

THIS OPINION IS  
NOT A PRECEDENT OF  
THE TTAB

Mailed: March 27, 2007

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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Keebler Company  
v.  
Partners, A Tasteful Choice Company

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Opposition No. 91152728  
Opposition No. 91154926

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John Bostjancich and Patricia S. Smart of Smart & Bostjancich for  
Keebler Company.

Michael G. Atkins and Robert C. Cumbow of Graham & Dunn PC for  
Partners, A Tasteful Choice Company.

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Before Holtzman, Drost and Cataldo, Administrative Trademark  
Judges.

Opinion by Holtzman, Administrative Trademark Judge:

Applicant, Partners, A Tasteful Choice Company, has filed  
applications to register the mark ALL-AMERICAN CRACKERS  
("CRACKERS" disclaimed) for "crackers" in Class 30;<sup>1</sup> and the mark  
ALL-AMERICAN COOKIES ("COOKIES" disclaimed) for "cookies" in  
Class 30.<sup>2</sup> Both applications were filed on September 28, 2001  
based on an allegation of a bona fide intention to use the mark

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<sup>1</sup> Serial No. 76318169.

<sup>2</sup> Serial No. 76317807.

in commerce.

Opposer filed a notice of opposition against each application,<sup>3</sup> alleging that for many years opposer has been engaged in the advertising, promotion and sale of a wide variety of cookies and crackers; that the terms ALL-AMERICAN CRACKERS for crackers and ALL-AMERICAN COOKIES for cookies "is laudatory or descriptive" as applied to the respective goods; that registration of the mark would be inconsistent with opposer's right to freely describe its products as ALL-AMERICAN; and that the mark "is without acquired distinctiveness and incapable of distinguishing applicant's [cookies and crackers] from those of others."

Applicant filed an answer to each opposition denying the essential allegations therein.

The record includes the pleadings; the file of the involved applications; notices of reliance filed by opposer; and testimony by both parties, some of which was submitted in the form of declarations by stipulation of the parties. Opposer submitted the testimony, with exhibits, of applicant's president Marian Harris; applicant's vice president Greg Maestretti; and applicant's vice president, Cara Figgins, all pursuant to

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<sup>3</sup> Opposition No. 91152728 was filed on August 26, 2002 against Serial No. 76318169; Opposition No. 91154926 was filed on August 19, 2002 against Serial No. 76317807. The oppositions were consolidated by the Board on May 11, 2004. We note that on October 30, 2002, applicant filed an amendment to allege use in connection with Serial No. 76317807. On May 11, 2004, the Board notified the parties that the

subpoena. Opposer submitted the testimony declarations, with exhibits, of Carolyn Burns, market research director at opposer's subsidiary Kellogg Snacks Division, Kellogg North America Company; Jo Osborn, corporate counsel at Kellogg Snacks Division, Kellogg North America Company; and Mary Winch and Michelle Nowicki, two individuals who conducted Internet and other research for opposer. Applicant submitted the testimony declarations, with exhibits, of Cara Figgins; and Shin Hoshikawa, paralegal at Graham & Dunn PC.<sup>4</sup>

Both parties filed briefs. An oral hearing was requested by opposer, but the request was subsequently withdrawn.

As a preliminary matter, we want to be clear that the sole issue in this case is whether the marks are merely descriptive of the goods. Opposer has attempted to raise the issue of geographic descriptiveness for the first time in its reply brief. However, that issue was neither pleaded by opposer nor tried with applicant's consent. Opposer pleaded that applicant's marks are "laudatory or descriptive," albeit without citing a statutory basis for that claim, opposer identified the issue in its brief

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untimely paper would be forwarded to the ITU division of the Office to be returned to the applicant.

<sup>4</sup> The exhibits accompanying the declaration of Shin Hoshikawa consist of copies of third-party registrations. Opposer has objected to this evidence and requested that it be excluded on the grounds of lack of foundation and irrelevance. The request is denied. Opposer has not explained how the evidence lacks foundation, and in any event we find that the evidence was timely and properly introduced. Opposer's objection on the ground of relevance goes to the weight of the evidence rather than its admissibility, and we will therefore consider the evidence for whatever probative value it may have.

as whether the marks are "laudatory and merely descriptive," and applicant specifically noted in its brief that the issue of geographic descriptiveness had not been raised by opposer. Opposer submits that its pleadings are worded broadly enough to encompass any type of descriptiveness claim, including geographic descriptiveness. We disagree. The federal rules require a notice pleading, and as liberal as that standard may be, opposer's pleadings, taken as a whole, cannot be fairly read to provide adequate notice of a geographic claim. If opposer intended to assert a claim of geographic descriptiveness in addition to its claim of mere descriptiveness, opposer should have clearly and specifically pleaded that claim. Opposer's arguments on the issue of geographic descriptiveness are untimely and will be given no consideration.<sup>5</sup> We turn then to the merits.

Opposer has for many years been engaged in the manufacture of cookies and crackers. Opposer's cookies and crackers are sold under brands, including KEEBLER, SUNSHINE, CARR'S and FAMOUS AMOS. In 1996 opposer introduced a line of "All-American Cookies" which were sold under its SUNSHINE brand until 1999. From 1996 to 1999 opposer sold over 1,600,000 cases (with 6 or 12 packages of cookies to a case) and over \$22,000,000 wholesale worth of "All-American" cookies under the SUNSHINE brand. According to Ms. Burns, opposer has used the term "All-American"

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<sup>5</sup> On the other hand, to the extent that applicant is arguing that opposer is limited to a claim that the mark is "laudatory" and is not

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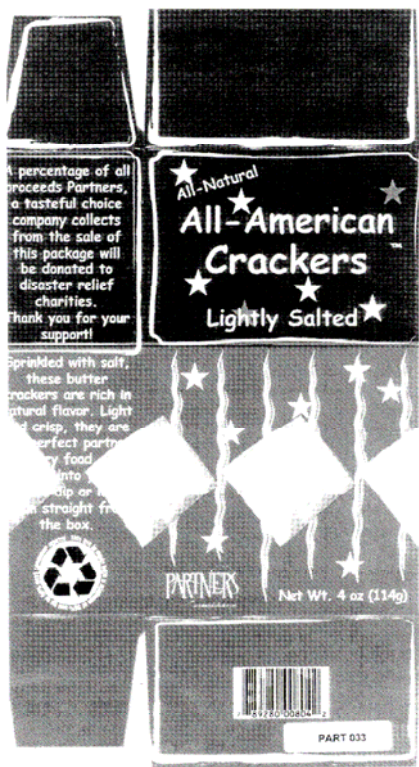
to tout opposer's line of cookies. Opposer's website, Keebler.com, contains a recipe for "All-American Sundae"; and the website of opposer's parent, Kellogg Company (kellogg.com), displays recipes for "All American Apples 'N Cream Pie" and "All-American Party Pudding."

Applicant, a family-owned company founded in 1992,<sup>6</sup> is in the business of making and selling baked goods, including cookies, crackers and granola. Applicant began using the term ALL-AMERICAN in connection with cookies, and in particular its ALL-AMERICAN SUGAR COOKIE CLASSIC VANILLA" and ALL-AMERICAN CRACKERS LIGHTLY SALTED" crackers on December 1, 2001 and has continued use since that date. An example of applicant's product packaging is shown below.

