

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

PRO-FOOTBALL, INC.,

Plaintiff,

v.

AMANDA BLACKHORSE, MARCUS
BRIGGS-CLOUD, PHILLIP GOVER,
JILLIAN PAPPAN and COURTNEY
TSOTIGH,

Defendants.

Civil Action No.: 1:14-cv-1043-GBL-IDD

**DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION
FOR PARTIAL SUMMARY JUDGMENT ON COUNTS 1, 2, AND 7**

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INTRODUCTION

On June 18, 2014, the Trademark Trial and Appeal Board (“TTAB”) ruled that six trademark registrations of Plaintiff Pro-Football, Inc. (“PFI”) should be cancelled. PFI is the owner of the Washington NFL football team, and Defendants are five Native American individuals who petitioned the TTAB to cancel the registrations.

The TTAB found that the trademarks contain matter that “may disparage” Native Americans or bring them into contempt or disrepute, and that the registrations were therefore issued in violation of 15 U.S.C. § 1052(a). *See Blackhorse v. Pro-Football, Inc.*, No. 92046185, 2014 WL 2757516 (T.T.A.B. 2014); 15 U.S.C. § 1052(a) (trademarks containing matter that “may disparage” persons are not eligible for registration). The matter that may disparage is the term “redskin,” which is an ethnic slur of Native Americans.

In finding that the trademarks “may disparage,” the TTAB relied upon dictionaries and other reference sources stating that “redskin” is a slur term, *id.* at *12-14, *25-26; the fact that “redskin” on its face refers to the real or imagined skin color of Native Americans, *id.* at *25; continuous opposition to the team’s name by the National Congress of American Indians (“NCAI”) (the oldest and largest national Native American organization) and the American Indian Movement (“AIM”) (an activist Indian advocacy organization), *id.* at *17-21, *26-27; a data compilation by expert linguist Dr. Geoffrey Nunberg showing that “redskin” is never used in late twentieth century newspapers as a neutral term to refer to Native Americans, *id.* at *15-16, *26; and an admission by PFI’s expert lexicographer that from 1967-85 the term “redskin” “certainly might be offensive,” *id.* at *17.

In this proceeding, Defendants have supplemented the record with additional evidence that the trademarks contain matter that “may disparage” Native Americans, establishing the

following: (1) in 1962, “almost all the students at Haskell Institute resent[ed] being called redskins” (at the time, Haskell was a post-secondary vocational school for American Indians, with 1,000 students); (2) the NCAI, AIM, and other diverse Indian organizations found common ground to fight the team name and met with PFI’s President in 1972 to demand that PFI change the team name; (3) in 1972, the University of Utah dropped the name “Redskins” due to concern that the term was offensive; (4) further efforts by NCAI over decades to bring about a change in PFI’s team name; (5) declarations from prominent Native Americans regarding their own experiences with “redskin” used as a slur, their understanding of the term, and the basis for their understanding; and (6) an additional data analysis by Dr. Nunberg demonstrating the negative connotations of “redskin.”

The evidence establishes that there is no genuine issue of material fact that PFI’s trademarks contain matter that *may disparage* Native Americans. Using the framework of analysis employed by the TTAB and the Federal Circuit in cases under 15 U.S.C. § 1052(a), there is no genuine issue of material fact that the trademarks contain matter that may be viewed as disparaging by a “substantial composite” of Native Americans.

Furthermore, there is no genuine issue of material fact that the TTAB did not err in its alternative ruling that the trademarks bring Native Americans into contempt or disrepute.

Finally, PFI’s argument that the TTAB erred by not dismissing Defendants’ petition due to laches has no merit. Laches does not apply because the petition raised issues of broad public interest, Defendants did not unreasonably delay in bringing their petition, and PFI cannot demonstrate reliance on any unreasonable delay.

For these reasons, the Court should grant summary judgment to Defendants on Counts 1, 2, and 7.

PROCEDURAL BACKGROUND

PFI owns the Washington NFL football team. Between 1967 and 1990, the United States Patent and Trademark Office (“USPTO”) granted PFI’s applications to register six trademarks that contain “Redskins” or a derivation of that term. One registration was issued in 1967, three were issued in 1974, one in 1978, and an additional one in 1990. [Dkt. 1] ¶ 21.

In August 2006, pursuant to 15 U.S.C. § 1064, five Native Americans – Amanda Blackhorse, Marcus Briggs-Cloud, Phillip Gover, Jillian Pappan and Courtney Tsotigh¹ (the Defendants in this case) – petitioned the TTAB to cancel PFI’s registrations. [Dkt. 1] ¶ 20. They sought cancellation on grounds that PFI’s marks contain matter (specifically the term “Redskins” or derivation of “Redskins”) that “may disparage” Native Americans or bring them into contempt or disrepute and were therefore ineligible for registration under 15 U.S.C. § 1052(a), Section 2(a) of the Lanham Act.

On June 18, 2014, the TTAB granted the petition to cancel PFI’s six trademark registrations, finding that the marks contain matter that both “may disparage” Native Americans and bring them into contempt or disrepute. [Dkt. 1] ¶ 33; *see Blackhorse v. Pro-Football, Inc.*, 2014 WL 2757156 (T.T.A.B. 2014).

The TTAB’s decision in *Blackhorse* was the second time that the TTAB had granted a petition to cancel PFI’s trademark registrations. Previously, in 1992, Suzan Shown Harjo and six other Native Americans petitioned the TTAB to cancel the registrations. [Dkt. 1] ¶ 16. In 1999, the TTAB granted the *Harjo* petition to cancel, also on grounds that the marks contain matter that “may disparage” Native Americans or bring them into contempt or disrepute. [Dkt. 1] ¶ 17;

¹ Ms. Blackhorse is a member of the Navajo Nation; Mr. Briggs-Cloud is a member of the Muscogee Nation of Florida; Mr. Gover is a member of the Paiute Indian Tribe of Utah; Ms. Pappan is a member of the Omaha Tribe of Macy, Nebraska; and Ms. Tsotigh is a member of the Kiowa Tribe of Oklahoma. [Dkt. 51].

Harjo v Pro-Football, Inc., 50 U.S.P.Q.2d 1705, 1999 WL 375907, at *48 (T.T.A.B. 1999). PFI appealed to the District Court for the District of Columbia, which held that the TTAB's decision was not supported by substantial evidence and that the TTAB erred in not dismissing the *Harjo* petition due to laches. After two trips to the D.C. Circuit, the decision was affirmed only as to laches. The federal proceedings in *Harjo* did not conclude until 2009. [Dkt. 1] ¶¶ 16-19, 24-26. Thus, the *Blackhorse* petition was filed in August 2006 while *Harjo* was on appeal to the federal courts; however, the TTAB suspended action in *Blackhorse* until after the *Harjo* federal litigation proceedings concluded. *Id.* ¶¶ 20-23.

On August 14, 2014, PFI filed this action under 15 U.S.C. § 1071(b) seeking to overturn the TTAB's June 18, 2014 decision. A § 1071(b) action is a new civil action in which the parties may introduce new evidence to supplement the record created during the TTAB proceeding. *See Swatch AG v. Beehive Wholesale, LLC*, 739 F.3d 150, 156 (4th Cir. 2014).

PFI alleges that the TTAB erred in granting the *Blackhorse* petition. Counts 1 and 2 allege that the TTAB erred in finding that its marks contain matter that "may disparage" Native Americans or bring them into contempt or disrepute. Counts 3 through 6 assert Constitutional arguments. Count 7 alleges that the TTAB erred in failing to dismiss the *Blackhorse* petition on grounds of laches.

Defendants request partial summary judgment on Counts 1, 2, and 7. PFI has moved for partial summary judgment on Counts 3-6, its Constitutional arguments, *see* [Dkt. 54], and Defendants will oppose that motion and cross-move for summary judgment on those Counts in accordance with the Court's briefing schedule, *see* [Dkt. 53].

THE BLACKHORSE RECORD AND SUPPLEMENTATION

In the *Blackhorse* TTAB proceeding, the parties agreed that, with certain exceptions, the

Harjo TTAB record would serve as the *Blackhorse* TTAB record. [Dkt. 1] ¶ 28. In addition, the parties agreed to waive all non-relevance evidentiary objections as to the evidence in the *Harjo* record (except as to evidence the TTAB ruled inadmissible in *Harjo*). See Ex. A Declaration Of Jennifer T. Criss In Support Of Defendants' Motion For Partial Summary Judgment On Counts 1, 2, and 7 ("Criss Decl.") Ex. 2.

Pursuant to 15 U.S.C. § 1071(b)(3), this Court is to review the TTAB's decision *de novo* based on the TTAB *Blackhorse* record as well as any additional evidence that the parties introduce. See [Dkt. 37]; *Swatch*, 739 F.3d at 156.

Defendants support their motion for summary judgment with excerpts from the *Blackhorse* TTAB record and supplemental evidence. Evidence from the *Blackhorse* TTAB record is identified as such in the Declaration of Jennifer T. Criss.

MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

A. PFI Adopted The Current Team Name In 1933 To Avoid Confusion With The Boston Braves Baseball Team, Not To Honor Native Americans.

