

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, 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 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

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“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-subsidiary 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 MGH Candy and Ciccone, MGH Candy was formed for the following purposes: (1) allowing Ciccone and Oseary to hold ownership interests in MGH Candy; (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 MGH Candy was formed reflect the limited role MGH Candy 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, MGH Candy, 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?

CASE 4.2

Pulte Home Corporation v Simerly
746 S.E.2d 173 (Ga.App. 2013)

Fooling Around with Documents and E-Mails: Costs and Consequences

FACTS

In January 2004, Pulte purchased property to develop single-family residences for what would become the Notting Hill and Fieldstone subdivisions. The Pulte Development discharged water into Harris Creek and was located upstream of the properties owned by Tim and Adele Simerly and Richard and Susan Trent (Plaintiffs). Pulte had purchased the property from Macauley Properties, which previously hired Lowe Engineering to complete a hydrology and storm-water management study. The Lowe Study was completed in January 2004, and Pulte relied upon the study to design and construct its development. The Lowe Study recommended that storm water discharges from future developments could be controlled with the construction of a weir on Harris Creek, which consisted of a partial wall across the creek, above Drew Campground Road located within Fieldstone.

Pulte began mass grading and other land-disturbing activities at Fieldstone in March 2004. Shortly thereafter, excessive amounts of storm water, dirt, sediment, and development debris were discharged into Harris Creek and ultimately into the ponds located on the Simerly and Trent properties. Investigations revealed that the discharged sediment and pollutants were caused by

Pulte's activities upstream and its failure to install and maintain erosion control devices required by law. The Pulte Development also caused a dramatic increase in the rate and flow of storm-water discharge into Harris Creek that caused flooding to the Simerly and Trent properties. During a subsequent study, it was discovered that the weir was inadequate to control the storm-water discharge from the Pulte Development because the Lowe Study, upon which Pulte had relied for storm-water management, was based upon flawed assumptions and analysis.

The Simerlys and Trents sued Pulte Home Corporation for trespass, nuisance, negligence, negligence per se, riparian rights, unjust enrichment, and ejectment based on the company's actions in causing excess storm water and sediment to enter the Simerlys' and Trents' properties.

The jury found in favor of the Simerlys, Trents, and Lawsons (collectively, the “Plaintiffs”) and awarded them \$2.49 million in damages and attorney fees. The court had found evidence of spoliation by Pulte and excluded certain exculpatory evidence from the trial because of a finding of Pulte's counsel's misconduct. The trial court also allowed evidence of Pulte's conduct during discovery in its determination of attorney fees. Pulte appealed.

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JUDICIAL OPINION

MILLER, Judge

During litigation, the trial court found that Pulte had engaged in spoliation by deleting emails relevant to the litigation, and enjoined Pulte from engaging in further destruction of evidence. The trial court had appointed a Special Discovery Master to oversee compliance with the court's injunction and to resolve other discovery issues, including the attempted recovery of spoliated evidence through a computer forensic investigation. The Special Discovery Master issued a report outlining that the computer forensic investigation revealed that Pulte had engaged in further spoliation of electronic evidence after the trial court's order and recommended that Pulte be sanctioned for its violations. The trial court adopted the Special Discovery Master's report and recommendation.

The Special Discovery Master also informed the trial court that the Simerlys' counsel and Pulte's counsel had provided conflicting statements relating to Pulte's removal of discovery documents during a May 2009 document review at Pulte's offices. At a subsequent hearing before the trial court, Simerlys' counsel, Michael Carvalho, testified that he and an associate attorney, Christine Westberg, had a scheduled document review at Pulte's offices in May 2009. Carvalho testified that during the document review, he had stacked a number of documents in a pile that were deemed relevant in order to copy them. Before

taking a break for lunch, Carvalho informed Pulte's counsel that they planned to copy the documents in the stack. When Carvalho returned from lunch, he noticed that the stack of documents was smaller. Carvalho testified that he asked Pulte's counsel about the missing documents, and she told him that she took the documents because they were privileged. Following the hearing, the trial court found that Pulte's counsel had taken documents during the document review.

The trial court allowed Carvalho to testify about spoliation during the May 2009 document review, and would [not] allow Pulte to benefit from its discovery violations.

Plaintiffs were forced to undergo unnecessary trouble and expense to prosecute their claims in this case, and the evidence [of the spoliation] was properly admitted as it related to the issue of attorney fees.

