No. 2005-CA-1066

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

John and Debra Hawkins, individually, and John Hawkins, as duly appointed personal representative of the Estate of Jay Hawkins, deceased,

Plaintiffs – Appellants

vs.

Andre Williams, individually, and d/b/a FreedomNet,

Defendant – Appellee

On Appeal from United States District Court for the Northern District of California

Civil Action Number CV-04-01885-C

BRIEF OF APPELLEE

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CORPORATE DISCLOSURE STATEMENT

The appellee, Williams d/b/a FreedomNet ("FreedomNet"), does not have a parent corporation and no publicly held company holds 10% or more of the stock in FreedomNet.

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JURISDICTIONAL STATEMENT

The United States District Court for the Northern District of California entered final judgment in this matter on 4 May 2005. The District Court had subject matter jurisdiction under to 28 U.S.C. § 1332 (2005). Notice of appeal was filed in timely fashion on 21 May 2005. This Court subsequently granted the appeal. The jurisdiction of this Court is invoked under 28 U.S.C. § 1291 (2005).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the District Court erred by improperly exercising personal jurisdiction pursuant to California's long arm statute and the due process requirements of the Fourteenth Amendment over an Internet website, based in Michigan, which only sells a small quantity of explosive-building instruction manuals alleged to have caused the death of one purchaser in California?

II. Whether the District Court properly ruled that the First Amendment provides an affirmative defense against a wrongful death negligence tort claim where an individual was killed while attempting to assemble a bomb, based on a manual purchased from a web site that, in addition to providing the instructions, also provided news and information?

STATEMENT OF THE CASE

This is a civil suit on appeal from the United States District court for the

Northern District of California (Case No. CV-04-01885-C). Plaintiff Hawkins filed a wrongful death action against Defendant Williams d/b/a FreedomNet ("FreedomNet") for the death of their son. Hawkins claimed that FreedomNet was negligent in selling a book that described how to construct a bomb from household goods. (R. at 5-6). Subject matter jurisdiction was based on complete diversity under § 1332. FreedomNet motioned to dismiss for lack of personal jurisdiction pursuant to Federal Rules Civil Procedure 12(b)(2) (R. at 10-11), however the court deferred ruling on this motion until trial. (R. at 12). FreedomNet's affirmative defenses at trial were: (1) the California Long Arm Statute violates the due process clause of the Fourteenth Amendment; (2) the First Amendment barred Plaintiff's claims; (3) Defendants were contributorily negligent; and (4) the complaint failed to state a cause of action upon which relief could be granted. (R. at 17). After trial on the merits, the trial judge denied FreedomNet's motion to dismiss for lack of personal jurisdiction but held that the Free Speech Clause of the First Amendment barred liability against FreedomNet. The District Court ordered Plaintiffs to bear all costs. (R. at 32).

On 20 May 2005, Plaintiff filed a notice of appeal with this Court. Defendant also filed a notice of appeal with this Court on 21 May 2005.

STATEMENT OF FACTS

An unfortunate accident occurred in California on 8 January 2004. Jay

Hawkins, a 13-year-old California resident, purchased a manual entitled "How to Build a Simple and Inexpensive Bomb Using Common Household Goods," ("The Book"), on 4 January 2004 using his father's credit card. (R. at 21). The Book included diagrams and instructions that described how to construct an "explosive device from common household items." (R. at 24). While Jay Hawkins was attempting to construct a bomb, an unanticipated chemical reaction resulted in an explosion. (R. at 21). Dr. Robert Ura, Assistant Coroner for the County of Santa Clara, confirmed it was "certainly possible" that Jay was killed because he mishandled the chemicals due to his age. (R. at 21).

Defendant-Appellee Williams d/b/a FreedomNet, a citizen and resident of Michigan, is the publisher and operator of FreedomNet, a website on the Internet. (R. at 2). Williams operates FreedomNet from his home in Michigan. (R. at 27). FreedomNet does not have any offices or agents outside of Michigan. (R. at 27-28, 30). Williams has never lived in California, (R. at 27, 30), and his only contact with California occurred over 20 years ago while on a visit to San Francisco. (R. at 28). FreedomNet's employees, a licensed accountant and a secretary, have never lived or visited California and have only been employed in Michigan. (R. at 28). No individual or entity has ever sued FreedomNet in California. (R. at 29).

FreedomNet is a resource dedicated to the "resistance of the enemies of freedom, wherever they reside." (R. at 9). Williams created FreedomNet in order

to “to have some way of making sure Americans and other people around the world" were aware of "the threats” they faced. (R. at 27). In furtherance of this goal, FreedomNet disseminates information about world events that threaten freedom. FreedomNet’s home page contains links to articles and other organizations which focus on “hot topics and the latest news,” (R. at 9), such as the “war in Iraq, possession of nuclear weapons … [and] terrorist attacks around the world.” (R. at 29). FreedomNet encourages self-preservation by offering “how to manuals” that teach citizens to prepare themselves for future threats. (R. at 27). These manuals are available to anyone on the Internet for $10. (R. at 29).

