



## CASE 3.1

*Hard Candy, LLC v Hard Candy Fitness*  
106 F. Supp. 3d 1231 (S.D. Fla. 2015)

## A Hard Decision on Madonna's Hard Candy Fitness Company

## FACTS

Hard Candy is a Florida limited liability company with its principal place of business in Hollywood, Florida, that began with "Hard Candy" nail polish in 1995. Around that time, Hard Candy filed a U.S. trademark application for the nail polish. Some time later, they filed other applications under the name "Hard Candy" for cosmetics, including lipstick, lip liner, and mascara. Hard Candy's products are sold in Wal-Mart retail stores and on Wal-Mart's website. Since 1997, Hard Candy has also operated a website at [www.hardcandy.com](http://www.hardcandy.com), on which Hard Candy currently displays its products with a link to Wal-Mart's website.

Hard Candy Fitness (HCF) is a network of luxury fitness clubs operated by Hard Candy Fitness, LLC ("HCF"), a Delaware limited liability company with its principal place of business in California. HCF's clubs are located worldwide, but there has never been a club in Florida. NEV Hard Candy Fitness, LLC ("NEV-HC") (a Delaware limited liability company) and MGH Candy (a Delaware limited liability company and owner of HCF) with its principal place of business in California, along with New Evolution Ventures, LLC ("NEV") (a Delaware limited liability company with its principal place of business in California), are businesses associated with Madonna Louise Ciccone, popularly known as Madonna.

Ciccone (a resident of New York) has Guy Oseary (a resident of California) as MGH Candy's "senior management representative." Additionally, Oseary and Sara Zambreno have provided personal management services to Ciccone since around 2005, first as employees of Guyo Entertainment, Inc., and later in affiliation with third-party Live Nation. Although in some circumstances Oseary and Zambreno must consult with Ciccone before making decisions on her behalf, as a general matter both have considerable discretion to manage Ciccone's affairs without her input.

In November 2008, NEV filed with the U.S. Patent and Trademark Office for use of the mark "Hard Candy Fitness" for "[h]ealth club services." The "Hard Candy Fitness" mark was used for the first time over two years later. On October 12, 2011, MGH Candy granted HCF a license to use the mark "Hard Candy Fitness" in connection with the operation of fitness clubs, the sale

of related products, and the marketing and promotion of the clubs and products. In May 2014, MGH Candy assigned to HCF its rights in the unregistered mark "Hard Candy" for use on clothing, bags, jewelry, athletic gear, and accessories. All of these companies, Ciccone, Oseary, and Zambreno are the Defendants.

Hard Candy filed suit in Florida for infringement of the *Hard Candy Marks* by *Hard Candy Fitness* through the clubs, the apparel, the [www.hardcandyfitness.com](http://www.hardcandyfitness.com) website, and the Hard Candy Fitness DVD, entitled *Addicted to Sweat*.

Madonna and her companies (Defendants) filed a motion to dismiss or, in the alternative, to transfer venue to the Northern District of California.

## JUDICIAL OPINION

ALTONAGA, District Judge

The Florida long-arm statute recognizes two kinds of personal jurisdiction over a nonresident defendant: specific jurisdiction and general jurisdiction. The statute confers specific jurisdiction over a non-resident defendant if the claim asserted against the defendant arises from the defendant's forum-related contacts (*i.e.*, contacts with Florida). The statute expressly provides a defendant's contacts may be based not only on the defendant's personal activities, but also on the actions of the defendant's agents. Hard Candy relies on this agency theory of jurisdiction.

To establish a defendant is "carrying on business" under the Florida long-arm statute, "the activities of the defendant must be considered collectively and show a general course of business activity in the state for pecuniary benefit. Relevant factors in this analysis include "the presence and operation of an office in Florida . . . , the possession and maintenance of a license to do business in Florida . . . , the number of Florida clients served . . . , and the percentage of overall revenue gleaned from Florida clients."

The Defendants conduct significant business in this District by selling Hard Candy Fitness products and services here, both in stores and via the internet; MGH-Candy "actively participates in all of HCF's decisions related to the use of the mark 'Hard Candy,' and the aesthetics of the mark and the products." [MGH-Candy, Ciccone,] and Oseary approve and control all aspects of the use of the mark "Hard Candy," including the

CONTINUED



“artistic content,” aesthetics and images related to the use of the mark. Their approval and control rights specifically include the Addicted to Sweat DVD—from its creation, sale and marketing, to the content and cover—the locations for new fitness centers, and the scope of “Hard Candy Fitness” branded services and products, including apparel, sunglasses, bags, t-shirts and more.

