

Applicant, Walmart Apollo, LLC, submits the following response to the Office Action issued on July 22, 2019 (the “Office Action”) with respect to Application Serial Number 88416692 for OZARK TRAIL (the “Mark”) as to “nutritional supplements for boosting energy; nutritional supplement energy bars; nutritional supplement meal replacement bars for boosting energy,” “fruit-based meal replacement bars for boosting energy,” and “cereal based energy bars.”

Section 2(d) Partial Refusal

The Examining Attorney has initially partially refused registration of the Mark under Trademark Act Section 2(d) because of a supposed likelihood of confusion between the Mark and the mark in U.S. Registration No. 2011197, OZARK TRAILS for use on “meats” (the “Registered Mark”).

Applicant responds by submitting the below arguments to demonstrate that Applicant’s Mark and the Registered Mark are readily distinguishable from each other mainly because of manifest differences in the parties’ respective goods. Applicant respectfully submits that there is no likelihood of confusion between marks and requests that the Examining Attorney withdraw the partial refusal to register the Mark.

Courts use relevant *DuPont* Factors to determine whether a likelihood of confusion exists between marks. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973). No single factor is dispositive, and relevant factors may differ from case to case, while only factors that are significant to the particular mark are necessary for consideration. *Id.* at 1361-62. One key consideration in any likelihood of confusion determination is “the relatedness of the goods or services as described in the application and registration(s).” TMEP § 1207.01 (October 2018) (citing *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103, 192 USPQ 24, 29 (C.C.P.A. 1976). Other pertinent factors include, “the similarity or dissimilarity of

established, likely-to-continue trade channels,” and the “similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.” *Id.* (citing *du Pont*, 476 F.2d at 1362-63).

The Examining Attorney noted Applicant’s Mark and the Registered Mark were confusingly similar when comparing the marks in appearance, sound, connotation and commercial impression; and found that goods covered by Applicant’s Mark and the Registered Mark were commercially related, or travel in the same trade channels.

Applicant responds by submitting the arguments below demonstrating that Applicant’s Mark and the Registered Mark are distinguishable from each other due in most significant part to the dissimilarities between the parties’ goods and their trade channels. Applicant respectfully disagrees that the marks are confusingly similar and respectfully requests the Examining Attorney withdraw the refusal and allow the mark to proceed toward registration.

The Goods are Dissimilar and the Trade Channels are Distinguishable

Analysis under the *du Pont* factors for assessing the similarity of goods “requires a comparison between the goods or services described in the application and those described in the registration.” *Coach Servs. v. Triumph Learning LLC*, 668 F.3d 1356, 1369 (Fed. Cir. 2012). For example, in *In re Princeton Tectonics, Inc.*, 95 U.S.P.Q.2d 1509 (Trademark Trial & App. Bd. June 16, 2010), the Trademark Trial and Appeal Board (“TTAB”) reversed a refusal for the mark EPIC, finding that although the marks were identical, there was no likelihood of confusion because the goods were not related.

In *Princeton*, the applicant identified the goods as a “personal headlamp” and the examining attorney found another company’s EPIC mark covering “electric lighting fixtures” was confusingly similar because lighting fixtures are defined as “a fixture providing artificial light”

and includes a personal headlamp fixed on one's head or helmet. *Id.* at 1510. The Board reversed this finding, reasoning that although both goods “emit and provide light, that is not a sufficient basis to conclude that the goods are related,” nor can a conclusion be drawn that “both types of goods would be sold through common trade channels.” *Id.*

Courts have used a similar reasoning for food products. It is “well-established and frequently articulated doctrine (i.e., by the Board and its reviewing courts) that there exists no ‘per se’ rule that all food products are to be deemed related goods by nature or by virtue of their capability of being sold in the same food markets, (i.e., the ‘modern supermarket’ environment with its enormous variety of food cleaning, paper and other products stocked and offered for sale.)” *In re August Storck KG*, 218 U.S.P.Q. (BNA) 823, 825 (Trademark Trial & App. Bd. June 28, 1983).