The only interactive aspect of FreedomNet is the request for payment information when a user purchases a manual. (R. at 9). No password or permission is required to access FreedomNet (R. at 22) because it was designed to be accessible to all Internet users. (R. at 23). Following a credit card payment of $10, the publications are electronically transmitted to the purchasers’ computer. (R. at 4). No other transfer or exchange of information takes place between FreedomNet and its users or between FreedomNet’s users.

FreedomNet’s gross revenue from sales of these publications was $1,500 in 2003 and $2,000 in 2004. (R. at 31). At the time of Jay Hawkins’ purchase, FreedomNet was not capable of recording where purchases originated from or who the purchaser was. (R. at 29). Even if FreedomNet had the ability to identify its

purchasers, FreedomNet would only know that a purchase was made by John Hawkins since Jay Hawkins used his father's credit card to make his purchase. (R. at 29). FreedomNet did not learn that Jay Hawkins purchased the book until records obtained from the credit card company were introduced at trial. (R. at 29).

SUMMARY OF ARGUMENT

The District Court erred in finding that personal jurisdiction existed over FreedomNet. The District Court correctly sustained FreedomNet's affirmative defense that the Free Speech Clause of the First Amendment bars the Hawkins' claims.

There were insufficient minimum contacts to justify either general or specific personal jurisdiction over FreedomNet. Without sufficient minimum contacts, the District Court's exercise of personal jurisdiction violates the due process clause of the Fourteenth Amendment. First, Hawkins failed to establish sufficient continuous or systematic contacts between FreedomNet and California to justify general jurisdiction. Second, Hawkins failed to satisfy the three-part test for specific personal jurisdiction over an out of state defendant because: (1) FreedomNet did not purposefully avail itself of California's protection or purposefully direct its activities towards California; (2) the death of Jay Hawkins was not a result of his interaction with FreedomNet; and (3) there are compelling reasons that weigh against an exercise of specific personal jurisdiction.

The First Amendment provides an affirmative defense to negligence based tort liability for the information FreedomNet provided to Jay Hawkins because it was protected "political speech." Political speech is viewed as the central type of speech protected by the First Amendment and has the highest degree of protection. Political speech is unprotected only if it comes within an exception. Here, the relevant exceptions are the "fighting words" exception, the "imminent lawless actions" exception, the "aiding and abetting" exception and the "commercial speech" exception. As there are no applicable exceptions, the District Court correctly held that the Free Speech Clause barred FreedomNet's liability.

STANDARD OF REVIEW

The District Court's exercise of personal jurisdiction over Williams and FreedomNet is subject to *de novo* review because personal jurisdiction involves constitutional due process rights which constitute a question of law. *See Pacific Atl. Trading Co. v. M/V Main Express*, 758 F.2d 1325, 1326 (9th Cir. 1985). The District Court's determination that the Free Speech Clause of the First Amendment protects FreedomNet from liability is also subject to *de novo* review. *See Geary v. Renne*, 914 F.2d 1249, 1252 (9th Cir. 1990). Therefore, no deference shall be given to conclusions reached by the District Court.

ARGUMENT

I. THE LOWER COURT ERRED IN EXERCISING PERSONAL JURISDICTION OVER WILLIAMS BECAUSE THERE WERE INSUFFICIENT MINIMUM CONTACTS AND DUE PROCESS REQUIREMENTS WERE VIOLATED.

A court must satisfy both a state's long arm statute and federal due process requirements before it can exercise personal jurisdiction over an out-of-state defendant. Since California's long arm statute, California Code Civil Procedure Section 410.10 (Deering 2005), is coextensive with the Due Process Clause of the Fourteenth Amendment, the jurisdictional analysis is identical under both state and federal law in the case at hand. First, a court must find that the defendant has "minimum contacts" with the forum state, and second, that the exercise of jurisdiction over the defendant "does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 325 U.S. 310, 316 (1945).

Courts may exercise two types of personal jurisdiction over out-of-state defendants: general jurisdiction or specific jurisdiction. Specific jurisdiction requires plaintiffs allege sufficient facts to satisfy a three-part test under *Ballard*. *Ballard v. Savage,* 65 F.3d 1495, 1498 (9th Cir. 1995). Alternatively, a court may exercise general jurisdiction if the defendant engages in "continuous and systematic general contacts" that "approximate to physical presence in the state. *Helicopteros Nationales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984). In

this case, the District Court improperly asserted either type of jurisdiction.

