

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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DAVID D'AMATO,

Plaintiff,

**REPORT AND
RECOMMENDATION**

-against-

CV 06-2429 (BMC) (WDW)

DAVID W. STARR, MAGIC TOUCH PRODUCTIONS,
KENT BARCLAY, GODADDY.COM, INTERCOSMOS
MEDIA GROUP, INC. D/B/A DIRECTNIC.COM,
BLOGSPOT.COM, GOOGLE.COM, BLOGGER.COM,
PYRA.COM, LTD., THEPLANET.COM and
COMPUTER TYME HOSTING,

Defendants.

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WILLIAM D. WALL, United States Magistrate Judge:

This matter was referred to the undersigned by District Judge Brian M. Cogan for the purpose of conducting an inquest and issuing a report and recommendation with respect to damages or other appropriate relief. The complaint and plaintiff's request for a temporary restraining order were filed on May 18, 2006. *See* Docket Entry ("DE") [1], [34]. The TRO was denied, and the preliminary injunction motion was referred to the undersigned for a report and recommendation. When it became apparent that defendants would not answer, plaintiff opted to withdraw his motion for a preliminary injunction and seek relief through entry of a default judgment. By orders dated August 2, 2006, August 5, 2006, and August 6, 2006, Judge Cogan entered defaults against defendants Magic Touch Productions, David Starr, and Kent Barclay, respectively.¹ The undersigned scheduled an inquest, which was ultimately held on October 6, 2006. At the inquest, counsel for plaintiffs appeared, provided testimony from plaintiff David

¹The other defendants named in the case, GoDaddy.com, Google.com, Blogger.com, Blogspot.com, Intercosmos Media Group, ThePlanet.com, Pyra.com, and Computer Tyme Hosting, are website hosts and were previously dismissed from the case by stipulation.

D'Amato, and submitted papers in support of the damages claim. There was no submission of papers or appearance by any of the defendants. The court requested, and plaintiff submitted, additional documentation as well as a post-inquest brief regarding the question of personal jurisdiction. Defendants have not submitted any evidence regarding the relief sought by plaintiff.² Based on the evidence submitted, the court recommends that the entries of default be vacated and the case dismissed for lack of personal jurisdiction over the defendants.

BACKGROUND

Plaintiff David D'Amato is an individual residing in New York. Compl. at ¶ 3. Defendant David W. Starr is a resident of California; defendant Magic Touch Productions ("Magic Touch") is a Nevada corporation with its principal place of business in that state; and defendant Kent Barclay is a resident of Massachusetts. *Id.* at ¶¶ 4, 12, 14. The complaint alleges several causes of action, including defamation and infliction of emotional distress, arising from content published on websites maintained by the defendants.

Starr is alleged to be the registrant and operator of several websites, including www.ticklishguyscasting.net and www.adultfilmcasting.com. *Id.* at ¶ 5. The exact number of sites allegedly operated by Starr is unclear as plaintiff says that "the content, location, number of websites and blogs utilized by Starr and [sic] changes on a frequent, if not daily, basis." *Id.* at ¶ 26. Plaintiff alleges that through these websites, Starr "has engaged in an ongoing, ever-growing and constantly changing pattern of posting, through the Internet, to the general public and to residents of the State of New York, information which is false and/or damaging to

²The court returned, undocketed, a submission from Marie Pappas sent on behalf of Magic Touch. Ms. Pappas was advised that as a non-attorney, she could not file papers on behalf of Magic Touch, and that as a corporation, it could not proceed pro se. *See* Notice, DE [51].

Plaintiff's reputation." *Id.* at ¶ 23. Plaintiff further claims that Starr has posted photographs of plaintiff without his consent. *Id.* at ¶¶ 122, 140. The causes of action alleged against defendant Starr are defamation, infliction of emotional distress, and violation of New York Civil Rights Law §51.

