

ORAL ARGUMENT NOT YET SCHEDULED

No. 03-7162

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

\_\_\_\_\_  
SUZAN S. HARJO, ET AL.,

*Appellants,*

v.

PRO-FOOTBALL, INC.,

*Appellee.*

\_\_\_\_\_  
ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

\_\_\_\_\_  
**REPLY BRIEF FOR APPELLANTS**  
\_\_\_\_\_

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\* Authorities upon which we chiefly rely are marked with asterisks.

## **GLOSSARY**

Appellants' Br.	Brief for Appellants dated Oct. 31, 2008
Appellee's Br.	Brief for Appellee Pro-Football dated Dec. 31, 2008
<i>Harjo Discovery</i>	2006 WL 2092637 (D.D.C. July 26, 2006)
<i>Harjo Post-Remand</i>	567 F. Supp. 2d 46 (D.D.C. 2008)
<i>Harjo SJ</i>	284 F. Supp. 2d 96 (D.D.C. 2003)
<i>Harjo TTAB</i>	50 U.S.P.Q.2d 1705 (TTAB 1999)
Native Americans	Appellants Suzan Shown Harjo, Raymond D. Apodaca, Vine Deloria, Jr., Norbert S. Hill, Jr., Mateo Romero, William A. Means, and Manley A. Begay, Jr.
Pro-Football	Appellee Pro-Football, Inc.
Romero	Appellant Mateo Romero
TTAB	Trademark Trial and Appeal Board

## STANDARD OF REVIEW

Summary judgment decisions are reviewed *de novo* on appeal. *See, e.g., Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 918 (D.C. Cir 2008); *Adams v. Rice*, 531 F.3d 936, 942 (D.C. Cir. 2008); *Greer v. Paulson*, 505 F.3d 1306;1312 (D.C. Cir. 2007) (multiple internal citations omitted); *Nat’l Mining Ass’n v. Fowler*, 324 F.3d 752, 756 (D.C. Cir. 2003); *CarrAmerica Realty Corp. v. Kaidanow*, 321 F.3d 165, 185 (D.C. Cir. 2003); *Goldman v. Bequai*, 19 F.3d 666, 672 (D.C. Cir. 1994); *Liberty Lobby, Inc. v. Rees*, 852 F.2d 595, 598 (D.C. Cir. 1988). This standard of review applies to summary judgment determinations on the issue of laches. *CarrAmerica*, 321 F.3d at 185, 187. Neither *Daingerfield Island Protective Society v. Lujan*, 920 F.2d 32 (D.C. Cir. 1990) nor *NAACP v. NAACP Legal Def. & Educ. Fund, Inc.*, 753 F.2d 131 (D.C. Cir. 1985), which Pro-Football argues were “not followed” by the *CarrAmerica* panel, countermands this well established principle nor articulates an alternative standard of review.

When considering a district court’s laches ruling, this Court has consistently engaged in a detailed review of the record and reached its own independent legal conclusions. Indeed, far from departing from *Daingerfield* and *NAACP*, the *CarrAmerica* panel followed the very same course trod in those cases, first by conducting a thorough review of the record evidence and then by reversing the district court’s laches determination. Moreover, the *NAACP* panel noted that any

deference to be afforded the district court was mitigated where, as in this case, the parties agree that the material facts are not in dispute. 753 F.2d. at 138 & n.67.

Finally, it is undisputed that “a district court’s ruling on laches does not qualify for deference if the court applied the wrong legal standard.” *Daingerfield*, 920 F.2d at 38.

### **SUMMARY OF ARGUMENT**

The district court’s ruling that Romero’s claim is barred by laches is erroneous.

1. Pro-Football failed to establish that it suffered trial prejudice as a result of Romero’s delay in filing the petition to cancel. First, the unavailability of Edward Bennett Williams to testify is immaterial because Mr. Williams’ account of a 1972 meeting with representatives of Native Americans is memorialized in a letter he authored. Second, Pro-Football’s loss of a small number of financial documents reflecting its investment in the redskins marks is immaterial because the evidence is relevant only to the laches issue and is, in any event, only cumulative. Finally, Pro-Football’s contradictory assertions regarding a hypothetical survey that it may have commissioned had the case been filed earlier are highly speculative and ignore the fact that a 1995 survey was given limited weight by the TTAB.

