

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
VALDOSTA DIVISION

NATIVE AMERICAN ARTS, INC.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action No. 7:10-CV-00124-HL
	:	
BUD K WORLD WIDE, INC.,	:	
	:	
Defendant.	:	
_____	:	

**NATIVE AMERICAN ARTS, INC.’S RESPONSE TO DEFENDANT’S MOTION TO
DISMISS FOR LACK OF ARTICLE III STANDING**

NOW COMES Plaintiff Native American Arts, Inc., by its attorney, Michael Patrick Mullen of the law firm of Mullen & Foster, and for its Response to Defendant’s Motion to Dismiss for Lack of Article III Standing, states as follows:

I. INTRODUCTION

Native American Arts, Inc. (“NAA”) sues a non-Indian, Defendant Bud K World Wide, Inc. (“Bud K”), alleging violations of the Indian Arts and Crafts Act and the Indian Arts and Crafts Enforcement Act of 2000, 25 U.S.C. § 305e (“IACA”). NAA, composed of Ho-Chunk Indians, is an Indian arts and crafts organization under the IACA and a maker, manufacturer, retailer, wholesaler and distributor of authentic Indian-made products similar to those non-Indian-made products marketed and sold by Defendant. IACA is a truth-in-marketing statute designed to stop the false suggestion that products are Indian-made when they are not. Congress determined that 40% to 50% of the total annual one billion dollar Indian arts and crafts market consists of imitation products, many foreign made. IACA prohibits directly or indirectly offering, displaying or selling goods in a manner that falsely suggests it is Indian produced, an

Indian product or the product of a particular Indian, Indian tribe or Indian arts and crafts organization. Standing under the IACA is limited to Indians, Indian tribes and Indian Arts and Crafts Organizations or the Government suing on their behalf.

Regulation 25 C.F.R. 309.24, promulgated by the Secretary of Interior after appropriate notice and comment regulation procedures, states the unqualified use of the term "Indian," "Native American" or the name of an Indian tribe in connection with an art or craft product means that the maker is a member of an Indian tribe and the product is an Indian product. The Complaint alleges defendant labels its products as "Indian," "Native American," "Navajo," "Cherokee," "Chippewa" and "Apache." (Cmplt. ¶¶ 10-11, 17-18). Defendant concedes in its brief, p.3, that it "operates an online and mail order catalogue store selling *** products of traditional Native American Indian style." Defendants offer, display and sale of non-authentic Indian products competes with NAA's offer, display and sale of similar authentic Indian products.

Defendant asserts "NAA may be an eligible organization to bring suit under the IACA but NAA is not an eligible Plaintiff to bring suit in the District Court." (Def's Brief p.9). This argument is nonsense. The District Court has exclusive jurisdiction over IACA claims. Defendant argues NAA has a claim but should be denied a remedy.

Defendant argues that because it distributes goods not manufactured by Native Americans and NAA distributes only Native American made goods, somehow the similar Indian style products are not competing. (Def.'s Brief p.10). That is also nonsense. The Defendant's products at issue are knives and tomahawks, some labeled as "Indian Tribal Tomahawks" or "Navajo Knives." NAA sells similar Indian tomahawks and Indian knives which are authentic Native American made. That is the point of the IACA and NAA's claim. The case covers the

offer and sale of counterfeit products. Defendant is offering and selling products falsely suggested to be Indian made. It is not a false advertising case involving statements as Defendant inaccurately attempts to characterize it.

Defendant moves to dismiss arguing an alleged lack of standing by NAA. As established herein and as previously held by numerous judges in the Northern District of Illinois¹ and elsewhere, Defendant's arguments are without merit.

II. STANDARD OF REVIEW

The standard of review for Rule 12(b)(1) facial attack is whether the Plaintiff has sufficiently alleged a basis of subject matter jurisdiction. This is a statutory action under a federal statute. At the pleading stage, general allegations of injury are sufficient to demonstrate standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

A 12(b)(1) motion to dismiss may attack jurisdiction facially or factually. *Morrison v. Amway Corp.*, 323 F. 3d 920, 924 n5 (11th Cir. 2003). In a facial attack, the court accepts the allegations as true. The court decides whether the Plaintiff has sufficiently alleged a basis of subject matter jurisdiction. *Lawrence v. Dunbar*, 919 F.2d. 1525, 1528-29 (11th Cir. 1990), *Compton v. Circle B Enterprises, Inc.*, 2010 WL 942293 *3, (M.D. Ga. 2010 J. Lawson). In a factual attack the court in its discretion may consider matters outside the pleadings including extrinsic evidence.

