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**Docket: SUCV2016-00553-BLS1**

**Date: September 14, 2018**

**Parties: SCVNGR, INC. vs. PUNCHH, INC.**

**Judge: /s/Mitchell H. Kaplan Justice of the Superior Court**

SECOND MEMORANDUM OF DECISION AND ORDER ON DEFENDANT PUNCHH, INC.'S MOTION TO DISMISS FOLLOWING REMAND

The plaintiff, SCVNGR, Inc., doing business as LevelUp, filed this action against the defendant, Punchh, Inc., one of its competitors. LevelUp complains that Punchh engaged in a "campaign of [making] knowingly false statements to LevelUp restaurant clients and potential clients," to the effect that LevelUp does not respect the confidentiality of its restaurant clients' customer data. Punchh filed a motion to dismiss LevelUp's complaint on the grounds that the court lacked personal jurisdiction over it. After a period of jurisdictional discovery and supplemental briefing, the court allowed the motion in a Memorandum of Decision and Order on Defendant Punchh, Inc.'s Motion to Dismiss issued on July 22, 2016 (the Prior Decision). In the Prior Decision, informed by the United States Supreme Court's instruction on this issue in *Walden v. Fiore*, 134 S. Ct. 1115 (2014) (*Walden*), this court held that Punchh did not have sufficient contacts with Massachusetts to satisfy the due process requirements of the United States Constitution. With respect to the Massachusetts Long-Arm Statute, G.L. c. 223A, § 3, the Prior Decision noted that "there was no evidence in the record before it that LevelUp's claims arise out of Punchh's transacting business in Massachusetts, and LevelUp has not pressed a contention that Punchh's "persistent course of conduct" in Massachusetts is sufficient to

1

establish general jurisdiction." See G.L. c. 223A, §3(a) and (d). The court did not, however, address LevelUp's contention that Long-Arm jurisdiction existed under §3(c).

LevelUp appealed and the Supreme Judicial Court (SJC) transferred the case to itself on its own motion. See *SCVNGR, Inc. v. Punchh, Inc.*, [478 Mass. 324](#), 325 (2017) (SCVNGR). In SCVNGR, the SJC declined to review this court's conclusion that Massachusetts courts could not assert personal jurisdiction over the claim asserted against Punchh consistent with due process limitations. Rather, it held that a Massachusetts court must "consider the long-arm statute first, before approaching the constitutional question." *Id.* at 330. It remanded the case to this court to perform that analysis. *Id.* at 331.

Following remand, LevelUp requested the opportunity to take additional jurisdictional discovery, which the court granted. Following an extended discovery period, the parties filed supplemental memoranda and supporting materials.[1] In consideration of those supplemental filings, as well as the initial rounds of briefing, the court finds that in addition to failing the substantial contacts test under Federal due process standards, the court also does not have jurisdiction under the Massachusetts Long-Arm statute.

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[1]In May, 2018, LevelUp filed what it styled an Amended Complaint. However, this pleading did not amend any of the factual allegations asserted in the original complaint, but rather sought to allege additional tortious conduct on the part of Punchh that allegedly occurred during the two years since the original complaint was filed. LevelUp also sought to take additional jurisdictional discovery relating to the period covered by its proposed new complaint. In a Decision dated

May 30, 2018, the court struck that pleading. It noted that the proposed amended complaint was actually a supplemental pleading under Mass.R.Civ.P 15(d), as it only added allegations concerning conduct occurring "since the date of the pleading sought to be supplemented," but did not amend any of the existing allegations. Id. It also pointed out that the order of remand from the SJC directed this court to decide whether the complaint before it when it rendered its Prior Decision met Long-Arm jurisdiction requirements and reopening jurisdictional discovery yet again seemed imprudent. The court suggested that LevelUp simply dismiss this case and file a new complaint covering the entire period of allegedly tortious conduct, as there did not appear to be any statute of limitations issues. LevelUp rejected this suggestion.

-2-

#### ADDITIONAL FACTS

The factual allegations of the complaint and the additional jurisdictional facts developed through the first round of jurisdictional discovery are fully set out in the Original Decision and will not be repeated. The additional, relevant factual contentions that LevelUp has presented in its supplemental filings, assumed to be true for the purposes of this motion, are as follows.

