

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

THE NAVAJO NATION, a sovereign Indian
Nation, et. al,

Plaintiffs,

v.

URBAN OUTFITTERS, INC., a Delaware
Corporation, et al.

Defendants.

CIVIL ACTION NO:

No. 1:12-cv-00195-LH-LAM

**PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL
SUMMARY JUDGMENT ON STANDING AND PLAINTIFF'S MEMORANDUM IN
SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON STANDING**

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I. INTRODUCTION

The undisputed facts of this case show that Urban Outfitters, Inc. (“UO”), Urban Outfitters Wholesale, Inc., Anthropologie, Inc. (“Anthropologie”), and Free People of PA LLC (“Free People”) (collectively, “Defendants”) engaged in precisely the conduct prohibited by the Indian Arts and Crafts Act (“IACA”) — the false use of “Indian,” “Native American,” and tribal names to sell cheap, unauthentic knock-offs of Indian crafts. In this motion, the Defendants make the surprising claim that The Navajo Nation (the “Nation”) and the Navajo Arts and Crafts Enterprise (“NACE”) (collectively, “Plaintiffs”) do not have standing. The Defendants argue that the very entities Congress named in the IACA as “persons that may initiate civil actions” cannot bring claims under the IACA to address the very conduct that it was passed to prevent. That incongruity puts the Defendants to a very hard climb, because the Supreme Court is unimpressed with standing challenges when a specific judicially-protected right is the substance of the case:

As we have observed above, Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute.

Warth v. Seldin, 422 U.S. 490, 514 (1975).

Defendants spend a large part of their brief on a purported requirement that Plaintiffs prove actual economic damages, but the statute itself proves that argument is misplaced. Congress did not limit the IACA’s reach to economic damages suffered, it allows actions for an injunction to prevent threatened harm and adds deterrent statutory monetary damages that accrue as soon as a violator “offers or displays for sale” a non-Indian item as Indian. 25 U.S.C.A. §305e(b). It also allows for awards of punitive damages. 25 U.S.C.A. § 305e(c). It would be an odd result to find that standing for violation of the IACA requires economic injury, like lost sales, when the statute can be violated without any sale occurring, and provides statutory damages based on three times the defendants’ lost profits or \$1000 per day that the product was falsely offered as “Indian.”

The IACA’s focus on deterrence, prevention of future harm, and punishment dooms Defendants’ argument that Plaintiffs cannot show injury-in-fact sufficient for Article III standing.

Already-suffered economic injury is simply not required, the injury-in fact requirement is met if a tribe alleges and supports “a particularized imminent economic injury.” *Sac and Fox Nation of Missouri v. Pierce*, 213 F.3d 566, 573 (10th Cir. 2000). The undercutting of the Indian crafts market is certainly a particularized imminent economic injury, so standing is present.

Injury in fact is also present for those items that had names other than “Navajo,” because the only other names included by the Plaintiffs in their damage model are names that they sell. Declaration of Barbara McGough (“McGough Decl.”) at ¶ 2. As a result, since all the items the Plaintiffs sell are genuine Zuni (for instance), the presence of Defendants’ false “Zuni” goods threatens to or does undercut the genuine Zuni market and causes harm or prospective harm to Plaintiffs. Congress did not limit relief under the IACA to only members of a given tribe when that tribe’s name is falsely used. Therefore, if one is a proper plaintiff under the IACA and has suffered or is threatened by the misuse of a tribal name for authentic goods from that tribe that the Plaintiff sells, standing is present.

The Defendants also claim that the impact of falsely suggesting Indian origin of the non-Navajo goods is not “traceable” to them, another Article III standing factor. How not? If they are offering or selling false Zuni goods and thus undercutting or threatening the market for genuine Zuni goods, why is that harm not traceable to them? If the Defendants stop falsely suggesting the Zuni origin (by removing the Zuni name from their goods), the harm to sellers of genuine Zuni goods, including Plaintiffs will cease. Traceability is present, for if stopping a defendant’s misconduct will stop or lessen the harm, the misconduct is certainly traceable to that defendant.

Defendants’ final argument is that Plaintiffs lack statutory standing for any IACA violations related to goods the Defendants offered or sold as anything other than “Navajo.” ECF. No. 222. at 16-21. Like the Article III argument, this claim is completely unsupported by fact or law both because the Defendants waived that argument and because these Plaintiffs sell genuine Indian goods under every tribal or Indian name listed in the damage report, and use “Indian” and “Native American.” McGough Decl. at ¶ 2. The language of the IACA is tailored to be read widely to stop non-Indians from misidentifying non-Indian goods as Indian. Plaintiffs have

standing for all their IACA claims and Defendants' motion must be denied.

II. STATEMENT OF FACTS PLAINTIFFS DISPUTE

1. Plaintiffs dispute Defendants' assertion in paragraph 6 of Defendants' statement of facts (hereinafter Defendants' statement of facts is referred to as "paragraph __") that "Plaintiffs asserted their intent to seek damages based on the use of the tribal descriptions" to the extent this statement implies Plaintiffs asserted any intent to seek damages, as defined under 25 U.S.C.A. § 305e(b)(2), for Defendants' marketing of goods as being made by "any other Indian tribe." Plaintiffs sought discovery for Defendants' use of other tribal names because it is relevant to Plaintiffs' claim, including with respect to the scope of Defendants' IACA violations, which is pertinent to equitable relief available under § 305e(b)(1), and punitive damages available under § 305e(c). In addition to goods marketed as being Navajo, Native American, and Indian, Plaintiffs' current expert reports by Judith Wagner, (ECF Nos. 244-2 and 244-3) and Susan Scafidi¹ describe damages under § 305e(b)(2) for Defendants' false suggestion of goods as being made by the Zuni, Zia, and Cherokee tribes. ECF No. 223-2; McGough Decl. at ¶ 2; Scafidi Decl. Ex. A at (p. 12 and Ex. 3) (Expert Report of Susan Scafidi, hereinafter "Scafidi Report").

2. Plaintiffs dispute paragraph 7 that it is only relevant that Plaintiffs sold Zuni, Pueblo, and Zia goods (in addition to Navajo goods). Pueblo is not a specific Indian Tribe, but rather is "any of the 25 Native American peoples, including the Hopi, Zuni and Taos, living in established villages in northern and western New Mexico." Declaration of Ken Claassen ("Claassen Decl."), Ex. 1. As an arts and crafts organization, it is also relevant that NACE sells goods made by members from a variety of other Indian tribes, including the Hopi, Cheyenne, Crow, and Apache, Zuni, Pueblo of Laguna, Pueblo of Santo Domingo, and Zia tribes. The fact that NACE sells Zuni, Zia, and other Pueblo Indian goods is particularly relevant because Defendants sold imitation goods marketed as being made by those tribes. McGough Decl. at ¶ 2.

3. Plaintiffs dispute paragraph 8, to the extent it contends that Plaintiffs' damages expert,

¹ Plaintiffs may supplement these reports to include sales of other tribal products or in other ways based on the discovery ordered by the court on November 21, 2014 (ECF Nos. 212 and 213).

Judith Wagner, only calculated damages based on sales listed in Exhibit B of her report. Ms. Wagner also provides sales figures for Defendants' sales of goods marketed as made by other Non-Navajo tribes, which combined total \$5,241,749. ECF No. 223-2 at 9 of 17. This information is relevant for punitive damages. Plaintiffs also dispute paragraph 9 that Ms. Wagner's expert report includes damages calculations for products "identified by Plaintiffs' counsel" [sic]. Ms. Wagner's report plainly states that the items "subject to consideration under the IACA" were "based on the opinions of Susan Scafidi and/or J.T. Willie." *Id.* at 7 of 17; Scafidi Report at Ex. 3.

