTORNEYS' FEES

Sean M. Sherman
Michael T. Kirkpatrick
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

January 6, 2017

Attorneys for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel certifies that amicus curiae Public Citizen, Inc. is a nonprofit, non-stock corporation. It has no parent corporations, and no publicly traded corporations have an ownership interest in it.

/s/ Sean M. Sherman
Sean M. Sherman
Attorney for Public Citizen, Inc.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

I. Fee-Shifting Provisions Promote Important Federal Policies by Encouraging Private Enforcement. 4

II. "Whenever … Appropriate" Fee-Shifting Provisions Make a Broad Class of Plaintiffs Eligible for Attorneys' Fee Awards. 8

III. The District Court Erred by Denying an Attorneys' Fee Award 15

A. The district court incorrectly applied an ERISA standard to determine whether to award attorneys' fees under the Endangered Species Act. 16

B. No special circumstances justify denial of attorneys' fees in this case. 18

CONCLUSION 24

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases **Page(s)**

Ackerley Communications, Inc. v. City of Salem,
752 F.2d 1394 (9th Cir. 1985) 23

American Canoe Ass'n, Inc. v. EPA,
138 F. Supp. 2d 722 (E.D. Va. 2001) 10

Animal Welfare Institute v. Feld Entertainment, Inc.,
944 F. Supp. 2d 1 (D.D.C. 2013) 14

Ass'n of California Water Agencies v. Evans,
386 F.3d 879 (9th Cir. 2004) 12

Bennett v. Spear,
520 U.S. 154 (1997) 8, 20

Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources,
532 U.S. 598 (2001) 11

Bunn v. Central Realty of Louisiana,
592 F.2d 891 (5th Cir. 1979) 22

Center For Biological Diversity v. Marina Point Development Co.,
566 F.3d 794 (9th Cir. 2009) 21

Christiansburg Garment Co. v. EEOC,
434 U.S. 412 (1978) 20

Citizens Legal Environmental Action Network, Inc. v. Premium Standard Farms,
397 F.3d 592 (8th Cir. 2005) 21

Conservation Force v. Salazar,
753 F. Supp. 2d 29 (D.D.C. 2010) 10

DeJesus Nazario v. Morris Rodriguez,
554 F.3d 196 (1st Cir. 2009) 19

Duncan v. Poythress,
777 F.2d 1508 (11th Cir. 1985) 23

Ellwest Stereo Theater, Inc. v. Jackson,
653 F.2d 954 (5th Cir.1981) 23

Environmental Defense Fund, Inc. v. EPA,
672 F.2d 42 (D.C. Cir. 1982) 14

Federation of Fly Fishers v. Daley,
200 F. Supp. 2d 1181 (N.D. Cal. 2002) 10

Florida Key Deer v. Board of County Commissioners for Monroe County, Florida,
772 F. Supp. 601 (S.D. Fla. 1991) 10

Gore v. Turner,
563 F.2d 159 (5th Cir. 1977) 21

Hatfield v. Hayes,
877 F.2d 717 (8th Cir. 1989) 19

Hensley v. Eckerhart,
461 U.S. 424 (1983) 12

Idaho Watersheds Project v. Jones,
253 F. App'x 684 (9th Cir. 2007) 10, 21

Inmates of Allegheny County Jail v. Pierce,
716 F.2d 177 (3d Cir. 1983) 22

Iowa League of Cities v. EPA,
711 F.3d 844 (8th Cir. 2013) 18

Jones v. Wilkinson,
800 F.2d 989 (10th Cir. 1986) 23

Lefemine v. Wideman,
758 F.3d 551 (4th Cir. 2014) 18, 19

Lenard v. Argento,
699 F.2d 874 (7th Cir. 1983) 22

Loggerhead Turtle v. County Council of Volusia County, Florida, 307 F.3d 1318 (11th Cir. 2002) 11, 12, 14

Martin v. Arkansas Blue Cross & Blue Shield,
299 F.3d 966 (8th Cir. 2002) 16, 17, 18, 19

McLean v. Arkansas Board of Education,
723 F.2d 45 (8th Cir.1983) 23

Milwe v. Cavuoto,
653 F.2d 80 (2d Cir. 1981) 23

New York Gaslight Club, Inc. v. Carey,
447 U.S. 54 (1980) 6, 22

Newman v. Piggie Park Enterprises, Inc.,
390 U.S. 400 (1968) ..... *passim*

Northcross v. Board of Education Of Memphis City Schools,
412 U.S. 427 (1973) 13

Northeast Iowa Citizens For Clean Water v. Agriprocessors, Inc.,
489 F. Supp. 2d 881 (N.D. Iowa 2007) 21

