

**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,

and

UNITED STATES OF AMERICA,

Intervenor.

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

**PRO-FOOTBALL, INC.'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION
FOR SUMMARY JUDGMENT, AND IN OPPOSITION TO DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT, ON CLAIMS I, II, AND VII**

REDACTED FOR PUBLIC FILING

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
PROCEDURAL HISTORY	3
PFI’S STATEMENT OF UNDISPUTED MATERIAL FACTS	4
A. PFI’s Marks Were Published, Registered And Used Without Opposition Until 1992	4
B. By 1967, The Name “Redskins” In Connection With PFI’s Services Was Understood To Identify The NFL Team, Not Native American Individuals	4
C. Native Americans Did Not View The Redskins Marks As Disparaging In 1967-1990	5
1. Native American Participation At The 1977 All-Indian Honor Band & Pageant	5
2. Native Americans Often Named Their Sports Teams “Redskins” In 1967-1990	8
3. Native Americans Play Under, Use, And Support PFI’s Team Name	9
D. Defendants’ Claims Are Barred By Laches	10
PFI’S RESPONSES TO DEFENDANTS’ STATEMENT OF MATERIAL FACTS	11
A. PFI’s Intent In Selecting The Team Name In 1933 Is Not Relevant To How A Substantial Composite Of Native Americans Viewed The Marks In 1967-1990	11
B. Defendants’ References Regarding The Word “Redskin” Are Not Relevant To How A Substantial Composite Of Native Americans Viewed The Marks In 1967-1990	11
1. Defendants’ Dictionary Sources Are Not Relevant	11
2. Defendants’ “Other Written Sources” Are Not Relevant	13
3. Defendants’ Four Witness Declarations Are Not Probative	13

C. Defendants’ “Evidence Of Usage” Of The Word “Redskins” Is Not Relevant To How A Substantial Composite Of Native Americans Viewed The Marks In 1967-199013

 1. Nunberg’s “Sentiment Analysis” Is Irrelevant13

 2. Nunberg’s Analysis Of 20th Century “Disuse” Of “Redskin” Is Irrelevant.....15

D. Barnhart Did Not Admit That The Redskins Marks Are Disparaging15

E. Defendants Provide No Evidence That A Substantial Composite Of Native Americans Understood The Redskins Marks To Be Disparaging In 1967-1990.....16

 1. The 1962 Haskell Article Has No Bearing On The Redskins Marks16

 2. The Views Of The Attendees At The 1972 Meeting With Mr. Williams Did Not Represent The Views Of A Substantial Composite of Native Americans.....17

 3. Purported Oppositions To The Team’s Name Did Not Represent The Views Of A Substantial Composite Of Native Americans In 1967-199019

 a. Newspaper Articles About The Name20

 b. School Name Changes And One Student Letter.....20

 c. NCAI And Suzan Harjo21

 d. Elected Representatives23

 e. Post-1992 Opinions.....23

F. The Ross Survey Is Both Unsound And Irrelevant.....24

G. Defendants Provide No Evidence That Native Americans in 1967-1990 Perceived The Redskins Marks As “Mocking”25

LEGAL STANDARD.....25

ARGUMENT26

I. DEFENDANTS BEAR THE BURDEN OF PROVING THAT EACH REDSKINS MARK DISPARAGED A SUBSTANTIAL COMPOSITE OF NATIVE AMERICANS AT THE TIME EACH MARK WAS FIRST REGISTERED26

A.	Disparagement Must Be Proven “By A Preponderance Of The Evidence”	26
B.	In The Circumstances Presented Here, A “Substantial Composite” Should Comprise At Least A Majority Of The Referenced Group.....	29
C.	The Evidence Presented Must Be The Perceptions Of Native Americans, Not The General Public	31
D.	Defendants Must Introduce Evidence That The Redskin Marks In Fact Do Disparage, And Not That They Are Merely Capable Of Disparagement.....	32
II.	DEFENDANTS HAVE NOT SUSTAINED THEIR BURDEN OF PROVING THAT THE REDSKINS MARKS DISPARAGED A SUBSTANTIAL COMPOSITE OF NATIVE AMERICANS WHEN EACH WAS FIRST REGISTERED	33
A.	The Redskins Marks Refer To The Washington, D.C. Football Team, Not Native American Individuals	33
B.	Defendants Have Not, And Cannot, Establish By A Preponderance Of The Evidence That A Substantial Composite Of Native Americans Viewed The Redskins Marks As Disparaging In 1967-1990.....	34
III.	PFI’S AFFIRMATIVE EVIDENCE DEMONSTRATES THAT THE REDSKINS MARKS DID <i>NOT</i> DISPARAGE A SUBSTANTIAL COMPOSITE OF NATIVE AMERICANS AT THE TIME OF THEIR RESPECTIVE REGISTRATIONS	36
A.	The 1977 All-Indian Half-Time Marching Band And Pageant Demonstrates Mainstream Native American Support For The Redskins Name	36
B.	Native Americans’ Own Extensive Use Of The Term “Redskins”	37
IV.	PFI’S LACHES DEFENSE BARS DEFENDANTS’ PETITION	38
A.	Laches Is An Available Defense To Defendants’ Cancellation Petition	38
B.	Defendants Unreasonably Delayed In Bringing Their Petition	39
C.	Defendants’ Delay Caused Substantial Economic Prejudice To PFI	39
	CONCLUSION.....	40

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>A.C. Aukerman Co. v. R.L. Chaides Const. Co.</i> , 960 F.2d 1020 (Fed. Cir. 1992).....	39
<i>Blackhorse v. Pro-Football, Inc.</i> , 2014 WL 2757516 (TTAB June 18, 2014).....	2, 26, 29, 30, 31, 34
<i>Bridgestone/Firestone Res., Inc. v. Auto. Club De L'Ouest De La France</i> , 245 F.3d 1359 (Fed. Cir. 2001).....	38, 40
<i>In re Budge Mfg., Inc.</i> , 857 F.2d 773 (Fed. Cir. 1988).....	28
<i>Cold War Museum, Inc. v. Cold War Air Museum, Inc.</i> , 586 F.3d 1352 (Fed. Cir. 2009).....	27
<i>Comedy Hall of Fame, Inc. v. George Schlatter Prods., Inc.</i> , 874 F. Supp. 378 (M.D. Fla. 1994).....	39
<i>Gantt v. Whitaker</i> , 57 F. App'x 141 (4th Cir. 2003).....	11
<i>Glynn v. EDO Corp.</i> , 710 F.3d 209 (4th Cir. 2013)	26
<i>Pro-Football, Inc. v. Harjo</i> , 567 F. Supp. 2d 46 (D.D.C. 2008).....	39, 40
<i>Harjo v. Pro-Football, Inc.</i> , 1999 WL 375907 (TTAB Apr. 2, 1999).....	25, 32
<i>Hot Wax, Inc. v. Turtle Wax, Inc.</i> , 191 F.3d 813 (7th Cir. 1999)	39
<i>In re Heeb Media, LLC</i> , 2008 WL 5065114 (TTAB Nov. 26, 2008)	27, 28, 29, 32
<i>In re McGinely</i> , 550 F.2d 481 (CCPA 1981)	40
<i>In re Pacer Tech.</i> , 338 F.3d 1348 (Fed. Cir. 2003).....	27
<i>In re Squaw Valley Dev. Co. ("Squaw Valley I")</i> , 2005 WL 2543626 (TTAB Sept. 26, 2005)	27, 28
<i>In re Squaw Valley Dev. Co. ("Squaw Valley II")</i> , 2006 WL 1546500 (TTAB June 2, 2006).....	28, 29, 30, 31, 36

In re Tam,
108 U.S.P.Q. 2d 1305 (TTAB Sept. 26, 2013)31, 32

Kumho Tire Co. v. Carmichael,
526 U.S. 137 (1999).....14

New Era Publ'ns Int'l v Henry Holt & Co.,
873 F.2d 576 (2d Cir. 1989).....39

Pro-Football, Inc. v. Blackhorse,
2014 WL 6682640 (E.D. Va. Nov. 25, 2014).....25

Pro-Football, Inc. v. Harjo,
565 F.3d 880 (D.C. Cir. 2009).....3, 38, 39, 40

Pro-Football, Inc. v. Harjo,
415 F.3d 44 (D.D.C. 2005)39

Pro-Football, Inc. v. Harjo,
284 F. Supp. 2d 96 (D.D.C. 2003) passim

Ray Commc'ns, Inc. v. Clear Channel Commc'ns, Inc.,
673 F.3d 294 (4th Cir. 2012)40

Swatch AG v. Beehive Wholesale, LLC,
739 F.3d 150 (4th Cir. 2014)3, 25

Timex Grp. USA, Inc. v. Focarino,
993 F. Supp. 2d 606 (E.D. Va. 2014)25

Trigon Ins. Co. v. United States,
204 F.R.D. 277 (E.D. Va. 2001)16

United States v. ReBrook,
58 F.3d 961 (4th Cir. 1995)11

Rules and Statutes

15 U.S.C. § 1052(a)1

15 U.S.C. § 1071(b)3

Fed. R. Evid. 801(c).....11

Fed. R. Evid. 80211

Fed. R. Evid. 80311

Fed. R. Evid. 80711

Secondary Sources

6 MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 31:1239

INTRODUCTION

Since the 1930s, the team name “Washington Redskins” has been understood to refer exclusively to the NFL’s Washington, D.C. professional football team. As the owner of one of the most famous brand names in sports history, Pro-Football, Inc. (“PFI”) secured federal registrations for six trademarks that feature the Redskins’ name for football entertainment services. The Redskins Marks have now enjoyed federal trademark protection for nearly half a century.

In recent years, there has been a public debate regarding the use of Native American-related terminology and imagery relating to sports teams, including the Washington Redskins’ team name. This debate, however, is not at issue here. Rather, the single question before the Court is whether Defendants have proved by a preponderance of the evidence, and as a matter of law, that each of the six registrations for the Redskins Marks should be cancelled as disparaging pursuant to 15 U.S.C. § 1052(a). To do so, Defendants are required to prove:

- (1) a “*substantial composite*” of Native Americans;
- (2) viewed the Redskins Marks as disparaging *in the context of PFI’s services*;
- (3) *at the time each registration was issued* (i.e., 1967, 1974, 1978, and 1990).

Defendants come nowhere close to satisfying this exacting standard. Here, *every* form of Defendants’ alleged “evidence” fails to satisfy at least one (and often all three) of these criteria, and is therefore irrelevant. Indeed, Defendants largely ignore these criteria; instead, they merely list their purported “evidence” and leave it up to the Court to figure out the details.

Notwithstanding Defendants’ lack of evidence, there is sufficient evidence before the Court to decide the instant inquiry and grant summary judgment in favor of PFI. Indeed, in 2003, on an *effectively identical record*, Judge Colleen Kollar-Kotelly of the U.S. District Court for the District of Columbia ruled that the same evidence did not support a finding that the Redskins Marks were disparaging when registered, and reversed the TTAB’s contrary decision. *Pro-Football, Inc. v.*

Harjo, 284 F. Supp. 2d 96 (D.D.C. 2003). After considering the “entire record,” *id.* at 99, Judge Kollar-Kotelly concluded:

The findings do not come close to shedding any light on the legal inquiry. There is no evidence in the record that addresses whether the use of the term “redskin(s)” in the context of a football team and related entertainment services would be viewed by a substantial composite of Native Americans, in the relevant time frame, as disparaging.

Id. at 144 (emphasis added); *see also Blackhorse v. Pro-Football, Inc.*, 2014 WL 2757516, at *35 (TTAB June 18, 2014) (Bergsman, J., dissenting) (“[t]he consequence of petitioners’ decision to rely on the same evidence previously found insufficient to support cancellation ... is that the evidence before the Board in this case remains insufficient”). The “supplemental” evidence now introduced by Defendants is just more of the same: ***none*** of it proves that a substantial composite of Native Americans found the team name “Washington Redskins” to be disparaging in 1967-1990.

By contrast, PFI has supplemented the record with compelling evidence demonstrating that in 1967-1990, mainstream Native Americans broadly supported the Redskins’ name. ***First***, the evidence shows that on Thanksgiving Day in 1977, hundreds of Native Americans competed for and participated in an All-Indian Half-Time Marching Band and Pageant at a Redskins-Cowboys game in Washington, D.C. The presentation was coordinated by the Bureau of Indian Affairs, widely covered in tribal newspapers, and broadly supported by prominent Native American organizations. ***Second***, the evidence shows that in the relevant years of 1967-1990, Native American schools, tribes, and organizations across the country routinely named their ***own*** sports teams the “Redskins.”

