

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

PRO-FOOTBALL, INC.,

Plaintiff,

v.

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

Defendants.

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

**DEFENDANTS' REBUTTAL MEMORANDUM IN SUPPORT OF THEIR
MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNTS 1, 2, AND 7;
AND IN OPPOSITION TO PLAINTIFF'S CROSS-MOTION FOR SUMMARY
JUDGMENT ON CLAIMS I, II AND VII**

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INTRODUCTION

PFI has not created a genuine issue of fact that its marks contain matter that “may disparage” Native Americans. PFI’s argument boils down to its assertion that “*every* form” of Defendants’ evidence “fails to satisfy at least one” of the elements that Defendants supposedly must demonstrate to cancel PFI’s trademark registrations. [Dkt. 100] at 1 (emphasis original). But every piece of evidence need not prove every element of a party’s case. *See* Fed. R. Evid. 401. “[I]t is universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue....” *New Jersey v. T. L. O.*, 469 U.S. 325, 345 (1985). Similarly unavailing are PFI’s numerous other meritless evidentiary objections, such as asserting that this Court may consider only “direct” evidence. [Dkt. 100] at 29.

PFI’s evidence that some Native Americans are supposedly not offended by “redskin” or that some expressed support for the team’s name does not create a genuine issue of fact that the marks contain matter that “may disparage.” The term “may disparage” requires only that the marks contain matter that have the potential to disparage, and does not require proof of actual disparagement. Further, as the TTAB correctly reasoned, “once a substantial composite has been found, the mere existence of differing opinions cannot change the conclusion.” *Blackhorse v. Pro-Football, Inc.*, 2014 WL 2757516, at *29 (T.T.A.B. 2014). Given Defendants’ showing that “redskin” is a term that “may disparage” Native Americans (both when applying the facts to the statutory plain language or using the TTAB “substantial composite” inquiry), PFI cannot defeat summary judgment by trying to show that not all Native Americans felt the same way.

The Court should grant Defendants summary judgment on Counts 1, 2 and 7.

RESPONSE TO PLAINTIFF’S STATEMENT OF MATERIAL FACTS

¶ 1: Suzan Harjo filed her petition after never receiving a response from former PFI owner Jack

Kent Cooke when she contacted him as NCAI Executive Director in the 1980s. [Dkt. 71-5] ¶ 16.

¶ 2: Numerous dictionaries define “redskin” as a North American Indian, with usage labels such as “offensive slang,” “usually offensive,” “usually taken to be offensive,” “considered offensive,” and “contemptuous.” [Dkt. 71] at 6. Two of PFI’s marks contain express Indian imagery, and PFI has used its marks in connection with Indian imagery and themes (*e.g.*, helmet image, cheerleader and marching band uniforms, and fight song lyrics). [Dkt. 71] at 27-29, 33.

¶¶ 3-9: There is no evidence that any of the organizations or individuals who planned or participated in the 1977 halftime show supported the team name. PFI has introduced evidence that certain Native American organizations organized a special trip to Washington, D.C. for talented Native American high school musicians and dancers. The students, some as young as eighth grade, missed school, traveled to Washington D.C., attended a movie premiere, toured the Capitol, performed at a Smithsonian Museum, performed at the White House for an audience that included Rosalynn Carter and Joan Mondale, and also performed before 50,000 or so fans at RFK Stadium at halftime during an NFL game. [Dkt. 93-5, 12, 15; Dkt. 98-15; Dkt. 99-13].

PFI has introduced no evidence that the performance at RFK Stadium expressed support for the team name on anyone’s part. There is no other way to perform in Washington, D.C. before an audience of 50,000 at a nationally televised NFL game unless one plays at a “Redskins” game. That the organizers could have declined to schedule a performance at RFK and the students participated in the performance is not evidence that any of them supported the team name.

PFI’s characterization (at ¶ 7) of the National Tribal Chairmen’s Association (“NTCA”) as “the primary Native American organization during the mid- to late-1970s” has no support. PFI cites a single source, which: (1) consists of inadmissible hearsay, (2) purports to describe the

organization only through 1974, and (3) notes that any influence the NTCA had was because officials in the Nixon Administration believed NCAI President Leon Cook was an “Anti-Nixon Democrat.” [Dkt. 98-11] at 2, 10-12. The federal government’s Bureau of Indian Affairs created the NTCA as an Indian organization that would support the BIA, unlike the NCAI which acted independently of the Government in advancing Native American interests. *See* Ex. A, Second Declaration of Jennifer T. Criss (“2nd Criss Decl.”) Exh. 1 at 100:17-101:9.

¶¶ 10-12: PFI provides no evidence of the facts and circumstances concerning the limited examples of the use of the term “redskin” by Native Americans that they cite, such as whether they were using the term ironically or facetiously. Members of minority groups or other disparaged groups often reappropriate slur terms and use the term amongst themselves.¹ *See* [Dkt. 72-16] at 62-64.

