

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

THE NAVAJO NATION, et al.	:	
	:	
Plaintiffs,	:	
	:	
v.	:	No. 1:12-cv-00195 LH-LAM
	:	
URBAN OUTFITTERS, INC., et al.	:	
	:	
Defendants.	:	
_____	:	

**DEFENDANTS' COMBINED REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR
PARTIAL SUMMARY JUDGMENT ON STANDING AND RESPONSE IN
OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT ON
STANDING**

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I. INTRODUCTION

Defendants have moved for partial summary judgment on two separate but related grounds. First, Plaintiffs lack Article III standing as to all claims under the Indian Arts and Crafts Act (the “IACA”) because they cannot show an injury-in-fact (*i.e.* lost customers, reputational harm, or lower profit margins) traceable to Defendants. Second, even if Plaintiffs somehow satisfy Article III (which they cannot), they still lack statutory standing with respect to claims involving product descriptions other than “Navajo.”¹ As previously explained, Plaintiffs lack any commercial interest in the goods that Defendants sold using those descriptions (because they do not sell competing goods), and lack a sufficient identity interest in the descriptions themselves.

In opposing Defendants’ motion — and in supporting their inappropriate cross-motion on the same issues — Plaintiffs fail to set forth one shred of evidence (because none exists) controverting the following key facts:

- Plaintiffs’ total sales did not decline during the relevant period, and Plaintiffs did not lower the price of their goods.
- The only authentic Zuni items that Plaintiffs sold were figurine items, whereas the items that Defendants described as “Zuni” were women’s jewelry items.
- The only authentic Pueblo or Zia items that Plaintiffs sold were figurine, home décor, pottery, and jewelry items, whereas the items that Defendants described as “Pueblo” or “Zia” were women’s clothing items.

¹ For purposes of clarity, this brief uses the terms “Navajo description,” “Indian description,” and “tribal description” in the same manner as in Defendants’ opening brief. Accordingly, “tribal description” refers to any term used to identify an Indian people other than “Navajo.” In their combined response brief, Plaintiffs effectively concede that they lack standing with respect to the 42 tribal descriptions not used in Plaintiffs’ business in any way. *See* ECF No. 258 at 8, 25–26. But, because Plaintiffs declined to consent to summary judgment on that issue and have not explicitly capitulated, Defendants request that the Court address it in ruling on their instant motion.

- Plaintiffs do not sell goods of the same product type as those that Defendants marketed using the Indian descriptions.
- Plaintiffs do not self-identify with tribal names other than “Navajo.”

Further, on other issues such as reputational damages and diverted sales, Plaintiffs reference only defficient evidence that fails to raise any genuine factual dispute.

In the absence of any real evidence to support their claim of standing, Plaintiffs attempt to divert the Court’s focus by arguing that the wording of the IACA’s citizen-suit provision vitiates any need to prove an actual injury, or to establish proximity to the alleged violations. However, Plaintiffs’ interpretation of the IACA is inconsistent with the basic constitutional and common law principles that Congress legislates against. As explained in detail below, Plaintiffs bear the burden of establishing an injury-in-fact and a proximate relationship to the alleged misconduct. Because Plaintiffs cannot do so, Defendants are entitled to summary judgment with respect to all claims asserted under the IACA.

II. UNDISPUTED MATERIAL FACTS

Rule 56.1(b) of the District of New Mexico Local Rules of Civil Procedure provides that material facts set forth in an opening brief in support of summary judgment will be “deemed undisputed unless specifically controverted” with citation to controverting evidence. In responding to the Defendants’ motion for summary judgment, Plaintiffs failed to provide *any* evidence controverting the facts that the Defendants presented on the following issues.

A. Sales figures and profit margins.

Defendants’ opening brief argued that Plaintiffs lack Article III standing because they cannot show, among other things, declining sales or profit margins. ECF No. 223 at 13, ¶¶ 18-19. In response, Plaintiffs do not provide any evidence of declining sales figures during

the period when the Defendants sold products using the Navajo, Indian, or tribal descriptions.² See ECF No. 258 at 12, ¶ 10. Plaintiffs also do not offer any evidence that they lowered prices. See *id.* ¶¶ 10–11. As evidence of adjusted business operations, Plaintiffs rely solely on the fact that they filed the instant lawsuit, which is proof of nothing. *Id.* ¶ 11.