During the period relevant to the personal jurisdiction question—January 1, 2015 through February 16, 2016[2]—Punchh had contractual relationships with the following customers that operated restaurants in Massachusetts: Capriotti's Sandwich Shop, Inc., Earl of Sandwich, Taste, Inc. d/b/a Vino Volo, Moe's Southwest Grill, Noodles & Company, and Rita's Italian Ice. However, Punchh did not yet receive any revenue attributable to Massachusetts from the latter three restaurants during this period. As to the first three Punchh customers, Capriotti's and Taste had two locations in Massachusetts and the Earl of Sandwich one. Punchh's customers paid Punchh a flat fee per restaurant regardless of the state in which their restaurants were located. In consequence, Punchh received some revenue that could be traced to its customers' Massachusetts restaurants, although Punchh did not track revenue on a state by state basis and did not control the locations in which the customers established restaurants. The total revenue generated from these customers' Massachusetts locations over the relevant period appears to be approximately \$12,000.[3]

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[2] "In establishing specific jurisdiction, particularly in the absence of a contractual or other continuing relationship with a Massachusetts plaintiff, our focus is directed to the defendant's contacts at the time the cause of action arose rather than when the complaint was filed. . . General jurisdiction may be affected by contacts with the forum "at the time of the complaint." See *Fletcher Fixed Income Alpha Fund, Ltd. v. Grant Thornton*, [89 Mass. App. Ct. 718](#), 725 (2016) (Fletcher).

[3] LevelUp also makes reference to the fact that Punchh charges its customers a one-time set up fee before the customer goes live with its app. However, this service is rendered to the corporate customer irrespective of where it locates its restaurants and appears unrelated to any contact that the Punchh customer has with Massachusetts.

-3-

There is also evidence that, during this period, Punchh had some communications with Massachusetts based restaurant chains, but it appears to have been sporadic and unsuccessful.

The further discovery did not identify any allegedly defamatory

statement made to someone in Massachusetts or to an officer or agent of a Massachusetts based company, although there are allegations that a false statement was made to a firm that had some restaurant locations in Massachusetts.

ANALYSIS

As noted above, in the Prior Decision, the court concluded that only § 3(c) of the Long Arm Statute appeared potentially applicable to the jurisdictional facts presented by LevelUp. See n. 5. The court will, nonetheless, consider whether the requirements of § 3(a), (c) and (d) have been met, as LevelUp argues that the court has Long-Arm jurisdiction under those subsections.

§3(a)

"A court may exercise personal jurisdiction over a person, who acts directly or by agent, as to a cause of action in law or equity arising from the person's (a) transacting business in this commonwealth. . . ." LevelUp principally relies on *Tatro v. Manor Care, Inc.*, [416 Mass. 763](#) (1994) (*Tatro*) in arguing that the claims asserted in this case arise out of business that Puncch transacted in Massachusetts. The court finds *Tatro* inapposite.

In *Tatro*, the plaintiff suffered a personal injury as result of an accident that occurred in a hotel bathroom in Anaheim, California while she was attending a conference in the hotel. She alleged that the accident was the result of the defendant hotel's negligence. The defendant was a

-4-

Delaware corporation and did not have a place of business in Massachusetts or advertise directly there. It did however have contracts with a number of Massachusetts based corporations that held conferences in the hotel and had direct billing arrangements with the defendant. The SJC observed that "it is obvious that the defendant, which solicited and obtained meeting and convention business from at least ten Massachusetts businesses, and maintained telephone and mail contact with them, transacted business in the Commonwealth during the relevant period. We also think that the defendant's acceptance of the plaintiff's room reservation formed part of the defendant's over-all purposeful solicitation of hotel business from residents of Massachusetts." *Id.* at 768. In support of its conclusion that specific jurisdiction existed, the SJC held that: "The defendant's contact with the plaintiff was part of a larger systematic effort on its part to obtain business from Massachusetts businesses and residents. . . ." *Id.* at 769.