2. As to economic prejudice, the district court applied the wrong legal standard. Mere investment in the marks is not enough to establish prejudice, at

least not where right to use is not at stake. Pro-Football must demonstrate at least a reasonable likelihood that it would have changed the team's name had Romero acted earlier. Pro-Football did not make that showing; rather, the unambiguous and uncontroverted evidence establishes that the team's owner during the Romero delay period, Jack Kent Cooke, would not have considered changing the team's name had Romero acted earlier.

3. With respect to the Redskinettes mark, a delay period of two years in a trademark case is not unreasonable, and Pro-Football failed to establish prejudice resulting from the 1990-1992 delay. No legal authority has been proffered to support the district court's rationale as to the Redskinettes mark, described by Pro-Football as "closely related" to the tacking doctrine. In any event, the tacking doctrine does not apply to the Redskinettes mark because the Redskinettes mark is not the legal equivalent to any of the redskins marks. *See Lincoln Logs Ltd. v. Lincoln Pre-Cut Log Homes, Inc.*, 971 F.2d 732, 735 (Fed Cir 1992) (*citing Van Dyne-Crotty, Inc. v. Wear-Guard Corp.*, 926 F.2d 1156, 1159 (Fed. Cir. 1991)).

## **ARGUMENT**

### **I. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN CONCLUDING THAT PRO-FOOTBALL SUFFERED TRIAL PREJUDICE AS A RESULT OF ROMERO'S DELAY.**

Pro-Football's arguments concerning trial prejudice center upon the dubious assertion that Edward Bennett Williams "would have been *perhaps* Pro-Football's

most important witness on the issue whether the marks were viewed by a substantial composite of Native Americans as disparaging.” (Appellee’s Br. at 16, emphasis supplied.) The implausibility of this assertion is apparent upon an examination of the evidentiary bases for both the TTAB’s decision, *Harjo TTAB*, A 406-13<sup>1</sup> (relying primarily on linguistic and historical testimony to find the marks disparaging) and the district court’s reviewing decision, *Harjo SJ*, 284 F. Supp. 2d 96, 127-36 (D.D.C. 2003) (demanding “direct evidence” of Native Americans’ opinions). Edward Bennett Williams was a great lawyer and a great man; he was, however, not a Native American – nor has it been suggested that he possessed expertise in opining about Native American attitudes. Any testimony he would have provided concerning Native American views regarding the Redskins marks could have been of only negligible value to the TTAB.

In an attempt to support its claim of trial prejudice, Pro-Football relies on the district court’s findings that (1) Mr. Williams’ testimony concerning a meeting held in 1972 might have been relevant to the disparagement determination; and (2) he “may very well have had other interactions with Native Americans that would have provided contemporaneous evidence of their opinions of the Redskins name .

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<sup>1</sup> Citations in the form “A \_\_\_\_” are to the original Appendix filed with the Court October 4, 2004. The parties have also agreed to use a Deferred Supplemental Joint Appendix. *See* Fed. R. App. P. 30; D.C. Cir. R. 30(c).

...” *Harjo Post-Remand*, 567 F. Supp. 2d 46, 57 (D.D.C. 2008). Neither finding justifies the conclusion that trial prejudice has been established. First, the events at the 1972 meeting are well documented in correspondence, A 138-40, 142-46, including a letter authored by Mr. Williams himself;<sup>2</sup> any testimony of this meeting would have mostly have been cumulative. Second, while Mr. Williams “may very well have had” the “interactions” described above, that is also true of virtually every individual in the United States who died during the delay period. In the absence of a substantial likelihood that Mr. Williams’ testimony would have uniquely set forth whether a *substantial composite* (not one or two he interacted

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<sup>2</sup> In a letter to Commissioner Pete Rozelle, Mr. Williams wrote:

Yesterday I met with a delegation of American Indian leaders who are vigorously objecting to the continued use of the name “Redskins.” Instead of detailing the various bases for their objections, I am enclosing a rather full letter which was mailed to me as a prelude to the meeting. It sets out their position quite cogently. They have asked me to attempt to get them a hearing with the other owners at our League meeting in May. They have heretofore registered protests with other teams using either Indian names or Indian symbols; for example, Stanford University, Dartmouth College, Cleveland Indians, Atlanta Braves and Kansas City Chiefs. As a result of their efforts Stanford University and Dartmouth College have abandoned their traditional nicknames.

