

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In re Registration No. 1,606,810 (REDSKINETTES)  
Registered July 17, 1990,

Registration No. 1,085,092 (REDSKINS)  
Registered February 7, 1978,

Registration No. 987,127 (THE REDSKINS & DESIGN)  
Registered June 25, 1974,

Registration No. 986,668 (WASHINGTON REDSKINS & DESIGN)  
Registered June 18, 1974,

Registration No. 978,824 (WASHINGTON REDSKINS)  
Registered February 12, 1974,

and Registration No. 836,122 (THE REDSKINS—STYLIZED LETTERS)  
Registered September 26, 1967

Amanda Blackhorse, Marcus Briggs-Cloud, )  
Phillip Gover, Jillian Papan and Courtney Tsotigh, )  
 )  
Petitioners, )

Cancellation No. 92/046,185

v. )  
 )  
Pro-Football, Inc., )  
 )  
Registrant. )  
\_\_\_\_\_ )

**PETITIONERS' TRIAL BRIEF**

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## **I. INTRODUCTION**

In *Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q.2d 1705 (T.T.A.B. 1999), the Board ruled that the same six registrations challenged in this petition should be canceled because they contain matter (“redskin(s)” or derivations of “redskin(s)”) that may disparage Native Americans or bring them into contempt or disrepute. In *Harjo*, the Board stated its conclusions as follows:

- “[W]e conclude that the evidence of record establishes that, within the relevant time periods, the derogatory connotation of the word ‘redskin(s)’ in connection with Native Americans extends to the term “Redskins,” as used in respondent’s marks in connection with the identified services, such that respondent’s marks may be disparaging of Native Americans to a substantial composite of this group of people.”
- “[W]e conclude that the marks in each of the challenged registrations consist of or comprise matter, namely, the word or root word, ‘Redskin,’ which may bring Native Americans into contempt or disrepute.”
- “As to each of the registrations subject to the petition to cancel herein, the petition to cancel under Section 2(a) of the [Lanham] Act is granted on grounds that the subject marks may disparage Native Americans and may bring them into contempt or disrepute.”

*Harjo*, 50 U.S.P.Q.2d at 1748, 1749.

Petitioners and Registrant Pro-Football, Inc. (“PFI” or “Registrant”) have stipulated that the record in *Harjo* shall serve as the record in this matter. Since the registrations are the same, the record is the same, and the legal standards are the same, the result should be the same: the Board should order cancellation of the registrations.

Indeed, as demonstrated below, at all relevant times, “redskin(s)” has been a disparaging term used to refer to Native Americans. The trademarks were not eligible under the Lanham Act for registration and the registrations should now be canceled.

## **II. BACKGROUND**

### **A. Procedural History**

On August 11, 2006, pursuant to Section 14(3) of the Lanham Act, 15 U.S.C. § 1064(3), Petitioners Amanda Blackhorse, Marcus Briggs-Cloud, Phillip Gover, Jillian Pappan and

Courtney Tsotigh filed this petition to cancel six trademark registrations that are registered in the name of PFI, the owner of the Washington NFL Football Team.<sup>1</sup> Section 14(3) provides for cancellation of a registration granted contrary to Section 2(a), and Section 2(a) provides that a trademark is not eligible for registration if it “consists of or contains ... matter which may disparage ... persons, ... or bring them into contempt or disrepute...” 15 U.S.C. §§ 1052(a) & 1064(3).

Here, each of the challenged registered marks contains the term “REDSKIN” or a form of “REDSKIN” and, as a result, consists of or comprises matter that may disparage Native American persons or that may bring them into contempt, ridicule, and disrepute. On that basis, Petitioners seek cancellation of the registrations in question.

On September 26, 2006, PFI filed an Answer that asserted twelve affirmative defenses. The Board then suspended this matter until the federal court proceedings in *Harjo* were concluded. The Board resumed proceedings in this matter on March 18, 2010.

On May 5, 2011, the Board struck ten of PFI’s affirmative defenses, leaving only laches and “secondary meaning.” *See* Order Summarizing Pretrial Conference (May 5, 2011) [Dkt. 39] at 12-18. “Secondary meaning” is not an affirmative defense, but the Board explained that it “interpret[s] this affirmative defense as an elaboration of respondent’s denial that the term REDSKINS is disparaging,” *i.e.*, a theory as to why the term REDSKINS is supposedly not disparaging. *See id.* at 14.

On May 31, 2011, after inviting the parties to submit briefs, the Board issued an Order setting forth the legal standards that it intends to apply for “disparagement,” “contempt or disrepute,” and laches.

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<sup>1</sup> A sixth petitioner withdrew the petition as to her alone in July 2010 [Dkt. 24].

## **B. The Parties' Stipulation Regarding Admissibility Of *Harjo* Evidence**

On March 14, 2011, the parties filed a stipulation intended to reduce discovery burdens and expenses by letting the *Harjo* record serve as the record in this petition. The parties stipulated that, with certain exceptions, evidence submitted in *Harjo v. Pro-Football, Inc.*, Cancellation No. 21,069 (T.T.A.B.), shall be admissible in this proceeding, unless the Board ruled in *Harjo* that the evidence was not admissible in which case all arguments as to admissibility were preserved.<sup>2</sup> The parties, however, preserved their rights to argue that any particular piece of evidence submitted in *Harjo* lacks relevance.<sup>3</sup> The parties further stipulated that the *Harjo* materials may be submitted in this matter through a Notice of Reliance.<sup>4</sup>

In addition to stipulating as to the admissibility of *Harjo* evidence, the parties stipulated to limits regarding introducing new evidence. The parties agreed that Petitioners would be subject to only one deposition apiece, and that transcripts of discovery deposition of the Petitioners would be admissible to the same extent as if the deposition were taken during the testimony period. They further stipulated that PFI could introduce evidence relevant to its affirmative defenses of laches. In other respects, the parties agreed to forego introducing additional evidence, agreeing instead to rest on the *Harjo* record.<sup>5</sup> The Board commended the parties for reaching these stipulations, in contrast to the excessively litigious nature of *Harjo*.<sup>6</sup>

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<sup>2</sup> See Joint Stipulation Regarding Admissibility Of Certain Evidence And Regarding Certain Discovery Issues (March 14, 2011) [Dkt 31] ¶ 1.

<sup>3</sup> See *id.* ¶ 2.

<sup>4</sup> See Order Summarizing Pre-Trial Conference (May 5, 2011) [Dkt. 39] at 5.

<sup>5</sup> See Joint Stipulation Regarding Admissibility Of Certain Evidence And Regarding Certain Discovery Issues (March 14, 2011) [Dkt. 31] ¶¶ 5-7.

<sup>6</sup> See Order Summarizing Pre-Trial Conference (May 5, 2011) [Dkt. 39] at 2-5.

### C. The *Harjo* Proceedings

The seven *Harjo* petitioners filed their petition in 1992. In a 145-page opinion issued in April 1999, the Board ruled in favor of the *Harjo* petitioners and directed that the registrations be canceled. *See Harjo v. Pro-Football, Inc.*, 50 U.S.P.Q.2d 1705 (T.T.A.B. 1999).

PFI then filed an action in the United States District Court for the District of Columbia, pursuant to 15 U.S.C. § 1071(b). On September 30, 2003, the district court entered summary judgment in favor of PFI. *See Pro-Football, Inc. v. Harjo*, 284 F. Supp. 2d 96, 68 U.S.P.Q.2d 1225 (D.D.C. 2003). It held that the *Harjo* petition was barred by laches, and also stated that the Board's decision was not supported by substantial evidence.

The district court emphasized, however, that its decision “should *not* be interpreted as reflecting, one way or the other, this Court's views as to whether the term ‘Washington Redskins’ may be disparaging to Native Americans.” *Id.*, 284 F. Supp. 2d at 98, 68 U.S.P.Q.2d at 1228 (emphasis original). Rather, the district court asserted (erroneously) that the Board did not make necessary findings of fact to support its ruling and also faulted the Board for not conducting a live hearing:

[T]he TTAB only made specific findings of fact in two areas – linguistic evidence and survey evidence. These findings are very limited, because in most instances, the TTAB merely drew from the undisputed portions of the record to make these findings of fact. Indeed, the TTAB heard no live testimony, and the testimony cited in its opinion merely came from the deposition transcripts. For the rest of the voluminous record, the TTAB decided not to make findings of fact, and instead simply cataloged the evidence put forth by both parties.

*Id.*, 284 F. Supp. 2d at 102, 68 U.S.P.Q.2d at 1230.<sup>7</sup>

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<sup>7</sup> The district court further asserted that “by making minimal findings on the disputed evidence and focusing almost exclusively on the undisputed portion of the record, the TTAB's findings of disparagement is supported by inferential fact-based judgments, unsubstantiated with concrete evidentiary proof.” *Id.* at n.4. The district court repeated its unfounded criticisms of the Board's supposed failure to make findings of fact or conduct a live hearing. “With these two exceptions [the testimony of linguistic

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Because of the Board's supposed failure to make fact findings, the district court severely restricted its review of the record that was before the Board:

The Court's review of the TTAB's findings of fact is limited by necessity given the paucity of actual findings made by the TTAB. Even though it spent fourteen pages cataloging the evidence in the case, the TTAB made specific findings of fact in only two areas: (1) the linguists testimony; and (2) survey evidence. *Since the TTAB only made specific findings of fact in two areas, it is only these two areas that are subject to court-scrutiny under the substantial evidence test.*

*Id.*, 284 F.Supp. 2d at 119, 68 U.S.P.Q.2d at 1243 (emphasis added) (citations omitted).

The district court's critique of the Board's *Harjo* decision is mistaken and represents a very inaccurate portrayal of the Board's thoughtful 145-page decision. In *Harjo*, the Board thoroughly and carefully reviewed and weighed the factual record, and fully explained the reasons for its conclusions. By severely limiting its review of the record that the Board considered, the district court's ruling is plainly erroneous.

On appeal, the D.C. Circuit did not comment on the district court's dubious substantial-evidence analysis. Instead, it addressed only laches. The D.C. Circuit affirmed the district court ruling that laches barred the petition as to six of the *Harjo* petitioners, and remanded the matter to the district court to consider further whether laches barred the remaining petitioner. *See Pro-Football, Inc. v. Harjo*, 415 F.3d 44, 75 U.S.P.Q.2d 1525 (D.C. Cir. 2005). On remand, the district court ruled that the remaining *Harjo* petitioner was barred by laches, and the D.C. Circuit affirmed that laches ruling. *See Pro-Football, Inc. v. Harjo*, 567 F. Supp. 2d 46, 87 U.S.P.Q.2d

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experts and survey evidence], the TTAB made no other findings of fact regarding the voluminous record and instead merely presented the evidence of each of the parties in the form of summaries.... Again, it should be noted that the testimony supporting these findings was in the form of depositions and not in the form of live testimony before the finders of fact." *Id.*, 284 F. Supp. 2d at 107, 68 U.S.P.Q.2d at 1234.

1891 (D.D.C. 2008), *aff'd* 565 F.3d 880, 90 U.S.P.Q.d 1593 (D.C. Cir.), *cert denied*, 130 S. Ct. 631 (2009).

Here, in contrast to *Harjo*, subsequent federal court proceedings in this matter (if any) will not occur in the D.C. federal courts. In September 2011, Congress enacted the Leahy-Smith America Invents Act, which changed the venue for subsequent federal court proceedings from the District of Columbia to the Eastern District of Virginia (as the alternative to an appeal to the Federal Circuit). *See* Pub. L. No. 112-29 § 9(a), 125 Stat. 284; 15 U.S.C. § 1071(b)(4) (2012). Thus, subsequent judicial proceedings, if any, will occur in either the Fourth Circuit or in the Federal Circuit, but not in the D.C. Circuit.

### **III. DESCRIPTION OF THE RECORD**

On March 15, 2012, pursuant to the March 14, 2011 Stipulation, Petitioners filed portions of the *Harjo* record and, on March 21, 2012, filed their deposition transcripts. For ease of reference, Petitioners assigned Bates label to the *Harjo* record portions that they submitted (BLA-TTAB-00001 through BLA-TTAB-07031). In addition, pursuant to the Board's May 5, 2011 Order, Petitioners have attached a Table of Evidence as Appendix B. The portions of the record on which Petitioners rely include:

- The Patent and Trademark Office file histories for each of the challenged registrations;
- The Answer and other filings of PFI in this matter;
- PFI's responses to Interrogatories and Requests for Admission in *Harjo*;
- Deposition testimony of each of the Petitioners, Amanda Blackhorse, Marcus Briggs-Cloud, Phillip Gover, Jillian Pappan and Courtney Tsotigh;
- Deposition testimony of expert linguist, Geoffrey Nunberg, Ph.D;
- Deposition testimony of film studies expert, Susan Courtney;
- Deposition testimony of expert historian, Frederick Hoxie, Ph.D.;

- Deposition testimony of survey expert, Ivan Ross, Ph.D.;
- Deposition testimony of JoAnn Chase, Executive Director of National Congress of American Indians (at time of deposition);
- Deposition testimony of Harold M. Gross, Former Director of Indian Legal Information Development Service;
- Deposition testimony of John Kent Cooke, Sr., PFI's Executive Vice President (at time of deposition);
- Exhibits used at above-referenced depositions;
- Articles, columns and editorials from newspapers and magazines;
- Excerpts from dictionaries, scholarly articles and other reference sources; and
- Videotapes (copied and provided as DVDs), programs, yearbooks, press guides and other materials produced by PFI.