In *August Storck*, the TTAB held that JUICY 2 for candy and JUICY BLEND II for ground beef and textured vegetable protein mix were “quite different in character and... would not normally be expected to emanate from the same producers, would not normally be sold in the same areas or sections of supermarkets or other retail foods outlets, and are not really foods subject to complementary use.” *Id.*; (*Hi-Country Foods Corp. v. Hi Country Beef Jerky* , 4 U.S.P.Q.2D (BNA) 1169, (Trademark Trial & App. Bd. July 30, 1987) (the TTAB found no likelihood of confusion between HI-COUNTRY for prepared meat products, namely jerky and sausage, and HI-COUNTRY for fruit juices) and *In re Mars, Inc.*, 741 F.2d 395 (Fed. Cir. 1984) (no likelihood of confusion between CANYON for fresh citrus fruits and CANYON for candy bars—even though the marks were identical).

The relatedness of food products “may not be assumed and the evidence of record must show ‘something more’ than that similar or even identical marks are used.” TMEP §

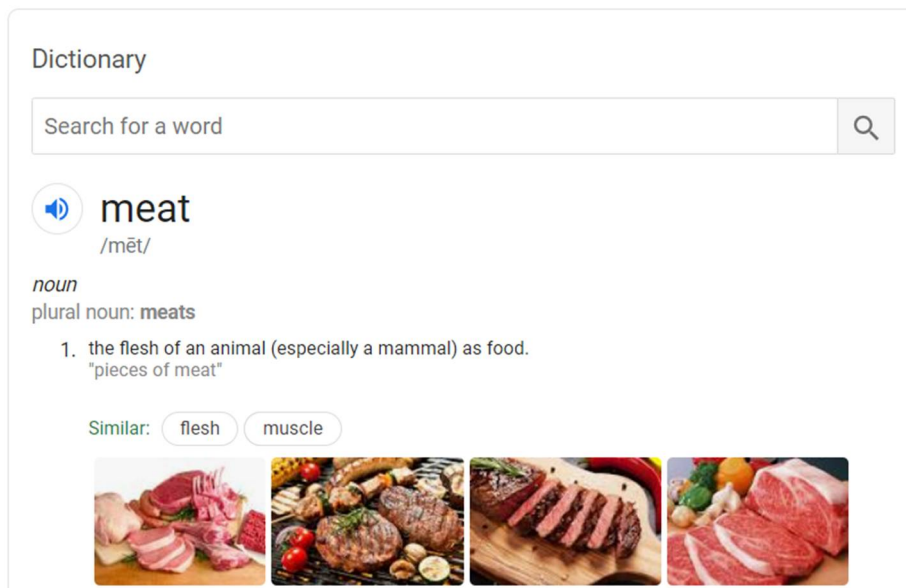
1207.01(a)(ii)(A) (citing *In re Coors Brewing Co.*, 343 F.3d 1340, 1345 (Fed. Cir. 2003)). In *Coors*, the Federal Circuit of Appeals found the examining attorney's evidence of several third-party registrations showing dual registrations for BLUE MOON for brewpubs who brew their own beer and restaurant services was *de minimis* and "not supported by substantial evidence." *In re Coors Brewing Co.*, 343 F.3d at 1346. Specifically, the court found that in the United States there are about 1,450 brewpubs (microbreweries and regional specialty breweries) and about 815,000 restaurants. *Id.* Therefore, even if all the brewpubs offered restaurant services, this would only constitute approximately 18 one-hundredths of one percent of all brewpubs (and microbreweries and regional specialty breweries) also offering restaurant services. *Id.* With such limited evidence to show an overlap between beer and restaurant services, the court in *Coors* required "something more" than the fact that restaurants serve food. *Id.*

Here, like *Princeton*, although Applicant's goods and the goods covered by the Registered Mark are food items, a conclusion cannot be drawn that the parties' respective goods are related and would be sold through common trade channels. The Examining Attorney stated without proper or sufficient evidentiary support that "the compared goods are closely related because they are both food products that are commonly consumed in the same context by the same class of consumers, are goods that travel in the same trade channels, and are the types of goods that may emanate from a single entity." However, such a conclusory statement is contradictory to *August Storck's* instruction that there can be no "per se" rule that all food products are deemed related.

Indeed, the limited and insufficient evidence offered by the Examining Attorney supports that the products are not related. As in *Coors*, "something more" than a couple websites showing certain EPIC protein bars incorporate a dried fruit product and others incorporate dried beef-jerky-like meat food product, or showing that both beef jerky and protein bars made a couple journalists'

lists of top foods to take on the trail, would be necessary to demonstrate that applicable consumers would be prone to expect Applicant’s goods and the “meats” covered by the Registered Mark may emanate from a common source. Similarly, the evidence from the USPTO’s X-Search database showing third-party marks purportedly registered for “the same or similar goods and/or services as those of both applicant and registrant” does not in fact show that “energy bars and meat” are related in that applicable consumers would expect them to emanate from a single source under a single mark.