Letter from Edward Bennett Williams to NFL Commissioner Pete Rozelle (Mar. 30, 1972) A 145; *see also*, Letter from Harold Gross to Edward Bennett Williams (Jan. 18, 1972) A 138-40.

with) of Native Americans considered the term “redskins” disparaging, it does not support a finding of trial prejudice.

Pro-Football’s arguments about lost documents and the survey are makeweights. The documents were lost due to Pro-Football’s neglect, (Appellants’ Br. 9), are relevant only to the laches issue itself, and, even as to that issue, are unnecessary cumulative evidence. As regards the survey, Pro-Football cannot seem to decide whether, as it asserted to the district court, “the Redskins have never been obligated to take a survey . . . [and i]t is irrelevant whether . . . [they] would have,” A 1096, or whether, as it asserts now, “Pro-Football could have commissioned its own survey . . . .” (Appellee’s Br. 19). In either case, Pro-Football has failed to present a plausible case that evidence materially relevant to the issue of disparagement was lost. The TTAB gave the 1995 survey limited weight, *Harjo TTAB*, A 397-98; even under the completely implausible assumption that Pro-Football would have actually commissioned a survey and that such a survey in the mid-1980s would have produced a materially different result, it would not have overcome the overwhelming weight of other evidence which persuaded the TTAB of what is and has been commonly known for years – the word “redskins” is a disparaging and insulting epithet for Native Americans.

## II. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN CONCLUDING THAT PRO-FOOTBALL SUFFERED ECONOMIC PREJUDICE AS A RESULT OF ROMERO'S DELAY.

Pro-Football reiterates the argument that economic prejudice can be established simply upon a showing that it “invested substantial labor and capital” in the trademark during the delay period. (Appellee’s Br. 26.) It supports that argument by citing cases (unlike this one) in which the trademark owners would have been required to abandon any use of the mark upon an adverse legal ruling. *See Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 816 (7th Cir. 1999) (involving claims “for false advertising and false promotion under § 43(a) of the Lanham Act seeking damages and injunctive relief”); *Conopco, Inc. v. Campbell Soup Co.*, 95 F.3d 187, 189-190 (2d Cir. 1996) (involving claims for “false advertising and misrepresentation under the Lanham Act” and seeking injunctive relief); *NAACP v. NAACP Legal Def. & Educ. Fund, Inc.*, 753 F.2d 131, 132 (D.C. Cir. 1985) (“Two civil rights organizations contend for the right to use the initials ‘NAACP’ as their trademark.”).<sup>3</sup> Similarly, the dispute in *Bridgestone/Firestone Research, Inc. v.*

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<sup>3</sup> Contrary to Pro-Football’s assertion, the Court in *AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531 (11th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987), did not hold that expenditure of money alone constitutes economic prejudice. The *AmBrit* Court plainly upheld a finding of no prejudice where no causal link had been established between a delay and significant expenditures involving “millions of dollars,” focusing “not on how much money . . . [was] spent, but on how much . . . [was] spent that” would not have been spent in the absence of the delay. 812 F.2d at 1546 & n.82.