4. Plaintiffs dispute paragraph 10 that "[n]either Plaintiffs or members of the Navajo Nation self-identify using any of the 50 tribal descriptions that were subject to discovery." Whether Plaintiffs or members of the Navajo Nation "self-identify" as Zuni, or Zia has no relevance to Plaintiffs' IACA claim. In addition, the 50 tribal names for which Plaintiffs received discovery include "Navajo," and Plaintiffs and members of the Navajo tribe "self-identify" as "Navajo." Declaration of Michael Licata ("Licata Decl.") Ex. 1. Moreover, NACE sells authentic Indian-made goods marketed as "Navajo," "Hopi," "Zuni," "Zia," "Cheyenne," "Crow," and "Apache." McGough Decl. at ¶ 2.

5. Plaintiffs dispute Defendants' use of the phrase "Navajo description," in paragraph 11. Defendants define the phrase as "the term 'Navajo'" used to "describe the style of certain clothing and accessory items." ECF No. 223 at 1. The standard definition of Navajo is a people or a language. There has been "no change in the meaning of the word 'Navajo' as a people or language to 'Navajo trend' or 'Navajo fashion' or similar usages. The word Navajo remains a specific reference to the Navajo people and language as a noun, and to the attributes of the Navajo people and language as an adjective." Licata Decl. Ex. 2, at 10 (excerpt from Expert Report of Gail Stygall, Ph.D.). Defendants have submitted no expert opinion from a linguist that "Navajo" has changed from its standard definition to a fashion trend. Moreover, under the IACA, the unqualified use of the name of an Indian tribe denotes Indian origin. 12 C.F.R. § 309.24(a).²

² Plaintiffs do not dispute selling clothing accessory items, which is what Defendants apparently mean when they use the word "closing" in paragraph 11.

6. Plaintiffs dispute Defendants' use of the phrase "Indian descriptions," in paragraph 12. Defendants define the phrase to mean the terms "Indian," or "Native American," used to "describe the style of clothing/apparel." ECF No. 223, at 1. Defendants cite no evidence that these terms mean anything other than their standard definitions, and under the IACA, the unqualified use of these terms denotes Indian origin. 12 C.F.R. § 309.24(a). "Indian" means "a member or any of the Native American peoples . . ." or "of or relating to any of the Native American peoples..." Claassen Decl. Ex. 1. "Native American" means "a member of any of the indigenous peoples of the Western Hemisphere." *Id.* The American Heritage Dictionary notes that "*Native American* is now fully established in American English as an equivalent of Indian . . ." *Id.*

7. Plaintiffs dispute Defendants' use of the phrase "tribal descriptions," in paragraph 10. Defendants define the phrase to mean tribal names (other than Navajo) "like 'Zuni,' and 'Zia,' used "to describe the style of clothing/apparel." ECF No. 223 at 1. Defendants cite no evidence that these tribal names mean anything other than their standard definitions, and under the IACA, the unqualified use of tribal names denotes Indian origin. 12 C.F.R. § 309.24(a).

8. Plaintiffs dispute paragraph 13: whether Plaintiffs market products as "Indian" or "Native American" is irrelevant, as the IACA prohibits falsely marketing goods as Indian-made, whether using the terms "Native American," "Indian," or the names of Indian tribes. 25 U.S.C.A. § 305e(b); 12 C.F.R. § 309.24(a). In any case, the Navajo Nation represents thousands of Navajo artisans whose goods are marketed and sold as "Native American" and/or "Indian," by many retailers across the globe. *See, e.g.,* ECF Nos. 248-251 (Decl.'s of Zeller, Foutz, Butler, and Garland); Claassen Decl. Ex. 2. Moreover, NACE markets its authentic Indian goods using terms like "Native American." McGough Decl. at ¶ 9.

9. Plaintiffs dispute paragraphs 14-17 in relation to the goods Plaintiffs' sell or sold. Plaintiffs identified a limited number of *representative examples* of Zuni, Zia, and other Pueblo Indian products Plaintiffs have sold as an "agreement of the parties" with respect to a discovery response. ECF No. 223-1 at 2. Plaintiffs also dispute the photographs in Tables 2-4, which "were not provided by Plaintiffs" and do not depict Plaintiffs' website or the goods Plaintiffs sell or sold.

Decl. of Curcio at 6 n. 2, ECF No. 223; ECF No. 223-4. Those images and Defendants' supporting declaration should be considered as irrelevant and inadmissible. *See infra*, Section IV(B)(3)(a).

10. Plaintiffs dispute the contention in paragraph 18 that "Plaintiffs have not set forth any evidence that their sales decreased." The record shows that Defendants diverted potential customers and sales away from Plaintiffs' website. Claassen Decl. Ex. 4 (Yahoo & Google keywords); Licata Decl. Ex. 3 (excerpts from the Expert Report of Becky Raichur). The record also includes an Internet advertisement "Assorted Navajo Bracelet," which was linked to Urban Outfitters' website and appeared alongside the search results for "navajo bracelet." Those results included the Plaintiffs' website ("goNavajo.com"). ECF No. 143-9.

11. Plaintiffs dispute paragraph 19 that "Plaintiffs have not set forth any evidence that they . . . adjusted their business operations in order to respond to the Defendants." Plaintiffs adjusted their business operations by prosecuting this case, which has required the expenditure of substantial resources, including the hiring multiple experts and attorneys, as well as substantial time by Plaintiffs' employees.

12. Plaintiffs dispute paragraph 20 that "Plaintiffs have not produced any expert evidence that consumers were actually confused by the Defendants' use of the Indian or tribal descriptions." Plaintiffs' experts, Phillip Johnson, Susan Scafidi, and Gail Stygall, each submitted reports finding consumer confusion as to Defendants' marketing of Navajo goods. Licata Decl. Ex. 2 at 1-2, 16-17 (excerpts from the Expert Report of Gail Stygall); Licata Decl. Ex. 4 at 25-26 (excerpts from the Expert Report of Phillip Johnson); Decl. of Susan Scafidi, Ex. A & B. Defendants' marketed goods using the term "Navajo" in the same manner as goods marketed using the terms "Native American," "Indian," and the names of other Indian tribes; the Stygall and Johnson reports are also expert evidence as to confusion for those "Non-Navajo" goods. Moreover, there is evidence of actual confusion. For example, ten website users, as reported in an October 22, 2011 Arizona Republic news article, were confused by Urban Outfitters' use of the tribal name "Navajo" to describe woven bracelets and feather earrings. Claassen Decl. Ex. 3. *See also* ECF No. 223-7 at 11 (noting blog post in which a person commented "No wonder people are confused when a

commercial enterprise [(referring to Urban Outfitters)] offers ‘Navajo’ or other tribal named items.”).

13. Plaintiffs dispute paragraph 21 that there is a lack of evidence “showing Plaintiffs were injured.” As set forth below, Plaintiffs were injured in their reputation, and injury to the Indian-made market that in turn injures Plaintiffs. Defendants’ violation of the IACA is by itself considered to be an injury-in-fact.

III. STATEMENT OF UNDISPUTED FACTS

The following statement of undisputed facts is both lettered and numbered in compliance with Local Rule 56.1(b) because Plaintiffs are the non-moving party on Defendants’ Motion but are cross-moving for partial summary judgment.