Defendant Barclay, who also allegedly uses the name "Damon Kruezer," operates two websites. *Id.* at ¶¶ 15-16. Plaintiff alleges that the first site, www.damonkruezer.net, claims to be "a website for 'gay entertainment news, gossip, and DVD reviews.'" *Id.* at ¶ 48. Plaintiff alleges that Barclay falsely states on this website that an individual named Dext Jones "has been working with D'Amato for over a year now." *Id.* at ¶ 55. This is the only statement on this website that plaintiff directly attributes to defendant Barclay. All other content objected to by plaintiff is authored by Starr. The only content to which plaintiff objects on the second website, www.kruezeratnight.com, is a quote from Starr regarding plaintiff under the headline "Another Starr Victory for the 1st Amendment and Justice." *Id.* at ¶ 73. The causes of action alleged against defendant Barclay are defamation, and three causes of action concerning his failure to remove allegedly false statements from the websites.

Defendant Magic Touch operates the Tickling Media Forum website at www.ticklingforum.com. *Id.* at ¶ 13. There is no allegation that either Starr or Barclay owns, operates, or has any authority over Magic Touch. The content on the Tickling Media Forum site found to be objectionable by plaintiff consists entirely of comments about plaintiff posted by Starr. Plaintiff does not allege that defendant Magic Touch has done anything beyond providing a forum for the posting of these comments. The three causes of action alleged against Magic Touch all concern that entity's failure to remove the allegedly false statements from the websites.

The reason behind the apparent animus felt by Starr toward plaintiff, as exhibited by the postings on the various websites, is not at all clear from either the complaint or the testimony given at the inquest. During the inquest, D'Amato testified that he had in the past had a "business relationship" with defendant Starr regarding the sale of "tickling fetish videos" that featured "males over the age of 18 being tickled in various formats in a non-sexual way." Tr. at 13. Plaintiff assisted Starr by advertising "the availability of such videos for purchase" through mass e-mailings, or "spamming." *Id.* Plaintiff testified that he had nothing to do with the production of those videos and that his relationship with Starr ended in July 2001. *Id.* According to D'Amato, Starr believes that D'Amato is offering the sale of digital video files on several recent websites: "The whole crux of this matter is that Mr. Starr is claiming, among other things, that I have ownership and profit from several web sites that I do not own, have never owned, and have never had any fiduciary interest in." *Id.* at 14. In e-mails sent to plaintiff's counsel, Starr has apparently represented that he will cease his conduct if D'Amato either stops conducting business on specific websites or provides an affidavit that he does not operate those sites. *See Porges Decl., Ex. M, N.*

DISCUSSION

As a threshold matter, the court must look to whether it has personal jurisdiction over the defaulting defendants. "[W]hen entry of a default judgment is sought against a party who has failed to plead or otherwise defend, the district court has an affirmative duty to look into its jurisdiction both over the subject matter and the parties. In reviewing personal jurisdiction, the court . . . exercises its responsibility to determine that it has the power to enter the default judgment." *Weininger v. Castro*, 462 F. Supp. 2d 457, 490-91 (S.D.N.Y. 2006) (quoting

Williams v. Life Sav. & Loan, 802 F.2d 1200, 1203 (10th Cir. 1986))(additional citations omitted); *see also Dardana Ltd. v. A.O. Yuganskneftegaz*, 2001 U.S. Dist. LEXIS 16078, *14 (S.D.N.Y. Sept. 21, 2001) (vacated on other grounds). Accordingly, the court will first conduct an independent analysis of its jurisdiction over the defendants David Starr, Kent Barclay, and Magic Touch Productions.