To be sure, the present debate over the Redskins’ name “arouse[s] the passions of committed individuals on both sides of the issue.” *Harjo*, 284 F. Supp. 2d at 99. But the role of this Court is to evaluate evidence, not emotion. On the current record, PFI’s motion should be granted and Defendants’ motion denied.

PROCEDURAL HISTORY

The Redskins Marks were registered for use in connection with “entertainment services” in the form of professional football games as follows (*see* Dkt. 51 ¶8):

Reg. No. 836,122	THE REDSKINS (stylized)	Sept. 26, 1967
Reg. No. 978,824	WASHINGTON REDSKINS	Feb. 12, 1974
Reg. No. 986,668	WASHINGTON REDSKINS & design	June 18, 1974
Reg. No. 987,127	THE REDSKINS & design	June 25, 1974
Reg. No. 1,085,092	REDSKINS	Feb. 7, 1978
Reg. No. 1,606,810	REDSKINETTES	July 17, 1990

In 1992, seven Native Americans filed a petition to cancel the Redskins Marks on the grounds that the marks disparaged Native Americans. (Compl. ¶16). In 1999, the TTAB scheduled the registrations for cancellation. (*Id.* ¶17). In 2003, Judge Kollar-Kotelly reversed the TTAB on two grounds: (1) the record evidence did not support a finding of disparagement; and (2) the claims were barred by laches. *Harjo*, 284 F. Supp. 2d at 135-36, 144. The D.C. Circuit ultimately affirmed on laches, without disturbing the disparagement ruling. *Id.*, 565 F.3d 880 (D.C. Cir. 2009). On August 10, 2006, Defendants filed their Petition to cancel the marks on the same grounds. (Compl. ¶20).

On June 18, 2014, the TTAB issued a split decision (with Judge Bergsman dissenting) scheduling for cancellation all six Redskins Marks. PFI filed the instant action pursuant to 15 U.S.C. § 1071(b). Where a party to such an action exercise its right to supplement the TTAB record, the Court reviews the entire record *de novo*, with no deference to the TTAB’s findings. *Swatch AG v. Beehive Wholesale, LLC*, 739 F.3d 150, 156 (4th Cir. 2014). Here, PFI’s supplemental evidence includes: (1) three expert reports;¹ (2) the declaration of Bruce Allen, President of the Washington Redskins; and (3) documents so identified in the Declaration of Jessica A. Rose (“Rose”).

¹ *See* Declarations of David K. Barnhart, Ex. 2; Dr. Hart Blanton, Ex. 1; Dr. and Ronald R. Butters, Ex. 3. PFI also relies on the following four experts reports submitted in *Harjo*: Declaration of Dr. Jacob Jacoby, Ex. 1; Barnhart Ex. 1; and Butters Exs. 1 & 2.

PFI'S STATEMENT OF UNDISPUTED MATERIAL FACTS²

A. PFI's Marks Were Published, Registered And Used Without Opposition Until 1992

1. "Washington Redskins" is one of the most famous brands in the history of sports. Rose Ex. 120-127; Allen ¶¶ 8-11. To protect this valuable asset, PFI secured federal registrations for six trademarks beginning in 1967 that feature the "Redskins" name. No oppositions were filed prior to the Redskins Marks' publications or registrations, nor were any lawsuits filed against the team by the few Native American activists who claim to have disliked the team name in the 1970s. In fact, it was not until 1992 when, in order to oppose upcoming celebrations of the 500th anniversary of Christopher Columbus's arrival in North America, that Native American activist Suzan Harjo first organized and filed a petition seeking to cancel the Redskins Marks. (Compl. ¶¶34-38); Rose Exs. 3-7 (Nos. 53-54); *id.* Ex. 31.

B. By 1967, The Name "Redskins" In Connection With PFI's Services Was Understood To Identify The NFL Team, Not Native American Individuals

2. Starting in the 1930s, the American public understood that "Redskins" identified a Washington, D.C. professional football team. *See* Butters Ex. 1 at 2; Butters Ex. 3 at 5; Barnhart Ex. 1 at A9027; Rose Exs. 120-127; Compl. ¶35; Rose Exs. 120-122. By 1967, this separate commercial meaning of "Redskins" far surpassed in frequency and significance the earlier meaning of "redskin" for an American Indian. *See* Butters Ex. 1 at 12-15; Butters Ex. 2 at 4, 6-7; Butters Ex. 3 at 4-7; Barnhart Ex. 1 at A9026-29; Rose Exs. 41 (at 132:5-10), 42 (at 161:18-162:4, 174:24-176:2), 43 (at 206:15-25), 44 (at 60:23-61:17), 147 (at 23:19-24:6, 39:4-9). For example, in 1977, "Redskins" had its own dictionary entry, defined as "The National Football League team from Washington." Rose Ex. 145 (*American Heritage School Dictionary*, for which Nunberg was Usage Editor and Usage

² Abbreviated herein as "PFI SMF." In addition, PFI hereby incorporates the evidence cited in its responses to Defendants' Statement of Material Facts ("Def. SMF").

Panel Chair); *see also* Allen ¶¶8-11; Rose Exs. 3-7 (No. 1), 122-127.

C. Native Americans Did Not View The Redskins Marks As Disparaging In 1967-1990

1. Native American Participation At The 1977 All-Indian Honor Band & Pageant

3. The evidence demonstrates widespread *support* for the team and its name among mainstream Native Americans in 1967-1990. For example, on November 27, 1977, hundreds of Native Americans from more than 80 tribes participated in an unprecedented celebration of Native American culture at for the Redskins-Cowboys Thanksgiving Day game at Robert F. Kennedy Stadium: The All-Indian Half-Time Marching Band and Pageant. This Native American cultural event was widely reported in tribal newspapers. The Bureau of Indian Affairs (“BIA”) even produced a half-hour documentary commemorating the event that was broadcast in local markets. Rose Exs. 2 (video), 98-111, 135-138, 141-143, 152-157; Allen ¶¶2-5.

4. This event featured a performance of the National All-Indian Honor Band, which comprised 150 Native American high school students selected from over 600 applicants. Rose Exs. 135-137.³ The Indian Honor Band was assembled by renowned Native American composer Dr. Louis W. Ballard of the Quapaw-Cherokee tribe, who also composed original music for the event. Rose Exs. 135 & 138; Allen ¶3.

5. In addition, a drill team of 50 Native American girls from the Institute of American Indian Arts (“IAIA”) and Intermountain Indian School (“IMIS”) performed the words to the “Star Spangled Banner” in traditional Plains Indian sign language while dressed in the native dress of their tribes. Rose Ex. 2 at 3:44-4:25, 13:00-14:25. Further, traditional Native American dances, including the Eagle Dance, Harvest Dance, and Buffalo Dance, were performed by the Laguna-Pueblo, Zuni-

³ Many students selected were profiled in their local newspapers. Rose Exs. 105-106, 108, 136-137, 143, 154, 156, 157.

Pueblo and Jemez-Pueblo tribes. *Id.* at 21:00-22:30. All participants rehearsed at IMIS in Utah before flying to Washington, D.C. to perform at the Redskins game. *Id.* at 3:00-10:10; Ex. 110.

6. The Redskins worked closely with the BIA and National Indian Education Association (“NIEA”) to organize this performance. Joel Margolis (the Redskins’ Business Manager) and John Olguin (a member of the Isleta tribe and a member of the Redskins’ marching band), participated in meetings with the BIA and Native American organizations about the show. Rose Ex. 138; Allen ¶¶4-5. Thomas “Buck” Wright Jr., who assisted in preparing and planning for Redskins half-time shows, coordinated the logistics of the performance. Allen ¶5. The show was announced in the November 27, 1977 edition of *Pro!*, the official magazine of the NFL. *Id.* ¶6 & Ex. 1.

7. Prominent Native American organizations and individuals participated in and/or supported this event, including:

- a. **National Tribal Chairmen’s Association (“NTCA”)**: NTCA was the primary national Native American organization during the mid- to late-1970s. Rose Ex. 139 at viii-ix. NTCA was composed of the elected tribal chiefs from more than 140 federally registered tribes. *Id.* Exs. 138 & 140. During its annual convention in May 1977, NTCA adopted a resolution formally endorsing the presentation, *id.* Exs. 110 & 138, and participated in meetings with the Washington Redskins and the BIA about the project. *Id.* Ex. 110.⁴
- b. **National Indian Education Association**: NIEA is the premiere organization advocating for Native Americans on educational issues. See <http://www.niea.org/>.⁵ NIEA endorsed the event and gave it its “full support.” *Id.* Ex. 110. John Olguin of NIEA was a liaison between BIA and the Washington Redskins. *Id.* Mr. Olguin was also a member of the Washington Redskins marching band. *Id.* Ex. 138; Allen ¶5.
- c. **Haskell Institute**: Haskell Institute was a post-secondary coeducational vocational training school for Native Americans. Fred Shields, Haskell’s Music Director in 1977, served as the

⁴ See also Rose Ex. 40 at 197:16-198:12 (Riding In agrees that NTCA is an advocate “of and for our Indian people”); *id.* Ex. 30 at 108:22-109:6.

⁵ Apodaca describes NIEA as having a mission of promoting “positive constructive education opportunities and subject matter of Indians themselves, of Indian students themselves, and also to foster a positive teaching of Indian history, culture, et cetera.” Rose Ex. 30 at 17:7-18:21. He further describes NIEA as a “reputable” and “influential” organization and testified that its positions reflect those of mainstream Native Americans. *Id.*; see also *id.* Ex. 40 at 100:18-101:10 (Riding In).

co-director of the All-Indian Honor Band. Rose Ex. 40 (at 85:4-16). Fourteen students from Haskell participated in the All-Indian Honor Band, including Angelina Valadez, who was crowned Miss Haskell 1977-1978. *Id.* Ex. 109. The day after the show, Haskell's President, Wallace Galluzi, expressed disappointment that the event was not televised nationally. *Id.* Ex. 14. Nevertheless, a story in *The Indian Leader* (Haskell's campus newspaper) described the event as a "highlight" of the school year. *Id.* Ex. 142.⁶

- d. ***Institute of American Indian Arts:*** IAIA is a Native American school focused on fine arts education. See <http://www.iaia.edu/>. Twenty-five female students from IAIA performed as part of the all-girls drill team. Rose Exs. 2 (at 13:15-14:35), 110 & 136. A teacher at IAIA created four banners depicting the great chiefs Powhatan, Sitting Bull, Geronimo and Seattle, which were featured in the pageant. *Id.* Exs. 136 & 2 (at 3:09-3:43, 18:26-21:00).
 - e. ***Intermountain Indian School:*** IMIS was a Native American school in Bingham City, Utah. Twenty-five of its students participated in the all-girls drill team. Rose Exs. 110, 137; *id.* Ex. 2 (at 4:30-10:10). A dress rehearsal of the show was performed for IMIS students before the group travelled to Washington D.C. *Id.* (at 9:00).
 - f. ***Laguna-Pueblo, Zuni Pueblo and Jemez-Pueblo Tribes:*** Members of the Laguna-Pueblo, Zuni Pueblo and Jemez-Pueblo tribes performed traditional tribal dances before the pre-game ceremonies. *Id.* Ex. 110. Transportation to Washington D.C. for these dancers was paid for by their tribes. *Id.*
 - g. ***Dr. Louis W. Ballard:*** Dr. Ballard, the musical director of the show, was a well-known Native American composer. *Id.* Ex. 40 (at 72:13-73:4) & 136. Dr. Ballard was quoted in many Native American newspapers thanking the Redskins for giving the Native American students an opportunity to perform. *Id.* Exs. 100 & 135. Dr. Ballard appears in and narrates the BIA documentary about the event. *Id.* Ex. 2.
 - h. ***Gracie Ann Welch:*** Gracie Ann Welch of the Chemehuevi Mojave tribe, Ms. Indian America 1977, made an appearance during the show. *Id.* Exs. 110 & 2 (at 23:30-24:00).
8. The All-Indian Half-Time Marching Band and Pageant was a grand celebration of Native American heroes, heritage and history that closely associated Native Americans with the Washington Redskins. Preparations for the event—and the show itself—were widely and favorably reported in Native American newspapers such as *The Taos News*, *The Navajo Times*, and *The Cherokee Advocate*. Rose Exs. 98-111, 135-138, 140-142. There is ***no evidence*** that any person or

⁶ Thus, while Defendants argue that Haskell students were offended by the Redskins' name (Br. 15-16), this obviously was not the case; Defendants' expert Riding In, himself a former Haskell student, conceded the half-time show was "a big deal at Haskell." Rose Ex. 40 at 75:19-22.

organization, Native American or otherwise, objected to the presentation. Rose Ex. 40 at 78:5-79:2, 91:8-92:20; Allen ¶7.