A.1 The U.S. Commerce Department (“Commerce”) has estimated that imitation Indian arts and crafts are siphoning off 10 to 20 percent of the market for genuine handicrafts produced domestically. The industry’s value has been estimated at \$400-\$800 million annually. This means that imitation Native American arts and crafts are siphoning an estimated \$40 to \$80 million from the genuine manufacturers’ markets. Commerce also found that most of the counterfeit market is made up of jewelry production that has been underselling genuine Indian jewelry, made by the Zuni, Navajo and Hopi, by as much as 50 percent. Claassen Decl. Ex. 5.

B.2 Within the Navajo Nation, there are an estimated 14,000 silversmiths, weavers, and other craftspeople, and the sale of items handcrafted by Navajo crafts persons contributes millions of dollars annually to the Nation’s economy. Claassen Decl. Ex. 2, at 2.

C.3 Navajo are recognized as highly skilled craftspeople. Claassen Decl. Ex. 1 (Navajo Definition).

D.4 The Navajo Nation is an Indian Tribe. NACE is an Indian arts and crafts organization, as the term is used under the IACA, that sells authentic Indian-made goods from the Navajo, and from other Indian tribes, including the Hopi, Zuni, Zia, Pueblo of Laguna, Pueblo of Santo Domingo, Cheyenne, Crow, and Apache. McGough Decl. at ¶ 2.

E.5 NACE, originally known as Navajo Arts and Crafts Guild, was established in 1941 by the

Indian Arts and Crafts Board for the purpose of increasing tribal income from the sale of arts and crafts and protecting the artistic craftsmanship of the Navajo people. NACE continues that mission and is a well-known marketing channel of the Navajo Nation for arts and crafts. McGough Decl. at ¶ 5; Claassen Decl. Ex. 6.

F.6 NACE sells clothing, jewelry, belts, and other accessories, as well as pottery, rugs, and other Native American arts and crafts. McGough Decl. at ¶ 12.

G.7 It is the policy of the Navajo Nation to develop its tourism potential by promoting high quality arts and crafts and offering them to the public. ECF No. 182, Ex. 4 at 62.

H.8 NACE follows authentication and quality control standards to ensure the products it sells are authentic and of high quality. McGough Decl. at ¶¶ 2, 8, 9, 10.

I.9 Like most Indian arts and crafts organizations, NACE markets its goods using terms like Native American, as well as specific tribal names, like Navajo, and NACE advertises the fact that the goods it sells are of high quality. McGough Decl. at ¶ 9.

J.10 The Indian Arts and Crafts Association (“Association”) was established in 1974 in response to the growing problem of misrepresentation of American Indian arts and crafts in the marketplace, and it promotes high quality American Indian arts and crafts. Association members (including NACE and many Navajo artisans) agree to honestly represent American Indian arts and crafts as to nature and origin. The Association works closely with the Indian Arts and Crafts Board established under the IACA. The Defendants are not members of the Association. Decl. of Zeller at ¶¶ 3-4, 6-7, 10, 16-17, ECF No. 250.

K.11 Defendants sold comparatively low quality arts and crafts goods that were sold as Indian-made. Licata Decl. Exs. 5 & 11.

L.12 Defendants’ goods confused consumers. Licata Decl. Exs. 2 & 4 (excerpts from the Johnson and Stygall Expert Reports)³; Claassen Decl. Ex. 3; ECF No. 223-7 at 11; McGough

³ Due to the Court’s admonition about filing over-length exhibits, Plaintiffs only attach the relevant excerpts from various expert reports. The entire reports have been produced to Defendants, and Defendants had the opportunity but chose not to depose this expert, Ms. Becky Raichur. Plaintiffs will replace the excerpts attached with the entire reports if this Court so requests.

Decl. at ¶ 4; Decl. of Susan Scafidi, Scafidi Expert Report, Ex. A, and Rebuttal Report, Ex. B.

M.13 Defendants are likely to have diverted sales away from Plaintiffs' website. Licata Decl. Ex. 4 (keywords); Licata Decl. Ex. 5; ECF No. 143-9.

N.14 NACE had annual sales of approximately \$13.5 million in 2013. McGough Decl. at ¶ 13.

O.15 In addition to brick and mortar retail stores, NACE offers its products for sale all over the world via its website <http://www.goNavajo.com>. McGough Decl. at ¶ 11.

P.16 Hundreds of Navajo artisans sell products using a network of Association members, 75 that sell by retail channels and 62 that sell by wholesale channels located throughout the country and on the internet. Decl. of Zeller at ¶¶ 1-2, 11-15, ECF No. 250; Decl. of Foutz at ¶¶ 2, 4-7, ECF No. 249; Decl. of Butler at ¶¶ 2, 4-7, ECF No. 248; Decl. of Garland at ¶¶ 2, 4, ECF No. 251.

Q.17 NACE spends hundreds of thousands of dollars each year marketing its goods. McGough Decl. at ¶ 18, and Association members also spend money promoting authentic Navajo goods. Zeller Decl. at ¶ 2; Butler Decl. at ¶¶ 6-7; Foutz Decl. at ¶¶ 6-7 (ECF No. 248-250).

R.18 NACE competes with other retailers and wholesalers that sell or purport to sell Indian-made products, including but not limited to the Defendants in this case. McGough Decl. at ¶¶ 3; Licata Decl. Ex. 6 & 7; ECF No. 143-9.

S.19 The Nation, members of the Indian tribe, and NACE are harmed by the sale of imitation arts and crafts. Such imitation products displace sales, confuse consumers, and lower the image and value of Indian arts and crafts in the eyes of consumers. McGough Decl. at ¶ 4. Claassen Decl. Ex. 2; ECF No. 182, Ex. 4.

T.20 Free People admits that when "vintage" goods were offered for sale using the names of Indian tribes, it was representing that those goods were authentically Indian-made products. Licata Decl. Ex. 8. On April 18, 2014, Free People admitted in interrogatory answers that it offered for sale 27 vintage Navajo items, 1 vintage Pueblo Indian item, 1 vintage Native American item, 1 vintage Sioux item, and 18 Zuni items; and UO admitted offering for sale 9 vintage Navajo items and 3 vintage Zuni items. Licata Decl. Ex. 9. On December 5, 2014 as ordered by the Court (ECF No. 212), Defendants admitted that they have no information enabling them to identify the supplier

of these goods that they offered for sale. Licata Decl. Ex. 10. Free People does not make much money selling “vntage” goods offered for sale using the names of Indian tribes, but offers them to help the Free People brand. Licata Decl. Ex. 14 (Reich Tr. 183:13-25).

U.21 The Division of Economic Development Director, Al Damon, testified that he inspected the goods for sale at the Urban Outfitters store that were being sold as Indian-made, and they were not of the same quality as authentic Navajo goods. Licata Decl. Ex. 11.

V.22 J.T. Willie, the Director of Marketing for NACE, has submitted an expert opinion after inspecting the Defendants goods that were sold as Indian-made that the products sold by Defendants are not in fact Navajo-made, Licata Decl. Ex. 12 (Expert Report of JT Willie), and has testified about the value of authenticating Indian goods. Licata Decl. Ex. 13, JT Willie Tr. p 69:15-70:1; 96:19-25; 100:8-19.