1. PFI's first year in the NFL was 1932, when the team played in Boston and was known as the Boston Braves. At the time, there was also a Boston Braves professional baseball team (now the Atlanta Braves), and PFI played at Braves Field, the home of the baseball team. In 1933, PFI's owner, George Preston Marshall, changed the football team's name to "Boston Redskins," and moved the team to Fenway Park, home to the Boston Red Sox. [Dkt. 1] ¶ 34; Criss Decl. Ex. 3 at Request Nos. 1, 2.

2. Marshall changed the name from "Braves" to "Redskins" in order "to distinguish it from the professional baseball team," Boston Braves. [Dkt. 1] ¶ 34. Marshall explained at the time that he was changing the name to avoid confusion with the baseball team and not because of any Native Americans associated with the team: "The fact that we have in our head coach, Lone

Star Dietz, an Indian, together with several Indian players, has not, as may be suspected, inspired me to select the name Redskins.” Criss Decl. Ex. 4. As a 1972 game program explained, when Marshall “switched playing sites, he wanted to change names but keep the Indian motif. Since he was now sharing a park with the Red Sox and at the same time liked Harvard’s crimson jerseys, Redskins seemed appropriate.” Criss Decl. Ex. 5. In 1937, Marshall moved the team to Washington. [Dkt. 1] ¶ 34.

B. Dictionaries, Reference Works, Other Written Sources, and Native Americans Expressly Recognize the Disparaging Nature Of The Term “Redskin.”

1. Dictionaries

3. Many dictionaries – dating back to 1898 – contain usage labels indicating that “redskin” is an offensive, contemptuous or disparaging way to refer to Native Americans:

- *Webster’s Collegiate Dictionary* (1898): “often contemptuous.”
- *The Random House Dictionary of the English Language* (1966): “Often Offensive.”
- *Thorndike-Barnhart Intermediate Dictionary* (1974): “a term often considered offensive.”
- *Oxford American Dictionary* (1980): “contemptuous.”
- *The American Heritage Dictionary of the English Language* (1982): “Offensive Slang.”
- *Webster’s Ninth New Collegiate Dictionary* (1983): “usu[ally] taken to be offensive.”
- *Merriam-Webster Collegiate Dictionary* (1983): “usu[ally] taken to be offensive.”
- *Collier’s Dictionary* (1986): “considered offensive.”

Criss Decl. Exs. 6-11; Ex. 12 at 23:18-26:11; Ex. 14 at 143:13-25, 183:15-184:16; Ex. 13 at 11.

4. These dictionaries were published either before or during the period in which PFI obtained its registrations. Furthermore, the parties’ expert linguists, Dr. Geoffrey Nunberg for

Defendants and Ronald Butters for Plaintiff, agree that dictionaries tend to lag in updating usage labels for ethnic slurs. Criss Decl. Ex. 15 at 56:18-57:7, 216:24-218:1; Ex. 16 at 56-57; Ex. 17 at 146:13-147:4.

2. Other Written Sources.

5. Numerous scholarly articles, newspaper articles and other written sources recognize that “redskin” is a disparaging term.

6. For instance, a 1962 article in *The American Journal of Sociology* published by the University of Chicago Press identified “redskin” as an “ethnophaulism,” a “racial or ethnic group derogatory nickname for another.” The article gives examples of such derogatory names used by one group to refer to another: “whites call Negroes ‘niggers,’” “the Spanish-speaking are called ‘spics,’” “Gentiles call Jews ‘Yids,’” and “[w]hites call Indians ‘redskins.’” Criss Decl. Ex. 18 at 442 (emphasis added).

7. Similarly, the sociologist Irving Lewis Allen has written a well-regarded scholarly book that cites “redskin” as an example of an ethnic slur. In his book, *Unkind Words: Ethnic Labeling From Redskin to WASP* (1990), Allen identified “redskin” as a “slur-name” and a “racial epithet” – and used “Redskin” in the book’s title as an example of a slur. Criss Decl. Ex. 19 at 3, 18. Plaintiff’s expert linguist, Ronald Butters, described Allen as “an authoritative sociologist who is respected within the general field of ethnic labeling” and Butters testified that *Unkind Words* “certainly is a respected source.” Criss Decl. Ex. 17 at 141:7-143:21.

8. Additional scholarly works and written sources describing “redskin” as a disparaging epithet include:

- *Encyclopedia Britannica* (1911) at 452 (“Other popular terms for the American Indians which have more or less currency are ‘red race,’ ‘Red man,’ ‘Redskin,’ *the last not in such good repute* as the corresponding German *Routhaiite*, or French *Peaux-rouges*, which have scientific standing.”).

- Alden Vaughan, “From White Man to Redskin: Changing Anglo-American Perceptions of the American Indian,” *American Historical Review* (October 1982) at 942, 949 (“redskins” is an “epithet.”).
- Haig Bosmajian, Defining the ‘American Indian’: A Case Study in the Language of Suppression, in *Exploring Language*, G. Goshgarian, Ed. (1983) at 295 (“Our language includes various phrases and words which relegate the Indian to an inferior status,” including “Redskins”).
- Robert Keller, “Hostile Language: Bias in Historical Writing About American Indian Resistance,” *Journal of American Culture* (1986) at 15 (providing “redskin” as an example of “deprecatory language.”).
- Michigan Civil Rights Commission Report, “Use of Nicknames, Logos and Mascots Depicting Native American People in Michigan Education Institutions” (1988) at 45, 91 (“Redskins” assigns an “inferior status,” and is a “blatantly stereotypic name.”)
- Jay Coakley, *Sport in Society: Issues and Controversies* (1990) at 206 (“The use of the name Redskins cannot be justified under any conditions. To many native Americans, redskin is as derogatory as ‘nigger’ is for black Americans.”).
- Robert Jensen, “Banning ‘Redskins’ From the Sports Page: The Ethics and Politics of Native American Nicknames,” *Journal of Mass Media Ethics* (1994) at 21 (“redskin” is “derogatory name,” a “racist term that has been used against an oppressed group”).

Criss Decl. Exs. 20-26.

9. Another scholarly essay reflecting the slur nature of “redskin” is a famous 1939 article by literary critic Philip Rahv, entitled *Paleface and Redskin*. Rahv divided American writers into two groups: “redskins” and “palefaces,” doing so in a way that demonstrates the wild, primitive connotations of “redskins.” According to Rahv, paleface writers are erudite and intellectual, whereas “redskin” writers are “low-brow,” “primarily emotional, spontaneous and lacking in personal culture,” with a “habitual hostility to ideas.” Rahv further bemoaned that “[a]t present, the redskins are in command of the situation, and literary life in America has seldom been so deficient in intellectual power.” Criss Decl. Ex. 27 at 2, 4.

10. In addition, many newspaper articles between 1967 and 1990 mention or reflect the fact that “redskin” is a disparaging term to refer to Native Americans. For example, a 1972

article in *The Washington Star* discussing the controversy over the team's name contrasted the slur, "redskin," with the neutral term, "Indian": "Of course, the names and symbols differ. They range from the name Indian all the way to Redmen and Redskins, and the symbols go from strong and gallant caricatures, to silly war-whooping idiots." Criss Decl. Ex. 28.

11. Other editorials, columns and articles expressing the understanding that "redskin" is an ethnic slur were published between 1967 and 1990 in, among other places, *The Washington Post*, *The Baltimore Evening Sun*, *The Chicago Tribune*, *The Wall Street Journal*, and *Sports Illustrated*. See, e.g., Criss Decl. Ex. 29-55. One writer noted that the name of the Washington team was "the most glaring example" of a one-dimensional caricature of Native Americans as "savage warmonger[s]." Criss Decl. Ex. 35. A repeated observation was that the team name should shock the conscience just as much as it would to name a team after a disparaging term for any other ethnic group, and that "Redskins" was the most offensive name still in use. See Criss Decl. Exs. 30, 43, 48.

3. Native Americans Have Experienced The Slur.

12. Native Americans attest to what the dictionaries and other reference sources declare – that "redskin" is a slur term. Attached as Exhibits B-E are Declarations of four prominent Native Americans – Raymond Apodaca (former VP of the National Congress of American Indians (NCAI) and Governor of his pueblo), Leon Cook (former NCAI President and former Council Member and Tribal Administrator of his tribe), Kevin Gover (prominent attorney, former Director of the Bureau of Indian Affairs, and Executive Director since 2007 of the Smithsonian National Museum of the American Indian), and Suzan Shown Harjo (former NCAI Executive Director and recipient of the Presidential Medal of Freedom) – averring their understanding that "redskin" is a slur term and recounting their experiences being called a "redskin" as a slur. See Ex. B, Apodaca Decl. ¶ 4-7; Ex. C, Cook Decl. ¶ 4; Ex. D, Gover Decl.

¶ 5; Ex. E, Harjo Decl. ¶¶ 5, 19. Mr. Apodaca was told at a bus stop in Lubbock, Texas, that he must eat his lunch outside and not at the lunch counter because he was a “redskin.” Ex. B, Apodaca Decl. ¶ 15. Mr. Gover was called a “dirty redskin” on the playground in elementary school and a “redskin” on the football field by members of opposing teams in order to bully him. Ex. D, Gover Decl. ¶ 5. Growing up in rural Oklahoma, Ms. Harjo was called a “redskin” as an insult dozens of times, at the same time that “No Indians or Dogs Allowed” signs were posted in stores near where she lived. Ex. E, Harjo Decl. ¶¶ 5-6.