Because the defendants reside outside the forum state of New York, and there is no relevant federal jurisdictional provision, defendants' amenability to suit in this Court is determined by New York state law. *Rescuecom Corp. v. Hyams*, 2006 U.S. Dist. LEXIS 45282, *8-9 (N.D.N.Y. July 5, 2006). Here, the plaintiff claims that the defendants are subject to personal jurisdiction under New York's long-arm statute, C.P.L.R. §302(a). *See* Plaintiff's Post-Inquest Hearing Brief [57], 2-6 ("Pl.'s Brief"). Determination of personal jurisdiction under the long-arm statute is a two step process. *Knight-McConnell v. Cummins*, 2005 U.S. Dist. LEXIS 11577, *6 (S.D.N.Y. June 10, 2005) (citing *Bensusan Rest. Corp. v. King*, 126 F.3d 25, 27 (2d Cir. 1997)). First, the court looks to the provisions of the long-arm statute itself. If there is jurisdiction under the long arm statute, then the court must examine whether the jurisdiction comports with the requirements of due process. *Id.*

New York's long-arm statute allows for personal jurisdiction over a nondomiciliary in three circumstances: (1) if the nondomiciliary transacts business in the state and the claim arises out of that business transaction; (2) if the nondomiciliary commits a tortious act within the state; or (3) if the nondomiciliary commits a tortious act outside the state injuring a person within the state. *Id.* at **6-7. "In all cases, there must be a 'strong nexus between the plaintiff's cause of action and the defendant's in state conduct' for long-arm jurisdiction to apply." *Id.* at *7

(quoting *Welsh v. Servicemaster Corp.*, 930 F. Supp. 908, 910 (S.D.N.Y. 1996)). Here, the plaintiff argues that personal jurisdiction arises against defendant Starr under all three provisions, and against defendants Barclay and Magic Touch under section 302 (a)(1). See Pl's Brief at 2-6.

The court will first consider whether defendant Starr's creation and/or maintenance of the allegedly defamatory websites amounts to the transaction of business in New York so as to confer jurisdiction under section 302(a)(1).

1.) Section 302 (a)(1) as applied to David Starr:

The first provision of section 302(a) provides long-arm jurisdiction over any defendant who "transacts any business within the state or contracts anywhere to supply goods or services in the state" if the cause of action arises from the transaction. N.Y. C.P.L.R. §302 (a)(1). A nondomiciliary transacts business under CPLR section 302(a)(1) when he "purposely avails himself of the privilege of conducting activities within New York, thus invoking the benefits and protections of its laws." *Rescuecom*, 2006 U.S. Dist. LEXIS 45282 at *11 (quoting *CutCo Indus. v. Naughton*, 806 F.2d 361, 365 (2d Cir. 1986)). Under section 302(a), the plaintiff's cause of action must arise from the specific New York business transaction, and the provision requires "a substantial relationship between the transaction and the claim asserted." *Id.* (internal quotations and citations omitted).

This case, of course, involves posting of information on the internet, and, as one court has noted "[d]etermining whether personal jurisdiction exists has become increasingly complex in the internet age." *Best Van Lines, Inc. v. Walker*, 2004 U.S. Dist. LEXIS 7830, at *8 (S.D.N.Y. May 5, 2004). "Depending on their nature, a defendant's contacts with New York via the internet can provide a basis for jurisdiction under section 302(a)(1)." *Knight-McConnell*,

2005 U.S. Dist. LEXIS 11577, at *8 (citing *Citigroup, Inc. v. City Holding Co.*, 97 F. Supp. 2d 549, 564-65 (S.D.N.Y. 2000)). In assessing the applicability of the statute, courts examine “the nature and quality of commercial activity that [a defendant] conducts over the internet.” *Id.* (quoting *Zippo Mfg. Co. v. Zippo Dot Com*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997)). In making that assessment, courts have distinguished a range of website categories, with varying implications for long-arm jurisdiction, “ranging from ‘passive’ websites, which merely display information and therefore are unlikely to support jurisdiction, to websites which clearly allow defendant to transact business in the forum state over the internet, and thus sustain jurisdiction.” *Id.* at **8-9 (citing *Seldon v. Direct Response Techs.*, 2004 U.S. Dist. LEXIS 5344, at *3 (S.D.N.Y. Mar. 31, 2004); *Hsin Ten Enter. USA v. Clark Enters.*, 138 F. Supp. 2d 449, 456 (S.D.N.Y. 2000); *Citigroup*, 97 F. Supp. 2d at 565). In the middle of the range are websites that are interactive, allowing an exchange of information between users in the forum state and the defendant, and which may provide a basis for jurisdiction “depending on the level and the nature of the exchange.” *Id.* at *9 (citing *Citigroup*, 97 F. Supp. 2d at 565). Although this “sliding scale” model can be a useful guide, “it does not amount to a separate framework for analyzing internet-based jurisdiction, and traditional statutory and constitutional principles remain the touchstone of the inquiry.” *Best Van Lines*, 2004 U.S. Dist. LEXIS 7830, at *9 (citations omitted).