9. Riding In conceded that the broad Native American participation in and support for the event is “inconsisten[t]” with the position that the Redskins’ name disparages Native Americans. Rose Ex. 40 at 90:6-11. The 1977 All-Indian Half-Time Marching Band and Pageant performed on Thanksgiving Day is compelling evidence that the Washington Redskins and Native Americans embraced and honored each others’ respective histories.

2. Native Americans Often Named Their Sports Teams “Redskins” In 1967-1990

10. In 1967-1990, “Redskins” was routinely used by Native American tribes and organizations (including youth and adult leagues) as the name for their sports teams—powerful evidence that the term was not considered disparaging when used in the sports context. Examples include:

1968: The Whiteriver Redskins	1978: The Damon Freight Redskins
1969: The Canyon Day Redskins	1982: The Omak Redskins
1974: The Red Mesa Redskins	1984: The Seminole Redskins
1975: The Navajo Nation Redskins	1985: The St. John’s Redskins
1976: The Redskins “reservation team”	1989: The Fort Hall Redskins

These and *dozens* of other “Redskins” teams were reported on, non-controversially, in Native American publications such as *The Fort Apache Scout*, *The Navajo Times*, and *The Cherokee Advocate*. Rose Exs. 46-91; Butters Ex. 3 at 32-34 & Ex. D; *cf.* Rose Ex. 14.

11. Schools that are predominantly Native American have named their sports teams the “Redskins” as well. For example, “Redskins” is the nickname for Red Mesa High School, a Native American school located on the Navajo Indian Reservation. *Id.* Exs. 3 (Nos. 17-19), 10-11, 116. Wellpinit High School in Washington, which is predominantly Native American and serves the Spokane Reservation, has used the nickname “Redskins” for over 100 years. *Id.* Exs. 91, 134.

12. Phoenix Indian High School called its student newspaper “The Redskin” during 1967-1989, and its 1981 yearbook was called “Redskin.” *Id.* Exs. 92-96.

3. Native Americans Play Under, Use, And Support PFI's Team Name

13. The team name “Redskins” was selected in 1933 by then-owner George Preston Marshall. At that time, four players—Louis Weller,⁷ John Orien Crow, David Ward and Larry Johnson—and the team’s head coach, William “Lone Star” Dietz, identified as Native Americans. (*Id.*; Compl. ¶34; Answer ¶34); Rose Exs. 113-115, 131.

14. Defendants Tsothigh and Gover agreed that using the word “Redskins” when specifically “talking about a football game” is “not offensive.” Rose Exs. 24 at 129:22-130:25 (Tsothigh); 16 & 15 at 114:18-115:3 (context “probably” mattered in his use of “Redskins” to refer to team); *see also id.* Ex. 38 at 152:4-11, 144:10-15 (Nunberg admits that “Redskins” “denotes the Washington Redskins football team,” which is “distinctive of [the] usage of the word ‘redskins’ when applied to individuals”), 129:14-130:4, 147:5-13; *id.* Ex. 33 at 246:9-23 (same as to Ross).⁸

15. A survey conducted in 2003-2004 by the highly reputable (and independent) National Annenberg Election Survey questioned 768 Native Americans in 48 states, and found that **90%** did not find the Washington Redskins’ name to be offensive. *Id.* Ex. 18; Blanton Ex. 1 at 18-19.

16. Former U.S. Senator Ben Nighthorse Campbell, a Native American named by Defendants as a fact witness (but who defied a subpoena for his deposition), was quoted in the *Pueblo Chieftain* in 1988 describing the Washington Redskins’ name as used with “dignity and respect.” Rose Ex. 32.

17. On January 16, 1992, the Inter-Tribal Council, Inc., issued a resolution signed by five tribal chiefs and representatives supporting the Washington Redskins’ team name. *Id.* Exs. 128 & 130. Other Native American chieftains and tribal members have expressed similar support for the team

⁷ Weller was a charter inductee into the American Indian Athletic Hall of Fame. Rose Ex. 114.

⁸ Nunberg conceded he “didn’t provide an opinion as to ... the word ‘redskins’ as it appears in the marks and as those marks are used in connection with the goods and services.” Rose Ex. 39 at 88:1-6. These errors are addressed by Butters. *See* Butters Ex. 2 at 4, 6-7; Butters Ex. 3 at 6-7.

name. *Id.* Ex. 129.

18. The term “skins” has been used conversationally or informally by Native Americans. *Id.* Exs. 8 (at 133:9-134:18), 12, 24 (at 131:22-132:2), & 40 (at 83:9-84:25).

19. Native American newspapers in 1967-1990 used the words “redskin” (and derivations) in headlines in referring to Native Americans. *See, e.g.*, Rose Exs. 97 (“Pale-Face Tourism Program Brings Glow To Redskin Faces,” *The Navajo Times*, June 22, 1967) & 110 (“Washington-Dallas Game Will Feature Skins,” *The Navajo Times*, November 3, 1977).

20. The term “redskin” has been used on Native American reservations as the name for a street, motel, and movie theater. Rose Exs. 117-119; *id.* Ex. 3 (No. 59).

21. Given the history of the word, it is not surprising that many Native Americans use “Redskins” to name their own sports teams: The word was *coined* by Native Americans to describe themselves to early French explorers and was not regarded as offensive, a fact conceded by Defendants’ linguistics expert. Rose Ex. 39 at 179:14-181:4; Criss Ex. 16 at 14-15.

D. Defendants’ Claims Are Barred By Laches

22. Each Defendant was aware of the Redskins Marks for many years before his or her eighteenth birthday, and nothing preventing them from filing the Petition immediately after turning eighteen. Rose Exs. 3-7 (No. 16), 8 (at 29:8-31:13), 13 (at 45:13-16, 48:21-49:10), 15 (at 35:10-36:8), 24 (at 28:1-29:4) & 146 (No. 10).

23. The only excuse offered by any Defendant for his or her delay in filing was a lack of awareness of his or her legal rights. *Id.* Exs. 8 (at 85:9-87:7); 13 (at 62:12-64:13); 15 (at 37:13-39:6); 17 (at 82:11-83:4); & 24 (at 140:7-141:8).

24. PFI continued to invest in developing enormous goodwill in 2000-2006. For example, revenue for Redskins-attributable licensed merchandise exceeded ██████████ in 2006. The valuation of PFI in 2006 increased by ██████████ to ██████████. And in 2006 alone: (1) *Forbes*

valued PFI's brand management at \$140 million; (2) PFI contributed over [REDACTED] to NFLP's marketing and promotional expenses; and (3) PFI revenues exceeded [REDACTED]—a [REDACTED] increase over the previous year. *Id.* ¶¶6-14. Detailed breakdowns of these figures for each financial year 2000-2006 are in the joint stipulation relating to PFI's laches defense. (*Id.* Ex. 132, ¶¶6-14).

PFI'S RESPONSES TO DEFENDANTS' STATEMENT OF MATERIAL FACTS⁹

A. PFI's Intent In Selecting The Team Name In 1933 Is Not Relevant To How A Substantial Composite Of Native Americans Viewed The Marks In 1967-1990¹⁰

¶¶1-2: Defendants' claim that the change of the team name from the "Braves" to the "Redskins" in 1933 was to avoid confusion with the Boston Braves is only part of the story: "Redskins" in particular was selected because it *continued* to honor Native Americans, including because "the team is to be coached by an Indian, Lone Star Dietz, with several Indian players." Rose Exs. 115, 131; *Harjo*, 284 F. Supp. 2d at 104. Regardless, PFI's intent in naming the team in 1933 is not relevant.

B. Defendants' References Regarding The Word "Redskin" Are Not Relevant To How A Substantial Composite Of Native Americans Viewed The Marks In 1967-1990

1. Defendants' Dictionary Sources Are Not Relevant¹¹

⁹ Throughout Def. SMF, Defendants rely on newspaper articles and other published materials as support for the truth of the matter asserted therein. *See, e.g.*, Criss Exs. 4, 5, 24, 29-55, 61, 68-82, 84-107, 110-112, 118-119, 121-123, 132, 136-146, 151-279. This evidence is inadmissible hearsay and should be excluded. FED. R. EVID. 801(c), 802; *see also Gantt v. Whitaker*, 57 F. App'x 141 (4th Cir. 2003) ("newspaper articles are inadmissible hearsay") (citing *United States v. ReBrook*, 58 F.3d 961, 967 (4th Cir. 1995)). Nor do Defendants argue that these materials fall into a hearsay exception or are subject to the residual hearsay exception. FED. R. EVID. 803, 807.

¹⁰ Because the headings in Def. SMF are not statements of undisputed facts supported by evidence, PFI's response does not address Defendants' headings, which contain nothing but argument. In addition, ¶¶5, 13, 20, 54 & 58 fail to include any record cites "to support the listed facts as alleged," L.R. 56.B, and thus do not present any admissible facts for the Court's consideration.

¹¹ PFI's linguistics experts, Dr. Ronald Butters and David Barnhart, base their findings on considerable professional experience and substantial scientific research. *Butters*, an emeritus professor and former chair of the Department of English at Duke University, holds a Ph.D. in
(footnote continued)

¶¶3-4: Defendants argue that a few dictionary usage labels establish that, in certain circumstances, the term “redskin” as it applies to an individual might have been considered offensive in 1967-1990. This “evidence,” however, is not relevant. **First**, these definitions reflect (at best) the views of the general public, not of Native Americans, and “perceptions of the general public are irrelevant to determining if the marks are disparaging to Native Americans.” *Harjo*, 284 F. Supp. 2d at 134. **Second**, the usage labels cited indicate not that the word “redskin” *is* offensive but that it *may* or *may not* be offensive. Thus, whether “redskin” is offensive depends on the context of its use. *See Harjo*, 284 F. Supp. 2d at 130 (usage label of “often” offensive “means that in certain contexts the term ‘redskin(s)’ was not considered offensive”). Because these usage labels do not consider the word in the context of the name of PFI’s football team, they are not probative. **Third**, none of the entries cited describe the term as “disparaging,” which Nunberg concedes is not synonymous with “offensive.” *Rose Ex. 37* at 64:4-17. **Fourth**, even if the Court were to consider usage labels as having any probative value, Defendants offer only six labels from 1967-1990; by comparison, Barnhart offered **63** dictionaries spanning 1967-1990, concluding that the term “redskin” was not disparaging.¹² *Barnhart Ex. 2* at 2-4, 10; *see Barnhart Ex. 1* at A9028-29.

English with a concentration in linguistics. *Butters Ex. 3, Ex. A*. He has been a member of Duke’s prestigious English Department for 48 years and was a recipient of a 1986 Fulbright award. Butters is the former General Editor of the American Dialect Society publications and member of the Editorial Board of the *International Journal of Speech, Language, and Law*. **Barnhart**, a linguist with a specialty in lexicography, is the editor and publisher for Lexik House publishers. *Barnhart Ex. 2, Ex. A*. Barnhart has served as a general editor of *The Barnhart Dictionary of New English* since 1963. He has also been an editor for *The World Book Dictionary* and *Thorndike-Barnhart* school dictionaries.