In the instant case, LevelUp supports its contention that Puncch transacted business in the Commonwealth, not from any activities in which Puncch itself engaged, but rather based upon evidence that some of its customers operate restaurants in Massachusetts. The court finds no support in *Tatro*, or other Massachusetts decisions, for the proposition that a non-resident transacts business in Massachusetts because its customer has some contact with the forum. See *id.* citing *Droukas v. Divers Training Academy, Inc.*, [375 Mass. 149](#), 153 ("defendant which agreed to sell marine engines to plaintiff did not transact business in Massachusetts where, among other factors, there was no evidence of contacts other than minimal contacts with plaintiff-purchaser"). Indeed, § 3 specifically states that a defendant may subject itself to jurisdiction because its "agent" transacted business in the Commonwealth on its behalf. In this case, LevelUp makes no argument that Puncch's customers were acting as Puncch's agent in deciding to open restaurants in Massachusetts and then having those restaurants employ

-5-

Puncch's app.

*Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) is a case in which

the United States Supreme Court addressed due process limitations on the exercise of personal jurisdiction, rather than a state long-arm statute. Nonetheless, its discussion of what it means to transact business within a jurisdiction is instructive.[4] There the Supreme Court noted that a defendant does not "purposely avail itself of the privilege of conducting activities in the forum State as a consequence of unilateral activity of another party or a third person. . . . Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant himself that create a substantial connection with the forum State." *Id.* at 474-475 (emphasis in original, internal citations and quotations omitted). The fact that some of Punchh's customers operated restaurants in Massachusetts and therefore used Punchh's apps in Massachusetts, does not translate into Punchh transacting business in Massachusetts. It also does not mean that when Punchh allegedly disparaged LevelUp to customers or potential customers outside of Massachusetts that constitutes a tort arising out of Punchh's having transacted business in the Commonwealth. See *Fletcher*, 89 Mass. App. Ct. at 723-724 (knowledge that statements made to out-of-state third-parties would affect plaintiffs in Massachusetts was not a basis for jurisdiction under § 3(a)).

§3(c)

"A court may exercise personal jurisdiction over a person, who acts directly or by agent,

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[4] See *Fletcher* where the Appeals Court observed: "In *United Elec., Radio & Mach. Wkrs. Of America v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 7087 (1st. Cir. 1992), the United States Court of Appeals for the First Circuit explained that the Massachusetts 'long-arm statute also demands that plaintiffs' cause of action arise from the defendant's transaction of business in the commonwealth,' and 'the statute's relatedness requirement mirrors a key constitutional requirement for the exercise of specific jurisdiction.'

-6-

as to a cause of action in law or equity arising from the person's. . . (c) causing tortious injury by an act or omission in this commonwealth . . . ." In support of its contention that Punchh's disparaging statements made to non-Massachusetts third-parties outside of Massachusetts support jurisdiction under this clause, LevelUp asserts that Punchh's defamation of LevelUp should be "considered" an act occurring within Massachusetts. While the court has found no case expressly addressing this contention, LevelUp's argument appears to depart from the plain language of § 3(c), which bases jurisdiction on where the tortious act was undertaken, not where its effect was felt, even when the defendant knew that the plaintiff was located in Massachusetts.

LevelUp cites *Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201 (1st Cir. 1993) (*Ticketmaster*) as persuasive authority for its proposition. However, the reasoning in *Ticketmaster* is actually adverse to the argument that LevelUp advances. There, the plaintiff sued the defendant for allegedly making a defamatory statement to a reporter for the *Boston Globe*. The reporter apparently called the defendant in California where he resided, and the defendant made the statement to the *Globe* reporter over the telephone, presumably while the reporter was in Massachusetts. The statement was then published in the *Globe*. The plaintiff filed suit in the United States District Court in Massachusetts. The trial court dismissed the case for lack of personal jurisdiction, and the First Circuit Court of Appeals affirmed.