As an initial matter, “for the purpose of determining the scope of an identification, the examining attorney should consider the ordinary meaning of the wording apart from the class number designations.” TMEP § 1402.07(a). The ordinary meaning of “meats” as identified in the Registered Mark is exactly what the registrant sells in connection with its mark, namely, “the flesh of an animal (especially a mammal) as food.” This is the primary definition of meat as revealed in a Google search:



This primary, ordinary meaning is supported by multiple dictionaries and Internet searches and searches of prominent online grocers. See, e.g., <https://en.wikipedia.org/wiki/Meat> (“Meat is

animal flesh that is eaten as food.”). It is also supported by what the registrant means by “meats” as indicated by what the registrant actually sells, namely, fresh ham, turkey, bacon, beef and quail of the kind sold through specialty food stores. See <https://www.hamiam.com/> and <https://www.hamiam.com/about-us/>.

In contrast, the goods of Applicant at issue could all be fundamentally characterized as energy bars, which are generally “supplemental bars containing cereals and other high energy foods targeted at people who require quick energy but do not have time for a meal.” See https://en.wikipedia.org/wiki/Energy_bar. For example, Applicant’s energy bars are for the kind of people utilizing Applicant’s other OZARK TRAIL camping and outdoor products in situations that would call for quick energy and that would not allow for a meal comprising “meats” like the registrant’s. That is, customers looking for Applicant’s energy bars would at the very least go to a wholly different part of a grocery store than they would go to if looking for “meats” available at a store’s butcher counter. The goods are at minimum noncompetitive and are encountered in significantly different market areas and contexts. Against this proper framework for understanding the respective goods at issue and their inherent, fundamental differences in several respects, it becomes clearer that the goods at issue are amply distinguishable and are sold in significantly different ways to different people for different purposes. It also becomes clear that the evidence proffered by the Examining Attorney is grossly insufficient to support the conclusions set out in the Office Action.

In particular, the Examining Attorney offered evidence from an article by AlissaRumsey.com to demonstrate that meat bars are considered energy bars. However, showing that some unique energy bars contain meat is very different than showing that “meats” are related to energy bars from a trademark infringement analysis standpoint. Like *Coors*, the evidence

proffered by the Examining Attorney to support relatedness of goods is *de minimis*. Of the 16 Energy Bars listed in Rumsey’s article, only 1 bar, the Epic Bar, contained meat. Even Rumsey points out the Epic bar offers a “unique” savory bar. (See Exhibit A). Further, Rumsey instructs “how to pick an energy bar” by “sticking with ingredients like nuts, seeds, nut butters, whole grains, fruits and veggies.” (See Exhibit B). It is noteworthy that Rumsey’s recommended ingredients’ list does not include meat products, only plant-based ingredients. And again, showing that some energy bars contain meat products is very different than showing meats and energy bars as properly defined and understood are sold under a common mark, much less sold under a common mark so often that applicable consumers would come to expect the products to emanate from a common source under a single mark. In other words, the websites offered by the Examining Attorney do not show meats and energy bars sold under a common mark, nor that they would be expected to be sold under a common mark.

Even if showing that some energy bars contain meat products were indicative to some degree that the registrant’s meats could be seen as related to Applicant’s energy bars, out of the multitude of websites promoting energy bars, it is rare that meat is featured as an ingredient. (Of the leading results revealed by a search on Google for “energy bars,” Rumsey’s site is the only one that features a bar containing meat product. See Exhibit C). Examples include:

- <https://swirled.com/healthiest-energy-bars/> - of the 14 bars ranked, none contained meat;
- <https://www.gearhungry.com/best-energy-bars/> - of the 14 bars ranked, none contained meat;
- <https://www.verywellfit.com/top-natural-energy-bars-3436390> - of the 11 bars ranked, none contained meat;
- <https://www.health.com/nutrition/best-energy-bars-no-added-sugar> - of the 5 best energy bars with no added sugar, none contained meat;
- <https://www.outdoorgearlab.com/topics/camping-and-hiking/best-energy-bar> - of the 13 best energy bars for Camping and Hiking, namely outdoor activity, none contained meat.