A. Specific personal jurisdiction was improperly asserted over FreedomNet because the three-part test for specific jurisdiction has not been met.

The Hawkins failed to allege sufficient facts to satisfy the three-part test adopted by this Court in *Ballard* because: (1) there was no purposeful availment or purposeful direction by FreedomNet; (2) Hawkins' claim did not arise out of FreedomNet's activities in California; and (3) the exercise of jurisdiction over FreedomNet was unreasonable. *Ballard,* 65 F.3d at 1498.

1. FreedomNet did not purposefully avail itself of the benefits of California or purposefully direct its activities towards California.

This Court adopted two tests for determining what activities constitute purposeful availment in *Northwest Healthcare Alliance Inc. v. Healthgrades.com*, 50 Fed. Appx. 339 (9th Cir. 2002). The "effects test," endorsed by the Supreme Court in *Calder v. Jones*, 466 U.S. 783, 788 (1984), applies to cases involving tort claims. The "sliding scale approach," adopted in *Cybersell (AZ) v. Cybersell (FL)*, 130 F.3d 414, 417 (9th Cir. 1997), applies to cases involving Internet websites. Since this case involves a tort and an Internet website, both tests are applicable.

a. Under the Calder "effects test,"there is no purposeful direction because FreedomNet did not expressly aim its intentional activities towards the state of California.

When a cause of action involves a tort, plaintiffs must show that defendants purposefully directed their activities towards the forum state even though those

activities take place elsewhere. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797 (9th Cir. 2004) citing to *Keeton v. Hustler Magazine Inc.,* 464 U.S. 770, 772 (1984). This involves a three-pronged inquiry: (1) whether defendant engaged in an intentional action; (2) whether defendant's action was expressly aimed at the forum state; and (3) whether the action caused harm, the brunt of which was suffered and which the defendant knew was likely to be suffered in the forum state. *Panavision Int'l v. DennisToepen,* 141 F.3d 1316, 1321 (9th Cir. 1998) citing to *Core-Vent Corp. v. Nobel Indus. AB,* 11 F.3d 1482, 1286 (9th Cir. 1993).

First, Williams did not intentionally sell publications to teach users how to build explosive devices. The *Restatement 2d of Torts* defines an act as an "external manifestation of the actor's will and does not include any of its results." RS 2d Torts, §2 (1964). Here, the act was Williams' creation and operation of a website that sells "how to" pamphlets. William's intent was not to encourage individuals to build explosive devices, but rather to encourage self protection against future threats. (R. at 27). When a purchaser creates an explosive device, this is only an indirect result of William's primary intent to promote self protection. This indirect result, according to the Restatement's definition, is not part of William's intentional act to sell "how to" pamphlets to help people protect themselves.

Second, FreedomNet did not expressly aim its activities towards the forum state. Unlike the out-of-state defendant in *Sinatra v. Nat'l Enquirer*, 854 F. 2d

1191, 1195 (9th Cir. 1988), who "mounted significant advertising efforts in California" for its services, FreedomNet did not advertise or sell its products in California. Moreover, the creation of the website and the decision to sell the "how to" publications were not made with the specific interests of California residents in mind. FreedomNet's website was expressly aimed at anyone who had access to the Internet worldwide. Thus, FreedomNet did not knowingly reach out to or specifically target California residents like the defendant in *Sinatra*.

This case can also be distinguished from *Panavision,* where the defendant registered domain names as part of a scheme to extort money. *Panavision,* 141 F.3d at 1321. In that case, the defendant actively sent letters to Panavision, a California entity, demanding money. *Id*. Unlike sending letters expressly aimed at California residents, FreedomNet's act of selling publications to all Internet users was not expressly aimed at or demanded anything from California residents.

The third element to consider is whether the sale of the publications caused harm, the brunt of which FreedomNet knew would likely to be suffered in California. However, mere foreseeability that a particular act will have an effect in a forum state is insufficient to justify an assertion of specific personal jurisdiction. *Bancroft & Masters v. Augusta Nat'l,* 223 F.3d 1082, 1087 (9th Cir. 2000). Otherwise, any sale via the Internet would improperly give rise to specific jurisdiction in any forum where injuries occurred, even though the injuries may be

far removed from the purchase. *Schwarzenegger*, 374 F.3d at 805. Therefore, *Bancroft* requires that non-resident defendants intentionally and individually target residents in California. *Bancroft*, 223 F.3d at 1088. Here, FreedomNet neither intentionally nor individually targeted Jay Hawkins because its publications were available to anyone in the world who chose to visit its website. Furthermore, FreedomNet did not limit or target its sales to a particular location, therefore FreedomNet's actions were not "expressly calculated to cause injury in California." *Sinatra*, 854 F.2d at 1196.

b. The minimal interactivity and limited commercial nature of of FreedomNet's website does not justify an exercise of specific jurisdiction under Cybersell's "sliding scale test".