#### **IV. STATEMENT OF THE ISSUES**

1. Whether Petitioners have statutory standing to bring the petition.
2. Whether Registrant's marks consist of or contain matter which may disparage

Native Americans, or bring them into contempt or disrepute.

3. Whether each of the five Petitioners is barred from bringing this petition under the doctrine of laches.

#### **V. RECITATION OF THE FACTS**

##### **A. The Petitioners**

The petitioners are five Native Americans who are members of different tribes. Amanda Blackhorse is a Native American who is an enrolled member of the federally recognized Navajo Nation.<sup>8</sup> Phil Gover is a Native American who is an enrolled member of the federally

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<sup>8</sup> See Blackhorse Depo. [Dkt. 122] at 196-97.

recognized Paiute Tribe.<sup>9</sup> Courtney Tsotigh is a Native American who is an enrolled member of the federally recognized Kiowa Tribe.<sup>10</sup> Marcus Briggs-Cloud is a Native American who is an enrolled member of the Muscogee Nation of Florida, and also holds a Certificate of Degree of Indian Blood from a federally recognized tribe.<sup>11</sup> Jillian Pappan is a Native American who is an enrolled member of the federally recognized Omaha Tribe of Macy, Nebraska.<sup>12</sup>

Each Petitioner views “redskin” as a derogatory term referring to Native Americans that offends him or her, as well as other Native Americans.<sup>13</sup> Indeed, they have jointly filed the instant Petition which states that “redskin” as a derogatory term referring to Native Americans that offends the Petitioners and other Native Americans, and that the term as used in the registered marks disparages Native Americans and brings them into contempt and disrepute.<sup>14</sup>

#### **B. The Registrations**

The six challenged registrations purport to cover entertainment services relating to the presentation of professional football games and exhibitions, and/or the performance of dance routines by cheerleaders at games, exhibitions and other personal appearances.<sup>15</sup> Two of the registrations (PTO ‘668 and PTO ‘127) contain the profile of a Native American man with an Indian headdress containing feathers, with one of the registrations also containing a spear

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<sup>9</sup> See Gover Depo. [Dkt. 120] at 10, 187 & Gover Depo. Ex. 2 [Dkt. 118].

<sup>10</sup> See Tsotigh Depo. [Dkt. 115] at 146 & Tsotigh Depo. Ex. 1 [Dkt. 116].

<sup>11</sup> See Briggs-Cloud Depo. [Dkt. 110] at 136-141 & Briggs-Cloud Depo. Exs. 10-11 [Dkt. 121].

<sup>12</sup> See Pappan Depo. [Dkt. 112] at 183.

<sup>13</sup> See Blackhorse Depo. [Dkt. 122] at 197; Gover Depo. [Dkt. 120] at 93-94; Tsotigh Depo. [Dkt. 115] at 146-147; Briggs-Cloud Depo. [Dkt. 110] at 135; Pappan Depo. [Dkt. 112] at 184.

<sup>14</sup> See Petition For Cancellation ¶¶ 1-2; Blackhorse Depo. [Dkt. 122] at 8-9 (reaffirming content of Petition); Gover Depo. [Dkt. 120] at 9-10 (same); Briggs-Cloud Dep. [Dkt. 110] at 9 (same); Pappan Dep. [Dkt. 112] at 9 (same).

<sup>15</sup> BLA-TTAB-00561, 563-66, 568.

decorated with eagle feathers.<sup>16</sup> The challenged registrations were issued between September 26, 1967 and July 17, 1990.<sup>17</sup> Registrant PFI owns the marks at issue.<sup>18</sup>

**C. Dictionaries, Reference Works, And Other Written Sources State That “Redskin” Is Disparaging**

The record contains many dictionaries and other references that state that “redskin” is a disparaging term used to refer to Native Americans. For instance, many dictionary definitions contain usage labels acknowledging that “redskin” is an offensive, contemptuous or disparaging way to refer to Native Americans:

- “Often offensive. A North American Indian.” *The Random House Dictionary of the English Language* (1966). BLA-TTAB-00165. Subsequent editions of this dictionary, including the “school edition” and the college edition, have included the same or a substantially similar definition. BLA-TTAB-00168, 171, 173, 176, 178, 180, 213.
- “a North American Indian (a term often considered offensive). *Thorndike-Barnhart Intermediate Dictionary* (1974). Submitted by Registrant; Docket 162 at 27.
- “(contemptuous) a North American Indian.” *Oxford American Dictionary* (1980). BLA-TTAB-00183.
- “American Indian – usu. taken to be offensive.” *Webster’s Ninth New Collegiate Dictionary* (1986). BLA-TTAB-00210. See also BLA-TTAB-00216, 225, 231 (later editions).
- “(derog.) a Red Indian.” *Chambers English Dictionary* (1989). BLA-TTAB-00219.
- “Offensive slang. Used as a disparaging term for a Native American.” *The American Heritage Dictionary of the English Language* (3d ed. 1992). BLA-TTAB-00228. See also BLA-TTAB-00234 (later edition).

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<sup>16</sup> BLA-TTAB-00564-65, 2566-67.

<sup>17</sup> BLA-TTAB-00561, 563-66, 568.

<sup>18</sup> BLA-TTAB-02610.

Similarly, a 1972 article in *The Washington Star* newspaper on the use of Indian-themed sports names and symbols observed that “redskin” is a derogatory way to refer to Native Americans. The article contrasted the slur, “redskin,” with the neutral term, “Indian”: “Of course, the names and symbols differ. They range from the name Indians all the way to Redmen and Redskins, and the symbols go from strong and gallant caricatures, to silly war-whooping idiots.”<sup>19</sup>

Many scholarly articles and books have also noted that “redskin” is an epithet:

- Alden Vaughan, “From White Man to Redskin: Changing Anglo-American Perceptions of the American Indian,” *American Historical Review* (October 1982). BLA-TTAB-01856 (“... ‘redskins’ eventually emerged as the epithet for enemies who usually used red paint on the warpath”) & 1863 (“redskin” is an “epithet”).
- Haig Bosmajian, “Defining the ‘American Indian’: A Case Study in the Language of Suppression,” in Gary Goshgarian, *Exploring Language* (1983) (“Our language includes various phrases and words which relegate the Indian to an inferior status,” including “Redskins.”) BLA-TTAB-01886.
- Robert Keller, “Hostile Language: Bias in Historical Writing About American Indian Resistance,” *Journal of American Culture* (1986) (giving “redskin” as an example of “deprecatory language.”) BLA-TTAB-01897.
- Irving Lewis Allen, *Unkind Words: Ethnic Labeling from Redskin to WASP* (1990) (referring to “redskin” as a “slur-name” and a “racial epithet”). BLA-TTAB-01914, 1922.
- Irving Allen Lewis, *The Language of Ethnic Conflict* (1983) (“redskin” is an epithet). BLA-TTAB-02103.
- Jay Coakley, *Sport in Society: Issues and Controversies* (1990) (“The use of the name Redskins cannot be justified under any conditions. To many native Americans, redskin is as derogatory as ‘nigger’ is for black Americans.”) BLA-TTAB-02555.
- Robin Powell, “Recycling the Redskins,” *Turtle Quarterly* (1993) (redskin as “racial slur”). BLA-TTAB-02012.

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<sup>19</sup>See Paul Kaplan, “Do We Defame Native Americans?” *The Washington Star*. BLA-TTAB-00086, 826.

- Robert Jensen, “Banning ‘Redskins’ From the Sports Page: The Ethics and Politics of Native American Nicknames,” *Journal of Mass Media Ethics* (1994) (“redskin” is “derogatory name,” a “racist term that has been used against an oppressed group”). BLA-TTAB-02043, 44.
- John Coward, “What ‘Indians’ Mean in the Media: Race, Language, and the Popular Imagination” (1995) (“redskin” is term that designates Native Americans as inferior). BLA-TTAB-02054.
- Michigan Civil Rights Commission Report, “Use of Nicknames, Logos and Mascots Depicting Native American People in Michigan Education Institutions” (1988) (term “Redskins” assigns an “inferior status,” is a “reference[] to racial color” and a “blatantly stereotypic name”). BLA-TTAB-02258, 2304.
- Rayna Green, “The Indian in Popular American Culture” (identifying “redskin” as epithet). BLA-TTAB-00013-14, 1699, 1712.
- Richard Hill, “Savage Splendor: Sex, Lies and Stereotypes,” *Turtle Quarterly* (“redskin” as term evoking savage warrior). BLA-TTAB-00014, 1717.
- Michael Dorris, “Why I’m Not Thankful for Thanksgiving” (“redskin” as term evoking savagery and bloodthirstiness). BLA-TTAB-00014, 1727.
- Richard MacPhie, “We Are Not Extras A Native American Perspective on the Morality of Indian Mascots” (“redskin” is “racist” term). BLA-TTAB-02003.
- *Encyclopedia Britannica* (1911) (“Other popular terms for the American Indians which have more or less currency are ‘red race,’ ‘Red man,’ ‘Redskin,’ *the last not in such good repute* as the corresponding German *Routhaüte*, or French *Peaux-rouges*, which have scientific standing.”) BLA-TTAB-00130.<sup>20</sup>

In addition, during the relevant time period, authors of other editorials, columns and news articles published in newspapers and magazines have also understood “redskin” to be a disparaging reference to Native Americans. *See, e.g.,* Tom Quinn, “Redskins, Rednecks,” *The Washington Daily News* (Nov. 5, 1971). BLA-TTAB-00086, 825.<sup>21</sup>

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<sup>20</sup> Another source that viewed “redskin” as disparaging is a 1993 decision of a PTO Examining Attorney. The Examining Attorney concluded that “redskin” is a disparaging term for Native Americans and refused a trademark registration application for “Redskins Review” on that basis, among other reasons. BLA-TTAB-00014,1653.

<sup>21</sup>Other editorials, columns and articles published in, among other places, *The Washington Post*, *The Baltimore Evening Sun*, *The Philadelphia Inquirer*, *The Chicago Tribune*, *The Minneapolis Star-Tribune*,

(Continued)

**D. In 1972, A “Delegation of American Indian Leaders . . . Vigorously Objecting To the Continued Use Of The Name Redskins” Met With The PFI President To Demand That PFI Change The Team Name.**

In March 1972, a delegation of Native American leaders met with the President of PFI to object to the team name and demand a change. Harold Gross, who in 1972 was the Director of a Native American group called the Indian Legal Information Development Service (“ILIDS”), testified about the meeting and related events.<sup>22</sup>

The effort originated after a number of ILIDS staff members met with Mr. Gross to see what they could do “about changing the name of the local professional football team on the grounds that it was disparaging, insulting and degrading to American Indians.”<sup>23</sup> Thereafter, in January 1972, using ILIDS letterhead, Mr. Gross wrote to Edward Bennett Williams (a renowned attorney who was then the President of PFI<sup>24</sup>) to object strenuously to the team’s name and to request a meeting:

On behalf of my immediate colleagues, all of whom are American Indians, I ask you to consider the effect that the use of the derogatory racial epithet ‘Redskins’ as a team nickname for the Washington Professional Football team has upon them, and other American Indians, as well as upon non-Indians.

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

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(Continued)

*The Albuquerque Journal, The Seattle Times, Newsweek, and Sports Illustrated*, are included in the record at BLA-TTAB-00828, 832, 853, 880, 896, 902, 903, 910, 917, 918, 921, 922, 923, 926, 931, 937, 941, 942, 944, 945, 948, 954, 971, 981, 986, 994, 1001, 1003, 1005, 1006, 1007.

<sup>22</sup>BLA-TTAB-03536-38 (Gross Depo. at 7-9). ILIDS trained young Native Americans in careers in journalism, law or legislative affairs, and also provided legislative information and monitoring services to Indian tribes around the country. *See id.*

<sup>23</sup>BLA-TTAB-03545 (Gross Depo. at 16).