C. Evidence Of Usage Reveals The Negative Connotations Of “Redskin.”

1. “Redskin” Is More Closely Associated With Negative Modifiers Than Positive Modifiers.

13. “Redskin” is not a synonym used interchangeably with “Indian,” but rather a term correlated with negative stereotypes of Native Americans. Expert linguist, Geoffrey Nunberg, Ph.D.,² studied the connotations of the term “redskin.” A word’s connotations are the associations—positive, negative or otherwise—that accompany a word beyond the word’s literal meaning. His study revealed that “redskin” has negative connotations when compared with the neutral term “Indian.”

14. Dr. Nunberg compared the relative frequencies with which “redskin” and “Indian” were modified by negative or positive terms. For this study, Dr. Nunberg used the newspaperarchive.com database, which includes records from 6,200 newspapers, drawn from

² Dr. Nunberg is an Adjunct Full Professor at the School of Information at the University of California at Berkeley. He was previously a Consulting Professor of Linguistics at Stanford University and a principal scientist at the Xerox Palo Alto Research Center, a usage editor for the *American Heritage Dictionary*, and was the Chair of the usage panel of that dictionary. His areas of specialization include Lexical Semantics (the study of the use of words) and Lexicography (the study of dictionaries and the procedures involved in producing dictionaries). He has also done work in Computational Linguistics and, in particular, in the use of techniques of information retrieval with regard to large-scale text databases, and has published numerous articles in the field of linguistics. Criss Decl. Ex. 15 at 10:4-12:18; Ex. 56 at 1-15.

every state, from the colonial era to the present. Dr. Nunberg queried the archive from 1920 until 1979 to determine how frequently various positive and negative terms were used to modify either “redskin” or “Indian.” Since throughout that period “Indian” was used much more frequently than “redskin” in the database, Dr. Nunberg focused not on the absolute numbers of uses of each word, but rather on how the ratio of uses of “Indian” and “redskin” varied based on whether Native Americans were being discussed in positive or negative ways. Criss Decl. Ex. 15 at 82:16-84:25, 224:11-225:6; Ex. 16 at 8-11.

15. The following table shows the results of Dr. Nunberg’s queries:

Table 1: Ratio of *Indian* to *redskin* in selected linguistic contexts, newspaperarchive.com

Linguistic context	Modifying <i>redskin</i>	Modifying <i>Indian</i>	Ratio
___ princess	4	5403	1350.8
friendly	16	4628	289.3
contemporary	7	1598	228.3
loyal, *faithful	2.5	265	106.0
*courageous, brave	1.5	154	102.7
hostile	79	3042	38.5
marauding	39	1104	28.3
savage	69	1849	26.8
treacherous	6	133	22.2
bloodthirsty	17	332	19.5
screaming, yelling, shrieking, whooping	10	195	19.5
murderous	9	100	11.1
thieving	5	42	8.4
crafty, wily	58	233	4.0
noble	92	332	3.6
___bit the dust	85	52	0.6
Pesky, infernal	50	22	0.44

*No actual hits for redskin in this period.³

Criss Decl. Ex. 15 at 82:16-84:25, 224:11-225:6; Ex. 16 at 10; Ex. 57 at 10.

16. Dr. Nunberg's work demonstrates that "redskin" carries negative connotations. The Indian-to-Redskin ratio is much higher when positive modifiers are used than when negative modifiers are used. Thus, if a negative modifier like "pesky, infernal, '___ bit the dust,' thieving, murderous, screaming, yelling, shrieking, whooping, treacherous, save, marauding and hostile" is used, it is more likely that a Native American will be referred to as "redskin" instead of "Indian" than if a positive modifier like "___ princess, friendly, loyal, faithful, courageous and brave" is used. In contrast, the reverse is true for positive modifiers. For every "friendly redskin," there are 289 references to "friendly Indian," but for every "pesky/infernal/crafty/wily redskin" there are only 2.3 references to "pesky/infernal/crafty/wily Indian." This means that the probability that an author will choose "redskin" over "Indian" is 125 times greater ($289 \div 2.3$) if the word is modified by "pesky/infernal/crafty/wily" than if the word is modified by "friendly."⁴

2. In *Harjo*, Dr. Nunberg Demonstrated That "Redskin" Was Not Used In Late 20th Century Newspapers To Refer To Native Americans, Indicating That It Is A Disparaging Term.

17. As an expert in *Harjo*, in 1996, Dr. Nunberg queried a Dialog database (a tool on which he relied at that time in the ordinary course of his work as a linguist, with a billion words of text and containing the text of 60 newspapers dating from 1982) to evaluate the use of the

³ "The ratios for *courageous* and for *faithful* are lower limits. These terms do not in fact occur with *redskin* in this period. The ratios given are based on an assignment of 0.5 to non-occurring terms and their comparators for purposes of calculation (i.e., a ratio of 71 to 0 is entered as 71.5 to 0.5). This is a standard work-around in such cases." Criss Decl. Ex. 16 at 10.

⁴ The modifier "noble" was used with "redskin" with similar relative frequency as negative modifiers. Dr. Nunberg explained that "noble redskin" is used as a subtype of the stereotypical "noble savage:" either a stock figure representing naïve wisdom, or an object of derision where "noble" is only applied ironically. Criss Decl. Ex. 16 at 38-40.

term “redskin” in newspapers. Criss Decl. Ex. 58 at 305:6-305:20, 314:22-315:4. Dr. Nunberg’s research demonstrated that newspaper writers avoid the word redskin(s) because it is not a neutral term, but is a pejorative term.

18. After filtering out articles about the football team and redskin potatoes, Nunberg’s research uncovered a mere 71 stories in which “redskin(s)” was used in reference to American Indians. *Id.* at 306:22-307:8. This numerical result is significant in and of itself. The finding of only 71 articles using “redskin(s)” to refer to American Indians, compared with 74,000 instances of “American Indian(s)” and 73,000 instances of “Native American(s),” means that “redskin(s)” is very rarely used in newspapers to refer to Native American individuals or groups. *Id.* at 307:12-308:2. There were also over one million instances in the database of “Indian” (although that figure also includes references to individuals from the Asian subcontinent). *Id.* at 308:3-308:11. Thus, the data show that writers in newspapers intentionally avoid using the term “redskin,” opting instead for “Indian,” “American Indian,” or “Native American.” *Id.* at 307:12-308:11.

19. Furthermore, none of the 71 articles involved the use of “redskin(s)” as a straightforward denotative or neutral reference to American Indians. For instance, as Dr. Nunberg put it, “there were no sentences in the form ‘there are five redskins on the panel’ or ‘redskins have moved into the region in increasing numbers’ or ‘redskin actor Jay Silverheels was honored last night’ in the sense you might expect which [sic: if it] was an ordinary neutral term that was not disparaging.” *Id.* at 308:16-308:22. Most of the 71 stories involved “mentions” of the term “redskin” as opposed to “uses” of the term “redskin,” *i.e.*, the term was not used to refer to anyone but was discussed only as a term and often included in quotation marks. *Id.* at 308:23-309:3. For example, on mention from *The San Francisco Chronicle*

stated, “[i]n almost every movie the bad guy bit the dust and that was the end of their story. Another cartoon figure had been erased from the script. As we rejoiced in their agony and cheered their demise, it never occurred to us that the ‘redskins,’ ‘krauts,’ and ‘japs’ represented real people.” *Id.* at 309:4-309:23.

D. Plaintiff’s Expert Lexicographer Admitted That As Of 1967, 1975 and 1985, “Redskin” “Certainly Might Be Offensive.”

20. David K. Barnhart is a lexicographer, an expert in creation and interpretation of dictionaries, retained by PFI to testify in both *Harjo* and this action.

21. Counsel for PFI asked Mr. Barnhart about his opinions of the “word redskin in 1967 as applied to American Indian persons,” based on Mr. Barnhart’s consideration of Dr. Nunberg’s testimony, Mr. Barnhart’s own research, and his consideration of all the accepted scientific basis used in the field of linguistics by lexicographers. In his response, Mr. Barnhart admitted that the term “redskin” “*certainly might be offensive.*” Criss Decl. Ex. 14 at 180:20-181:12 (emphasis added). Mr. Barnhart testified that his opinion was the same for 1975 and 1985. *Id.* at 182:4-12.⁵

⁵ Mr. Barnhart opined that the term “redskin” was not disparaging because intent to offend is required for disparagement. Criss Decl. Ex. 14 at 181:13-182:3. As a matter of law, the TTAB rejected Mr. Barnhart’s construction of “disparaging” as requiring intent. *See* Blackhorse, 2014 WL 2757156 at*13 (“... Mr. Barnhart’s conclusion is based on too narrow a construction because he views the label ‘disparaging’ as requiring intent”) & *17 (“Mr. Barnhart testifies that while the term ‘redskin(s)’ was not disparaging ‘as applied to American Indian persons’ in 1967-85 it might have been offensive. As noted above, Mr. Barnhart attaches intent of the speaker to the word disparaging and his view of offensive is more in line with the meaning of disparaging in the context of Section 2(a) [15 U.S.C. § 1062(a)].”).

