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Ms. Patti Strand, National Director
National Animal Interest Alliance and
NAIA Trust

RE: Professor Schaffner's July 25, 2005 Letter to HSUS

Dear Ms. Strand:

I have had the opportunity to review the letter of Georgetown University law professor Joan Schaffner to Mr. Jonathan Lavvorn, Vice President for Animal Protection Litigation, Humane Society of the United States, dated July 25, 2005.

The purpose of this letter is to counter the glaring inaccuracies contained in Professor Schaffner's letter.

Professor Schaffner argues that rescue and shelter operators will not be deemed to be dealers under the Animal Welfare Act (AWA) after PAWS because they do not "sell" animals. In Professor Schaffner's words:

> Rather, they are non-profit groups providing a service to the public and the adoption fee accepted by such organizations is necessary to maintain their existence.

She goes on to say that:

> Rescue and shelter operators do not "sell" animals as pets; they provide a service to the public. Courts have held that services performed for the benefit of the community should not be considered "sales." See Howell v. Spokane & Inland Empire Blood Bank, 785 P.2d 815, 822 (Wash. 1990); see also Washington National Corp v. Sears Roebuck & Co., 474 N.E.2d 116, 120 (Ind. 1985)…[T]he adoption fees accepted by rescue and shelter operators are not in exchange for the animal, but rather to pay for continued existence of the shelter.

The cases that Professor Schaffner cites for this fanciful contention provide no authority for her proposition.

In *Howell v. Spokane & Inland Empire Blood Bank*, a 1990 decision, the Washington State Supreme Court was called upon to decide whether the plaintiff, who had contracted AIDS from a blood-transfusion in 1984 before blood-screening of HIV, could sue the blood bank on a products liability claim. The plaintiff claimed that he was entitled to damages upon the imposition of strict liability against the blood bank, arguing that the blood bank had put an inherently dangerous product into the stream of commerce.

The Washington Supreme Court went through the history of blood cases in which plaintiffs attempted to argue that tainted blood was a defective product. The Court held:

> It would be artificial to find the transfusion of blood to a patient as constituting a sale by the hospital. [[O]ne who enters a hospital as a patient] goes there, not to buy medicine or pills, not to purchase bandages or iodine or serum or blood, but to obtain a course of treatment in the hope of being cured… [citation omitted]…
>
> The purposes of strict liability are not furthered when applied to blood and blood products,…first, the societal need to ensure an affordable, adequate blood supply furnishes a persuasive reason for distinguishing between victims of defective blood and victims of other defective products. Second, strict liability cannot provide an incentive to promote all possible accident prevention at a time when there is no possible means of screening the blood for HIV. Third, while the producers may be in a better position to spread the costs, it is not in society's best interest to have the price of a transfusion reflect its true costs. In addition, both the blood bank and the hospital are in the distribution chain of providing blood to patients as a service. Although the blood bank does charge a fee for the blood, the blood bank is a non-profit entity providing a service for the community.
>
> For the foregoing reasons we hold the trial court correctly dismissed Plaintiffs' strict liability and implied warranty claims against Defendants Deaconess and the SIEBB…

Howell, 75 P.2d 815 at 821-822.

The *Howell* court was concerned about protecting the blood supply at a time when HIV was undetectable in blood. It has no application to the treatment of rescuers after PAWS.

The second case cited by Professor Schaffner has even less to do with animal rescuers. Like *Howell v. Spokane & Inland Empire Blood Bank*, the decision in *Washington National Corp. v. Sears Roebuck & Co.* is a state case, this time from Indiana. In *Washington National Corporation*, Sears entered into a shopping center lease on their standard form. The lease contained a percentage rent clause which required Sears to pay a certain percentage of their net sales as rent to the landlord. The lease language defined net sales. The issue before the appellate court was as follows:

> Whether the trial court erred in interpreting the lease to exclude from net sales all monies received by Sears through gift-wrapping, clothes alteration, bike setup, auto labor, maintenance agreements and appliance repair.
>
> *Washington National Corporation*, 474 N.E.2d 116 at 119.

The interpretation of a commercial lease also has nothing to do with whether rescuers and shelter operators are engaged in sales when they sell an animal.

The truth is that rescue and shelter operators do, in fact, "sell" animals when the animal is "adopted" by the buyer. Professor Schaffner's position that "the adoption fees accepted by rescue and shelter operators are not an exchange for the animal, but rather to pay for the continued existence of the shelter" is disingenuous, to be charitable to her.

It is false a statement to claim, as some have, that IRC § 501(c)(3) charitable organizations cannot make a profit. That is untrue. 501(c)(3) organizations simply cannot distribute the profits to their shareholders in the form of a dividend.