*Automobile Club de L'Ouest de la France*, 245 F.3d 1359, 1362 (Fed. Cir. 2001), implicated the parties' right to use the challenged mark. There, the petitioning Automobile Club sought cancellation of Bridgestone's trademark "LEMANS for tires" because it "falsely suggested a connection with the Automobile Club and its sponsorship of the Le Mans [automobile] race," in violation of 15 U.S.C. § 1052(a). *Bridgestone*, 245 F.3d at 1360. Although the Automobile Club did not seek to enjoin use of the LEMANS mark, affirmation of the finding of false suggestion could have had serious implications for Bridgestone's future use of the LEMANS mark, because it would necessarily have been predicated on a finding of "a likelihood of confusion." *See, e.g., Opryland USA, Inc. v. Great American Music Show, Inc.*, 970 F.2d 847, 853 (Fed. Cir. 1992) (citing *Morehouse Mfg. Corp. v. J. Strickland & Co.*, 56 C.C.P.A. 946, 407 F.2d 881, 888-89, 160 USPQ 715, 721 (CCPA 1969)). Indeed, in *Bridgestone* the TTAB had found below that, "the Automobile Club's race is of sufficient fame or reputation that when Bridgestone's mark LEMANS is used on tires, a connection with the Automobile Club would be presumed." *Bridgestone*, 245 F.3d at 1360. Therefore, if the *Bridgestone* Court had rejected the laches defense and affirmed the TTAB's finding that the LEMANS mark falsely suggested a connection with the Automobile Club, the Automobile Club would have been in a position to bring a subsequent infringement action based on, *inter alia*, false designation of origin

relating to indications of affiliation or connection with, or sponsorship, approval, or endorsement by, the Automobile Club. *See* 15 U.S.C. § 1125; *see also, e.g., Allen v. Men's World Outlet*, 679 F. Supp. 360, 367-370 (S.D.N.Y. 1988).

In right to use cases, it is obvious that a trademark holder may well have elected to, and, indeed may have been required to, abandon the name and the mark earlier had the case been commenced earlier. However, language from such decisions to the effect that “investment” in the mark establishes prejudice because the funds “could have” been directed elsewhere provides no persuasive authority for the resolution of this case.

Pro-Football’s reluctance to engage the question of whether it would have changed its name during the Romero delay period is not surprising. John “Jack” Kent Cooke (“Cooke”) “was the sole, principal owner of the Washington Redskins Franchise during the Romero Delay Period,” *Harjo Discovery*, 2006 WL 2092637, at \*6 (D.D.C. July 26, 2006), and his views regarding the continued use of the Redskins mark were not ambiguous:

***“It would be as sacrilegious to change the club’s name, as it would be to change the name of the White House, the Smithsonian, the Potomac, or the Senate.”*** (Cooke, October 16, 1986.) (Decl. of Philip J. Mause Supp. Defs’ Mot. Summ. J. & Opp’n Pl.’s Mot. Summ. J. Ex. 75, Dec. 19, 2006 (“Mause Decl.”)); A 1045-46.

***“After 51 years, I can hardly conceive of this fine organization carrying any title other than the one it so proudly bears.”*** (Cooke, January 15, 1988.)

(Mause Decl. Ex. 56); A 1005-06.

***“The Redskins will not change their name.”*** (Cooke, February 22, 1991.)  
(Mause Decl. Ex. 58); A 1009-11.

***“. . . I intend to continue to call our football club the Redskins. So be it; and I intend that it will remain so.”*** (Cooke, October – December, 1992.) (Mause Decl. Ex. 61-66, 72-74); A 1017-28; A 1039-44.

***“First, I have no intention of changing the name of the Redskins. Senator Campbell’s proposed bill means nothing to me. If it passes, I’ll simply move the new stadium to Virginia or Maryland. . . . [O]ur position will not change.”***  
(Cooke, July – August, 1993.) (Mause Decl. Ex. 77-80, 82-84); A 1053-60; A 1063-68.

***“But one of the things you can count on is that I ain’t not ever going to change the name of the Redskins. It will be the name of the football club here long after the dunderhead [Senator Ben Nighthorse Campbell] is dead and buried.”*** (Cooke, August 3, 1993.) (Mause Decl. Ex. 81); A 1061-62.

***“Mr. Cooke has no intention of changing the name of the Redskins.”***  
(Stuart A. Haney, Washington Redskins In-House Counsel, October 20, 1994.)  
(Mause Decl. Ex. 59); A 1012-14.