Here Defendant appears to facially dispute standing but then also inaccurately labels it a factual attack. However Defendant presents no evidence challenging the factual standing alleged. Defendant's only evidence suggested is an affidavit of Defendant's President submitted

¹ NAA cites many Northern District of Illinois cases herein as that District has a substantial body of law on the IACA. This is the first IACA case in the Middle District of Georgia or the 11th Circuit.

² Defendant's statements in its brief that NAA has filed over one hundred twenty three (123) lawsuits is exaggerated and misleading as some of those PACER print out cases were re-filed cases or insurance

to counter personal jurisdiction in Illinois based upon limited transactions in Illinois. None of the facts asserted therein counter any standing allegations or undermine NAA's standing in any way. Defendant merely asserts it questions the injury in fact plead by NAA but offers no evidence or basis contesting those allegations. But before the court considers a factual attack, the movant should present some basis or evidence that contradict or undermines the subject matter jurisdiction alleged. The Court should not exercise its discretion unless and until a defendant proffers evidence that calls the court's jurisdiction into question. *Commodity Trend Service v. CFTC*, 149 F.3d 679, 685 (7th Cir. 1998); *Synthes USA Sales v. Hancock*, 2009 WL 2043525 (S.D. Ala. 2009).

Whereas here a defendant merely argues it questions or does not believe a plaintiff can prove jurisdictional facts alleged such as damages, it is merely a facial attack, not a factual attack. *Synthes* is directly on point. There the court held that where a defendant proffered no evidence supporting a challenge to alleged jurisdictional damages but merely argued it did not believe plaintiff could prove damages, it was merely a facial attack on subject matter jurisdiction, not a factual attack. The court would presume plaintiff's allegations are true.

Even if challenged by evidence, in such cases, it is extremely difficult to dismiss a claim for lack of subject matter jurisdiction. *Garcia v. Copenhaver, Bell & Assoc.*, 104 F.3d 1256, 1260-1261 (11th Cir. 1997) *citing Simanonok v. Simanonok*, 787 F.2d 1517, 1519 (11th Cir.1986); cited with approval in *Salah v. U.S.*, 11 Fed. Appx. 603, 604 (7th Cir. 2001). *See also* Federal Civil Rules Handbook, Rule 12(b)(1) commentary p. 352, "the plaintiff must carry this burden by a preponderance of the evidence. The burden, however, is generally not a heavy one." Plaintiff has met its burden.

Defendant merely seeks to prevent NAA from pursuing merits discovery at this stage. Defendant improperly attempts to have the Court decide issues as a fact finder, instead of the jury. Further, NAA's allegations of injury and damages implicate the merits of its IACA claim. Injury and damage are intertwined with and flow from the issue of a false suggestion products alleged were Indian made Indian products. The injury and damage establish that NAA is an injured Indian arts and crafts organization.

However in a factual attack the court is precluded from acting as a fact finder where the jurisdictional issue implicates or is intertwined with the merits. A summary judgment standard rather than a 12(b)(1) standard should apply. A court should rely on Rule 12(b)(1) only if the facts do not implicate the merits of the plaintiff's cause of action. *Garcia* at 1261. If a jurisdictional challenge does implicate the merits, the district court should find that jurisdiction exists and deal with the objection as a direct attack on the merits and refrain from deciding disputed factual issues. *Morrison* at 925; *Lawrence* at 1529.

Here Defendant's arguments are also premature before any merits discovery. If defendant disputes any allegations, let it so answer and we can get on with the case in the ordinary course, including if appropriate after full discovery, summary judgment motions.

III. NAA SATISFIES ALL ARTICLE III STANDING REQUIREMENTS

A. NAA plead an injury cognizable by the IACA and traceable to Bud K

NAA can establish Article III injury in fact standing under *Lujan*. NAA, an Illinois corporation composed of members of the Ho-Chunk Nation, a recognized Indian tribe, is an Indian arts and crafts organization under the IACA and a maker, manufacturer, retailer, wholesaler and distributor of authentic Indian-made products similar to those marketed and sold

by Defendant. (Cmplt. ¶¶ 3, 24).² Over the past sixteen years (and currently), NAA has offered authentic Indian art and craft items made by NAA and by artisans from over thirty different Indian tribes. NAA conducts retail and wholesale operations including distributing catalogs and other advertising materials as well as operates a nationwide internet website offering for sale its authentic Indian products nationwide. (Id.).

