

ORAL ARGUMENT NOT YET SCHEDULED

No. 03-7162

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

SUZAN S. HARJO, ET AL.,

Appellant,

v.

PRO FOOTBALL, INC.,

Appellee.

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

BRIEF FOR APPELLANT

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1) of the Circuit Rules of the United States Court of Appeals for the District of Columbia Circuit, appellants, Suzan Shown Harjo, Raymond D. Apodaca, Vine Deloria, Jr., Norbert S. Hill, Jr., Mateo Romero, William A. Means, and Manley A. Begay, Jr., submit the following information:

(a) Parties and Amici: Parties currently before this Court and previously before the District Court are Defendants-Appellants Suzan Shown Harjo, Raymond D. Apodaca, Vine Deloria, Jr., Norbert S. Hill, Jr., Mateo Romero, William A. Means, and Manley A. Begay, Jr. and Plaintiff-Appellee Pro-Football, Inc. Amici InterFaith Conference of Metropolitan Washington, National Congress of American Indians, National Indian Education Association, National Indian Youth Council and Tulsa Indian Coalition Against Racism were granted leave to participate by this Court's Order on April 7, 2004.

(b) Rulings under Review: The rulings under review are contained within the District Court's Memorandum Opinion and Order issued on June 25, 2008, per the Hon. Colleen Kollar-Kotelly, granting Plaintiff Pro-Football's Motion for Summary Judgment and denying Defendants' Cross-Motion for Summary Judgment on the issue of the applicability of laches to Defendant Mateo Romero's claims. 567 F. Supp. 2d 46 (D.D.C. 2008).

(c) **Related Cases**: Prior to review by the District Court, this case was before the Trademark Trial and Appeals Board (“TTAB”) as Cancellation No. 21,069, *Harjo v. Pro-Football, Inc.* 50 U.S.P.Q.2d 1705 (TTAB 1999). Following the Cancellation proceeding the District Court reviewed and reversed the TTAB’s decision. *Pro-Football, Inc. v. Harjo*, 284 F. Supp. 2d 96 (D.D.C. 2003) (“*Harjo I*”). This Court previously reviewed plaintiff’s laches argument with respect to all defendants other than Romero and remanded the matter to the District Court for individual consideration of Romero’s claims in light of its opinion. *Pro-Football, Inc. v. Harjo*, 415 F.3d 44 (D.C. Cir. 2005) (“*Harjo II*”).

A Petition for Cancellation, *Blackhorse, et al. v. Pro-Football, Inc.*, No. 92/046,185 (TTAB Aug. 11, 2006), has been filed before the TTAB challenging the federal registration of the trademarks at issue in this matter.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Circuit Rules of the United States Court of Appeals for the District of Columbia Circuit, appellants Suzan Shown Harjo, Raymond D. Apodaca, Vine Deloria, Jr., Norbert S. Hill, Jr., Mateo Romero, William A. Means, and Manley A. Begay, Jr. (the “Native Americans”), submit the following disclosure statement: the Native Americans are individuals and are not a corporation engaged in business. The Native Americans have no parent corporation and none of them own 10% or more of the stock of a publicly-held corporation.

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STATEMENT OF JURISDICTION

Suzan Shown Harjo, Raymond D. Apodaca, Vine Deloria, Jr., Norbert S. Hill, Jr., Mateo Romero, William A. Means, and Manley A. Begay, Jr. (the “Native Americans”) initiated this proceeding before the Trademark Trial and Appeal Board (“TTAB”) pursuant to 15 U.S.C. § 1052(a) by filing a petition to cancel six federal trademark registrations containing the word “Redskins” (the “Redskins marks”) owned by Pro-Football, Inc. (“Pro-Football”). 15 U.S.C. § 1052 (2004). By Order dated April 2, 1999, the TTAB ordered the cancellation of the Redskins marks.

Thereafter, pursuant to 15 U.S.C. §§ 1071(b)(1) and (4), Pro-Football sought reversal of the TTAB’s decision in the United States District Court for the District of Columbia. 15 U.S.C. § 1071 (2004). On September 30, 2003, the District Court reversed the TTAB’s decision. The Native Americans timely filed a Notice of Appeal on October 29, 2003.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. 28 U.S.C. § 1291 (2004). This Court previously stated that it was “retaining jurisdiction over the case” while remanding it to the District Court for individual consideration of laches as applied to appellant Romero. *Pro-Football v. Harjo*, 415 F.3d 44, 50 (D.C. Cir. 2005) (“*Harjo II*”).

STATEMENT OF ISSUES PRESENTED

1. Whether the District Court erred in finding that Pro-Football suffered sufficient trial prejudice and economic prejudice between 1984, when Romero reached the age of majority, and 1992, such that all of Romero's claims are barred by laches.

2. Whether the District Court erred by failing to analyze separately whether laches applied to Romero's claim for cancellation of the Redskinettes mark, which was registered in 1990, just two years before Romero brought his claim, and by finding that his claim to cancel the Redskinettes was barred by laches.