E. Native American Individuals And Organizations Have Long Understood “Redskin” As A Slur And Have Opposed Plaintiff’s Team Name.

1. At Haskell Institute in 1962, “Almost All the Students Resent[ed] Being Called Redskins.”

22. In 1962, Haskell Institute was a post-secondary coeducational vocational training school for Indians operated by the United States government. In 1962, more than 1,000 American Indian students attended Haskell Institute from at least 80 different tribes covering 30 states. Criss Decl. Ex. 59 at 7:10-8:9; Ex. 60 at 3-5; Ex. 61 at 270.⁶

23. Alan Dundes, a Professor of Folklore at University of California-Berkeley, and C. Fayne Porter, an Instructor at Haskell Institute in Lawrence, Kansas, published a scholarly article in *American Speech: A Quarterly in Linguistic Usage* regarding their research of the use of slang by American Indian students at Haskell in 1962. Dundes and Porter observed that almost all of the students at Haskell Institute resented being called “redskins:”

A great number of the slang expressions in common use at Haskell appear to be either neologisms or new combinations of old words. Some of the most interesting tend to be a type of *blazon populaire*, or ethnic slur. Navaho students are called *Nava-Joes* or simply *Joes*. Students from Alaska are labeled *polar bears*, *huskies*, *seal herders*, or *Alaskamos*. Students from Montana or Wyoming are *sheep herders*. Oklahoma Indians like to be called *Okies*, but are more often called *ditch diggers* and *dust bowlers*. North Carolinians are *moonshiners*. Floridians are known as *gators*, and an individual (Seminole) may be a *gator boy* or a *gator girl*. The Sioux are *dog-eaters*. ***Almost all the students resent being called redskins.***

⁶ Professor James Riding In earned a Ph.D. in U.S. history, with an emphasis in American Indian history, from the University of California Los Angeles (UCLA), a Master’s degree in American Indian Studies, with a concentration in history and law, from UCLA, a Bachelor’s degree in history from Fort Lewis College, and Associate of Arts degree from Haskell Indian Nation Junior College. He is a member of the Pawnee Nation. Since 1990 he has taught at Arizona State University, and since 2004 he has been an Associate Professor of American Indian Studies teaching courses on American Indian concerns ranging from Indian sovereignty and the U.S. courts to struggles over repatriation, sacred sites, and human rights. Criss Decl. Ex. 60 at 1.

Criss Decl. Ex. 61 at 271 (emphasis added).⁷

24. In the 1960s, Haskell was a microcosm of the national American Indian population given its geographic and tribal diversity (aside from the fact that the students were young). According to Professor Riding In (who attended Haskell from 1972-74), in light of the geographic and tribal diversity of Haskell, the finding that “almost all” the students at Haskell Institute in 1962-63 “resented being called *redskins*” would most assuredly apply to the national American Indian population. Criss Decl. Ex. 59 at 131:23- 133:8; Ex. 60 at 5.⁸

25. Dundes and Porter were writing a scholarly piece intended for publication and therefore would have had every reason to be accurate in their statements, including the statement that “almost all the students resent being called *redskins*.” The authors were not advocating for any cause or purpose but merely recording and memorializing the use of language at Haskell in 1962-63. Criss Decl. Ex. 60 at 4.

2. In 1972, A “Delegation of American Indian Leaders” From The National Congress of American Indians And Other Organizations Met With The PFI President To Demand A Change In Team Name.

26. In 1972, a delegation of American Indian leaders consisting of the leadership of major national Native American organizations met with then-President of PFI, Edward Bennett Williams, to demand that PFI change the team name. The organizations included the NCAI, AIM, and the National Indian Youth Council (“NIYC”), among others. The effort was led by Leon Cook, then-President of the NCAI. Ex. C, Cook Decl. ¶¶ 8-14.

⁷ Alan Dundes, now deceased, was one of the most eminent 20th century American folklorists. Criss Decl. Ex. 15 at 190:10-190:12. *American Speech* is a well-regarded publication. Criss Decl. Ex. 17 at 113:22-114:3.

⁸ The school was Haskell Indian Nation Junior College when Professor Riding In attended; it is now Haskell Indian Nations University. Criss Decl. Ex. 60 at 1.

27. From the 1960s to the present, NCAI has been the largest and most prominent national American Indian organization. NCAI was founded in 1944 to represent the interests and needs of Indian governments and communities. Criss Decl. Ex. 60 at 6; Ex. C, Cook Decl. ¶ 5; Ex. B, Apodaca Decl. ¶¶ 7, 12; Ex. E, Harjo Decl. ¶ 11.

28. In the late 1960s and the years thereafter, the NCAI had approximately 150 tribes as members; these tribes comprised approximately 50% of all American Indians. Criss Decl. Ex. 62 at 79:16-80:20, 93:14-22; Ex. C, Cook Decl. ¶ 6. There were 277 federally recognized tribes as of 1979 (apparently, the first year the Department of the Interior published a list). Criss Decl. Ex. 63. In 1972, NCAI's member tribes comprised between 300,000 and 350,000 Native Americans. Criss Decl. Exs. 52-53.

29. AIM was founded in 1968 in Minneapolis to combat police violence against Indians. By the early 1970s, AIM had become the country's largest militant Indian organization with thousands of members, supporters, and sympathizers from virtually all Indian tribes. AIM became involved in many of the most pressing issues facing Indian peoples and nations. Criss Decl. Ex. 59 at 152:8-11; Ex. 60 at 8-9; Ex. C, Cook Decl. ¶ 10.

30. NIYC was founded in 1961 by Indian college students to address educational and social issues relevant to Native Americans. In the early 1970s, NIYC advocated the use of activism to promote change and had hundreds of members from many different Indian tribes throughout the country. Criss Decl. Ex. 60 at 8-9; Ex. C, Cook Decl. ¶ 10.

31. Other Native American advocacy groups during this period included Americans for Indian Opportunity, run by LaDonna Harris (a Comanche and wife of then-U.S. Senator Fred Harris), and the Indian Legal Information Development Service ("ILIDS"), an educational and

legislative oversight organization run by Harold Gross (who previously served as Staff Counsel for NCAI). Criss Decl. Ex. 64 at 7:20-8:17, 37:2-7; Ex. 59 at 152:12-15; Ex. 60 at 7-9.

32. In 1971, Leon Cook was elected President of NCAI on a platform of increased cooperation between NCAI and other advocacy groups like AIM and NIYC. Ex. C, Cook Decl. ¶¶ 6-10. In January 1972, he invited leaders of AIM and NIYC to join NCAI Officers and Area Representatives to identify issues of common interest. Together, the leadership of NCAI, AIM, and NIYC agreed “wholeheartedly” to take on the Washington NFL team name. Ex. C, Cook Decl. ¶ 9-10. The issue was chosen as a priority for the organizations because, among the disparaging names and images used for Native Americans, the Washington team name was “the worst of the worst.” Ex. C, Cook Decl. ¶ 10.

33. On January 18, 1972, Harold Gross of ILIDS, who was also an NCAI volunteer and former in-house counsel, wrote to PFI President Edward Bennett Williams, objecting strenuously to the team’s name:

... I ask you to imagine a hypothetical National Football League, in which the other teams are known as the New York Kikes, the Chicago Polocks, the San Francisco Dagoes, the Detroit Niggers, the Los Angeles Spics, etc.

Such a league would shortly be out of business, since the number of people properly outraged by such ethnic slurs would be sizeable enough to force its closing. Yet, the term ‘Redskin’ is no less stereo-type provoking and no less insulting to American Indians than the others which I have used solely to make my point....

Born at a time in our history when the national policy was to seize Indian land and resources, and hunt down Indian people who stood in the way, the term ‘Redskin’ has been perpetuated through such media as western movies and television. Most often, the term is coupled with other derogatory adjectives, as ‘dirty Redskin’ or ‘pesky Redskin’ which is used interchangeably with the word ‘savage’ to portray a misleading and denigrating image of the Native American....

Criss Decl. Ex. 64 at 7-10; Ex. 65; Ex. C, Cook Decl. ¶¶ 11.

34. This letter resulted in a meeting with Williams in March 1972 attended by NCAI, AIM, and NIYC leaders and other prominent Native American leaders (“Williams meeting”). Criss Decl. Ex. 3 at Request No. 61. The Native American delegation that attended the Williams meeting included: (1) Leon Cook, President of NCAI; (2) Dennis Banks, National Director of AIM; (3) Ron Aguilar, District Representative of NIYC; (3) LaDonna Harris, President of Americans for Indian Opportunity; (4) Richard LaCourse, Washington Bureau of the American Indian Press Association; (5) Laura Wittstock, Editor of Legislative Review for ILIDS; (6) Hany Geigomah, Assistant to the Commissioner of Indian Affairs and the Youth Representative from the Bureau of Indian Affairs; and (7) Ron Petite, AIM. Criss Decl. Ex. 64 at 18:6-19:5; Ex. 66.