“Generally, a foreign parent corporation is not subject to the jurisdiction of a forum state merely because a subsidiary is doing business there.” A subsidiary’s contacts may, however, be imputed to the foreign parent, and therefore potentially subject the parent to personal jurisdiction, “if the subsidiary is merely an agent through which the parent company conducts business in a particular jurisdiction or [the subsidiary’s] separate corporate status is formal only and without any semblance of individual identity.” This agency theory of personal jurisdiction is “not . . . limited to a parent-subsidary relationship,” but rather may extend to other relationships, such as the relationship between members of a limited liability company and the company.

The fact the parent approves major policy decisions of the subsidiary and establishes the subsidiary’s goals and directives is not sufficient to render the subsidiary merely a formality. Similarly, operational control does not exist simply because the parent monitors the subsidiary and advises it when necessary.

According to Richard Feldstein, who provides business and accounting services to MGHCandy and Ciccone, MGHCandy was formed for the following purposes: (1) allowing Ciccone and Oseary to hold ownership interests in MGHCandy; (2) fulfilling obligations and receiving benefits pursuant to the HCF Operating Agreement; (3) facilitating the transfer of intellectual property rights to HCF; and (4) engaging in other necessary and incidental activities.

The limited purposes for which MGHCandy was formed reflect the limited role MGHCandy plays in HCF.

Ciccone provided input regarding: “(1) the individual names used for the DVDs in the set; (2) the DVD descriptions included on the back of the DVD covers; (3) the wording of the quote attributed to Ciccone on the cover of the DVDs; and (4) the title that should be given to the dancer in the DVD, Nicole Winhoffer.” Ciccone also selected the final DVD cover artwork as well as the final color scheme and layout (including images) for the rest of the DVD artwork. Ciccone also viewed a “sizzle reel” highlighting portions of the DVD’s content, but she never viewed the entire DVD. Ciccone was “only concerned with [her own] image on the cover of the DVD,” and she did not otherwise take part in any approval process regarding how the DVD was advertised, presented, or sold.

When they do discuss HCF-related matters, the issues are “more aesthetic, approving a color of something in a gym, approving flooring.” Indeed, Ciccone approved certain HCF merchandise, including shirts, sunglasses, water bottles, a gym bag, and a pen.

In 2012 and 2013, Live Nation and one of Ciccone’s business entities collaborated to produce a worldwide concert tour. As part of the arrangement, Live Nation—not Ciccone—scheduled and produced the concerts and manufactured and sold merchandise with the “Hard Candy” mark. In late November 2012, Ciccone performed two of those concerts in Miami, Florida, but she did not promote HCF or HCF-related goods or services at her concerts, nor did she attend a special event held in Miami around the time of her concerts to promote the ATS DVD. Ciccone has not directly sold concert tickets or merchandise in connection with the concerts she has performed with Live Nation over the past five years.

Strictly construing the Florida long-arm statute, and making all reasonable inferences in favor of Hard Candy, the Court finds the Defendants’ Florida contacts relating to the asserted causes of action are too tenuous to support specific jurisdiction over the Defendants.

The reach of general jurisdiction under the Florida long-arm statute “extends to the limits on personal jurisdiction imposed by the Due Process Clause of the Fourteenth Amendment. . . . Corporations are considered “at home” in their place of incorporation and principal place of business. Corporations may be subject to the exercise of general jurisdiction in other places as well, but the Due Process Clause imposes a high standard: “the inquiry . . . is not whether a foreign corporation’s in-forum contacts can be said to be in some sense ‘continuous and systematic,’ it is whether that corporation’s ‘affiliations with the State are so ‘continuous and systematic’ as to render [it] essentially at home in the forum State.” Defendants, MGHCandy, LLC, Guy Oseary, and Madonna Louise Ciccone are dismissed from this action. The request to transfer this case to a different venue is granted.

#### CASE QUESTIONS

1. Develop a chart showing the various companies involved along with the people and locations for doing business.
2. Explain when Madonna was in Florida and why her presence was not enough to allow jurisdiction.
3. What kinds of activities would have subjected Madonna and her companies and agents to Florida jurisdiction?
4. Why do you think it is so important for Hard Candy to have Madonna and one of her companies as defendants?