JKB/cmj/622231 443-144-51

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NATIVE AMERICAN ARTS, INC.,	)	
	)	
Plaintiff,	)	
v.	)	
	)	No. 08 CV 3908
PETER STONE CO., U.S.A., INC.,	)	
	)	Magistrate Judge Cole
Defendant.	)	

PETER STONE'S REPLY IN SUPPORT OF ITS
MOTION FOR SUMMARY JUDGMENT ON NAA'S LACK OF STANDING

Defendant, Peter Stone Co., U.S.A., Inc. ("Peter Stone"), by and through its attorneys, Tressler LLP, hereby submits its Reply in support of its Motion for Summary Judgment on Plaintiff Native American Arts, Inc.'s ("NAA") Lack of Standing.

I. INTRODUCTION

Plaintiff has failed to create a genuine issue of material fact for trial. Peter Stone is entitled to judgment as a matter of law that NAA cannot establish standing to sue. This Court lacks jurisdiction to hear the claims presented by NAA because, as a matter of law, NAA lacks standing to sue Peter Stone for the following three reasons: (1) NAA cannot credibly distinguish the *Indio* decision; (2) NAA has failed to create any factual dispute as to the elements of standing; and (3) NAA cannot meet its burden to establish any injury in fact traceable to Peter Stone's conduct, and (4) no action of the Court can redress NAA's speculative injuries.

II. ARGUMENT

A. Summary Judgment Is Not Optional

Plaintiff argues that summary judgment "should be granted sparingly." (ECF at 5). The law is to the contrary. "Summary judgment is not a remedy to be exercised at the court's option; it must be granted when there is no genuine disputed issue over a material fact. *Bank of Illinois*

v. Allied Signal, 75 F.3d 1162, 1168 (7th Cir. 1996). The salutary purposes of summary judgment include avoiding protracted, expensive and harassing trials and to conserve judicial resources and provide a speedy and efficient summary disposition. *Abdu-Brisson v. Delta Air Lines*, 239 F.3d 456, 466 (2nd Cir. 2001); *Sibley v. Lutheran Hosp. of Maryland*, 871 F.2d 479, 483, n.8 (4th Cir. 1989).

B. NAA Fails To Establish That It Has Standing

1. Collateral Estoppel Bars NAA's Claim

In its Motion, Peter Stone established that NAA was collaterally estopped from pursuing this claim based on the *Indio* decision. (ECF 250 at 18-19). NAA's only response to this argument is its erroneous conclusion "[c]ollateral estoppel does not apply unless the facts and issues in the case at bar and the prior suit are virtually identical." (ECF 279 at 18). First, Plaintiff misrepresents the standard, which requires merely that the issues between the two cases be substantially similar. (ECF 250 at 12-13). Second, the standing issue in this case is in fact substantially similar to that decided in *Indio*.

Next, Plaintiff misrepresents the *Indio* holding, arguing that it was based on a finding that "NAA had no standing in that case because NAA did not demonstrate a violation of the Act" and that "any discussion on standing was necessarily mere *dicta*." (ECF 279 at 18, 21). The *Indio* court decided that NAA lacked standing prior to, and independent of, the finding that summary judgment was also proper because NAA did not demonstrate a violation of the Act. (ECF 279-4 at 50-56). The rationale in *Indio* for the ruling that NAA lacked standing was not, as Plaintiff asserts that it failed to demonstrate a violation of the Act, but rather because "NAA's alleged injuries lack evidentiary support, because NAA has not conducted an investigation from which it could reasonably conclude that it has been injured by Indio's conduct and NAA has not provided admissible expert testimony supporting any such conclusion." (ECF 279-4 at 51).

NAA next argues that in *Indio* "Judge Kocoras did not address the issue of statutory standing under Article III." (ECF 279 at 21). This is a blatant misrepresentation of the *Indio* ruling, where the court directly addressed standing under Article III, the court finding:

> [e]ven if [Article III standing] true, NAA must still satisfy the typical standing requirements. (citation omitted) Otherwise, every Indian, Indian tribe, and Indian arts and crafts organization could sue any and every person who violates the Indian Act, even though the parties do not compete against each other and the wrongful act had no actual impact on the plaintiff.

(ECF 279-4 at 51).