¶ 13: The fact that Native Americans (and William Dietz who held himself out as a Native American but who was not) have played for or coached the team is not evidence that they support the team name. There are few playing and coaching jobs in the NFL; it is just as reasonable to conclude that they played for the team despite its name.

¶ 14: Defendants object to “Washington Redskins” as disparaging. [Dkt. 1] ¶20; [Dkt. 41] ¶20; *see, e.g.*, 2nd Criss Decl. Exh. 2 at 93:6-94:8, 115:4-116:9; Exh. 3 at 122:13-16, 130:10-19.

Geoffrey Nunberg opined that “Washington Redskins” carries the negative connotations of “redskin.” [Dkt. 72-16] at 37-38.

¹ Todd Anten, *NOTE: SELF-DISPARAGING TRADEMARKS AND SOCIAL CHANGE: FACTORING THE REAPPROPRIATION OF SLURS INTO SECTION 2(A) OF THE LANHAM ACT*, 106 Colum. L. Rev. 388, 392, 413, 422 (2006) (commenting that “[t]he reappropriation of slurs is a common source of empowerment among disparaged groups” and that “reappropriation of former slurs is an integral part of the fostering of individual and group identity, recapturing ‘the right of self-definition, of forging and naming one’s own existence’” and “an act of ‘courageous self-emancipation’ that allows the victims of hateful labels to make themselves ‘whole’ again.”).

¶ 15: PFI cites a two-page press release purporting to state the results of a 2003 survey. The press release is inadmissible hearsay. *See* Fed. R. Evid. 802. It was not within the *Harjo* record (it was created years after the *Harjo* record) and is therefore not covered by the parties' evidentiary stipulation. *See infra* at 14. PFI also cites a discussion of the survey in Hart Blanton's rebuttal report, but Blanton only reviewed a hearsay summary of a survey and is not competent to testify to the survey's "methodology or results beyond recounting the hearsay."² . *See Swatch, S.A. v. Beehive Wholesale, L.L.C.*, 888 F.Supp.2d 738, 743-44, n. 1 (E.D.Va. 2012); Fed. R. Evid. 702-03, 801(c), 802.

¶ 16: The document purporting to state what Ben Nighthorse Campbell purportedly stated to the *Pueblo Chieftan* is hearsay quoting hearsay, and is inadmissible. The document was not within the *Harjo* record and not within the parties' evidentiary stipulation.

¶ 17: PFI has introduced no evidence concerning the individuals who wrote the letters cited in ¶ 17, or the facts and circumstances of their letters, including whether others within their tribe knew or agreed with the letters. PFI has not cited any testimony or provided the declaration of a single Native American. Indeed, PFI failed to identify *any* Native American beyond the Defendants as having discoverable information regarding the disparagement issue. *See* 2nd Criss Decl. Exh. 4.

¶¶ 18-20: *See* Response to ¶¶ 10-12.

¶ 21: Whether "redskin" was coined centuries ago by Native Americans is not relevant.

¶¶ 22-24: These facts do not establish that Defendants unreasonable delayed filing their TTAB petition or that PFI took any actions based on any delay.

² In addition, Blanton acknowledged that he was not asked to opine on the actual attitudes of Native Americans from 1967 to 1990 and did not find any material, including the press release, which "could be used as a basis for advancing an empirically justified opinion on this matter." [Dkt. 82-1] at ¶ 7.

ARGUMENT

I. THE *HARJO* DISTRICT COURT IS NOT ENTITLED TO DEFERENCE.

PFI asserts that this Court should follow the *Harjo* District Court. [Dkt. 100] at 1, 36. In fact, the *Harjo* District Court opinion is entitled to no deference, was based on a different record, and its opinion was flawed.

This Court is required to review the evidence *de novo*; as a matter of law, the *Harjo* District Court opinion is entitled to no deference. *See Swatch, S.A. v. Beehive Wholesale, L.L.C.*, 739 F.3d 150, 155 (4th Cir. 2014). Moreover, the record in this case includes significant evidence that was not in the *Harjo* record. *See* [Dkt. 71] at 2 (describing additional evidence generated in this action). The record is not an “effectively identical record,” as PFI incorrectly states. [Dkt. 100] at 1.

In addition, if anything can be inferred from the D.C. Circuit’s decisions, it is that the D.C. Circuit disagreed with the *Harjo* District Court on the “may disparage” issue. Despite receiving full briefing and argument on the “may disparage” issue, the D.C. Circuit remanded the case to the District Court to reconsider the laches issue under a different legal standard. *See Pro-Football, Inc. v. Harjo*, 415 F.3d 44, 46 (D.C. Cir. 2005). If the D.C. Circuit believed that the *Harjo* District Court was correct in its “may disparage” ruling, as a matter of judicial economy, one would have expected the D.C. Circuit to have affirmed on that basis instead of remanding for more litigation on laches.