IV. ARGUMENT

A. The Legal Standard.

“To prevail at summary judgment on standing grounds, the defendant must show that the record is devoid of evidence raising a genuine issue of material fact that would support the plaintiff’s ultimate burden of proving standing.” *Day v. Bond*, 500 F.3d 1127, 1132 (10th Cir. 2007). “If there are any genuinely disputed facts regarding standing, summary judgment is, of course, inappropriate.” *Colo. Manufactured Hous. Ass’n v. Bd. of Cnty. Comm’rs of Pueblo, Colo.*, 946 F. Supp. 1539, 1544 (D.Colo. 1996). As in all summary judgments, “all reasonable inferences” must be drawn in favor of the nonmoving party and all evidence construed “in the light most favorable to the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (“The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.”).

B. Plaintiffs Have Suffered an Actual Injury Sufficient for Article III Standing.

Defendants’ first claim is that the Plaintiffs do not have standing for any IACA claims because they have not provided evidence of an “actual injury” under Article III. Defendants base that argument on the incorrect belief that injury in this context requires lost sales damages or

other direct economic harm. Defendants' lengthy discussion of the amount of statutory damages available to Plaintiffs is an attempt to suggest that the IACA is somehow overreaching, but the *amount* of the damages do not determine standing; they are simply a way for Congress to gauge what it wants to accomplish and set the remedies of its statutes.

Standing depends on whether Defendants' conduct has harmed or threatened a protected legal interest held by Plaintiffs and whether those harms and/or threats can be redressed by the Court. At issue is the Defendants' use of "Navajo" (and other American Indian and tribal identifiers) in offering or displaying products for sale. That conduct violates the IACA, which reserves the use of tribal names for authentic Native American goods. It is a fact that Defendants falsely called non-Navajo products "Navajo." That is certainly a violation of the Act. The Act allows injunction, which can be filed on the threat of harm. If the Nation brought an action solely for injunction, in such a case, no one would question standing. The fact that Congress added statutory damages for offering or displaying such goods for sale (and the amount of that penalty) does not undercut the Nation's standing; it simply adds another remedy. All that matters for standing is the existence of a legal right held by the plaintiffs being violated or threatened to be violated. Such facts are present here.

Contrary to Defendants' attempt to find a requirement of economic harm, Congress constructed the IACA remedies solely on defendants. Both measures of statutory monetary damages focus on defense data, not lost sales by the plaintiffs, as Congress set the damages as the greater of three times the defendant's profits on the false goods or \$1,000 a day for as long as they had them up for sale. By doing so, Congress recognized that "Plaintiffs who bring suit under the IACA . . . have difficulty in proving and quantifying damages. For example, lost or diminished sales attributable to the complained behavior, are difficult or impossible to prove." S. REP. 106-452, 4. Thus, the IACA mirrors other federal laws where actual damages are difficult

or impossible to prove.⁴ Second, the array of statutory damages and criminal sanctions,⁵ reflect the importance of the interests at stake. While the IACA is a “truth-in-marketing law,” 68 FR 35164-01, that “protect[s] Indian artists from unfair competition from counterfeits,” H.R. Rep. 101-400(I), 1990 U.S.C.C.A.N. 639, the statute seeks to do much more—it is an effort to protect Indian culture itself.⁶ Defendants ask the Court to deny these Plaintiffs standing to defend their culture. As one court put it in finding standing for a tribe on a different issue: “A tribe . . . enjoys a unique status under our state and federal law that allows it to protect and preserve its cultural heritage.” *Paucatuck Eastern Pequot Indians v. Connecticut Indian Affairs Council*, 18 Conn.App. 4, 10 (Conn.App. 1989). Having falsely traded on Native American culture, culture to help its brand, Licata Decl. Ex. 14 (Reich Tr. 183:13-25), Defendants’ attempt to throw the Plaintiffs out of court on standing grounds should be rejected.

1. The Requirements of Article III Standing.

In order “[t]o establish Article III standing, an injury must be ‘concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.’” *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138 (2013) (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010)). Defendants’ motion argues that Plaintiffs cannot show harm for any items and, additionally, cannot trace the harm to their actions with respect to the non-

⁴ See *Native Am. Arts, Inc. v. Bundy-Howard, Inc.*, 168 F.Supp. 2d 905, 914 (N.D. Ill. 2001) (the IACA “deals with the selfsame problem that is addressed in trademark cases . . . ‘[t]here is no effective way to measure the loss . . .’”) (citation omitted); *Douglas v. Cunningham*, 294 U.S. 207, 209 (1935) (statutory damages in Copyright Act of 1909 “give the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages”); Restatement (Third) of Unfair Competition § 37 (1995) (noting “difficulty of proving lost sales”).

⁵ See 25 U.S.C.A. § 305e(b) and (c) (civil damages); 18 U.S.C.A. § 1159 (criminal imprisonment, fines and penalties); attorneys’ fees are also available to successful plaintiffs. 25 U.S.C. § 305e(c).

⁶ Congressman John Kyl, who introduced the 1990 amendments, explained that “[m]isrepresenting products as genuine Indian is not only an unfair marketing practice . . . it is a threat to the historical and cultural traditions that are entailed in the manufacture of Indian arts and crafts.” *Id.* 136 Cong. Rec. H8291-01, 1990 WL 149013. Congressman Robert Kastenmeier further explained that the IACA is an effort to provide “protection for an irreplaceable part of American culture, and a valuable national resource: Native American arts and crafts.” *Id.* Scafidi Report at ¶¶ 11-16 (explaining, *inter alia*, that the “IACA and the Board’s regulations are prototypical legal attempts to address the issues of authenticity and appropriation of Native American culture”).

Navajo items at issue. ECF No. 223, at 27. The evidence defeats these claims.

2. Plaintiffs Satisfy the Injury-in-Fact Element.

All that Article III injury-in-fact requires is an “invasion of a legally protected interest that is concrete, particularized, and actual or imminent.” *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1087 (10th Cir. 2006) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). “Injury in fact is a low threshold” *WC Capital Mgmt., LLC v. UBS Sec., LLC*, 711 F.3d 322, 329 (2d Cir. 2013) (internal quotation and citation omitted). “At the summary judgment stage, the injury-in-fact element requires that the plaintiff set forth by affidavit or other evidence specific facts which for purposes of the summary judgment will be taken to be true.” *Oklahoma ex rel. Pruitt v. Burwell*, No. 11-30, 2014 WL 4854543, at *9 (E.D. Okla. Sept. 30, 2014) (quoting *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1572 (10th Cir. 1995)).

In discussing the injury-in-fact element, these Defendants attempt to add a non-existent requirement of “competition” or “competitive injury.” See ECF No. 223, at 12-13, 15. In support, they cite *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 188 (2014) and *Native Am. Arts, Inc. v. Contract Specialties, Inc.*, 754 F.Supp. 2d 386, 391 (D.R.I. 2010). However, *Lexmark* is inapplicable here. It didn’t consider Article III standing—only *statutory* standing; not standing under the IACA, but for false advertising claims under the Lanham Act, 15 U.S.C.A. § 1125(a)(1)(B). The court in *Contract Specialties* was even further off course. It too was addressing a *statutory* standing claim, not an Article III claim. It incorrectly decided that the “IACA must be interpreted congruently with [the Lanham Act], which requires a showing of competitive injury.” *Id* at 390. *Lexmark* later rejected the competitive injury requirement even for Lanham Act cases, *Lexmark*, 134 S.Ct. at 1384, leaving *Contract Specialties* without precedential value to the standing issue here.

a. Plaintiffs Have Been Deprived of a Statutorily-Protected Right.