The legal issue here and in *Indio* is identical: whether NAA has standing to sue a small business for alleged multi-million dollar violations of the Act. The standing argument was thoroughly litigated through summary judgment by those parties, the standing determination was final and a critical part of the case, and NAA had a full and fair opportunity to litigate the issue, as demonstrated by the appeal it brought, but then dismissed, to the Seventh Circuit. The proper forum for NAA's argument was the Seventh Circuit in the appeal it voluntarily dismissed. NAA's attempt to distinguish *Indio* as having different facts and circumstances misrepresents the striking similarities between the two cases. A comparison of NAA's complaint in *Indio* and the complaint filed against Peter Stone make clear that this case is a carbon copy of the former: NAA merely cut and pasted Peter Stone's name and products into the *Indio* document. Likewise, a comparison between NAA's response to summary judgment here with NAA's response to summary judgment in *Indio* demonstrates the substantial recycled standing arguments made by NAA between the two cases. Perhaps this explains why there is not a single shred of evidence offered by NAA to demonstrate a material factual difference between the two cases on the standing issue. Bare arguments of counsel do not create a triable issue of fact of summary judgment. *Ellis v. England*, 432 F.3d 1321, 1326-27 (11th Cir. 2005). This case involves the same plaintiff, same legal claims, the same facts relevant to NAA's alleged injuries, and with

respect to standing the same legal argument, as those at issue in *Indio*. This Court should follow *Indio* and conclude that NAA lacks standing.

2. NAA Has Failed To Establish That It Has Suffered An Injury In Fact

The *Indio* court held that NAA's alleged injuries lacked evidentiary support because NAA (1) failed to conduct an investigation to show that it had been injured by the alleged conduct, and (2) failed to provide admissible expert testimony supporting any such conclusion. *Id*. Similarly, in this case Plaintiff has failed to conduct any investigation into whether Peter Stone's conduct actually injured NAA. Instead, as in *Indio*, NAA relies on the inadmissible testimony of its owner, Matthew Mullen.[1] Second, Plaintiff has submitted no expert testimony whatsoever supporting any such conclusion.[2] Plaintiff's argument that it suffered reputational injury, loss of goodwill, and diminution in the value of a designation of origin, are, as in *Indio*, conclusory and not supported by any competent or admissible evidence.

The case law Plaintiff relies on do not support standing. *Armes* was a FACTA case involving a consumer being provided a credit card receipt that violated the plaintiff's legal right to an electronically printed that truncated the consumer's credit card number. Thus, the plaintiff there suffered an alleged actual injury in fact.

Plaintiff's reliance on *Lexmark* also fails. Plaintiff's argument that "[a]fter *Lexmark*, *Indio* and *Specialty Merch.'s* standing analysis is no longer good law" is a blatant misrepresentation of the holding in *Lexmark.* In fact, *Lexmark* is irrelevant to this case, as well as to the decisions in *Indio* and *Specialty Merch*. The issue in *Lexmark* was whether a remanufacturer had standing to bring a false advertising claim under the Lanham Act against a

[1] Peter Stone is filing a separate motion to strike Matthew Mullen's Declaration.

[2] Plaintiff indentified two purported experts in this case, Tony Erachio and James Berger. Erachio was barred from testifying in *Indio* (as well as other cases brought by NAA) and Berger was also barred under *Daubert* in another case Plaintiff filed. Plaintiff has recently indicated that it will not be calling either of these witnesses and has not submitted their opinions in response to this Motion.

manufacturer. The standing issue in *Lexmark* was limited to whether the plaintiff had "prudential standing", and the manufacturer conceded that the remanufacturer had suffered or was imminently threatened with a concrete and particularized 'injury in fact' that was fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision. *Lexmark,* 134 S.Ct. at 1383-86. Here, Peter Stone's primary standing argument is not based on prudential standing, but rather as in *Indio* and *Specialty Merch.* are based on the typical standing requirements. Also, unlike in *Lexmark*, in this case, as in *Indio* and *Specialty Merch*., there is no admissible evidence that NAA has suffered any injury in fact that is fairly traceable to Peter Stone's actions.

Next, Plaintiff relies on cases such as *Village of Arlington Heights, Trewhella* and *Friends of the Earth* that involved challenges to government ordinances and nominal damages. This case does involve any of those things. Also, those cases involved only Article III standing, which as the *Indio* court found was not enough, and NAA must also satisfy typical standing requirements.

Plaintiff also places misplaced reliance on rulings on motions to dismiss brought in other lawsuits that it has filed under the Act, such as *Concord Buying Group*, *Jose Maigua*, and *Bundy-Howard* that were decisions on a Rule 12(b)(1) motion. It is axiomatic that, when standing is raised at the summary judgment stage, the plaintiff can no longer rest on "mere allegations" from the complaint. *Defenders of Wildlife*, 504 U.S. at 561. Contrary to a Rule 12 motion, Peter Stone's summary judgment motion required NAA to set forth admissible evidence to meet its burden. NAA has not done so.