STATEMENT OF FACTS

The facts surrounding this proceeding up to the date of *Harjo II* have been fully presented to this Court previously, and are summarized in the Court's opinion in *Harjo II*. *Harjo II*, 415 F.3d at 44.¹

After this Court's decision in *Harjo II*, the District Court conducted proceedings regarding the applicability of laches to Romero's claims. *Pro-Football v. Harjo*, 567 F. Supp. 2d 46 (D.D.C. 2008) ("*Harjo III*"). Romero sought discovery regarding whether Pro-Football would have changed the team's

¹ Appellant hereby incorporates the Statement of Facts from Appellants' initial brief in this appeal.

name had the petition for cancellation of the trademarks been filed in 1984 when Romero reached the age of majority, Mot. Disc. to Conduct Ltd. Disc. Related to Laches & Memo In Supp. Compel Disc., *Pro-Football, Inc. v. Harjo*, No. 99-1385 (D.D.C. Mar. 10, 2006); A 1069-78, the District Court denied the Native Americans' motion seeking discovery, Order Den. Defs.' Mot. to Conduct Ltd. Disc., *Pro-Football, Inc. v. Harjo*, No. 99-1385 (D.D.C. July 26, 2006); A 1079.

The parties then filed cross summary judgment motions on the issue of whether Romero's claims are barred by laches. A 754-57. In support of its Motion for Summary Judgment, Pro-Football argued Romero's delay in bringing his claims resulted in loss of evidence, specifically 1) certain of Pro-Football's financial records from 1988, 1991, and 1992 that were not located; and 2) the testimony of Edward Bennett Williams, the former President of the Washington Redskins from 1965 to 1980, who died in 1988. A 1093-95. Pro-Football also argued that the passage of time made it more difficult, though not impossible, to conduct a survey of attitudes at the time that many of the marks were registered.

With respect to economic prejudice, Pro-Football presented evidence concerning its investment in promoting the Redskins marks between 1984 and 1992. But, no evidence was submitted that the team's name would have been changed, or that the Redskins marks would have been discarded, had Romero brought his claims earlier.

The District Court granted Pro-Football's Motion for Summary Judgment and denied the Native Americans' Motion for Summary Judgment. Order Mot. Summ. J., *Pro-Football, Inc. v. Harjo*, No. 99-1385 (D.D.C. July 10, 2008); A 1079-81.

The Court should be aware of the fact that on August 11, 2006, six Native Americans filed a joint petition with the Trademark Trial and Appeal Board ("TTAB") of the U.S. Patent and Trademark Office for cancellation of Pro-Football, Inc. of the same trademarks that are in issue in this case. Petition for Cancellation, *Blackhorse, et al. v. Pro-Football, Inc.*, No. 92/046,185 (TTAB Aug. 11, 2006); A 1047-52. The Native Americans who filed the petition are: Amanda Blackhorse, Marcus Briggs, Phillip Gover, Shquanebin Lone-Bentley, Jillian Pappan, and Courtney Tsoitigh. A 1049-50. Some of the Petitioners bringing the Petition to Cancel had just recently reached the age of majority, at the time the petition was filed. Mem. Supp. Defs' Mot. Summ. J. & Opp'n Pl.'s Mot. Summ. J. at 24, *Pro-Football, Inc. v. Harjo*, No. 99-1385 (D.D.C. Dec. 18, 2006); *see also* Pet. for Cancellation, *Blackhorse, et al. v. Pro-Football, Inc.*, No. 92/046,185 (TTAB Aug. 11, 2006); A 1051. The U.S. Patent and Trademark Office has ruled that action on the petition will be suspended pending the results of this case.

SUMMARY OF ARGUMENT

The District Court's laches analysis with respect to Romero is erroneous in two main respects. First, the District Court erred in finding that Romero's delay resulted in prejudice to Pro-Football, whether trial prejudice or economic prejudice. Second, the District Court erred in its analysis of laches for the Redskinettes mark, applied the wrong legal standards, and incorrectly placed the burden of proof on Romero.

With respect to trial prejudice, Pro-Football made no showing that Romero's delay caused the loss of documentary evidence or material testimony from witnesses. First, the few absent documents, financial records from the years 1988, 1991, and 1992, are not missing due to Romero's delay but to Pro-Football's own lack of diligence, and in any event would be merely cumulative evidence of Pro-Football's investment in the marks, an issue immaterial to the merits of the case. Second, the District Court's conclusion that Edward Bennett Williams' 1998 death was prejudicial to Pro Football is unsupportable because the record is devoid of any evidence as to whether, had the claims been brought in 1984, Williams could have testified completely about the views of Native Americans at the time the marks were registered. Third, the District Court's determination that more reliable attitude survey would have existed, but for Romero's delay, is speculative. In any

event, there is no evidence that a survey conducted between 1984 and 1992 would have been more helpful to Pro-Football's cause.

As regards to economic prejudice, the District Court erroneously found that Pro-Football's investment in the marks was sufficient to establish prejudice without causally linking that investment to Romero's delay. In particular, the District Court failed to require that Pro-Football come forward with some evidence that it would have stopped using the marks (*i.e.*, changed the team's name) if Romero had filed earlier.

The District Court also erred by failing to distinguish between Romero's claim to cancel the Redskinettes mark, and his claims related to the other Redskins marks, which could have been brought in 1984. The District Court should have performed a separate laches analysis for the Redskinettes mark that focused only on the 1990-1992 time period. Under that analysis, the District Court should have concluded as a matter of law that the two year period between registration of the mark and initiation of the cancellation proceeding did not constitute an undue delay and Pro-Football did not incur any trial or economic prejudice between 1990 and 1992.