The sliding scale test recognizes a broad spectrum of websites that differ in purpose and display. Completely passive websites provide information, display graphics, and conduct no commercial activity. *Cybersell*, 130 F.3d at 418. Interactive websites enable users to exchange information and employ the Internet as a business channel. *Id*. In the middle of the spectrum are websites such as FreedomNet, which contain passive and interactive elements. This Court has adopted a sliding scale approach that weighs (1) the level of interactivity, and (2) the commercial nature of the website, to determine if a semi-passive, semi-interactive website purposefully availed itself of the forum-state. *Cybersell*, 130 F. 3d at 419.

The level of interactivity on FreedomNet's website was extremely low, and it contained mostly passive features like graphics, texts, and links pertaining to current events. (R. at 9). To further its goal of disseminating information, FreedomNet is a general access website that does not require authentication or access codes for entry. Therefore, FreedomNet is strikingly similar to the defendant's web page in *Bensusan Rest. Corp. v. King*, 126 F.3d 25 (2d Cir. 1997), which contained informative text about the defendant's jazz club. Like that defendant, FreedomNet did nothing more than create a website permitting access to anyone who could find it; and the provision of publications was ancillary to its primary purpose of disseminating information about current events.

This case is also analogous to *Cybersell*, where an Arizona court attempted to assert specific jurisdiction over defendant Cybersell FL who maintained a website advertising its consulting services in Florida. *Cybersell*, 130 F.3d at 416. However, this Court refused to infer from the existence of the Cybersell FL website that it was advertising to Arizona residents, encouraging Arizona residents to access it, or seeking business from Arizona residents. *Id.* at 418. Likewise, FreedomNet had no contacts with California other than merely maintaining a website that was accessible to anyone via the Internet. Furthermore, there is no conclusive evidence that other California residents, besides Jay Hawkins, have viewed FreedomNet's website. (R. at 29).

FreedomNet's only interactive element occurs when users choose to purchase a publication and are prompted for billing information. Upon successful payment, the publication is electronically transmitted to the purchaser. No other exchange of information takes place between FreedomNet and its users. Moreover, many websites, like news websites, require that users enter personal information to create accounts before they can access the site's contents. This simple entry of information does not render a website interactive. Furthermore, FreedomNet neither hosts chat rooms nor facilitates any other type of communication between itself and its users.

Second, the commercial nature of the exchange of information that takes place on FreedomNet's website is very minimal. In *Hasbro v. Clue Computing*, 994 F. Supp. 34 (D. Mass. 1997), the defendant derived 33-50% of its income from the forum state; therefore, it would be reasonable to exercise specific jurisdiction over that defendant. FreedomNet's gross revenue from sales, however, totaled only $1,500 in 2003 and $2,000 in 2004. And, only one out of four links on FreedomNet's website was used for the sale of the publications. (R. at 9) Without further conclusive evidence about other transactions with California residents, any attempt to calculate the percentage of gross income derived from California would be entirely speculative and inaccurate.

The district court in *Stomp* asserted specific jurisdiction over an out of state

defendant by focusing on the quality, not the quantity, of contacts even though the "actual number of sales to California residents was small." *Stomp v. Neato* 61 F.Supp. 2d 1074, 1078 (D. Cal. 1999). FreedomNet is easily distinguisable from *Stomp* because out of 150 transactions in 2003 and 200 transactions in 2004, only one known sale was made to a California resident. Even the quality of this exchange was insubstantial because it was a one time exchange of ten dollars where the user's personal information was neither captured nor stored, unlike the website of the defendant in *Jewish Def. Org. v. Sup. Ct. of Los Angeles County*, 72 Cal. App. 4th 1045 (1999).

After weighing the minimal interactivity and the marginal commercial transactions on its website, FreedomNet resembles passive websites more than interactive websites. As a low-level interactive website with extremely few commercial transactions, FreedomNet cannot be found to have purposefully availed itself of the privilege of conducting business in California.

2. *The "but for" test cannot be satisfied because Jay Hawkins' death did not arise out of a purchase from FreedomNet.*

The second prong of this inquiry uses a "but for test" to address the causal connection between the forum-related activities and the claim. *Ballard*, 65 F.3d at 1500. The critical question is whether "but for FreedomNet's sale, would the Hawkins have claims against FreedomNet?" The answer is in the negative because

there is no clear causal evidence that Jay Hawkins' purchase led to his death.