II. FOR COUNT 1, THE STATUTORY TEST IS “MAY DISPARAGE” AND PROOF OF ACTUAL DISPARAGEMENT IS NOT REQUIRED.

A. The Statute Says “May Disparage.”

According to PFI, Section 2(a) requires Defendants to demonstrate that PFI’s marks *actually* disparage. [Dkt. 100] at 32-33. PFI’s position is contradicted by the plain language of

the statute: Section 2(a) states that a trademark is not eligible for registration if it consists of or comprises “matter that *may* disparage.” 15 U.S.C. § 1052(a) (emphasis added).

In this appeal, the Court interprets the Lanham Act *de novo*. *In re St. Helena Hosp.*, 774 F.3d 747, 750 (Fed. Cir. 2014); *Tequila Centinela, S.A. v. Bacardi & Co., Ltd.*, 517 F. Supp. 2d 1, 3-4 (D.D.C. 2007); *Glendale Int’l Corp. v. USPTO*, 374 F. Supp. 2d 479, 485 (E.D. Va. 2005).

As Defendants have demonstrated, Congress’s inclusion of “may” before “disparage” in Section 2(a) was deliberate and meaningful. All the other statutory bars to registration in 15 U.S.C. § 1052 conspicuously lack “may.” A separate requirement in Section 2(a), for example, bars registration if the mark contains matter that *actually is* “immoral, deceptive, or scandalous,” not merely if the matter *may be* so. Congress also struck “tends to” from early drafts of the legislation in favor of “may.” [Dkt. 71] at 31-32. “May disparage” is a lower standard than “tends to disparage,” which itself was a lower standard than “does disparage.”

It is well-established “[i]n common and legal usage” that “‘may’ reflects possibility, not certainty.” *United States v. Arias-Espinosa*, 704 F.3d 616, 619 (9th Cir. 2012); *see also FTC v. Morton Salt Co.*, 334 U.S. 37, 46 (1948) (“may” requires only “reasonable possibility”); *United States v. Lexington Mill & Elevator Co.*, 232 U.S. 399, 411 (1914) (applying ordinary meaning of “may”); *Ventura v. Attorney Gen.*, 419 F.3d 1269, 1282 (11th Cir. 2005) (stating that “‘may’ and ‘could’ are both words used to express ‘possibility.’”).

One commentator – who is now the Honorable Kimberly Moore of the Federal Circuit – explained the significance of “may” before “disparage”:

Section 2(a) provides that registration should be refused when a mark ‘[c]onsists of or comprise immoral, deceptive, scandalous matter; or matter which *may* disparage ... persons [...]. The statute does not prohibit ‘matter which disparages;’ rather, it prohibits ‘matter which *may* disparage.’ The latter is certainly a broader prohibition than the former.

Kimberly A. Pace, *The Washington Redskins Case and The Doctrine of Disparagement: How Politically Correct Must a Trademark Be?*, 22 Pepp. L. Rev. 7, 33 (1994). Accordingly, “[t]o cancel a mark because it disparages, the mark has to have the potential to disparage the group at the date of its registration.” *Id.* at 33 n.174. In fact, the TTAB recently articulated the legal question as whether a mark contains matter with a “potential ... to be disparaging.” *See In re Beck*, 2015 WL 1458229, at *7 (March 19, 2015) (“[T]he fact that Jesus plays a role in religions other than Christianity does not diminish the *potential* for the mark PORNO JESUS *to be disparaging* to a substantial composite of Christian-Americans”) (emphasis added).

PFI points out that the TTAB has stated that the inclusion of “may” demonstrates that no intent to disparage is required. [Dkt. 100] at 32. That is true as far as it goes. The inclusion of “may” is certainly incompatible with requiring proof of an intent to disparage, but that is not the sole impact of the word “may.” If Congress included “may” in Section 2(a) merely to signify that intent is not required, then it would have been unnecessary for Congress to replace “tends to disparage” with “may disparage.” *See* [Dkt. 71] at 31-32 (describing Congress’s adoption of “may disparage” in place of “tends to disparage” in Section 2(a)). Instead, by selecting “may disparage” instead of “tends to disparage,” “does disparage” or any other formulation, Congress rendered unregistrable marks that pose a possibility of disparagement.

PFI’s contention that “may” was included solely to clarify the lack of an intent requirement is flawed for an additional reason. Even without “may,” Section 2(a) would not require intent. The statute asks whether the “matter,” not whether the owner, may disparage. “Matter” – not the trademark owner – is the subject and “may disparage” is the verb. “Matter” is inanimate and cannot possess intent. Further, as PFI has noted, as of 1946, “disparage” meant “to describe (someone or something) as unimportant, weak, bad, etc.” or “to lower in rank or

reputation: degrade” or “to depreciate by indirect means (as invidious comparison): speak slightingly about.” [Dkt. 56] at 18-19 (quoting Merriam-Webster) & n. 14 (other dictionaries in 1946 provided “materially identical definitions”). Under these definitions, intent is not required to “disparage.” “Disparagement” is about effects. *See United States v. Grunberger*, 431 F.2d 1062, 1067 (2d Cir. 1970) (stating need for appellate court to determine “whether questions by the judge had the *effect of unfairly disparaging* the defense”) (emphasis added).