STANDARD OF REVIEW

In determining whether a party moving for summary judgment has made a showing that there are no triable issues of fact, a court must view all inferences to

be drawn from the underlying facts “in the light most favorable to the party opposing the motion.” *Liberty Lobby, Inc. v. Rees*, 852 F.2d 595, 598 (D.C. Cir. 1988). Review of a grant or denial of summary judgment is generally *de novo*. See, e.g. *id*; *Adams v. Rice*, 531 F.3d 936, 942 (D.C. Cir. 2008); *Nat’l Mining Ass’n v. Fowler*, 324 F.3d 752, 756 (D.C. Cir. 2003); *CarrAmerica Realty Corp. v. Kaidanow*, 321 F.3d 165, 185 (D.C. Cir. 2003). On the issue of laches, this Court reviews District Court’s conclusions of law *de novo*. *CarrAmerica*, 321 F.3d at 185, 187; *Daingerfield Island Protective Soc’y v. Lujan*, 920 F.2d 32, 38 (D.C. Cir. 1990) (“A district court’s ruling on laches does not qualify for deference if the court applied the wrong legal standard.”) (citations omitted).

ARGUMENT

I. THE DISTRICT COURT ERRED IN CONCLUDING THAT PRO-FOOTBALL PROVED IT SUFFERED TRIAL AND ECONOMIC PREJUDICE AS A RESULT OF ROMERO’S DELAY IN BRINGING HIS CLAIMS.

A. THE DISTRICT COURT ERRED IN FINDING TRIAL PREJUDICE.

With respect to whether Pro-Football established trial prejudice, the Court instructed the District Court to “consider the extent to which Romero’s post-majority delay resulted in a ‘loss of evidence or witnesses supporting [Pro-Football’s] position,’” *Pro-Football v. Harjo*, 415 F.3d 44, 49 (D.C. Cir. 2005) (“*Harjo II*”) (citing *Gull Airborne Instruments, Inc. v. Weinberger*, 694 F. 2d 838,

844 (D.C. Cir. 1982)). However, no trial prejudice was proven because nothing in the record below establishes that, but for Romero's delay, Pro-Football would have had better evidence in support of its position on the merits.

1. Romero's Delay Did Not Result In A Prejudicial Loss Of Documentary Evidence.

The District Court plainly erred in finding that the loss of certain Pro-Football financial records from 1988, 1991 and 1992 were attributable by Romero's delay. *Pro-Football v. Harjo*, 567 F. Supp. 2d 46, 58 ("*Harjo III*"). As an initial matter, none of those documents even existed when Romero reached his age of majority in 1984, so they would not have been available to Pro-Football had Romero filed at that time. Second, there was no evidence presented below as to when or how these documents were lost, such that the District Court could determine that the disappearance would have been prevented if the petition had been filed earlier. Third, Pro-Football, Inc. is a Maryland corporation, and Maryland corporations are expected to retain business records for three years. *See* MD. CODE ANN., Business Regulation – Uniform Preservation of Private Business Records Act, § 1-304 (LexisNexis 2008); Pro-Football's failure to do so cannot appropriately be blamed on Romero.² *cf. Rozen v. District of Columbia*, 702 F.2d

² The District Court's statement that "the Redskins have stated under oath that the financial records in question in this case are missing, and there is no evidence that they were destroyed after the cancellation petition was filed" *Harjo III*, 567 F. Supp. 2d at 58 n.7, improperly relieves Pro-Football of its burden to prove

1202, 1204 (D.C. Cir. 1983) (a plaintiff cannot use its own lack of diligence as an offensive weapon in a laches argument).

Moreover, the missing financial records, as well as missing team sponsorship lists from earlier years, are not relevant to the determination of trial prejudice because they do not relate to the merits of the underlying case: whether or not the marks disparage Native Americans.³ *Serdarevic v. Advanced Med. Optics, Inc.*, 532 F.3d 1352 (Fed. Cir. 2008). Trial prejudice “may arise by reason of a defendant’s inability to present a full and fair defense *on the merits* due to the loss of records, the death of a witness, or the unreliability of memories of long past events, thereby undermining the court’s ability to judge the facts.” *Id.* at 1360 (emphasis added) (citing *A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1033 (Fed. Cir. 1992)).

Despite recognizing that the missing financial documents did not pertain to the merits of Romero’s claim, the District Court nonetheless found that Pro-Football “may establish trial prejudice by demonstrating the loss of evidence

prejudice. Some of the documents were actually *created* after the cancellation petition was filed, so those were obviously destroyed thereafter. With regard to those created before the petition was filed, Pro-Football had custody and control and a legal obligation to maintain them.

³ At best, the missing records might be probative of the economic prejudice prong of the laches analysis. However, because Romero did not dispute that investment in those years took place and is willing to concede that missing financial information is likely to be consistent with that of surrounding years for which data is available, the loss of this “evidence” is not prejudicial.

relevant to its laches defense.” *Harjo III*, 567 F. Supp. 2d at 58 (D.D.C. 2008).