<sup>24</sup> BLA-TTAB-02621.

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

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

Even the fact that 'Redskins' has been the nickname of the Washington franchise for many years is a poor argument for its retention. Professional team owners have been notoriously slow in recognizing the social consequences of their practices. Not until 1947 was the first black man allowed to play major league baseball, and considerably later, the owner of the Washington Senators was still notorious for keeping his team lily-white.<sup>25</sup>

The letter led to a March 29, 1972 meeting between Native American leaders and Mr. Williams and other PFI representatives. Leon Cook, the President of the National Congress of American Indians, and six other Native American leaders, came with Mr. Gross to the meeting.<sup>26</sup> As Mr. Gross testified, the group met with Mr. Williams "to discuss our reasons for objecting to the name of the team, and some of the trappings that went with it. And to present the reasons why we thought it should be changed," *i.e.*, the reasons set out in his January 1972 letter.<sup>27</sup> The group asked Mr. Williams to change the team name.<sup>28</sup>

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<sup>25</sup> BLA-TTAB-03538-39 (Gross Depo. at 9-10) & BLA-TTAB-05850-52 (letter)

<sup>26</sup> The other six Native American leaders were LaDonna Harris (President of Americans For Indian Opportunity, and wife of then-U.S. Senator Fred Harris), Richard LaCourse (Washington bureau chief for the American Indian Press Association), Ron Aguila (District Representative of the National Indian Youth Council), Dennis Banks (District Representative of the American Indian Movement), Hanay Geigomah (Director of Youth Programs, Bureau of Indian Affairs), and Laura Wittstock (Editor of the ILIDS Legislative Review). BLA-TTAB-03547-49, 3582-83, 5846, 5848.

<sup>27</sup> BLA-TTAB-03548-49 (Gross Depo. at 19-20).

<sup>28</sup> BLA-TTAB-03549-52 (Gross Depo. at 20-23) & 5846, 5860.

The next day, in a letter to Peter Rozelle (the Commissioner of the NFL), a copy of which was sent to Mr. Gross, Mr. Williams reported that a “delegation of American Indian leaders ... are vigorously objecting to the continued use of the name Redskins” and described Mr. Gross’s letter as “cogently” expressing their position:

*Yesterday I met with a delegation of American Indian leaders who are vigorously objecting to the continued use of the name Redskins. Instead of detailing the various bases for their objection, I am enclosing a rather full letter which was mailed to me as a prelude to the meeting. It sets out their position quite cogently.*<sup>29</sup>

PFI, of course, refused to change the team name. Mr. Williams did, however, change language in the team’s fight song, “Hail to the Redskins,” that mocked Native Americans, and also decided that the team’s cheerleaders would no longer wear Indian-style wigs that stereotyped Native American women.<sup>30</sup> (The fight song and cheerleader outfits are discussed further below, at pages 37-38.)

**E. The National Congress of American Indians Has Denounced The Term “Redskin” As Disparaging And Has Pressed For Years For A Change In The Team’s Name.**

The National Congress of American Indians (“NCAI”) has long pressed for a change in PFI’s team name. As noted, Leon Cook, the NCAI President was among the “delegation of American Indian leaders” who vigorously objected to PFI’s team name during the 1972 meeting with Edward Bennett Williams. A January 1972 article in *The Washington Daily News* reported that the NCAI (and other Native American groups) were involved in a “battle” to get PFI to change the team name.<sup>31</sup> Likewise, articles in the *Washington Star* and the *Washington Post* in

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<sup>29</sup> BLA-TTAB-03553 (Gross Depo. at 23) & 5860 (emphasis added).

<sup>30</sup> BLA-TTAB-00826, 837.

<sup>31</sup> BLA-TTAB-00828.

March 1972 also reported that the NCAI was among a number of Native American groups pressing for a change in the team name.<sup>32</sup>

NCAI's opposition to the PFI team name continued after the unsuccessful 1972 effort to persuade Edward Bennett Williams. As reported in a September 1992 article in *The Lakota Times* newspaper, "[t]he National Congress of American Indians has been battling against the racist use of Indians as mascots for decades."<sup>33</sup> A 1988 report by the Michigan Civil Rights Commission similarly reported that the NCAI supports efforts to change the team name.<sup>34</sup> A former NCAI President known by his Native American name "gaiashkibos" spoke at a protest over the "Redskins" team name at the 1992 Super Bowl, the last time the team played in the Super Bowl.<sup>35</sup>

In January 1992, NCAI spoke up to oppose a proposed transfer of land from the U.S. Department of Interior to PFI, unless PFI changed the team name. In its statement, the PFI Executive Committee declared, in part, "The National Congress of American Indians ... finds the use of the name 'Redskins' offensive and go on record opposing demeaning and degrading the integrity of the first Americans – the Indian people."<sup>36</sup>

In 1993, the NCAI adopted two formal resolutions declaring their opposition to the "Redskins" football team name on grounds that "redskin" disparages Native Americans. In January 1993, the NCAI, acting through its Executive Council, adopted a resolution expressing support for the *Harjo* cancellation petition and declaring that:

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<sup>32</sup> BLA-TTAB-00835, 836.

<sup>33</sup> BLA-TTAB-00988.

<sup>34</sup> BLA-TAB-02220.

<sup>35</sup> BLA-TTAB-00960, 02817-18 (Chase Depo. at 47-48).

<sup>36</sup> BLA-TTTAB-00947.

[T]he term REDSKINS is not and has never been one of honor or respect, but instead it has always been and continues to be a pejorative, derogatory, denigrating, offensive, scandalous, contemptuous, disreputable, disparaging and racist designation for Native American[s].<sup>37</sup>

The NCAI further declared that the registered marks at issue in this petition are “offensive, disparaging . . . and damaging” to Native Americans.<sup>38</sup> The Executive Council, the body that adopted the resolution, consists of an official delegate of each tribe that is a member of the NCAI, as JoAnn Chase (the NCAI Executive Director and a Native American herself) testified in a 1996 deposition in *Harjo*.<sup>39</sup> The Executive Council is the “decision-making” organization within the NCAI.<sup>40</sup> Hundreds of tribes are members of the NCAI (206 tribes as of 1996).<sup>41</sup>

Eleven months later, in December 1993, the General Assembly of the NCAI adopted a resolution opposing the use of Indian sports mascots generally, and specifically objecting to the “Washington Redskins” team name. The resolution expressed support for a bill introduced by Senator Ben Nighthorse Campbell to impose conditions on federal funding for a stadium to replace RFK Stadium; the resolution characterizes Senator Campbell’s bill as stating “(no building) until the team changes the name.”<sup>42</sup> As Ms. Chase testified, the General Assembly consists of the individual delegates who represent the tribal members of NCAI, as well as individual members of the NCAI.<sup>43</sup>

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<sup>37</sup> BLA-TTAB-00236, 02820-21 (Chase Depo. at 50-51).

<sup>38</sup> *Id.*

<sup>39</sup> BLA-TTAB-02774-75, 2777-79, 2799-2800 (Chase Depo. at 4-5, 7-9, 29-30).

<sup>40</sup> BLA-TTAB-02800.

<sup>41</sup> BLA-TTAB-02824. The NCAI is the oldest and largest national Indian group in the country. BLA-TTAB-02220.

<sup>42</sup> BLA-TTAB-02809-10, 2816-18 (Chase Depo. at 39-40, 46-48) & 4727.

<sup>43</sup> BLA-TTAB-02808 (Chase Depo. at 38).

Ms. Chase further testified that “resolutions are the policy of the organization [NCAI], our mandate....”<sup>44</sup> In addition, Ms. Chase explained that the issue of the “Washington Redskins” team name is an issue of “national significance, and which would be of concern to at least every Indian person I have ever had contact with....”<sup>45</sup>

The historic opposition of the NCAI to the “Redskins” team name is also demonstrated by the fact that three of the *Harjo* petitioners had previously served in leadership roles in the NCAI. Suzan Shown Harjo and Vine Deloria, Jr. were Executive Directors of the NCAI, and Raymond D. Apodaca was the Albuquerque area vice president for the NCAI and the chair of its Religious and Human Affairs Committee.<sup>46</sup>

**F. Other Native American Groups And Individuals Have Objected To PFI’s Team Name And To Indian Mascots, Generally.**

In addition to the NCAI, other Native American groups and individuals have objected to the PFI’s team name and to Indian mascots, generally.

As a result of protests from Native Americans, in 1969 and early 1970’s, Dartmouth College abandoned the use of Native American imagery and mascots for its teams, and adopted a non-Indian team name.<sup>47</sup> Similarly, in 1970, Native Americans pressed Stanford University to change its team mascot from “Indian,” leading Stanford to adopt “Cardinal” as its team name.<sup>48</sup>

The record contains a number of articles reporting on efforts by numerous Native American groups and individuals to protest the “Washington Redskins” and other Indian sports

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<sup>44</sup> BLA-TTAB-02817 (Chase Depo. at 47).

<sup>45</sup> BLA-TTAB-02838 (Chase Depo. at 68).

<sup>46</sup> BLA-TTAB-00988, 2220, 2834 (Chase Depo. at 64); *see also* Petition For Cancellation, *Harjo v. Pro-Football, Inc.*, No. 21,069 (TTAB) (PFIB-TTAB-0083-87).

<sup>47</sup> BLA-TTAB-00885, 889, 973, 2161-71, 2192-94, 2216.

<sup>48</sup> BLA-TTAB-00894, 973, 2207-08, 2217-18, 2639.

mascots, from the late 1960s and through the 1970s.<sup>49</sup> For example, a January 27, 1972 article in *The Washington Star* reported on “mounting protests from Indian groups that decry the use of Indian names and symbols as nicknames for sports teams.”<sup>50</sup> The article further stated that the “Washington Redskins” was particularly objectionable to the Indian groups:

Particularly annoying to 750,000 American Indians is the word ‘redskin.’ To them the word is a racist slur, no more acceptable than the word ‘nigger’ is to a black man and no more acceptable than the term ‘white trash’ is among the poor in the south.<sup>51</sup>

Significantly, an NFL publication, *The Redskin Edition of Pro! Magazine*, dated November 20, 1972, also reported on Native American opposition to Indian team names generally, and the “Redskins” team name in particular.<sup>52</sup> It asserted that “[u]ntil recently,” the “Redskins” name has been a “proud tradition.” The article further reported that Russell Means, director of the Cleveland American Indian Center, “went on the warpath against the Cleveland Indians’ mascot, Chief Wahoo,” and “before he was through, the Atlanta Braves’ Chief Noc-a-Homa..., the Kansas City Chiefs and the Redskins felt the slings and arrows of his outrage.” *Pro! Magazine* insisted that there was no intent to harm anyone in the team name “Redskins,” but noted that objections by Native Americans caused the University of Nebraska at Omaha to change its name (from “Indians”) and also caused Stanford University to change its Indian symbol.<sup>53</sup> The fact that, in 1972, the NFL saw a need to report on, and respond to, Native

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<sup>49</sup> BLA-TTAB-00825-39, 1127, 1643, 1712.

<sup>50</sup> BLA-TTAB-00830.

<sup>51</sup> BLA-TTAB-00830.

<sup>52</sup> BLA-TTAB-01378.

<sup>53</sup> *Id.*

American objections to the “Redskins” name, indicates that there was significant Native American opposition at the time.

Native American opposition to “Redskins” as a team name continued. In 1991-93, following objections from Native Americans, at least three high schools or universities dropped “Redskins” as the name of the sports team – Miami University in Ohio, the Grand Forks, North Dakota school system, and the Naperville, Illinois high school.<sup>54</sup>

A 1992 article in *The Lakota Times* (a newspaper with primarily Native American readership) reported that multiple “Indian tribes and organizations” had made “vociferous calls” to change PFI’s team name, and that most Indian groups consider the “Redskins” team name “racist and demeaning”:

Mr. Cooke [the PFI owner] has consistently refused to consider changing the name of his team despite vociferous calls from Indian tribes and organizations for him to do so. Most Indian groups consider the team moniker racist and demeaning.<sup>55</sup>

Other news articles over the years have also reported that Native American groups and individuals object to the team name.<sup>56</sup> For example, the record contains many newspaper articles reporting on objections to the name “Redskins” by Native American groups and individuals during the 1992 Super Bowl in Minnesota (the last time the team played in the Super Bowl). Many of the articles reported on an organized protest by Native American groups at the stadium where the game was played.<sup>57</sup>

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<sup>54</sup> BLA-TTAB-00932, 936, 982, 995, 2340-53.

<sup>55</sup> BLA-TTAB-00946-47.