Prior to 1946, when Congress barred registration of marks that “may disparage,” the USPTO had received applications to register many racist trademarks. *See, e.g.*, 2nd Criss Decl. Exh. 5 (reproducing racist trademarks on registration applications). By passing the Lanham Act, Congress sought to ensure that the USPTO would not issue registrations “in the name of the United States,” “under the seal of the Patent and Trademark Office,” and “signed by the Director” for trademarks with matter that “may disparage” fellow Americans. 15 U.S.C. § 1057(a).

B. Evidence Of A “Substantial Composite” Is One Way To Demonstrate That A Mark Contains Matter That “May Disparage,” But Is Not The Only Way.

For the second part of its two-part test (*i.e.*, is the meaning of the marks one that “may disparage” the referenced group?) the TTAB has stated that “[t]he views of the referenced group are ‘reasonably determined by the views of a substantial composite thereof.’” *Blackhorse*, 2014 WL 2757156, at *5 (internal quotation omitted); *see also Harjo v. Pro-Football, Inc.*, 1999 WL 375907, at * 36 (T.T.A.B. 1999).

From this, PFI incorrectly asserts that the *only* way to demonstrate that a mark contains matter that may disparage is by evidence of the views of a substantial composite of Native Americans. [Dkt. 100] at 36 Certainly, evidence that a substantial composite of Native Americans views “redskins” as disparaging demonstrates that the mark contains matter that “may

disparage.” However, PFI ignores that other evidence can also demonstrate that a mark contains matter that may disparage.

The Lanham Act does not include the “substantial composite” terminology. 15 U.S.C. § 1052(a). Rather, the TTAB adopted its “substantial composite” inquiry as a way of “reasonably” determining whether a mark contains matter that “may disparage.” PFI’s arguments are directed solely towards the TTAB’s term, “substantial composite.” But this Court’s role is to interpret and apply the “may disparage” language of the Lanham Act, not the meaning of the “substantial composite” expression that the TTAB has adopted. On this appeal, the Court interprets the statute *de novo*. See *In re St. Helena Hosp.*, 774 F.3d 747, 750 (Fed. Cir. 2014).

The term “substantial composite” was coined by the Federal Circuit’s predecessor in a case deciding whether a mark contains *actually scandalous* matter under Section 2(a). In *In re McGinley*, 660 F.2d 481 (C.C.P.A. 1981), the Court stated that “[w]hether or not the mark, including innuendo, *is scandalous* is to be ascertained from the standpoint of not necessarily a majority, but a substantial composite of the general public.” *Id.* at 485 (emphasis added); see also *In re Mavety Media Group, Ltd.*, 33 F.3d 1367, 1371 (Fed. Cir. 1994). In *Harjo*, the TTAB borrowed “substantial composite” from the “is scandalous” context for use in the “may disparage” context. *Harjo*, 1999 WL 375907, at *35. It is illogical to use an expression relevant to whether a mark contains matter that *actually is scandalous* as the sole means of assessing whether matter *may disparage*, since “may disparage” requires only a potential to disparage. Since the TTAB found that Defendants had introduced evidence of the views of a substantial composite, it did not need to consider whether other evidence can also suffice to establish that the matter in the marks “may disparage” Native Americans.

In Section IV, below, Defendants demonstrate that the TTAB was correct in concluding

that a substantial composite of Native Americans, at the relevant time periods, viewed “redskins” as disparaging. Likewise, PFI’s marks were ineligible for registration under a straightforward application of the facts to the statutory “may disparage” test.

III. PFI’S VARIOUS EVIDENTIARY CONTENTIONS HAVE NO MERIT.

Scattered in its brief, PFI makes a variety of extreme arguments intended to narrow the Court’s consideration of evidence regarding the disparaging nature of “redskins.” PFI’s arguments contradict the Federal Rules of Evidence, common sense, and precedent from other Section 2(a) “may disparage” cases.

A. PFI’s Effort To Bar Non-“Direct” Evidence Should Be Rejected.

PFI asserts that Defendants are “required to provide *direct* evidence of disparagement...,” and are not permitted to “extrapolate” (by which PFI apparently means that inferences cannot be drawn from circumstantial evidence). [Dkt. 100] at 29 (emphasis original); *see also id.* at 32 (“... extrapolations are insufficient; direct evidence is required”); *id.* at 36 (“... [Defendants] must introduce *direct evidence* of disparagement” and “direct evidence of the views of a ‘substantial composite’ of Native Americans is required.”) (emphasis original). Thus, according to PFI’s extreme approach to relevance, this Court cannot consider dictionary definitions, reference sources and newspaper articles discussing “redskin,” the activities of the NCAI, Indian protests at the 1988 Super Bowl, empirical analysis comparing use of “redskin” to “Indian,” or any other evidence submitted by Defendants.