The existence of the manual in the garage may have been coincidental. Dr. Robert Ura, Assistant Coroner for the County of Santa Clara, testified that it is "certainly possible" that Jay was killed by his own mishandling of the chemicals due to his age; and as a result, an unanticipated chemical reaction caused an explosion. (R. at 21). No evidence exists to prove that Jay Hawkins followed the instructions in the manual or even used the manual at the time of his death. The only undisputed evidence is that the manual was found in the garage. Without further conclusive causal evidence, the "but for" test cannot be satisfied.

3. Compelling considerations of fairness weigh against any exercise of specific personal jurisdiction over FreedomNet.

The third prong of the specific jurisdiction test considers seven factors to determine whether there are compelling reasons that make the exercise of specific jurisdiction unreasonable. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-477 (1985); *Core-Vent*, 11 F.3d at 1487.

The first factor is the extent of FreedomNet's purposeful direction and availment towards California. As presented above, there is no purposeful direction or purposeful availment by FreedomNet. FreedomNet did not invoke any benefits or protections of California law. Only one known sale has occurred between FreedomNet and a California resident, demonstrating that FreedomNet does not

rely on California residents to form a substantial portion of its users or purchasers. Moreover, the publication sales are not only limited in number, but merely exist as an incidental function to the website's primary informational purpose. Lastly, FreedomNet does not solicit any users specifically from California.

Second, a heavy burden was placed on FreedomNet to defend this suit in California. It was more than a mere inconvenience for FreedomNet's operator and two part-time employees, all Michigan residents, to travel to California to testify. This burden was substantial because FreedomNet was created as a personal expression, not as part of a calculated business decision. FreedomNet did not produce substantial income for its operator and employees. Furthermore, it is irrelevant that FreedomNet defended this action in California at the trial level because it is the District Court's initial exercise of personal jurisdiction over FreedomNet that must be evaluated for fairness.

Third, Michigan's sovereignty would be infringed upon if California could ignore due process considerations and hail Michigan residents into California courts via its long-arm statute. Michigan has a strong interest in protecting its residents' due process rights. Even if Michigan is part of the Sixth Circuit Court of Appeals, and the Sixth Circuit uses a virtually identical specific jurisdiction test as the Ninth Circuit is irrelevant. It is the court where defendant must be physically present that is at issue, not what legal tests are applied. This third factor also

weighs in favor of FreedomNet.

Fourth, California may have a strong interest in adjudicating this dispute because it involves a death of a resident that occurred in California. But turning to the fifth factor, the most efficient judicial resolution of the controversy is not necessarily in California. The witnesses likely to be called concerning the manuals will be FreedomNet's operator and employees, who are residents of Michigan. Even though Jay died in California, technology makes it possible to photograph the scene to create exhibits transportable to any court. No judge or jury will ever need to visit the Hawkins garage to decide issues of fact or law. This factor weighs in favor of FreedomNet. Sixth, Hawkins' mere preference for California is insignificant because this Court does not give much weight to the plantiff's choice of forum. *Core-Vent*, 11 F.3d at 1490. Lastly, the Hawkins bear the burden of proving the unavailability of an alternate forum, and the Hawkins have not shown that an alternate forum does not exist. *Id*.

In balancing these factors, the first three factors weigh heavily in favor of FreedomNet, while the remaining factors are insignificant, as shown above. Hence, there are compelling reasons to overrule the District Court's exercise of specific personal jurisdiction over FreedomNet.

B. California improperly exercised general personal jurisdiction over FreedomNet because there were no continuous or systematic contacts between FreedomNet and California.

In non-Internet "real space," the Supreme Court has decided that "mere purchases [in conventional settings], even if occurring at regular intervals, are not enough" to establish general jurisdiction. *Rosenburg Bros. v. Curtis Brown*, 260 U.S. 516, 518 (1923). Thus, a one-time purchase by Hawkins from FreedomNet's website can hardly be sufficient to establish a continuous and systematic relationship between FreedomNet and the state of California. Moreover, Williams has no significant personal contacts with the forum state; as the operator of FreedomNet, Williams has personally visited California only once over 20 years ago. (R. at 28). Neither Williams nor any of his employees were born in or ever lived in California. Furthermore, FreedomNet does not have any satellite offices or agents that reside in California. And, even though FreedomNet's website is accessible by anyone capable of using the Internet, including California residents, this in and of itself is insufficient to constitute the "continuous and systematic" contacts that the Supreme Court requires for an exercise of general jurisdiction. *See Cybersell*, 130 F. 3d at 414; *Helicopteros*, 466 U.S. at 408. In the absence of such contacts, California cannot properly assert general jurisdiction over FreedomNet. Accordingly, this Court should reverse the District Court's exercise of personal jurisdiction over Williams and FreedomNet.