However, the District Court failed to cite to any legal authority – and Appellants are unaware of any – for this novel proposition. The Federal Circuit’s statement in *Serdarevic* is persuasive. Pro-Football cannot support a claim for *trial* prejudice based on the absence of documents that would not have been presented at *trial*.

2. Romero’s Delay Did Not Result In A Prejudicial Loss Of Witness Testimony.

The District Court also concluded that “[w]hile . . . the loss of [Edward Bennett] Williams’ testimony, alone, would [not] establish prejudice to Pro-Football as a result of Defendant Romero’s delay, it is certainly a source of relevant evidence that has become unavailable due to the passage of time.” *Harjo III*, 567 F. Supp. 2d at 57. The Court found that because Williams “may very well have had other interactions with Native Americans [in addition to the 1972 meeting] that would have provided contemporaneous evidence of their opinions of the Redskins name,” and because he “would likely have been able to shed some light on whether the Redskins might have changed their name during the Romero Delay Period if the cancellation petition had been brought earlier,” his absence was prejudicial. *Id.*; *see also id.* at 59 n.8. These conclusions are not warranted by the record.

First, although Williams died during the delay period, he ceased being President of the Redskins in 1980. *Id.* at 56. The Romero delay period began in

1984. There is no indication in the record that Williams was authorized or competent to offer an opinion on the likelihood of a team name change at any point after his tenure as President, let alone during a time period beginning four years later.⁴

Second, the District Court offered no analysis as to how Williams' hypothetical testimony could be relevant to the resolution of the issue of disparagement. Consistent with the District Court's analysis of the disparagement issue, Williams' opinion on that issue would be entirely irrelevant. *See Pro-Football v. Harjo*, 284 F. Supp. 2d 96, 124 (D.D.C. 2003) ("*Harjo I*") ("[O]nly the perceptions of those referred to, identified or implicated in some recognizable manner by the involved mark are relevant" to a determination of the disparagement issue.). It is simply too speculative to confer on Williams an ability to opine on the perceptions of Native Americans at the time the marks were registered.

Finally, just as Romero may be charged with the knowledge of the potential for a cause of action to cancel the Redskins marks' registrations based on disparagement, *see Harjo III*, 567 F. Supp. 2d at 55, so should Pro-Football be charged with knowledge of the 1972 letter and notice of a potential claim by Native Americans. *Id.* at 57. Pro-Football could have preserved and memorialized

⁴ Williams died two years before the registration of the Redskinettes mark in 1990. Therefore, his testimony would be entirely irrelevant with respect to that mark.

any relevant evidence or knowledge held by Williams by having him execute an affidavit, or perpetuating his testimony. *See* Fed. R. Civ. P. 27; *De Wagenknecht v. Stinnes*, 250 F.2d 414, 416-17 (D.C. Cir. 1957) (“The use of Rule 27 to perpetuate testimony is an ancillary or auxiliary proceeding to prevent a failure or delay of justice, by preserving and registering testimony which would otherwise be lost before the matter to which it relates could be made ripe for judicial determination.”).

3. Romero’s Delay Did Not Result In Loss Of Survey Evidence.

The District Court also improperly conflated a critique of the quality of evidence submitted by the Native Americans in the TTAB proceeding with its finding of trial prejudice, holding that:

If Defendant Romero had filed his cancellation petition when he reached majority in 1984, *he would have been able to collect evidence* of attitudes prevailing in the mid-1960s that was twelve years less removed, and likely more reliable, than the evidence he and his co-Defendants eventually captured with their 1996 survey

[W]hile the Court does not find that the impact upon the available survey evidence, alone, would establish prejudice to Pro-Football, Pro-Football is correct that *defending this lawsuit against evidence that, due to Defendant Romero’s delay may be significantly less accurate*, would represent a hardship to Pro-Football.

Harjo III, 567 F. Supp. 2d at 57-58 (emphases added). The District Court’s reasoning here is mistaken. Trial prejudice is based upon an allegation that the party defending an action could have obtained evidence supporting his position had

the plaintiff brought the case earlier. Here, the District Court found trial prejudice based on evidence that the party charged with the delay might have obtained. Apparently, the District Court assumes (without stating) that Romero would have performed an opinion survey at an earlier point in time had the petition been filed in 1984 , and that Pro-Football was somehow prejudiced by having to defend against a “less accurate” survey due to the delay, again based on an unstated assumption that an earlier survey would have somehow been supportive of Pro-Football’s position.

Pro-Football was on notice since at least 1972 that at least some Native Americans found its trademarks offensive. Pro-Football never attempted to conduct a survey, even after the action was brought in 1992. The record contains no evidence that an earlier petition would have caused Pro-Football to conduct a survey. Furthermore, there is no evidence that Romero, had he commenced the case in 1984, would have had the resources or the inclination to conduct such an earlier survey. Nor is there any showing that such an earlier survey would have supported Pro-Football’s position. In any event, the District Court did not explain how Romero’s delay “resulted in a ‘loss of [survey] evidence,’” *Harjo II*, 415 F.3d at 50, or why such a “loss” prejudiced Pro-Football. Indeed, any difficulty in obtaining survey evidence did not prejudice Pro-Football’s interests. The Native Americans arranged for a survey in 1996; it was given limited weight by the

TTAB. *Harjo I*, 284 F. Supp. 2d at 109-12 (internal citation omitted). The delay made it more difficult for the Native Americans to carry their burden of proof on the disparagement issue.