PFI’s position contradicts Federal Rules of Evidence 401 and 402, which apply to this case. *See* Fed. R. Evid. 101 & 1101. Rule 401 states that evidence is relevant if “it has any tendency to make a fact more or less probable than it would be without the evidence” and “the fact is of consequence in determining the action.” Fed. R. Evid. 401; *see also Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 330 (1960) (“direct evidence of a fact is not required”);

United States v. Williams, 445 F.3d 724, 731 (4th Cir. 2006) (“circumstantial evidence is not inherently less valuable or less probative than direct evidence”). Furthermore, evidence may be admissible even where the evidence standing alone does not prove a party’s entire case. *See T. L. O.*, 469 U.S. at 345 (“But it is universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue....”); *see also Old Chief v. United States*, 519 U.S. 172, 178-79 (1997).

PFI does not discuss the Federal Rules of Evidence or federal opinions on relevance. Instead, it asserts that the TTAB does not allow non-“direct” evidence in *inter partes* cases. PFI’s argument has no legal merit because Fed. R. Evid. 401 governs relevance in this proceeding and because PFI distorts the TTAB decisions.

PFI pulls out of context the TTAB’s discussion of the quantum of evidence that the USPTO needs to present in order to make a *prima facie* showing in an *ex parte* case. [Dkt. 100] at 27-29 (discussing *In re Heeb Media, LLC*, 2008 WL 5065114 (T.T.A.B. 2008) and *In re Squaw Valley Dev. Co.*, 2006 WL 1546500 (T.T.A.B. 2006)). In an *ex parte* proceeding, the USPTO has only the burden of presenting a *prima facie* case, and the party applying for registration then has the burden of proof to rebut the *prima facie* case. *See Squaw Valley*, 2006 WL 1546500, at *9; *Heeb*, 2008 WL 5065114, at *7. In these two cases, the TTAB stated that a lower quantum of evidence is needed to make out a *prima facie* case than is required to meet a burden of proof. Neither case suggests that unique rules of relevance apply in *ex parte* cases. While the TTAB stated that the USPTO can make out a *prima facie* case with non-“direct” evidence, the TTAB has never stated that a party in an *inter partes* action can only meet its burden of proof with direct evidence. *See Squaw Valley*, 2006 WL 1546500, at *9; *Heeb*, 2008 WL 5065114, at *7. To the contrary, in both *Harjo* and *Blackhorse*, the TTAB found non-

“direct” evidence to be relevant. *See e.g., Blackhorse*, 2014 WL 2757516, at *11-17.

Accordingly, PFI’s blanket effort to bar the Court from considering non-“direct” evidence should be rejected.

B. Evidence Of General Perception Is Relevant.

PFI asserts that only evidence of the perceptions of Native Americans may be considered, and not evidence of the general public’s perception. [Dkt. 100] at 31-32. 36. This is a special application of the general argument addressed above that only “direct” evidence is relevant. *See id.* at 32 (reincorporating its arguments at [Dkt. 100] at 26-29. As just explained, the standard for determining relevance is Federal Rule of Evidence 401. Evidence of the general understanding and perception of “redskins” is relevant to how Native Americans understand and perceive the term. Americans – including Native Americans – speak the same language, English. *See In re Tam*, 2013 WL 5498164, at *1-2, *7 & n.3 (T.T.A.B. 2013) (relying in part on dictionaries to find that “slants” is viewed as disparaging by a substantial composite of the referenced group); *In re Heeb Media*, 2008 WL 5065114, at *1 (same as to “heeb”); *In re Squaw Valley Dev. Co.*, 2006 WL 1546500, at *13 (same, as to “squaw”).

C. Evidence Regarding “Redskins” Is Relevant, Even If Not Specifically Regarding “Washington Redskins.”

PFI contends that dictionaries, other written references, and other that evidence that “redskins” may disparage is not relevant unless the evidence specifically concerns “Washington Redskins.” *See, e.g.*, [Dkt. 100] at 11, 13, 15, 35. In fact, this evidence is relevant.

PFI’s team name contains “redskins.” Evidence that “redskins” may disparage is therefore evidence that “Washington Redskins” may disparage. *See Blackhorse*, 2014 WL 2757516, at *10 n.43 (“There is no case in our review where a term found to be a racial slur in general was found not to be disparaging when used in the context of specific services”); *see also*

Christine Haight Farley, *Stabilizing Morality in Trademark Law*, 63 Am. U. L. Rev. 1019, 1030 (2014) (Section 2(a) applies to “immoral, scandalous and deceptive ‘matter,’ not immoral, scandalous, and disparaging marks. That is, the matter contained within the mark is the object of the inquiry, not the mark.”).

Consider, for instance, the trademarks in 2nd Criss Decl. Exh. 5, such as the trademark for “N*gg*r Head Brand.” Evidence that “n*gg*r” may disparage would be relevant to whether “N*gg*r Head Brand” may disparage. The relevance issue is the same for “Washington Redskins.”