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entitled to argue that it is not otherwise descriptive, applicant is incorrect.

<sup>6</sup> The company is owned by Ms. Harris; and Ms. Figgins and Mr. Maestretti are her daughter and son.



Applicant sells its products through national grocery store chains, as well as through distributors and gift basket companies. Applicant's annual sales of its "Classic Vanilla" cookies totaled \$540.96 on 455 units in 2001; \$33,530.85 on 18,776 units in 2002; and \$3,625.12 on 1,905 units in 2003. Applicant's annual sales of its "Lightly Salted" crackers totaled \$580.00 on 576 units in 2001; \$30,402.00 on 21,302 units in 2002; and \$20,980.49 on 13,802 units in 2004.

Opposer has clearly demonstrated its standing by showing that it is a competitor of applicant and that it has used or has

an interest in using the term "all-American" in connection with its business.

Opposer argues that ALL AMERICAN is "laudatory and descriptive" in view of the dictionary definitions of "all-American" showing that the term "describes something that is the best or one of the best of America or is typically American"; applicant's acknowledgement that it is "possible" that ALL AMERICAN "could be taken to mean" "the best" or "traditional"; and widespread descriptive third-party use of term by opposer and others. Opposer argues that because of its descriptive and laudatory meanings, it has been commonly used to promote food products including food products such as cookies and crackers and that competitors' extensive use of the term and their need to use the term confirms its descriptive meaning.

Opposer also argues that the mark has not acquired distinctiveness, and that in view of extensive third-party use, the mark is so highly descriptive that it cannot acquire distinctiveness.

Applicant, on the other hand, contends that while all-American may be laudatory in the field of sports and denotes excellence in sports it would not immediately be perceived as equivalent to "best" for cookies and it is not used in a laudatory manner to denote this meaning in relation to baked goods; and that the term instead "vaguely suggests" a type of cookie in the same way that the Board found in Holiday Inns, Inc.

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v. *Monolith* 212 USPQ 949 (TTAB 1981) that THE AMERICAN CAFE

"vaguely suggests" a type of food and restaurant:

... what is American food? Is it native Indian? Is it Pennsylvania Dutch? Is it grits, corn bread and country ham; or baked beans, lobster and clam chowder; or rice, gumbo and crawfish? Is it a combination of these? We don't know and opposer has not enlightened us. ... [g]iven the wide variety of ethnic groups that have contributed to our national heritage, and whose dishes, decor, attitudes, customs and costumes have been blended and refined into what is considered typically American, it appears that use of that term in connection with a restaurant is nebulous, at best.

Applicant argues that ALL AMERICAN differs from marks found to be self-laudatory, such as THE BEST BEER IN AMERICA, PREFERRED, AMERICA'S BEST POPCORN! and AMERICA'S FAVORITE POPCORN!, because, in applicant's view, those marks praise the product whereas ALL AMERICAN contains no self-praising claim of superiority. Applicant contends that there is no evidence that the term would immediately convey any information about any quality or characteristic of applicant's cookies or crackers "with particularity."

Applicant also points to *Wilco Co. v. Automatic Radio*, 255 F. Supp. 625, 151 USPQ 24 (D. Mass. 1966); *R.W. Eldridge Co. v. Southern Handkerchief*, 23 F. Supp. 179, 37 USPQ 608 (W.D.S.C. 1938); and a Board case which cited those two cases, *In re Jim Crockett Promotions, Inc.*, 5 USPQ2d 1455 (TTAB 1987). Based on those cases, applicant argues that "Federal precedent has already determined that ALL-AMERICAN is not merely descriptive." (Brief,



p. 14.) Finally, applicant maintains that while competitors might need to use genuinely self-laudatory terms such as best, deluxe or premier, they do not need to call their products "all American"; and that the third-party registrations show, according to applicant, that "using ALL-AMERICAN as a trademark, as 122 other sellers do, does not unfairly deprive its competitors of a needed way to describe their products."

In response to applicant's contention regarding the lack of "particularity," opposer argues that a laudatory term can be descriptive even if it does not define a particular characteristic. Opposer cites *Nett Designs* 57 USPQ2d 1564 (Fed. Cir. 2001) and *In re Consolidated Cigar Co.*, 35 USPQ2d 1290 (TTAB 1995) which, according to opposer, rejected the "lack of particularity" argument in finding SUPER BUY a laudatory and merely descriptive term for tobacco products because it "described a quality of superior value to the goods, noting the Board's language (at 1293) that "Such expressions are a condensed form of describing in detail the outstanding character or quality of the objects to which they are applied."

In support of its position that the mark is laudatory and merely descriptive, opposer has submitted dictionary definitions of "all-American"; examples of its product packaging for cookies and crackers; examples of third-party packaging for food products by three companies, "Designer Cookies," "Parmalat" and "Kids Cooking Kits"; pages from retail websites selling cookies or

baskets of cookies and other food products; pages from restaurant websites with menu selections; excerpts of articles and commentary in connection with food products; a catalog of food products; printouts of recipes; and listings of cookbook titles and/or excerpts from the books. In addition, both parties have submitted third-party registrations. We have described the evidence in some detail below.

**Dictionary definitions of "all-American"**

Webster's New Encyclopedic Dictionary (2002):

*Adjective* (1888)

1 a *also* all-America: selected (as by a poll of journalists) as one of the best in the U.S. in a particular category at a particular time (an *all-American* quarterback) b: having only all-American participants (an *all-American* basketball team) j

2: composed wholly of American elements

3: representative or typical of the U.S. or its ideals (an *all-American* boy) (her *all-American* optimism)

...

*noun* (1920)

: one (as an athlete) that is voted all-American

Webster's New Explorer Dictionary and Thesaurus (1999):

*adj* 1: selected as the best in the U.S. 2: composed wholly of American elements 3: typical of the U.S. - all-American *n*.

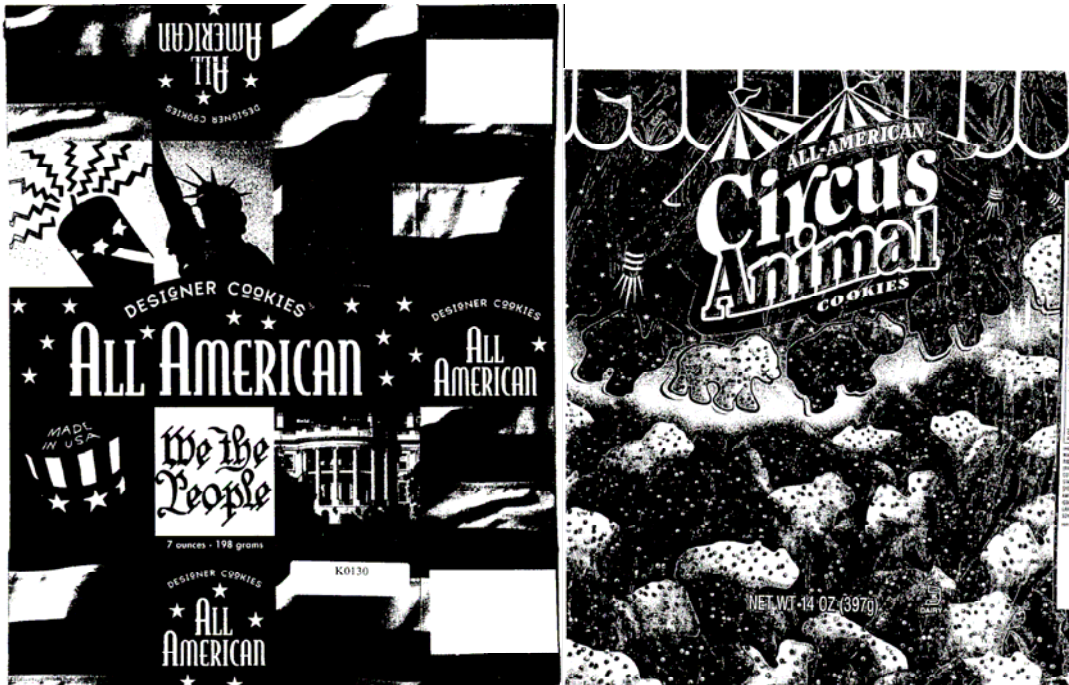
The Penguin Webster Handy College Dictionary (3<sup>rd</sup> ed. 1995):