Implicitly acknowledging its failure to submit evidence establishing any injury in fact, Plaintiff suggests that it should nevertheless be allowed to proceed with this case as a Private Attorney General. However, this is not permitted under federal law. *See Lee v. American Nat'l*,

260 F.3d 997, 1001-02 (9th Cir. 2001); *Stanford v. Home Depot USA, Inc.*, 358 Fed.App. 816, 819 (9th Cir. 2009); *People's Gas v. U.S. Postal Serv.*, 658 F.2d 1182, 1198 (7th Cir. 1981).

3. Plaintiff's Attempt To Invoke Standing Under The Lanham Act Fails

Plaintiff attempts to invoke standing under the Lanham Act. This argument fails for numerous reasons. First, and most obvious, Plaintiff has not asserted any claim in this case under the Lanham Act.

Second, Plaintiff has previously taken the position in similar cases that the Lanham Act does not apply to its claims. For example in *NAA v. Bud K*, Plaintiff argued that "this is not a Lanham Act case and the Lanham Act cases cited by Defendants do not apply." "NAA does not assert a trademark violation in this case or a false advertising," "[t]he Lanham Act addresses trademark rights….[i]t just does not fit", and NAA is not alleging it has a trademark or trade name. (Exhibit A). As a result, this argument is barred by judicial estoppel. *Eagle Foundation, Inc. v. Dole*, 813 F.2d 798 (7th Cir. 1987).

Third, Plaintiff has not alleged (and does not own) any trademark in this case. Plaintiff does not own the phrase "Authentic Native American Arts"[3], and thus cannot pursue any claim based on any use of that phrase, whether it be for infringement, dilution or any other basis. *Alpha Kappa v. Converse, Inc.*, 175 Fed.Appx. 672, 675 (5th Cir. 2006); *World Church v. Te-Ta-Ma Truth Foundation*, 239 F.Supp. 2d 846, 848 (C.D. Ill. 2003). For example, the *Hyatt* and *Caterpillar* cases relied on by NAA were trademark infringement and dilution claims brought by plaintiffs who owned trademark registrations. Similarly, *Blue Coral* involved a claim by a trade dress owner for trade dress infringement.

[3] Attached hereto to is Google printout of the phrase "Authentic Native American Arts", which does not even reference Plaintiff. (Exhibit B). Also, there is no trademark registration for that phrase, although there were two prior applications, none of which were by Plaintiff. (Exhibit C).

Plaintiff also cites cases brought by trade associations, seeking such as *Scotch Whiskey* and *Camel Hair*. These cases also have no bearing in this case, where NAA is not a trade association and seeks money damages. *See Camel Hair*, 799 F.2d at 19 ("[t]he cases under the Act have drawn a clear distinction between the showing required to establish a right to injunctive relief and that required to establish a right to damages … a showing that the defendant's activities are likely to cause confusion or to deceive customers suffices to warrant injunctive relief, but that a plaintiff must show actual harm to its business, a diversion of sales, for example, in order to recover damages); *Hesmer Foods, Inc. v. Campbell Soup Co.*, 346 F.2d 356, 359 (7th Cir. 1965).

4. NAA Has Failed To Present A Genuine Fact Issue That It And Peter Stone Are Competitors

Plaintiff has failed to meet its burden on summary judgment to establish fact issues on the issue of whether it and Peter Stone are competitors. In fact, the undisputed evidence demonstrates that NAA and Peter Stone are not competitors. There is not a scintilla of evidence that Peter Stone is a "competitor" of NAA, and NAA cannot point to any such evidence in the record. As in *Indio*, here the undisputed evidence demonstrates that NAA and Peter Stone maintain different types of businesses and primarily serve different markets. Specifically, Peter Stone is exclusively a jewelry business that is primarily a wholesaler and sells a wide variety of different types of jewelry, only a small fraction (far less than 1%) of which are Native American themed, whereas NAA sells exclusive Native American themed and makes products, of which jewelry is only one of many different types of such product sold. Peter Stone sells almost exclusively to wholesalers and retailers, while NAA sells primarily to end users. Peter Stone has never had any office or employees in Illinois, NAA's principal place of business. Similarly, NAA has never had any office or employees on the East Coast, where Peter Stone has principally