Plaintiff in his complaint does not allege any commercial activity upon which jurisdiction can be found, instead claiming that Starr is “reaching out to people in New York” who went to school with plaintiff, Compl. ¶ 38, or soliciting New Yorkers to be cast in adult films, *id.* at ¶¶ 41, 83, or “engaging with individuals in New York by asking for their feedback” *id.* at ¶¶ 124,

134 or “pulling in those in New York who know, know of, or are interested in Plaintiff.” *Id.* at ¶ 144. During the inquest and in his post-inquest brief, plaintiff argues for the first time that section 302 (a)(1) provides a basis for jurisdiction over defendant David Starr because he has transacted business in New York in two ways: (1) by advertising within New York and (2) by sales to consumers within New York. Pl’s Brief at 2.

Plaintiff asserts that “New York courts have long allowed for jurisdiction ‘where the defamation complained of arises from or is connected with the transaction of business in the State’” *id.* at 4 (quoting *Legros v. Irving*, 38 A.D.2d 53, 55 (1st Dep’t 1971)), and concludes that there is a “strong indication that the defamation at issue here ‘arises from or is connected with’ the sales and advertising in which Defendant Starr has engaged within New York.” Pl’s Brief at 4. The court finds that these arguments ignore the overarching requirement of a strong nexus, or substantial relationship, between the plaintiff’s specific cause of action and the defendant’s in-state, commercially oriented, conduct. *Knight-McConnell*, 2005 U.S. Dist. LEXIS 11577, at *7. Specifically, the plaintiff alleges that Starr has advertised his tickling video business via the defamatory statements and/or defamatory websites at issue, thus making purposeful contacts with New York. Pl. Brief at 2. The court has examined the plaintiff’s exhibits, including Starr’s allegedly defamatory sites, and finds them to be primarily displays of information with some degree of interactivity, but with no commercial activity. The court cannot locate, nor has plaintiff pointed to, any offer to sell videos or anything else on the websites at issue or on any of the links from those websites. Similarly, although the complaint claims that the websites reach out to New York residents “by soliciting them be [sic] cast in adult films,” Compl. ¶¶ 41-43, there is no nexus between this potentially commercial activity and the allegedly defamatory

statements that form the basis for plaintiff's causes of action. While Starr may sell tickling videos in New York or may solicit New York residents to be cast in his films, he has not used the allegedly defamatory sites to do so, and the requisite nexus is lacking. The conclusion is the same whether the court considers the cause of action to be defamation, New York Civil Rights Law §51, or intentional infliction of emotional harm.

Examining the websites from the tri-level approach, the result is the same. Plaintiff's counsel has asserted that the websites are of the middle level of interactivity: "I believe the web site that we're referring to here would be a medium level web site. It is not passive. And while it is interactive, **it is not interactive on a commercial level**, leading us to further inquiry as to whether or not this Court has jurisdiction." Tr. at 35 (emphasis added). The court agrees that Starr's websites are, at most, in the middle category.