The IACA prohibits a person from directly or indirectly offering, displaying for sale or selling goods in a manner that falsely suggests it is Indian produced. Here, Plaintiff has alleged an actual, concrete, particularized injury arising directly from Defendant's wrongful conduct. The Complaint alleges that Defendant offered, displayed for sale and sold arts and crafts products, which were falsely suggested to be Indian-made, directly and indirectly possibly since March 31, 2006. (Cmplt. ¶¶ 8-12). NAA alleged that Defendant utilized falsely suggestive marketing materials and advertisements on traditional Indian products including the use of Indian symbols, lore and descriptive labeling language such as "Native American," "Indian," "Navajo,"

² Defendant's statements in its brief that NAA has filed over one hundred twenty three (123) lawsuits is exaggerated and misleading as some of those PACER print out cases were re-filed cases or insurance litigation. All did not seek enforcement of the IACA. More importantly, Defendant fails to point out that those cases were filed over a fifteen (15) year period. Plaintiff estimates there have been about 90 enforcement cases over 15 years. In any event, the number of other lawsuits is irrelevant as held by Judge Guzman in a recent opinion when, following specific briefing, he held that NAA does have standing as an Indian arts and crafts organization under the IACA (*NAA v. Jose Maigua d/b/a Mother Earth Crafts*, Case No. 07 C 0361, (N.D.Ill. 2007), November 2, 2007 Memorandum Opinion). In doing so, Judge Guzman found that multiple suits do not preclude standing and recognized that "Congress expanded the entities entitled to sue in hopes of improving enforcement of the IACA *** to narrowly interpret standing under the IACA would go against Congress' intent to encourage more enforcement of the IACA. (See Sen. Rep. 106-452 at 1 ('the purpose of [amending the IACA] is to provide technical amendments to improve the enforcement of the IACA for the protection of the economic and cultural integrity of authentic arts and crafts, and for other purposes').)" The fact that NAA has followed Congress' intent to enforce the IACA and has directly encountered the grave flood of counterfeit Indian products ravaging the Indian products market and, through litigation, has sought to protect its and other Indian artisans' economic and cultural rights does not undermine its standing as a Indian arts and crafts organization. Furthermore, NAA has been instrumental in getting injunctions requiring the use of a disclaimer that a product is not Indian-made in more than fifty (50) instances over fifteen years, including against nationwide retailers of Indian-style products such as J.C. Penney Co., Inc. and Wal-Mart. This has tremendously benefited Indian artisans

"Cherokee," "Chippewa" and "Apache." (Id.). NAA also alleges that NAA was the purchaser of defendant's product which were falsely suggested to be authentic Indian-made products when they were not. (Id.). Finally, the Complaint alleges that NAA is a competitor of Bud K; that NAA advertises, markets and sells authentic Indian-made products similar to those advertised, offered, displayed and sold by Bud K falsely suggested to be Indian products; that NAA advertises, markets and sells authentic Indian-made products through identical mediums as Defendant; and that NAA has suffered competitive injuries as well as other damages as a result of Bud K's actions. (Id. at ¶¶ 24-29).

Defendant's aforementioned actions of selling counterfeit Indian products into the same marketplace where NAA competes resulted in a suppression of NAA sales by the Defendant. Such a diversion of sales and business opportunities is a concrete and particularized harm to NAA caused by Defendant's actions. The products sold by Defendant contribute to the flood of imitation Indian-products that enter the market place for authentic Indian-made products thereby undermining that market in terms of price and injuring NAA who sells authentic products in that market. They also undermine the quality and marketability of authentic Indian products. Also, since NAA participates in that market it further suffers a concrete and particularized injury based upon the damage to its goodwill and reputation caused by the flood of counterfeit Indian products. In addition, because NAA purchased products from Defendant that were counterfeit, NAA suffered a specific injury arising directly from the offer, display and sale of products from Defendant to NAA. Finally, it is very likely that discovery will reveal that Defendant had a gross profit on all of the Indian products at issue which, under the IACA, establishes that Plaintiff has been injured and damaged. 25 U.S.C. 305(e)(a). Congress included a defendant's

and the Indian community as a whole and encourages the use of disclaimers in the Indian products marketplace generally.

gross profit as damages and as a substitute for quantifying injury and damages based upon lost sales which is usually difficult to show.³ Although NAA may seek statutory damages in lieu of treble damages, Defendant's gross profits on the Indian products at issue establish an injury-in-fact. Congress has found that each of the injuries discussed infra result from the offer, display and sale of counterfeit Indian products and are the injuries that the IACA is meant to remedy and prevent. Sen. Rpt. 106-452.