*adj.* 1, the best or one of the best in the U.S. 2, composed wholly of Americans. 3, typically American. -.*n* an all-American person, esp. in sports.

Webster's New Collegiate Dictionary (1980):

*adj.* 1 :composed wholly of American elements 2: representative of the ideals of the U.S. (an ~ boy) 3 a: selected (as by a poll of journalists) as one of the best in the U.S. in a particular category at a particular time (an ~ quarterback) b: made up of all-American participants (an ~ basketball team) 4: of or relating to the American nations as a group  
*n*: one (as an athlete) that is voted all-American





"Kids Cooking Kits" uses the term ALL AMERICAN COOKIE KIT on the packaging for a kit comprising a cookie mix and cookie cutters.

**ALL AMERICAN in connection with  
the sale of cookies and/or cookie assortments**

●CHRIS'S COOKIES

...  
COOKIE ASSORTMENTS

...  
Chocolate Fantasy Assortment - Belgian Chocolate Chunk, & White Macadamia Cookies

...  
The All American Assortment- Oregon Red, Belgian Chocolate Chunk & Peanut Honey Butter Cookies

...  
The Gourmet Cookie Assortment- Toffeescotch Crunch, Sweet Arabian & Gusto Mocha Chunk

...  
*chriscookies.com*

From a "Press release" dated May 12, 2000, regarding the launch of the website: "Over the past decade I have improved classic American cookie recipes to create my own unique, simply exceptional cookies."

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●THE SWISS COLONY

...  
All-American Cookie Quartet  
All-American Cookie Quartet - Enjoy homestyle goodness, times four! Includes six each of our mouth-watering Oatmeal Raisin, Double Chocolate Chunk, Peanut Butter and Chocolate Chip-Macadamia Nut Cookies.  
*swisscolony.com*

●IMPROMPTU

Gourmet  
...  
Sweet Treats - Mini Peanut Butter Cookies

The All-American taste of pure, creamy peanut butter makes these 2 lbs. Mini Peanut Butter cookies absolutely addictive. ...  
*schwansselect.com*

●COOKIESINHEAVEN

Gourmet Cookies...Heaven Scent!  
Chocolate Chip Pecan  
The all-American cookie with the Southern drawl. ...  
*cookiesinheaven.com*

●MARYJANESFARM

Organic Chocolate Chip Cookies  
I've taken the melt-in-your-mouth flavor of the all-American classic and invented a chocolate chip cookie unlike any you've ever eaten. ...  
*maryjanesfarm.com*

●GEOFF & DREWS

RED SOX "Champion-Chip" Deluxe Cookies  
This gift of cookies is our newest creation dedicated to our home team. ... This is the NEW all American Cookie for you: favorite fan.  
*geoffanddrews.com*

●BEAUTIFULCOOKIES.COM They taste as good as they look.  
...The Fourth of July summer holiday deserves a tin of all-American gourmet chocolate and vanilla sugar cookies. ...  
*beautifulcookies.com*

●WELCOME TO LARSENS DANISH BAKERY

Chocolate Chip Cookies  
The all American cookie with lots of chocolate chips and walnuts.  
...  
*larsensbakery.com*

●BISSINGER'S

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COOKIES

Just like the ones Mom used to bake. Our fresh-baked cookies include all-American favorites. Snickerdoodle Cookies, Chocolate Chunk Cookies, Oatmeal Raisin Cookies...  
*corporategifts.bissingers.com*

●CUMBERLAND HOUSE PUBLISHING  
CAKE-MIX COOKIES

...  
Numerous all-American favorites are used as starting points: chocolate chip, oatmeal raisin, jam thumbprints, and dark chocolate brownies. There are also new takes on classic European cookies; for example, crunchy Italian biscotti, tender French madeleines, ...  
*cumberlandhouse.com*

●MAMA WISA BRAND PRODUCTS FROM PLEASANTVILLE COOKIE COMPANY

...  
6 Bags - All American Peanutbutter Cookies  
*mamawisa.com*

●CAROLINA COOKIE COMPANY

...  
All-American - 1 doz.  
An All American tin for an All American cookie. ...  
*carolinacookiestore.com*

**ALL-AMERICAN in connection with gift baskets**

●ADORABLE GIFT BASKETS

...  
All-American Cookie Basket  
Send this gorgeous All-American cookie basket packed with our All-American award winning classics! Homemade gourmet cookies are baked and shipped the same day in this patriotic basket to ensure freshness! Each basket is cello wrapped and tied with a patriotic ribbon...  
*adorablegiftbaskets.com*

●GIFTBASKETSX

\$42.00 All American Dad Gift Basket

[photograph of basket that includes a box of DESIGNER COOKIES ALL AMERICAN]

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Loving and festive gift basket to show Dad he is true Blue and your great dad. Includes All American gourmet designer shortbread cookies - only in America! ...  
*giftbasketsx.com*

●BIZRATE™ SHOPPING SEARCH

All American Gift Baskets [from various online stores]

All American Gourmet Food Gift Basket  
The rich history of America's best regional foods is brought to life as you read about and enjoy...

USA All the Way!!! Gift Basket  
Show that patriotic person how much you care in this All American Gift Basket. ...

All American Delights Gift Basket  
All across the country, small scale producers are creating wonderful, handcrafted gourmet food...

All American Favorite  
Send sweet greetings across the USA with this delightful tin filled with an all American...

...  
*bizrate.com*

●WINECOUNTRY GOURMET

All American Cookie Tray  
What a great addition to any celebration and it is two gifts in one. Our festive handled tray [dimensions] will be the highlight. It's stacked with an assortment of crowd-pleasing favorites including TWO DOZEN Cookies, SIX delicious chewy brownies...  
*winecountrygourmet.com*

●PUMPKIN PATCH CREATION

All American Snack Attack  
Our festive design [stars and stripes design] is sure to make a bang at your next birthday or celebration... An all American favorite bursting with salted peanuts, Cracker Jacks, candy bars, ...Raspberry Shortbread Cookies, homemade style cookies, ...  
*pumpkinpatchcreation.com*

●WELCOME TO FAMILY FARMS DIRECT.COM

All American Cookie Basket  
We've taken our Americana Basket and filled it to the brim with 18 assorted freshly baked cookies. This patriotic assortment

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includes:6 Double Chocolate Chip, 6 Chocolate Chip (no nuts),6 Oatmeal Raisin.