done business. As in *Indio*, NAA claims that both parties serve a nationwide market presence because NAA and Peter Stone offered and sold products through the Internet. The *Indio* court rejected this same argument, the court finding it was "not prepared to hold that two parties are competitors simply because they both sell products on the Internet." (ECF 279-4 at 53). There is no evidence of direct or indirect competition between these two very different businesses which operate in different markets. Merely conclusory and unsupported statements through counsel fails to create a disputed genuine issue of fact to avoid summary judgment. The fact that both businesses make sales through the internet – like most other businesses in the United States – fails to prove competition. NAA offers no evidence of how the two Internet sites actually overlap in the marketplace. NAA has not and cannot show specific, concrete facts demonstrating that Peter Stone's alleged conduct caused any demonstrable, particularized injury to NAA. NAA's alleged injuries are much too attenuated and unprovable. Because NAA has failed to present admissible evidence tracing injuries to Peter Stone, NAA lacks standing to prevail on its claim under the Act against Peter Stone.

5. NAA Admits The Facts That Demonstrate No Standing

The facts in Peter Stone's Statement of Facts support the factual elements of Peter Stone's argument that NAA lacks standing. All of these facts are either undisputed, disputed on non-material grounds, or disputed with inadmissible evidence. (ECF 279-1). The Court should grant summary judgment in Peter Stone's favor because NAA effectively concedes there is no evidence that NAA has suffered a redressible injury caused by Peter Stone.

6. NAA Cannot Demonstrate The Irreducible Constitutional Minimum For Standing

The party invoking federal jurisdiction – here, NAA – bears the burden of establishing the elements of constitutional standing. *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990). To

satisfy the standing requirement, NAA must show: (1) that it has suffered an injury in fact; (2) that the injury is fairly traceable to the challenged action of the defendant; and (3) that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). NAA's response fails to raise a single issue of material fact concerning any of the three elements of standing that would defeat entry of summary judgment in Peter Stone's favor.

7. NAA Has Not Suffered An Injury In Fact

NAA has not suffered any actual or concrete injury in this case because it cannot show how Peter Stone's alleged conduct harms NAA. NAA's two purchases from Peter Stone for purposes of its undercover litigation-driven buy cannot be converted into a lawsuit seeking in excess of $15,000,000 in statutory damages without it suffering any actual injury. *Id.*

8. NAA Cannot Show Lost Sales

NAA has failed to present a single shred of evidence of lost sales in general or lost sales in particular that might be attributed to Peter Stone. Importantly, NAA does not dispute, or does not dispute as supplemented with additional deposition testimony, the facts relied upon by Peter Stone concerning the absence of evidence of lost sales. In response, NAA pivots to a claim for "lost sales opportunities" and relies upon the say-so of its President, Matthew Mullen. This is the very essence of a speculative injury and "[s]peculation does not create a genuine issue of fact." *Cordoba v. Dillard's, Inc.*, 419 F.3d 1169, 1181 (11th Cir. 2005). NAA cannot make up for the lack documentation of a sale that would have gone to NAA but for Peter Stone or of a customer that left NAA to buy from Peter Stone by arguing that ***any*** money made by Peter Stone is necessarily money that would have gone to NAA. This is not a credible fact; "[f]or factual issues to be considered genuine, they must have a real basis in the record." *Mize v. Jefferson City Bd. of Educ.*, 93 F.3d 739, 742 (11th Cir. 1996). NAA has not shown, and cannot show, that

it even competes with Peter Stone for these sales or the opportunity to make the sales.[4] Vague, generalized statements about having to reduce prices because of Peter Stone at times and for items not recalled. However, these sweeping accusations, without more, do not prove injury on summary judgment. *Mayfield v. Patterson Pump Co*., 101 F.3d 1371, 1376 (11th Cir. 1996) (conclusory allegations and conjecture cannot be the basis for denying summary judgment). NAA was required and failed to make an affirmative showing of some documented proof of decreased price because of Peter Stone and it has not done so in its response. NAA responds with citations to the inadmissible Congressional Report which predates this case by a decade and does not reference Peter Stone, and Mr. Mullen's unsupported personal belief that Peter Stone is trading on general "Indian goodwill." Again, this is pure conjecture on the part of Mr. Mullen, and, at best, it creates the same type of "false issue" that is not material and that summary judgment is designed to root out before trial. *Mayfield*, 101 F.3d at 1376; *Cordoba*, 419 F.3d at 1181. There is no evidence of harm to NAA caused by Peter Stone.

9. NAA Cannot Show Loss of Good Will or Reputation

NAA also cannot show injury based on alleged loss of goodwill or reputation. NAA's argument fails as matter of law and logic.