At trial, NAA's owners are allowed to testify to the value of the business, competition between the parties, and the damage done to it by Defendant. *See Mary Ellen Enterprises, Inc. v. Camex, Inc.*, 68 F.3d 1065, 1070 (8th Cir. 1995); *TWM Mfg. Co. v. Dura Corp.*, 789 F.2d 895, 902 (Fed.Cir. 1986); and *Iris Arc v. S.S. Sarna, Inc.*, 621 F.Supp. 916 (E.D.N.Y. 1985). After full discovery which is necessary to assemble the information for an expert, Plaintiff anticipates employing the services of a market share expert in order to further establish NAA's injury and damages specifically attributable to Defendant. An accepted method for establishing injury to a plaintiff for lost profits is projecting market share which the plaintiff would have attained absent the anticompetitive activity and projecting plaintiff's profits accordingly. *See Zenith Radio v. Hazeltine*, 395 U.S. 100 (1969)(Supreme Court accepted use of market share analysis in establishing plaintiff's damages in regard to its foreclosure from the Canadian market); *See also BASF Corp. v. Old-World Trading*, 41 F.3d 1081 (7th Cir. 1994)(Seventh Circuit recognized damages for competitive injury based on projection of lost sales using market share analysis). Such expert testimony has been accepted in similar IACA cases and NAA should be allowed to

³ See Senate Report 106-452, pg. 4, "Plaintiffs who bring suit under the IACA, like other consumer protection cases, have difficulty in proving and quantifying damages. For example, lost or diminished sales attributable to the complained behavior, are difficult or impossible to prove." *See also NAA v. Bundy-Howard, Inc.*, 168 F.Supp.2d 905, 914, (N.D.Ill. 2001), "[T]here is no effective way to measure the loss of sales and potential growth – to ascertain the people who don't knock on doors or to identify specific person who do not re-order because of the existence of an infringer."

complete full discovery and develop such expert evidence. *NAA v. The Waldron Corporation*, Case No. 01 C 2370, N.D.Ill. J. Conlon 5-29-2002 Memorandum Opinion.⁴

NAA may also produce expert testimony by Native Americans who are involved in the Indian products market to also establish actual injury and damage.

NAA is a direct and indirect⁵ competitor of Bud K in the Indian arts and crafts market who suffered injuries traceable to the Defendant's offer, display and sale of similar Indian-style products which falsely suggested they were Indian-made. Clearly, taking the allegations in the Complaint as true, Defendant has more than the required minimum notice regarding its violative conduct and the resultant injuries suffered by NAA. This satisfies the inquiry, especially given the light burden imposed in satisfying jurisdictional requirements.

B. A Favorable Ruling Will Redress NAA's Injuries

NAA has established that it has suffered an injury-in-fact traceable to the Defendant. A favorable ruling (including an injunction) would redress the competitive injuries caused by the Defendant's offer, display and sale of falsely suggestive Indian products.

C. Northern District of Illinois Judges as Well as Other Judges Have Held That Nearly Identical Pleadings Satisfy Article III Standing Requirements

The Complaint clearly alleges an actual, concrete, particularized injury suffered by NAA

⁴ Any additional arguments that NAA is required to provide detail regarding its damages or lost sales rings hollow because a plaintiff is not required to itemize its damages in its complaint or allege its damages in detail and with particularity. *Avita v. Metropolitan Club of Chicago, Inc.*, 49 F.3d. 1219 (7th Cir. 1995); *Everco Industries, Inc. v. O.E.M. Products, Inc.*, 63 F.R.D. 662 (N.D.Ill. 1974). NAA's interest in pursuing this claim is directly related to its injury-in-fact even though NAA may seek statutory damages. As shown above, NAA has been injured by Defendant's actions and the fact that NAA may seek statutory damages is irrelevant to the issue of standing.

⁵ Congress specifically amended the IACA in 2000 to include "indirect" violations in order to provide greater enforcement against manufacturers and suppliers, such as Defendant, who sell violative products into an Indian arts and crafts organizations' competitive market. *See* Sen. Rep. 106-452, October 2, 2000, "To enhance the ability of the plaintiff to assess and calculate damages, the phrase 'directly or indirectly' will be added after the phrase 'against a person who.' This provisions clarifies that suit may be brought against a manufacturer and/or supplier when the plaintiff is not in direct competition with the

caused by Defendant's wrongful conduct. This meets the Article III injury-in-fact standing requirements and is sufficient to deny Defendant's Rule 12(b)(1) Motion. In other IACA cases in the Northern District and elsewhere, numerous judges have rejected Rule 12(b)(1) challenges and upheld subject matter jurisdiction based upon nearly identical allegations as present in this cause of action. No court has ever dismissed a NAA complaint with prejudice since the 2000 Amendment.