Each basket is tied with a Stars and Stripes ribbon.  
*store.yahoo.com/familyfarm*

●A116 Classic

This Father's Day send your "All American" dad an all American treat - cookies decorated with delicious icing in red, white, and blue [with stars and stripes motif]  
*cookiesbydesign.com*

●ITALIAN GIFTBASKETS

All American Snack Basket

...

This patriotic "All American" gift basket is a big hit! This USA themed gift basket is a great gift for any occasion... includes Uncle Sam teddy bear, Americana Fortune cookies with patriotic messages inside, gourmet pistachios ...  
*italiangiftbaskets.com*

●BONJOUR GIFTS CORPORATE COOKIES

all-american [sic] chocolate chip cookies

Celebrate America with our classic chocolate chip cookies. This one pound gift tin is chock-full of traditional all American treats. ... packed into an American flag keepsake tin.  
*bonjourbasket.com*

●SHOP & TOUR BACKROADS AMERICA

...

All American Gift Basket

This gift basket offers a great line-up of tons of food ready to eat... English Toffee dipped in chocolate. Cheese and crackers, nuts and cookies! ...

*search.store.yahoo.com/...backroadsamerica...*

●GIFT BASKET FEVER

...

All American

This gift box is filled with Simply Grand Zesty White Cheddar Popcorn, Simply Grand Crackers, Beef Summer Sausage... and Walker's Chocolate Chip Cookies

*giftbasketfever.com*

●FINDGIFT.COM

...

All American Gift Basket *Wolfies Nuts*

From MUNCHI GIFTS ... The "All American" Gift basket, packed full of our fresh roasted deluxe mixed nuts, Crunchy peanut nuggets...



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complete with an American flag to proudly show your support of America

...

USA All The Way, All American Gift Basket

From GIFT SENDER CENTRAL ... This patriotic "all American" gift basket is a big hit! This USA themed gift basket is a great gift for Dad... or any occasion where you want to show your sincere sentiments

...

All American Gift Basket

From DISCOVER NEW FOODS ... The rich history of America's best regional foods is brought to life as you read about and enjoy Sharp Cheddar spread, Spanish peanuts...& more from small-town America. ...

...

*findgift.com*

●WAL-MART

...

All American Basket

Celebrate the 4<sup>th</sup> of July with a festive basket of summer treats. Filled to the brim with succulent smoked pacific salmon, smoked beef summer sausage, stoned wheat crackers and more ...

*walmart.com*

●YOU GOT A CARE PACKAGE!

...

The All American Military Care Package

Send awesome military care packages to your All American soldier! ... They'll have to ration these amazing snacks out to the countless buddies...

*yougota.com*

●GOTHAM BASKETS IMPRESSIVE GIFTING

...

All American

Salute your favorite patriot with this all American metal basket brimming with Americana Fortune Cookies, patriotic jelly beans, Nuts About America snack mix, ... A star-studded basket!

*gothambaskets.com*

●GREAT ARRIVALS.COM GIFT BASKETS

...

American Freedom

This patriotic basket filled with all American snacks including cheese, crackers, chips and cookies is enough to make anyone sing the national anthem!

*greatarrivals.com*

**ALL-AMERICAN in a product catalog**

DEAN & DELUCA (Holiday 2004)

DEAN & DELUCA AMERICANA COOKIES USA

Our all-American cookies that no one ever outgrows: Chocolate Chip, Peanut Butter, Ginger and Oatmeal Raisin. Cookies with the allure of homemade. ...

**ALL-AMERICAN in articles/commentary**

●HOUSTON HOME THE JOURNAL

Cookies for grownups

08/20/03

...

Stacey Shy, the graphic artist behind the HHJ food page, is another cook who can win grownup hearts with her homemade cookies - especially that all-American treat that no commercial baker has come close to - the peanut butter cookie.

...

*mywebpal.com*

●THE SEATTLE TIMES

Cookie Comfort

...

It was while searching for the new "Betty Crocker's Cookie Book" that I happened upon "The All-American Cookie Book" by Nancy Baggett. ... What better time for an "All-American" theme than now? ...

*seattletimes.nwsourc.com*

●EDITORIAL REVIEWS

Amazon.com's Best of 2001

[The All-American Cookie Book]

... Every American cookie you can think of is here--more than 150 of them--from luscious Black Bottom Mini Brownie Cups and chewy Chocolate Thumbprint Crackles to Classic Chocolate Chip Cookies and crisp, spicy Old-Fashioned Gingerbread Cookies. ...

*amazon.com*

●THE CINCINNATI ENQUIRER

Sunday, December 02, 2001

[re The All-American Cookie Book]

...Ms. Baggett answered cookie questions from her home...

Question: Are all the cookies in your book "all-American?"

Answer: Yes, although a few recipes, such as the Pecan Rugelach, have been adapted by immigrants. ... Brownies are totally American. They were created around the turn of the 20<sup>th</sup> century.

...

*enquirer.com*

●[abc7chicago.com](http://abc7chicago.com)

Mr. Food Recipes

Cookie-Baking Tips

Cookies are an around-the-world favorite. In England, biscuits are king. ... And, of course, who doesn't love the simple pleasure of digging into a batch of warm-from-the-oven all-American chocolate chip cookies? ...

[abclocal.go.com](http://abclocal.go.com)

●THE FOOD TIMELINE--history notes: Cookies, crackers & biscuits

...

Fig Newtons

... The town of Newton celebrated the 100<sup>th</sup> anniversary of Fig Newtons April 10<sup>th</sup>, 1991: "...Newton is an all-American city, and the Fig Newton is an all-American cookie," said Linda Plaut, the city's director of cultural affairs. ...

[foodtimeline.org](http://foodtimeline.org)

●[NiceCupOfTeaAndASitDown.com](http://NiceCupOfTeaAndASitDown.com)

Oreo

Saturday 22 Feb 2003

...lets take a look at what the great all American biscuit (naturally it thinks its a cookie) can offer the rest of the free world.

[nicecupofteaandasitdown.com](http://nicecupofteaandasitdown.com)

●GIRL SCOUTS

...

Cookie Program

A Letter from Afghanistan

...Everybody here in Afghanistan always enjoys a taste of home, especially if it's all American as Girl Scout Cookies are. ...

[cbgsc.org](http://cbgsc.org)

●FIVE STAR Reviews

Tom's Mom's Cookies

...If you are a peanut butter fan, you'll love the Plain Peanut Butter, not too over-powering, but enough of the peanut butter to give it that blissful all American taste.

...

[fivestarreviews.com](http://fivestarreviews.com)

●[DESERETNEWS.COM](http://DESERETNEWS.COM)

Deseret Morning News, Sunday, July 3, 2005

Fourth of July festivities around Northern Utah

...

West Point: ... all-American cookie bake-off...