35. At the Williams meeting, the Native American leaders argued that the name of the team needed to change. Criss Decl. Ex. 64 at 19-23; Ex. C, Cook Decl. ¶¶ 12-13. The next day, Williams wrote a letter to NFL Commissioner Pete Rozelle to inform him that he met with a “delegation of American Indian leaders who are vigorously objecting to the continued use of the name Redskins.” Criss Decl. Ex. 3 at Request Nos. 73-74; Ex. 64 at 23; Ex. 67. Citing and enclosing Harold Gross’s letter, Williams admitted that the Native American leaders “set[] out their position quite cogently.” Criss Decl. Ex. 67.

36. PFI, of course, did not change its team name. In response to the meeting, however, Williams decided that the team’s cheerleaders would no longer wear Indian-style wigs that stereotyped Native American women and changed language in the team’s fight song, “Hail to the Redskins” because he recognized that some of the lyrics were “mocking.” Criss Decl. Ex. 54; Ex. 3 at Request No. 82; Ex. 46 ; Ex. C, Cook Decl. ¶ 13. (The fight song and cheerleader outfits are discussed further below, at pages 28-29.)

3. Native American Groups and Individuals Continued to Oppose The Team's Name And The Term "Redskin" as Offensive.

37. The Williams meeting was not an isolated event. As a 1972 editorial in *The Baltimore Sun* observed, "for several years, Indian organizations have been trying to get such teams as the Redskins, the Indians, the Braves, etc. to change their names." Criss Decl. Ex. 55. Since at least 1967, NCAI has worked to challenge "false, derogatory, and harmful" depictions of Native Americans in mass media. Criss Decl. Ex. 68. By 1988, after many years of protests against the name, *Chicago Tribune* columnist Clarence Page noted that complaints and protests over the team's name "have become a hardy perennial." Criss Decl. Ex. 43.

38. In 1971 and 1972, numerous newspaper articles and columns in newspapers reported on the controversy surrounding the Washington NFL team's name, including the NCAI's and other Native Americans' opposition to the team name. These articles appeared in Washington, D.C. local newspapers as well as national newspapers. Criss Decl. Exs. 52, 69-75. One Washington columnist summarized the extensive opposition to the team name: "[P]articularly annoying to the 750,000 American Indians is the word 'redskin.' To them, the word is a racist slur, no more acceptable than the word 'nigger' is to a black man and no more acceptable than the term 'white trash' is among the poor in the south." Criss Decl. Ex. 30.

39. In 1972, PFI recognized the significance of the Native American opposition to the team name. A November 1972 game program contained a lengthy article discussing Native American opposition to Indian team names generally, and the "Redskins" team name in particular. Criss Decl. Ex. 5.

40. Meanwhile, in 1972, the University of Utah decided to drop the name "Redskins" due to concern that the name disparaged Native Americans. Criss Decl. Ex. 60; *see* Criss Decl. Exs. 76, 77. Other universities around this time also eliminated Indian-themed team names due

to Native American opposition, including Dartmouth College and Stanford University. Criss Decl. Ex. 60 at 118-20; Exs. 78-80.

41. One Native American who voiced his opposition to the team name was a young Comanche named Billy Kevin Gover, who wrote to the PFI President in 1972 to make it clear that “Redskins is offensive to [him] and others. You can take a stand that would show you and the team as true believers in civil rights, or you can continue to carry a name that keeps alive a threatening stereotype to Indian people. People, Mr. Williams. We don’t want the Redskins!” Ex. D, Gover Decl. ¶ 6 and Ex. A thereto.

42. Although NCAI President Leon Cook could not convince Mr. Williams to change the team name in 1972, the NCAI’s opposition to the team name has continued ever since. At the 1973 NCAI annual convention in Tulsa, Reuben Snake, the Winnebago Tribal Chairman, addressed the convention and introduced a resolution calling for an end to racism in sports and especially an end to the Washington team’s name. Ex. C, Cook Decl. ¶ 14; Ex. E, Harjo Decl. ¶ 15. The convention with voted unanimously in favor of the report. Ex. C, Cook Decl. ¶ 14; Ex. E, Harjo Decl. ¶ 15.

43. Native American opposition to the team name continued through a PFI ownership change in the 1980s. Suzan Harjo, in her elected role as Executive Director of NCAI from 1984 through 1989, served with a series of NCAI Presidents. Throughout her tenure as NCAI Executive Director, Harjo “reflected and carried out the position of NCAI to oppose the name of the Washington NFL team and to call for its elimination.” Ex. E, Harjo Decl. ¶ 13. During this time, NCAI voiced its opposition to the team name as disparaging “in statements, speeches, telephone calls, interviews, educational outreach, and coalition-building meetings,” Ms. Harjo sent “notes to the team’s then co-owner, Edward Bennett Williams (1984-1985), in an effort to

renew NCAI's request to change the team's name, and to the team's then primary owner, Jack Kent Cooke (1984-1989), in an attempt to set up a meeting to discuss reasons for Native American opposition to the offensive team name and to encourage him to change it." *Id.* at ¶ 16. Cooke never responded to or met with Native Americans, but publicly acknowledged the controversy over the team name by stating to United Press International there was "not a chance in hell" that the name would be changed. *Id.* While she was Executive Director, the NCAI had over 300 tribal members. *Id.* at ¶ 13.

44. NCAI's opposition has continued for decades. As reported in a September 1992 article in *The Lakota Times* newspaper (a newspaper with primarily Native American readership), "[t]he National Congress of American Indians has been battling against the racist use of Indians as mascots for decades." Criss Decl. Ex. 81; *see* Criss Decl. Ex. 60 at 11. The Michigan Civil Rights Commission reported in 1988 that "[t]he National Congress of American Indians, the oldest and largest national Indian group in the U.S. also supports ... efforts to have the Washington team's name changed." Criss Decl. Ex. 24 at 6.

45. Indeed, past NCAI leaders who have been outspoken in their opposition to the Washington NFL team name include: Vine Deloria (NCAI Executive Director, 1964-1967 and *Harjo* petitioner); Leon Cook (NCAI President, 1971-73); Raymond Apodaca (Regional VP, 1990-1993); Joseph B. DeLaCruz (NCAI President 1984-1985); Reuben A. Snake, Jr. (NCAI President 1985-1987); John F. Gonzales (NCAI President 1987-1989); Suzan Harjo (NCAI Executive Director, 1984-1989); and gaiashkibos (NCAI President, 1992). Criss Decl. Ex. 62 at 1, 4:12-15, 79:16-20; Ex. 82; Ex. B, Apodaca Decl. ¶ 7; Ex. C, Cook Decl. ¶¶ 6, 15; Ex. E, Harjo Decl. ¶13. JoAnn Chase, Executive Director of NCAI in 1996 testified in *Harjo* that the issue of the "Washington Redskins" team name is an issue of "national significance, and which

would be of concern to at least every Indian person I have ever had contact with....” Criss Decl. Ex. 83 at 68:19-21.

46. As the Washington Redskins football team played in the 1988 playoffs and Super Bowl, NCAI supported protest efforts, including a “Change The Name” banner towed by a small plane above the NFC Conference Championship game in January 1988 and protests at the Super Bowl a few weeks later. Criss Decl. Exs. 24, 42, 43, 84. Many Native Americans and others protested the team name during the playoffs and Super Bowl. *See* Criss Decl. Exs. 38-43, 46, 84-86.

47. One influential voice in Indian country speaking out against the team’s name was Tim Giago, editor of *The Lakota Times*. With a national readership during the 1980s and early 1990s, the *Lakota Times* (renamed *Indian Country Today* in 1992) was a leading independent news outlet for critical analysis of Native American issues. Criss Decl. Ex. 60 at 11. Giago’s editorials for the *Lakota Times* were nationally syndicated in the mainstream press. *Id.* Mr. Giago wrote multiple editorials in *The Lakota Times* and elsewhere denouncing the “Washington Redskins.” *See, e.g.*, Criss Decl. Exs. 87-91. In a widely reprinted 1988 editorial, Giago wrote that “Redskins is, and was intended to be a very strong epithet against American Indians,” and stated that it would be no more racist to call the team the “Blackskins” and have fans “paint their faces Black, put on Afros, don colorful dashikis, and cavort around the football field like a bunch of wild savages.” Criss Decl. Exs. 33, 92-95.

48. Native Americans also influenced elected representatives to give voice to their opposition to the team name. In 1988, Senator Rudy Boschwitz of Minnesota, at the urging of his constituents, wrote to PFI’s owner to relay their concern that “Redskins” is “demeaning and offensive to Native Americans.” Criss Decl. Ex. 96. Three years later, Senator Dennis

DeConcini of Arizona, noting that he had “almost 300,000” Native Americans constituents, wrote the NFL Commissioner to complain that “Redskins” was “culturally insensitive.” Criss Decl. Ex. 97.

49. As in 1988, the team’s appearance in the 1992 playoffs spurred Native American protests. At the 1992 Super Bowl in Minnesota, Native American organizations led large protests of the team name. Among the speakers at these protests was NCAI President known by his Native American name “gaiashkibos,” AIM leaders, and Mr. Giago. Criss Decl. Exs. 82, 98-99. Around the same time, *The Lakota Times* reported that “Indian Tribes and organizations,” had made “vociferous calls” for a change in the team name, and that “[m]ost Indian groups consider the team moniker racist and demeaning,” specifically pointing out NCAI’s opposition. Criss Decl. Ex. 100.