On their faces, the websites are not in the highest category of overtly commercial sites that would allow Starr to conduct business in New York on them. If they are viewed as falling into the "passive" category, limited to displaying information, there is also no finding that jurisdiction exists. In cases involving only online postings of information, as opposed to commercial transactions, it is "unlikely that jurisdiction will be appropriate [and] '[t]he mere fact that . . . [an] allegedly defamatory posting may be viewed in New York is . . . insufficient to sustain a finding of jurisdiction.'" *Id.* at *9 (quoting *Best Van Lines*, 2004 U.S. Dist. LEXIS 7830, at *5). "Instead, 'jurisdiction will lie only if the posting is intended to target or focus on internet users in the state where the cause of action is filed.'" *Id.* (quoting *Seldon*, 2004 U.S. Dist. LEXIS 5344, at **4-5) (additional citations omitted)).

In this regard, the plaintiff argues that Starr requested information about him "from New

Yorkers with whom plaintiff interacted in academia,” and asked questions of people who viewed one or more of Starr’s websites, “including . . . New Yorkers.” Pl’s Brief at 3. The court finds that those requests are insufficiently focused on New York to satisfy the long-arm requirement. Moreover, while plaintiff may have directed some of his anti-D’Amato activities at New Yorkers, plaintiff has in no way connected those activities to Starr’s alleged commercial activities, and thus lacks the requisite nexus, as discussed *supra*.

The same lack of jurisdiction exists when viewing the websites as occupying the middle category of interactivity, inasmuch as they do provide links to other sites, although not to any sites promoting Starr’s alleged commercial activities. Although interactive sites can support a finding of jurisdiction, such a finding is not automatic. *Best Van Lines*, 2004 U.S. Dist. LEXIS 7830, at *10. Instead, “whether or not jurisdiction may be exercised depends upon the quantity and quality of a defendant’s contacts with the forum state, in line with statutory authority and due process principles.” *Id.* at *11. A finding of jurisdiction would depend on “the actual interaction between New York viewers and [Starr’s] website[s], and the nexus between those interactions and the asserted injury.” *Id.* Here, none of the interactive links connect a viewer to any commercial enterprise of Starr’s, but rather provide links to other pages regarding plaintiff.³ As mentioned earlier, plaintiff’s counsel has acknowledged that the interactivity is not commercial. Tr. at 35. The websites and links provide nothing for sale, do not “directly generate income in

³For example, the ticklishguyscasting site provides links to a list of plaintiff’s educational history, various pages concerning Terri DiSisto (a persona used by plaintiff, according to Starr), various news accounts including ones from Newsday, the Boston Herald, and the Philadelphia City News, various court papers, and informational materials on cyberstalking and Internet safety. It also includes a Frequently Asked Questions section with questions and answers regarding plaintiff.

any other manner,” and, despite the plaintiff’s argument, do not suggest that Starr will derive a commercial benefit from New York in connection with the postings on the site. *Rescuecom Corp.*, 2006 U.S. Dist. LEXIS 45282, at *16. Again, the nexus is lacking. Thus, the court finds that section 302(a)(1) does not provide a basis for long-arm jurisdiction over David Starr. The same is true of the other sections of section 302(a).

2.) Sections 302(a) (2) & (3) as applied to David Starr:

Plaintiff acknowledges that sections 302(a) (2) & (3) specifically exempt defamation from the torts that confer personal jurisdiction through the long-arm statute, but he argues that those sections confer jurisdiction via the cause of action based on New York Civil Rights Law §51. Plaintiff does not actively assert that his cause of action for intentional infliction of emotional distress provides a basis for jurisdiction. Courts “are instructed to decline jurisdiction over claims that attempt to avoid the requirements of New York’s long-arm statute by merely restating a defamation claim under a different name.” *Knight-McConnell*, 2005 U.S. Dist. LEXIS 11577, at *12 n.5 (citation omitted). Since the court finds that no personal jurisdiction exists for the reasons stated *infra*, it need not determine whether assertion of the intentional infliction of emotional distress claim, which arises out of the same allegedly defamatory acts of defendant, was an attempt to restate a defamation cause of action for jurisdictional purposes.