As noted, “Congress may create a statutory right or entitlement[,] the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute.” *Warth* at 514. In other words, “[t]he actual or

threatened injury required by Art[icle] III may exist solely by virtue of ‘statutes creating legal rights, the invasion of which creates standing.’ ” *Id.* at 500. “Such rights do not need to be expressly delineated in the statute, but may be inferred from conduct prohibited by it.” *Palm Beach Golf Ctr.-Boca, Inc. v. Sarris*, 771 F.3d 1274, 1281 (11th Cir. 2014).

Here, by prohibiting the offer, display, or sale of a good “in a manner that falsely suggests it is Indian produced,” 25 U.S.C.A. § 305e, Congress granted a protected right to Indians, Indian tribes, and Indian arts and crafts organizations. That right was given with express statutory standing to bring an action for injunction, trebled actual damages, statutory damages and punitive damages. As noted, both injunctive and statutory damages remedies can be pursued upon the mere offer or display for sale of an offending item, without waiting for actual economic injury. By that scheme, Congress made it clear that the right given was that of an arts and crafts market free from counterfeit Indian goods. Plaintiffs are beneficiaries of that right, so when the Defendants’ IACA violations intruded on it, an injury that satisfies the Article III case-or-controversy injury requirement occurred.

b. Plaintiffs Have Also Suffered Reputational Harm, a Separate Injury.

“The Supreme Court has long recognized that an injury to reputation will satisfy the injury element of standing.” *Gully v. Nat’l Credit Union Admin. Bd.*, 341 F.3d 155, 161 (2d Cir. 2003) (citing *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 139 (1951)).⁷ With respect to IACA claims, courts have held:

The IACA protects Indian sellers of arts and crafts by preventing non-Indians from exploiting the market value and goodwill associated with authentic, Indian-made products. . . Not only do violators of the IACA trade upon a reputation or advantage that they did not earn, but they take sales away from those who may rightfully capitalize on the fact that a product is Indian-made.

Flodine v. State Farm Ins. Co., No. 99-7466, 2001 WL 204786, at *6 (N.D.Ill. Mar. 1, 2001).

⁷ Since injury to reputation and goodwill are particularly difficult to quantify, courts have found such injuries constitute “irreparable harm” in the context of injunctions. *See, e.g., Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1264 (10th Cir. 2004) (“loss of goodwill or competitive market position”); *Cnty. Television of Utah, LLC v. Aereo, Inc.*, 997 F.Supp.2d 1191, 1203 (D.Utah 2014) (“loss of trade, goodwill, or control over one’s reputation”).

This “value and goodwill associated with authentic, Indian-made products” lies in both the products’ authenticity and also in their reputation for high quality, derived from the long tradition of Native Americans being highly-skilled craftspeople. *See* Licata Decl. 18 (JT Willie Expert Report) and Licata Decl. Ex. 19, JT Willie Tr. p 69:15-70:1; 96:19-25; 100:8-19. (testifying to the quality of Indian-made goods). For example, The American Heritage Dictionary explains that the Navajo are “skilled weavers . . . and silversmiths;” that the Pueblos “are noted for their skilled craft in pottery, basketry, weaving, and metalworking;” and that the Hopi “are noted for their . . . craftsmanship in basketry, pottery, silverwork, and weaving.” Claassen Decl. Ex. 1 (American Heritage Dictionary).

Here, Plaintiffs “rightfully” capitalize on this reputation to market and sell their authentic Indian-made goods. For example, on Plaintiffs’ website (www.goNavajo.com), NACE advertises the fact that it “provide[s] the public with the highest quality of Native American sterling silver (.925) inlay jewelry, traditional Navajo jewelry, pewter inlay jewelry and other unique forms of wearable art.” McGough Decl. at ¶ 9. Moreover, NACE has standards and procedures to ensure the goods it purchases (and in turn markets) are authentic and of high quality. *Id.* at ¶ 8. The Association also promotes high quality American Indian arts and crafts, requires honest representations as to the nature and origin of American Indian arts and crafts, and works closely with the Indian Arts and Crafts Board established under the IACA. Zeller Decl. at ¶¶ 3-7, 16.

Defendants, on the other hand, are not members of the Association, *id.*, at ¶17, and sold low quality goods as Indian-made. Defendants have admitted that they falsely advertised that items are Indian-made when they are in fact not made by Native Americans. Free People admits that the business reason for offering such products for sale is to help the Free People brand. *See* Section III.T, *supra.*; Licata Decl. Ex. 8-10, 14.⁸ These items are of lower quality, and this caused harm to the Plaintiffs’ market for authentic Indian-made products. One clear example can

⁸ The Defendants sold the same kinds of goods, that look like they could have been Indian-made, and they sold those goods in the same channels of trade in which Plaintiffs sell their goods, including catalogs, wholesale channels, retail stores, and via the Internet. McGough Decl. at ¶¶ 5, 11, 19.

be seen in what Urban Outfitters marketed as the “Large Navajo Ring.” Claassen Decl. Ex. 7. Customer reviews for that product noted issues with quality, most with respect to the metal turning their fingers green. *Id.* Anthropologie Chief Operating Officer and 30(b)(6) witness agreed that such a product is of inferior quality:

- Q.** If you heard about a ring turning someone’s finger green, does that suggest to you that the product is not of high quality?
A. Yes.

Licata Decl. Ex. 5. The Navajo Nation’s Division of Economic Development Director, Al Damon, testified that he inspected the goods at the Urban Outfitters’ store in Albuquerque, New Mexico, and that the items sold as Indian-made were lower quality than authentic Navajo products. Licata Decl. Ex. 11. Reputational harm to Plaintiffs who produce and market authentic Indian-made goods is simply unavoidable when Defendants market and sell low quality, unauthentic Indian goods as Indian-made. *See also* McGough Decl. at ¶ 4. Plaintiffs have testified that the “battle” they face with respect to arts and crafts is counterfeit goods. Licata Decl. Ex. 13, JT Willie Tr. at 69:15-70:1; 96:19-25; 100:8-19 .

Despite Defendants’ baseless assertions that they sold different types of products under the Indian Tribes than Plaintiffs, it makes no difference whether Defendants marketed imitation items as “Navajo,” “Pueblo,” “Zuni,” “Zia,” “Native American,” or “Indian” for purposes of Plaintiffs having standing under the IACA. First, Plaintiffs sell genuine arts and crafts made by members of each of the same tribes and the particular category is not relevant to standing. Plaintiff also market items as “Native American” and “Indian.”⁹ McGough Decl. at ¶ 2. Second, and more importantly, the IACA makes no distinction among those terms: if used without qualification they all denote Indian origin. *See* 25 C.F.R. § 309.24. Indeed, the harm the IACA seeks to protect against is the misrepresentation that a product is “Indian-made,” which relates to the market for Indian-made goods generally, and Plaintiffs have a legally protected interest in the

⁹ Plaintiffs note that Defendants have also taken the absurd, unsupported position that the terms “Navajo,” “Indian,” “Native American,” “Hopi,” “Apache,” “Cherokee,” and “Zuni,” do not denote tribal origin at all, and all mean the same thing when used as an adjective in a product name. Licata Decl. Ex. 2, Stygall Report at 7-8, 17.

reputation of Indian-made goods as a whole.¹⁰

Courts have recognized injury to plaintiffs in non-IACA cases where there is a deceptive practice in a market for authentic products. For example, in a case involving false claims as to the quality of cashmere products, the First Circuit held:

[T]he sale and manufacture of cashmere products by plaintiff's members establishes that they have an interest in the reputation of cashmere generally. It is but a short jump to the finding that their interest will be harmed if the defendants continue to sell the mislabeled coats. ... By selling these coats with labels which overstate their cashmere content, defendants are wrongfully profiting from the reputation of cashmere as a high quality fabric, which plaintiff's members have a right to protect.