<sup>56</sup> BLA-TTAB-00844-1008, 1128-30, 1667-77, 2219.

<sup>57</sup> BLA-TTAB-00850-851, 943, 948-51, 955-63, 1133.

One of the country's most prominent Native Americans, (former) Senator Ben Nighthorse Campbell introduced legislation to try to force the team to change its name. As noted above, in 1993, Senator Campbell introduced a bill that would have regulated the use of a stadium to be built to replace RFK Stadium on U.S. Department of Interior land. The legislation would have prevented PFI's team from playing at the stadium then under contemplation (but eventually never built) unless the team name were changed.<sup>58</sup>

In addition, the record contains many editorials published in *The Lakota Times* and elsewhere by Native Americans denouncing the "Washington Redskins."<sup>59</sup> For instance in a 1988 editorial, the editor of *The Lakota Times*, Tim Giago, wrote that "Redskins is, and was intended to be a very strong epithet against American Indians," and stated that it would be no more racist to call the team the "Blackskins" and have fans "paint their faces Black, put on Afros, don colorful dashikis, and cavort around the football field like a bunch of wild savages."<sup>60</sup>

**G. Dr. Geoffrey Nunberg Demonstrated That "Redskin" Was Not Used In Late 20th Century Newspapers To Refer To Native Americans, Indicating That It Is A Disparaging Term. Dr. Hoxie's Testimony Supports This Finding.**

Dr. Geoffrey Nunberg, the expert linguist,<sup>61</sup> conducted a search of a Dialog database (a tool on which he relied in the ordinary course of his work as a linguist, and which contains a

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<sup>58</sup> BLA-TTAB-00863-65, 996, 997-98.

<sup>59</sup> BLA-TTAB-01003-1007.

<sup>60</sup> BLA-TTAB-00252, 253, 262, 275, 843, 1133

<sup>61</sup> As of 1996, Dr. Nunberg was a Consulting Professor of Linguistics at Stanford University and a principal scientist at the Xerox Palo Alto Research Center, had previously been a usage editor for the *American Heritage Dictionary*, and was the current Chair of the usage panel of that dictionary. His areas of specialization included Lexical Semantics (the study of the use of words) and Lexicography (the study of dictionaries and the procedures involved in producing dictionaries). He had also done work in Computational Linguistics and, in particular, in the use of techniques of information retrieval with regard to large-scale text databases, and has published numerous articles in the field of linguistics. See BLA-TTAB-03974-80 (Nunberg Depo. at 229-235) & 4756-60 (Nunberg *curriculum vitae*).

billion words of text) containing the text of 60 newspapers going as far back as 1982.<sup>62</sup> Dr. Nunberg's database research demonstrates that newspaper writers avoid the word *redskin(s)* because it is not a neutral term, but is a pejorative term.

Dr. Nunberg's search turned up approximately 135,000 tokens of "*redskin(s)*," the vast majority of which referred to PFI's football team.<sup>63</sup> In order to locate just the references to American Indians, Dr. Nunberg devised a filter (for example, asking the computer to report only those tokens not appearing within a few words of "football," "quarterback," or "game"), which reduced the number to only 310.<sup>64</sup> Dr. Nunberg then hand-searched these, removing more articles about the football team and articles about *redskin* potatoes, leaving a mere 71 stories in which "*redskin(s)*" was used in reference to American Indians.<sup>65</sup>

This numerical result is significant in and of itself. The finding of only 71 articles using "*redskin(s)*" to refer to American Indians, compared with 74,000 instances of "American Indian(s)" and 73,000 instances of "Native American(s),"<sup>66</sup> means that "*redskin(s)*" is very rarely used to refer to Native American individuals or groups. There were also over 1 million instances in the database of "Indian" (although that figure also includes references to individuals from the Asian subcontinent).<sup>67</sup> Thus, the data show that writers in newspapers intentionally avoid using the term "*redskin*," opting instead for "Indian," "American Indian" or "Native American."<sup>68</sup>

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<sup>62</sup> BLA-TTAB-04050, 4059-60 (Nunberg Depo. at 305, 314-15).

<sup>63</sup> BLA-TTAB-04051 (Nunberg Depo. at 306).

<sup>64</sup> *Id.*

<sup>65</sup> BLA-TTAB-04051-52 (Nunberg Depo. at 306-07).

<sup>66</sup> BLA-TTAB-04052 (Nunberg Depo. at 307).

<sup>67</sup> BLA-TTAB-04053 (Nunberg Depo. at 308).

<sup>68</sup> BLA-TTAB-04052-53 (Nunberg Depo. at 307-08).

Furthermore, none of the 71 articles involved the use of “redskin(s)” as a straightforward denotative or neutral reference to American Indians. For instance, as Dr. Nunberg put it, “there were no sentences in the form ‘there are five redskins on the panel’ or ‘redskins have moved into the region in increasing numbers’ or ‘redskin actor Jay Silverheels was honored last night’ in the sense you might expect which [sic: if it] was an ordinary neutral term that was not disparaging.”<sup>69</sup> Most of the 71 stories involved “mentions” of the term “redskin” as opposed to “uses” of the term “redskin,” i.e., the term was not used to refer to anyone but was discussed only as a term and often included in quotation marks.<sup>70</sup>

The most reasonable inference to be drawn from the avoidance of the term “redskin(s)” to refer to Native American groups or individuals is that the term is widely considered unacceptable because it is disparaging. Dr. Nunberg, however, also tested and disproved an alternative hypothesis: that press writers might avoid using the term “redskin(s)” merely because it is too informal. He selected three ethnic terms that might be considered informal substitutes for more formal terms, “Brit(s),” “Limey(s),” and “Yank(s),” and then searched them in the same Dialog database. For “Brit(s),” he found 21,250 tokens, and a hand-search of 100 random selections from these 21,250 showed that they were all uses of “Brit(s)” as an ethnic term, reflecting a full

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<sup>69</sup> BLA-TTAB-04053 (Nunberg Depo. at 308).

<sup>70</sup> BLA-TTAB-04053-54 (Nunberg Depo. at 308-09). Dr. Nunberg gave some examples of “mentions” of “redskin as opposed to “use” of the term: From *The Washington Post*: “If Mr. Liles went back in history to when the 13 colonies were being organized, he would have seen that ‘redskins’ was not used to convey respect, adulation or honor.” Also from *The Washington Post*, “Hollywood regularly produced cowboys and Indian films back in the 1930s and ‘40s in which the U.S. Cavalry invariably arrived in the nick of time to save the brave frontiersmen and women and children from certain scalping by ‘the savage redskins.’” And from *The San Francisco Chronicle*, “In almost every movie the bad guy bit the dust and that was the end of their story. Another cartoon figure had been erased from the script. As we rejoiced in their agony and cheered their demise, it never occurred to us that the ‘redskins,’ ‘krauts,’ and ‘japs’ represented real people.” BLA-TTAB-04054 (Nunberg Depo. at 309).

range of opinions (positive, neutral, and negative) about Britons.<sup>71</sup> Similarly for “Limey(s)” and “Yank(s),” Dr. Nunberg found a large number of uses in the same Dialog database.<sup>72</sup> Thus, if “redskin(s)” were similarly just an informal substitute for “American Indian(s),” then one would expect to find more than a meager 71 articles using the term “redskin(s)” with reference to Native Americans.

Dr. Nunberg’s empirical study is consistent with the testimony of another expert witness, historian Frederick Hoxie, Ph.D. Dr. Hoxie is a historian who specializes in Native American history and who has published and taught in that field.<sup>73</sup> Dr. Hoxie testified that he has come upon the term “redskin” in his research in newspaper stories from the 19th century and documents from settler communities in the West, with “redskin” used disparagingly. However, Dr. Hoxie has never encountered an occasion in which a historian has used “redskin” to refer to Native Americans; the terms used by historians are “Indian,” “American Indian” or “Native American.”<sup>74</sup> Again, the most plausible explanation for why professional historians do not use “redskin” to refer to Native Americans is that it is a disparaging term.

#### **H. Examples of “Redskin” Used In Written Sources In A Derogatory Manner.**

The record contains numerous examples of “redskin” being used to refer to Native Americans in a disparaging manner.

The earliest recorded use of “redskin” appeared in 1699, when an author wrote that “ye firste Meetinge House was solid mayde to withstande ye wicked onsaults of ye Red Skins.”<sup>75</sup> In

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<sup>71</sup>BLA-TTAB-04064-67 (Nunberg Depo. at 319-22).

<sup>72</sup>BLA-TTAB-06941-45 (Nunberg Depo. at 81-85).

<sup>73</sup>BLA-TTAB-03729-34, 3773-74 (Hoxie Depo. at 4-9, 48-49).

<sup>74</sup>BLA-TTAB-03771-76 (Hoxie Depo. at 46-51).

<sup>75</sup>BLA-TTAB-03996 (Nunberg Depo. at 251); BLA-TTAB-00222.

this usage, “redskin” is used to refer to evil (“wicked”) Native Americans who perpetrate violent attacks (“onsalts”). Another early usage, in 1823, stated that “the whites will not harm the redskins when they have them thus in their power,” again using the term to describe Native Americans in violent struggle.<sup>76</sup> A subsequent usage, in 1851, continued in this vein of using “redskin” to refer to Native Americans as “savages,” this time expressly: “a strong believer in the native virtues of the Redskins, when these savages were treated well.”<sup>77</sup>

During the 19th century, while the United States was at war with certain Indian Nations, American newspapers and magazines provide vivid examples of the how “redskin” was used in an offensive and disparaging way. Articles reporting on conflicts between the United States Army or settlers and American Indians use the term “redskin” to associate Native Americans with violence, savagery, and racial inferiority, and as enemies of the American people:

- “Merrit Meets the Enemy. Victory over our Frontier Foes. *Thirty-Seven Redskins Sent to the Happy Hunting Grounds. The Indian Problem Reaching a Conclusion.*” *The Daily News* headline (Oct. 8, 1879) (BLA-TTAB-01009) (emphasis added).
- “... An Account of the Bloody Fight by Col. William M. Chivington, the Leader of the White Forces—*About Eight Hundred Redskins Killed in the Engagement—Savage Atrocities Which Provoked the Fearful Retribution.*” *Chicago Tribune* headline (Aug. 8, 1887) (BLA-TTAB-01014) (emphasis added). The article repeatedly calls the man who led the infamous Sand Creek massacre of the “Redskins” a “hero.” *Id.*
- “Their [the military authorities’] fears are, that, should the Indians arise, the settlers will arm themselves, and wipe the Red Skins out of existence before the ‘noble red’ man can be protected by Uncle Sam's bluecoats.” *Rocky Mountain News* (Nov. 16, 1890) (BLA-TTAB-01021) (article reporting on anticipated outbreak of military conflict with Native Americans).
- “Sitting Bull, they made their leader/And excited by firewater/They dug up their rusty hatchets/And prepared for blood and thunder./‘Ugh,’ said every greasy redskin,/‘We will paint the West vermilion!/We will simply mop the earth up/With the miserable

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<sup>76</sup>BLA-TTAB-04002 (Nunberg Depo. at 257); BLA-TTAB-00222.

<sup>77</sup>*Id.*

palefaces.” *Rocky Mountain News* (Nov. 19, 1890) (BLA-TTAB-01025) (emphasis added) (disparaging poem).

- “... fifteen lodges of the Wounded Knee fanatics, *including some of the most treacherous redskins in this part of the country*, had removed to White River ... and have again begun the ghost dance in a wilder manner than has been known thus far.” *The Daily News* (Denver) (Nov. 23, 1890) (BLA-TTAB-01030) (emphasis added) (article anticipating war between “the Wounded Knee fanatics” and U.S. Army). This article was also published in *The New York Times* (Nov. 23, 1890) (BLA-TTAB-01032).
- Using “redskins” to describe Native Americans who, in possession of “bloodthirsty villainy” were plotting an ambush, referred to as a “devilish ... deed” pursued with “murderous design.” *The New York Times* (Nov. 24, 1890) (BLA-TTAB-01033).
- “[T]he redskins are dancing in circles, making medicines, and preparing to take to the warpath.” *The New York Times* (Nov. 29, 1890) (BLA-TTAB-01047).
- “READY FOR BATTLE—The Troops Expecting to Take the Field Immediately Against THE REBELLIOUS REDSKINS.” *Aspen Daily Times* headline (Nov. 30, 1890) (BLA-TTAB-01018). “The more excitable red-skins are cutting themselves with spears and knives and the sight of blood has had the effect of greatly arousing the warrior spirit.” *Id.* (body of article).
- “On the Warpath ... Redskins Attack....” *Rocky Mountain News* headline (Dec. 18, 1890) (BLA-TTAB-01056).
- “Marauding Bands of Redskins Make Travel Absolutely Dangerous in the Bad Lands.” *Rocky Mountain News* headline (Jan. 6, 1891) (BLA-TTAB-01064).
- “THE REDSKIN TROUBLE—The Indians Declare Their Intention of Capturing the Agency and Massacring the People.” *Aspen Daily Times* (Jan. 7, 1891) (BLA-TTAB-01068).
- “Appeal to the Governor of Idaho for Troops to Put Down the Redskins.” *Rocky Mountain News* headline (Jan. 8, 1891) (BLA-TTAB-01069).
- “Custer’s Men Lured Into Trap By Wily Redskins.” *Denver Post* headline (June 19, 1932, reprinting 19th century article) (BLA-TTAB-01114).
- “‘Fort Wicked’ Too Tough for Redskins—Pleasant-Faced Rancher and Garrison of Three Men, Four Women, Beat Off Savages.” *Rocky Mountain News* headline (Oct. 31, 1932, reprinting 19th century article) (BLA-TTAB-01115).