Section 302(a)(2) provides jurisdiction over a person who “commits a tortious act within the state” of New York, unless the act is one of defamation. The statute has been narrowly construed to “apply only when the defendant was actually physically present in New York when he performed the allegedly tortious act.” *Rescuecom Corp.*, 2006 U.S. Dist. LEXIS 45282, at *21 (citing *Bensusan Rest. Corp.*, 126 F.3d at 28-29). The fact that plaintiff “may have suffered

injury in New York is not sufficient to establish a tortious act in New York within the meaning of section 302(a)(2).” *Id.* Here, there is no allegation that Starr was ever physically present in New York and no explanation of how the statute might otherwise apply, and section 302(a)(2) does not provide a basis for long-arm jurisdiction.

The same is true of section 302(a)(3), which provides jurisdiction if the non-domiciliary “commits a tortious act without the state” injuring a person in New York and the non-domiciliary either (1) regularly does or solicits business in the state, or (2) derives substantial revenue from interstate commerce and should reasonably expect the tortious act to have consequences in the state. Even if the facts alleged constitute tortious acts committed outside of the state that caused an injury in New York, there is no allegation in the complaint that defendant either engaged in regular business or derived substantial revenue from interstate commerce sufficient to find jurisdiction under section 302(a)(3). *See Knight-McConnell*, 2005 U.S. Dist. LEXIS 11577, at *14. After a thorough review of the record before it, the court has found only one attempt to quantify Starr’s business dealings in New York. At the inquest, plaintiff’s counsel stated that “[g]iven the e-mails and admissions we have for Mr. Starr that he has engaged, not my – someone who he believes to be my client in the sale and exchange of videos, he claims over 50 up until 2005.” Tr. at 35. To the extent the court can interpret this as an attempt to quantify the number of sales of videos by Starr, this statement alone is not enough to permit a finding that Starr has “regularly engaged” in business in New York or derived “substantial revenue” from interstate commerce, and thus any claim to jurisdiction under section 302(a)(3) must fail.

The lack of any commercial nexus is also significant given the tort alleged by plaintiff that confers jurisdiction over Starr, specifically New York Civil Rights Law §51. Pl’s Brief at 5.

That law provides in pertinent part that “[a]ny person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as provided [in §50] may maintain an equitable action . . . and may also sue and recover damages for any injuries sustained by reason of such use. . .” N.Y. Civil Rights Law §51. Plaintiff alleges three instances of defendant Starr’s unauthorized use of plaintiff’s picture. *See* Compl. ¶¶122 (c), 122 (o), and ¶140. While plaintiff alleges in the complaint that his photograph was used without his consent, he utterly fails to allege that defendants used those photographs for advertising purposes or for the purposes of trade. Both cases cited by plaintiff in support of using a violation of §51 to confer jurisdiction involved clearly commercial uses of the photographs. *See Albert v. Apex Fitness, Inc.*, 1997 WL 323899, *2 (S.D.N.Y. June 13, 1997) (photograph used in promotional poster for defendant’s business); *Eliah v. Ucatan Corp.*, 433 F. Supp. 309, 313 (W.D.N.Y. 1977) (photograph used in defendant’s advertisement and published in a magazine). As discussed *supra*, the court has been unable to find any commercial aspects to the websites in question. The only commercial activity even remotely attached to defendant is the alleged sale of tickling videos, and plaintiff’s photographs are not used to promote their sale. Thus the court finds that there is no jurisdiction under 302(a)(3).

3.) Section 302 (a)(1) as applied to Kent Barclay:

In a single paragraph in the post hearing brief, plaintiff concludes that this court has jurisdiction over defendant Barclay under section 302 (1)(a) since “Barclay has advertised his websites to people in New York by posting false information about Plaintiff, who is probably best known in New York.” Pl’s Brief at 6. The websites attributed to Barclay provide nothing for sale, do not directly generate income in any manner, and do not provide links to commercial

websites. *See Rescuecom Corp.*, 2006 U.S. Dist. LEXIS 45282, at *21 (citation omitted).