¹² 97% of all contemporaneous dictionaries that Barnhart reviewed either contained no entry for “redskin”; labeled the term “informal”; or employed a qualified or context-dependent usage label, such as “often” or “usually.” *Barnhart Ex. 2* at 4. In contrast, dictionaries in 1967-1990 consistently employed unqualified and strongly negative usage labels for terms such as “nigger,” “spic,” and “chink.” *Id.* at 9; *Butters Ex. 2* at 6. Defendants also misstate Butters’ position in ¶4. First, Butters testified that editors tend to err on the side of caution, so lexicographers are often slow to **remove** (footnote continued)

2. Defendants' "Other Written Sources" Are Not Relevant

¶¶5-11: Defendants also refer to "other written sources" that they contend recognized the term "redskin" as offensive. For similar reasons, however, such evidence simply is not relevant, as these "written sources" do not specifically reflect the views of Native Americans, nor do they consider the specific context of PFI's use, *i.e.*, as a team name. *Harjo*, 284 F. Supp. 2d at 131, 134.¹³ In any event, the examples from 1967-1990 demonstrate only that "redskin" is a neutral, informal, and dated counterpart to the more formal "American Indian" or "Indian." *See* Butters Ex. 2 at 3-5; Butters Ex. 3 at 9-11, 14, 17-32; Rose Exs. 38 (at 128:3-11), 44 (at 69:2-7), 147 (at 171:3-172:17).¹⁴

3. Defendants' Four Witness Declarations Are Not Probative

¶12: The personal experiences of four Native Americans with the word "redskin" are irrelevant to whether the *team* name disparaged a "substantial composite" of Native Americans in 1967-1990. *See also Harjo*, 284 F. Supp. 2d at 129 (views of seven petitioners, including Harjo and Apodaca, "clearly do not constitute a 'substantial composite' of Native Americans").

C. Defendants' "Evidence Of Usage" Of The Word "Redskins" Is Not Relevant To How A Substantial Composite Of Native Americans Viewed The Marks In 1967-1990

1. Nunberg's "Sentiment Analysis" Is Irrelevant

¶¶13-16: Nunberg's opinion that the term "redskin" is more often paired with negative

labels—not to *add* them. Rose Ex. 148 at 16-17. Second, Butters does not concur with Nunberg's unsupported assertion that dictionaries lag in introducing cautionary labels. Butters Ex. 3 at 34-35; *see also* Barnhart Ex. 2 at 1 (examples of up-to-date labels).

¹³ "[T]he ultimate legal inquiry is whether the six trademarks at issue may disparage Native Americans when used in connection with Pro-Football's services and during the relevant time frame. The ultimate legal inquiry is not whether the term 'redskin(s)' is a pejorative term for Native Americans." *Harjo*, 284 F. Supp. 2d at 131.

¹⁴ Contrary to Defendants' argument about Nunberg's *Harjo* research (¶19), the record shows newspapers using "redskin" in direct reference to Native Americans. *See* Butters Ex. 3 at 9, 24-28. (Notably, Nunberg's *Harjo* research was limited to post-1982 articles, after five of the six registrations issued.)

adjectives than is the word “Indian” is pure *ipse dixit* and thus legally irrelevant. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 157 (1999). Nunberg conducted no research on the term “redskin” in the context of Washington’s team name, nor on the perceptions of Native Americans. Rose Ex. 39 at 88:1-6, 201:24-202:2. In any event, Nunberg’s sentiment analysis is irreparably flawed. **First**, over 25% of the time “redskin” was used with *positive* adjectives, demonstrating the importance of context.¹⁵ Butters Ex. 3 at 16. **Second**, at best, Nunberg’s analysis reveals only that negative adjectives are used more frequently with the less formal term “redskin” than the more formal term “Indian”—an unsurprising result. *Id.* at 14-15; Rose Ex. 44 at 70:24-71:9. **Third**, Nunberg’s analysis is irredeemably skewed and thus misleading, given the far greater occurrence of “Indian” than “redskin” in the sample (a ratio of 39:1).¹⁶ Butters Ex. 3 at 14; Rose Ex. 44 at 77:2-78:25. **Fourth**, Nunberg’s analysis of 1920-1979 covers only twelve years of the relevant time period. Butters Ex. 3 at 13; Rose Ex. 44 at 79:7-81:24. **Fifth**, Nunberg’s research was based on a cursory review of “snippets” of text, lacking necessary context. Butters Ex. 3 at 13 Rose Ex. 39 at 51:8-52:10.

A proper review of 1967-1990 usage reveals “redskin” to have been a neutral synonym for “American Indian.”¹⁷ *See* Butters Ex. 1 at 7-11. The vast majority of scholars in 1967-1990 who

¹⁵ Nunberg strains to distinguish the many pairings of “noble redskin” as patronizing sentimentality or irony, yet offers no evidence supporting such a distinction. Butters Ex. 3 at 17, 29-30.

¹⁶ The ratio is so imbalanced because “redskin” is a dated term. *See infra* PFI’s responses to Def. SMF ¶¶17-19.

¹⁷ *See* Barnhart Ex. 1 at A9028-29; Butters Ex. 1 at 2, 7, 10-12, 14-15; Butters Ex. 3 at 11, 17, 19-20, 22-24; Rose Exs. 42 (at 168:3-19, 233:4-240:21), 147 (at 143:7-16), 43 (at 210:19-211:12). One set of examples throughout 1967-1990 is the widespread, continuing use of the literary terminology adopted by Philip Rahv in 1949, *see* Butters Ex. 1 at 8-10; *id.* Ex. 3 at 28-29, whereby Rahv characterized the great American authors according to how they fit into a Europeanist (“palefaces”) or nativist (“redskins”) tradition. (Notably, Rahv labels Mark Twain, an undisputed American icon, as a “redskin.” Criss Ex. 27 at 1.) Defendants misunderstand Rahv’s classifications, incorrectly interpreting (at ¶9) his statement that “[a]t present, the redskins are in command of the situation, and

(footnote continued)

studied negative nicknames ignored “redskin.” Butters Ex. 1 at 11-12. Even the scholars Nunberg cites consider “redskin” to be unlike disparaging racial terms (*e.g.*, “nigger,” “kike,” “chink”). *Compare* Rose Ex. 39 at 133:3-135:4 *with* Butters Ex. 3 at 8-9; *see* Barnhart Ex. 2 at 9.

2. Nunberg’s Analysis Of 20th Century “Disuse” Of “Redskin” Is Irrelevant

¶¶17-19: Nunberg’s conclusion that in 1967-1990 the word “redskin” fell into disuse or its use was avoided because it was disparaging (rather than because it was archaic or dated) is pure speculation not supported by the evidence. Butters Ex. 3 at 8-9, 11, 24-25, 27; Butters Ex. 2 at 3; Rose Ex. 44 at 60:9-16. Likewise, Defendants cite no evidence supporting their blanket contention that “newspaper writers avoid the term redskin(s) because it is ... pejorative.” (¶17). Butters Ex. 2 at 3. As *Harjo* held: “There is no evidence to support the conclusion that the drop-off of the use of the term ‘redskin(s)’ as a reference for Native Americans is correlative with a finding that the term is pejorative.” 284 F. Supp. 2d. at 132. In short, Defendants’ analysis is based on mere speculation.

D. Barnhart Did Not Admit That The Redskins Marks Are Disparaging

¶¶20-21: Contrary to Defendants’ insinuations, Barnhart did not admit that the Redskins Marks are disparaging. In discussing the pure word “redskin,” Barnhart said that “disparaging is too strong a term to apply in this case. It certainly *might* be offensive.” Criss Decl. Ex. 14 at 181:9-12. As he explained, whether a word is offensive turns on context. Rose Ex. 41 at 54:14-55:7; *id.* Ex. 42 at 164:9-20; Barnhart Ex. 1 at A9026; Barnhart Ex. 2 at 3-4. Because Barnhart was not referring to use in the context of the Washington Redskins’ team name, this testimony is immaterial.

literary life in America has seldom been so deficient in intellectual power” as an inferential castigation of Native Americans. But in Rahv’s literary analysis, “redskin” is not a derogatory label (*see* Butters Ex. 1 at 9-10; Butters Ex. 3 at 28-29), and here “intellectual” means “cerebral,” as contrasted with “emotional”: “palefaces” write from the head and “redskins” from the heart.

E. Defendants Provide No Evidence That A Substantial Composite Of Native Americans Understood The Redskins Marks To Be Disparaging In 1967-1990

1. The 1962 Haskell Article Has No Bearing On The Redskins Marks

¶¶22-25: Defendants rely heavily on their expert, Dr. James Riding In,¹⁸ whose opinions should be excluded from evidence (or at least afforded no weight) because his scholarship is both unsound and irreparably biased. Riding In concedes that his task was to “look for evidence of Indian opposition ... to the name.” Rose Ex. 40 at 52:14-25. Far from conducting thorough and balanced scholarship, Riding In intentionally limited his research to locating examples that *support* the conclusion that Native Americans opposed the Washington Redskins’ team name.¹⁹ For example, Riding In did not locate *any* information concerning the performance of All-Indian Honor Marching Band and Pageant for the Washington Redskins (*see* PFI SMF ¶¶3-9) in which hundreds of Native American students competed and participated. Rose Ex. 40 at 73:9-75:1. And although Riding In admitted he became aware of Native American support for the name (as byproduct of his search for evidence to the contrary), he did not include this information in his report. *Id.* As this Court has observed, an expert’s opinion must be “arrived at by a reliable mode of analysis and ... not driven by a desire to reach a particular outcome”; otherwise, “the witness ceases to be an expert ... and becomes, instead, just another legal practitioner for the client.” *Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 290 (E.D. Va. 2001).

In any event, most of the historical events Riding In describes are irrelevant to the issues before the Court because they do not concern Native American views about the Washington Redskins team name in 1967-1990. As to the 1962 Haskell Institute article (¶¶22-25)—which

¹⁸ Defendants rely on the opinion of Riding In in ¶¶22-25, 27-31, 40, 44, 47 & 53.

¹⁹ Riding In conceded that before beginning his research, he believed Native Americans objected to the name. Rose Ex. 40 at 26:5-28:18. Riding In also said he personally finds the Redskins’ name offensive, and that he has previously expressed this view to the press for attribution. *Id.* at 28:1-18.

concerned the use of slang terms on campus at Haskell Institute—the single sentence referenced is irrelevant not only because it is outside of the applicable time frame but also because it sheds no light on Native Americans’ attitudes toward the *Washington Redskins*’ team name.²⁰ In contrast, Haskell’s students, teachers and principal participated fully in the All-Indian Half-Time Marching Band and Pageant during the Washington Redskins-Dallas Cowboys game in 1977. (PFI SMF ¶19). For these and the further reasons detailed by Dr. Hart Blanton,²¹ the 1962 article cannot be generalized to the larger Native American population. Blanton Ex. 1 at 6-14, 17, *see id.* at 15-16.

2. The Views Of The Attendees At The 1972 Meeting With Mr. Williams Did Not Represent The Views Of A Substantial Composite of Native Americans

¶¶26-35: Defendants place great emphasis on a 1972 meeting between certain Native American activists and then-Redskins President, Edward Bennett Williams. What Defendants describe as a “delegation” was, in fact, just seven Native Americans who attended a meeting at the behest of Leon Cook, a self-proclaimed activist who had been recently elected President of NCAI. Rose Ex. 29 at 29:7-22, 60:10-61:20. Opposing the team name was entirely Cook’s idea—he proposed it to the NCAI executive committee (consisting of 15-16 individuals) as well as a few representatives from several other militant Native American activist organizations, such as AIM and NIYC, who then agreed to go along with it. Cook Decl. ¶8; Rose Exs. 29 (at 44:24-49:17) & 40 at (141:13-25).

²⁰ This article reports on Haskell students’ own use of certain slang terms in reference to each other, Rose Ex. 40 at 117:22-119:6, but it does not purport to speak to students’ feelings about the Washington Redskins. Further, Riding In admitted he knows nothing about the methodology used in the article. *Id.* at 108:11-109:12. As Riding In himself noted, the single sentence in the article about students’ use of the word “redskin” is “just kind of thrown in there.” *Id.* at 120:8-12. Further, Defendants’ claim that the population of Haskell was a “microcosm of the national American Indian population” (¶24) is not supported by the evidence; Riding conceded that Haskell’s student body is primarily teenagers, whose opinions are not necessarily representative of the larger Native American population. Rose Ex. 40 at 113:1-11, 120:13-122:10.

²¹ Blanton holds a Ph.D. from Princeton University and is a tenured professor at the University of Connecticut. He regularly teaches classes and gives presentations and conducts research social influence, group psychology, and other relevant areas. Blanton Ex. 1, Ex. A.

There is no evidence that Cook or anyone on the NCAI executive committee sought input or approval from the larger NCAI membership. *Id.* Ex. 39 at 68:11-14. In fact, Defendants identify no evidence that a substantial composite of Native Americans were even aware of Cook’s plan, much less supported it.²² Further, Cook admits that that each of the seven Native Americans who attended the 1972 meeting were “activists.” *Id.* Ex. 29 at 60:10-61:11. As *Harjo* recognized, “this evidence does not represent a ‘substantial composite’ of Native Americans.” 284 F. Supp. 2d at 135.