10. NAA Cannot Show Decreased Prices

NAA also has no evidence that Peter Stone drove down NAA's prices. NAA does not dispute that it has no documentation showing changed sales prices and that it cannot provide a single example of a price it reduced because of Peter Stone. NAA's Response again relies upon the say-so of President Mullen who contradicts his own testimony of no specific examples of decreased prices.

[4] NAA's reliance on *Bundy-Howard.*, 168 F.Supp.2d at 914, is misplaced as that case dealt with a substantive due process constitutional challenge to the damages scheme in the IACA, not specific allegations of damages suffered by NAA to maintain standing.

11. NAA Cannot Show an Advertising Injury

NAA does not factually dispute that there is no evidence of any advertising injury caused by Peter Stone, let alone one suffered by NAA at all. NAA's citation to Mr. Mullen fails to give any specifics based on his personal knowledge as to any concrete advertising injury. More than speculation is required to take this case to trial. NAA's bare conclusion and not facts with a nexus to Peter Stone fails to create a disputed genuine issue of fact to avoid summary judgment. *Ellis v. England,* 432 F.3d 1321, 1326 (11th Cir. 2005).

12. NAA Is Wrong that the IACA Obviates Injury in Fact

Rather than submit material facts that demonstrate an injury in fact, NAA argues that Congress has eliminated the injury in fact analysis from the IACA. This argument is wrong and it has been expressly rejected in *Indio* and *Specialty Merch. Corp*., 451 F. Supp. 2d 1080 (C.D. Cal. 2006), the courts made clear that Article III standing must be proven separate and apart from the IACA's statutory scheme. *Id*. at 1083 (on Rule 12 motion, stating "it could be tempting, as a plaintiff, to believe that one need not be prepared to prove any actual damages in order to recover under the IACA. . . . [however] Article III of the United States Constitution requires proof of such damages in order to have access to the federal courts. . . " and holding lack of standing because no alleged actual injury). NAA simply confuses prudential standing with the constitutional standing argument of Peter Stone. Prudential standing – the idea that a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by a statutory provision – can be modified or abrogated by Congress. *Bennett v. Spear,* 520 U.S. 154, 162 (1997). However, it is well-settled that while Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules, "[o]f course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants." *Warth v. Seldin*, 422 U.S.

490, 501 (1975); *see also Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009) ("requirement of injury in fact is a hard floor of Article III jurisdiction that cannot not be removed by statute."); *Gladstone, Realtors v. Village of Bellwood,* 441 U. S. 91, 100 (1979) (Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing). Having failed to provide any evidence of a distinct and palpable injury, NAA lacks constitutional standing to sue Peter Stone.

13. NAA Cannot Show Causation

NAA has not presented any material admissible evidence of the causal connection between an actual, imminent injury and Peter Stone's conduct. *Defenders of Wildlife*, 504 U.S. at 560 (injury must not be "th[e] result [of] the independent action of some third party not before the court."). In fact, NAA admits that it is "possible in many ways" for businesses other than Peter Stone to have caused lost sales, that there could many things that causes a company to lose sales," and that there are various factors that go into setting price. These admissions demonstrate that NAA cannot trace its unproven injuries to Peter Stone's conduct. NAA's speculative injuries might be self-induced or caused by the actions of some party not before the Court. Regardless, NAA offers no admissible evidence either way. In response, NAA predictably relies upon the inadmissible Congressional Report which predates this case by a decade and does not reference Peter Stone. There is simply no evidence that Peter Stone is an exclusive, or material, cause of NAA's speculative injuries, especially in light of the more than 100 other IACA cases NAA has filed.

14. NAA Cannot Establish Redressability

NAA has not presented any material admissible evidence that it is "likely," as opposed to merely "speculative," that an injury will be "redressed by a favorable decision." *Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1290 (11th Cir. 2010). NAA cites to no evidence or

case law supporting redressability. Statutory redress does not replace the need to demonstrate constitutional standing. *Id.*

III. CONCLUSION

NAA cannot satisfy any of the elements necessary to establish that it has standing to maintain this action against Peter Stone. NAA's rambling response admits evidence in the record that supports Peter Stone's position and can offer nothing more than inadmissible speculation and hearsay in a failed effort to salvage its ability to go to trial on this claim.

WHEREFORE, Defendant, Peter Stone Co., U.S.A., Inc. respectfully requests that this Court enter summary judgment in its favor.

PETER STONE CO., U.S.A., INC.

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