Northwest Indian Cemetery Protective Ass'n v. Peterson,
589 F. Supp. 921 (N.D. Cal. 1983) 14

Ohio River Valley Environmental Coalition, Inc. v. Green Valley Coal Co.,
511 F.3d 407 (4th Cir. 2007) 12

Ohio River Valley Environmental Coalition, Inc. v. Timmermeyer,
363 F. Supp. 2d 849 (S.D.W. Va. 2005) 21

Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,
478 U.S. 546 (1986) 8, 13

Pound v. Airosol Co.,
498 F.3d 1089 (10th Cir. 2007) 10, 21

Ruckelshaus v. Sierra Club,
463 U.S. 690 (1983) ..... *passim*

Save Our Sound Fisheries Ass'n v. Callaway,
429 F. Supp. 1136, 1146 (D.R.I. 1977) 14

Sierra Club v. EPA,
322 F.3d 718 (D.C.Cir. 2003) 12

St. John's Organic Farm v. Gem County Mosquito Abatement District,
574 F.3d 1054 (9th Cir. 2009) 6, 7, 14

St. Louis Fire Fighters Ass'n Int'l Ass'n of Fire Fighters Local 73 v. City of St. Louis,
96 F.3d 323 (8th Cir. 1996) 6

Starr v. Metro Systems, Inc.,
461 F.3d 1036 (8th Cir. 2006) 18, 20

Strahan v. Holmes,
686 F. Supp. 2d 129 (D. Mass. 2010) 21

Tennessee Valley Authority v. Hill,
437 U.S. 153 (1978) 7, 8, 17, 20

Williams v. Miller,
620 F.2d 199 (8th Cir. 1980) 6

Statutes

15 U.S.C. § 2618(d) 14

16 U.S.C. § 1531 7

16. U.S.C. § 1540(g)(1) 7

16 U.S.C. § 1540(g)(4) ..... *passim*

33 U.S.C. § 1365 7

33 U.S.C. § 1365(a) 7

42 U.S.C. § 1988 ..... 11, 13

42 U.S.C. § 7604 6

42 U.S.C. § 7604(a) 7

42 U.S.C. § 7604(d) 13

42 U.S.C. § 7607(f) 9

INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Public Citizen, Inc. submits this brief in support of plaintiffs-appellees/cross-appellants (hereafter, plaintiffs), to address the district court's error in denying an award of attorneys' fees. Although plaintiffs prevailed in the underlying litigation by obtaining an enforceable order requiring defendants to take steps to transfer the endangered species in their possession to an appropriate facility capable of meeting the needs of the animals, the district court sua sponte declined to award attorneys' fees and costs and rejected the plaintiffs' motion for leave to file an application for attorneys' fees under 16 U.S.C. § 1540(g)(4). In so doing, the court noted no special circumstances that would make an award of fees unjust.

Public Citizen is a nonprofit, consumer advocacy organization that appears on behalf of its members and supporters nationwide, working for enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen often represents members' interests in

---

[1]Amicus curiae has moved for leave to file this brief. No party's counsel authored this brief in whole or in part, and no party or party's counsel made a monetary contribution to fund the preparation or submission of this brief. No person or entity other than amicus made a monetary contribution to the preparation or submission of this brief.

litigation and as amicus curiae. Public Citizen supports fee-shifting as a means of promoting access to the civil justice system, and is concerned that the district court's decision, if affirmed, would impede the use of fee-shifting statutes and undermine the incentive Congress created for private enforcement of the Endangered Species Act. Public Citizen and its attorneys have filed amicus briefs or represented parties on attorneys' fee issues in cases including *Price v. District of Columbia*, 792 F.3d 112 (D.C. Cir. 2015), *Perdue v. Kenny A.*, 559 U.S. 542 (2010), *Richlin Security Service Co. v. Chertoff, Secretary of Homeland Security*, 553 U.S. 571 (2008), *Sole v. Wyner*, 551 U.S. 74 (2007), *Scarborough v. Principi*, 541 U.S. 401 (2004), and *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598 (2001).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

To encourage individuals to serve as private attorneys general, and to offset the expense they incur filing citizen-suits to enforce the Endangered Species Act, the Act, like many similar public-interest statutes, includes a fee-shifting provision. The provision authorizes courts to award attorneys' fees to "any party … whenever the court determines such award is appropriate." 16 U.S.C. § 1540(g)(4). Here, despite plaintiffs' success on the merits, the district court denied an award of fees or costs. When plaintiffs then moved for leave to file a motion for attorneys' fees and costs, the district court denied the motion. The court erred and its order denying a fee award should be reversed.