50. In 1993, Senator Ben Nighthorse Campbell, then one of the country’s most prominent Native Americans, sought to force PFI to change the name by introducing legislation that would have prevented PFI from using U.S. Department of Interior land for a new stadium unless the Team name were changed. Criss Decl. Exs. 101-107.

51. Also in 1993, the NCAI adopted two formal resolutions declaring the organization’s continued opposition to Team name on grounds that “redskin” disparages Native Americans. In January 1993, the NCAI, acting through its Executive Council, adopted a resolution supporting the *Harjo* cancellation petition and declaring the organization’s position that “redskins” has always been and continues to be a slur:

[T]he term REDSKINS is not and has never been one of honor or respect, but instead it has always been and continues to be a pejorative, derogatory, denigrating, offensive, scandalous, contemptuous, disreputable, disparaging and racist designation for Native American[s].

Criss Decl. Ex. 83 at 50:18-51:20; Ex. 108. The NCAI further declared that the registered marks at issue in this petition are “offensive, disparaging . . . and damaging” to Native Americans. Criss Decl. Ex. 108.

52. Eleven months later, in December 1993, the NCAI General Assembly adopted a separate resolution objecting to the “Washington Redskins” team name. The resolution expressed support for the bill introduced by Senator Campbell to prevent the use of federal land for a new stadium unless the Team changed its name. Criss Decl. Ex. 83 at 39:7-40:3, 46:21-48:7; Ex. 109.

53. At times and over time, protest efforts against the term “Redskins” have borne fruit. In 1988, sixteen years after the University of Utah dropped “Redskins,” Southern Nazarene College did so as well. Criss Decl. Ex. 60 at 11. In addition, in 1991-93, following objections from Native Americans, another university and two school systems dropped “Redskins” – Miami University in Ohio, the Grand Forks, North Dakota, and the Naperville, Illinois, high schools. Criss Decl. Exs. 110-112. Altogether, eleven high school districts dropped “Redskins” as a team name in the 1990s and another 18 have done so since 2000. Criss Decl. Ex. 60 at 20.

F. A 1996 Survey Showed That A Majority Of Native Americans Found The Term “Redskins” To Be Offensive To Themselves Or Others.

54. A poll designed and supervised by Dr. Ivan Ross, an expert retained in *Harjo*, showed that a majority of Native Americans found the term “redskins” offensive.⁹

⁹ Criss Decl. Ex. 113 at 19:21-20:18. Dr. Ross is deceased. As of 1996, when he performed his work, Dr. Ross was President of Ross Research, a former Professor of Marketing and Adjunct Professor of Psychology with the Carlson School of Management of the University of Minnesota for 27 years, and a Fellow with the Society for Consumer Psychology, the American Psychological Association, and the American Psychological Society. He had designed and conducted numerous studies for academic research, corporate clients, and litigated disputes;

55. In 1996, Dr. Ross conducted a survey of attitudes regarding various different words associated with Native Americans, including “redskin.” Criss Decl. Exs. 114-115. The survey tabulated responses from the general American public and from American Indians. Criss Decl. Ex. 115. For the Native American portion of the survey, Dr. Ross created a stratified probability sample by drawing from the 20 states with the highest Native American populations, selecting counties and census tracts within those states to arrive at a set of areas which would fairly represent both rural and urban areas, and using a randomized telephone draw to select the individual respondents. Criss Decl. Ex. 113 at 15:11-18:20. Dr. Ross testified to his expert opinion that the methodology used for the survey of Native Americans resulted in responses that “fairly represented” the views of the Native American population of the United States, and that the methods are accepted within his field. *Id.*

56. As a way to address any reluctance by respondents to reveal their personal feelings about the terms surveyed, Dr. Ross had respondents answer not only whether they would personally be offended by the terms but also whether they believed other people would be offended. Criss Decl. Ex. 116 at 77:8-79:13; Ex. 117 at 30:10-32:20, 37:1-38:23, 56:1-57:16, 110:4-113:7. This technique is an accepted way to illuminate a respondent’s true feelings about a sensitive issue. Criss Decl. Ex. 117 at 30:10-32:22.

57. According to the results of the survey, 36.6 percent of American Indians responded that they would be personally offended by the use of the word “redskin,” and 52.5 percent perceived that the word “redskin” would “offend others.” In total, 60.3 percent of Native Americans perceived the term “redskin” to be either offensive to themselves or to others. Criss

consulted for multiple U.S. government agencies; and been qualified as an expert in survey design on numerous occasions in federal court. *Id.* at 4:19-9:20.

Decl. Exs. 114-115. Based on these results, Dr. Ross concluded that approximately 60 percent of Native Americans consider the term “redskin” offensive. Criss Decl. Ex. 115.

G. PFI Has Used The “Redskins” Team Name And The Marks In Ways That Mock Native Americans.

58. PFI has used its trademarks in ways that make light of – or outright mock – Native American people and cultures, illustrated by halftime “entertainment,” the team’s fight songs, the band’s uniforms, and the former costumes used by the cheerleaders.

59. The most extreme example may be a video clip (produced by PFI in *Harjo* discovery) of half-time “entertainment.” The clip features an almost-naked “Indian” on a giant drum at midfield dancing violently in a mocking mimicry of Native Americans, and another “Indian” dancing with a horse. Criss Decl. Ex. 118 at 2:48 to 2:55. A written account of half-time “entertainment” states that “[b]etween the ‘halves,’ Indian bands march on the field and present all forms of pageantry, which may not make much sense but is highly diverting to the crowd. Mr. Marshall [the former owner] also has a swing band in a giant wigwam up over the stands, all in their customary war feathers, smoke emanating from this elevated tepee as [certain star players] and all the other ‘braves’ of the local professional entry go through their act on the field.” Criss Decl. Ex. 119.

60. The team’s original fight song included these lyrics that stereotyped and mocked the speech of Native Americans (and urged the team to fight for “old Dixie.):

Hail to the Redskins,
Hail Vic-to-ry!
Braves on the warpath,
Fight for old Dixie.
Scalp ‘em swamp ‘em,
We will take ‘em big score.
Read ‘em, Weep ‘em,
Touch-down we want heap more.

See Criss Decl. Ex. 3 at Request Nos. 75, 76; Ex. 120. As noted, PFI changed the lyrics in 1972 in response to opposition by Native American leaders. *See* ¶ 37, above. The fight song has continued to refer to the team as “braves on the warpath,” however. Criss Decl. Ex. 121.

61. The outfits of the team’s cheerleaders also mocked Native Americans. The costumes of the team’s cheerleaders were designed to allude to purported Native American attire, jewelry, or hairstyles. Criss Decl. Ex. 3 at Request No. 8. The cheerleaders used to wear stereotyped black braided-hair wigs and Indian-themed costumes as they entertain the crowds wearing faux-Indian outfits. Criss Decl. Exs. 122-130. From 1962 until as late as 1979, the cheerleading uniform included an Indian dress and Indian beaded headband. Criss Decl. Ex. 131 at No. 18. The cheerleaders stopped wearing the black-braided hair wigs in 1972, at the same time the fight song lyrics changed, also due to the meeting with the American Indian leaders. Criss Decl. Ex. 54.

62. The “Redskins marching band” also makes light of Native American culture; the band members march around wearing Indian headdresses full of feathers and play Indian-themed music (evoking stereotypes of tribal drumbeat war music). Criss Decl. Ex. 118 at 0:51 to 1:30; Ex. 130, 132-137. PFI gives the band permission to perform during games. Criss Decl. Ex. 3 at Request No. 178 (for at least the period between 1967 and 1990).

63. On different occasions, team players and PFI administrative personnel dressed up like Indians. Criss Decl. Exs. 138-146. Many covers of game programs feature caricatures of buffoonish-looking Native Americans. Criss Decl. Exs. 147-149. PFI even has a mocking “cigar store” Indian in the PFI corporate offices. Criss Decl. Ex. 150 at 126:21-127:18.

64. Numerous news articles and published advertisements mock Native American culture, such as by reporting that the “Washington Redskins” had “scalped” or “ambushed”

another team (or vice-versa), were “on the warpath,” were “brewing special Kickapoo Juice” for their opponents, or that they had been “massacred” by another team (sometimes to avenge the defeat of General Custer). Criss Decl. Exs. 120; 140; 151-270. Some articles use pidgin English or otherwise mock or stereotype Native American manner of speech. Criss Decl. Exs. 120; 140; 170; 176; 180-81; 251; 254; 256; 262; 267. Newspapers also published mocking caricatures of Native Americans in connection with the team and referred to the former team owner as the “Big Chief” or “Great White Father.” Criss Decl. Exs. 30; 176; 226; 254-271. Furthermore, the fans of the team frequently dress up like stereotyped Native Americans, with Indian headdresses and face paint, and shout war whoops. Criss Decl. Exs. 232-247; 272-279. PFI has encouraged this behavior; it has even rewarded one fan with free tickets to games so that he would continue to attend in Indian costume as “Chief Z.” Criss Decl. Ex. 280 at 118:21-119:10.

LEGAL STANDARD

“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “Summary judgment is appropriate when ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact.’” *Bonds v. Leavitt*, 629 F.3d 369, 380 (4th Cir. 2011) (quoting Fed. R. Civ. P. 56(c)). The Court should view “the facts and the reasonable inferences therefrom in the light most favorable to the nonmoving party,” *id.*, while requiring the movant to “go beyond the ‘mere existence of a scintilla of evidence.’” *Glynn v. EDO Corp.*, 710 F.3d 209, 213 (4th Cir. 2013) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)).