B. Non-competing Zuni, Pueblo, and Zia goods.

Defendants have also argued that Plaintiffs lack a commercial interest in the specific goods that the Defendants sold under the tribal descriptions “Zuni,” “Pueblo,” and “Zia,” because there is no evidence that Plaintiffs sold similar authentic goods made by the corresponding tribes. ECF No. 223 at 10–13, ¶¶ 13–17. In making that argument, the Defendants cited interrogatory responses in which Plaintiffs provided examples of their authentic Zuni, Pueblo, and Zia goods. *Id.* Because the interrogatory responses included only the names of those goods — many of which were somewhat obscure — Defendants’ brief provided images selected from Google Images™ search results as illustrative examples of what those goods *might* look like. *Id.* at 10–13, Tbls. 2–4. In their response, Plaintiffs fail to cite to any specific evidence controverting the facts that Defendants presented on this issue. See ECF No. 258 at 11–12, ¶ 9. Instead of making any effort to do so, they assert two meritless arguments. *Id.*

First, Plaintiffs state that the product names in their interrogatory responses were only representative examples of the authentic Zuni, Pueblo, and Zia products they sold. *Id.* Plaintiffs

² It is worth noting that, while Plaintiffs’ combined response brief repeatedly accuses Defendants of false advertisement, the issue of whether the Defendants falsely suggested that their goods were Indian-made is disputed and currently before the Court in other motions. See, e.g., ECF Nos. 145, 165. Plaintiffs’ statement that “Defendants have admitted that they falsely advertised that items were Indian-made” is blatantly false. ECF No. 258 at 21.

wrongly suggest that because the parties agreed to discovery limitations, they are relieved from the obligation to present evidence establishing standing. *See id.* It clearly does not. The party bringing suit bears the burden of proving standing as part of its *prima facie* case. *See, e.g., Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1391 n.6 (2014). Moreover, Defendants' opening brief stated as fact that there was no evidence showing that Plaintiffs sold authentic Zuni, Pueblo, or Zia goods in the same general categories as the goods that Defendants sold under corresponding tribal descriptions. Local Rule 56.1(b) therefore required Plaintiffs to controvert that statement with specific evidence, which they failed to do.

Second, Plaintiffs argued that the images in Tables 2, 3, and 4 of Defendants' opening brief are inadmissible because they are irrelevant and improperly authenticated. *See* ECF No. 258 at 26–27. Under Rule 402 of the Federal Rules of Evidence, an item of evidence is relevant if it “has any tendency to make a fact more or less probable than it would be without the evidence.” The images in the tables are clearly relevant for purposes of showing what type of product a “Kach Zuni” or “Zuni Cloud Man” might be, because search engine results provide at least some indication as to how search terms are commonly used. *See, e.g., In re Bayer Aktiengesellschaft*, 488 F.3d 960, 966–67 (Fed. Cir. 2007) (comparing the probative value of Google™ search results with that of dictionary definitions). With respect to authentication, Plaintiffs assert that the attorney who provided the declaration as to how the search results were produced “has no personal knowledge of the content” of those results. *See* ECF No. 258 at 27. Yet, the declaration states that the attorney personally performed each search query in Google Images™, and that the screen shots attached to the declaration were true and correct copies of the search results. ECF No. 223-4 at 2–3. This information is all that is needed to authenticate the

contents of a webpage *as of the date when the declarant personally viewed them*. See, e.g., *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1154 (C.D. Cal. 2002). The case that Plaintiffs cite in contesting authenticity is inapposite, holding that testimony from a system administrator is required in order to authenticate the *historic* contents of a webpage (*i.e.* the contents as of a time other than the time of viewing). *St. Luke's Cataract & Laser Inst., P.A. v. Sanderson*, No. 8:06-CV-223-T-MSS, 2006 WL 1320242, at *2 (M.D. Fla. May 12, 2006).

C. Lack of competition regarding goods sold under the Indian descriptions.

Paragraph 13 of the enumerated facts in Defendants' opening brief stated that Plaintiffs "have not established that they sell products of the same type as those sold by Defendants using th[e Indian] descriptions." ECF No. 223 at 10, ¶ 13. Plaintiffs have not set forth any evidence to controvert that statement. See ECF No. 258 at 11, ¶ 8. Instead, Plaintiffs' response to Paragraph 13 focuses on the issue of whether they market goods as "Indian" or "Native American." *Id.* Thus, pursuant to Local Rule 56.1(b), it is deemed admitted that Plaintiffs do not sell products of the same type as the following products for which they claim damages:

Table 1 – Defendants' Indian-Described Products³
(As Included in Plaintiffs' Damage Calculations)

VTG Indian Tooled Bags	Indian Coin Belt
Indian Warrior Necklace	Native American Embossed Belt

³ Defendants acknowledge that there is evidence in the record that Plaintiffs sold jewelry items such as necklaces and bracelets. However, Plaintiffs have not made any showing that their jewelry offerings were sufficiently similar in either style or marketing to compete with Defendants' "Indian Warrior Necklace" or "Indian Bead Bracelet." They also have not set forth any evidence or argument specifically comparing their products to Defendants' other six Indian-described products. As the party asserting standing, it is their burden to do so. See, e.g., *Lexmark*, 134 S. Ct. at 1391 n.6

Indian Bead Bracelet	Native American Hair Sticks
BP Beaded Indian Vest	Cherokee Bag