Indeed, plaintiff does not even suggest that Barclay conducts any commercial activity whatsoever, let alone in New York, in connection with the postings on the sites. Clearly, if there is no alleged commercial transaction, there can be no nexus between a transaction and the alleged causes of action, and thus section 302(a)(1) cannot provide a basis for long-arm jurisdiction over Kent Barclay.⁴

4.) Section 302 (a)(1) as applied to Magic Touch:

Plaintiff summarily argues that the court has jurisdiction over defendant Magic Touch “for the same reasons as this Court has personal jurisdiction over Defendant Barclay.” Pl’s Brief at 6. Plaintiff’s post-inquest brief, however, raises one additional point regarding Magic Touch-- that it “on its website, sells tickling videos, which it offers to ‘happily ship to almost anywhere,’ including, undoubtedly, New York.” *Id.* The court notes that this allegation was not made in the complaint. The court has found only the following paragraphs in the complaint relating to Magic Touch and its alleged actions in this case: that it is a Nevada corporation, Compl. ¶ 12; that it operates the Tickling Media Forum website, *id.* ¶¶ 13 & 90; and that the Tickling Media Forum website contains an area to post comments and that defendant Starr has used that area to post allegedly defamatory statements about plaintiff, *id.* ¶¶ 93-102.⁵ Even if the court considers the

⁴Plaintiff also alleges that Barclay’s sites are “reaching out to people in New York by speaking on a matter (gay pornography) that interests individuals throughout the United States, including New York.” *See, e.g.*, Compl. ¶ 74. Plaintiff has provided no legal support for the idea that merely posting information of “interest” to New York resident confers jurisdiction over the person posting the information.

⁵Considering the allegations of the complaint, Magic Touch may well be immune to suit under 47 U.S.C. § 230(c) which states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”

allegation regarding the sale of tickling videos raised in the post-inquest brief, the court finds that there are insufficient contacts for a finding of personal jurisdiction over Magic Touch.

While the Tickling Media Forum site may contain links to allow the purchase of items by persons presumably interested in tickling paraphernalia, the mere presence of those links is insufficient to establish the necessary nexus between that commercial activity and the activities giving rise to the cause of action. Plaintiff does not allege that the allegedly defamatory comments posted on the Tickling Media Forum site are connected in any way to the sale of the videos. Absent such a nexus, the court finds that there is no jurisdiction under 302(a)(1) over defendant Magic Touch.

Having found no personal jurisdiction over any of the defendants under New York law, “there is no need to consider whether assertion of long-arm jurisdiction would comport with due process.” *Rescuecom Corp.*, 2006 U.S. Dist. LEXIS 45282, at *24 (citation omitted). The undersigned recommends that the entries of default be vacated and that the complaint be dismissed for lack of personal jurisdiction over the defendants, without prejudice to filing the complaint in an appropriate forum.

Finally, the undersigned notes that plaintiff has filed several letters regarding recent increases in allegedly defamatory incidents attributable to defendant Starr. *See* DE [65], [66], [69], [71]. The court has reviewed those letters and has found no reference to any actions by Starr that would affect the court’s conclusion regarding the lack of personal jurisdiction over the defendants.

OBJECTIONS

A copy of this Report and Recommendation is being sent to counsel for plaintiff by electronic filing on the date below. Any objections to this Report and Recommendation must be

filed with the Clerk of the Court with a courtesy copy to the undersigned within 10 days. Failure to file objections within this period waives the right to appeal the District Court's Order. *See* 28 U.S.C. §636 (b) (1); Fed. R. Civ. P. 72; *Beverly v. Walker*, 118 F.3d 900, 902 (2d Cir. 1997); *Savoie v. Merchants Bank*, 84 F.3d 52, 60 (2d Cir. 1996).

Dated: Central Islip, New York
February 27, 2007

/s/ William D. Wall
WILLIAM D. WALL
United States Magistrate Judge