Recognizing this, Defendants ask the Court to simply assume that positions taken by the leadership of NCAI, AIM, NYIC, AIO or ILIDS—the organizations associated with the 1972 meeting with Williams (¶¶29-31)—represented the views of a substantial composite of Native Americans at the time. There is no basis whatsoever to support such an inference. To extrapolate broader population attitudes from the behaviors of these few activist leaders, or even its membership, is “critically flawed,” Blanton Ex. 1 at 19, because, *inter alia*: (1) members are not selected at random and do not necessarily reflect the broader population; (2) one cannot infer that even a substantial composite of *members* opposed the Redskins’ team name, let alone infer such beliefs to be the views of Native Americans as a whole; (3) there are “conformity pressures” within these groups; and (4) power influences make group representation unreliable. *Id.* at 19-34, 36, 39-40. Blanton concludes that Riding In lacks “any sound empirical basis from which to infer national attitudes of Native Americans” towards PFI’s use of the term “Redskins.” *Id.* at 36.²³ The decisions

²² Defendants claim that in 1973, the NCAI approved by voice vote a “resolution” opposing the Washington Redskins’ team name. However, no such documents exist in the files of NCAI, nor does any witness recall seeing, Rose Ex. 29 at 74:13-75:1, even though Apodaca testified that “[a] final resolution reflect[ing] the assimilation of the various drafts” would have been produced. Apodaca Decl. ¶10.

²³ The deficiencies in Defendants’ evidence become all the more obvious when considered in a different context. Certainly, for example, it would be incorrect to infer that every action taken by the 100 members of the United States Senate necessarily reflects the personal opinions of the 318
(footnote continued)

of a few self-identified activist leaders cannot automatically be imputed to the views of its entire membership, let alone the entire Native American population.

Moreover, the record is replete with evidence that Native Americans at the time were not offended by the team name or the use of the word “Redskins” in the context of sports. Rose Exs. 2, 98-111, 135-138, 141-143, 152-157; *id.* Exs. 46-91. To the contrary, the evidence shows that the views of mainstream Native Americans—and the less militant, more conservative Native American groups who represented them (including the NTCA and NIEA)—are out of synch with the actions of NCAI and other activist groups. (PFI SMF ¶¶3-21).²⁴

3. Purported Oppositions To The Team’s Name Did Not Represent The Views Of A Substantial Composite Of Native Americans In 1967-1990

¶¶37-53: Defendants claim that a substantial composite of Native Americans “continued to oppose” the team name and the use of the term “Redskins” in sports between 1972 and 1990. The record does not support this conclusion. *None* of the evidence cited by Defendants reflects sustained opposition by a substantial composite of Native Americans; at best it shows sporadic objections to the name by certain individual Native Americans, some of whom were writers, activists or leaders of Native American organizations. What the evidence does show is that *mainstream* Native Americans were not opposed to the team name or use of the word “Redskins” in the sports context during these years. Rose Exs. 2, 98-111, 135-138, 141-143, 152-157; *id.* Exs. 46-91.

million American citizens they represent. To the contrary, acts of Congress are quite often out of synch with the view of the public, as measured in opinion polls. The same is true for the acts and votes of NCAI—they are not evidence of the views of the individual people NCAI purports to represent.

²⁴ Further, Defendants’ rely only on two newspaper articles (¶28, Exs. 52-53) to establish the number of Native Americans purportedly represented by NCAI’s member tribes in 1972. Aside from being premised on inadmissible hearsay, these articles offer no indicia that those numbers are accurate, when accurate information could have been secured from NCAI’s records, but was not.

a. Newspaper Articles About The Name

¶¶37-39, 47: The cited handful of newspaper articles about opposition to the team name do not establish that a substantial composite of Native Americans viewed the Redskins Marks as disparaging in 1967-1990. Blanton Ex. 1 at 37-39. There is no indication that the authors were Native Americans, or if so, that their views reflect those of a substantial composite of Native Americans, rather than of a tiny group of vocal activists. For example, the referenced article (¶39) in the November 1972 issue of *Pro!* discusses the position as to the Redskins' name of only *one person*—Russell Means²⁵—in a passing sentence. Moreover, these articles are irrelevant because they merely demonstrate that there existed some difference of opinion. As *Harjo* recognized in evaluating such articles, “the existence of a controversy does not inform the Court as to whether the trademarks at issue are perceived of as disparaging by a substantial composite of Native Americans.” 284 F. Supp. 2d at 135. Further, the cited materials (Exs. 30, 43, 52, 55, 68-75) are hearsay.²⁶

b. School Name Changes And One Student Letter

¶¶40-41: Defendants (through Riding In) identify a total of five schools that changed their Indian-themed mascot or team names between 1967 and 1990.²⁷ These events, however, do not

²⁵ There is no indication that Means' personal views were shared by a substantial composite of Native Americans in 1972; to the contrary, Means (a petitioner in *Harjo*) was a leader of the militant Native American group AIM, an activist, and certainly was not a barometer of mainstream Native American views at the time. Rose Ex. 40 at 47:14-48:8. Further, *Harjo* held that Means' own views are insufficient to establish a “substantial composite.” 284 F. Supp. 2d at 129.

²⁶ Beginning in 1988, Native American journalist Tim Giago wrote four editorials expressing his personal point of view that the use of Native American imagery in connection with sports team and mascots should be stopped. Defendants offer no evidence that Mr. Giago's editorials reflect the views of a substantial composite of Native Americans in 1967-1990; at most, they represent his own views and perhaps “the existence of a controversy.” *Harjo*, 284 F. Supp. 2d at 135; see Blanton Ex. 1 at 37-39.

²⁷ Each for different reasons and under varying circumstances. At the University of Utah, for example, the name “Redskins”—the only example identified by Riding In of that precise name—was changed based on the request of a single individual, who was also the campus advisor for Indian
(footnote continued)

evidence Native Americans' views concerning the *Washington Redskins'* name and thus are irrelevant.²⁸ Blanton Ex. 1 at 36-37, 39. Moreover, as Riding In concedes, in several of these instances there was substantial *opposition* to the name changes among Native Americans.²⁹ Nor does a letter written by Kevin Gover shed any light on the broader views of Native Americans—it merely reflected his own views. *See supra* ¶12; *see also Harjo*, 284 F. Supp. 2d at 129.

c. NCAI And Suzan Harjo

¶¶42-46: Defendants provide no evidence that NCAI's opposition has "continued ever since" 1972; the cited evidence provides no such support. Rather, after 1973, the NCAI effectively *dropped the issue* until the 1990s, when it was resurrected as part of protests surrounding the 500th Anniversary of Columbus' arrival in North America. Rose Ex. 3.

Defendants claim that a resolution opposing the team name was introduced by a tribal chairman named Ruben Snake at the annual convention in 1973. However, there is *no evidence* of this purported resolution in the records of NCAI, even though both Apodaca and Cook testified that if the resolution had passed it would have memorialized in writing and published. Apodaca Decl. ¶10; Rose Ex. 29 at 70:5-75:2.³⁰ Defendants also have no basis for stating that the purported "voice vote" on the resolution was unanimous—there's no indication of: (1) who was in attendance; (2)

Affairs. Rose Ex. 40 at 169:5-25. There is no evidence that a substantial composite of Native Americans sought, or even supported, this change.

²⁸ Riding In conceded this very point during cross-examination. Rose Ex. 40 at 189:11-22 (admitting that "the transition away from Little Red" did not support his opinion that Native Americans found the Washington Redskins' name to be offensive).

²⁹ For example, more than 4,000 Native Americans signed a petition to reinstate Little Red, the mascot of University of Oklahoma. Rose Ex. 40 at 50:21-24; *id.* at 178:6-179:19 ("It was through the activism of a small group that was engaged in educational protests to get the name changed."); *see also id.* 191:20-192:17 (no evidence the larger community of Native Americans wanted the names changed for Stanford or Dartmouth).

³⁰ The only "evidence" of this purported resolution in the record are the inconsistent, 40-year-old memories of two convention attendees. *See supra* n.22.

how many were in attendance; (3) how many votes were cast; or (4) how the votes were counted.³¹

In addition, because Defendants do not present the text of the resolution, there is no evidence of what members actually voted on.³²

Even if this resolution had existed and passed, it is not evidence that a “substantial composite” of Native Americans in 1973 opposed the team name any more than a particular vote in Congress necessarily reflects Americans’ individual or collective opinions on that issue. *See* Blanton Ex. 1 at 19, 36, 39-40; *see also id.* at 17-19. Moreover, the NCAI was just one of many Native American groups at that time, and there is evidence that other prominent Native American groups, such as the NTCA, NIEA, IAIA, and Haskell Institute, did not oppose the team name. (PFI SMF ¶7.)

Nor have Defendants produced credible evidence of “continued” opposition by NCAI during the 1980s, when activist Suzan Harjo was at the helm of the organization. While Harjo may have had her own strong personal feelings about the Redskins’ name, the record contains no evidence corroborating Harjo’s claim that she made “statements, speeches, telephone calls, interviews, educational outreach and coalition-building meetings” in her role as the Executive Director of NCAI. But even crediting this testimony, there is no evidence that the broader NCAI membership was aware of Harjo’s activities, sanctioned them, or shared her point of view. *Harjo*, 284 F. Supp. 2d at 129.³³ The same is true for the views of other NCAI leaders.³⁴ Finally, while Defendants claim (at

³¹ Further, because there is no written record of the “voice vote,” Harjo’s and Cook’s declarations about the details of this vote are inadmissible hearsay.

³² Harjo’s and Cook’s memories of the resolution are inconsistent. Compare Cook Decl. ¶14 (remembering the resolution as “calling for the Washington Redskins” to change its name) with Harjo Decl. ¶15 (resolution “condemn[ed] name calling against American Indians in the media”).

³³ The 1992 cited article (¶44, Ex. 81), in addition to being hearsay, does not indicate that NCAI has undertaken any “battle” against the Redskins Marks, nor that such views represent those of a
(footnote continued)

¶46) that NCAI supported a protest in 1988 against the team name, the cited articles do not say that issue was brought to the attention of the NCAI membership, much less voted on.³⁵ At base, one cannot infer the views of a broader population from those of an organization’s leaders. Blanton Ex. 1 at 19-34.

d. Elected Representatives

¶48: The claim that in 1988 “Native Americans ... influenced elected representatives,” to oppose the team name is not supported by the evidence. Aside from being hearsay, Ex. 96 mentions only Sen. Boschwitz’s “constituents,” and Ex. 97 refers only to Sen. DeConcini’s own view that finds Indian-themed team names “culturally insensitive”—neither indicates Native Americans’ views.

e. Post-1992 Opinions

¶¶49-53: Defendants argue that various events occurring *after* 1992—*i.e.*, after Harjo and fellow activists filed a petition to cancel the Redskins Marks—are relevant to show the Native American views of the team name *before* 1992. This cannot be the case. Harjo’s lawsuit against the Redskins was intended to *change* public opinion on this issue, and to some extent, it was successful: Harjo’s campaign gave rise to events that almost certainly would not have occurred but for her advocacy. The NCAI resolutions in 1993, for example, were passed to express support for the lawsuit. *See* Criss Ex. 108. Defendants’ cited evidence of post-1992 events are thus irrelevant to Native Americans views prior to 1990—and certainly as to views in 1967, 1974, and 1978.³⁶

substantial composite of Native Americans in 1967-1990. And the 1988 report (¶44, Ex. 24), in addition to being hearsay, simply says that NCAI “supports” another organization’s efforts, but offers no detail of how NCAI “supported” the organization.

³⁴ Moreover, Harjo’s and Chase’s assertions of the purported positions of past NCAI leaders (¶45) are hearsay.

³⁵ Further, the cited articles provide no indication of what the “protest efforts” consisted of, including who the participants were and thus do not inform Native Americans’ views.