[deseretnews.com](http://deseretnews.com)

●DELECTABLE DESSERT BRINGS OUT THE INNER PASTRY CHEF

(ARA) - ... Renowned cookbook author Rose Levy Beranbaum has created a knock-your-socks-off dessert that a home baker can reproduce perfectly. ... Says Beranbaum, "This is the all-American pecan pie baked in an elegant and easy to serve tart..."  
*theallined.com*

**ALL-AMERICAN in cookbook titles, with portions of relevant commentary (from online sources where indicated)**

The All-American Cookie Book (2001) by Nancy Baggett

Introduction

...I've traveled throughout the [United States] all in search of cookies. ... Along the way, I baked between 25,000 and 30,000 cookies to come up with the best versions of our national favorites. ... This is a wholly American repertoire. ...

Month Of Meals: All-American Fare (3<sup>rd</sup> Ed.)

Satisfy your hunger for Chinese, Italian, or Mexican, Beef Burritos, Chop Suey, Veal Piccata...and many more new American favorites can be found here. ...

*store.diabetes.org*

Heartland Baking (All-American Cakes, Cookies, Pies, Pastries, Breads, and Bars) (2002)

[no relevant commentary]

*amazon.com*

The All-American Cowboy Cookbook (Home Cooking on the Range) (1995)

From the Publisher

...a definitive look at home cooking on the range...

*barnesandnoble.com*

All-American Low-Fat and No-Fat Meals in Minutes (300 Delicious Recipes) ((1997)

Jacket

American's Favorite Low-Fat Recipes Are Now Even More Delicious

365 All American Favorites (1997)

From the Publisher

As American as apple pie...Or Caesar Salad... Whether it's a matter of nostalgia...or an attempt to commemorate the rich culinary traditions that stretch across the country, you'll find America's most beloved dishes here. ...

*barnesandnoble.com*

It's All American Food (The Best Recipes for More than 400 New American Classics) (2003)

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From the Publisher

American food is no longer just steak, potatoes, and apple pie. Over the past 50 years, dishes that were once exotic have become essential parts of the American menu. ... a definitive cookbook of truly American favorites...

*barnesandnoble.com*

Weight Watchers Simply the Best All American (Over 250 Regional Favorites from Around the Country) (2002)

Introduction

...to bring you best-loved regional dishes your family will love. ... more than 250 recipes for home-style favorites and "new tradition" family dishes...

All-American Desserts (400 Star-Spangled, Razzle-Dazzle Recipes for America's Best Loved Desserts) (2003)

Introduction

These recipes showcase what American desserts are all about: creative cooking of high-quality, simple food, with a brash spirit of fun and adventure that you only find in the good ol' USA. ... a true American dessert is one that either has been ingeniously adapted from one of our many ethnic culinary traditions ... or one that has been created by an American cook using American ingredients. ...

Crazy for Casseroles (275 All-American Hot-Dish Classics) (2003)

Introduction

Casseroles are one of the shining gems of American cooking. ...they illustrate perfectly what authentic regional home cooking is all about. ...

The All-American Truck Stop Cookbook (Good eats from the road...) (2002)

Jacket

Check your oil, fill'er up, and get ready to dig into these all American recipes and stories from leading truck stops all across America

All-American Comfort Food (Recipes for the Great-Tasting Food Everyone Loves) (1997)

Jacket

...A timeless collection of classic American dishes...

**ALL-AMERICAN in recipes for cookies and other food products:**

15 websites with recipes for "All American Chocolate Chip Cookies" and/or "All American Peanut Butter Cookies."

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Over 20 recipes for other baked desserts from about 16 different websites, including recipes for: All-American Fudge Brownies, All-American Chocolate Cake and All American Apple Pie.

Over 25 recipes for other types of foods from 10 different websites including The All-American Hamburger, All American Chili, All American Meat Loaf and All-American Egg Rolls.

**ALL-AMERICAN in restaurant names and/or in menu selections:**

●A&W ALL AMERICAN FOOD  
*awrestaurants.com*

●ROSIE'S ALL AMERICAN CAFE  
*allearsnet.com*

**MENU ITEMS AND/OR SELECTIONS FROM VARIOUS WEBSITES INCLUDE:**

All American Hot Dog and All American Burger ("A fresh all beef burger done all the American way"), All-American Barbecue, All-American Breakfast, and "Assortment Teas - served with miniature all-American Cookies"; The All American (hot dogs, hamburgers, potato salad, etc.; All American Buffet, and All American Food (*awrestaurants.com*)

**ALL-AMERICAN in third-party registrations and applications:**

Applicant introduced copies of over 100 third-party registrations for ALL AMERICAN on the Principal Register with no disclaimer of "ALL-AMERICAN" and no 2(f) claim. In rebuttal, opposer submitted over 100 third-party registrations and applications where ALL AMERICAN is disclaimed, under Section 2(f), or registered on the Supplemental Register.

### Decision

A term is merely descriptive within the meaning of Section 2(e)(1) if it immediately conveys knowledge of a quality, characteristic, function, feature, purpose or use of the goods with which it is used. In *re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987). On the other hand, a term is suggestive if, in the context of those goods, a purchaser must use imagination, thought, or some type of multi-stage reasoning to understand the term's significance. See *Plyboo America Inc. v. Smith & Fong Co.*, 51 USPQ2d 1633 (TTAB 1999). There is often a fine line between merely descriptive marks and those which are suggestive, with the determination of which category a mark falls into frequently being a difficult matter involving a good measure of subjective judgment. In *re Phillips-Van Heusen Corp.*, 63 USPQ2d 1047 (TTAB 2002); and *Plyboo America Inc.*, *supra*.

In determining whether a designation is merely descriptive, we must analyze the designation not in the abstract, but in relation to the goods for which registration is sought, the context in which the mark is used or is intended to be used, and the impact that it is likely to make on the average purchaser of such goods. In *re Remacle*, 66 USPQ2d 1222 (TTAB 2002).

The question in this case is whether ALL-AMERICAN COOKIES for cookies and ALL-AMERICAN CRACKERS for crackers are laudatory and merely descriptive of those products. The Federal Circuit

has stated, "Marks that are merely laudatory and descriptive of the alleged merit of a product are also regarded as being descriptive.... Self-laudatory or puffing marks are regarded as a condensed form of describing the character or quality of the goods." In re Boston Beer Co. L.P., 198 F.3d 1370, 53 USPQ2d 1056, 1058 (Fed. Cir. 1999) quoting 2 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* §11:17 (4th ed. 1996)). Thus, registration has been refused when a term is held to be merely laudatory as applied to particular goods. See In re Inter-State Oil Co., Inc., 219 USPQ 1229 (TTAB 1983) (PREFERRED for "bird and squirrel repellent"); and In re Wileswood, Inc., 201 USPQ 400 (TTAB 1978) (AMERICA'S BEST POPCORN! and AMERICA'S FAVORITE POPCORN! for "popped popcorn").