The record contains insufficient evidence of the “particular prejudice” caused to Pro-Football by the missing documents, death of Williams, and the absence of an earlier survey. *See Meyers v. Asics Corp.*, 974 F.2d 1304, 1308 (Fed. Cir. 1992), *aff’d*, 78 F.3d 605 (Fed. Cir. 1999); *see also Beaty v. Selinger (In re Beaty)*, 306 F.3d 914, 928 (9th Cir. 2002) (citing, *inter alia*, *United States v. Admin. Enter., Inc.*, 46 F.3d 670, 673 (7th Cir. 1995); *Meyers*, 974 F.2d at 1328).

B. THE DISTRICT COURT ERRED IN FINDING ECONOMIC PREJUDICE BASED SOLELY UPON PRO-FOOTBALL’S INVESTMENT DURING THE PERIOD OF ROMERO’S DELAY.

This Court’s July 15, 2005 Order directed the District Court to “address both trial and economic prejudice.” *Harjo II*, 415 F.3d at 50. Regarding economic prejudice, the Order suggested the possible relevance, in this case, “what is at stake is not the trademark owner’s right to use the marks but rather the owner’s right to Lanham Act protections that turn on registration.” *Id.* Thus, the Order implied that the measure of economic prejudice may be different in this case than in a case in which the trademark owner’s “right to use the marks” is at stake. *Id.* The Order further encouraged the District Court to analyze “whether economic prejudice should be measured based on the owner’s investment in the marks during the

relevant years, on whether the owner would have taken a different course of action – e.g., abandoned the marks – had the petitioner acted more diligently in seeking cancellation, or on some other measure.” *Id.*

1. Pro-Football Would Not Have Changed The Team’s Name Even If A Petition For Cancellation Had Been Filed At An Earlier Point In Time.

Regardless of what measure of economic prejudice is used, virtually all relevant evidence on the matter is under the control of the trademark owner – here, Pro-Football. Bearing this in mind, Romero sought leave to take discovery focused on economic prejudice during the 1984 – 1992 period. Defs.’ Mot. To Conduct Ltd. Disc., *Pro-Football, Inc. v. Harjo*, No. 99-1385 (D.D.C. May 10, 2006). Although the District Court refused such leave, Order Den. Defs.’ Mot. to Conduct Ltd. Disc., *Pro-Football, Inc. v. Harjo*, No. 99-1385 (D.D.C. July 26, 2006), Romero reviewed documents produced during the original proceedings below. This documentary evidence strongly suggests that Pro-Football was adamantly opposed to any consideration of changing the name of the team. In this regard, Romero submitted a Rule 7.1(h), Statement of Undisputed Material Facts stating that there is “no evidence” that Pro-Football would have “changed the team’s name or abandoned the relevant trademarks” had the case been commenced earlier. Defs.’ Supplemental Local Rule 7.1(h) Statement of Undisputed Material Facts at ¶ 1, *Pro-Football, Inc. v. Harjo*, No. 99-1385 (D.D.C. Dec. 18, 2006)

(Public Version). Romero also filed a Declaration describing and attaching numerous documents demonstrating that Pro-Football's was adamant in not even considering a name change. A 789-1068. This filing obligated Pro-Football to come forward with evidence that it would have changed the team's name or abandoned the relevant trademarks had the case been commenced earlier, if such evidence existed. *See Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner*, 101 F.3d 145, 150-51 (D.C. Cir. 1996).

Pro-Football's silence in this matter is revealing. Pro-Football's failure to adduce any evidence that it would have changed the team's name or abandoned the relevant trademarks renders had the case been commenced earlier renders the absence of any such evidence an established fact. *See SEC v. Banner Fund Int'l*, 211 F.3d 602, 616 (D.C. Cir. 2000) (“[I]f the party opposing the motion fails to comply with this local rule, then ‘the District Court . . . should . . . deem as admitted the moving party’s facts that are uncontroverted by the nonmoving party’s Rule [7.1(h)] statement.’”) (citing *Jackson*, 101 F.3d at 154 (D.C.Cir.1996)). Under such circumstances summary judgment in favor of Pro-Football and the denial of the Native Americans’ motion for summary judgment are clearly erroneous.

The only thing that Pro-Football has established is that it spent a large amount of money advertising and promoting the marks during the delay period;

however, this does not establish that it suffered economic prejudice due to the delay because there has been no showing, indeed there is not one shred of evidence, that those expenditures would *not* have been made had the petition been filed earlier. In the absence of evidence that Pro-Football would have acted differently had the petition been filed earlier, no finding of economic prejudice is appropriate.

2. The District Court Erred By Not Requiring That A Causal Link Be Established Between Romero's Delay And Any Purported Economic Prejudice.