Wikipedia highlights that the average consumer considers energy bars to be “supplemental bars containing cereals and other high energy foods targeted at people who require quick energy but do not have time for a meal... and are used as an energy source during athletic events like marathon, triathlon and other events and outdoor activities, where energy expenditure is high, for [a] longer period of time.” https://en.wikipedia.org/wiki/Energy_bar (See Exhibit D).

The Examining Attorney relied heavily on the existence of the Epic Bar to show that energy bars and meat bars are related. However, as indicated above the issue the Examining Attorney has the burden to prove is different, namely, whether the registrant’s “meats” are related to Applicant’s energy bars from a trademark infringement analysis standpoint. The cited evidence shows that energy bars containing meat may be related to energy bars containing dried fruit. In other words, that energy bars are related to energy bars, or that some energy bars may contain meat product, not that “meats” are related to energy bars such that consumers may see, for example, a holiday ham and an energy bar to eat during a hike would emanate from a common source under a single mark. Moreover, even on the Epic Bar home page, the products are separated as “meat bars” and “performance bars.” (See Exhibit E) The “performance bars” do not contain meat and are marketed to “athletes, adventurers, and anyone seeking a simple yet powerful diet.” (See Exhibit F). In contrast, the meat bars are marketed as a carb free alternative for the keto friendly consumer. (See Exhibit G).

Although the Examining Attorney uses Epic to provide an example “of an entity that produces both meat in the form of energy bars and fruit-based meal replacement bars, and markets both of the products under the same mark,” the number of companies that produce both types of products is *de minimis* compared to the companies specializing in only energy bars or only meat bars. The vast majority of energy bars are vegan or vegetarian and many consumers of these bars

are steadfastly against animal proteins. Therefore many companies do not offer a meat bar, and as is evidenced by the Alissa Rumsey article only Epic produces a bar that contains meat, indicating such evidence does not sufficiently support the Examining Attorney's conclusions. Moreover, and perhaps more directly to the issue, "meat in the form of energy bars" is a creative way to describe Epic energy bars. Applicant submits that they are more properly characterized as "energy bars that contain meat product," i.e., the cited products are still fundamentally energy bars, not "meats."

The Examining Attorney also offers several articles to show that products comprising meat and energy bars are listed together as the best snacks to bring on hikes. An article by self.com, *13 Energizing Snacks That Frequent Hikers Swear By*, featured only 5 relevant items, namely, (1) a Kind Bar (vegetarian energy bar), (2) Duke's Shorty Smoked Sausages (jerky – not shaped as a bar), (3) an Epic Bar (energy bar comprising meat), (4) Luna Bars (vegetarian energy bar), and (5) Larabars (vegetarian energy bars). The majority of the items on the list did not contain meat and were not a "bar type" food. And none of the products are "meats" as that term is ordinarily understood and as it is used to identify the products covered by the Registered Mark. Moreover, that products appear together on a recommended list put together by a journalist is questionable proof of the relatedness of goods from a trademark analysis standpoint. The connection between energy bars and meats is *de minimis* and tenuous and is not probative of the relatedness of meats and energy bars, let alone the relatedness of the products on the list (which, in addition to jerky and energy bars includes two types of cookies, dried mangoes, almond butter packets, chocolate bars, Gatorade energy chews, Crunchsters spicy mung beans, and Chia Squeeze Pouches). Registrant's meats would never show up on a list of recommended snacks to take on a hike.

Similarly, the attached article *Ten Best Hiking Snacks*, by spoonuniversity.com, lists such varied food products as vegetables, seeds, trail mix, fruit, and nut butter, in addition to "beef jerky,"

“tuna,” and “energy bars.” Again, the list is at best a very tenuous link between energy bars and meats, and the evidence is wholly insufficient like in *Hi-Country Foods Corp* and *In Re Mars, Inc.* where the TTAB found a lack of substantial evidence of relatedness of goods as to HI-COUNTRY for jerky and fruit juice and CANYON for fresh citrus and candy bars.

Next, the Examining Attorney attached evidence from 21 registered marks to show “a number of third-party marks registered for use in connection with the same or similar goods and/or services as those of both applicant and registrant” to show that “the goods listed therein, namely energy bars and meat, are of a kind that may emanate from a single source under a single mark.” As an initial matter, it appears that the Examining Attorney is saying that “the goods listed therein,” that is, in the third-party registered marks, are energy bars and meat. This is simply not true. Although the descriptions of goods in the cited registrations contain “meat[s]” or words that overlap with Applicant’s energy bar products, a significant number of the cited registrations do not cover the same products covered by the Registered Mark or Applicant’s Mark. Accordingly, for that and other reasons the cited registrations are at best *de minimis* evidence that is not probative of the relatedness of goods issue, and at worst the cited registrations are unscrutinized or misleading evidence offered to lead to or support a wrong conclusion.