D. PFI’s Suggestion That A “Substantial Composite” Means A Majority Should Be Rejected.

PFI argues that a “substantial composite” of Native Americans should mean at least a majority, *i.e.*, that it would be acceptable for PFI to offend up to 49% of Native Americans. [Dkt. 100] at 29-31. As discussed above, “substantial composite” is not a statutory term; it is a term that the TTAB adopted for its use in determining whether a mark contains matter that “may disparage.” *See* Part II, *supra*. The TTAB has repeatedly held that a substantial composite may be less than a majority. *See Blackhorse*, 2014 WL 2757516, at *29; *In re Tam*, 2013 WL 5498164, at *4; *In re Heeb Media*, 2008 WL 5065114, at *8; *In re Squaw Valley Dev. Corp.*, 2006 WL 1546500, at *18 n.12.

PFI’s suggestion is also contradicted by the plain language of Section 2(a), which provides that a mark is not eligible for registration if it contains matter that “may disparage.” To satisfy that standard, it is not necessary to prove the views of a majority of the referenced group.

E. PFI’s Hearsay Objections Should Be Rejected.

In a footnote, PFI asserts that this Court should not consider Defendants’ documentary evidence because it allegedly is hearsay. [Dkt. 100] at 11 n.9. With a single exception, PFI’s

assertion should be rejected.³ PFI previously waived its hearsay objections over most of the documents. All other documents satisfy the “ancient records” exception, Fed. R. Evid. 803(16).

1. PFI Waived Its Hearsay Objections Over Almost All The Documents.

In the *Blackhorse* TTAB proceeding, the parties agreed that the *Harjo* TTAB record would serve as the *Blackhorse* TTAB record. [Dkt. 1] ¶ 28. The parties further agreed to waive all non-relevance evidentiary objections as to the evidence in the *Harjo* record. See [Dkt. 72-2] at 2. Evidentiary stipulations and waivers of objections are enforced. See *United States v. Mezzanatto*, 513 U.S. 196, 202 (1995).

Accordingly, PFI made no hearsay objections before the TTAB in *Blackhorse*. See 2nd Criss Decl. Ex. 6. The TTAB confirmed that the parties expressly waived hearsay and non-relevancy objections:

As stipulated, the parties only reserved the right to make objections based on relevance to evidence earlier admitted in the *Harjo* record.... All other possible objections, including those based on hearsay, were waived. This was confirmed from both parties at the oral hearing.

Blackhorse, 2014 WL 2757516, at *4 (emphasis added). The TTAB further noted that the stipulation encompassed a waiver of objections to hearsay within hearsay. See *Blackhorse*, 2014 WL 2757516, at *6 n.21.

Defendants discussed the stipulation in their brief ([Dkt. 71] at 4-5), and PFI has not argued that the stipulation lacks effect. If it has any such argument, PFI has now waived it.

PFI’s waiver of hearsay applies to all the documents referred to in footnote 9 of its brief, except for Exhibits 4, 55, 61, 72, 73, and 76-78 to the Criss Declaration [Dkt. 71-1 – 75-35].

2. Other Documents Satisfy The Ancient Documents Exception.

The hearsay exception for ancient documents applies to “a statement in a document that

³ As to Exhibit 77, PFI’s objection is well founded. [Dkt. 73-37].

is at least 20 years old and whose authenticity is established.” Fed. R. Evid. 803(16). This exception applies to Exhibits 4, 55, 61, 72, 73, 76 and 78 to the Criss Declaration [Dkt. 71-1].

There is no dispute that the documents are older than 20 years. Five of these documents are newspaper articles published between 1933 and 1972 in *The Hartford Courant*, *The Baltimore Sun*, *The Wall Street Journal*, the *Washington Evening Star*, and the *Los Angeles Times*. [Dkt 72-4; Dkt. 73-15, 32, 33, 38]. One is an article in a scholarly journal, *American Speech*, published in 1963. [Dkt 73-21]; [Dkt. 72-16] at 53. And one document is the minutes of a 1972 meeting of the University of Utah Athletic Board regarding the university’s decision to drop “Redskins” as the name for its sports teams. [Dkt. 73-36]; [Dkt. 73-20] at 16. PFI has stipulated as to the authenticity of each of these documents. [Dkt. 68; Dkt. 47-3].

Accordingly, Federal Rule of Evidence 803(16) has been satisfied. *See United States v. Balt. Museum of Art*, 991 F. Supp. 2d 740, 746 (E.D. Va. 2014); *Brumley v. Albert E. Brumley & Sons, Inc.*, 727 F.3d 574, 579-80 (6th Cir. 2013) (applying exception to newspapers).

IV. UNDER THE TTAB’S TWO-PART TEST, PFI’S TRADEMARKS ARE NOT ELIGIBLE FOR FEDERAL REGISTRATION.

A. PFI’s Marks Contained Matter That “May Disparage” As Of The Dates Of The Registrations.

1. “Redskins” In PFI’s Marks Refer To Native Americans.