However, the Court also stated that "laudation does not *per se* prevent a mark from being registrable." In re The Boston Beer Co. L.P., *supra* at 1058 ("there is an assortment of generally laudatory terms that serve as trademarks" citing In re Bush Brothers & Co., 884 F.2d 569, 12 USPQ2d 1058, 1060 (Fed. Cir. 1989). See also, for example, Plus Products v. Plus Discount Foods, Inc., 722 F.2d 999, 222 USPQ 373, 378-9 (2d Cir. 1983) (PLUS "which is little more than self-praise" when applied to vitamins "merely implies additional quantity or quality"); H. Lubovsky, Inc. v. Esprit de Corp, 627 F.Supp. 483, 228 USPQ 814, 817 (S.D.N.Y. 1986) (ESPRIT for women's shoes suggesting lively, colorful attributes "is a type of laudatory mark"); and The



Borden Company v. Blue Goose Growers, Inc., 157 USPQ 218 (TTAB 1968) ("'GOLDEN GLOW' has [nothing] other than possibly a suggestive or laudatory connotation as applied to food products generally.").

As always, the particular facts in the case are controlling. We consider first the dictionary definitions of "all-American." The most comprehensive definitions are contained in the Encyclopedic and Collegiate versions of the four Webster's dictionaries submitted by opposer. These dictionaries provide a fuller context for the meaning, and they are therefore more useful in ascertaining the perception of the term by consumers. There are two relevant definitions of "all-American": 1) "selected (as by a poll of journalists) as one of the best in the U.S. in a particular category at a particular time (an *all-American* quarterback)"; and 2) "representative or typical of the U.S. or its ideals (an *all-American* boy) (her *all-American* optimism)."<sup>7</sup> Viewed in the proper context, the term "all-American" in the first definition denotes "the best" or excellence in sports. We find support for this construction of the definition in previous cases, *Wilco Co. v. Automatic Radio*, *supra* and *R.W. Eldridge Co. v. Southern Handkerchief*, *supra*.

The issue in *Eldridge* was whether ALL AMERICAN for handkerchiefs was geographically descriptive. As the court

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<sup>7</sup> The definition "composed wholly of American elements" is not relevant for our purposes because geographic descriptiveness is not an issue in this case.

observed, "It is common knowledge that the term 'All American' has a peculiar significance in the realm of sports." The Court then went on to find that ALL AMERICAN

is suggestive of the geographic origin of the goods... the vast body of Americans would immediately think of achievement in sport when hearing the term "All American"...[as in the best quarterback in college football for the year] ... When the defendant applied the term to its handkerchiefs, it suggested to the American public that its handkerchiefs possessed merit, distinction, and superiority... .. It is a term of double meaning...

*Wilco* involved the question of whether ALL AMERICAN was geographically descriptive for radio receivers. The Court found that the mark

does not necessarily indicate to the purchasers that it is intended as a description of the geographical origin of the component materials of the product. ... The words "ALL AMERICAN" have acquired, especially as used in connection with sports, a desirable connotation of high quality, distinction and excellence. [citing *Eldridge*]. It is this acquired connotation which makes the words valuable as a trademark. While they may have been descriptive of certain features of [defendant's] product, they were not solely or even primarily descriptive.

We find nothing inherent in the definition that would extend the meaning of "the best" to food products. While, as opposer points out, the present case involves different facts and a different record than the cited cases, it will be seen later in this opinion that none of the other evidence in this record supports a finding that "all-American" means "the best" when applied to food products.

The second definition of the term is: "typical of the U.S. or its ideals." While exact precision in meaning is not

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necessary to find that a mark is merely descriptive, some reasonable degree of particularity is required. The concept in this definition is simply too broad and nebulous to immediately impart information about an attribute or a combination of attributes of food products with any degree of particularity. See *In re Intelligent Medical Systems Inc.*, 5 USPQ2d 1674 (TTAB 1987); *Holiday Inns, Inc. v. Monolith Enterprises*, 212 USPQ 949, 952 (TTAB 1981); and *In re TMS Corp. of the Americas*, 200 USPQ 57 (TTAB 1978). Even if we were to assume that "all-American" refers to food products that are "typically American," it would be necessary to go beyond the definition to determine what qualities or attributes make the food "typically American." It is certainly not apparent from the definition itself, and it is neither explained by opposer nor, as will be discussed below, otherwise shown by the record.

We turn then to opposer's evidence of use of "all-American" by competitors and others on or in connection with food products to determine its meaning and commercial impact. It is clear from the record that "all-American" is an appealing term and that it has been frequently used by companies in connection with the sale or advertising of their food products. However, frequent use of a particular term while certainly capable of rendering the mark weak and entitled to only a very narrow scope of protection, does not automatically render the mark unregistrable. See, for example, *In re Wakefern Food Corp.*, 222 USPQ 76 (TTAB 1984) (WHY

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PAY MORE!, a phrase in common commercial use, would not be perceived as a mark for supermarket services; but assuming it did function as a mark, it was not merely descriptive of such services that applicant's prices are lower than those found in other supermarkets). See also *Sears, Roebuck, and Co. v. Hofman*, 258 F.2d 953, 119 USPQ 137, 138 (CCPA, 1958) ("the word 'ROYAL' is not arbitrary but is a suggestive word frequently used to indicate high quality"); *Plus Products v. Plus Discount Foods, Inc.*, supra (PLUS for vitamins is suggestive, but weak in view of, inter alia, the extensive third-party use); and *Elizabeth Taylor Cosmetics Co. Inc. v. Annick Goutal S.A.R.L.*, 673 F.Supp. 1238, 5 USPQ2d 1305, 1309 (S.D.N.Y. 1987) ("Although the word 'passion" may be used frequently in fragrance advertising copy, [it] is not a descriptive term"). We must look to the nature and context of the use in order to determine how the term will be perceived by the purchasing public. In doing so, we do not find the evidence particularly illuminating regarding any descriptive meaning of "all-American."

We first consider some of the examples of use of "all-American" on packaging for cookies. As shown on the package of Designer Cookies, ALL AMERICAN appears to be used in the manner of a trademark, and not in a descriptive sense. The term ALL AMERICAN is far more prominent on the package than the house mark. It is not clear how consumer's would view "all-American" on opposer's and Parmalat's packaging for cookies. We do note

that "ALL-AMERICAN" appears in larger lettering on opposer's "MINI CHIP-A-ROOS package than the product name itself. "All-American" in that context could be viewed as a secondary mark to identify an "ALL AMERICAN" line of cookie products. As used on the Parmalat package, "ALL-AMERICAN" could be seen as describing the "CIRCUS" or the "CIRCUS ANIMAL" rather than the cookies. For example, consumers may read the label as "ALL AMERICAN CIRCUS - ANIMAL COOKIES, similar to the familiar term "ANIMAL CRACKERS." At the very least, the nature of use by opposer and these other companies is ambiguous and fails to show that it would be perceived by the purchasers of those products as a descriptive term.<sup>8</sup>

The evidence shows that "all-American" is frequently used in connection with the sale of gift baskets containing food products. In many of these instances, however, the term "all-American" refers generally to the decorative theme of the baskets, and not specifically to the contents of the baskets. It can be seen that the baskets are usually designed to convey

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<sup>8</sup> The use of ALL-AMERICAN in the name of the restaurant, ROSIE'S ALL AMERICAN CAFE, is similarly ambiguous as to whether it is descriptive use or trademark use. On the other hand, opposer's other example of use by a restaurant, A&W ALL AMERICAN FOOD, is in fact trademark use. See discussion, *infra*.