The Supreme Court has long recognized that because fee-shifting provisions encourage private enforcement of important national priorities, courts should ordinarily award attorneys' fees to successful plaintiffs in cases brought under those provisions, absent "special circumstances." The Court has extended this reasoning to the Endangered Species Act and other environmental statutes with analogous fee-shifting provisions. To the extent there are linguistic differences among fee-shifting provisions, the Supreme Court and

Congress have made it clear that "whenever … appropriate" fee-shifting provisions, such as the provision in the Endangered Species Act, are meant to broaden the class of plaintiff who may obtain attorneys' fees beyond those eligible under "prevailing party" fee-shifting provisions.

Moreover, the test applied in ERISA cases is inapplicable to cases under the Endangered Species Act. The reasons this Court departed in the ERISA context from the general rule that fees should be awarded to a successful party in litigation brought under a federal fee-shifting statute absent special circumstances cut against doing so here.

Applying the appropriate standard, plaintiffs' were eligible for and entitled to an award of attorneys' fees in this case.

ARGUMENT

I. Fee-Shifting Provisions Promote Important Federal Policies by Encouraging Private Enforcement.

Under the generally applicable "American Rule," each party to a lawsuit pays its own legal fees. A number of statutes, however, include fee-shifting provisions to encourage plaintiffs to bring private suits to enforce the important public policies embodied in those statutes.

The importance of fee-shifting to encourage socially beneficial litigation was recognized by the Supreme Court in, among numerous

other cases, *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). *Piggie Park* was an action brought under Title II of the Civil Rights Act of 1964 to enjoin racial discrimination by a restaurant chain. Title II has a fee-shifting provision authorizing an award of reasonable attorneys' fees to the "prevailing party" at the court's "discretion," but the Fourth Circuit had instructed the district court to award fees only to the extent that the defendant's defenses had been advanced in bad faith or for improper purposes. *Id.* at 401. The Supreme Court rejected that standard, finding instead that "one who succeeds in obtaining an injunction under [Title II] should ordinarily recover an attorneys' fee unless special circumstances would render such an award unjust." *Id.* at 402. The Court's holding was driven by the recognition that Congress included a fee-shifting provision in the statute "to encourage individuals injured by racial discrimination to seek judicial relief under Title II." *Id.* As the Court explained, "[i]f successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts." *Id.*

Since *Piggie Park*, it has become well-established that when a "prevailing party" fee-shifting provision is involved, even where the provision uses the term "discretion," a district court's discretion to deny attorneys' fees is "narrow," and attorneys' fees should be awarded absent "special circumstances," which will be exceedingly rare. *See N.Y. Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 68 (1980); *St. Louis Fire Fighters Ass'n Int'l Ass'n of Fire Fighters Local 73 v. City of St. Louis*, 96 F.3d 323, 331 (8th Cir. 1996); *see also St. John's Organic Farm v. Gem Cty. Mosquito Abatement Dist.*, 574 F.3d 1054, 1062 (9th Cir. 2009) ("[F]ee awards should be the rule rather than the exception.") (internal quotation marks and citation omitted). The burden of proof for showing "special circumstances" is on the losing defendant. *See Williams v. Miller*, 620 F.2d 199, 202 (8th Cir. 1980).

After *Piggie Park*, in an effort to harness the assistance of private enforcement to address the national priority of protecting the environment, Congress extended fee-shifting to a number of environmental statutes. *See, e.g.*, 42 U.S.C. § 7604 (Clean Air Act); 33 U.S.C. § 1365 (Clean Water Act). Among these was the Endangered Species Act, 16 U.S.C. § 1531, *et seq.*, which "represented the most

comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 179 (1978). Congress added an innovation in many of these environmental statutes—citizen-suit provisions that authorize individuals to bring actions against governments or private parties for violating that law. *See, e.g.*, 16 U.S.C. § 1540(g)(1) (Endangered Species Act); 33 U.S.C. § 1365(a) (Clean Water Act); 42 U.S.C. § 7604(a) (Clean Air Act); *see St. John's Organic Farm*, 574 F.3d at 1063 ("The [Clean Air Act], the [Endangered Species Act] … and the [Clean Water Act] are all broad public interest statutes that authorize citizen suits to enforce their substantive provisions.").