³⁶ *First*, the article that Defendants cite concerning a protest against the team’s appearance in the
(*footnote continued*)

F. The Ross Survey Is Both Unsound And Irrelevant

¶¶54-57: The “survey” conducted in 1996 by Ivan Ross does not inform as to Native Americans’ perceptions in 1967-1990 of PFI’s use of the team name. (The deficiencies in the survey are discussed in detail in PFI’s expert rebuttal report of Dr. Jacob Jacoby, which is incorporated herein in its entirety. *See generally* Jacoby Ex. 1.) Thus, in evaluating the same survey, Judge Kollar-Kotelly relied on Jacoby’s critiques and concluded:

This survey, aside from its extrapolation flaws, says nothing about whether the term “redskin(s)” when used in connection with Pro-Football’s football team disparages Native Americans. Furthermore, the survey provides no information about the relevant time periods. ***The survey is completely irrelevant to the analysis.***

Harjo, 284 F. Supp. 2d at 145 (emphasis added); *see also id.* at 119-121, 128, 132-133 (cataloging flaws). For the reasons discussed in *Harjo*, this Court should reach the same conclusion.³⁷ But even if the Court believes the survey was properly conducted, “the survey results do not demonstrate that a ‘substantial composite’ of Native Americans found the term offensive.” *Id.* at 133 n.32.

1992 playoffs describes the protest as a “mostly non-Indian crowd,” and does not state that “Native Americans led” such protests. (¶49) (Ex. 82) At most it identifies “the existence of a controversy,” not a substantial composite. *Harjo*, 284 F. Supp. 2d at 135. **Second**, Senator Campbell’s bill reflected a change in the Senator’s opinion on the issue (¶50): in 1988, he described the Washington Redskins’ name as used with “dignity and respect.” Rose Ex. 32. This change of heart pointedly illustrates why post-1992 events do not evince opinions in 1967-1990. **Third**, after more than 20 years of inactivity on the issue, the NCAI passed formal resolutions in January and December of 1993, specifically to support the lawsuit. (¶¶51-52). These resolutions “were made after the relevant time frame”—and thus “are irrelevant to the calculus.” *Harjo*, 284 F. Supp. 2d at 135. **Fourth**, most of the cited universities and high schools that have ceased to use the name “Redskins” did so **after** 1992. (¶53). In any event, in addition to being hearsay, this evidence does not purport to reflect the views of **any** Native Americans, (*see, e.g., supra* n.27 regarding the University of Utah) and does not involve PFI’s use of the Redskins Marks.

³⁷ The deficiencies identified include: (1) the survey measured attitudes in 1996, not in 1967-1990; (2) respondents were asked only if they would be offended if the term “redskin” were used to refer to “an American Indian person,” rather than being asked about use as a team name; (3) Ross sampled from only 2% of U.S. counties, which is not representative; and (4) Ross tabulated responses incorrectly by including responses of whether “others” might be offended.

G. Defendants Provide No Evidence That Native Americans in 1967-1990 Perceived The Redskins Marks As “Mocking”

¶¶58-64: While Defendants complain of certain Native American themes and motifs associated with Redskins games (*e.g.*, band and cheerleader costumes, acts of fans, media coverage), the cited evidence does not address the Redskins Marks, but instead only *other imagery* alluding to Native Americans, and thus does not inform whether PFI’s use of the name “Redskins” in connection with PFI’s goods and services was disparaging. Moreover, even if evidence of such non-Redskins imagery was material, the evidence cited offers no indication of Native Americans’ perceptions of such imagery, let alone a substantial composite.³⁸ *Harjo*, 284 F. Supp. 2d at 134-35. Finally, in addition to being hearsay, much of the cited evidence is undated and/or outside of the relevant time period—*e.g.*, Exs. 138-143 (undated); Exs. 119, 146-149, & portions of 118 (before 1967).³⁹

LEGAL STANDARD

Because the parties have supplemented the TTAB record by introducing additional evidence, the Court “will act as a finder of fact and will review the TTAB record in addition to new evidence brought before the court *de novo*.” *Pro-Football, Inc. v. Blackhorse*, 2014 WL 6682640, at *3 (E.D. Va. Nov. 25, 2014) (citing *Swatch AG*, 739 F.3d at 155).⁴⁰ Thus, this Court must review the entire

³⁸ To the contrary, “during the relevant time periods, the use of the term ‘redskin(s)’ in connection with [PFI’s] marks was used in a respectful manner.” *Harjo*, 284 F. Supp. 2d at 134. PFI’s good intentions are one more factor for the Court to consider in this fact-intensive inquiry. *See Harjo v. Pro-Football, Inc.*, 1999 WL 375907, at *36 n.100 (TTAB Apr. 2, 1999) (“intent, or lack thereof,” is “one factor to consider”), *rev’d on other grounds*, 284 F. Supp. 2d 96.

³⁹ The lyric “fight for old Dixie” (¶60) was used for only three years, and stopped being used long before the first Redskin Mark was registered in 1967. Rose Ex. 133. And as to the activities of the media or fans (¶64), “[c]learly, [such] evidence ... has no bearing on whether a substantial composite of Native Americans finds the term ‘redskin(s)’ to be disparaging when used in connection with [PFI’s] marks.” *Harjo*, 284 F. Supp. 2d at 134.

⁴⁰ “[D]*e novo* review of the entire record is required because the district court ‘cannot meaningfully defer to the PTO’s factual findings if the PTO considered a different set of facts.’” *Timex Grp. USA, Inc. v. Focarino*, 993 F. Supp. 2d 606, 607 (E.D. Va. 2014) (quoting *Swatch AG*, 739 F.3d at 156).

record on a clean slate, without any deference to the TTAB’s findings of fact or conclusions of law. This standard is even less deferential than the one in *Harjo*, which nonetheless reversed the TTAB’s cancellation order under the “deferential level of judicial scrutiny provided by the substantial evidence test.” 284 F. Supp. 2d at 128.

Summary judgment shall be granted if the pleadings and supporting documents “show[] 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). The Court is to “view the facts and draw all reasonable inferences in the light most favorable to the non-moving party”; however, the non-movant may not rely solely on denials, and must “set forth specific facts that go beyond the ‘mere existence of a scintilla of evidence.’” *Glynn v. EDO Corp.*, 710 F.3d 209, 213 (4th Cir. 2013) (citations omitted).

ARGUMENT

I. DEFENDANTS BEAR THE BURDEN OF PROVING THAT EACH REDSKINS MARK DISPARAGED A SUBSTANTIAL COMPOSITE OF NATIVE AMERICANS AT THE TIME EACH MARK WAS FIRST REGISTERED

The parties agree that the following test applies to determine whether Defendants have established that the Redskins Marks should be cancelled:

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 Native Americans?

Blackhorse, 2014 WL 2757516, at *4. “Both questions are to be answered as of the various dates of the registration of the involved marks.” *Id.*; *Harjo*, 284 F. Supp. 2d at 125 (similar). Thus, the Court must evaluate Defendants’ evidence on both questions as of 1967, 1974, 1978, and 1990.

A. Disparagement Must Be Proven “By A Preponderance Of The Evidence”

Because Defendants sought cancellation of the Redskins Marks through an inter partes challenge, Defendants bear the burden of establishing “by a preponderance of the evidence” that

each Redskins Mark was disparaging to a substantial composite of Native Americans at the date of its registration. *Harjo*, 284 F. Supp. 2d at 122-23; *see also, e.g., Cold War Museum, Inc. v. Cold War Air Museum, Inc.*, 586 F.3d 1352, 1356 (Fed. Cir. 2009). And in the circumstances presented here, where all but one of the marks at issue were registered for *decades* before the instant Petition was filed, the Court must “pay even closer attention to the proof adduced to buttress the cancellation request.” *Harjo*, 284 F. Supp. 2d at 123.

Defendants make no mention of this burden, let alone explain how they meet it. Instead, Defendants erroneously appear to rely on a *different* standard of proof that applies in ex parte proceedings, which merely requires establishing a prima facie case of disparagement, rather than the standard of proof for inter partes proceedings such as the one now before the Court.⁴¹

The difference between the standard of proof that applies in an inter partes versus an ex parte proceeding is material. In inter partes proceedings, each party presents a complete set of evidence, which may include surveys, affidavits, experts testimony, depositions, and extensive discovery (as was this case here). In ex parte proceedings, however, it is a PTO examining attorney who must establish an evidentiary basis that a mark is disparaging and thus not eligible for registration. Because the PTO has limited resources, examining attorneys are held to a lower standard in evaluating whether a mark is disparaging—the PTO need present only “more than a scintilla of evidence, in support of the PTO’s prima facie case.” *In re Heeb Media, LLC*, 2008 WL 5065114, at *7 (TTAB Nov. 26, 2008) (quoting *In re Pacer Tech.*, 338 F.3d 1348 (Fed. Cir. 2003)).

In one recent disparagement case, for example, application of the incorrect standard changed the outcome. In *In re Squaw Valley*—an ex parte proceeding—the examining attorney refused to

⁴¹ An ex parte proceeding is an appeal “from appeals from an examining attorney’s final refusal to register a mark in an application.” TBMP §102.02. An inter partes proceeding is an opposition, cancellation, interference, or concurrent use proceeding initiated by a third party. *Id.*

register marks for “SQUAW” on the ground that they were disparaging to Native Americans. On appeal, the TTAB reversed, relying on *Harjo* and holding that “there is no evidence in the record that a substantial composite of Native Americans find applicant’s use of its marks on its identified goods and services disparaging. The statements attributed to Native Americans and Native American groups do not address applicant’s mark as used on its goods and services.” *In re Squaw Valley Dev. Co.* (“*Squaw Valley I*”), 2005 WL 2543626, at *13 (TTAB Sept. 26, 2005). But on reconsideration, the TTAB recognized its mistake: in ex parte proceedings, the PTO need only offer “sufficient evidence” to establish a prima facie case of disparagement because “the PTO has limited facilities for acquiring evidence—it cannot, for example, be expected to conduct a survey of the marketplace or obtain consumer affidavits.” *In re Squaw Valley Dev. Co.* (“*Squaw Valley II*”), 2006 WL 1546500, at *8 (TTAB June 2, 2006) (quoting *In re Budge Mfg., Inc.*, 857 F.2d 773 (Fed. Cir. 1988)). The TTAB thus concluded that it had erred by placing the PTO under the higher burden of proof reserved for inter partes proceedings. Specifically, the Board stated:

We did not consider whether the evidence that was of record was sufficient to satisfy the examining attorney’s burden of showing that a substantial composite of Native Americans find applicant’s use of SQUAW in its marks on applicant’s identified goods and services to be disparaging ***under the standard of proof approved by the Federal Circuit in ex parte cases.*** In other words, even though there was no ***direct evidence*** that a substantial composite of Native Americans find applicant’s use of SQUAW in its marks on the identified goods and services to be disparaging, we did not consider whether the examining attorney met the Office’s burden under the second prong of the *Harjo I* test by extrapolating from the evidence of record that a substantial composite of Native Americans find applicant’s use of SQUAW in its marks on the identified goods and services to be disparaging.

Id. at *9; *see also, e.g., In re Heeb*, 2008 WL 5065114, at *9 (because of PTO’s “limitations in amassing evidence, ... in the absence of direct evidence, the [PTO] may meet its burden by extrapolating from the evidence of record”). Ultimately, the TTAB ruled that “in light of the ex parte nature of this case,” the examining attorney was permitted to extrapolate from the evidence,

even though such extrapolation was *not* permitted under the inter partes standard. *Squaw Valley II*, 2006 WL 1546500, at *15; *see also id* *9. The Board concluded: “[I]n this ex parte proceeding the amount of evidence needed for the Office to make a prima facie case *does not necessarily rise to the level of what is required in an inter partes proceeding* because of the Federal Circuit’s recognition that the [PTO] has limited resources.” *Id.* at *18 (emphasis added).

The principles of *Squaw Valley II* directly apply here: While the lower standard of an ex parte case permits examining attorneys to “extrapolate” from certain types of evidence (*e.g.*, standard dictionary definitions, newspaper articles) in inter partes cases, the standard is higher—Defendants are required to provide *direct* evidence of disparagement to carry their burden of proof by a preponderance of the evidence, and cannot rely on extrapolations or unsupported inferences.