The first question in the TTAB’s two-part test is, logically, “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 good and services identified in the registrations?” [Dkt. 71] at 32; [Dkt. 100] at 26. The TTAB consistently uses dictionaries to find the “meaning of the matter.” *See, e.g., Heeb*, WL 5065114, at *4; *Tam*, 2013 WL 5498164, at *2-4. Dictionaries clearly establish that when it comes to the word “redskin,” the “meaning of the matter” is “a North American Indian.” [Dkt. 72-6 – 72-10]. *See* [Dkt. 72-11].

PFI asserts that any connection between the team name and Native Americans is “vestigial” and that “[m]uch of the [Native American] imagery was no longer present by 1990.” *See* [Dkt. 100] at 33-34. In fact, for years, PFI has reinforced that “redskin” in the marks refers to Native Americans. *See, e.g.*, [Dkt. 72-3] at Nos. 4-8 (team name, two of the registered trademarks, fight song lyrics, marching band uniforms and Indian-themed music, past cheerleader uniforms expressly depict or allude to Native Americans); [Dkt. 73-78, Dkt. 73-84 – 74-3]; *see also* [Dkt. 71] at 27-29.

2. The Marks Contain Matter That “May Disparage.”

The TTAB has formulated the next question: Is the meaning of the marks one that may disparage Native Americans? [Dkt. 71] at 32; [Dkt. 100] at 26.

As noted in Section II.B, in considering the second question, the TTAB looks to the views of the referenced group, which are “reasonably determined by a substantial composite thereof.” *Blackhorse*, 2014 WL 2756516, at *5. All agree that evidence that a substantial composite of Native Americans views “redskins” as disparaging demonstrates that the mark contains matter that “may disparage.” Other evidence, however, can also establish that the marks contain matter that “may disparage.” *See* Section II.B, *supra*.

Here, as outlined below, the evidence introduced in this case: (1) demonstrates that the marks contain matter that “may disparage” as reasonably determined by the views of a substantial composite of Native Americans (*i.e.*, using the TTAB “substantial composite” inquiry); and (2) demonstrates that the marks contain matter that “may disparage” based on a straightforward application of the facts to the statutory language of Section 2(a). Despite PFI’s claims to the contrary, Defendants’ evidence is directly relevant to the “may disparage” question.

Dictionaries, Reference Works, Other Written Sources, Newspapers and David

Barnhart’s Testimony [Dkt. 71] at 6-9, 14: These sources all provide evidence that “redskin” is a term that may disparage Native Americans. Native Americans, like other Americans, speak English and “redskin” is “matter” contained within the trademarks. Therefore, these sources are evidence that the marks contain matter that may disparage and provide evidence of the views of a substantial composite of Native Americans. 15 U.S.C. § 1052(a). In determining the views of a substantial composite of the referenced minority group, the TTAB consults dictionaries. *See, e.g., Heeb* at *3-4, 14; *Tam* at *2-4, 16; *Squaw Valley*, 2006 WL 1546500, at *13.

Native Americans Have Experienced The Slur [Dkt. 71] at 9-10: The declarations of four prominent Native Americans regarding their experience being slurred with “redskin” is relevant to the term’s meaning and connotation as a slur.

National Congress of American Indians and Other Indian Organizations [Dkt. 71] at 16-25: According to the TTAB, evidence of the views and actions of organizations like the NCAI provides evidence of the views of a substantial composite. *See, e.g., Heeb*, 2008 WL 5065114, at *1-2 (finding relevant the statement of Anti-Defamation League Associate Director). From the 1960s to the present, the NCAI has been the largest and most prominent national American Indian organization; it had about 150 tribes as members in 1967-1973, comprising about 50% of Native Americans, and approximately 300 member tribes during the 1980s. [Dkt. 71] at 17; [Dkt. 71-5] at ¶13. NCAI has consistently opposed the team’s name, including: (1) the 1972 meeting with PFI coordinated with other Native American organizations; (2) the resolution at the 1973 annual NCAI meeting; (3) NCAI Executive Director Suzan Harjo’s efforts to re-engage with new team ownership in the 1980s; (4) a succession of NCAI’s elected Presidents from Leon Cook to gaiashkibos objected to the team name; (5) NCAI support of protests at Super Bowls; and (6) two NCAI resolutions in 1993, one of which resolved in part that

“REDSKINS ... has always been and continues to be a [slur].” [Dkt. 71] at 16-25 ¶¶ 26-38, 42-46, 49, 51-52.

PFI contends that other Indian organizations “did not oppose the team name” ([Dkt. 100] at 22), but these organizations lack the national prominence or significance of the NCAI. *See supra* at 2-3. Moreover, the only evidence cited is that the organizations helped arrange for a special trip for Native American high school students to Washington, D.C., in 1977, where they performed at the White House and the Smithsonian, as well as RFK Stadium, and toured Washington. This is not evidence that the organizations “did not oppose the team name.” *See supra* at 2. In any event, some difference in opinions among Native Americans does not rebut Defendants’ evidence that establishes that “redskins” *may* disparage.