\* \* \* \*

In light of this evidence, as well as the Native Americans' Local Rule 7(h) Statement, and in the absence of even a sliver of evidence to the contrary, the district court should have granted summary judgment to the Native Americans on the ground that an earlier petition by Mr. Romero would not have led to a name change and that, therefore, there can be no economic prejudice.

### **III. THE DISTRICT COURT ERRED IN FINDING THAT ROMERO'S TWO-YEAR DELAY IN CHALLENGING THE REDSKINETTES TRADEMARK RESULTED IN PREJUDICE TO PRO-FOOTBALL.**

Pro-Football's defense of the district court's decision that laches bars Romero's (and the other Native Americans') challenge to the Redskinettes trademark is unpersuasive. Pro-Football does not directly invoke the "tacking" doctrine articulated in *Lincoln Logs*, but argues that the district court's rationale in finding the two year delay unreasonable is "closely related" to the tacking doctrine. (Appellee's Br. 29.) Thus, it appears that Pro-Football concedes that the tacking doctrine is not applicable.<sup>4</sup>

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<sup>4</sup> The tacking doctrine cannot apply here in any event; the Redskinettes mark is not the legal equivalent of the redskins marks because it does not create "the same, continuing commercial impression." See *Lincoln Logs*, 971 F.2d at 735 (citing and quoting *Van Dyne-Crotty, Inc.*, 926 F.2d at 1159). Furthermore, although Romero may have had actual notice of the use of the various marks from 1984-1992, the district court expressly limited Romero's constructive notice of registration to one mark - the Redskinettes mark in 1990 - because of his age. *Harjo Post-Remand*, 567 F. Supp. 2d at 55.

While Romero's prior knowledge of the team, the name and the cheerleaders arguably might be relevant, it is still necessary to determine whether the two year delay was unreasonable and prejudicial. While Pro-Football criticizes the Native American petitioners' citation by analogy to statutes of limitation, (Appellee's Br. 29-30), there is additional legal authority that two years is not an unreasonable delay for the application of the doctrine of laches in trademark cases. *See AmBrit*, 812 F.2d at 1546 (implying that delay of less than two years would not constitute laches); *Piper Aircraft Corp. v. Wag-Aero, Inc.*, 741 F.2d 925, 933 (7th Cir. 1984) (“[T]wo years has rarely, if ever, been held to be a delay of sufficient length to establish laches.”).

Pro-Football has not established prejudice in the two year Redskinettes delay period. In this regard, it is undisputed that Edward Bennett Williams died before the two year delay period commenced. *Harjo Post-Remand*, 567 F. Supp. 2d at 56. In addition, the evidence is overwhelming and unrebutted, *see supra*, pp. 9-10, that a 1990 challenge to the Redskinettes trademark could not conceivably have induced Jack Kent Cooke to change the team's name. Hence, there can be no prejudice to Pro-Football due to the brief delay from 1990-1992.

Pro-Football failed to establish either undue delay or a scintilla of evidence to support a finding of prejudice during the Redskinettes delay period, while the Native Americans established the absence of both. This constitutes more than a

mere genuine issue of material fact so as to preclude summary judgment for Pro-Football; it requires that summary judgment should have been entered in favor of the Native Americans.

### **CONCLUSION**

This appeal challenges both the district court's grant of summary judgment to Pro-Football and the district court's denial of summary judgment to the Native Americans. To the extent that this Court determines that the district court applied the wrong legal standard in finding economic prejudice, this Court should reverse both district court determinations because of the Native Americans' unrebutted Rule 7(h) Statement and the lack of any evidence supporting Pro-Football's trial prejudice allegation. In any event, this Court should reverse both the district court's grant of summary judgment to Pro-Football and denial of summary judgment to the Native Americans with respect to the Redskinettes trademark because of the short delay period and the absence of any evidence of prejudice.

Respectfully submitted,

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Date: February 6, 2009

**CERTIFICATE OF COMPLIANCE**

I hereby certify that this reply brief conforms to the word limit imposed by this Court Order of October 3, 2008, and contains 3,114 words.

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 25, 2009, I caused a true and correct copy of Suzan S. Harjo's corrected Reply Brief for Appellant to be served by hand delivery and overnight mail on the following persons:

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