Recently, in *NAA v. Concord Buying Group d/b/a A.J. Wright*, Case Number 07 C 7109 (N.D.Ill. 2008) *see* pgs 2-3 of 06-12-2008 transcript, Judge Pallmeyer opined:

Really it seems to me, in fairness, that the plaintiff has alleged sufficiently, even under the *Twombly* standard, that it has standing to challenge the alleged offering of goods in violation of the [IACA]. I really understand the argument the defendant to be making is one that confuses the question of standing with a question of whether the plaintiffs can prove any injury. If this plaintiff doesn't have standing to enforce the [IACA], *** I can't imagine who would. *** I just don't believe the statute is intended to require that at the pleading stage plaintiff identify chapter and verse the way in which it was injured so long as plaintiff establishes that it is an individual who would be injured by a violation of the act, and makes specific allegations about what violations did occur. And I think those specifics do appear in the complaint that was filed here in this case.

In *NAA v. Finding King*, Case No 06 C 6143 (N.D.Ill. 2007) *see* pgs. 3-4 of 11-07-2007 transcript, Judge Pallmeyer also denied a similar Rule 12(b)(1) Motion to Dismiss, filed by the same Defense counsel herein, opining:

It seems to me inconsistent with the goals of the Act to require some additional showing of standing in this context. Certainly Native American Arts can claim injury at least to the extent that the statute presumed that sales by non-Native Americans of goods that hold themselves out in this nature injure those alleged legitimate purveyors.

In addition, other judges in the Northern District of Illinois have also denied Rule 12(b)(1) motions in IACA litigation. In *NAA v. J.C. Penney*, 5 F.Supp.2d 599 (N.D. Ill. 1998),

manufacturer or supplier *** although these defendants may not be the final retailer who sells the violative product."

the court, relying on the Supreme Court's decision in *Lujan* at 561, held that nearly identical factual allegations satisfied Article III standing requirements. In *J.C. Penney*, the defendant brought a Rule 12(b)(1) motion to dismiss contending that the complaint in that action did not establish Article III standing for NAA. The court rejected this argument holding:

NAA alleges a more substantial injury that it has already suffered in a particularized and concrete way: lost revenue and business opportunities as Penney's direct retail competitor. NAA claims that 'effect of this flood of imitation Indian products by defendant is to undercut the authentic Indian product market and NAA's sale and profits and business opportunities in several injurious ways. NAA pledges to prove that 'it is a direct retail competitor of Defendant selling similar authentic products. *** These general allegations are sufficient to encompass more specific claims about exactly how and to what extent Penney's sales undermined NAA's profits. Thus, the injuries NAA outlined in its brief are sufficiently concrete, particularized, and actual to meet the injury-in-fact prong.

Id. at 602.⁶

Furthermore, the court held that the injuries discussed above satisfied the requirements for causation and redressability. In doing so, the court opined:

NAA has met the remaining requirements of causation and redressability. NAA alleges that it was Penney's conduct in selling imitation Indian-style goods that caused NAA to lose sales and business opportunities. As such, NAA's injury is fairly traceable to Penney's offending conduct ***. As for redressability, the complaint plainly sets forth the relief requested-compensatory and punitive damages and injunctive relief-all of which the statute authorizes as relief to be paid to an aggrieved Indian arts and crafts organization such as NAA. Because NAA has sufficiently plead all three constitutional standing requirements, we have subject matter jurisdiction.

Id. at 603.

In *NAA v. Bundy-Howard*, the court similarly held that under nearly identical factual

⁶ As pointed out by Judge Castillo in *J.C. Penney*, "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations of injury embrace those specific facts that are necessary to support the claim *** In addition, the court may consider facts contained in NAA's memorandum in opposition to the motion to dismiss as long as they are consistent with the allegations in the complaint." *Id.* at 602 citing *Lujan* at 561; *Dausch v. Rykse*, 52 F.3d 1425 FN 3 (7th Cir. 1994); and *Jrubec v. National R.R. Passenger Corp.*, 981 F.2d 962, 963-964 (7th Cir. 1992).

allegations as here that NAA was an “aggrieved” party under the IACA. Specifically, the court held:

As an ‘Indian arts and crafts organization,’ [NAA] is within a class authorized to sue under Section 305e(c). And the Complaint (which must be taken as true) alleges that Movants sold and marketed items in a manner falsely suggesting they were Indian-made when in fact they were not. Under any sensible reading of the term ‘aggrieved,’ [NAA] – competing in the market place by offering legitimate Indian-made products – fits comfortably within that term. Enough said.

Id. at 911. (Adopted in its entirety in *NAA v. Giftmart Trading Post*, Case No. 01 C 2892, 01-16-2002 Minute Order (N.D.Ill. 2002)).