Unlike the fee-shifting provision at issue in *Piggie Park*, which authorizes attorneys' fees to a "prevailing party" at "the court's discretion," 390 U.S. at 401, the fee-shifting provisions in the Endangered Species Act and numerous other environmental statutes provide that a court may award attorneys' fees to "any party, whenever the court determines such award is appropriate," 16 U.S.C. § 1540(g)(4); *see Ruckelshaus v. Sierra Club*, 463 U.S. 680, 681 n.1 (1983) (listing 16 analogous provisions in environmental statutes). Despite the variance in

language between "prevailing party" and "whenever … appropriate" fee-shifting provisions, the provisions share the same purpose: to incentivize enforcement by citizens acting as private attorneys general. *See Bennett v. Spear*, 520 U.S. 154, 165 (1997) (noting that the "obvious purpose" behind the citizen-suit and fee-shifting provisions in the Endangered Species Act is "to encourage enforcement by so-called 'private attorneys general'—evidenced by its … provision for recovery of the costs of litigation."); *Hill*, 437 U.S. at 179 (explaining that "[c]itizen involvement was encouraged by the [Endangered Species Act], with provisions allowing interested persons to … bring civil suits in United States district courts to force compliance with any provision of the Act."). The common purpose of these attorneys' fees provisions counsels strongly in favor of a common interpretation, including the award of attorneys' fees absent special circumstances. *See Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 559-60 (1986).

II. "Whenever … Appropriate" Fee-Shifting Provisions Make a Broad Class of Plaintiffs Eligible for Attorneys' Fee Awards.

Two inquiries are relevant to consideration of whether to award attorneys' fees. First, courts consider whether the plaintiff has achieved a level of success to be eligible for an award. Importantly, "whenever …

appropriate" fee-shifting provisions allow for a *broader* group of plaintiffs to be eligible for an award of attorneys' fees than "prevailing party" provisions. Thus, in most cases brought under a statute containing a "whenever … appropriate" fee-shifting provision, a plaintiff who has achieved "some success" will be eligible for an award of fees.

In *Ruckelshaus*, the Supreme Court considered an award of fees under section 307(f) of the Clean Air Act, a provision substantively identical to section 1540(g)(4) of the Endangered Species Act. 463 U.S. at 688.[2] The Court held that, although an award requires "some success," the "whenever … appropriate" language provides for attorneys' fees for a *broader* class of plaintiffs than the "prevailing party" provisions. *Id.* at 682, 687. The Court explained that "Section 307(f) was meant to expand the class of parties eligible for fee awards from prevailing parties to *partially prevailing* parties—parties achieving *some success*, even if not major success." *Id.* at 688 (emphasis in original). The Court explained that its "interpretation of 'appropriate' in § 307(f) controls construction of

[2] Section 307(f) provides, "[i]n any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such an award is appropriate." 42 U.S.C. § 7607(f).

the term in these statutes," including section 1540(g)(4) of the Endangered Species Act. *Id.* at 681 n.1.

Following *Ruckelshaus*, most courts that have considered whether a plaintiff may be awarded fees under "whenever … appropriate" provisions have solely considered whether a plaintiff achieved "some success." *See, e.g.*, *Idaho Watersheds Project v. Jones*, 253 F. App'x 684, 685 (9th Cir. 2007); *Conservation Force v. Salazar*, 753 F. Supp. 2d 29 (D.D.C. 2010); *Am. Canoe Ass'n, Inc. v. EPA*, 138 F. Supp. 2d 722, 732 (E.D. Va. 2001).[3] In opinions addressing fee awards under a "whenever … appropriate" provision, amicus has not found any decision by any court applying a multi-factor approach comparable to the standard applied by the district court.