Camel Hair & Cashmere Inst. of Am., Inc. v. Associated Dry Goods Corp., 799 F.2d 6, 15 (1st Cir. 1986). Similarly here, “a lasting but not readily measureable injury” is inflicted on the reputation of Indian-made goods, which harms Plaintiffs, when low-quality, mass produced goods are sold as Indian-made. This is exactly the type of injury and “erosion of consumer confidence” that the IACA seeks to prevent, and there is no question that Plaintiffs’ interest “in the reputation of [Indian-made goods] generally,” has been harmed by Defendants’ “wrongful[] profiting.” *See also W. Indian Sea Island Cotton Ass’n v. Threadtex, Inc.*, 761 F.Supp. 1041, 1050 (S.D.N.Y. 1991) (“a particular commercial harm occurs where a defendant falsely represents a product of lesser quality and greater quantity as being a relatively rare and fine product.”).¹¹

¹⁰ *See* S. REP. 106-452, 2 (“The flood of inauthentic Indian arts and crafts also damages traditional Indian heritage and culture. Indian arts and crafts are created through time-honored cultural practices and traditions. Intergenerational continuity of these cultural practices is threatened when young people are deterred from becoming artisans because of the changing market that results from the surge of cheaply made, imitation Indian arts and crafts.”)

¹¹ *Klein-Becker USA LLC v. Englert*, No. 2-06378, 2007 WL 1933147, at *5 (D.Utah Mar. 28, 2007) (“loss of reputation, trade, and goodwill if counterfeit product or product that does not meet its quality controls is sold”); *Chanel, Inc. v. Pu*, No. 07-2502, 2009 WL 722050, at *8 (D.Kan. Mar. 18, 2009) (“defendant’s acts of producing and selling counterfeit items causes confusion among purchasers, which, in turn, weakens Chanel’s reputation”); *Coach, Inc. v. Richie’s Playhouse Inc.*, No. 11-12638, 2013 WL 594243, at *5 (E.D.Mich. Feb. 15, 2013) (“manufacturer’s reputation for quality may be damaged if individuals mistake an inferior counterfeit for the original” and “manufacturer’s reputation for rarity may be harmed by the influx of knockoffs onto the market”).

c. Plaintiffs Have Also Shown Diversion of Customers.

As noted above, lost sales attributable to Defendants' IACA violations are "difficult or impossible to prove." S. REP. 106-452, 4; *see also Native Am. Arts, Inc. v. Bundy-Howard, Inc.*, 168 F.Supp.2d 905, 914 (N.D.Ill. 2001). In cases where inexpensive materials are represented as something more valuable, courts have inferred lost sales. *See Camel Hair*, 799 F.2d at 13. "This reasonable inference, to which [P]laintiffs are entitled at summary judgment, enables [P]laintiffs to demonstrate the causal link between the harm they suffered and defendants' misrepresentations." *Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave.*, 284 F.3d 302, 319 (1st Cir. 2002) (citing *Camel Hair*).

Despite the fact that Plaintiffs need not show actual lost sales, the record shows that Defendants' marketing and sale of imitation Indian goods diverted customers away from Plaintiffs. Defendants each used "Navajo" on their websites and in numerous other ways to drive Internet traffic to their websites. *See Licata Decl. Ex. 3 at ¶ 12 (Raichur Report)*. For example, Defendants purchased "Navajo" and the names of other Indian tribes as keywords or phrases that triggered Defendants' "sponsored link" advertisements to appear on search engine results pages when a user searched the purchased keyword or phrase. *Id*; Licata Decl. Ex. 3. A few (non-exhaustive) examples of other keywords and phrases purchased by Defendants include: "Navajo cardigan," "Navajo jumper," "Navajo wool tote," and "native american moccasins." Claassen Decl. Ex. 4. These keyword purchases resulted in "sponsored link" advertisements that appeared in the Internet search engine's results page. For example, the record shows that a "sponsored link" titled "Assorted Navajo Bracelet" appeared alongside the Google search results for the query "navajo bracelet," and those results included Plaintiffs' website "goNavajo.com," through which Plaintiffs sell authentic Indian-made bracelets, including Navajo bracelets. ECF No. 143-9. In addition, Defendants' used Search Engine Optimization techniques to increase traffic to Defendants' websites "that should have gone to the Navajo Nation's GoNavajo.com." Licata Decl. Ex. 3 (excerpts from Raichur Report). Given this evidence, Defendants injured Plaintiffs by diverting customers away from Plaintiffs' website.

3. Plaintiffs Have Shown Traceability.

Traceability focuses on who inflicted the harm of which Plaintiff complains. The evidence here shows that the Defendants' actions were what violated the IACA, not the "independent action of some third party." *Lujan*, 504 U.S. at 560–61. The Tenth Circuit has stated that all that "traceability" requires is "proof of a substantial likelihood that the defendant's conduct caused plaintiff's injury in fact." *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1156 (10th Cir. 2005). Here, Plaintiffs have shown that Defendants' false advertisement that items are Indian-made injured Plaintiffs, and the market for authentic Indian-made goods of which Plaintiffs are part. The injuries are traceable to Defendants as the source of those misstatements. Given this, Defendants are left with little to argue in fact or law, so they again attempt to confuse the legal standard and assert misplaced factual arguments.

The standard for traceability is "a substantial likelihood" that the defendant's conduct caused plaintiff's injury, not the "but for" test for cause-in-fact that Defendants suggest. *See* ECF No. 223, at 15. Second, Defendants' discussion of evidence of confusion, quality, and displaced sales all relate to injury—not causation. *Id.* At any rate, Plaintiffs have established confusion, inferior quality, and displaced sales. Third, Defendants' reliance on *Contract Specialties* is inappropriate because that case discusses the test for *statutory* standing under Lanham Act false advertising claims—a test that has since been rejected. 754 F. Supp. 2d at 390; *Lexmark*, 134 S. Ct. at 1385, 92-95, and Lanham Act standing does not apply. At any rate, there is no question that one who purports to sell imitation goods competes with those who sell the real thing.¹²

Beyond "Navajo" goods, the only other IACA-violating goods for which Plaintiffs are seeking damages are those the defendants mis-marketed as Indian, Zuni, Zia, Santo Domingo,

¹² In comparing the facts here to those in *Phoenix v. McDonald's*, 489 F.3d 1156 (11th Cir. 2007), by asserting that the "idea that the Defendants' use of the Indian and tribal descriptions affected Plaintiffs' business is equally as tenuous" as Burger King's business being affected by misstatements as to the odds of McDonalds' customers winning prizes, ECF No. 223, at 15, the Defendants miss the mark. Their analogy isn't close to what happened here, where Defendants marketed and sold inferior goods as authentic Indian-made goods, while at the same time, Plaintiffs were selling genuine goods made by other tribes.

and Pueblo. Plaintiffs offer and sell authentic goods from those tribes, so they were injured when Defendants' inauthentic goods undercut the market for the genuine article.

When a party uses inauthentic materials and misrepresents them as the more valuable authentic goods, the *Camel Hair*, *supra*, court approved the district court's drawing of a common sense "inference that the sale of cashmere-blend coats which overstated their cashmere content could cause a loss of sales of cashmere-blend coats which correctly stated their cashmere content." 799 F.2d 6. That inference has been used to find a "causal link between the harm [plaintiffs] suffered and defendants' misrepresentations," *Cashmere & Camel*, 284 F.3d 302, 319 (1st Cir. 2002). That same inference defeats Defendants' motion here.