II. THE FIRST AMENDMENT PROVIDES IMMUNITY TO NEGLIGENCE BASED TORT LIABILITY FOR INFORMATION PROVIDED BY FREEDOMNET BECAUSE THE INFORMATION AND CONTENT OF FREEDOMNET'S WEBSITE IS PROTECTED "POLITICAL SPEECH."

The free speech protections in the First Amendment are based on a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). In *Mills v. Ala.*, the Supreme Court noted that there was "practically universal agreement" that the purpose of the First Amendment was to protect "free discussion of governmental affairs." *Mills v. Ala.*, 384 U.S. 214, 218-219 (1966). If a particular type of speech is protected, the Supreme Court has held that there must be restraints on both the "grounds" that give rise to damages and the "persons" from whom those damages can be recovered. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916-917 (1982).

Liability may be imposed if the challenged speech falls into an exception. This Court's decision in *United States v. Schiff* is illustrative of the applicable exceptions. *United States v. Schiff*, 379 F.3d 621 (9th Cir. 2004). In *Schiff*, this Court considered an injunction preventing the sale of publications on how to stop paying taxes. *Id.* This Court held that the sales could be enjoined, despite the First Amendment protection of speech, if the publications: (1) incited imminent lawlessness action; (2) aided and abetted criminal activity; or (3) were fraudulent commercial speech. *Schiff*, 379 F.3d at 626. These exceptions are relevant here.

A. FreedomNet is entitled to immunity under the First Amendment because the Hawkins seeks to enforce state regulations.

The Free Speech Clause of the First Amendment provides that "Congress shall make no law … abridging the freedom of speech, or of the press." U.S. Const. amend. I. The First Amendment has been incorporated against the states. *See Duncan v. La.*, 391 U.S. 145,148 (1968). As Plaintiff's claims are based on state law the First Amendment is applicable. *See* Cal. Code Civ. Proc. §§ 377.20, 377.60 (Deering 2005). If California does not permit FreedomNet to assert immunity under the First Amendment, California would be enforcing its laws in violation of FreedomNet's right to immunity under the First Amendment. Recognition of First Amendment immunity to tort liability is not novel as the First Amendment already provides considerable immunity against defamation. *See N.Y. Times*, 376 U.S. at 284.

B. The information provided by FreedomNet is protected "political speech" because it comments on the operation of government

In *Mills*, the Supreme Court recognized that a central purpose of the First Amendment was "to protect the free discussion of governmental affairs," including discussions about the "manner in which government is … or should be operated." *Mills*, 384 U.S. at 218-219. The Supreme Court reasoned imposing criminal penalties for publishing editorials on election day suppressed the right of the press to "praise or criticize" the government and to argue for change. *Id.* The decision

broadly interpreted the "press" to include "humble leaflets and circulars" in addition to newspapers, books, and magazines. *Mills*, 384 U.S. at 218-219. This broad view is also reflected in *Reno v. ACLU*, where the Supreme Court noted that Internet websites were "the equivalent of individualized newsletters." *Reno v. ACLU*, 521 U.S. 844, 853 (1997). The vast scope of information and the diverse points of view represented on the Internet led the Supreme Court to strike down a federal decency act. *Id.* at 885.

FreedomNet, like the editorials in *Mills*, serves to inform the public about important political issues regarding the operation of the government and its effect on the citizenry. FreedomNet's focus was to raise public awareness of threats to freedom from "around the world" and from within the federal government. (R. at 9). FreedomNet sought to maximize awareness about these threats by providing timely information about world events, such as the Iraqi war, nuclear proliferation and terrorist attacks. (R. at 27).

Additionally, FreedomNet only provides pamphlets and manuals that Williams deemed "essential" for the preservation of freedom. (R. at 23). Although the titles of these pamphlets, "Homemade Grenade Launchers", "Instructions for Building an Altitude-Sensitive Detonator" and "How to Build a Simple and Inexpensive Bomb Using Common Household Goods" (R. at 23), suggest untoward purposes, the information they contain is in not restricted or illegal. That

FreedomNet considered such information might be needed at some point in the future does not lessen the value of the political statement that the government and its power should be viewed with caution.

Furthermore, as recognized in *Reno v. ACLU*, websites such as FreedomNet, are akin to the pamphleteers of bygone eras; they serve to inform the public about unique points of view and the latest news and information. Instead of distributing information by handing out leaflets and circulars on street corners, websites distribute information electronically; the method has changed, but the function is the same. If FreedomNet is unable to continue expressing its views due to a finding of civil liability, its unique point of view will be silenced.

C. The exceptions based on violent or illegal speech do not apply because of the method and type of information FreedomNet provided.