D. Self-Identification only as “Navajo.”

Finally, Paragraph 10 of Defendants’ fact statement declared that “[n]either Plaintiffs nor members of the Navajo Nation self-identify using any of the 50 tribal descriptions that were subject to discovery.” ECF No. 223 at 9, ¶ 10. Although Plaintiffs’ response is somewhat unclear, they appear to concede that they themselves and other members of the Navajo Nation self-identify only as “Navajo.” See ECF No. 258 at 10, ¶ 4. In any event, Plaintiffs response to Paragraph 10 does not set forth any evidence proving otherwise, but instead cites evidence that they sell goods marketed as “Hopi,” “Zuni,” “Zia,” “Cheyenne,” “Crow,” and “Apache.” *Id.*

III. DISPUTED FACTS NOT PRECLUDING SUMMARY JUDGMENT

Plaintiffs’ combined response brief includes not only a “statement of disputed facts” for purposes of contesting Defendants’ motion, but also a “statement of undisputed facts” to support their unwarranted cross-motion. ECF No. 258 at 9–16. None of the evidence set forth in this latter section entitles Plaintiffs to summary judgment or creates a genuine dispute of fact with respect to Defendants’ motion. The following evidence is specifically controverted:

A.1. Defendants dispute Plaintiffs’ allegation in paragraph K.11 that “Defendants sold comparatively low quality arts and crafts goods that were sold as Indian-made,” as well as the similar allegation in paragraph U.22. ECF No. 258 at 14, 16. Plaintiffs cite to the deposition testimony of Denise Albright (testifying on behalf of Anthropologie) wherein she answered the question “Are you aware of what might cause a piece of jewelry, for example, a ring, to turn someone’s finger green?” ECF No. 259-5. Plaintiffs cite to no evidence that Anthropologie sold such a ring, that it in fact turned someone’s finger green, or that Anthropologie sold such a ring as authentic, Indian-made. *Id.* Indeed, Anthropologie has never sold any goods as being

authentic, Indian-made. *See* Declaration of Scott R. Knapp (“Knapp Decl.”) at Ex. 1. Plaintiffs also cite to the deposition testimony of Albert Damon, the Navajo Nation’s Director of Division of Economic Development, who testified that some unidentified “jewelry” he reviewed was “not Navajo quality.” ECF No. 259-11. Plaintiffs provide no evidence that Mr. Damon has expertise to render such an opinion, or that the “jewelry” he reviewed was sold as Indian-made. *Id.* And Plaintiffs provide no evidence that any Defendant allegedly sold any “low quality arts and crafts goods” purported to be made by any non-Navajo tribe.

B.2. Defendants dispute Plaintiffs’ allegation in paragraph L.12 that “Defendants’ goods confused consumers.” ECF No. 258 at 14. To the contrary, Defendants’ use of the word “Navajo” to describe goods did not confuse customers, and did not falsely suggest the items to be Indian-made. *See* Knapp Decl. at Ex. 2. Further, Plaintiffs provide no evidence that Defendants’ use of the name of any non-Navajo tribe caused confusion. ECF No. 258 at 14.

C.3. Defendants dispute Plaintiffs’ allegation in paragraph M.13 that “Defendants are likely to have diverted sales away from Plaintiffs’ website.” ECF No. 258 at 15. To support this contention, Plaintiffs merely provide evidence that certain Defendants used “Navajo” as a keyword in certain internet advertising. *Id.* Such isolated evidence does not support a contention of “diverted sales.” Moreover, Plaintiffs provide no evidence of diverted sales regarding products sold using the Indian or tribal descriptions. *Id.*

D.4. Defendants dispute Plaintiffs’ allegation in paragraph S.19 that Plaintiffs “are harmed by the sale of imitation arts and crafts.” ECF No. 258 at 15. To support this contention, Plaintiffs cite to various legislative history, generally discussing the harm to Indians from the

sale of imitation Indian goods. However, Plaintiffs cite no evidence of any harm caused to Plaintiffs, as a result of any actions by Defendants. *Id.*

E.5. Defendants dispute Plaintiffs' allegation in paragraph V.22 that Defendants sold goods as Indian-made, and that those products "are not in fact Navajo-made." ECF No. 258 at 16. In support of this contention, Plaintiffs cite only the expert report and deposition testimony of J.T. Willie. *Id.* Though Plaintiffs assert that Mr. Willie inspected goods "that were sold [by Defendants] as Indian-made," Mr. Willie makes no such contention. Indeed, Mr. Willie makes no reference whatsoever as to how the items were offered for sale (e.g., the verbiage attached to any internet advertising), or whether they were actually sold by Defendants as Indian-made. *Id.* Moreover, for several goods, Mr. Willie opined that the goods "might be Navajo." ECF 259-12.