The First Circuit first considered the question of whether Long-Arm jurisdiction existed under § 3(c). It noted that "logic suggests that, on these facts, the defendant cannot be said to have performed 'an act' in

Massachusetts." The Court nonetheless acknowledged that an earlier case, *Murphy v. Erwin-Wasey, Inc.*, 460 F.2d 661 (1st Cir. 1972) (*Murphy*) might be construed to support jurisdiction, because the statement was specifically made to a person in Massachusetts and then published there. The *Murphy* decision, however, specifically rejected the argument

-7-

advanced by LevelUp in this case, i.e., that a tortious act may be said to have been committed in Massachusetts because the injury is to a Massachusetts resident: "Section 3(c) is intended to apply only when the act causing injury occurs within the Commonwealth. . . . To give it any broader meaning would render § 3(d) a nullity. . . . The question we must decide is whether the delivery in Massachusetts by mail or telephone of a false statement originating outside the state, followed by reliance in Massachusetts, is an 'act. . . within this commonwealth.'" *Id.* at 664. In this case, unlike *Murphy* and *Ticketmaster*, there is no allegation that Puncch's offending statements were delivered into the Commonwealth or that anyone relied on them in the Commonwealth.

In any event, in *Ticketmaster* the Court of Appeals noted that there had not been any jurisdictional discovery, and, although skeptical that Long-Arm jurisdiction existed, decided to follow the District Court's approach and decide the issue on constitutional grounds. It held that, based on the allegations made in the complaint, the Due Process Clause bars a court from asserting jurisdiction over the defendant.

In this case, § 3(c) will not support Long Arm Jurisdiction because Puncch committed no tortious act in Massachusetts.

§3(d)

"A court may exercise personal jurisdiction over a person, who acts directly or by agent, as to a cause of action in law or equity arising from the person's (d) . . . causing tortious injury in the commonwealth by an act or omission outside this commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this commonwealth. . . ."

-8-

LevelUp appears to argue that § 3(d) provides another means of establishing specific jurisdiction. If that is the argument that LevelUp is asserting, the court finds that it misstates the law.

In *Connecticut Nat. Bk. v. Hoover Treated Wood Products, Inc.*, [37 Mass. App. Ct. 231](#), 233-34 n.4 (1994), the Appeals Court distinguished specific jurisdiction from general jurisdiction explaining that: "General jurisdiction, on the other hand, 'exists when the litigation is not directly founded on the defendant's forum-based contacts, but the defendant has nevertheless engaged in continuous and systematic activity, unrelated to the suit, in the forum state.' *United Elec. Workers v. 163 Pleasant Street Corp.*, supra at 1088. General Laws c. 223A, § 3(d)." Similarly, in *Fern v. Immergut*, [55 Mass. App. Ct. 577](#), 581 n.9 (2002), the Appeals Court referred to § 3(d) as an expression of general jurisdiction. And, in *Noonan v. Winston Co.*, 135 F.3d 85, 93 (1st Cir. 1997), the First Circuit referred to its analysis of whether one of the defendants met the requirements of § 3(d) as one addressing the question of whether that defendant had "sufficient minimum contacts to authorize general jurisdiction."

Turning to the jurisdiction requirements expressed in § 3(d), the court agrees that the complaint adequately alleges that LevelUp experienced "tortious injury in the commonwealth" as a result of "an act. . . outside the commonwealth." The court however finds that LevelUp has not adduced evidence that Puncch "regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue form

goods used or consumed or services rendered, in this commonwealth."

The fact that, during the period relevant to the jurisdictional inquiry, Punchh received \$12,000 from customers that were not based or incorporated in the Commonwealth, but could be traced to those customers' operations in Massachusetts, is insufficient to establish general jurisdiction.

-9-

ORDER

For the foregoing reasons, the court concludes that it does not have jurisdiction over the claims asserted in the complaint under the Massachusetts Long-Arm Statute. Therefore, for that reason, as well as the reasons set out in the court's Prior Decision, in which it concluded that it could not assert jurisdiction over those claims under the Due Process clause of the United States Constitution, Punchh's motion to dismiss for lack of personal jurisdiction is ALLOWED. Final Judgment to enter dismissing the complaint.

/s/Mitchell H. Kaplan Justice of the Superior Court

-10-