ARGUMENT

I. THE TTAB DID NOT ERR IN FINDING THAT THE MARKS CONTAIN MATTER THAT “MAY DISPARAGE” NATIVE AMERICANS OR THAT BRING THEM INTO CONTEMPT OR DISREPUTE. THEREFORE, DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON COUNTS 1 AND 2.

Plaintiff contends in Count 1 that the TTAB erred in ruling that its trademarks contain matter that “may disparage” Native Americans and contends in Count 2 that the TTAB erred in ruling that its trademarks contain matter that bring Native Americans into “contempt or disrepute.” *See* [Dkt. 1] ¶¶ 130-131; 15 U.S.C. § 1052(a).

As explained below, the TTAB did not err in finding that Plaintiff’s trademarks were subject to cancellation under 15 U.S.C. § 1052(a). Rather, the TTAB’s ruling is consistent with decisions in a line of ethnic disparagement cases. *See In re Geller*, 751 F.3d 1355, 1360-61 (Fed. Cir. 2014), *cert. denied*, No. 14-175, 2015 WL 132962, (U.S. Jan. 12, 2015) (finding “Stop The Islamisation of America” may disparage Muslim Americans); *In re Tam*, No. 85472044, 2013 WL 5498164, at *7 (T.T.A.B. 2013) (finding “slants” may disparage Asian Americans), *on appeal*, No. 2014-1203 (Fed. Cir.); *In re Lebanese Arak Corp.*, No. 77072261, 2010 WL 766488, at *4 (T.T.A.B. 2010) (finding “Khoran” when used with wine may disparage Muslims); *In re Heeb Media, LLC*, No. 78558043, 2008 WL 5065114, at *1 (T.T.A.B. 2008) (finding “heeb” may disparage Jews); *In re Squaw Valley Dev. Corp.*, Nos. 76511144, 76511145, 2006 WL 1546500, at *10 (T.T.A.B. 2006) (finding “squaw,” in context of apparel and retail store services may disparage Native Americans).

A. There Is No Genuine Issue Of Material Fact That The Trademarks Contain Matter That “May Disparage.”

1. Section 2(a) Does Not Require Proof of Actual Disparagement or Bad Intent, But Rather Only That the Term “May” Disparage the Target Group.

Section 2(a) of the Lanham Act provides that a trademark is not eligible for registration if it consists of or comprises “matter which *may* disparage” persons. 15 U.S.C. § 1052(a) (emphasis added). Therefore, to cancel a trademark registration, a petitioner need only demonstrate that the mark contains matter that *may* disparage, not actual disparagement.

Congress’s insertion of “may” before “disparage” was deliberate. To refuse registration of an immoral, deceptive, or scandalous mark, Section 2(a) requires that the mark contain matter that *actually is* “immoral, deceptive, or scandalous.” The contrast is plain:

[Registration is to be refused to a trademark that:] Consists of or comprises immoral, deceptive, or scandalous matter; or matter which *may disparage* or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt or disrepute....

15 U.S.C. § 1052(a) (emphasis added). *See in re Lebanese Arak Corp.*, 2010 WL 766488 at *2 (“The structure of Section 2(a), with various refusals and, therefore, different tests, interwoven into its various parts, is the result of its legislative development.”).

The drafting history further demonstrates that Congress made a deliberate choice in inserting “may” before disparage. Initial House and Senate bills provided that a trademark is ineligible for registration if it “tends to” disparage.¹⁰ In 1942, the House Committee on Patents

¹⁰ Criss Decl. Ex. 281, Hearings before the Subcomm. on Trademarks Comm. on Patents, House of Representatives, 76th Cong. 1st Sess. (March 28, 29 and 30, 1939) at 1 (Section 2(a) of bill contains “tends to disparage” standard); Criss Decl. Ex. 282, Hearings before the Subcomm. on Trademarks Comm, on Patents, House of Representatives, 77th Cong., 1st Sess. (Nov. 4, 12, 13 and 14, 1941) at 1-2 (Section 2(a) of H.R. 102, which is “identical” to S. 895, contains a “tends to disparage” standard) & at 15 (by contrast, H.R. 5461 contains “may disparage” standard).

marked up a Senate bill and substituted “may” in place of “tends to” in front of “disparage.”¹¹ Subsequent bills¹² and the enacted legislation contained the “may disparage” standard instead of “tends to disparage.” 15 U.S.C. § 1052(a); *see Doe v. Chao*, 540 U.S. 614, 622 (2004) (relying on drafting history to interpret statute).

In addition, intent to disparage is not required for a trademark to be ineligible for registration under 15 U.S.C. § 1052(a). *See In re Lebanese Arak Corp.*, 2010 WL 766488 at *8 (“intent [to disparage] is not necessary in order to find that the mark does, in fact, disparage [Muslims] or their beliefs”); *In re Heeb Media*, 2008 WL 5065114 at *8 (“good intentions” do not save a mark that may disparage an ethnic group); *In re Tam*, 2013 WL 5498164, at *5 (same).

2. The Record Evidence Clearly Demonstrates That the Term “Redskins” May Disparage Native Americans.

The TTAB has established a two-part test to determine whether a trademark contains matter that “may disparage” a group:

1. What is the meaning of the matter in question, as it appears in the marks and as those marks are used in connection with the goods and services identified in the registrations?
2. Is the meaning of the marks one that may disparage the referenced group [here, Native Americans]?

Blackhorse, 2014 WL 2756516, at *4; *In re Heeb Media, LLC*, 2008 WL 5065114, at *4

(T.T.A.B. 2008). The TTAB has held that both questions are to be answered as of the date of the

¹¹ Criss Decl. Ex. 283, H. Rep. No. 2283 (77th Cong. 2d Sess.) (June 25, 1942) at 2 (recommending passage of S. 895 with certain amendments, including: “strike out ‘tends to’ and insert in lieu ‘may’” before “disparage”).

¹² *See, e.g.*, Criss Decl. Ex. 284, Hearings before the Comm. on Patents, House of Representatives, 78th Cong., 1st Sess. (Apr. 7-8, 1943) at 2; Criss Decl. Ex. 285, Hearings before the Subcomm. of the Comm. on Patents, 78th Cong., 2d Sess. (Nov. 15-16, 1944) at 2.

registration of the involved marks. *Blackhorse*, 2014 WL 2756516, at *4. Courts have employed the TTAB's two-part test where the parties did not argue for another interpretation. *In re Geller*, 751 F.3d 1355 at 1358, and *Harjo v. Pro-Football, Inc.*, 284 F. Supp. 2d 96, 125 (D.D.C. 2003). Our research has found no other federal court decision interpreting the "may disparage" prong of 15 U.S.C. § 1052(a).

a. "Redskins," as Used in the Marks, Refers to Native Americans.

As to the first question in the two-part test, there can be no dispute that the meaning of the "matter in question," *i.e.*, the term "redskins" or a derivation of "redskins" in each of the trademarks, refers to Native Americans. PFI admits that "redskin" alludes to Native Americans, that two of the marks contain an image of a man in profile that alludes to Native Americans, that a spear in one of the marks alludes to Native Americans, and that the Team's football helmets contain an image of a Native American in profile. Criss Decl. Ex. 3 at 6-7. The team's band wears Indian headdresses, the cheerleaders have worn Indian-themed outfits, and PFI's publications have used Indian imagery. Criss Decl. Exs. 118; 124-143. Accordingly, as the TTAB stated, "the evidence overwhelmingly support a determination that the term REDSKINS as it appears in the marks retains the meaning Native American." *Blackhorse*, 2014 WL 2756516, at *8; *Harjo*, 1999 WL 375907, at *40 (stating that it would be "factually incomplete and disingenuous" to ignore the substantial evidence of Native American imagery used by [PFI], as well as by the media and [PFI's] fans, in connection with [PFI's] football team and entertainment services). The district court in *Harjo* agreed that the "meaning of the matter in question" refers to Native Americans. *See Harjo*, 284 F. Supp. 2d at 126-27.

b. The Term “Redskins” Is One That May Disparage Native Americans.

In deciding the second question – is the meaning of the marks one that “may disparage” the referenced group – the TTAB looks to the views of the referenced group, which are “‘reasonably determined by the views of a substantial composite thereof.’” *Blackhorse*, 2014 WL 2756516, at *5. Although “substantial composite” is an expression that the TTAB uses in Section 2(a) cases, the term does not come from the statute and does not alter the statutory directive that marks with matter that “may disparage” persons are not eligible for registration.

In using the term “substantial composite,” the TTAB has repeatedly explained that a minority of the referenced group may constitute a substantial composite. *See In re Tam*, 2013 WL 5498164, at *4 (T.T.A.B. 2013); *In re: Heeb Media*, 2008 WL 5065114, at *8; *In re Squaw Valley Dev. Corp.*, 2006 WL 1546500, at *18 n.12; *see also Ritchie v. Simpson*, 170 F.3d 1092, 1094 (Fed Cir. 1999) (To determine “[w]hether a mark comprises immoral or scandalous matter, ...the relevant viewpoint is not necessarily that of a majority of the general public, but of a ‘substantial composite’”); *In re McGinley*, 660 F.2d 481, 485 (C.C.P.A. 1981) (substantial composite of general public, relevant to evaluating whether a mark contains “scandalous” matter, may be a minority of the general public).