[3] A few district court opinions have added a second consideration: whether the suit "served the public interest." *See, e.g.*, *Fed'n of Fly Fishers v. Daley*, 200 F. Supp. 2d 1181, 1187 (N.D. Cal. 2002); *Fla. Key Deer v. Bd. of Cty. Comm'rs for Monroe Cty.*, 772 F. Supp. 601, 602 (S.D. Fla. 1991). This consideration, however, is not required by the plain text of the provision. *See Pound v. Airosol Co.*, 498 F.3d 1089 (10th Cir. 2007) (Hartz, J., concurring in judgment) ("A party seeking attorney fees under [the Clean Air Act] need not make a separate showing that it is serving the public interest."). Regardless, this case would satisfy that criterion because it served the public interest.

Further illustrating the breadth of the statutory language, the "catalyst theory" may provide an appropriate basis for a fee award under a "whenever … appropriate" statute, although that theory is not an appropriate basis for an award under "prevailing party" provisions. Under the catalyst theory, a plaintiff is considered eligible for an award of attorneys' fees if she achieved her desired result "because the lawsuit brought about a voluntary change in the defendant's conduct," even if the suit did not result in a victory in court. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 601 (2001). In *Buckhannon*, the Supreme Court rejected the catalyst theory as a basis for fee-shifting under a "prevailing party" provision, 42 U.S.C. § 1988. *Buckhannon*, 532 U.S. at 605. The Court held that because "prevailing party" status requires an alteration in the *legal* relationship between the parties, a party is only a "prevailing party" when she has obtained judicial relief, either by judgment or consent decree. *Id.* This holding has been extended to the full range of other "prevailing party" fee-shifting provisions. Nonetheless, courts to have addressed the question unanimously agree that the catalyst theory may form the basis for a fee award under "whenever … appropriate" fee-shifting provisions. *See Ohio*

River Valley Envtl. Coal., Inc. v. Green Valley Coal Co., 511 F.3d 407, 414 (4th Cir. 2007); *Ass'n of Cal. Water Agencies v. Evans*, 386 F.3d 879, 885 (9th Cir. 2004); *Sierra Club v. EPA*, 322 F.3d 718 (D.C. Cir. 2003); *Loggerhead Turtle v. Cty. Council of Volusia Cty., Fla.*, 307 F.3d 1318, 1324 (11th Cir. 2002) (collecting cases).

The second inquiry for consideration of whether to award attorneys' fees is whether "special circumstances" would make an award unjust. As numerous federal courts have recognized, a plaintiff who has achieved "some success" in a case brought under a statute containing a "whenever … appropriate" fee-shifting provision should be awarded attorneys' fees absent special circumstances. This principle applies in cases under the Endangered Species Act.

In *Hensley v. Eckerhart*, the Supreme Court held, based on the purpose and history behind 42 U.S.C. § 1988, that a "prevailing party" should be awarded attorneys' fees absent special circumstances. 461 U.S. 424, 429 (1983). Subsequently, the Court explained that this aspect of its interpretation of 42 U.S.C. § 1988 extends to section 304(d) of the Clean Air Act, a citizen-suit fee-shifting provision similar to the relevant provision in the Endangered Species Act. *See Del. Valley*, 478 U.S. at 559-

560 (relying on cases under 42 U.S.C. § 1988).[4] The Court explained that, "[g]iven the common purpose of both § 304(d) and § 1988 to promote citizen enforcement of important federal policies, we find no reason not to interpret both provisions governing attorney's fees in the same manner." *Del. Valley*, 478 U.S. at 560.

The texts of section 1540(g)(4) of the Endangered Species Act and section 304(d) of the Clean Air Act are substantively the same and, accordingly, should be interpreted consistently. *See Northcross v. Bd. of Educ. of Memphis City Schs.*, 412 U.S. 427, 428 (1973) (explaining that similar attorneys' fee provisions "should be interpreted *pari passu*," especially where the provisions exist to incentivize private attorneys general to vindicate national policy); *see also Ruckelshaus*, 463 U.S. at 681 n.1 (noting 17 federal statutes that contain provisions for awards of attorneys' fees using "whenever … appropriate" language and stating that its interpretation of "appropriate" controls the construction of the term in each). Thus, several courts have recognized that under the

[4] Section 304(d) provides that "[t]he court, in issuing any final order in any suit brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate." 42 U.S.C. § 7604(d).