F.6. Defendants dispute Plaintiffs' reliance on evidence proffered from attorney Susan Scafidi, as cited in paragraphs 1, 12, and N.12, because it is patently inadmissible as set forth in *Defendants' Motion in Limine to Exclude Expert Testimony of Susan Scafidi*, ECF No. 284.

IV. ARGUMENT

A. Plaintiffs have not suffered a traditional or statutory injury-in-fact, and therefore lack Article III standing on their IACA claims.

Article III of the Constitution requires that, in order for there to be a justiciable "case" or "controversy," a plaintiff must suffer an actual or imminent injury-in-fact. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). In response to Defendants' motion for summary judgment, Plaintiffs have asserted Article III standing based on three supposed injuries: (1) violation of a statutory right created by the IACA; (2) reputational harm; and (3) diverted sales. The first of

these “injuries” is not a cognizable basis for standing under Article III, and Plaintiffs have failed to raise a genuine issue of material fact as to the latter two.

1. IACA does not create statutory rights conferring Article III standing.

Plaintiffs correctly note that “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). However, not every statutory violation confers Article III standing on the parties that the statute is intended to protect. The Supreme Court has identified two relevant considerations for determining when a statute creates a right conferring Article III standing. The first is a rule of statutory interpretation, designed to ensure that Congress clearly intended to create such a right. The second is a constitutional limit on Congress’s power. Both considerations preclude a finding of any right under the IACA.

With respect to the interpretation issue, the Supreme Court has stated that when Congress exercises its power to define cognizable injuries, it “must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit.” *Massachusetts v. E.P.A.*, 549 U.S. 497, 516 (2007). Justice Kennedy’s concurring opinion in *Lujan*, which first articulated this interpretive rule, provides instructive guidance on its application:

The citizen-suit provision of the Endangered Species Act does not meet these minimal requirements, because while the statute purports to confer a right on “any person . . . to enjoin . . . the United States and any other governmental instrumentality or agency . . . who is alleged to be in violation of any provision of this chapter,” it does not of its own force establish that there is an injury in “any person” by virtue of any “violation.”

Lujan, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in judgment) (alterations in original).

Applying this interpretive analysis, the IACA cannot be plausibly construed as creating a statutory right conferring standing. The citizen-suit provision in the IACA is structured in a similar fashion to that in the Endangered Species Act, stating generally that a “civil action under subsection (b) may be initiated by . . . an Indian tribe . . . an Indian; or . . . an Indian arts and crafts organization.” 25 U.S.C. § 305e(d)(1)(B)–(D). For its part, subsection (b) provides that “a person specified in subsection (d) may . . . bring an action against a person who, directly or indirectly, offers or displays for sale or sells a good . . . in a manner that falsely suggests it is Indian produced.” *Id.* § 305e(b). Like the citizen-suit provision in the Endangered Species Act, these provisions in the IACA do not specifically relate the injury that Congress seeks to vindicate (adverse market effects) to the class of persons listed as being entitled to bring suit (any Indian, Indian tribe, or Indian arts and crafts organization). So, just as a violation of the Endangered Species Act might occur without having any demonstrable effect on certain “persons,” violations of the IACA can occur without having any demonstrable effect on certain “Indians.”⁴

By contrast, under statutes that have been found to confer Article III standing, the defined violation *necessarily* impacts all persons that are authorized to sue. *See, e.g., Robey v. Shapiro, Marianos & Cejda, L.L.C.*, 434 F.3d 1208, 1211 (10th Cir. 2006) (Fair Debt Collection Practices

⁴ Tellingly, several district courts have discussed Article III standing in the context of the IACA without even mentioning the possibility that the IACA creates rights conferring standing in the absence of traditional injuries. *Native American Arts, Inc. v. Contract Specialties, Inc.*, 754 F. Supp. 2d 386, 389–90 (D.R.I. 2010); *Native American Arts, Inc. v. Specialty Merchandise Corp.*, 451 F. Supp. 2d 1080, 1082 (E.D. Ca. 2006).

Act (“FDCPA”)); *Hammer v. Sam’s E., Inc.*, 754 F.3d 492, 498–99 (8th Cir. 2014) (Fair Credit Reporting Act (“FCRA”)). For example, the FCRA’s liability provision states that “[a]ny person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer.” 15 U.S.C. § 1681n(a). This provision confers Article III standing on the parties it authorizes to sue, because — unlike the IACA — it “creates a sufficient nexus between the individual plaintiff and the legal violation.” *Hammer*, 754 F.3d at 499. Because the IACA does not create such a nexus, Plaintiffs’ argument must be rejected as a matter of statutory interpretation.