Hawkins may argue that speech that incites violence or aids and abets criminal conduct is unprotected. The Supreme Court has held that speech that is intended to and likely to produce "imminent lawless action" is unprotected. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). This court has also denied protection to speech which "aids and abets" criminal conduct. *United States v. Barnett*, 667 F.2d 835, 842 (9th Cir. 1982). Neither of these exceptions can be applied to FreedomNet.

1. *The "imminent lawless action" exception does not apply because the information provided by FreedomNet was neither intended to*

produce nor was likely to produce such action.

In *Brandenburg*, the Supreme Court held that the First Amendment did not protect speech that was "directed [at] inciting or producing imminent lawless action" and was likely to incite or produce that type of action. *Brandenburg*, 395 U.S. at 447. The Supreme Court noted that "abstract teaching" of the "moral necessity" of resorting to violence did not rise to the constitutionally required level of "preparing a group for violent action and steeling it to such action." *Id.* at 448. In *Hess*, the Supreme Court applied the *Brandenburg* test to statements made by an antiwar demonstrator while in the vicinity of police officers. *Hess v. Ind.*, 414 U.S. 105 (1973). Although the words were spoken in the presence of police, during a tense demonstration, the Supreme Court held that "at worst" the words were "advocacy of illegal action at some indefinite future time." *Id.* at 108-109.

Under the *Brandenburg* standard, to find that the information provided by FreedomNet is not protected speech, it must be demonstrated that the information was both directed at producing imminent lawless conduct, and was likely to produce such conduct. Although it may be argued that FreedomNet's website advised its readers to "take up arms today" (R. at 9) and "[s]tart fighting back immediately" (R. at 9), these phrases are similar to the statements in *Hess*. At worst, this language might be viewed as abstract teaching of the need to resort violence or possibly a call to illegal action at some indeterminate point in the future, both of which are protected. *See Brandenburg*, 395 U.S. at 448; *Hess*, 414

U.S. at 108-109. Furthermore, the use of a few catch phrases on a webpage cannot be compared to constitutionally required standard of "preparing a group for violent action and steeling it to such action." *Brandenburg*, 395 U.S. at 448. Even if the materials provided on FreedomNet's website could be considered preparatory, given that at least 7.4 million people in California alone (R. at 26) could have accessed them, it is difficult to conclude that FreedomNet was steeling any particular or targeted group to violent action.

With regard to the Book purchased by Jay Hawkins, merely providing information that allows for the construction of a bomb cannot be viewed as intended to produce imminent lawless conduct. Since there are lawful purposes for such information, including educational curiosity in chemistry, the assertion that the Book was intended to produce lawless conduct is unsupportable. In addition, the imminence requirement is lacking because FreedomNet merely made the information available; after the information was downloaded, FreedomNet could not force the purchaser to read the instructions or to use them to build a bomb. The information could be purchased and then utilized days, weeks or years from the date of sale. Here, approximately four days passed between purchase and use. If statements made at a demonstration in the immediate presence of police were insufficiently imminent in *Hess,* the passage of four days here can hardly qualify. *Hess*, 414 U.S. at 107.

2. *The Barnett exception is not applicable because FreedomNet did not aid and abet in any criminal conduct*

This Court, in *Barnett*, rejected the claim that the First Amendment protection of speech acted as an affirmative defense to a criminal charge of aiding and abetting criminal conduct. *Barnett*, 667 F.2d at 842. The Fourth Circuit Court of Appeals extended *Barnett* to aiding and abetting claims in civil actions. *See Rice v. Paladin Enters.*, 128 F.3d 233 (4th Cir. 1997). The recent case of *Wilson v. Paladin Enters.*, 186 F. Supp. 2d 1140, 1141 (D. Or. 2001), involved claims of negligence and strict products liability for the sale of a book, in addition to claims of aiding and abetting. *Wilson*, 186 F. Supp. 2d at 1142. The District Court in *Wilson* dismissed the negligence and strict products liability claims because those claims were based on the "speech itself" rather than how the speech aided in the commission of a crime. *Id.* at 1145.

This case is distinguishable from *Barnett* and *Rice*. First, *Barnett* was limited to criminal cases. *See Barnett*, 667 F.2d at 843. Second, both cases were based on aiding and abetting criminal conduct. *Barnett*, 667 F.2d at 837; *Rice*, 128 F.3d at 239. Aiding and abetting is primarily concerned with whether the speech encouraged the commission of a crime while negligence can focus on the act of speaking, directly implicating the First Amendment. *See Wilson*, 187 F. Supp. 2d at 1144. Finally, both *Barnett* and *Rice* concerned writings about illegal activities. *Barnett*, 667 F.2d at 837; *Rice*, 128 F.3d at 239. Here, FreedomNet provided

instructions on the construction of an explosive, which can also be gleaned from basic chemistry texts. If FreedomNet is liable for providing legal information, this Court must consider why liability could not be found for other sources of the same information, such as chemistry textbooks or high school courses.