Finally, Defendants' attempt at manufacturing a distinction for goods sold as "Indian," "Native American," "Zia," Zuni," and "Pueblo" should be rejected. Not only is the evidence Defendants rely upon as support for their contention improper and irrelevant (*see infra* Section IV(B)(3)(a)), but Plaintiffs sell authentic arts and crafts made by members of each of those tribes, the IACA makes no distinction among those terms, and Plaintiffs have a legally protected interest in the reputation of Indian-made goods as a whole. The IACA was specifically amended to allow civil actions by arts and crafts organizations, like NACE, that commonly sell goods for more than one tribe, and standing for those goods has been routinely found or assumed.¹³ As a result, Plaintiffs meet the traceability requirement, including for goods marketed with descriptions other than "Navajo."

a. The Declaration of Nicholas Curcio Should Be Disregarded.

To support their traceability argument, Defendants cite Tables 2-4 found at pages 7-9 in

¹³*See Contract Specialties*, 754 F.Supp.2d at 388 (suit for advertising "using the label 'Indian' and names of tribes such as 'Apache,' 'Navajo,' 'Kiowa,' and 'Cree'); *Native Am. Arts, Inc. v. Vill. Originals, Inc.*, 25 F.Supp.2d 876, 880 (N.D.Ill 1998) (false suggestion products were made by "Tigua and Navajo tribes"); *Native Am. Arts, Inc. v. Waldron Corp.*, 399 F.3d 871, 873 (7th Cir. 2005) ("Indian-style jewelry that is advertised under such names as "Navajo," "Crow," "Southwest Tribes" and "Zuni Bear"); *Native Am. Arts, Inc. v. Chrysalis Inst., Inc.*, No. 01-5714, 2002 WL 441476, at *1 (N.D.Ill Mar. 21, 2002) ("Advertisements touting these products make various references to Native Americans and 'native hands' as well as explicit references to the Navajo and Jicarilla Apache tribes").

their Motion. ECF No. 223, at 16. The tables depict photographs “that were not provided by Plaintiffs, but were instead selected from search results on Google Images.” *Id.* at 6 n. 2; *see also* Decl. of Curcio, ECF No. 223-4. The tables have no evidentiary value as they do not purport to depict Plaintiffs’ websites, but rather purport to show “the top 5 results” that Defense counsel subjectively chose from Google Image searches “that resembled arts and crafts products.” ECF No. 223, at 6 n. 2. The tables should be disregarded and their source, the Declaration of Nicholas Curcio, should not be considered because it is inadmissible. Fed.R.Evid. 901 require authentication of evidence “as a condition precedent to admissibility.” This requirement is satisfied by “evidence sufficient to support a finding that the matter in question is what its proponent claims.” *Id.* For the “Google Images” printouts to be admissible, Defendants must provide the Court with a statement or affidavit from a representative with personal knowledge of the contents of the Google Images website or search results. The declaration of Mr. Curcio does not meet this requirement as he has no personal knowledge of the content of the Google Images search results. *See St. Luke’s Cataract & Laser Inst., P.A. v. Sanderson*, No. 06-223, 2006 WL 1320242, at *2 (M.D.Fla. May 12, 2006).

C. Defendants’ Argument that Plaintiffs Do Not Have Statutory Standing Fails on Multiple Grounds.

1. Defendants Have Waived Any Argument As to Lack of Statutory Standing.

“The Supreme Court has affirmed that questions of so-called ‘statutory standing’ like the one presented in this case, despite no longer falling under the technical label of prudential standing, are not jurisdictional.” *Niemi v. Lasshofer*, 770 F.3d 1331, 1345 (10 Cir. 2014) (citing *Lexmark*, 134 S. Ct. at 1387). Accordingly, statutory standing, unlike Article III standing, may be waived.

Here, Plaintiffs included allegations and examples of Defendants’ sale of goods related to general descriptions like “Native American” and tribes other than the Navajo in their Complaint. *See, e.g.*, Compl., ECF No. 82, at e.g. ¶ 124; ECF No. 82-1 at ¶¶ 2, 4, 5, 6, 13, 14. The Court previously recognized that Plaintiffs’ IACA allegations were “not limited to goods using Navajo, but, instead encompasses allegations that Defendants sold goods that falsely suggest they are ‘Indian-produced, an Indian product, or the product of an Indian, an Indian Tribe, or an Indian arts

and crafts organization.” Order on Pl.’s Mot. to Compel, ECF No. 104, at 4.

Defendants, however, *failed to plead an affirmative defense that Plaintiffs lacked statutory standing*. “Failure to plead an affirmative defense of lack of standing is a waiver of that defense,” *Native Am. Arts, Inc. v. Earthdweller, Ltd.*, 2002 WL 1173513 at *1 (N.D.Ill May 31, 2002). Defendants’ motion concerning the statutory arguments have been waived. That wasn’t a single oversight, Defendants did not raise statutory standing when they moved to dismiss Plaintiffs IACA claim, ECF No. 16. Accordingly, Defendants have waived any argument as to lack of statutory standing.

2. Plaintiffs Have Statutory Standing For Non-Navajo Goods.

Even if not waived, Defendants’ assertion that Plaintiffs lack IACA statutory standing with respect to claims relating to descriptions other than “Navajo” is without merit. The Tenth Circuit has stated that the question of whether a party “falls within the class of plaintiffs whom Congress has authorized to sue” under a particular statute is a question of statutory interpretation. *Niemi* at 770 F.3d 1331, 1344 (10th Cir. 2014). The IACA provides that those who can bring an action are: “(A) the Attorney General, ... (B) an Indian tribe, acting on behalf of-- (i) the Indian tribe; (ii) a member of that Indian tribe; or (iii) an Indian arts and crafts organization; (C) an Indian; or (D) an Indian arts and crafts organization.” 25 U.S.C.A. §305e (d).

Defendants admit that the Navajo Nation is an “Indian tribe,” ECF No. 223 at 3, and the Navajo Arts and Crafts Enterprise is an “Indian arts and craft organization” within the meaning of the statute. See Section III.D, *supra.*; McGough Decl. ¶ 2. The plain language of the statute makes clear that any Indian Tribe or an Indian arts and crafts organization may bring a civil action against a person who sells goods that falsely suggest that the product is Indian-made or a product of a particular Indian tribe. There is no requirement that only the Navajo can sue on Navajo products. In fact, NACE sells products from 8 other Indian tribes. McGough Decl. ¶ 2. There are numerous cases in which an arts and crafts organization filed suit for misrepresentations related to products sold as made by other Indian tribes. (*See* cases listed in fn 13, *supra.*) *Camel*

Hair is also instructive. In that case, the district court found the inference of injury and causation would be “too attenuated” for plaintiffs who sold cashmere products, but not specifically cashmere coats like the defendant. 799 F.2d at 13. The appellate court rejected that limitation and found the district court “gave too little weight to the members’ interest in the reputation of cashmere.” *Id.* at 14. The same is true here. Defendants’ sales of any counterfeit Indian arts and crafts causes injury to Plaintiffs, who have a vested interests in the market of Indian-made goods. Plaintiffs, however, are only seeking liability for the direct harms caused by Defendants who sold imitation goods using the names of same Indian tribes for which Plaintiffs sell genuine goods.

3. The Proximate Cause Standard of *Lexmark* Does Not Apply Here and Should Be Rejected.

Defendants argue that the Court should apply the proximate cause and zone of interest standards set forth in the U.S. Supreme Court’s *Lexmark* case, a false advertising case under the Lanham Act, to Plaintiffs’ IACA claims. This fails for a number of reasons.