Also, in *NAA v. Duck House, Inc.*, Case No. 05 CV 2176, 03-01-2007 Memorandum Opinion (N.D. Ill. 2007), Judge Hart at page 8, citing to *J.C. Penney* at 602-603 and *Bundy-Howard* at 911, held:

Plaintiff alleges that it lost sales due to defendant’s sale of similar products that, unlike plaintiff’s products, were not authentic Indian products. That makes plaintiff an ‘aggrieved’ Indian arts and crafts organization entitled [to] could recover statutory damages. This is a concrete injury caused by defendant’s alleged violative conduct and is redressable in this lawsuit.⁷

In *Native American Arts, Inc. v. Mangalick Enterprises, Inc.*, 633 F.Supp.2d 591, 596 (N.D. Ill. 2009 J. Dow) the court held that a similar IACA complaint established standing in a similar case. The court held that Native American Arts had standing as a competitor of Defendant involved in the distribution of similar authentic goods suffered competitive injuries.

Similarly, *Native American Arts, Inc. v. Peter Stone Co., U.S.A.*, 2009 WL 1181483 at *2 held that Native American Arts had standing in a similar IACA case.

As stated, Judge Guzman also held NAA did have standing in *Jose Maigua*. See footnote 3 herein.

⁷ See also *NAA v. Nature’s Gifts, Inc.*, 1999 U.S. Dist. Lexis 3687 *9 (N.D. Ill)(Judge Holderman holding that NAA satisfied requirements for standing based upon NAA’s allegation that one of its injuries

In *Native American Arts, Inc. v. Contract Specialties, Inc.*, 2010 WL 4823688, the District of Rhode Island court recently denied a 12(b)(1) motion to dismiss raising similar arguments on standing. It held, "At this stage of litigation, however, it is enough for [Native American Arts] to allege that it sells similar products as [Defendant] and that its sales and reputation are harmed by [Defendant's] false advertising and sales of fakes." (*Contract Specialties* at *8).

Defendant inaccurately and misleadingly asserts that regarding attacks on the district court's subject jurisdiction, some have succeeded *citing Native American Arts, Inc. v. Specialty Merchandise*, 451 F.Supp.2d. 1080 (C.D. Cal. 2006); (Def.'s Brief p.6). As stated, this is incorrect. None have succeeded, NAA has not lost a standing issue in any case since the 2000 amendment.

Defendant misrepresents *Specialty Merchandise* in arguing that NAA lost a standing issue previously. It did not. In *Specialty Merchandise* Plaintiff argued but did not plead: (1) it lost sales, (2) defendants imitation products drove prices down, forcing plaintiff to offer its authentic products at lower prices, and (3) it suffered a loss of goodwill and reputation because of the "counterfeit" products. *Id.* at 1082. "Plaintiff argues in the opposition" the above but failed to allege the injuries in the complaint. *Id.* At 1082. (Underlying supplied). That lack of pleading allegations in the complaint was the basis for ruling without prejudice. The *Specialty Merchandise* Court also noted that those injuries would be sufficient to meet the injury in fact requirement if properly alleged. *Specialty Merchandise* was then later replead. Here the injury and damages are properly alleged. Compl. ¶ 24. See also *Mangalick* at 596, n. 3 rejecting *Specialty Merchandise* as inapposite where, as here, injury is alleged; and *Contract Specialties*

was caused by a reduction in sales which was caused by defendants marketing non-authentic products as authentic and selling them at a discounted price).

ruling similarly at *9 n. 4.

IV. PRUDENTIAL STANDING REQUIREMENTS DO NOT APPLY

NAA has satisfied all standing requirements. Defendant's additional argument that prudential principles require dismissal is frivolous at best. Prudential standing limitations are generally at issue in cases where a litigant is seeking to address the legal rights of another. In such cases, prudential limitations eliminate cases "where no individual rights would be vindicated" and restrict "access to federal courts to those litigants best suited to assert a particular claim." *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979); *Family & Children Center, Inc. v. School City of Misawaka*, 13 F.3d 1052 (7th Cir. 1994). Such is not the case here as NAA is seeking redress for its own claims against Defendant, not someone else's claims.

NAA, as an Indian arts and crafts organization, was granted direct standing under the IACA 2000 Amendment. After NAA in *J.C. Penny* lost a direct standing challenge under the prior statute before amendment, NAA specifically petitioned Congress for direct standing, proposed the amendment, appeared at hearings and testified in furtherance of the amendment which Congress adopted. Before the amendment NAA had indirect standing through its tribe. Congress then knowingly granted NAA direct standing under the amendment. Thus, it is patently frivolous for Defendant to argue that NAA is not a proper party to seek redress under the statute.