D. The "commercial speech" exception is inapplicable because (1) FreedomNet's speech is legal, non-misleading speech, and (2) preventing FreedomNet from asserting a First Amendment defense does not advance a state interest in providing a negligence cause of action.

Hawkins may argue that FreedomNet's speech should be denied protection because it is commercial speech. The Supreme Court recognized the "commercial speech" exception in *Valentine v. Chrestensen*, 316 U.S. 52 (1942). This exception was significantly changed in *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm.*, 447 U.S. 557 (1980). In *Cent. Hudson*, the Supreme Court articulated a four-part analysis to determine whether a governmental restriction on commercial speech was constitutional. *Cent. Hudson*, 447 U.S. at 566. The first step determines whether the commercial speech deserves First Amendment protection. *Id.* The Supreme Court stated that non-misleading commercial speech concerning lawful activities merits protection. *Id.* The second step ascertains if a substantial government interest is involved. *Id.* The final two steps determine if the restriction "directly advances" the government interest, and if the restriction is more "excessive than is necessary" to advance the government interest. *Id.*

Subsequent Supreme Court cases suggest that the means must be "narrowly tailored" because broad restrictions "seriously underestimate" commercial speech's value. *Cincinnati v. Discovery Network Inc.*, 507 U.S. 410, 419 (1993). Even if commercial and non-commercial elements are intertwined, the whole is not converted into either commercial or non-commercial speech. *See Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 474-475 (1989) . In *Fox*, the university had passed a regulation banning commercial speech and applied this regulation to Tupperware parties. *Id.* at 472. The Supreme Court rejected the argument that including non-commercial "home economic elements" into the sales presentation converted the whole into "educational speech." *Id.* By separating the commercial and non-commercial elements and applying the *Cent. Hudson* test only to commercial elements, the Supreme Court recognized that non-commercial speech could not be transformed into commercial speech merely by association with commercial speech.

Here FreedomNet's website contains links to books which it sells. (R. at 9). FreedomNet also provides the complete title of each book. (R. at 23). The titles describe each book's contents. (R. at 23). For example, the book Jay Hawkins bought provided instructions on "How to Build a Simple and Inexpensive Bomb Using Common Household Goods." (R. at 21). As FreedomNet offers to sell publications, each a perfectly legal transaction, and it does not mislead its

purchasers about the content, its speech, though commercial, merits First Amendment protection under the first part of the *Cent. Hudson* analysis.

FreedomNet does not contest that California has a substantial interest in providing its citizens with a negligence cause of action, so the second part of the *Cent. Hudson* analysis is satisfied. However, California's interest is limited to providing plaintiffs with the means to recover; the interest does not extend to ensuring recovery in every case. If California refuses FreedomNet's First Amendment defense, it directly advances Hawkins' ability to recover, however it does not directly advance California's interest of providing a cause of action. The cause of action exists whether or not FreedomNet's defense is allowed.

Furthermore, denying FreedomNet a First Amendment defense is a restriction that is more extensive than is necessary. The book that Jay Hawkins purchased was not commercial speech, since it did not propose any sort of commercial transaction. To deny First Amendment protection for a legal publication under these circumstances, allows a small amount of commercial speech to convert non-commercial speech into commercial speech. As shown by the Supreme Court's analysis in *Fox*, any restriction on commercial speech must be limited to the commercial elements. *See Fox*, 492 U.S. at 474-475.

Also, denial of First Amendment protection to the commercial portion of FreedomNet's website is more extensive than necessary, because to do otherwise may

convert offers to sell books into unprotected speech based only on the manner in which purchaser uses the book. Thousands of books on all manner of topics are sold every day so a restriction of this nature could make each seller liable. This casts the net of liability farther than is necessary. A denial of First Amendment protection for the sale of completely legal information via FreedomNet's website may also mean that any merchant who does business on the Internet is at risk. Suppose a child burns himself with matches purchased from the Internet. It would be improper to deny First Amendment protection to the merchant for merely proposing to sell matches. Such broad liability would have a severe chilling effect on a thriving industry and exceeds what is necessary to promote the government interest in providing tort remedies to injured parties.

CONCLUSION

For the foregoing reasons, the District Court's determination that personal jurisdiction could be exercised should be reversed, and the District Court's determination that the Free Speech Clause of the First Amendment barred liability for Plaintiff's claims should be affirmed.

Dated: 29 October 2005

Respectfully Submitted,

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PROOF OF SERVICE

The undersigned, counsel for Defendant-Appellee, FreedomNet, hereby certifies that on 29 October 2005, two copies of this Brief were mailed to the counsel for Plaintiff-Appellant, Hawkins.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7695 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2004 in 14-point Times New Roman.

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