The record also contains an article published in 1948 in a widely read magazine that also used the term “redskin” when describing a conflict between the U.S. Army and Native

Americans regarding World War I draft registration. See J.H. Peck, “How I Put Down the Redskins,” *Saturday Evening Post* (Oct. 23, 1948) (BLA-TTAB-01769). In addition, the record contains a disturbing 1939 *Newsweek* article that uses “redskin” to refer to the “problem” that Native American birth rates were increasing. See “Redskin Revival: High Birthrate Gives Congress A New Overproduction Problem,” *Newsweek* (Feb. 20, 1939) (BLA-TTAB-01765).

Other written sources also use the term as a slur. For instance, the 1919 book, *Making the Movies* by Ernest Dench includes a chapter entitled “The Dangers of Employing Redskins as Movie Actors.” Using “redskin” in the chapter title as a slur, the book asserts that “[t]he Red Indians ... are paid a salary that keeps them well provided with tobacco and their worshipped ‘firewater,’” and “[i]t might be thought that this would civilize them completely, but it has had quite a reverse effect, for the work affords them an opportunity to live their savage days over again.”<sup>78</sup>

#### **I. Use of “Redskin” in Movies**

The record also contains evidence from movies and popular songs that “redskin” is a disparaging term. Movie evidence was introduced through the 1996 deposition testimony of Susan Courtney. At the time, Ms. Courtney was a graduate student at University of California-Berkeley studying American cinema, and had just been offered a position as a Professor of Film at the University of Southern California.<sup>79</sup> Working under assignment from Geoffrey Nunberg, Ms. Courtney undertook to research usage of the word “redskin” in American film.<sup>80</sup>

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<sup>78</sup> BLA-TTAB-01754-55; see *Harjo*, 50 USPQ 2d at 1745 (quoting *Making the Movies*).

<sup>79</sup> BLA-TTAB-03379-81(Courtney Depo. at 7-9). The USC website indicates that Susan Courtney is currently an Associate Professor in the USC Film and Media Studies Department. See <http://www.sc.edu/bulletin/ugrad/LibFilm.html> (last visited Sept. 5, 2012).

<sup>80</sup> BLA-TTAB-03381-82 (Courtney Depo. at 9-10).

Based on her knowledge and experience in American film, a review of reference books and other literature in the field of film studies, and informal queries of colleagues, Ms. Courtney compiled a list of 51 movies that she thought might contain the word “redskin.”<sup>81</sup> Based on movie availability (some of the 51 were out of print or not available on video at the time), limited time, and to a lesser degree based on whether she thought Native Americans might have a large role in the film, she selected 20 of the 51 movies to watch.<sup>82</sup> Ten of the 20 movies contained at least one usage of the term “redskin,” with a total of 14 usages.<sup>83</sup>

Ms. Courtney prepared a video containing 11 of the 14 usages.<sup>84</sup> Petitioners hand-delivered a copy of the video, copied in DVD format, to the Board on March 15, 2012. The movie clips on the DVD sharply demonstrate that “redskin” is as a slur. The clips are:

- *Whoopee!* (1930, starring Eddie Cantor). In a movie that also contains a “comic” scene in which Native Americans are stereotyped as stiff and primitive and are the butt of crude jokes about indigestion and violent behavior, in one scene, an angry white man angrily yells at an Native American, “You lying redskin. I don’t believe you.”
- *Northwest Passage* (1940, starring Spencer Tracy and Robert Young). One colonial explorer uses “redskin” when encouraging another explorer to kill a Native American: “Get a redskin for me, won’t you?” The other assures him that he will “do better than that” and has a rifle filled with buckshot.
- *The Paleface* (1948, starring Bob Hope). Talking to a large pile of dead Native Americans, Hope disrespectfully jokes, “Let’s keep it neat.” As a cheering crowd forms, Hope’s gun goes off accidentally and he kills a Native American hiding in a tree. As Hope is about to give a speech, a man interrupts with: “Let’s get outta here before those redskins come back!” and everyone runs off. Here, “redskin” refers to violent attackers who need to be killed or fled.
- *Broken Arrow* (1950, starring Jimmy Stewart). A white boy, whose father was identified by the Jimmy Stewart character as “one of the worst haters of the Apaches,” claims that

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<sup>81</sup> BLA-TTAB-03384-85, 3427-28, 3436-37 (Courtney Depo. at 12-13, 55-56, 64-65), 5812-13.

<sup>82</sup> BLA-TTAB-03388-90, 3435-36, 3441-42 (Courtney Depo. at 16-18, 63-64, 69-70), 5814

<sup>83</sup> BLA-TTAB-03390 (Courtney Depo. at 18), 5814.

<sup>84</sup> BLA-TTAB-03394-97 (Courtney Depo. at 22-25), 5815 (DVD delivered to Board).

“that redskin jumped me.” This movie portrays the Apaches as peaceful, and the “redskin” slur is used by a hater.

- *Peter Pan* (1953, Walt Disney, animated). The villainous Captain Hook looks at a map wondering where to find Peter Pan. Seeing “Indian Cove” on the map, Captain Hook says “Those redskins know this island better than I do!” Here, the film’s villain uses “redskins” to describe people he thinks are even more fiendishly cunning than him. The movie clip also contains a song entitled “What makes the redman red” that mocks Native Americans, stereotyping them as saying “Ugh” and “How,” and stating that the “redman” became “red” from when the “very first Injun prince” kissed a maid and blushed.
- *Mohawk* (1956). Following an attack, one white man asks “What got into those redskins tonight, Captain?” Another man states, “Mean, just plain mean. Kill for the love of killing.” And another man adds: “Should be skinned alive every one of them, the dirty, mean, ignorant, slinking redskin skunks.”
- *The Comancheros* (1961, starring John Wayne and Lee Marvin). The Lee Marvin character recites a verse to the John Wayne character: “And by that crimson settin’ sun, peace come to forest glade, and of the redskins they was none, but history had been made.” Here, in a movie full of violent conflicts with Comanches who repeatedly ambush white settlers and are slaughtered by the droves, this verse states that there can only be peace when there are no “redskins.”
- *The Scalphunters* (1968, starring Burt Lancaster). After Native Americans ride off with the Burt Lancaster’s property, booze and women, stranding him in the desert, he yells “You dirty redskin!”
- *Tell Them Willie Boy Is Here* (1969, starring Robert Blake and Robert Redford). In two different scenes, racist white men use “redskin” as a slur.<sup>85</sup>

#### **J. Expert Opinion of Dr. Geoffrey Nunberg**

Dr. Nunberg repeatedly testified to holding an expert opinion that “redskin(s)” is, and has been since 1967, a disparaging epithet for Native Americans which evokes negative associations or stereotypes with American Indians, including by being used with connotations of violence, savagery, and oppression.<sup>86</sup> He testified at length regarding the support and bases for this

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<sup>85</sup> Ms. Courtney prepared an analysis of each the film clips. See BLA-TTAB-03399-3418 (Courtney Depo. at 27-46), 5816-20.

<sup>86</sup> BLA-TTAB-02967-68, 3006-08 (Nunberg Depo. at 76-77, 115-17), 3994-95, 4116-21 (Nunberg Depo. at 249-50, 371-76), 6958-59 (Nunberg Depo. at 98-99).

opinion, including the following: dictionary entries;<sup>87</sup> the contextual use of the term by non-Indians in movies, songs, and literature;<sup>88</sup> the systematic avoidance of its use by the press and in the public context;<sup>89</sup> and its contextual use in old press, old books and encyclopedias.<sup>90</sup>

Dr. Nunberg also explained that the use by PFI of “redskin(s)” in its marks is disparaging because of the connotations associated with the word. Words may carry two types of meaning. “Denotation” refers to what a word represents, such as a person, a thing, or a category of things, whereas “connotation” refers to the mental image, the nuance, or the associations that a word evokes.<sup>91</sup> In this case, the denotation of “redskin(s)” is North American Indians, and it can also denote the NFL football club that plays in the Washington, D.C. area. This additional denotation, however, does not affect the negative connotations of “redskin(s).” Dr. Nunberg concluded that it is from these connotations that the offensive and disparaging qualities of the marks arise. Whether the denotation is of Native American individuals or the football team, the connotation of “redskin(s)” is pejorative of Native Americans.<sup>92</sup>

As regards usage labels in dictionaries, Dr. Nunberg explained that while the *absence* of a usage label in a dictionary entry does *not* mean a great deal by itself and does *not* show that the word is not offensive, particularly to the group or person that the word denotes or connotes, the

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<sup>87</sup> BLA-TTAB-03085, 3993, 4000-06, 4067-80, 4156-61 (Nunberg Depo. at 248, 255-61, 322-335, 410-15), 4779-802, 4808-13 (Nunberg Depo. Exs. 8-15 & 18-19) & 6161-63, 6260-83 (Nunberg Depo. Exs. 35 & 40).

<sup>88</sup> BLA-TTAB-03085, 3096-98 (Nunberg Depo. at 194, 205-07), 3996, 4039-50 (Nunberg Depo. at 251, 294-305).

<sup>89</sup> BLA-TTAB-03084-85 (Nunberg Depo. at 193-94), 4051-67 (Nunberg Depo. at 306-22).

<sup>90</sup> BLA-TTAB-03084-85 (Nunberg Depo. at 193-94), 3992-93, 3996, 4006-39, 4109-112 (Nunberg Depo. at 247-48, 251, 261-94, 364-67) & 6165-96, 6589-601 (Nunberg Depo. Exs. 36 & 43).

<sup>91</sup> BLA-TTAB-02978-80 (Nunberg Depo. at 87-89), 3981-89 (Nunberg Depo. at 236-44).

<sup>92</sup> BLA-TTAB-4109-21, 4226-27, 4236, 4241-42 (Nunberg Depo. at 364-76, 480-81, 490, 495-96); *see also* BLA-TTAB-4744-51.

*inclusion* of a usage label in a dictionary entry *is* evidence that the lexicographers consider the words as the label designates.<sup>93</sup> The absence of a usage label may simply mean that the dictionary editors did not put much thought or research into the particular word or that nobody brought the connotation of the word to their attention. In contrast, the presence of a label indicates that the editors did consciously think about the word and made a judgment about its connotation.<sup>94</sup>

### **K. Survey and Expert Opinion of Ivan Ross**

The *Harjo* record also contains the expert opinion of Ivan Ross, Ph.D., and the results of a survey on Native American views of the term “redskin.” Dr. Ross formulated the survey based on his 30 years of training and experience in designing and conducting attitude surveys.<sup>95</sup>

In 1996, Dr. Ross conducted a survey of attitudes regarding various different words associated with Native Americans, including “redskin.”<sup>96</sup> The survey tabulated responses from the general American public and from American Indians.<sup>97</sup> For the Native American portion of the survey, the 20 states with the highest Native American populations were identified (excluding Alaska and Hawaii); counties and census tracts within those states were examined to

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<sup>93</sup> BLA-TTAB-02959-63 (Nunberg Depo. at 68-72), 4071-80, 4087-89, 4156-61 (Nunberg Depo. at 326-35, 342-46, 410-15).

<sup>94</sup> *See id.*

<sup>95</sup> BLA-TTAB-03136-37 (Ross Depo. at 19-20). As of 1996, when he performed his work, Dr. Ross was President of Ross Research, a former Professor of Marketing and Adjunct Professor of Psychology with the Carlson School of Management of the University of Minnesota for 27 years, and a Fellow with the Society for Consumer Psychology, the American Psychological Association, and the American Psychological Society. He has designed and conducted numerous studies for academic research, corporate clients, and litigated disputes; consulted for multiple U.S. government agencies; and been qualified as an expert in survey design on numerous occasions in federal court. *See* BLA-TTAB-04250-55 (Ross Depo. at 4-9).