The suggestion by this Court that, in a case like this one, where the owner's right to use the mark is *not* at stake, an analysis of whether the owner would have taken a different course of action in response to an earlier petition may be relevant, is a sound one. If the owner of a trademark is steadfast in his determination to keep using the trademark even after the cancellation of his federal registration in a disparagement proceeding, it is hard to see how he can suffer any economic prejudice due to a delay in commencing that proceeding. As a matter of fact, the trademark owner who is determined to use his trademark before, during, and even after the cancellation of the federal registration of his trademark, actually obtains an economic benefit from the delay – he is permitted to enjoy the benefits of federal registration for the delay period. The fact that such a trademark owner spent large sums promoting or advertising the trademark during the delay period

does not establish economic harm. The monies would have been spent regardless of the delay and the trademark would have been cancelled regardless of the delay; the only impact of the delay is to benefit the trademark owner by extending his period of federal registration. It is only if a trademark owner can show that he would have – or at least likely would have – changed his behavior in response to an earlier petition that he can be said to have suffered economic harm *due to the delay*.⁵

A significant body of case law supports this analysis. Thus, it has been held that economic prejudice arises when a defendant suffers the loss of monetary investments or incurs damages that likely *would have* been prevented by earlier suit. *A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1033 (Fed. Cir. 1992). In patent cases, it is clear that a nexus must be shown between the patentee's delay in filing suit and the expenditures; the alleged infringer must change his position “because of and as a result of the delay.” *Hemstreet v.*

⁵ Similarly, precedent in this Circuit suggests that reliance is an element of laches. *See NAACP v. NAACP Legal Def. & Educ. Fund, Inc.*, 753 F.2d 131, 137-139 & nn. 64, 75, 77 (D.C. Cir. 1985) (identifying a “reliance interest” as an “affirmative requirement[.]” of laches, and analyzing in some detail the reasonableness of the defendant’s reliance); *Gull Airborne Instruments, Inc v. Weinberger*, 694 F.2d 838, 843 (D.C. Cir 1982) (“There are, therefore, two factors to be considered in determining whether laches applies: lack of diligence by the plaintiff and injurious reliance thereon by the defendant.”) (internal citations omitted). The District Court erroneously declined to require a showing of reasonable reliance by Pro-Football, relying instead on Federal Circuit case law. *See Harjo III*, 567 F. Supp. 2d at 40-41.

Computer Entry Sys. Corp., 972 F.2d 1290, 1294 (Fed. Cir. 1992); *see also State Contracting & Eng'g Corp. v. Condotte Am., Inc.*, 346 F.3d 1057, 1066 (Fed. Cir. 2003) (“A nexus must be shown between the . . . delay . . . and the expenditures.”); *Gasser Chair Co. v. Infanti Chair Mfg. Corp.*, 60 F.3d 770, 775 (Fed. Cir. 1995) (“We reiterate that a change in the economic position of the infringer during the period of delay must be as a result of the delay; the infringer must prove that the change in economic position *would not* have occurred had the patentee sued earlier.”) (emphasis added); *Ecolab, Inc. v. Envirochem, Inc.*, 264 F.3d 1358, 1371 (Fed. Cir. 2001) (district court’s declination to apply laches was not an abuse of discretion where there was no evidence of “economic prejudice, *i.e.*, a change in the economic position of Envirochem during the period of delay that *would not* have occurred had Ecolab sued earlier”) (emphasis added); *accord Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 824 (7th Cir. 1999) (Prejudice “ensues when a defendant has changed his position in a way that *would not* have occurred if the plaintiff had not delayed.”) (quoting and citing *Conopco, Inc. v. Campbell Soup Co.*, 95 F.3d 187, 192 (2d Cir. 1996) (emphasis added)); *Conopco*, 95 F.3d at 187 (citing *Goodman v. McDonnell Douglas Corp.*, 606 F.2d 800, 808 n.17 (8th Cir. 1979) (quoting *Tobacco Workers Int’l Union Local 317 v. Lorillard Corp.*, 448 F.2d 949, 959 (4th Cir. 1971))); *AmBrit, Inc. v. Kraft, Inc.*, 812 F.2d 1531, 1546 n.82 (11th Cir. 1986) (“In assessing the prejudice issue, the district court properly

focused not on how much money Kraft spent, but on how much Kraft spent that it *would not have spent* had Isaly immediately informed Kraft of its objection.”) (emphasis added)).⁶

The District Court rejected this line of argument and held that “detriment” results from “investment in and development of the trademark” and that “the question is how much investment there has been in the commercial exploitation of the mark.” *Harjo III*, 567 F. Supp. 2d at 59-61. Apparently conceding some validity to Romero’s line of argument, the District Court did note that “Pro-Football could have diverted the millions of dollars it spent on promoting, advertising, and protecting its marks during the Romero Delay Period elsewhere, rather than continuing to invest money in marks that might be rendered uncertain by a successful cancellation petition,” and also referred to its earlier statement that “prejudice is equated with investment in the trademark that *theoretically could have been diverted elsewhere* had the suit been brought sooner.” *Id.* at 61 (emphasis supplied).