The fact that Ms. Burns claims that opposer uses the term "all-American" to tout the product does not mean that the term would be perceived by consumers as mere touting. Nor does applicant's asserted "admission" in its brief (p. 26) that "all-American" on opposer's packaging is "non-trademark" use persuade us that the term would therefore be perceived as descriptive use. Furthermore, in context, it appears that statement was made by applicant in an attempt to dispel any notion, if it existed, that there would be a likelihood of confusion between the parties' marks.

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patriotic themes and messages. As described on the various websites, the baskets are decorated with "stars and stripes," or wrapped in "patriotic ribbon"; or they are intended for "that patriotic person"; or contain a "patriotic assortment"; or they include an "Uncle Sam teddy bear, Americana Fortune cookies with patriotic messages" or cookies decorated with "a stars and stripes motif"; or the products are "packed into an American flag keepsake tin." In a similar manner, the ALL AMERICAN COOKIE KIT contains cookie cutters in the shapes of patriotic symbols, including "a US map, a flag and shooting stars," for making cookies with an "all-American" theme.

On several of the websites that sell gift baskets, the term "all-American" is simply the name of the gift baskets, and there is no accompanying descriptive information to help determine its meaning. In these instances, it is not clear from this usage what message is conveyed by the term "all-American" or how the term would be understood or perceived by consumers. More particularly, it is not clear that the name is used in this context in a merely descriptive manner, that is, to describe the cookies or other food products contained in the baskets. Merely because food products are included in the baskets does not mean "all-American" describes the products. We have a similar problem with the websites showing use of "all-American" as the name of the cookies or cookie assortments, as the term appears on a few of the retail websites, and also in the titles of recipes for

cookies,<sup>9</sup> and one of the cookbooks (The All-American Cookie Book). It cannot be determined whether the use is proprietary or descriptive. However, we note that other gift baskets listed on the retail websites have names such as "Midnight Blue Blessings," "Gallant Affair," "Screamin' Salsa," "Totally Nuts," and "Chocolate Fantasy Assortment," all of which clearly only suggest rather than describe the contents of the baskets. This leads us to believe that "all-American," when used as the name of a basket or a cookie assortment, or in recipe and book titles, is more likely to be perceived as a mark, or at least as a term that only suggests something about the products rather than one that describes them.

Other examples of use on cookies and in connection with gift baskets are ambiguous as well. In some instances the term appears as part of a catchy phrase or slogan "The all-American cookie with the Southern drawl" (*cookiesinheaven.com*); "An All American tin for an All American cookie" (*carolinacookiestore.com*); and "Newton is an all-American city, and the Fig Newton is an all-American cookie" (*foodtimeline.org*). In another example, on *giftbasketsx.com* "all-American" is tied, at least indirectly, to an overall concept associated with the goods rather than to the goods themselves: "All American gourmet

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<sup>9</sup> It is also not clear that all of these recipes for cookies and other food products, along with the titles of the recipes, are unique to each website. There is no way of knowing whether, or the extent to which, the names originated with each website or whether they are simply compilations or duplicates of the recipes appearing on other websites.

designer shortbread cookies" are for the "All American Dad" to "show Dad he is true Blue and your great dad."

There are a handful of examples of uses that could be characterized as purely descriptive. These references appear on *beautifulcookies.com* ("all American gourmet chocolate and vanilla sugar cookies"); *larsensbakery.com* ("The all American cookie with lots of chocolate chips"); *nicecupofteaandasitdown.com* ("lets take a look at what the great all American biscuit...can offer"); *theallined.com* ("Says Beranbaum, 'This is the all-American pecan pie baked in an elegant...tart'"); and *enquirer.com* (in an interview, the author of The All-American Cookie Book was asked, "Are all the cookies in your book 'all-American'?" and she answered "Yes, although a few receipes...have been adapted by immigrants. ... Brownies are totally American"). However, the overwhelming majority of uses are not clearly descriptive and the limited evidence of descriptive usage does not persuade us that the public would perceive "all-American" as a merely descriptive term. See *Levi Strauss & Co. v. R. Josephs Sportswear Inc.*, 28 USPQ2d 1464, 1469 (TTAB 1993), recon. denied, 36 USPQ2d 1328 (TTAB 1994) ("the 'mixed bag' of usages...and particularly the very limited number of clearly descriptive uses" insufficient to show that ACTION SLACKS would be perceived as a descriptive term).

The meaning of "all-American" as a suggestive, rather than a descriptive term is supported by the context of use on other



websites and in the other materials submitted by opposer. Many of the retail websites, as well as some of the articles and commentary and cookbooks, do contain references to a "meaning" of "all-American" in connection with cookies. In these instances, "all-American" is referred to variously as, for example, "a blissful...taste," "a favorite," "a classic," "a wonder," "a delight," "handcrafted gourmet food," "most beloved," "traditional American," "new tradition," "typically American," "homestyle goodness," and the "allure of homemade." The term is also used to suggest cookies "like the ones Mom used to bake"; or to convey a "wholesome image"; or to evoke feelings of "nostalgia" and "patriotism." What is apparent from the evidence is that there is no consistent meaning of "all-American" in association with food products. Its meaning appears to vary from person to person. Nor is there any definitive category of meanings for "all-American" that would apply to food products. The most that can be said is that "all-American" only suggests the various meanings; it cannot be considered the equivalent of any of them. Further, considering that the possible meanings associated with "all-American" run the line from laudatory and merely descriptive, to vaguely laudatory and suggestive, we cannot find that the term is *merely* or *only* descriptive of the goods.

Moreover, out of all the many attributes that may be associated with "all-American" for food products, "the best" is

not one of them. There is no evidence to support opposer's contention that "all-American" cookies means or would be thought of as "the best" cookies. Opposer points to the author's use of term "the best version" and "the best of the best" in relation to cookies in her recipe book The All-American Cookie Book; but the author in that context is referring to the quality of her recipes and products, not the meaning of "all-American." Opposer also points to what it considers to be admissions by applicant's principals that "all-American" means "the best" or is otherwise descriptive. We are not persuaded by this evidence. At most, Ms. Figgins admitted that that "all-American" for chocolate chip cookies means "traditional" (Test., p. 57); that "it's possible" that all-American "means the best chocolate chip cookies," and she was not even sure of that (Test., pp. 74, 76); that "it's possible" that it means "American favorites" (Test., p. 74); and that she "supposed it could be possible" that All-American "can accurately describe certain cookies and pastries," (Test., pp. 63-64; but what, in particular, the term "accurately describes" about the cookies is not made clear). Similarly, Mr. Maestretti admitted only that the term "could mean" patriotic or wholesome or "the best" (Test., pp. 48-52); and that all-American "might" communicate "to some people" that it is one of the best crackers; (Test., p. 53).<sup>10</sup> These tentative and speculative statements by

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<sup>10</sup> We do not interpret Mr. Maestretti's statement that "all-American" means "of course our crackers, All-American Crackers, Cookies" (Test., p. 48) as referring to any quality or attribute of the products.

the witnesses are hardly conclusive admissions that "all-American" means "the best" when applied to cookies, or that it has any other descriptive meaning for that matter. In fact, if anything, this testimony is consistent with the other evidence of record showing that there is no clear meaning or clear understanding of the term.