Aside from issues of interpretation, the Supreme Court has also suggested that Congress’s power to create rights conferring standing is limited to “elevating to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.” *See Lujan*, 504 U.S. at 578.⁵ In other words, Congress likely cannot create an injury-in-fact out of whole cloth, but can instead only “elevate” a demonstrable real-world effect to the status of an injury-in-fact. *See id.* For example, Congress can “elevate” the effect of being contacted by a wrongful debt collector, or even the market effects caused by an unauthorized competitor. *See Robey*, 434 F.3d at 1211 (wrongful debt collection); *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 6, (1968) (wrongful competitor). However, Congress may exceed its power if it attempts to confer standing on a class of plaintiffs that does not experience any adverse, real-world effect as a result of the statutory violation. *See Lujan*, 504 U.S. at 578.

⁵ The *Lujan* Court specifically held that such a limitation exists with respect to causes of action against the government. *Lujan*, 504 U.S. at 578. It reserved the question with respect to causes of action against private citizens, but noted that none of its prior decisions have recognized a statutory right conferring standing in the absence of a concrete injury. *Id.*

In light of this limit on congressional power, the IACA cannot be read to confer Article III standing on an Indian, Indian tribe, or Indian arts and crafts organization in the absence of any showing of adverse effects experienced by that particular individual or group. Even assuming, *arguendo*, that Congress intended to confer Article III standing on those groups, *Lujan* suggests that it lacks the power to do so. *See Lujan*, 504 U.S. at 578. Thus, Plaintiffs cannot establish Article III standing based solely on their status as an “Indian Tribe” or “Indian arts and crafts organization.”

2. Plaintiffs overstate their reputational interests and do not raise material issues of fact regarding reputational harm.

Reputational harm to the plaintiff is a sufficient injury to establish Article III standing, but it must be “based in reality” rather than pure conjecture. *Nat’l Collegiate Athletic Ass’n v. Governor of New Jersey*, 730 F.3d 208, 220 (3d Cir. 2013). The scant evidence of reputational harm set forth in Plaintiffs’ response fails to satisfy this standard.

Plaintiffs seek to prove reputational harm based on deposition testimony that jewelry purportedly sold by certain Defendants was of an inferior quality to authentic Navajo jewelry. ECF No. 258 at 14, ¶ K.11; and 16, ¶ U.21. As described in detail above, however, there are numerous deficiencies in this testimony including that it: (1) does not prove that the purportedly inferior jewelry items were marketed as authentic Navajo-made; and (2) does not establish deponent Albert Damon’s qualifications to render an opinion as to the comparative quality of the jewelry. *See discussion supra* at 6–7.

Further, even if this evidence were sufficient to create a dispute as to whether Plaintiffs were injured by jewelry items that Defendants sold under the Navajo description (which it is

not), it does not establish an injury resulting from the other Navajo-described items, or from any of the items that Defendants sold using the Indian or tribal descriptions. Plaintiffs' claim of reputational injury from the Indian- and tribal-described goods is particularly conjectural, because that there is *no evidence* with respect *to those goods* showing that: (1) Plaintiffs sold goods similar to those sold by Defendants; (2) consumers were confused as to whether Defendants' goods were Indian-made; or (3) a consumer would likely impute the quality of a good purchased from Defendants to a good sold by Plaintiffs.

In the absence of any evidence suggesting a nexus between Plaintiffs' reputation and Defendants' specific goods, Plaintiffs assert a general reputational interest in all Indian-made goods. *See, e.g.*, ECF No. 258 at 23 (citing *Camel Hair & Cashmere Inst. of Am., Inc. v. Associated Dry Goods Corp.*, 799 F.2d 6, 15 (1st Cir. 1986)). In *Camel Hair*, the First Circuit held that vendors and manufacturers of various cashmere goods stood to suffer reputational harm based on the defendant's practice of overstating the cashmere content in coats. The Court specifically found that because of defendant's practices, the "reputation of cashmere is put at stake" in a manner that threatens the general interests of those in the cashmere industry. *Id.*

By analogy, Plaintiffs argue that they are directly injured by *any* counterfeit Indian product introduced into the market, because those products undermine consumer confidence in the quality of Indian-made goods. ECF No. 258 at 23. This analogy quickly breaks down, however, because "cashmere goods" are far more uniform as a class than "Indian goods." "Cashmere goods" are necessarily made from the same material, and derive their reputational quality from that fact. Thus, there are strong reasons to believe that a consumer who purchases a counterfeit cashmere good might impute its quality to cashmere goods generally, and become

less likely to buy a cashmere good in an entirely different product category. This is much less true with “Indian goods,” which include a wide array of arts and crafts made with different skill sets. The quality of one is not so readily attributed to the whole, as Plaintiffs acknowledge in their discussion of the craftsmanship skills of different tribes. *See* ECF No. 258 at 21. Accordingly, Plaintiffs cannot claim a reputational interest in Indian goods as a class, and cannot establish Article III injuries with respect to the Indian- and tribal-described goods without any evidence of a specific reputational nexus.