Affirmed.

CASE QUESTIONS

1. Explain what the Special Master found about Pulte's behavior in the case.
2. What are the consequences when one side attempts to withhold or destroy evidence?
3. What management lessons should be learned and applied from this case?

CASE 5.1

National Federation of Independent Business v Sebelius
132 S.Ct. 2566 (2012)

Mandating Health Insurance under the Commerce Clause

FACTS

Congress passed the Patient Protection and Affordable Care Act (also known as Obama Care) in order to increase the number of Americans covered by health insurance and decrease the cost of health care. One key provision in the law is the individual mandate, which requires most Americans to maintain “minimum essential” health insurance coverage. Attorneys general from several states, along with businesses, challenged this requirement (and other provisions of the law) as being unconstitutional under the Commerce Clause. From a series of federal court decisions below, some finding the law constitutional and others not, the affected parties appealed and the Supreme Court granted *certiorari*. Their cases were consolidated for the court’s review.

JUDICIAL OPINION

ROBERTS, Chief Justice

The Constitution grants Congress the power to “regulate Commerce.” (Art. I, § 8, cl. 3.) The power to regulate commerce presupposes the existence of commercial activity to be regulated. If the power to “regulate” something included the power to create it, many of the provisions in the Constitution would be superfluous. For example, the Constitution gives Congress the power to “coin Money,” in addition to the power to “regulate the Value thereof.” And it gives Congress the power to “raise and support Armies” and to “provide and maintain a Navy,” in addition to the power to “make Rules for the Government and Regulation of the land and naval Forces.” If the power to regulate the armed forces or the value of money included the power to bring the subject of the regulation into existence, the specific grant of such powers would have been unnecessary. The language of the Constitution reflects the natural understanding that the power to regulate assumes there is already something to be regulated.

Our precedent also reflects this understanding. As expansive as our cases construing the scope of the commerce power have been, they all have one thing in common: They uniformly describe the power as reaching “activity.” It is nearly impossible to avoid the word when quoting them.

The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce. Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority. Every day individuals do not do an infinite number of things. In some cases they decide not to do something; in others they simply fail to do it. Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could *potentially* make within the scope of federal regulation, and—under the Government’s theory—empower Congress to make those decisions for him.

Indeed, the Government’s logic would justify a mandatory purchase to solve almost any problem. To consider a different example in the health care market, many Americans do not eat a balanced diet. That group makes up a larger percentage of the total population than those without health insurance. The failure of that group to eat a healthy diet increases health care costs more than the failure of the uninsured to purchase insurance. Those increased costs are borne in part by failure of that group to have a healthy diet increases health care costs, to a greater extent than other Americans who must pay more, just as the uninsured shift costs to the insured. Congress addressed the insurance problem by ordering everyone to buy insurance. Under the Government’s theory, Congress could address the diet problem by ordering everyone to buy vegetables.

People, for reasons of their own, often fail to do things that would be good for them or good for society. Those failures—joined with the similar failures of others—can readily have a substantial effect on interstate commerce. Under the Government’s logic, that authorizes Congress to use its commerce power to compel citizens to act as the Government would have them act.

That is not the country the Framers of our Constitution envisioned. James Madison explained that the Commerce Clause was “an addition which few oppose and from which no apprehensions are entertained.”

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The Federalist No. 45, at 293. While Congress's authority under the Commerce Clause has of course expanded with the growth of the national economy, our cases have "always recognized that the power to regulate commerce, though broad indeed, has limits." The Government's theory would erode those limits, permitting Congress to reach beyond the natural extent of its authority, "everywhere extending the sphere of its activity and drawing all power into its impetuous vortex." The Federalist No. 48, at 309 (J. Madison). Congress already enjoys vast power to regulate much of what we do. Accepting the Government's theory would give Congress the same license to regulate what we do not do, fundamentally changing the relation between the citizen and the Federal Government.

[There were other issues covered in the 106-page opinion. The complicated decision resulted in the lower court decisions being both affirmed and reversed, but the individual mandate was declared unconstitutional under the Commerce Clause but constitutional as a tax.]

CASE QUESTIONS

1. What was missing that the Court indicated was needed in order to find that the mandate was constitutional?
2. What was the purpose of the court's discussion of a healthy diet?
3. What sources does the court rely on for constitutional interpretation?