The record does show that one of the meanings that may be associated with "all-American" for food products is "typically American." However, we do not find that this meaning is merely descriptive of food products. Contrary to opposer's contention, the situation in the present case is not analogous to that in *In re Wileswood, Inc.*, supra (AMERICA'S BEST POPCORN! and AMERICA'S FAVORITE POPCORN!) and similar cases. In those cases, the laudatory messages conveyed by the marks were clear and the meanings were inherent in the mark. In order to ascertain the descriptive meaning of ALL AMERICAN, however, it would first be necessary to understand that "all American" means "typically American," and it would then be necessary to understand or determine what constitutes a food product that is "typically American." This multi-step process makes the mark suggestive.

We also disagree with opposer that "all-American" is in the same category of mark as SUPER BUY in the *Consolidated Cigar* case, supra. In that case the Board found that SUPER BUY for tobacco products merely described the "exceptional value" of the products. However, the underlying qualities or attributes that

made up an "exceptional value" were clearly defined and understood. Thus, the Board was able to find that the expression SUPER BUY was "merely a condensed form" of describing "in detail" the goods, and then to conclude that the expression described the goods "with the requisite degree of particularity." In the present case, however, we simply cannot ascertain, at least on this record, what underlying qualities or attributes comprise a "typically American" food. We note, for example, that there are recipes in The All-American Cookie Book that are "adapted from immigrants"; recipes in the All American Fare book for Chinese, Italian and Mexican foods; and recipes in the book All American Desserts for "true American desserts" that have "been adapted from one of our many ethnic culinary traditions." While, as we noted earlier, a term does not have to precisely or exactly describe the goods in order for the term to be considered descriptive, purchasers need to have at least some idea of what to expect if they were to ask for "all American cookies." We find that the term "all-American" fails to immediately inform consumers with any degree of particularity the qualities or attributes that make applicant's cookies "all-American."

We turn next to the third-party registrations submitted by each party. Applicant introduced 35 registrations for food-related products and/or services where ALL-AMERICAN is registered on the Principal Register without either a disclaimer of the term or a Section 2(f) claim. Of those, 15 of the registrations are

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for restaurants and food services. The registrations include: ALL AMERICAN (Registration No. 2380970); ALL AMERICAN MEAL (Registration No. 1856086, "Meal" disclaimed); ALL AMERICAN BUFFET (Registration No. 1728380, "Buffet" disclaimed); and ALL AMERICAN FOOD (Registration No. 2542264, "Food" disclaimed); all of which are owned by different entities.

The remaining 20 registrations are for various food items - coffee, hot dogs, pies, French fries, hamburgers, fried chicken, onions, vegetables, bakery goods, meats, peanut butter, barbecue sauce, salads, soup, breakfast entrees, candy, etc. These registrations include: ALL AMERICAN for peanut butter (Registration No. 0658838); ALL AMERICAN for candy (Registration No. 1968200); ALL-AMERICAN PIE for snack pies (Registration No. 2746650, "Pie" disclaimed); and BIG BILL'S BROWNIES THE ALL AMERICAN BROWNIE for bakery goods (Registration No. 1395977, BROWNIES and BROWNIE disclaimed); all of which are owned by different entities.

The majority of the registrations introduced by opposer have been cancelled, and the majority of the applications have been abandoned. There are only five relevant "live" registrations for ALL-AMERICAN in the food-related field introduced by opposer. They consist of a registration for "a gift box for holding candy and similar items"; three registrations for restaurant and/or food delivery services; and one registration for "dried meat."

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We recognize, as opposer points out, that we are not bound by the decisions of examining attorneys, and that each case must be decided on its own facts. However, third-party registrations may be used, in the same way a dictionary is used, to show that a commonly registered a term has a meaning for particular goods. See *Tektronix, Inc. v. Daktronics, Inc.*, 187 USPQ 588 (TTAB 1975), *aff'd*, 534 F.2d 915, 189 USPQ 693 (CCPA 1976); *Conde Nast Publications, Inc. v. Miss Quality, Inc.*, 597 F.2d 1404, 184 USPQ 422 (CCPA 1975); and *Knight Textile Corp. v. Jones Investment Co.*, 75 USPQ2d 1313 (TTAB 2005). In this case, the third-party registrations show that ALL AMERICAN, registered on the Principal Register without a disclaimer of "ALL AMERICAN" or a Section 2(f) claim as to that term, tend to show that the term has a highly suggestive, rather than descriptive, meaning in relation to food products and services.

We also note that opposer, in arguing that the mark is descriptive, points to use of "A & W ALL AMERICAN FOOD" as an example of descriptive use of "all-American" for restaurant services, and to "ALL AMERICAN FOOD" as an example of descriptive use of the term as a menu item. (See *awrestaurants.com*) However, it can be seen from applicant's submission, that both of these marks are registered trademarks of A & W Restaurants, Inc. for restaurant services and menu items. While third-party registrations in and of themselves are not evidence of use, opposer has proven that at these two registered marks are in fact

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in use, as a trademark, thus providing conclusive evidence that, at least with respect to these marks, the term is not used descriptively, and further undercutting opposer's position that the term is descriptive at all. There are a number of other registered marks that consist of or include ALL-AMERICAN for menu items. These include: DAVE'S ALL AMERICAN HOT DOGS for hot dog sandwiches (Registration No. 76526335, "Hot Dogs" disclaimed); ALL-AMERICAN BREAKFAST for egg-based combination breakfasts (Registration No. 1510302, "Breakfast" disclaimed); and ALL AMERICAN for breakfast entrees (Registration No. 2021733). This evidence further convinces us that ALL-AMERICAN for food products is not used in a merely descriptive manner, whether on packaging for goods or on retail websites, or as menu items or in recipe or cookbook titles, or by the media. At the very least, this evidence serves to cast further doubt on opposer's claim that ALL-AMERICAN is used descriptively and would be perceived by consumers as a merely descriptive term.

We find, in considering the record as a whole, that opposer has not carried its burden of showing, by a preponderance of the evidence, that ALL AMERICAN is either used or would be perceived as a term that is merely descriptive of applicant's goods. See, e.g., *Levi Strauss & Co. v. R. Josephs Sportswear Inc.*, supra at 1471 (burden of proving descriptiveness not met where the evidence of descriptive use was sporadic and very limited and the vast majority of the uses were ambiguous, and some of the

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evidence clearly showed use in the manner of a trademark). See also Plyboo America Inc. v. Smith & Fong Co., 51 USPQ2d 1633 (TTAB 1999). At most, the term has some vaguely laudatory meanings, suggesting an association with American ideals and all that is traditionally and typically American, and to be sure, the term has been frequently used and registered for those meanings. But in order to have an idea of the nature of the product's qualities, characteristics or attributes, a consumer needs additional information. This makes the term suggestive. Thus, we find that while ALL AMERICAN COOKIES and ALL AMERICAN CRACKERS may be very weak marks, they nonetheless fall short of merely describing applicant's goods.

Having found that the marks, as applied to applicant's goods, are not merely descriptive of them within the meaning of Section 2(e)(1), we need not reach the question of whether the marks have acquired distinctiveness under Section 2(f).

**Decision:** The consolidated oppositions are dismissed.