B. In The Circumstances Presented Here, A “Substantial Composite” Should Comprise At Least A Majority Of The Referenced Group

As Defendants acknowledge (Br. 34), “[t]he views of the referenced group are ‘reasonably determined by the views of a substantial composite thereof.’” *Blackhorse*, 2014 WL 2757516, at *5 (quoting *Harjo*, 284 F. Supp. 2d at 124). The TTAB has repeatedly stated that “[a] ‘substantial composite’ of the referenced group is not *necessarily* a majority.” *Id.* (quoting *In re Heeb Media LLC*, 2008 WL 5065114, at *8 (TTAB 2008)) (emphasis added). However, “[w]hat comprises a “substantial composite” of the referenced group is a [question of] fact,” based on the particular circumstances at issue. *Id.*

In this case, given that: (1) the Redskins Marks have been registered for up to nearly 25 to 48 years; (2) this is an inter partes cancellation action, and not an ex parte opposition proceeding (and thus Defendants are in a position to offer a fulsome evidentiary submission to the Court); and (3) the Redskins Marks are prominently used and displayed across the entire country and thus Native Americans were widely exposed to the marks during the relevant time period (PFI SMF ¶¶1-2, 13-

17), a “substantial” composite should comprise at least a majority of Native Americans. And to be a “composite,” such a majority should consist of a complete representation of various Native American socio-demographic categories. This is consistent with the standard that a “substantial composite” is “not necessarily,” but could be, a majority. Indeed, *Harjo* suggested that a “substantial composite” should constitute a majority under these circumstances—the court found Ross’s survey results to be insufficient because it “*does not even represent a majority of Native Americans polled,*” but rather “only 36.6%.” 284 F. Supp. 2d at 133 n.32 (emphasis added).⁴²

Defendants make *no attempt* to quantify what should comprise a “substantial composite” in this case, nor how their alleged evidence meets that standard—the precise deficiency noted by Judge Bergsman. *Blackhorse*, 2014 WL 2757516, at *36 (“[i]t is astounding that the petitioners did not . . . introduce any evidence or argument as to what comprises a substantial composite of [the Native American] population” in 1967-1990). Instead, Defendants try to bypass the inquiry by conclusorily asserting that it is “common sense” that an “ethnic slur” is disparaging to a “substantial composite.” (Br. 34-35.) However, as explained in detail above, the word “Redskins,” when used in the context of PFI’s services to refer to the Washington, D.C. professional football team, is *not* an “ethnic slur,” particularly evidenced by the dozens of Native Americans schools and leagues that named themselves “Redskins.” (PFI SMF ¶¶2, 10-12.) For example, in *Squaw Valley II*, the TTAB (applying the lenient, ex parte standard) considered evidence that the word “squaw” is “one of four terms most offensive to Native Americans,” and is “the worst of the worst,” 2006 WL 1546500, at *15, but nonetheless held that “when SQUAW is considered in connection with applicant’s [goods],

⁴² If the Court disagrees that a “substantial composite” should be at least 50% in these circumstances, it should at least remain consistent with *Harjo* and recognize that it is certainly above 36.6%, which itself was “difficult to support [a substantial composite] in the context of this case” and thus deemed insufficient. 284 F. Supp. 2d at 133 n.32.

it is the Squaw Valley ski resort meaning of SQUAW, rather than the meaning of a Native American woman or wife, that will come to the minds of consumers.” *Id.* at *22. The same applies here—as Defendants and their experts concede that when the Redskins Marks are considered in connection with PFI’s services, it is the football team that comes to mind.⁴³ (PFI SMF ¶14.)

Defendants cannot escape their burden of proof by invoking “common sense” in place of evidence. Because they failed to offer any indication of what they believe comprises “substantial composite,” or how their evidence satisfies whatever level that may be, Defendants’ motion should be denied and PFI’s motion should be granted.

C. The Evidence Presented Must Be The Perceptions Of Native Americans, Not The General Public

To determine whether the Redskins Marks were disparaging to Native Americans during the relevant time period, the Court “look[s] not to the American public as a whole, but to the views of the referenced group (*i.e.*, Native Americans).” *Blackhorse*, 2014 WL 2757516, at *4. Thus, in *Harjo*, the District Court ruled that the views of the general public were not probative, and the TTAB thus erred “[b]y focusing on the general public and inferring that the Native Americans would simply agree with those views.” 284 F. Supp. 2d at 129.

Defendants nonetheless commit the same error here, as the TTAB did in *Harjo*, insisting that “evidence of the general public’s perception of a term” (Br. 34) can support a finding of disparagement. Defendants, however, are incorrect—such extrapolation is permitted only in cases involving *ex parte* proceedings, where the PTO’s burden is lower. Indeed, the only cases Defendants cite for this point are *ex parte* cases. (*See id.* at 34-35 (citing *In re Tam*, 108 USPQ2d 1305 (TTAB

⁴³ To be sure, *Squaw Valley II* also found that the examining attorney established a *prima facie* case of disparagement on a different SQUAW mark in the context of jackets, pants, and sweaters. But there, (unlike here) no strong connection existed in people’s minds between the mark and the goods.

Sept. 26, 2013) (ex parte refusal to register), *appeal filed*, No. 2014-1203 (Fed Cir.); *In re Heeb Media*, 2008 WL 5065114, at *8 (same); *Squaw Valley II*, 2006 WL 1546500, at *13). But in inter partes cases, such extrapolations are insufficient; direct evidence is required. *See supra* Part I.A.

In any event, Defendants have not introduced evidence that, in *this* case, the views of the general public are the same as those of Native Americans. In fact, Ross’s survey found that the views of the general public and Native Americans differed significantly, leading *Harjo* to conclude that “the views of the Native Americans on this issue were not congruent with that of the population as a whole,” and thus not probative. *Harjo*, 284 F. Supp. 2d at 128.

D. Defendants Must Introduce Evidence That The Redskin Marks In Fact Do Disparage, And Not That They Are Merely Capable Of Disparagement

Finally, Defendants argue that the word “may” in the term “may disparage” means that they need not prove the Redskins Marks were actually disparaging to Native Americans, but merely that the marks were *capable of* disparagement, purportedly based on the Lanham Act’s legislative history. (Br. 31). This theory, however, has already been considered and rejected. As the 1999 TTAB *Harjo* opinion explained, disparagement “usually requires some degree of intent by the speaker to cause offense.” *Harjo*, 1999 WL 375907, at *36. With this understanding, the TTAB analyzed the meaning of the word “may” in detail and concluded:

[T]he use of the term “may” is necessary in connection with “disparage” in Section 2(a) to avoid an interpretation of this statutory provision that would require a showing of intent to disparage. Such a showing would be extremely difficult in all except the most egregious cases. Rather, this provision, as written, shifts the focus to whether the matter may be perceived as disparaging.

Id. at *36. That is, the word “may” simply clarifies that there is no requirement of an intent to disparage. The District Court agreed. *Harjo*, 284 F. Supp. 2d at 125. In the proceeding below, the TTAB again rejected Defendants’ argument, reaffirming that “the term ‘may disparage’ clarifies that intent to disparage is not required,” noting that “*Board decisions require proof of disparagement*,

not merely capacity to disparage.” Rose Ex. 144 at 7-8 (emphasis added) (citing cases)). In contrast, Defendants do not cite a single case where the TTAB (or any other court) allowed a petitioner to merely demonstrate that a mark was “capable” of disparagement—indeed, such a standard would endorse hypothetical fact-finding, and cannot be reconciled with Defendants’ evidentiary burden.⁴⁴ Further, this unsupported interpretation would compound the ambiguity of the already unconstitutionally vague Section 2(a), leaving the public *even more* uncertain as to its application and encouraging arbitrary enforcement by the PTO in violation of the First and Fifth Amendments. See PFI’s Mem. Of Law In Support Of Its Mot. For Summary Judgment On Constitutional Claims III-VI (Dkt. 56), at 18-22.

II. DEFENDANTS HAVE NOT SUSTAINED THEIR BURDEN OF PROVING THAT THE REDSKINS MARKS DISPARAGED A SUBSTANTIAL COMPOSITE OF NATIVE AMERICANS WHEN EACH WAS FIRST REGISTERED

Applying the correct test as stated above, Defendants have not proven by a preponderance of the evidence that the Redskins Marks, as used in the context of PFI’s services, were disparaging to a substantial composite of Native Americans in 1967, 1974, 1978, and 1990.

A. The Redskins Marks Refer To The Washington, D.C. Football Team, Not Native American Individuals

Ever since the 1930s, the name “Redskins” as it is used in connection with PFI’s services has identified Washington, D.C.’s professional football team. (PFI SMF ¶¶1-2, 13-14.) By 1967, this meaning dominated American culture, far surpassing any earlier meaning as denoting a North American Indian. (*Id.* ¶2.) Defendants’ experts conceded that “Redskins,” in this context, has a distinct and separate definition. (*Id.* ¶¶2, 14.) Further, massive public awareness of the Washington

⁴⁴ Defendants’ citation to earlier drafts of Section 2(a), which used the term “tends to disparage” (Br. 31-32 & n.10), begs the question—“tends to” offers no more guidance than “may,” and is also consistent with the TTAB’s interpretation that the speaker’s intent to disparage is not required.

Redskins team solidifies this secondary meaning. (*Id.* ¶¶1-2.) To be sure, there were vestigial allusions to Native American imagery in connection with Washington Redskins football games in 1967-1990. However, a separate and independent understanding of the term, as used in context, was (and is) a reference to the Washington D.C. football team.⁴⁵

B. Defendants Have Not, And Cannot, Establish By A Preponderance Of The Evidence That A Substantial Composite Of Native Americans Viewed The Redskins Marks As Disparaging In 1967-1990

While Defendants assert that the Redskins Marks were disparaging to Native Americans, they provide essentially no explanation of *how* they arrive at that conclusion; rather, Defendants simply list their submitted evidence without regard for whether such evidence: (1) represents the views of a substantial composite of Native Americans; (2) of the Redskins Marks, in the context that they are used by PFI; (3) during the relevant years (*i.e.*, 1967, 1974, 1978, and 1990). Instead, as Judge Bergsman noted, Defendants apparently are “leaving it to the [Court] to make [Defendants’] case have some semblance of meaning.” *Blackhorse*, 2014 WL 2757516, at *36.

PFI need not repeat the failures of Defendants’ evidentiary submission, detailed in PFI’s responses to Defendants’ Statement of Material Facts. Below is a summary of their key evidentiary shortcomings:

⁴⁵ Much of the imagery cited by Defendants (Br. 33) was no longer present by 1990, when the last Redskin Mark was registered.

Defendants' evidence (citations to Def. SMF)	Not 1967-1990	Not PFI's Use as Its Team Name	Not Native Americans	Not a Substantial Composite
Dictionaries, other written sources. (¶¶3-11)	X	X	X	X
Four personal experiences of "redskin." (¶12)		X		X
Expert "sentiment" analysis. (¶¶13-16)	X	X	X	X
Expert "disuse" analysis. (¶¶17-19)		X	X	X
1962 Haskell Institute article. (¶¶22-25)	X	X		X
1972 meeting with Mr. Williams. (¶¶26-36)				X
Protests that included Native Americans (1988 & 1992). (¶¶46, 48-49)	X			X
Schools changing mascots or team names. (¶¶40, 53)	X	X	X	X
Articles and editorials about the team name. (¶¶37-39, 47)			X	X
Individual views and actions of activists (leaders of organizations, columnists). (¶¶41-50)	X			X
1993 NCAI resolutions. (¶¶51-52)	X			X
Evidence after the <i>Harjo</i> petition was filed. (¶¶49-53)	X			X
Ross survey (¶¶54-57)	X	X		X
References to Indian-themed imagery at games and by media. (¶¶58-64)	X	X	X	X

Every category of Defendants' evidence suffers from at least one fatal flaw. Accordingly, Defendants are unable to establish as a matter of law that the Redskins Marks are disparaging, and PFI's motion should be granted.

Recognizing that their evidence is insufficient under the proper standard, Defendants try to circumvent their burden by claiming that evidence such as dictionary usage labels, reference works, or statements by organizations are sufficient on their own to prove disparagement. (Br. 36 (listing cases).) Each of the cases cited by Defendants, however, were *ex parte* proceeding, where the examining attorney: (1) was permitted to "extrapolate" from such evidence (based on the PTO's lack

of resources); (2) need only to provide “more than a scintilla of evidence” in support of the PTO’s prima facie case. *In re Heeb*, 2008 WL 5065114, at *7; *see also supra* Part I.A. But as *Squaw Valley II* recognized, in inter partes cases a petitioner must introduce *direct evidence* of disparagement; it is not enough to extrapolate the views of the general public (*see supra* Part I.C), or of individual Native American activists, or even Native American organizations. Rather, direct evidence of the views of a “substantial composite” of Native Americans is required. Because Defendants’ evidentiary submission is effectively the same as what Judge Kollar-Kotelly considered in *Harjo*, this Court should follow her lead and reverse the TTAB.