<sup>96</sup> The survey results are summarized at BLA-TTAB-04860-69, 4885. Survey details, including the specific individual responses to the survey, are found at BLA-TTAB-04888-5113.

<sup>97</sup> *See id.*

arrive at a set of areas which would fairly represent both rural and urban areas for the actual telephone draw; telephone number sets defined by area code that are census tract and county-based were purchased to generate a stratified probability sample; and a random digit dial draw was made from the final strata level.<sup>98</sup>

According to the results of the survey, 36.6 percent of American Indians responded that they would be personally offended by the use of the word “redskin,” and 52.5 percent perceived that the word “redskin” would “offend others.” In total, 60.3 percent of Native Americans perceived the term “redskin” to be either offensive to themselves or to others.<sup>99</sup> Dr. Ross testified to his expert opinion that the methodology used for the survey of Native Americans resulted in responses that “fairly represented” the views of the Native American population of the United States, and that this opinion is backed up by the textbooks from which he had taught in the past 30 years.<sup>100</sup> He explained that, while using a stratification process (as had the survey) almost always results in respondents living in 5–10 counties (less than 2% of total counties of the United States), it will nonetheless involve a “probability sample” that reflects an accurate projection of the views of the broader population.<sup>101</sup>

Dr. Ross’ expert opinion was also that “it is appropriate to combine the responses to Question 9 (offensive to self) and Question 10 (offensive to others) from the survey in order to arrive at an accurate measurement of offensiveness from the perspective of the statute,” as they

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<sup>98</sup> BLA-TTAB-03279-80 (Ross Depo. at 162-63), 4261-63 (Ross Depo. at 15-17).

<sup>99</sup> BLA-TTAB-03178, 3210-12, 3301-02 (Ross Depo. at 61, 93-95, 185-86), 4306, 4311-12 (Ross Depo. at 60, 65-66), 4867, 4885.

<sup>100</sup> BLA-TTAB-03259, 3277-80 (Ross Depo. at 142, 160-63), 4296-97 (Ross. Depo. at 50-51).

<sup>101</sup> BLA-TTAB-04340-41 (Ross Depo. at 94-95).

are “essentially the same question.”<sup>102</sup> As Dr. Ross explained while citing two supporting research texts, the “third-person technique methodology” on which Question 10 was based is “a common method of getting what a person’s true feeling about something is” regarding a sensitive topic, and will “more accurately reflect their state of mind” by providing an “indirect measure of whether the respondent thinks that the term is offensive.”<sup>103</sup> Since some people may be loath to admit that they are themselves offended, a respondent’s statement that others may be offended by the term “redskin” should be considered as evidence of the disparaging nature of the word. It reflects those same respondents’ views about the meaning and significance of “redskin.”<sup>104</sup> Thus, according to the survey results, 60.3 percent of Native Americans consider the term “redskin” offensive.

**L. PFI And The NFL Have Admitted That “Redskin” Is A Disparaging Term**

The record also contains admissions by PFI that “redskins” is a disparaging term.

As discussed above, in 1972, PFI’s President, Edward Bennett Williams admitted in a letter to NFL Commissioner Peter Rozelle that, through Harold Gross’s letter, the delegation of Native American “leaders” “quite cogently” explained that the team name was disparaging (*see*

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<sup>102</sup> BLA-TTAB-03154-55 (Ross Depo. at 37-38), 4302-04 (Ross Depo. at 56-57), 4867.

<sup>103</sup> BLA-TTAB-04418-20, 4498-4501 (Ross Depo. at 30-32, 110-113).

<sup>104</sup> Dr. Ross explained that positive responses to Question 10 (whether the surveyed person perceived “redskin” as offensive to others) tend to indicate that those responders viewed the term “redskin” as offensive. He noted that “in any case where one is measuring a concept having to do with offensive or embarrassing or any concept of something which might evoke the concept of social desirability, it’s very common that one would use a question format that would solicit the person’s perception from the perspective of another in addition to or instead of just the perception that they would have about that thing themselves.” BLA-TTAB-03196. The purposes of posing Question 10 as phrased were to “defeat the shield or guard that someone might bring to bear,” “to cover all bases,” and “to measure the same thing,” namely the respondents’ own state of mind regarding the word “redskin.” BLA-TTAB-03197, 3199, 3201.

*supra* at 14). The Williams letter to Rozelle was an admission by PFI that the objections to the “redskins” name were “cogent,” *i.e.*, logical and convincing.

The 1996 deposition testimony of John Kent Cooke in *Harjo* constitutes a further admission by PFI that “redskin” is disparaging. At the time of the deposition, Mr. Cooke was PFI’s Executive Vice President, and he had been responsible since 1981 for the daily operations of the organization.<sup>105</sup> Mr. Cooke repeatedly gave evasive answers to the straightforward question of whether a reasonable person could find “redskin” disparaging, and PFI’s attorney went to the extraordinary lengths of instructing him not to answer such questions. After pages of avoiding the question “are there any circumstances in which you would use the word Redskin face-to-face with an American-Indian,”<sup>106</sup> the following exchange occurred:

Q: Sir, if you did have occasion or opportunity to speak with an American-Indian, do you believe it would be appropriate to use the word Redskin in addressing the American-Indian?

[Objection omitted]

A: I can’t answer the question

Q: Why are you not able to answer the question?

A: Because I think the question is preposterous.

Q: Why is it preposterous?

[Counsel for PFI]: Don’t answer any more questions. Go on. You’ve gotten your answer, Counselor, if you don’t like it, you can get a ruling.

Q: So our record is clear, sir—

[Counsel for PFI]: I’m instructing him not to answer the question. You’ve gotten your answer. You may not like it, but you’ve gotten it, so let’s go on.<sup>107</sup>

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<sup>105</sup> BLA-TTAB-02646 (Cooke Depo. at 9-10, 12).

<sup>106</sup> BLA-TTAB-02647 (Cooke Depo. at 21).

<sup>107</sup> BLA-TTAB-02648 (Cooke Depo. at 25-26).

Later, Mr. Cooke and counsel for PFI spent four transcript pages evading the following important question:

[D]o you believe that reasonable minds could come to the conclusion that the use of the word Redskin or Redskins in the Washington football team's name is disparaging?<sup>108</sup>

Counsel for PFI improperly instructed Mr. Cooke not to answer that question on grounds that it calls for a legal conclusion, and Mr. Cooke did not answer.<sup>109</sup>

The Board should conclude from Mr. Cooke's refusal to answer these questions, and from the instructions by PFI's counsel not to answer questions even though no privilege was implicated, that PFI has made the following two admissions: (1) it is not appropriate to refer to a Native American as a "redskin" because "redskin" is not a neutral term; and (2) it is reasonable to believe that "redskins" is a disparaging reference to Native Americans.<sup>110</sup> *See Levi Strauss & Co. v. R. Josephs Sportswear Inc.*, 36 U.S.P.Q.2d 1328, 1332-35 (T.T.A.B. 1994) (Board may make adverse inference from party's refusal to answer and from counsel's unfounded instructions not to answer questions).

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<sup>108</sup> BLA-TTAB-02672-73 (Cooke Depo. at 21, 22-24).

<sup>109</sup> BLA-TTAB-02672 (Cooke Depo. at 21-22).

<sup>110</sup> Mr. Cooke's testimony is replete with refusals to answer questions, and evasive and seemingly insincere testimony. For instance, he refused to answer the question whether the term "braves on the warpath" as used in the team fight song suggests an association with Native Americans. His answer was "I am able to [answer the question], but I choose not to." BLA-TTAB-02680 (Cooke Depo. at 79). Elsewhere, he denied that the feathers in the Washington Redskins logo are Indian feathers, even though he had previously referred to them in his testimony as "Indian feathers." BLA-TTAB-02676, 2680 (Cooke Depo. at 51, 81). He also at first denied having ever said that the "Redskins" name "represents the finest things in the Indian culture." After being confronted with a newspaper article quoting him saying exactly that, Mr. Cooke stated that "I think I have said on occasion that it represents *fine things* of the Indian culture. Whether it is the *finest things* of the Indian culture I have no idea...." BLA-TTAB-02682 (Cooke Depo. at 91, 94) (emphasis added).

An additional admission in the record relates to a 1993 letter from PFI to an advertising company regarding a McDonald's advertising campaign centered around the team. The letter was written by John Kent Cooke, Jr., PFI's Director of Marketing. Bemoaning "this day and age of political correctness," Mr. Cooke set out certain criteria regarding how the "Redskins" name, logo, and image must be portrayed in advertising. The criteria include "[n]o caricatures," "[n]o Indian Costumes or Headresses," "No War Chants, Yelling, Derogatory Indian language (ie: 'Scalp the Cowboys,' etc...)," "Use of 'Hail to the Redskins' must be Presented Tastefully," "No Smart-Select [sic: Alec] Language or Humor," and "No Insulting Language or Humor."<sup>111</sup> While this letter did not expressly state that "redskin" is disparaging, PFI was plainly admitting that the "Redskins' name, logo and image" lend themselves to mocking Native Americans due to the disparaging nature of the marks. Otherwise, the letter would be unnecessary.

Finally, the November 20, 1972 *The Redskins Edition of Pro! Magazine*, an NFL publication, also contains an admission by the NFL and PFI that "redskin" is a disparaging term. Reporting on Native American opposition to the "Redskins" team name, *Pro! Magazine* states that "one suspects that there is some confusion between result and intent." Thus, the NFL has admitted that the "result" of the name "Redskins" is hurtful, but tries to justify the use of the team name on grounds that there was no "intent" to harm.<sup>112</sup> The NFL further admitted to the reasonableness of the Native American view, stating that the objecting Native Americans may "have [their] day," and pointing out that some universities had recently abandoned Indian sports mascots.<sup>113</sup>

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<sup>111</sup> BLA-TTAB-02673-74 (Cooke Depo. at 25-30) & 2708 (Cooke Depo. Ex. 7).

<sup>112</sup> BLA-TTAB-01378.

<sup>113</sup> *Id.*

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

The “Redskins” team name and the trademarks at issue have been used in connection with Native American themes and imagery. In an interrogatory response, PFI stated that “on many occasions,” Jack Kent Cooke (as of 1996, PFI’s owner, President and Chairman) has claimed that “Redskins,” as used by PFI, is intended to honor Native Americans.<sup>114</sup> In response to another interrogatory asking PFI to identify persons with knowledge of PFI’s use of Native American symbols, rituals and other aspects of Native American heritage, PFI responded, “through long, extensive and widespread use of its services, as well as in advertising and promotional contexts, and through extensive broadcast and print coverage, the Redskins name and logo are well-known to many millions of people throughout the United States and elsewhere.”<sup>115</sup>

Utterly contradicting the self-serving claim that PFI uses “Redskins” to honor Native Americans, the record is full of examples in which PFI made fun of Native Americans and their culture. The examples in the record come from half-time entertainment, the team’s fight song, cheerleader uniforms, and marching band uniforms. Writing in *The Washington Post*, the erudite Pulitzer-Prize-winning writer Jonathan Yardley had this to say about the claim that the team name honors Native Americans: “There’s an eight-letter word for that, first letter ‘b.’”<sup>116</sup> Yardley was right.

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<sup>114</sup> BLA-TTAB-02576.

<sup>115</sup> BLA-TTAB-02579.

<sup>116</sup> BLA-TTAB-00923.

The most extreme example in the record of PFI's making fun of Native Americans may be a video clip (produced by PFI in *Harjo* discovery) of half-time "entertainment." The clip features an almost-naked "Indian" on a giant drum at midfield dancing violently in a mocking mimicry of Native Americans.<sup>117</sup> A written account of half-time "entertainment" states that "[b]etween the 'halves,' Indian bands march on the field and present all forms of pageantry, which may not make much sense but is highly diverting to the crowd. Mr. Marshall [the former owner]<sup>118</sup> also has a swing band in a giant wigwam up over the stands, all in their customary war feathers, smoke emanating from this elevated tepee as [certain star players] and all the other 'braves' of the local professional entry go through their act on the field."<sup>119</sup>

The team's original fight song lyrics are also repulsive, as they stereotyped and mocked the speech of Native Americans. Until 1972, the team fight song included these lyrics:

HAIL TO THE REDSKINS, Hail Vic-to-ry,  
*Braves on the warpath*, Fight for old Dixie  
*Scalp 'em, swamp 'em*  
*We will take 'em big score.*  
*Read 'em, weep 'um*  
*Touchdown we want heap more.....*<sup>120</sup>

PFI admitted that the lyrics made fun of Native Americans, and changed them after the 1972 meeting with the delegation of Indian leaders described above (at pages 14-15).<sup>121</sup> Even after the "most offending" passages were removed, the fight song has continued to refer to the team as

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<sup>117</sup> BLA-TTAB-02376 (DVD, at 2:48 to 2:55).