Article on Haskell Institute Students’ Understanding of “Redskin” in 1962 [Dkt. 71] at 15-16 and Ross Survey [Dkt. 71] at 25-27: The 1962 scholarly article stating that “almost all” Haskell Institute students “resent being called redskins” is relevant to show the views of Native Americans at the time and whether a substantial composite would have viewed “redskin” as objectionable. Likewise, the 1996 survey of Native American views of “redskin” is relevant. PFI asserts that this evidence is not relevant because they do not discuss “Washington Redskins.” However, “redskins” is matter that appears within “Washington Redskins.” 15 U.S.C. § 1052(a); *see* Part III.C, *supra*.

Dr. Nunberg’s Sentiment Analysis [Dkt. 71] at 10-12 and Newspaper Usage Analysis [Dkt. 71] at 12-14: There is no dispute that Dr. Nunberg performed the analyses and obtained the results that he obtained. PFI objects to the relevance of his work [Dkt. 100 at 13-15], but evidence that “redskin” has negative connotations is relevant to whether “Washington Redskins” may disparage and to the views of a substantial composite of Native Americans. PFI also asserts

incorrectly that his analysis is “skewed” because “Indian” is used more commonly than “redskin.” [Dkt. 100] at 14. However, the point that Dr. Nunberg made is that the ratio of Indian-to-redskin usage varies according to whether a positive or negative sentiment is expressed. [Dkt. 71] at 11.

University of Utah Drops “Redskins” in 1972 [Dkt. 71] at 20-21: PFI asserts that the University’s decision is not relevant, but the decision is evidence that the feelings of many Native Americans about “redskins” as a team name were known and understood as of 1972.

B. PFI’s Evidence Does Not Create An Issue Of Fact As To Whether The Marks Contain Matter That “May Disparage.”

PFI has introduced evidence about a trip to Washington, D.C. organized in 1977 for Native American youth during which they performed at multiple venues, including RFK Stadium during a “Redskins” game. This is not evidence that the participants do not object to the team name, only that they were willing to perform at a home game at RFK Stadium. [Dkt. 100] at 5-8. PFI has also introduced evidence that some Indians have used “redskins” and letters in support of the “Washington Redskins” from people who purport to be Native Americans, including some tribal leaders. [Dkt. 100] at 8-10. PFI has introduced no witness testimony, so the relevant facts and circumstances are not known. The deficiencies in this evidence are discussed above at pages 2-4.⁴

Even if PFI’s evidence is viewed in the light most favorable to it, there is still no genuine issue of material fact that PFI’s marks contain matter (the word “redskin”) that “may disparage” Native Americans as of 1967, 1974, 1978 and 1990, including if viewed from the perspective of a substantial composite of Native Americans. The fact some Native Americans did not object to

⁴ PFI relies in part on a 2003 press release about a survey and a document purportedly reciting what Ben Nighthorse Campbell told a newspaper. [Dkt. 100] at 9, 38. As noted above (*supra* at 4), these documents are inadmissible hearsay, subject to no exception. *See* Fed. R. Evid. 802.

the team name – or even supported it – does not create a genuine issue of fact that the term “may disparage.” As the TTAB reasoned:

Respondent has introduced evidence that some in the Native American community do not find the term ‘Redskin’ disparaging when it is used in connection with professional football. While this may reveal differing opinions within the community, it does not negate the opinions of those who find it disparaging.... [O]nce a substantial composite has been found, the mere existence of differing opinions cannot change the conclusion.

Blackhorse, 2014 WL 2757516, at *29 (emphasis added); see also *Heeb*, 2008 WL 5065114, at *8 (“Applicant’s evidence, in support of its contention that its use of the term HEEB is not disparaging, does not erase the perception of others....” and “Although some in the [Jewish] community may not find ‘HEEB’ disparaging, as noted above, the evidence shows that there is a substantial composite of those in the named group who do.”).

V. PFI HAS IGNORED KEY ARGUMENTS AND AUTHORITIES ON LACHES.

PFI’s response on laches ignores key arguments and authorities raised by Defendants. *First*, PFI ignores Fourth Circuit authority that the public interest weighs against applying laches. [Dkt. 71] at 37 (citing two Fourth Circuit cases). *Second*, PFI does not respond to the argument that the entire period that *Harjo* was pending provided excusable delay (and thus has waived a response). [Dkt. 71] at 38. *Third*, PFI ignores *Ray Commc’ns, Inc. v. Clear Channel Commc’ns, Inc.*, 673 F.3d 294, 305 (4th Cir. 2012), which requires a showing of actual prejudice due to delay. PFI asserts that it invested in its trademarks during the alleged delay, but introduced no evidence that it would have acted differently if the cancellation petitions had been filed sooner.

CONCLUSION

For the foregoing reasons and the reasons in Defendants’ opening brief, Defendants’ Motion for Partial Summary Judgment on Counts 1, 2, and 7 should be granted and Plaintiff’s Cross-Motion for Partial Summary Judgment on those counts should be denied.

Dated: April 3, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of April, 2015, the foregoing pleading or paper was filed and served electronically by the Court's CM/ECF system upon all registered users in this action:

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