First, while the statutes can seem similar in the harm they seek to prevent (false advertising and false association), the two statutes’ lists of who is authorized to sue are far different. The Lanham Act provides a right to sue to “*any person* who believes he or she is likely to be damaged.” 15 U.S.C.A. 1125(a)(1). Accordingly, the case law has judicially created additional limitations to narrow who is “any person” before opening the courthouse door. With respect to the IACA, that is not necessary. Congress defined a statutory civil (and criminal) wrong for false representation of Indian origin and gave only a *narrow* class of those likely to be injured by such conduct the right to relief in federal courts. *See* 25 U.S.C.A. § 305e (the Attorney General; an Indian tribe; an Indian; or an Indian arts and crafts organization). Courts have rejected similar attempts to graft the *Lexmark* standing test to other statutes. *See, e.g. DRK Photo v. McGraw-Hill Co.*, No. CV12-8093, WL 2584811 (D.Ariz. June 10, 2014)(refusing to apply the *Lexmark* standing test to the copyright statute). The numbers show why *Lexmark* is unnecessary for an IACA case. There have only been about 3 dozen cases brought under the IACA in the last nearly 25 years, while thousands of cases are brought under the Lanham Act

every year. Thus Defendants' warning that this Court may create "a cottage industry" of Indians suing retailers is not a serious threat. Defs' Br., ECF No. 223 at 18.

Second, the term "aggrieved" does not support the application of proximate cause. Defendants contend that Congress's use of the term "aggrieved" and the possible lack of proportionality of statutory damages support a requirement of proximate cause. Defendants read too much into inclusion of the word "aggrieved," which simply identifies those authorized to sue under the statute who suffer a constitutionally cognizable Article III injury-in-fact. As one court held on the issue of statutory standing:

As an "Indian arts and crafts organization," Native American 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," Native American—competing in the market place by offering legitimate Indian-made products—fits comfortably within that term. Enough said.

Bundy-Howard, 168 F.Supp.2d 905 (N.D.Ill. 2001).

Third, Defendants' argument that Congress could not have intended Plaintiffs to receive statutory damages that are not proportionate to their lost profits is directly contrary to the language Congress chose for the IACA. It specifically provides a successful plaintiff with punitive and statutory damages. 25 U.S.C.A. §305e(b). The statutory damages are calculated solely on the Defendants' actions. Congress made them proportionate, but elected to make the proportionality rest on the defendant's conduct (the greater three times the profit that the *defendant* made from violating items or \$1,000 a day for every day the *defendant* offered the offending good for sale). The deterrent purpose of that kind of damage model could not be clearer; Congress was not interested in the kind of compensatory damages the Defendants seem to advocate. Congress wanted to deter actors like the Defendants to not take advantage of Native American peoples' right to their own culture. There is no basis for the Court to fashion a new requirement of proportionality; Congress has set the proportions. *See Sony BMG Music Entm't v. Tenenbaum*, 719 F.3d 67, 71-72 (1st Cir. 2013).

4. Even if the Court adopts the Lexmark Standard, Plaintiffs Meet It.

Though Plaintiffs submit it is improvident to argue statutory standing by analogy to an incongruous provisions in another statute, even if the Court were to apply the standard in *Lexmark*, Plaintiffs meet it. Tellingly, Defendants make no mention of the fact that *Lexmark* rejected the “competitor-only” standing test for Lanham Act false advertising claims that the *Contract Specialties* court had relied on in its discussion. *See Lexmark*, 134 S. Ct. at 1385, 92-95.¹⁴ Plaintiffs clearly meet the “zone of interest” requirement. 134 S. Ct. at 1387. Here, Plaintiffs are an Indian tribe and an Indian arts and crafts association who sell Indian-made goods. Plaintiffs also meet the proximate cause requirement. *Lexmark*, 134 S. Ct. at 1390. Plaintiffs are directly harmed by Defendants who sell imitation goods purporting to be authentic Indian-made goods. Plaintiffs have set forth sufficient evidence to show this causal connection, as evidenced in the Injury-in Fact Section, *supra.*, Section IV.B.2. Plaintiffs’ claims against the Defendants that offered and sold non-genuine Zuni, Pueblo, and Zia products while Plaintiffs sold genuine ones does not come close to reaching the outer limits of proximate cause under the IACA. Congress amended the IACA’s civil cause of action to include the phrase “directly or indirectly” and Congress made clear that is amendment “clarifies that suit may be brought against a manufacturer and/or supplier when the plaintiff is not in direct competition with the manufacturer or supplier.” S. Rep. 106-452, 2000 WL 1471529. Plaintiffs’ harm is proximately caused by Defendants falsely selling Indian-made products such that Plaintiffs have standing to sue. Still, Plaintiffs respectfully request the Court read the statutory language of the IACA to decide who is authorized to sue, not the Lanham Act, and to apply the Article III standing test.¹⁵

¹⁴ IACA violations are more akin to false association or designation of origin cases under 15 U.S.C. § 1125(a)(1)(A). *See Native Am. Arts, Inc. v. Hartford Cas. Ins. Co.*, 435 F.3d 729, 733 (7th Cir. 2006). Importantly, a false association claim has never required “an allegation of competitive injury, and those with standing for false association claims include parties with a commercial interest in the product wrongfully identified . . .”). *Cimarron Lumber & Supply Co. v. McLiney Lumber & Supply, LLC*, No. 12-2240-JAR, 2013 WL 1308708, at *2 (D.Kan. Mar. 29, 2013) (quotation omitted).

¹⁵ While the Lanham Act standing does not apply, the Lanham Act also supports Plaintiffs’ standing. False advertising Lanham Act cases hold that confusion is an Article III injury in fact

V. CONCLUSION

Plaintiffs have standing and this issue should be resolved by denying Defendants' Motion for Partial Summary Judgment on Standing and granting Plaintiffs' Cross-motion, establishing that they have standing for the IACA claims in the case.

RESPECTFULLY SUBMITTED this 24th day of December, 2014.

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that supports standing on its own. In the marketplace, "confusion is, in itself, damage." *Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co.*, 408 F. Supp. 1219, 1232 (D.Colo. 1976). Where a defendant's statements are literally false under the Lanham Act, confusion is presumed to injure the plaintiff." *CTI Servs., L.L.C. v. Energy Maint. Servs. Grp. I, L.L.C.*, No. 9-144, 2013 WL 428054, at *2 (N.D.Okla. Feb. 4, 2013); *see also Procter & Gamble Co. v. Haugen*, 627 F. Supp. 2d 1287, 1290 (D. Utah 2008). For standing purposes, therefore, the fact that the Defendants' unqualified false statements of Indian origin of their products (for instance, offering "Navajo Feather Earrings," when they were cheap knockoffs with nothing to do with any Native American) harm Plaintiffs because Plaintiffs are making the same statements – "Navajo Earrings" with respect to the very same kinds of product. As a result, confusion is presumed and Article III standing results. Plaintiffs also have shown evidence of actual confusion. *See Licata Decl. Ex. 2 & 4; Claassen Decl. Ex. 7*. Still, the court need not go here because no showing of confusion is required to prove an IACA violation, *See Native Am. Arts v. Earthdweller, Ltd.*, No. 01-2370, 2002 WL 1173513, at *6 (N.D.Ill. May 31, 2002).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th day of December, 2014, I filed the foregoing electronically through the CM/ECF system, which caused the following counsel to be served by electronic means:

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