<sup>118</sup> BLA-TTAB-02619.

<sup>119</sup> BLA-TTAB-00601.

<sup>120</sup> BLA-TTAB-01191, 1228, 1231, 1344; *see also* BLA-TTAB-01187-91; BLA-TTAB-02678 (Cooke Depo. at 63) & 02710.

<sup>121</sup> BLA-TTAB-00837 (quoting Edward Bennett Williams: "[T]he swamp 'ems, scalp 'ems and heap 'ems is a mocking of dialect. We won't use these lyrics anymore."); *see also* BLA-TTAB-00837.

“braves on the warpath,” however.<sup>122</sup> And, 24 years after Mr. Williams changed the original lyrics, PFI Executive Vice President John Kent Cooke denied that the original lyrics were mocking.<sup>123</sup>

The outfits of the team’s cheerleaders have also mocked Native Americans. The record contains video clips and photographs of cheerleaders wearing stereotyped black braided-hair wigs and Indian-themed costumes, as they entertain the crowds wearing faux-Indian outfits; one video clip shows a cheerleader wildly dancing while playing drums, again in mocking mimicry of Native Americans.<sup>124</sup> PFI has admitted that the cheerleader outfits from 1962 until as late as 1979 included an Indian dress and Indian beaded headband.<sup>125</sup> In 1972, at the same time the fight song lyrics were changed and due to the 1972 meeting with the American Indian leaders, it was announced that the cheerleaders would no longer wear the black-braided hair wigs.<sup>126</sup>

The “Redskins marching band” also makes light of Native American culture; the band members march around wearing Indian headdresses full of feathers and plays Indian-themed music (evoking stereotypes of tribal drumbeat war music). The record contains numerous video

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<sup>122</sup> BLA-TTAB-00849, 2576.

<sup>123</sup> BLA-TTAB-02679 (Cooke Depo. at 68).

<sup>124</sup> BLA-TTAB-00699, 1166, 1251 (describing cheerleaders as “girls” “[m]arching at the head of the Band in their spanking new Indian costumes”), 1263 (“Here are the Redskinettes all decked out in their Indian garb...”), 1486 (wearing “braided clone-like Indian wigs...”) & 1277, 1280, 1288, 1359. *See also* BLA-TTAB0-2380 (DVD, at 20:20); BLA-TTAB-02388 (DVD, at 1:14-1:26) (cheerleader wildly dancing while playing drums).

<sup>125</sup> BLA-TTAB-02640.

<sup>126</sup> BLA-TTAB-00837.

clips and photographs of them wearing the headdresses and playing Indian-themed music, and PFI has admitted that the band uniform includes the Indian headdress.<sup>127</sup>

The record also contains photographs of players and administrative personnel dressed up like Indians.<sup>128</sup> Covers of game programs featuring caricatures of buffoonish-looking Native Americans are also in the record.<sup>129</sup> And, in the PFI corporate offices, there is even a mocking “cigar store” Indian.<sup>130</sup>

The mockery of Native Americans is consistent with the history of racism towards African Americans while under the ownership of its first owner, George Preston Marshall.<sup>131</sup>

The *Harjo* record contains numerous news articles and published advertisements in the context of PFI’s team that mock Native American culture, such as by reporting that the “Washington Redskins” had “scalped” or “ambushed” another team (or vice-versa), were “on the warpath,” were “brewing special Kickapoo Juice” for their opponents, or that they had been “massacred” by another team (sometimes to avenge the defeat of General Custer).<sup>132</sup> Some articles use pidgin English or otherwise mock or stereotype Native American manner of speech.<sup>133</sup> Newspapers also published mocking caricatures of Native Americans in connection

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<sup>127</sup> BLA-TTAB-01139-66, 1167, 1270, 1292, 1350, 1356, 1412, 1474, 1479, 02639. *See also* BLA-TTAB-02376 (DVD, at 0:53 to 1:31; 2:43 to 2:48); BLA-TTAB-02378 (DVD, at 6:48 to 7:00); BLA-TTAB-02388 (DVD, at 1:09 to 1:14); BLA-TTAB-02390 (DVD, 4:14 to 4:25, and 11:24 to 11:26).

<sup>128</sup> BLA-TTAB-000676-81, 684, 695-98, 903, 1229.

<sup>129</sup> BLA-TTAB-00757-77.

<sup>130</sup> BLA-TTAB-02687 (Cooke Depo. at 126-27).

<sup>131</sup> The “Washington Redskins” was the last NFL team to integrate and permit African-American players. George Preston Marshall agreed to integrate the team only after the Kennedy Administration’s Secretary of the Interior threatened not to permit the team to play in D.C. Stadium (now RFK Stadium), which was then owned by the federal government, unless PFI allowed African Americans to play. *See* BLA-TTAB-00806-24, 1390, 1872. Marshall was the owner from 1932 to 1969. *See* BLA-TTAB-02619.

<sup>132</sup> *See, e.g.*, BLA-TTAB-00598-723, 779-804.

<sup>133</sup> *See, e.g.*, BLA-TTAB-00601, 621, 627, 631, 632, 677, 783, 786, 789, 795, 801.

with the team, and referred to the former team owner as the “Big Chief” or “Great White Father.”<sup>134</sup> Furthermore, the fans of the team frequently dress up like stereotyped Native Americans, with Indian headdresses and face paint, and shout war whoops.<sup>135</sup> Although these activities were not undertaken by PFI, it is obvious that the broader public was responding to how PFI has used the team name and trademarks in ways that mock Native Americans.

## **VI. ARGUMENT**

Section VI.A, below, demonstrates that each of the Petitioners has “standing” to request cancelation of the registrations. Section VI.B explains that, based on the evidence in the record outlined, the registrations may disparage Native Americans or bring them into contempt or disrepute. Section IV.C demonstrates that PFI’s laches defense lacks merit.

### **A. The Petitioners Have Standing.**

To establish statutory standing under 15 U.S.C. § 1064, Petitioners must show that they have “a personal interest in the outcome of the case beyond that of the general public.” *See* Order Summarizing Pre-Trial Conference (May 5, 2011) [Dkt. 39] at 15; *Harjo v. Pro Football, Inc.*, 30 U.S.P.Q.2d 1828, 1830 (T.T.A.B. 1994). In *Harjo*, the Board ruled that a petitioner seeking to cancel the “redskins” registrations can meet this standard by demonstrating that he or she is a Native American enrolled in a federally recognized tribe, and that he or she views “redskin” as a derogatory term referring to Native Americans that offends Native Americans. *See id*; *see also Harjo v. Pro Football, Inc.*, 50 U.S.P.Q.2d at 1735 n.89.

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<sup>134</sup> *See, e.g.*, BLA-TTAB-00627, 692, 786-804, 819, 828.

<sup>135</sup> BLA-TTAB-00704-723, 844, 850, 851, 856, 861, 961, 1133, 1432, 1440. *See also* BLA-TTAB-02380 (DVD, at 22:36 to 22:43); BLA-TTAB-02382 (DVD, at 33:05 to 33:07); BLA-TTAB-02392 (DVD, at 5:15 to 5:21, 9:17 to 9:21, and 18:55 to 18:58).

Here, there can be no dispute that each Petitioner satisfies the *Harjo* standard for standing. Each Petitioner is indisputably a Native American and views “redskin” as a derogatory term referring to Native Americans that offends Native Americans.

**B. The Challenged Trademark Registrations Contain Matter That May Disparage Native Americans or Bring Them Into Contempt Or Disrepute.**

The Board’s May 31, 2011 Order set forth a two-part inquiry into whether a trademark registration should be canceled because it may disparage persons, using the same legal test it applied in *Harjo*. *See* May 31, 2011 Order [Dkt. 40] 10-11. The two questions are:

- 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?
- Is the meaning of the marks one that may disparage Native Americans?

*See id.*; *Harjo*, 50 U.S.P.Q.2d at 1741-42. These questions are to be answered as of the various dates of registration of the marks in question. *See* May 31, 2011 Order [Dkt. 40] at 11.

Furthermore, for purposes of this proceeding, the Board has held that the guidelines for determining whether a registration should be canceled as disparaging are the same as the guidelines for determining whether it should be canceled for bringing persons into contempt or disrepute. *See id.* at 3-4.

As demonstrated below, and as the Board found in *Harjo*, the marks in question refer to Native Americans, and the meaning of the marks is one that may disparage Native Americans.

**1. The Term “Redskins” in the Registrations “Clearly Carries the Allusion to Native Americans.”**

In *Harjo*, the Board ruled that “the word ‘Redskins,’ as it appears in the marks herein, clearly carries the allusion to Native Americans.” *Harjo*, 50 U.S.P.Q.2d at 1742. Indeed, two of the registrations (PTO ‘668 and PTO ‘127) contain the profile of a Native American man with an

Indian headdress containing feathers, with one of the registrations also containing an Indian spear decorated with feathers.<sup>136</sup> Furthermore, on “many occasions,” Jack Kent Cooke, the former PFI President, Chairman and majority owner from 1974 until after 1996, stated that the name “Redskins” “is intended to honor Native Americans.”<sup>137</sup> While Petitioners deny that the team name confers any honor, this statement is an obvious admission that the marks allude to Native Americans. Moreover, in response to an interrogatory, PFI has admitted that the Redskins name and logo constitute a use by PFI of “Native American symbols, rituals or other aspects of Native American heritage.”<sup>138</sup>

Aside from PFI’s admissions, there can be no dispute that the word “redskin” has been used for centuries to refer a North American Native American, and that George Preston Marshall selected the team name for its “Indian motif.”<sup>139</sup> And, of course, the marching band uniforms, the cheerleader outfits, the fight song, game programs, yearbooks and press guides routinely use Native American themes and imagery. Furthermore, the team’s fans and the press have used Native American themes and imagery in their activities relating to the team, demonstrating that the allusion of the marks to Native Americans is well understood.

As noted, PFI asserted as an affirmative defense that the term “Redskin” as used in the marks has a acquired a secondary meaning such that it refers only to PFI’s football team and “cannot reasonably be understood” to refer to Native Americans. *See* Answer [Dkt. 4] at 3. In *Harjo*, the Board rejected that argument as meritless:

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<sup>136</sup> BLA-TTAB-00564-65.

<sup>137</sup> BLA-TTAB-02576, 02579, 2588.

<sup>138</sup> BLA-TTAB-02579.

<sup>139</sup> BLA-TTAB-01378.

[I]n determining the meaning of the term ‘redskin(s)’ as it appears in respondent’s registered marks, it would be both *factually incomplete and disingenuous* to ignore the substantial evidence of Native American imagery used by respondent, as well as by the media and respondent’s fans, in connection with respondent’s football team and its entertainment services.

*Harjo*, 50 U.S.P.Q.2d at 1742.

PFI’s secondary meaning argument is no less “factually incomplete” and “disingenuous” today. Petitioners have satisfied the first test to demonstrate disparagement.

**2. The Term “Redskin” Disparages Native Americans, As Perceived By A Substantial Composite of Native Americans.**

The second question, whether the meaning of the marks may disparage Native Americans, depends on “whether, as of the relevant times, a substantial composite of Native Americans in the United States so perceive the subject matter in question.” *Harjo*, 50 U.S.P.Q.2d at 1743. “A ‘substantial composite’ of the referenced group is not necessarily a majority of the referenced group.” May 31, 2011 Order [Dkt. 40] at 8-9 (citing *In re Heeb Media LLC*, 89 U.S.P.Q.2d 1071, 1074 (T.T.A.B. 2008)).

In *Harjo*, the Board found that the petitioners had “clearly established” that a substantial composite of Native Americans perceived the marks as disparaging as of the dates they were registered. The Board explained that “[n]o single item of evidence or testimony alone brings us to this conclusion; rather, we reach our conclusion based on the cumulative effect of the entire record.” *Harjo*, 50 USPQ 2d at 1743.