Endangered Species Act and the other fee-shifting provisions listed in *Ruckelshaus*, attorneys' fees should be awarded unless special circumstances would render an award unjust. *See St. John's Organic Farm*, 574 F.3d at 1063; *Animal Welfare Inst. v. Feld Entm't, Inc.*, 944 F. Supp. 2d 1, 14 (D.D.C. 2013); *Nw. Indian Cemetery Protective Ass'n v. Peterson*, 589 F. Supp. 921, 927 (N.D. Cal. 1983); *Save Our Sound Fisheries Ass'n v. Callaway*, 429 F. Supp. 1136, 1146 (D.R.I. 1977). Furthermore, "prior legislative history for similar environmental statutes employing identical 'whenever … appropriate' language is directly on point" and lends strong support to the conclusion that a plaintiff who has achieved "some success" should be awarded attorneys' fees absent special circumstances. *Loggerhead Turtle*, 307 F.3d at 1325. *See, e.g.*, *Envt'l Def. Fund, Inc. v. EPA*, 672 F.2d 42, 49 (D.C. Cir. 1982) (quoting Sen. Tunney's statement that "[the attorneys' fee] provision [of the Toxic Substances Control Act of 1976] would allow an award of fees and costs to any party when 'appropriate' …. [I]n typical circumstances, the court should follow prevailing case law which holds that a successful plaintiff 'should ordinarily recover in [sic] attorneys' fee unless special circumstances would render such an award unjust.'").

III. The District Court Erred by Denying an Attorneys' Fee Award.

Below, although the district court held that Cricket Hollow Zoo and its owners (collectively, defendants) had been engaged in longstanding violations of the Endangered Species Act and ordered the removal of endangered species from the Zoo, it nonetheless denied plaintiffs an award of attorneys' fees and costs. Appellant Add. 72-73. When plaintiffs moved to amend the judgment to enable them to move for attorneys' fees, the Zoo did not contest the amount of fees or whether plaintiffs had achieved some success. ALDF Add. 13. The Zoo argued only that it should not be "punished" by having to pay plaintiffs' attorneys' fees. In ruling on the motion to amend the judgment, the district court applied a multi-factor test borrowed from an ERISA case and denied all attorneys' fees to the plaintiffs, despite their success. *Id.* at 15. The court erred in applying the ERISA standard in this Endangered Species Act case and, because no special circumstances would render an award in this case unjust, erred in denying an award of attorneys' fees.

A. The district court incorrectly applied an ERISA standard to determine whether to award attorneys' fees under the Endangered Species Act.

Rather than consider whether special circumstances would render an award of attorneys' fees unjust, the district court applied a multi-factor test taken from ERISA cases. *Id.* at 15. The reasons this Court concluded that, in the context of ERISA, attorneys' fees should not be awarded in the ordinary course—namely, that ERISA is designed to protect individual economic rights, not important societal goals, and that the text and legislative history behind ERISA do not support the regular award of attorneys' fees—do not apply in the context of the Endangered Species Act. To the contrary, as discussed above, a plaintiff who has achieved some success under the Endangered Species Act should be awarded attorneys' fees unless special circumstances would render an award unjust.

The test applied by the district court was set out in *Martin v. Arkansas Blue Cross & Blue Shield*, 299 F.3d 966, 969-70 (8th Cir. 2002) (en banc).[5] The Court reasoned that, unlike the civil rights statutes at

[5] ERISA's fee-shifting provision provides that, "[i]n any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may

issue in *Piggie Park* and *Hensley*, which were "enacted to further important societal goals or policies that Congress considered of the highest priority," "ERISA involves vindication of statutory, economic rights" only, and therefore ERISA plaintiffs should not be awarded attorneys' fees in the ordinary course. *Id.* at 971. The Court further found that the fee-shifting provision was "neutral" and "discretionary," and that the legislative history did not compel a contrary conclusion. *Id.*

The reasons for adopting a multi-factor test for ERISA cases do not apply in the context of Endangered Species Act litigation. *First*, the Endangered Species Act is *not* a personal economic statute, but was enacted to further the federal policy of preserving endangered species. *See Hill*, 437 U.S. at 174-76. *Second*, as explained above, courts, including the Supreme Court, have interpreted the text and legislative history of the Endangered Species Act and analogous "whenever … appropriate" fee-shifting provisions to require the award of attorneys' fees to plaintiffs who have achieved some success unless special circumstances would render such an award unjust.

---

allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g).