III. PFI’S AFFIRMATIVE EVIDENCE DEMONSTRATES THAT THE REDSKINS MARKS DID NOT DISPARAGE A SUBSTANTIAL COMPOSITE OF NATIVE AMERICANS AT THE TIME OF THEIR RESPECTIVE REGISTRATIONS

Because Defendants have failed to meet their burden of establishing by a preponderance of the evidence that a substantial composite of Native Americans viewed the Redskins Marks as disparaging at the time each mark was registered, the Court need proceed no further—it should grant PFI’s motion on that basis alone. But should the Court harbor doubts, PFI introduced evidence affirmatively demonstrating that Native Americans in 1967-1990 did not take issue with the team name “Redskins,” undermining any theory of a “substantial composite” of opposition.⁴⁶

A. The 1977 All-Indian Half-Time Marching Band And Pageant Demonstrates Mainstream Native American Support For The Redskins Name

As noted above (PFI SMF ¶¶3-9), in 1977, hundreds of Native Americans participated in the Washington Redskins’ “All-Indian Half-Time Marching Band and Pageant.” Native American

⁴⁶ Additionally noteworthy is that the Redskins Marks were published for opposition and then registered without any opposition or cancellation petitions filed until 1992. (PFI SMF ¶1). The marks were thus approved by PTO examining attorneys a total of twelve times without complaint. *See Harjo*, 284 F. Supp. 2d at 136 n.34 (these twelve approvals “would appear, at least, to work against the TTAB’s inferential conclusion that the marks, when used in connection with Pro-Football’s entertainment services may disparage Native Americans”).

support for this event included: (1) coordination by the Redskins organization with representatives from BIA and NIEA; (2) a resolution by NTCA formally endorsing the presentation; (3) endorsement and full support of NIEA; (4) participation by Haskell’s Music Director as co-director of the Indian Honor Band, fourteen students from Haskell in the Band (including Miss Haskell), and Haskell’s newspaper calling it a school-year “highlight”; (5) participation of fifty students from IAIA and IMIS (both Native American schools) in the all-girls drill team; (6) performances of traditional dances by three tribes; (7) participation of Dr. Louis W. Ballard, a prominent Native American composer, who was the musical director; and (8) an appearance by Ms. Indian America 1977 during the ceremony. (PFI SMF ¶¶4-7.) Further, the positive tone of the Native American press reports on both the preparation and the performance demonstrates that the event—and the name “Washington Redskins” itself—was not objectionable to mainstream Native Americans. (*Id.* ¶8.) As Defendants’ expert conceded, this broad participation in and support for the event is “inconsisten[t]” with Defendants’ position that the Redskins’ name disparaged Native Americans. (*Id.* ¶9.)

The universal Native American enthusiasm and support for the project—and the complete absence of any form of protest by any Native American group, *including* NCAI—demonstrates that mainstream Native Americans embraced the Redskins’ name and did not share the views of the small group of non-representative activists who held executive positions at NCAI in 1972 and 1973.

B. Native Americans’ Own Extensive Use Of The Term “Redskins”

Between 1967-1990, “Redskins” was routinely used by Native American schools, tribes, leagues and organizations as the name for their sports teams. (PFI SMF ¶¶10-12.) Indeed, some Native American schools still use the nickname, such as the Red Mesa Redskins on the Navajo Reservation. (*Id.* ¶11.) This evidence directly refutes Defendants’ contention that Native Americans opposed the use of “Redskins” in the context of sports. Even outside of the sports context, Native

Americans used the term “Redskins” as a neutral identifier in 1967-1990, such as in the headlines of articles in tribal newspapers and as the name of newspapers and yearbooks. (*Id.* ¶¶18-20.) They also chose the name “redskin” for streets, movie theaters, and motels. (*Id.* ¶20.) Such evidence demonstrates that in 1967-1990, the term “Redskins” was acceptable to Native Americans when used in certain contexts.

Further, Native Americans have supported the Washington Redskins. The first team had four Native American players. (*Id.* ¶13). Since then, Native Americans have expressed support for the team—even ten years *outside* of the relevant time period, 90% of Native Americans said that they were not bothered by the name. (*Id.* ¶¶15-17.) As Tsotigh commented, Gover’s use of “Redskins” to refer to the Washington team “doesn’t really” bother her because “he’s obviously talking about a football game.” (*Id.* ¶14.) This is the point—the Redskins Marks, when considered in context, do not disparage a substantial composite of Native Americans today, let alone in 1967-1990.⁴⁷

IV. PFI’S LACHES DEFENSE BARS DEFENDANTS’ PETITION

A. Laches Is An Available Defense To Defendants’ Cancellation Petition

Defendants argue that laches is never an available defense to a disparagement claim because of the “public interests” at stake. (Br. 37.) *But no court has ever so held.* To the contrary, *Harjo* concluded that, “in the context of a cancellation proceeding, the laches defense applies.” 284 F. Supp. 2d at 137; *Bridgestone/Firestone Res, Inc. v. Auto. Club De L’Ouest De La France*, 245 F.3d 1359, 1360-61 (Fed. Cir. 2001); *see also Harjo*, 284 F. Supp. 2d at 144; *id.*, 565 F.3d at 881 (applying laches).⁴⁸ There is no basis for this Court to now manufacture a circuit split.⁴⁹

⁴⁷ PFI and Defendants agree that the Court’s resolution of disparagement will also resolve whether the marks bring Native Americans into “contempt or disrepute.” (Br. 36.) *Harjo*, 284 F. Supp. 2d at 114 (equating the two inquiries). Thus, the Court should also grant PFI’s motion on Count II.

⁴⁸ Defendants suggest that the D.C. Circuit did not consider whether laches applies in cases raising
(footnote continued)

B. Defendants Unreasonably Delayed In Bringing Their Petition

“[L]aches is a question of degree.” *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 824 (7th Cir. 1999) (quotes omitted); *see also A.C. Aukerman Co. v. R.L. Chaides Const. Co.*, 960 F.2d 1020, 1032 (Fed. Cir. 1992). Here, “tak[ing] account of the particular facts,” the Court may consider Defendants’ exposure to the Redskins Marks before their 18th birthdays. *Harjo*, 565 F.3d at 885.

The circumstances presented in this case dictate that Defendants’ delays evinced a marked lack of reasonable diligence—they concede that they: (1) were aware of the Redskins Marks for *years* before their eighteenth birthdays (PFI SMF ¶22); and (2) could have filed the Petition quickly after turning 18, but simply chose not to, without any valid excuse (*id.* ¶¶22-23).⁵⁰ In *Harjo*, a mere 29-month delay was unreasonable where the defendant was “fully aware” of the marks but “failed to complain *immediately*.” 565 F.3d at 885 (emphasis added). As one commentator notes, even “a delay of less than six months” may give rise to laches “if the resulting prejudice is very great.” 6 MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 31:12.⁵¹

C. Defendants’ Delay Caused Substantial Economic Prejudice To PFI

As a result of Defendants’ unreasonable delay, PFI suffered severe economic prejudice.

“broader public interest[s].” (Br. 37 n.13.) Not so—the D.C. Circuit acknowledged the “broader interest[s]” at issue but nonetheless concluded that laches barred their claims. *Harjo*, 415 F.3d 44, 47 (D.C. Cir. 2008).

⁴⁹ *Harjo* also explained why reasons for considering “public interests” in likelihood-of-confusion cases such as the ones cited by Defendants (Br. 37) do not easily apply in cancellation cases. 284 F. Supp. 2d at 138-39.

⁵⁰ The only excuse for delay Defendants ever offered was their lack of knowledge of their legal rights (PFI SMF ¶23), but such ignorance “is not a reasonable excuse.” *Harjo*, 567 F. Supp. 2d at 55. Thus, Defendants’ *post hoc* rationalizations (Br. 38) do not justify their delays—no Defendant said that the pending *Harjo* proceedings, or the need to “assess” the situation, justified their delays.

⁵¹ *See also, e.g., Comedy Hall of Fame, Inc. v. George Schlatter Prods., Inc.* 874 F. Supp. 378, 383 (M.D. Fla. 1994) (13-month delay unreasonable); *New Era Publ’ns Int’l v Henry Holt & Co.*, 873 F.2d 576, 584-85 (2d Cir. 1989) (2-year delay “unconscionable” in light of “severe prejudice”).

“Economic prejudice arises from investment in and development of the trademark, and the continued commercial use and economic promotion of a mark over a prolonged period adds weight to the evidence of prejudice.” *Harjo*, 565 F.3d at 884 (quoting *Bridgestone*, 245 F.3d at 1363).⁵² Thus, “proof of continued investment in the late-attacked mark alone” is sufficient to establish economic prejudice. *Id.* Here, PFI invested millions of dollars in developing goodwill in the marks even during Tsothigh’s 1-year delay period, which subsumed a *full* season of professional football.⁵³ (PFI SMF ¶24.) This information is essentially identical to that accepted in *Harjo* as establishing laches for a 29-month period. *Harjo*, 567 F. Supp. 2d 64, 51 (D.D.C. 2008). The same result is warranted here.

CONCLUSION

PFI’s motion should be granted and Defendants’ motion should be denied.

Dated: March 19, 2015

Respectfully submitted,

/s/ Craig C. Reilly

Craig C. Reilly, Esq. (VSB # 20942)

craig.reilly@ccreillylaw.com

THE LAW OFFICE OF CRAIG C. REILLY

111 Oronoco Street

Alexandria, Virginia 22314

Tel: (703) 549-5354

Fax: (703) 549-5355

⁵² The Fourth Circuit has relied on *Bridgestone* in evaluating economic prejudice. *See, e.g., Ray Commc’ns, Inc. v. Clear Channel Commc’ns, Inc.*, 673 F.3d 294, 305 (4th Cir. 2012).

⁵³ PFI’s continued investment in, development of, and use and promotion of the Redskins Marks involved the devotion of [REDACTED] dollars. (PFI SMF ¶24.) PFI’s services (with which the Redskins Marks are inextricably linked) are of tremendous value as a result of PFI’s investment. (*Id.* ¶¶1, 24.) Breakdowns of these figures for the financial years 2000-2006 are in the joint stipulation relating to PFI’s laches defense. (*Id.* ¶24.) And because the District Court reversed the TTAB in 2003 (including on disparagement), PFI was entitled to even *greater* confidence in the investment in its 50-year-old registrations. *Cf. In re McGinely*, 550 F.2d 481, 485 n.7 (CCPA 1981) (cited at Br. 38-39 and involving debatable *unregistered* marks).

Robert L. Raskopf (*pro hac vice*)
robertraskopf@quinnemanuel.com

Todd Anten (*pro hac vice*)
toddanten@quinnemanuel.com

Claudia T. Bogdanos (*pro hac vice*)
claudiabogdanos@quinnemanuel.com

Jessica A. Rose (*pro hac vice*)
jessicarose@quinnemanuel.com

Jennifer D. Bishop (*pro hac vice*)
jenniferbishop@quinnemanuel.com

QUINN EMANUEL URQUHART & SULLIVAN, LLP

51 Madison Avenue, 22nd Floor

New York, New York 10010

Tel: (212) 849-7000

Fax: (212) 849-7100

Counsel for Plaintiff Pro-Football, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2015, I caused the foregoing pleading or paper to be filed and served electronically by the Court's CM/ECF system upon all registered users in this action, including the following counsel of record:

Jesse A. Witten
Jeffrey J. Lopez
Adam Scott Kunz
Tore T. DeBella
Jennifer Criss
DRINKER BIDDLE & REATH LLP
1500 K Street, N.W., Suite 1100
Washington, D.C. 20005-1209
Tel : (202) 842-8800
Fax : (202) 842-8465
Jesse.Witten@dbr.com
Jeffrey.Lopez@dbr.com
Adam.Kunz@dbr.com
Tore.DeBella@dbr.com
Jennifer.Criss@dbr.com

Dated: March 19, 2015

/s/ Craig C. Reilly
Craig C. Reilly, Esq. (VSB # 20942)
craig.reilly@ccreillylaw.com
THE LAW OFFICE OF CRAIG C. REILLY
111 Oronoco Street
Alexandria, Virginia 22314
Tel: (703) 549-5354
Fax: (703) 549-5355