Where a statute grants standing to the full limits of Article III, courts "lack the authority to create barriers to standing" in suits brought under that statute. *Haven Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982); *Family & Children's Center* at 1060. In *Haven*, the Supreme Court held that because Congress had granted standing under the Fair Housing Act that

prudential requirements were moot. It held that the inquiry into statutory standing collapsed into the question of whether the injuries alleged met the Article III minimum of injury in fact. At 372. This is exactly the case here. "The actual or theoretical injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing ..." *Haven* 455 U.S. at 374 quoting *Warth v. Seldin*, 422 U.S. at 500." *Watts v. Boyd Properties, Inc.*, 758 F.2d. 1482 (11th Cir. 1985); *Center for Auto Safety v. National Highway Traffic Safety Admin.*, 793 F.2d. 1322, 1336-1337 (D.C. Cir. 1986). The IACA where Indians are granted standing specifically is such a statute.

The IACA gives express standing to Indians, tribes and Indian arts and craft organizations, a limited class of plaintiffs. This is a full grant of standing under Article III. A court lacks the authority to create prudential barriers to standing under IACA. Thus no prudential considerations apply and that should be end the inquiry.

Also see *J.C. Penney* at 603 n. 6 (Judge Castillo holding "[i]n addition to constitutional requisites for standing, federal courts 'also adhere [] to a set of prudential principles that bear on the question of standing'***[t]hese principles, directed toward ensuring that the federal judiciary maintains its limited role in this democracy, are not at issue in this case."). See also *Duck House* at 9:

Defendant contends that prudential limitations on standing should be applied to find that plaintiff lacks standing. Those arguments, however, depend on defendant's contention that plaintiff has not adequately alleged any injury. As discussed above, plaintiff has alleged an injury to its business. There is no sufficient basis for exercising prudential standing limitations.

Mangalick at 596 also rejected prudential standing arguments in upholding NAA's standing.

Defendant argues that the court should apply a standard for standing from a Lanham Act

false advertising claim to an IACA claim. This is simply unsupported. Defendant incorrectly and misleadingly cites an opinion on a discovery dispute, *Ho Chunk Nation v. J.C. Penney Company, Inc.*, 1999 WL 1068700 at *4 (N.D. Ill. Nov. 17, 1999), for this proposition stating that case noted that the IACA was drafted to parallel Section 43(a) of the Lanham Act suggesting it referred to false advertising. It did not. The case stated, "considering the legislative history of the Act, section 305e was drafted with this false suggestion language to parallel the false designation provisions of the Lanham Act 15 U.S.C. § 1125", not the false advertising provisions. In any event, that opinion involved a discovery dispute and the portion relied upon by Defendant is purely dicta and unpersuasive.

V. NAA SATISFIES ANY PRUDENTIAL STANDING REQUIREMENTS THAT MAY APPLY

However, even if this Court were to find that prudential principles were applicable, NAA would easily fall with the "zone of interests" protected by the statute. *Baaske v. City of Rolling Meadows*, 191 F.Supp.2d 1009, 1014 (N.D.Ill. 2002)(The only possible relevant prudential restriction is that a plaintiff's claim must fall within the zone of interests to be protected or regulated by the statute in question). NAA's claims fall squarely within the zone of interests protected by the IACA. The IACA was enacted to protect Indian artisans and artisan organizations from the flood of imitation products being sold as authentic. NAA is an Indian arts and crafts organization that sells only authentic arts and crafts. NAA's claim that Defendant is flooding the market with imitation goods undermining the ability of Indians to sell their goods is exactly within the zone of interests Congress intended to protect. Thus, NAA's claims meet all prudential standards.

Defendant solely relies upon *Phoenix of Broward, Inc. v. McDonald's Corporation*, 489 F.3d 1156 (11th Cir. 2007) citing *Conte Bros. Automotive, Inc. v. Quaker State-Slick 50, Inc.*,

165 F.3d 221 (3rd Cir. 1998), a false advertising case arising under the Lanham Act. *Conte Bros.* applied an antitrust basis for standing, rather than only a competition standard. Defendant incorrectly argues that prudential standing principles should be examined using the prudential principles applicable to a false advertising claim under the Lanham Act. However, this case is not a Lanham Act false advertising case or even a Lanham Act case nor a false advertising case. The IACA is *sui generis* preventing offer or sale of products falsely suggested to be Indian made Indian products. Simply because the IACA history references the Lanham Act in another context (actually referring to a parallel criminal statute) does not mean that any, let alone all Lanham Act standards are applicable to the IACA. An antitrust approach as in *Conte Bros.* and *Phoenix* is inappropriate for an IACA case. A Lanham Act false advertising claim has different elements including advertising that is false that causes a likelihood of confusion. None of those facts are elements of an IACA claim. Unlike the Lanham Act, there is no statutory likelihood of confusion requirement in the IACA. An IACA claim requires only a false suggestion that a product is an Indian made Indian product. While some IACA claims may include false advertising, it is not a required element and indeed need not even be present in an IACA claim. The purpose of the IACA is to protect Indians and to redress a public wrong to Indians and the consuming public, not to redress a private right regarding private property as under the Lanham Act. This difference of purpose dictates different prudential considerations.