Not surprisingly, in a case after *Martin* involving another "whenever … appropriate" provision, this Court did not invoke the *Martin* factors. *See Iowa League of Cities v. EPA*, 711 F.3d 844, 878 n.20 (8th Cir. 2013) (noting under the Clean Water Act that an award is "appropriate" when a party has advanced the goals of the statute invoked in the litigation).[6] Accordingly, here, the district court erred in applying the *Martin* factors to deny reasonable attorneys' fees to the successful plaintiffs.

B. No special circumstances justify denial of attorneys' fees in this case.

Because plaintiffs indisputably achieved "some success," the district court should have awarded attorneys' fees "unless special circumstances would render such an award unjust." *Piggie Park*, 390 U.S. at 402. "Courts have universally recognized that [the] special circumstances exception is very narrowly limited." *Lefemine v. Wideman*, 758 F.3d 551, 555 (4th Cir. 2014) (rejecting three different proffered "special circumstances") (citation omitted and alteration in *Lefemine*); *see*

[6] Even applying the *Martin* factors, a successful plaintiff should "rarely fail[] to receive fees." *See Starr v. Metro Sys., Inc.*, 461 F.3d 1036, 1041 (8th Cir. 2006) (reversing denial of attorneys' fees in an ERISA case).

Hatfield v. Hayes, 877 F.2d 717, 720 (8th Cir. 1989) (explaining that "special circumstances" should be "narrowly construed"). "Indeed, [o]nly on rare occasions does a case present such circumstances." *Lefemine*, 758 F.3d at 555 (citation omitted and alteration in *Lefemine*); *see, e.g.*, *DeJesus Nazario v. Morris Rodriguez*, 554 F.3d 196, 200 (1st Cir. 2009) (stating that the special circumstances justifying denial of attorneys' fees are "few and far between").

Looking to the *Martin* factors, the district court held that plaintiffs were not entitled to attorneys' fees because defendants (1) did not act in bad faith, (2) were private parties, not a government entity, (3) lacked the ability to pay, and (4) an award of fees would have a chilling effect on private animal owners litigating against "well-financed national organizations." ALDF Add. 15. None of these reasons constitute "special circumstances" justifying denial of a fee award, and all are contrary to the purpose behind the fee-shifting provision.

Lack of Bad Faith. A defendant's lack of bad faith is not a "special circumstance." As the Supreme Court has explained, "if the objective of Congress had been to permit the award of attorney's fees only against defendants who had acted in bad faith, 'no new statutory provision would

have been necessary,' since even the American common-law rule allows the award of attorney's fees in those exceptional circumstances." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 416 (1978) (quoting *Piggie Park*, 390 U.S. at 402). Indeed, even in the post-*Martin* ERISA context, the Court has admonished that district courts should not put much weight on a finding that a defendant lacks bad faith. *See Starr*, 461 F.3d at 1041.

Private Defendants. The district court gave no authority for denying a fee award because defendants are private parties. The text of the Act provides no basis for distinguishing between governmental and private defendants. And denying fees on this basis runs counter to the purpose of the Act, which was designed to protect and preserve endangered species from all threats, private and governmental alike, by encouraging citizen-suits against an entity in violation of it. *See Bennett*, 520 U.S. at 165; *Hill*, 437 U.S. at 179.

The court's statement that there is "little, if any, precedent" for claims under the Endangered Species Act by private plaintiffs against private defendants is also wrong. ALDF Add. 15. Private plaintiffs have brought numerous Endangered Species Act cases against private

defendants, including cases in which courts have awarded attorneys' fees. *See, e.g.*, *Ctr. For Biological Diversity v. Marina Point Dev. Co.*, 566 F.3d 794, 806 (9th Cir. 2009); *Idaho Watersheds Project v. Jones*, 253 F. App'x 684, 687 (9th Cir. 2007); *Cf. CLEAN v. Premium Standard Farms*, 397 F.3d 592 (8th Cir. 2005); *Strahan v. Holmes*, 686 F. Supp. 2d 129, 131 (D. Mass. 2010). Likewise, courts have awarded attorneys' fees under analogous "whenever … appropriate" provisions in suits by private plaintiffs against private defendants. *See, e.g.*, *Pound*, 498 F.3d at 1093; *Ne. Iowa Citizens For Clean Water v. Agriprocessors, Inc.*, 489 F. Supp. 2d 881, 886 (N.D. Iowa 2007); *Ohio River Valley Envtl. Coal., Inc. v. Timmermeyer*, 363 F. Supp. 2d 849, 850 (S.D.W. Va. 2005).