These statements suggest ambiguity in the District Court’s holding. It is unclear whether the District Court held that, *whenever* a trademark holder makes

⁶ The District Court suggested that Edward Bennett Williams, “could have illuminated” whether the Redskins would have changed the team’s name is unfounded. *Harjo III*, 567 F. Supp. 2d at 59, n.8. Williams was no longer President of the Redskins after 1980, well before the “Romero delay period” began in 1984. *Id.* at 57. As such, Williams could not offer any testimony as to whether the team’s name might have been changed during the “Romero delay period.”

an investment in a mark, it is *always* true that the investment *could theoretically* been directed in another direction had the petition been filed earlier; or, alternatively, that, *under the factual circumstances of this case*, Pro-Football could have “diverted” its trademark promotion expenditures elsewhere. If the District Court held the former, then it simply held that mere evidence of investment is sufficient to show economic harm; as noted above, that is inconsistent with both logic and precedent. *See, e.g., Gasser Chair*, 60 F.3d at 775 (“[T]he district court did not require proof of a nexus between the investment and the delay. Instead, it concluded that ‘in light of Infanti’s significant investments, there can be no genuine issue that Infanti was actually prejudiced by Gasser’s delay.’ This approach was improper.”) If the District Court held the latter, there is no explanation for why Pro-Football – having produced no evidence on the matter – is entitled to summary judgment.

The District Court’s “theoretically could have been” test creates an impossible burden for Romero. The evidence concerning what Pro-Football was considering, what Pro-Football might have done, and how Pro-Football reacted once the petition was filed, is all in Pro-Football’s possession. As noted above, the documents produced contain not a shred of evidence of consideration of a name change; it is difficult to imagine how or why Pro-Football would have changed its investment in the marks without changing the team’s name, but, again, the

evidence on the issue is entirely within Pro-Football's possession. Under these circumstances, it was error to grant summary judgment to Pro-Football. In light of the Native Americans' uncontested Rule 7.1(h) submission, summary judgment should have been granted to Romero.

II. ROMERO'S CHALLENGE TO THE REDSKINETTES TRADEMARK WAS TIMELY, AND THERE IS NO EVIDENCE THAT THE SHORT DELAY IN BRINGING THE CLAIM RESULTED IN PREJUDICE TO PRO-FOOTBALL.

A. THE DISTRICT COURT ERRED IN FAILING TO PERFORM A SEPARATE LACHES ANALYSIS WITH RESPECT TO ROMERO'S CLAIM TO CANCEL THE REDSKINETTES MARK.

The Redskinettes trademark was published for opposition on April 24, 1990, 29 months before Romero filed the Petition in the cancellation proceeding. *Harjo I*, 284 F. Supp. 2d at 107. Unlike the other marks at issue, the Redskinettes registration came after Romero reached majority. As such, for laches purposes, the Redskinettes mark must be analyzed separately, with relevant time period running from the date of registration in 1990 to the date of the cancellation proceeding in 1992. However, the District Court erred in failing to analyze the evidence limited to the 29 month Redskinettes delay period. Based on the undisputed facts, Pro-Football's laches claim with respect to the Redskinettes mark is unsupportable.

The District Court limited its analysis of the Redskinettes mark to a long footnote in which the District Court stressed that the Redskinettes mark was used before it was registered and that Mateo Romero had been "aware of the Redskins

cheerleaders since he was a child.” *Harjo III*, 567 F. Supp. 2d at 54 n.5. However, the District Court’s brief treatment of this issue does not withstand scrutiny. Because this case involves a challenge to the registration of a trademark on the ground that it is disparaging, there is no legal action⁷ that Romero could have taken prior to the actual registration of the trademark. Thus, the delay period cannot have commenced prior to the actual registration of the Redskinettes trademark. It is well established that use of a mark is irrelevant to the issue of whether a plaintiff delayed in bringing a cancellation proceeding. See *Lincoln Logs Ltd. v. Lincoln Pre-Cut Log Homes, Inc.*, 971 F.2d 732, 734 (Fed. Cir. 1992) (stating that equitable defenses “as applied in trademark opposition or cancellation proceedings . . . must be tied to a party’s registration of a mark, not to a party’s use of the mark”); *Nat’l Cable Television Assoc., Inc. v. Am. Cinema Editors, Inc.*, 937 F.2d 1572, 1581 (Fed. Cir. 1991) (holding that in assessing the issue of laches in a cancellation or opposition proceeding, the alleged delay is not to be measured from the date of knowledge of use but from “knowledge of the application for registration.”); *Tillamook Country Smoker, Inc. v. Tillamook County Creamery Ass’n*, 333 F. Supp. 2d 975, 981 (D. Or. 2004); cf. *Meyers v. Asics Corp.*, 974 F.2d 1304, 1307 (Fed. Cir. 1992) (laches period does not begin to run until a patent issues). Thus, it would be both illogical and contrary to the Lanham Act to assess

⁷ In a case involving confusion or misappropriation, the party challenging the trademark may have legal remedies before the trademark is actually registered.

the time that laches begins to run with respect to a petition to cancel the Redskinettes mark's registration on any basis other than the registration date, such as use of the Redskinettes mark or knowledge of its use: "Logically, laches begins to run from the time action could be taken against the acquisition by another of a set of rights to which objection is later made. In an opposition or cancellation proceeding the objection is to the rights which flow from registration of the mark." *Nat'l Cable Television*, 937 F.2d at 1581 (internal citations and quotations omitted).