No IACA case has ever held that Lanham Act standing principles should apply.

This argument that Lanham Act standing principles should apply was recently rejected by the Court in *Contract Specialties* at *9-10. There the court noted the lack of any decisions applying the Lanham Act standing test to IACA claims or holding that IACA standing is the same as Lanham Act standing.

A. NAA Nevertheless Meets Prudential Standing Under the Lanham Act

Regardless, even under the prudential standing requirements applicable to the Lanham Act, NAA's claim would still fall within the zone of interest to be protected under the IACA. The Lanham Act prudential considerations include: (1) the nature of the plaintiff's injury: is the injury of a type that Congress sought to redress in providing a private remedy for violations of the Act; (2) the directness or indirectness of the asserted injury; (3) the proximity or remoteness of the party to the alleged injurious conduct; (4) the speculativeness of the damages claim; and (5) the risk of duplicative damages or complexity in apportioning damages.

As stated above, regarding number one, Congress intended to provide an Indian arts and crafts organization, such as NAA, the ability to obtain redress for violations of the IACA when it amended the IACA in 2000 specifically for that purpose.

Second, NAA has suffered direct injury from Defendant's violations of the IACA. NAA is an Indian arts and crafts organization under the IACA that offers, displays and sells its similar authentic products throughout the nation, through the internet, catalogs, brochures, mailed solicitations and newspaper advertisements. (Cmplt. ¶¶ 3, 10-11, 24). NAA is an alleged competitor of Defendant, injured by Defendant's offer, display and sale of violative products in its marketplace. (Id. at ¶¶ 24-29). Therefore, NAA has sufficiently suffered direct injury from Defendant.

Third, NAA's injury is directly connected to Defendant's conduct. Both NAA and Bud K sell similar Indian-style products in the same marketplace and, thus, competition exists and direct injury is present.

Fourth, the IACA's damage provision is clear as are NAA's damage claims. NAA seeks redress under the IACA by possibly opting for the statutory damage provision. Congress

provided for this statutory provision because it recognized the difficulty in proving damages (*e.g.* lost sales) under the IACA. NAA's alleged damages are not speculative, but rather are based upon the statutory damage formula as applied to the quantity of Defendant's allegedly violative products. Alternatively, actual damages are present which are not speculative.

Fifth, the risk of duplicative damages or complexity in apportioning damages is not a factor in this action. Defendant's argument that NAA does not satisfy prudential standing requirements because Defendant could be sued by other aggrieved Native American artists for violating the IACA rings hollow. This argument is based upon pure speculation. Any other injured Native American artist which might bring suit against Defendant would have to satisfy Article III standing requirements irrespective of this case. Similarly, any damages awarded to said Native American artist would be based upon the injuries suffered by that Native American artist which would be entirely distinct and separate from competitive injuries alleged by NAA.

VI. CONCLUSION

For the reasons stated, this Honorable Court should deny Defendant's Motion to Dismiss.

I certify that the originally executed document contains the signatures of all filers indicated herein and therefore represents consent for filing of this document.

Respectfully submitted,

STONE & BAXTER, LLP
By:
/s/ Ronald C. Thomason
Ronald C. Thomason
Georgia Bar No. 706900
577 Mulberry Street, Suite 800
Macon, GA 31201
(478) 750-9898
(478) 750-9899 (Facsimile)

MULLEN & FOSTER
By:
/s/ Michael P. Mullen
Michael P. Mullen
333 N. Michigan Avenue, Suite 2333
Chicago, IL 60601
(312) 750-1600
Counsel for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 25, 2011, the foregoing was electronically filed with the Clerk of the U.S. District Court using the CM/ECF System, which will send notification of such filing to the following:

Elizabeth A Knight EKnight@khkklaw.com

Paul Bruno Johnson pjohnson@khkklaw.com

R. Sean McEvoy rsm@caseygilson.com, gxb@caseygilson.com, slk@caseygilson.com

This 25th day of January, 2011.

/s/ Michael P. Mullen

Of Counsel