Defendants' Inability to Pay. At trial, plaintiffs argued that the Zoo lacked funds properly to care for the endangered species. In denying a fee award, the court held that defendants therefore also lacked the ability to pay plaintiffs, which counseled against awarding attorneys' fees. ALDF Add. 15. This consideration too was inappropriate. "Congress did not intend that vindication of statutorily guaranteed rights would depend on the private party's economic resources[.]" *Gore v. Turner*, 563 F.2d 159, 164 (5th Cir. 1977) (discussing 42 U.S.C. § 1988). Accordingly,

numerous courts have rejected the proposition that a defendant's inability to pay is a special circumstance justifying denial of attorneys' fees. *See Inmates of Allegheny County Jail v. Pierce*, 716 F.2d 177, 180 (3d Cir. 1983); *Lenard v. Argento*, 699 F.2d 874, 899-900 (7th Cir. 1983); *Bunn v. Cent. Realty of La.*, 592 F.2d 891, 892 (5th Cir. 1979).

Chilling Effect on Violators. The court below also stated that awarding attorneys' fees would "have a chilling effect on private animal owners to defend lawsuits brought by well-financed national organizations." ALDF Add. 15. This rationale cannot be reconciled with the purpose of the fee-shifting provision in the Endangered Species Act—encouraging private citizens to bring litigation when a public or private entity is threatening endangered species. That is, fee-shifting is intended to assure that *plaintiffs*, not defendants, are not chilled from enforcing the Act.

Further, the Supreme Court has expressly rejected the notion that a court may deny a fee award on the ground that the plaintiff had legal assistance from a public interest group. *See N.Y. Gaslight Club*, 447 U.S. at 70 n.9 (1980) ("We [] reject petitioners' argument … that respondent's representation by a public interest group is a 'special circumstance that

should result in denial of attorneys' fees.'"); *see also McLean v. Ark. Bd. Of Educ.*, 723 F.2d 45 (8th Cir.1983) (holding that fundraising by ACLU specifically to finance the litigation was irrelevant to the issue of attorneys' fees and not a special circumstance). And numerous courts of appeals have recognized that "the ability of a party to bring a suit without a fee award is not a special circumstance rendering a fee award unjust." *Jones v. Wilkinson*, 800 F.2d 989, 991 (10th Cir. 1986); *see Duncan v. Poythress*, 777 F.2d 1508, 1511-14 (11th Cir. 1985) (en banc); *Ackerley Commc'ns, Inc. v. City of Salem*, 752 F.2d 1394, 1397 (9th Cir. 1985); *Ellwest Stereo Theater, Inc. v. Jackson*, 653 F.2d 954, 956 (5th Cir.1981); *Milwe v. Cavuoto*, 653 F.2d 80, 83 (2d Cir. 1981). These cases reflect the courts' recognition of the important role public interest groups play in furthering important national priorities through citizen-suit litigation and the propriety of fee awards when they are successful in doing so.

* * *

In sum, none of the bases supplied by the district court constitutes a "special circumstance" that would render an award of attorneys' fees

unjust. Because plaintiffs' suit was successful and no special circumstance would make an award unjust, the court erred in denying a fee award.

CONCLUSION

For the foregoing reasons and those set forth in plaintiffs-appellees/cross-appellants' briefs, this Court should reverse the district court's order denying attorneys' fees and remand for a determination of the reasonable amount of fees and costs.

Respectfully submitted,

/s/ Sean M. Sherman
Sean M. Sherman
Michael T. Kirkpatrick
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Attorneys for Amicus Curiae

January 6, 2017

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing brief is proportionately-spaced, has a type-face of 14 points, and, as calculated by my word processing software (Microsoft Word), contains 4,656 words, less than half the number of words permitted by the Court for the parties' briefs. The electronic version of the foregoing brief has been scanned for viruses pursuant to 8th Circuit Rule 28A(h)(2) and is virus-free according to the anti-virus program.

/s/ Sean M. Sherman
Sean M. Sherman

CERTIFICATE OF SERVICE

I hereby certify that this brief has been served through the Court's ECF system on counsel for all parties required to be served on January 6, 2017.

/s/ Sean M. Sherman
Sean M. Sherman