Every 501(c)(3) organization whose gross receipts normally exceed $25,000 must file a Form 990 tax return. Part I of the return is entitled "Revenue, Expense, and Changes in Net Assets or Fund Balances." Lines 1(a) through 1(d) require the organization to list its contributions, gifts, grants and similar amounts received. Line 2 requires the organization to list its program service revenue. Program services are primarily those that form the basis of an organization's exemption from tax.

One rescue organization's Form 990 for 2004 provides a good example. Doberman Rescue Unlimited, Inc., showed program service revenue for the year of $29,060.00. In Part VII of their return, entitled "Analysis of Income Producing Activities," the program service revenue was listed as follows:

93	Program Service Revenue: …	(E) Related or Exempt Function Income
a.	Adoption Fees	$26,630
b.	Placement Fees	$2,430

While Professor Schaffner would have people believe that the adoption fees are to "pay for the continued existence of the shelter," the fact is that like any other organization, revenue and expenses are separated on their federal income tax return. Program Service expenses are set forth on Form 990 at Line 13, taken from Line 44, Column B.

Rescue organizations can – and often do – generate profit. The sales of animals by rescue organizations are reported as program service revenue. The profit is reported on Line 18 of their return as an excess (or deficit) for the year, listed in the section on the return entitled "Net Assets," because the profit must be retained by the entity and not distributed to its members.

Other examples abound. The Humane Society of Silicon Valley reported under Part VII of

their 2002 Form 990 return "income producing activities" that included "animal placement fees" in the amount of $257,204.00.

S.F. Bay German Shepherd Rescue, Inc. in Menlo Park, CA reported program service revenue on their 2003 Form 990 of $5,265, which they showed on Part VII, Line 93 as "income producing activities" from "adoption fees" of $5265.

Folsom Feline Rescue showed on their 2003 990-EZ form program service revenue of $18,992. The Nor Cal Golden Retriever Rescue, Inc. shows program service revenue on their 2003 Form 990 return of $71,692. They report this figure on Part VII of their return under "income producing activities" as "related or exempt function income" adoptions: $58,377.

It cannot be disputed that 501(c)(3) organizations can and do make a profit and are still 501(c)(3) charitable organizations. The income generated from program service activities is deemed to be just that for federal income tax purposes: income producing activities.

What is more, the AWA defines a dealer as any person who sells a dog or other animal *for compensation* or profit. Whether or not a loss is generated as program service revenue for the sales of dogs and cats to the ordinary purchaser, certainly the transaction involves compensation to the rescuer or shelter operator.

To suggest that a sale does not occur when a rescuer or shelter operator transfers the animal to a person in exchange for money is akin to suggesting that one may walk into a Goodwill store, load up on clothing, and walk out the front door without paying for the items without fear of arrest. Under Professor Schaffner's analysis, Goodwill Industries, being a 501(c)(3) charitable organization, does not engage in a sale of the clothing to the public. Rather, the services performed by Goodwill were "for the benefit of the community" and "should not be considered 'sales.'" Using her analysis, the "fees" accepted by Goodwill are not in exchange for the clothing, but rather to pay for the continued existence of Goodwill Industries, "which in turn benefits the taxpayers who often pay to support" welfare organizations.

Lastly, Professor Schaffner argues that if rescue and shelter operators are considered "dealers" under the AWA after PAWS, then they are "retail pet stores" specifically exempt under the Act.

Under PAWS, the "retail pet store" exclusion from the AWA will define "retail pet store" to mean "a *public retail establishment* that sells animals commonly kept as pets in households in the United States…" The term "retail pet store" does not include "a person breeding animals to sell to the public as pets."

Professor Schaffner argues that rescuers will be exempt as retail pet stores because a rescuer will be defined as a "public retail establishment." She strains this logic by separately defining the words "public," "retail" and "establishment."

Unfortunately, that strained reasoning is not how federal courts have defined the term "retail establishment." See *Wirtz v. Keystone Readers Service, Inc*., 418 F.2d 249 (5th Cir. 1969), in which the Fifth Circuit defined "retail establishment" to mean "open to the general public" under the Fair Labor Standards Act. See also *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 496, 65 S. Ct. 807, 810, 89 L.Ed. 1095, 1100 (1945) in which the United States Supreme Court defined "establishment" as a 'distinct physical place of business.'

Moreover, those dog fanciers who both breed and rescue would not fit under Professor Schaffner's contorted definition of rescuers as "public retail establishments," because PAWS excludes any breeders from the retail pet store exemption.

In short, as an analysis of the effect of PAWS on rescuers, Professor Schaffner's letter must receive a failing grade.

Very truly yours,

Jeffrey P. Helsdon
Attorney at Law

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