Indeed, there is abundant evidence in the record demonstrating that, as of the relevant dates, the marks contain matter that a substantial composite of Native Americans would find disparaging. As set out in detail above, the evidence includes the following categories:

1. Dictionaries, reference works, newspaper articles and editorials, and other published sources stating that “redskin” is a disparaging term (*see supra* at 9-11). The sources in

the record date back to 1911 (*Encyclopedia Britannica*), 1966 (*Random House Dictionary*) and 1971 & 1972 (*Washington Star* and *Washington Daily News* articles). In *Harjo*, the Board found that the dictionary evidence in the record alone demonstrates that “a not insignificant number of Americans have understood ‘redskin(s) to be an offensive reference to Native Americans since at least 1966.” *Harjo*, 50 U.S.P.Q.2d at 1744. Likewise, the Board found that “excerpts from various articles and publications about language ... include, often, in larger discussion about bias in language, the assumption or conclusion that the word ‘redskin(s)’ as a term of reference for Native Americans is, and always has been, a pejorative term.” *Id.* It is “reasonable to infer” from these written sources that state that “redskin” is disparaging that “a substantial composite of Native Americans would similarly perceive the word.” *Id.*

2. The 1972 meeting between “American Indian leaders” and PFI (*see supra* at 12-14) is important evidence that throughout the relevant time period, a substantial composite of Native Americans found the content of the marks to be disparaging. In *Harjo*, the Board “in particular” noted the testimony of Harold Gross regarding the 1972 events. *See Harjo*, 50 U.S.P.Q.2d at 1747.

3. The National Congress of American Indians has taken stands against the marks and PFI’s team name, including adopting a resolution that “the term REDSKINS . . . has always been and continues to be a pejorative, derogatory, denigrating, offensive, scandalous, contemptuous, disreputable, disparaging and racist designation for Native American[s].” (*see supra* at 14-17). *See id.* at 1747 (noting NCAI opposition to team name).

4. Evidence that numerous Native American groups and individuals, in addition to NCAI, oppose PFI’s team name and also oppose other Indian-themed sports mascots (*see supra* 17-20). The evidence in the record shows opposition to the Dartmouth College and Stanford

University Indian-themed mascots and team names, dating back to the late 1960s. *See Harjo*, 50 U.SP.Q. 2d. at 1747 (record contains “substantial number of news articles, from various time periods, including from 1969-70, 1979, 1988-89, and 1991-92, reporting about Native American objections, and activities in relation thereto, to the word “Redskins” in respondent’s team’s name.”)

5. The empirical work of expert linguist Geoffrey Nunberg, and the testimony of expert historian Frederick Hoxie, demonstrate that “redskin” is not used in newspapers or by historians as a term to refer to Native Americans (*see supra* at 20-23). In *Harjo*, the Board stated that evidence that “redskin” fell into disuse in the latter part of the 20th century is evidence that the term “has been since at least from the 1960’s, perceived by the general population, which includes Native Americans, as pejorative term for Native Americans.” *Id.* at 1745.

6. Examples in written sources (*see supra* at 23-26) and movies (*see supra* at 26-28) in which “redskin” is used in a disparaging manner to refer to Native Americans. In *Harjo*, the Board noted that the record contained many writings from the 19th century through the middle of the 20th century in which “redskin” was used in a disparaging manner, but that from the 1950’s forward, “there are minimal examples of uses of the word ‘redskin’ as a reference to Native Americans.” *Id.* That the term went into disuse is evidence of its disparaging nature, as the Board has already reasoned. *See id.*

7. The expert opinion of Geoffrey Nunberg that “redskin” is and always has been a disparaging term, based on his evaluation of reference sources, evidence of usage, and his empirical work regarding the non-use of “redskin” in newspapers (*see supra* at 28-30).

8. The expert opinion of Ivan Ross and survey data (*see supra* 30-32). In *Harjo*, “[a]fter careful consideration of Dr. Ross’ testimony, the survey report and the substantial survey

data in the record,” the Board found “ample support for the viability of the survey methodology used, including the sampling plan, the principal questions asked, and the manner in which the survey was conducted.” 50 U.S.P.Q. 2d at 1734. The Board further found “that the survey adequately represents the views of the two populations sampled,” was “a survey of current attitudes towards the word ‘redskin(s)’” as a reference to Native Americans, and, “[w]hile certainly far from dispositive of the question before us in this case, ... is relevant and ... [to be] accorded some probative value....” *Id.* at 1746. Ultimately, despite what the Board described as some “flaws in the survey that limit its probative value” and its “limited applicability to the issues in this case as it sought to measure the participants’ views only as of 1996,” the Board concluded that “the percentage of participants in each sample who ... stated they were offended by the word ‘redskin(s)’ for Native Americans ... to be significant” and to constitute “substantial composites of both the general population and the Native American population,” and that the survey evidence was “supportive” of other evidence that indicating the derogatory nature of the word “redskin(s).” *See id.* at 1745-46.

In reaching these conclusions, the Board gave no weight to the survey results for Question 10 of the survey, which asked about whether survey participants believed that “redskin” would be offensive to others. *See id.* at 1746. The Board’s decision, however, did not address Dr. Ross’ testimony regarding the basis for including the results of responses to Question 10. As noted, Dr. Ross offered expert testimony that the offensive-to-others question is fully supported by the “third-person technique methodology,” an accepted method in the field of opinion surveys (*see supra* at 31-32). Accordingly, Petitioners respectfully request that the Board reconsider whether to give evidentiary weight to answers to the offensive-to-others

question in light of Dr. Ross's well-supported expert testimony regarding the relevance and methodological support for the question.

9. PFI and the NFL have admitted that the PFI team name is offensive to Native Americans (*see supra* 32-35). The earliest admission occurred in 1972, in a letter from the PFI President Edward Bennett Williams to NFL Commissioner Peter Rozelle. In *Harjo*, the Board did not discuss these admissions.

10. PFI has used the "Redskins" team name and the marks in ways that mock Native Americans and their culture (*see supra* 36-40). The record contains evidence from half-time shows, the fight song, the cheerleader costumes, the marching band uniform, programs and yearbooks, and so on. And, the public (fans, the media, and advertisers) joined in with belittling headlines, ads and behavior. In *Harjo*, the Board found that all of this evidence "reinforces [the] conclusion that the word 'redskin(s)' retains its derogatory character as part of the subject marks and as used in connection with respondent's football team." *Id.* at 1747.

Thus, there can be no dispute that the evidence in the record demonstrates, by at least a preponderance of the evidence, that the marks contain matter (the term "redskin(s)") that was perceived by a substantial composite of Native Americans as disparaging during the relevant time periods.

### **C. PFI's Laches Defense Lacks Merit.**

On May 31, 2011, the Board set forth the legal test it intended to apply for laches, which the Board based on the D.C. Circuit laches rulings in *Harjo* even though the Board's own legal analysis on laches differs. *See* May 31, 2011 Order [Dkt. 40] at 12 n.6. The laches standard in the May 31, 2011 Order requires "a showing of (1) undue delay in asserting one's rights against another, and (2) material prejudice to the latter resulting from the delay." *Id.* at 12 (citations omitted). PFI bears the burden of proof. *Id.* at 13-14.

Below, Petitioners demonstrate that PFI's laches defense lacks merit under the standard set forth in the May 31, 2011 Order. Separately, however, Petitioners have filed a motion to reconsider the laches standard due to the America Invents Act, which was enacted in September 2011, after the Board's Order. In their motion, Petitioners argue that the reason for following the D.C. Circuit standard no longer applies because, under the America Invents Act, no subsequent federal court proceedings in this matter will take place in the District of Columbia.

**1. None Of The Petitioners Unduly Delayed In Bringing This Petition.**

None of the Petitioners unduly delayed in filing this petition. They filed while the *Harjo* matter was still active in the federal courts – and while the Board's decision to cancel the registrations in *Harjo* was still in effect, although in suspense.

On April 2, 1999, in *Harjo*, the Board determined that each of the registrations at issue in this petition should be canceled. At the time of that ruling, Petitioners Jillian Pappan and Courtney Tsotigh were only 11 years old. Petitioner Marcus Briggs-Cloud was only 15. Petitioner Phil Gover was 16 and Petitioner Amanda Blackhorse was 17. The *Harjo* federal court proceedings did not end until the Supreme Court denied the *Harjo* petitioners' writ of certiorari on November 16, 2009. *See Harjo v. Pro-Football, Inc.*, 565 F.3d 880, 90 U.S.P.Q.2d 1593 (D.C. Cir.), *cert denied*, 130 S.Ct. 631 (2009).

Any delay occurring between the April 2, 1999 Board decision in *Harjo* (when the petitioners were all under age 18) and November 16, 2009 (when the federal court *Harjo* proceedings concluded) cannot be considered a period of undue delay. During that time period, the Board's most recent pronouncement was that the registrations were to be canceled, a decision that remained in effect until the federal court proceedings in *Harjo* came to conclusion. It would be nonsensical to insist that the Blackhorse Petitioners needed to file their petition before the *Harjo* proceedings had concluded. To the contrary, it was reasonable and justifiable – and

presumably welcomed by the Board – for potential petitioners to await the completion of the federal proceedings in *Harjo*. Any other rule would invite the filing of excessive and unnecessary petitions.

Here, Petitioners actually filed their petition on August 11, 2006, more than three years before the federal court proceedings in *Harjo* were completed. If anything, therefore, the instant petition was premature and not unduly delayed. Indeed, in multiple orders, the Board stayed this petition pending completion of the *Harjo* federal court proceedings.<sup>140</sup> The Board did not remove this petition from suspense and order that proceedings commence until after it received notice that the Supreme Court denied *cert* in *Harjo*.<sup>141</sup> Furthermore, the Board continued to treat the *Harjo* petition as an open, but suspended, matter, and did not terminate the *Harjo* proceedings before the Board until May 2010.<sup>142</sup>

Alternatively, even if the period of time between April 2, 1999 and November 16, 2009 could be counted towards undue delay (which it should not) none of the Petitioners unduly delayed after reaching his or her 18th birthday to file the petition. Ms. Tsotigh was 18 years old; Ms. Pappan was 19 years old; Mr. Briggs-Cloud was 22; Mr. Gover was 23; and Ms. Blackhorse was 24.

Accordingly, none of the Petitioners unduly delayed in filing the petition.

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<sup>140</sup> See Order Suspending Petition Pending Disposition of Civil Action (Sept. 28, 2006) [Dkt. 6]; Order (Mar. 31, 2008) [Dkt. 12]; Order (March 31, 2009) [Dkt. 13]; Order (June 9, 2009) [Dkt. 16]; Order (Nov. 16, 2009) [Dkt. 20].

<sup>141</sup> See Order (Mar. 18, 2010) [Dkt. 23] (resuming proceedings in this petition in light of Supreme Court's denial of *Harjo* petitioners' petition for a *writ of certiorari*).

<sup>142</sup> See Order, *Harjo v. Pro-Football, Inc.*, Cancellation No. 21,069 (Sept. 30, 2009) [Dkt. 109] (Board proceeding in *Harjo* “remains suspending pending final determination of the civil action”).

## 2. PFI Suffered No Prejudice By Any Delay In The Filing Of This Petition

PFI's laches defense also fails for the separate reason that PFI did not suffer "material prejudice ... resulting from the delay."<sup>143</sup> Here, no prejudice can be attributed to any delay on the Petitioners' part, let alone "material prejudice."

PFI has known since well before each of the Petitioners turned 18 that its trademark registrations were vulnerable to cancellation. PFI has obviously known that in 1999, the Board ruled in *Harjo* that the trademarks should never have been registered because they may disparage Native Americans. Any money spent to promote the "Washington Redskins" after 1999 was done with full knowledge that this agency believes that its registrations should be cancelled, and was done at PFI's peril. "[O]ne who uses debatable marks does so at the peril that his mark may not be entitled to registration." *In re McGinley*, 660 F.2d 481, 485, 211 U.S.P.Q. 668, 672 n.7 (C.C.P.A. 1981) (quoting *In re Riverbank Canning Co.*, 95 F.2d 327, 329, 37 U.S.P.Q. 268, 270 (C.C.P.A. 1938)).

Furthermore, PFI cannot demonstrate that it would have acted any differently during the period of time between each Petitioner's eighteenth birthday and August 16, 2009 filing date of the petition. Accordingly, PFI can show no prejudice "resulting from" the delay."<sup>144</sup> If PFI would have promoted its trademarked items in substantially the same way even if it had known that the Petitioners would be filing this petition, then it cannot claim prejudice "resulting from" any delay.

Accordingly, PFI cannot demonstrate the prejudice required for laches.

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<sup>143</sup> Order (May 31, 2011) [Dkt. 40] at 12.

<sup>144</sup> The prejudice must "result from" the delay. *See id.* at 12, 14, 15.

## VII. CONCLUSION

For the foregoing reasons, the Board should order cancellation of the six challenged trademark registrations.

Respectfully Submitted,

Dated: September 6, 2012

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on September 6, 2012, he caused a copy of the foregoing Petitioners' Trial Brief, and Appendix A and Appendix B thereto, to be served via Federal Express upon the following:

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