3. The mere existence of an advertisement does not prove diverted sales.

Plaintiffs’ final attempt to establish an injury-in-fact is through evidence of “diverted sales.” As noted above, the only evidence cited by Plaintiffs to support that contention is that certain Defendants used “Navajo” as a keyword in certain internet advertising. ECF No. 258 at 9. Plaintiffs have not set forth any evidence that these practices caused Plaintiffs to lose sales of authentic Navajo-made products. Moreover, Plaintiffs have not offered any evidence that Defendants engaged in similar practices using the Indian or tribal descriptions. Accordingly, there is no genuine dispute of fact as to whether Plaintiffs were injured by diverted sales.

B. Plaintiffs’ claims relating to descriptions other than “Navajo” are barred by lack of statutory standing.

Separate and apart from Article III standing, the Defendants also challenge Plaintiffs’ statutory standing to assert claims relating to the use of the Indian and tribal descriptions. The basis of the statutory-standing challenge is that the Plaintiffs are too remote from the alleged misconduct regarding those descriptions. Specifically, Plaintiffs do not have a commercial interest in the goods that Defendants sold using those descriptions, and do not have a sufficient

identity interest in the descriptions themselves. This challenge was timely raised, and is dispositive with respect to the Defendants' use of all descriptions other than "Navajo."

1. Defendants moved to contest statutory standing at their earliest opportunity.

Contrary to Plaintiffs' contentions, statutory standing is not an affirmative defense that must be stated in response to a pleading in accordance with Rule 8(c) of the Federal Rules of Civil Procedure. For purposes of Rule 8(c), an affirmative defense is an assertion raising new facts or argument that would defeat the plaintiff's claim even if the allegations in the complaint are true. *Saks v. Franklin Covey Co.*, 316 F.3d 337, 350 (2d Cir. 2003). By contrast, a non-affirmative defense "merely negates an element of the plaintiff's *prima facie* case." *Marino v. Otis Eng'g Corp.*, 839 F.2d 1404, 1408 (10th Cir. 1988). Standing challenges clearly fall within the latter category, because statutory standing is an "element of the cause of action" on which the plaintiff bears the burden of proof. *See Lexmark*, 134 S. Ct. at 1391 n.6.

Since *Lexmark*, the Tenth Circuit has implicitly confirmed that standing challenges are not affirmative defenses. In *Niemi v. Lasshofer*, the Tenth Circuit found that the defendants had forfeited their statutory standing defense by asserting it in a second Rule 12 dismissal motion. *Niemi v. Lasshofer*, 770 F.3d 1331, 1346 (10th Cir. 2014). In doing so, the Court specifically stated that the second Rule 12 dismissal motion was "improper under Rule 12(g)(2)," *id.*, which pertains to the assertion of non-affirmative defenses in successive dismissal motions, *see* Fed.R.Civ.P. 12(g)(2). By finding forfeiture under Rule 12(g)(2) rather than Rule 8(c), the Tenth Circuit tacitly acknowledged that challenges to statutory standing are non-affirmative defenses that may be raised when they become available.

In the instant case, Defendants' statutory standing challenge is based largely on Plaintiffs' failure to produce evidence of a commercial interest in the goods that Defendants sold under the Indian or tribal descriptions. *See* discussion *supra* at 3–4. Defendants could not have anticipated what evidence (or lack thereof) Plaintiffs would produce on these issues, and therefore could not have raised it prior to the close of discovery and did not waive or forfeit a statutory-standing defense by raising it now.

2. Plaintiffs' arguments that the IACA does not require proximate cause are misleading and unpersuasive.

In addition to their forfeiture argument, Plaintiffs raise three arguments as to why the statutory interpretation principles that the Supreme Court applied in *Lexmark* should not apply to the IACA. Each of these arguments is unavailing.

First, Plaintiffs mischaracterize the Supreme Court's interpretive approach in *Lexmark*. In holding that that Section 43 of the Lanham Act⁶ requires proximate cause for false-advertising claims, the Supreme Court did not impose a "judicially created" limitation on the broad statutory text. *Contra* ECF No. 258 at 29. Instead, the *Lexmark* Court explained that proximate cause is a "relevant background principle" that Congress legislates against. *Lexmark*, 134 S. Ct. at 1388. In other words, unless Congress indicates a contrary intent, courts "generally presume that a statutory cause of action is limited to plaintiffs whose injuries are proximately caused by violations of the statute." *Id.* at 1390. As with the Lanham Act, nothing in the IACA's citizen-suit provision (quoted *supra* at 10) suggests congressional intent to displace the principle of

⁶ Section 43 of the Lanham Act authorizes suit by "any person who believes that he or she is likely to be damaged" by a defendant's false-advertising. 15 U.S.C. § 1125(a)(1).

proximate cause. In fact, the text of the IACA implicitly acknowledges the principle, providing that only an “aggrieved” Indian, Indian tribe, or Indian arts and crafts organization is entitled to damages. 25 U.S.C. § 305e(b)(2).