Furthermore, the TTAB has explained that under the “substantial composite” inquiry, evidence of the general public’s perception of a term, such as dictionary evidence, can “serve to support a finding that the referenced group finds the term to be disparaging.” *Blackhorse*, 2014 WL 2757516, at *4 n.15; *see also In re Tam*, 2013 WL 5498164, at *1-2, *7 & n.3 (relying in part on dictionaries to find that “slants” is viewed as disparaging by a substantial composite of the referenced group); *In re Heeb Media*, 2008 WL 5065114, at *1 (same as to “heeb”); *In re Squaw Valley Dev. Co.*, 2006 WL 1546500, at *13 (same, as to “squaw”). It is common sense

that an ethnic slur will be viewed as disparaging by a substantial composite of the referenced group. *See Blackhorse*, 2014 WL 2757516, at *9 n.43 (“There is no case in our review where a term found to be a racial slur in general was found not to be disparaging when used in the context of specific services”).

Here, there can be no dispute that the trademarks in question contain matter that “may disparage” Native Americans, as determined by the views of a substantial composite or otherwise. Dictionaries and reference sources identify “redskin” as a disparaging term. *See supra* at ¶¶ 3-13. A 1962 scholarly article observed that “almost all the students [at Haskell Institute] resent being called redskins.” *Supra* at ¶ 24. The evidence of usage, as shown by the analytic work of Dr. Geoffrey Nunberg, reveals the negative connotations of the term. *See supra* at ¶¶ 13-20. The NCAI, and other Native American organizations such as the AIM and the NIYC, and prominent Native American individuals like Suzan Shown Harjo, Kevin Gover, Leon Cook, Raymond Apodaca, other former NCAI Presidents, and Tim Giago, have consistently objected to the Washington NFL team’s name from the 1960s to the 1970s. *See supra* at ¶¶ 23-54. Native American leaders met with the PFI President in 1972 to demand a change to the Team name and tried to meet with PFI in the 1980s to raise the issue again with new PFI ownership, and Native Americans publicly protested in 1988 and 1992 when the team played in the Super Bowl. *See supra* at ¶¶ 27-37, 47. Even PFI’s expert lexicographer admitted that “redskin” “certainly may be offensive.” *Supra* at ¶¶ 21-22. And, as a result of the disparaging nature of the term and Native American concerns, the University of Utah in 1972, and other schools and universities subsequently have dropped “Redskins” as their team names. *Supra* at 40-41.

These undisputed facts are sufficient to demonstrate that the marks in question contain matter that “may disparage” Native Americans. *See In re Geller*, 751 F.3d at 1358- 59 (citing dictionaries as among evidence that “Stop The Islamisation of America” may disparage); *In re Tam*, 2013 WL 5498164, at *7 (citing dictionaries, reference works, and the position of the Asian American Youth Leadership Council as among evidence that “slants” may disparage), *on appeal*, No. 2014-1203 (Fed. Cir.); *In re Heeb Media, LLC*, 2008 WL 5065114, at *1-2 (citing dictionaries, statement of the associate director of the Anti-Defamation League, statements by a professor and radio talk show host, and a newspaper editorial as evidence that “heeb” may disparage); *In re Squaw Valley Dev. Corp.*, 2006 WL 1546500, at *10-13 (citing statements of Native American groups and individuals, dictionary definitions, and examples of state governments dropping “squaw” as the name of geographic locations, as evidence that “squaw” may disparage).

Accordingly, because there is no dispute that the trademarks contain matter that “may disparage” Native Americans, Defendants are entitled to summary judgment on Count 1.

B. There Is No Genuine Issue Of Material Fact That The Trademarks Contain Matter That Bring Native Americans Into “Contempt Or Disrepute.”

The TTAB also correctly found that the marks in question contain matter that brings Native Americans into “contempt or disrepute,” having previously held that the legal test is indistinguishable from the legal test for determining whether a mark may disparage. *Blackhorse*, 2014 WL 2577516, at *7 n.33. The parties did not disagree with this proposition before the TTAB, and Defendants are unaware of any authority that interprets the “contempt or disrepute” prong separately from the “may disparage” prong.

Under the plain meaning of “contempt or disrepute,” and under the legal standard for “may disparage,” discussed above, Defendants are entitled to summary judgment on Count 2.

There is no genuine issue of disputed fact that the marks contain matter that brings Native Americans into contempt or disrepute.

II. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON COUNT 7.

In Count 7, PFI contends that the TTAB erred in failing to dismiss the petition to cancel under the equitable doctrine of laches. In fact, the TTAB properly rejected the laches argument and Defendants are entitled to summary judgment on Count 7.

A. Laches Does Not Apply Because Of The Public Interests At Stake.

The TTAB properly rejected PFI's laches defense because "courts and the [TTAB] have routinely held that where there is a broader public policy concern at issue, the equitable defense of laches does not apply." *Blackhorse*, 2014 WL 2757516, at *31 (citing cases). Similarly, the Fourth Circuit has held that the public interest is a factor that weighs against application of laches. *See Resorts of Pinehurst, Inc. v. Pinehurst Nat'l Corp.*, 148 F.3d 417, 423 (4th Cir. 1998); *Sara Lee Corp. v. Kayser-Roth Corp.*, 81 F.3d 455, 461-62 (4th Cir. 1996).¹³ Here, as the TTAB explained, "it cannot be disputed that there exists a broader public interest...." *Blackhorse*, 2014 WL 2757516, at *32. "[T]here is an overriding public interest in removing from the register marks that are disparaging to a segment of the population beyond the individual petitioners." *Id.* Because of the public interests at stake, the TTAB did not err in rejecting PFI's laches argument, and Defendants are entitled to summary judgment on Count 7.

B. Defendants Did Not Unreasonably Delay In Petitioning The TTAB.

In order to prevail in its laches defense, PFI must prove that, after turning age 18, each Defendant unreasonably delayed in petitioning the TTAB. *Brittingham v. Jenkins*, 914 F.2d 447,

¹³ In *Harjo*, the D.C. Circuit did not consider whether or not laches applies in cases raising broader public interest concerns. *See Harjo v. Pro-Football, Inc.*, 565 F.3d 880 (D.C. Cir. 2009); *Harjo v. Pro-Football, Inc.* 415 F.3d 44 (D.C. Cir. 2005).

456 (4th Cir. 1990); *Pro-Football, Inc. v. Harjo*, 415 F.3d 44, 48-49 (D.C. Cir. 2005) (holding that laches does not begin to run until party reaches age of majority).

Here, each of the Defendants was under age 18 in April 1999 when the TTAB granted the *Harjo* petition to cancel. *See* [Dkt. 51] at 2; [Dkt. 1] ¶ 17. The *Harjo* proceedings in federal court lasted until 2009. [Dkt. 1] ¶¶ 25-26. As the TTAB reasoned, the entire period that *Harjo* was pending “provided excusable delay.” *Blackhorse*, 2014 WL 2757516, at *33. Defendants filed their petition with the TTAB in 2006, during this period of excusable delay. It would be nonsensical and wasteful to insist that Defendants needed to file their petition before *Harjo* was concluded. Any other rule would invite the filing of excessive and unnecessary petitions.

Furthermore, Courtney Tsothigh was 18 years old and Ms. Pappan was 19 years, 3 months old. It is indisputable that these two young adults did not unreasonably delay as they were “entitled to assess the situation” for a reasonable period of time as adults before deciding whether to file a petition. *Blackhorse*, 2014 WL 2757516, at *33.

C. PFI Can Not Prove Prejudice From Any Delay.

PFI’s laches defense also fails for the separate reason that PFI cannot demonstrate material prejudice resulting from any delay by Defendants in filing their petition. *See Ray Commc'ns, Inc. v. Clear Channel Commc'ns, Inc.*, 673 F.3d 294, 305 (4th Cir. 2012). Mere continued expenditure to promote a challenged name is not sufficient to show economic prejudice. *See id.*; *Tisch Hotels, Inc. v. Americana Inn, Inc.*, 350 F.2d 609, 615 (7th Cir. 1965). PFI has known since long before the Defendants reached the age of majority that its trademark registrations were vulnerable to cancellation, since the TTAB granted the *Harjo* cancellation petition in 1999. Any money spent to promote the trademarks after the TTAB ruled in *Harjo* was expended at PFI’s peril. “[O]ne who uses debatable marks does so at the peril that his mark may not be entitled to registration.” *In re McGinley*, 660 F.2d 481, 485, 211 U.S.P.Q. 668, 672

n.7 (C.C.P.A. 1981). Accordingly, PFI cannot show any material prejudice arising from any delay by Defendants in filing their TTAB petition.

CONCLUSION

For the foregoing reasons, Defendants' Motion for Partial Summary Judgment on Counts 1, 2, and 7 should be granted.

Dated: February 26, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of February, 2015, the foregoing pleading or paper was filed and served electronically by the Court's CM/ECF system upon all registered users in this action:

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