Ultimately, the District Court concluded that laches applied because Romero "could have filed the cancellation petition immediately upon the registration of the Redskinettes mark in 1990, instead of waiting until 1992 to do so." *Harjo III*, 567 F. Supp. 2d at 54 n.5. The Court based this conclusion on the Washington Redskins cheerleaders use of the term "Redskinettes" since 1962 and Romero's knowledge of the name since 1984. *Id.* This line of reasoning is insufficient to support the legal conclusion that his claim should be barred by laches. The District Court failed to provide any legal authority for the proposition that knowledge of the use prior to registration is relevant to the determination of an appropriate delay period once registration has occurred. The District Court's decision fails to explain why a 29 month delay is too long and contains no conclusion concerning any prejudice suffered by Pro-Football during the Redskinettes delay period.

Instead of providing an analysis of the 29 month delay and any purported prejudice resulting from it, the District Court improperly shifted the burden of proof on the laches issue to Romero. The Court found that the Native Americans “offer no reason for concluding that Defendant Romero acted reasonably in waiting two years after that registration to bring the cancellation petition.” *Id.* But the burden of proving laches is on Pro-Football, not Romero, and Pro-Football failed to present sufficient evidence to carry its burden.

B. ROMERO’S CHALLENGE TO THE REDSKINETTES’ TRADEMARK WAS TIMELY.

Romero’s delay of approximately 29 months before filing is not unduly long. Federal law generally provides that “a civil action . . . may not be commenced later than four years after the cause of action accrues.” 28 U.S.C. § 1658 (2008). In addition, § 1658(a) provides for deference to states’ specific statutes of limitation, and courts have typically applied the states’ injury-to-personal-property statutes of limitations when confronted with a Lanham Act claim. *See Tandy Corp. v. Malone & Hyde, Inc.*, 769 F.2d 362, 365-66 (6th Cir. 1985) (trademark owner’s 32-month delay in bringing infringement action was not unreasonable as to overcome the presumption afforded by analogous three-year statute of limitations and to warrant finding that action was barred by laches, where there was no evidence of bad faith or any effort to mislead defendants and no evidence of behavior amounting to acquiescence.); *see also Bliss Clearing*

Niagara, Inc. v. Midwest Brake Bond Co., 339 F. Supp. 2d 944, 961 (W.D. Mich. 2004) (“The applicable period in this case is Michigan’s three-year limitation period for injury to personal property”). Here, the analogous statute of limitations is three years. *See* D.C. CODE ANN. § 12-301(3), (8) (LexisNexis 2008) (“injury to . . . personal property” or “for which a limitation is not otherwise specially prescribed.”). Romero’s 29 month delay is well within the limits of this analogous statutory period and is not unreasonable.

C. THERE IS NO EVIDENCE THAT ROMERO’S CHALLENGE TO THE REDSKINETTES MARK RESULTED IN PREJUDICE TO PRO-FOOTBALL.

The Redskinettes delay period is, as noted above, relatively short, and laches arguments have frequently been rejected in analogous circumstances. Neither Pro-Football nor the District Court has identified any evidence of economic or trial prejudice specifically focused on the short Redskinettes delay period. To be sure, Pro-Football has presented evidence of advertising and other expenditures during the longer 1984 – 1992 time period and some of those expenditures doubtlessly occurred during the 1990 – 1992 time period. But, given the short Redskinettes delay period, it is not plausible to contend that Pro-Football would have changed the team’s name or curtailed advertising in response to a 1990 petition to cancel the Redskinettes mark when it is clear that, in the last 16 years, Pro-Football has taken no such action in response to the 1992 petition to cancel all six trademarks.

In the absence of an at least plausible argument that Pro-Football would have changed the team's name or otherwise changed its behavior in response to an earlier petition, it is clear that Pro-Football cannot have been economically prejudiced by the delay. Where Pro-Football made no showing of economic or trial prejudice specific to the 29 month Redskinettes delay period, it should have been denied summary judgment as to that claim.

While Romero (and the other original petitioners) desire the cancellation of all the trademarks at issue in this case, a ruling limited to the Redskinettes mark alone would constitute a significant step in the direction of the resolution of a dispute which has already been pending for some 16 years. If this Court were to conclude that the relatively short Redskinettes delay period does not support a laches claim and were to then resolve the case on the merits, it could provide valuable guidance to the TTAB in the *Blackhorse* case⁸ and might well expedite the Board's decision-making process. In considering the merits of the Redskinettes mark, this Court would necessarily have to examine the TTAB's analysis of the disparagement associated with the term "redskin," which could be useful to the parties in the ultimate resolution of the *Blackhorse* case. While this consideration alone might not trump an otherwise meritorious laches claim, in the

⁸ In the *Blackhorse* case, it is unlikely that a laches defense will succeed; some of the petitioners had only reached the age of majority shortly before the petition was filed.

context of the Redskinettes delay period, the underlying laches claim is weak or non-existent.

CONCLUSION

For the foregoing reasons, this Court should reverse the District Court's grant of summary judgment to Pro-Football and the District Court's denial of summary judgment to the Native Americans.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the word limit imposed by this Court Order of October 3, 2008, and contains 6,770 words.

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CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2008, I caused a true and correct copy of Suzan S. Harjo's Brief for Appellant to be served by hand delivery and overnight mail on the following persons:

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