Second, Plaintiffs’ reliance on the *Bundy-Howard* decision is completely unpersuasive after *Lexmark*. ECF No. 258 at 30 (citing *Native Am. Arts, Inc. v. Bundy-Howard, Inc.*, 168 F. Supp. 2d 905 (N.D. Ill. 2001)). When the Northern District of Illinois decided *Bundy-Howard* in 2001, only two of the Supreme Court’s quartet of proximate-cause cases had been decided. *See Lexmark*, 134 S. Ct. at 1390 (citing three prior decisions requiring proximate cause in the absence of explicit statutory text). That line of cases has now firmly established that proximate-cause requirements are the rule rather than the exception with respect to statutory causes of action.⁷ *See id.*

Third, contrary to Plaintiffs’ contentions, Defendants have never suggested that statutory damages under the IACA must be proportionate with a plaintiff’s lost profits. *Contra* ECF No. 258 at 30. The parties are in agreement that IACA damages are calculated based on the defendant’s activities and profits. *See* 25 U.S.C. § 305e(b). The disagreement between the parties is with respect to the class of plaintiffs entitled to recover those damages. Defendants

⁷ In response to Defendants’ proximate-cause argument, Plaintiffs state that courts have “rejected similar attempts to graft the *Lexmark* standing test to other statutes.” ECF No. 258 at 29. However, the case that Plaintiffs cite for that proposition merely rejected an argument that *Lexmark* somehow expanded the scope of statutory standing under the Copyright Act. *DRK Photo v. McGraw-Hill Companies, Inc.*, No. CV 12-8093-PCT-PGR, 2014 WL 2584811, at *6–7 (D. Ariz. June 10, 2014). The Court concluded that such an argument was implausible, because the thrust of the *Lexmark* decision was to impose “background limitations” on standing that did not appear in the plain text. *Id.* (emphasis omitted). ***Plaintiffs have not cited any case—either before or after Lexmark—where a court rejected an argument that a statutory cause of action imposes a proximate-cause requirement.***

argue that the principle of proximate cause places reasonable limits on that class, barring recovery by remotely (or non-) injured parties. These limits do not undermine the deterrent effect of the statute, because violators are still subject to civil prosecution by the Department of Justice and private lawsuits by directly injured parties. *See* 25 U.S.C. § 305e(d).

3. For purposes of the IACA, proximate cause requires a commercial interest in the goods sold or identity interest in the descriptions used.

After establishing that the IACA incorporates a proximate cause requirement, Defendants' opening brief went on to explain how that requirement should be applied. ECF No. 223 at 23–25. In doing so, Defendants relied on the two causation-related factors that the *Lexmark* Court explicitly embraced: (1) the “directness or indirectness of the asserted injury;” and (2) the “proximity or remoteness of the party to the alleged injurious conduct.” *See Lexmark*, 134 S. Ct. at 1392 (embracing portions of the five-factor test announced in *Conte Bros. Auto. v. Quaker State-Slick 50*, 165 F.3d 221 (3d Cir. 1998)). Applying these factors, Plaintiffs lack standing with respect to the Indian and tribal descriptions because they do not have a sufficient interest (competitive, commercial, or otherwise) in the goods that Defendants sold using those descriptions, or in the descriptions themselves.

In opposing partial summary judgment, Plaintiffs trot out their straw man and mischaracterize this argument as an attempt to resurrect the “competitor-only” standing test that the Seventh, Ninth, and Tenth Circuits formerly applied (pre-*Lexmark*) to false-advertising claims under the Lanham Act. *See* ECF No. 258 at 31; *see also Lexmark*, 134 S. Ct. at 1385. It is nothing of the sort. Under the competitor-only test, standing was limited to plaintiffs who directly “compete at the same level of business as the defendant,” meaning that a retailer could

not sue a manufacturer or wholesaler for false advertising. *See, e.g., Marvellous Day Elec. (S.Z.) Co. v. Ace Hardware Corp.*, 900 F. Supp. 2d 835, 841 (N.D. Ill. 2012). The Defendants readily acknowledge that this test is too restrictive for purposes of the IACA, and have never suggested otherwise. The IACA allows Indian retailers to sue manufacturers and wholesalers of competing counterfeit goods. *See* 25 U.S.C. § 305e(b) (authorizing suits against persons who “directly or indirectly” offer counterfeit goods for sale). It also allows Indian retailers to sue non-competitors that misuse the tribal names with which they self-identify (*i.e.* “Navajo”), because that identity interest creates proximity. What the IACA does not allow—to Plaintiffs’ apparent dismay—are lawsuits by Indian retailers *solely because they are Indian retailers*, without any showing of proximity to the alleged violation. Allowing standing on that basis would repudiate the background principle of proximate cause that is now presumed to apply to all statutory causes of action.

In the instant case, Plaintiffs have failed to set forth any facts establishing proximity to the alleged violations involving descriptions other than “Navajo.” With respect to the tribal descriptions, Plaintiffs do not dispute that they self-identify as Navajo rather than Zuni, Pueblo, or Zia. *See* ECF No. 258 at 10, ¶ 4. As a result, they lack any inherent identity interest in those tribal names, and are too remote to assume the role as their general protector. *See Joint Stock Soc’y v. UDV N. Am., Inc.*, 266 F.3d 164, 182 (3d Cir. 2011) (holding that the existence of more proximate parties “diminishes the justification for allowing a more remote party to perform the office of a private attorney general”). Plaintiffs have also failed to establish that they are proximately situated to the alleged violations due to a competitive or commercial interest. The Defendants’ opening brief emphasized that Plaintiffs do not sell authentic Zuni, Pueblo, or Zia

goods in the same general categories as the goods that Defendants sold using corresponding tribal descriptions (*see, e.g.*, ECF No. 223 at 10–12, 24) and Plaintiffs have not submitted any evidence to the contrary, ECF No. 258 at 11, ¶ 9. Further, as discussed above, Plaintiffs do not have standing based on a generalized interest in the reputation of Zuni-, Pueblo- or Zia-made goods, because there is no reason to believe that a consumer would impute the quality of such goods to unrelated goods made by a member of the same tribe. *See* discussion *supra* at 14.

Plaintiffs’ interest in the goods sold under the Indian descriptions falls short as well. Their inherent interest in descriptions like “Indian” and “Native American” is no greater than that of any of any other Indian, Indian tribe, or Indian arts and crafts organization in the United States. Therefore, without a specific commercial interest in the goods that the Defendants sold under those names, Plaintiffs are not sufficiently proximate to the alleged violations. Plaintiffs failed to set forth any evidence that they sold products of the same type as those sold by Defendants using the Indian descriptions or suffered any other tangible injury relating to those goods, and are deemed not to have done so pursuant to Local Rule 56.1(b). *See* discussion *supra* at 3–5. For these reasons, Plaintiffs lack statutory standing under the IACA to assert claims based on Defendants’ use of the Indian and tribal descriptions, and Defendants are entitled to partial summary judgment on that basis.

C. Plaintiffs’ cross-motion for summary judgment is unwarranted and designed solely as an attempt to gain tactical advantage.

As previously noted, Plaintiffs have filed a cross-motion for partial summary judgment on standing, asking the Court to find that Plaintiffs have standing with respect all of their claims under the IACA. ECF No. 265. This motion is a procedural anomaly designed solely for an

attempt to gain tactical advantage. The filing of the motion does not in any way assist the Plaintiffs in eliminating issues from the trial—which is the sole purpose of summary judgment motions—because the relief it requests is the *exact converse* of that sought by the Defendants.

To illustrate this point, it is helpful to consider the two options before the Court with respect to the Defendants’ motion. The first option (and the correct one) is for the Court to determine that there is no genuine dispute of material fact with respect to standing, and to issue a definitive legal ruling as to whether standing exists. The second option is to determine that there are material facts in dispute, and that the issue of standing must therefore continue toward trial. The introduction of Plaintiffs’ cross-motion simply does not add anything to this mix. There is no possible scenario under which the cross-motion could eliminate issues from trial that would not otherwise be eliminated by the ruling on Defendants’ motion.

Regretfully, it seems that the real impetus for Plaintiffs’ cross-motion is not to narrow the issues for trial, but rather to “have the last word” on standing. By filing the cross-motion, Plaintiffs now have the opportunity to file a reply brief supporting it. The Defendants will not burden the Court with more motion practice, but would ask that the Court view Plaintiffs’ forthcoming “reply brief” as the unwarranted, procedural anomaly that it is. Further, for all the reasons stated here and in Defendants’ opening brief, the cross-motion should be denied in its entirety because the Plaintiffs lack standing with respect to their claims under the IACA.

V. CONCLUSION

In sum, the Plaintiffs have failed to controvert the material facts set forth in support of Defendants’ motion for partial summary judgment. They therefore have not raised a genuine dispute as to Article III standing with respect to any of their claims under the IACA.

Even assuming, *arguendo*, if the Court finds that Plaintiffs satisfy Article III's injury-in-fact requirement as to the Navajo description, Plaintiffs still lack standing to assert claims based on Defendants' use of descriptions other than "Navajo." As noted above, Plaintiffs have not established a commercial interest as to the goods sold under the Indian or tribal descriptions, or any identity-interest in the descriptions themselves. Thus, Plaintiffs do not satisfy either the injury-in-fact or proximate-cause requirements of standing as to the alleged violations regarding those descriptions.

Respectfully submitted,

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I HEREBY CERTIFY that on the 21st day of January, 2015, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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