For example, of the 21 cited registrations, only four or five of them (two of which have the same owner, Chris Fernandez) cover the same goods covered by the Registered Mark and the goods at issue in Applicant’s application. The rest cover goods that are different from either the goods in the Registered Mark or Applicant’s goods (even though all the descriptions contain the word “meat”), including, for example:

- “Beef jerky, dairy-based snack foods *excluding* ice cream, dehydrated fruit snacks, fruit and soy based snack food, jerky, **meat**-based snack foods, nut and seed-based snack bars” (emphasis added, as it is ambiguous whether (albeit probable that) just

ice cream is excluded). *See* U.S. Registration No. 3838471 for SMART FITNESS, which does not cover meat[s].

- “Frozen, prepared and packaged breakfast, lunch and dinner entrees consisting primarily of **meat**, fish, poultry, vegetable or cheese base.” *See* U.S. Registration No. 4472660 for PERFECTLY PORTIONED FOR WEIGHT MANAGEMENT, which does not cover meat[s].
- “Food package combinations consisting primarily of cheese, **meat and/or** processed fruit” (emphasis added). *See* U.S. Registration No. 4271380 for THRUBER, which does not cover meat[s]. And given the “and/or” description the referenced products may not even contain meat. Moreover, the cited registration is cancelled for failure to file an acceptable Section 8 declaration.
- “Pre-packaged dinners consisting primarily of **meat**, seafood *or* poultry served with pasta, rice and vegetables” (emphasis added). *See* U.S. Registration No. 4551422 for PROTI-THIN, which does not cover meat[s]. And given the “or” in the description, the referenced products may not even contain meat (assuming that they would contain seafood instead and that seafood is not encompassed by the ordinary meaning of meat).
- “**Meat**, fruit and vegetable jellies, jams.” *See* U.S. Registration No. 4723072 for CARIBBEAN PARADISE, which does not cover meat[s]. The referenced products are essentially jellies and jams, not “meat[s].” This is a good example of the shortcoming of merely searching for registrations covering “meat” and assuming they cover pertinent products.
- “[D]ried **meat** snack foods, namely, jerky, **meat** bars and **meat** bites.” *See* U.S. Registration No. 5278593 for PALEO INSPIRED, which does not cover meat[s].
- “[M]eat-based spreads.” *See* U.S. Registration No. 5737608 for SNACK ON DUDE, which does not cover meat[s]. The referenced products are essentially spreads, not “meat[s].”
- “[F]rozen meals consisting primarily of **meat**, fish, poultry, *or* vegetables” (emphasis added). *See* U.S. Registration No. 5718021 for FOOD FOR ALL(ERGIES), which does not cover meat[s]. And given the “or” in the description, the referenced products may not even contain meat.
- “[P]repared meals consisting primarily of **meat** substitutes; prepared meals consisting primarily of **meat**, poultry, game, eggs *or* seafood; ... **meat**-based snack food” (emphasis added). *See* U.S. Registration No. 5705384 for BATCHEZ and Design.

The following cover “cereal bars” which are somewhat different from Applicant’s energy bars, and they do not cover any of the same products covered by Applicant’s application:

- U.S. Registration No. 3644157 for TASTE OF INSPIRATIONS and Design.
- U.S. Registration No. 5383177 for GREAT FOR YOU and Design.
- U.S. Registration No. 5297219 for MIX DELIGHT, covering “High-protein cereal bars,” which are different from although arguably related to Applicant’s energy bars.
- U.S. Registration No. 5059293 for BALDUCCI’S.
- U.S. Registration No. 5576278 for SARO TAORMINA.
- U.S. Registration No. 5527705 for SURKIN, based on Section 44(e) (actual use in U.S. commerce not necessary to obtain registration) and whose pertinent goods are encompassed within a confusing description, namely, “Flours and flour substitute products, namely, coconut flour, almond flour, oat flour, rice flour, corn flour, sorghum flour, amaranth flour, buckwheat flour, chickpea flour, millet flour, oat flour, quinoa flour, mesquite flour, arrowroot powder, flax seed meal, ground chia seed, and potato flour, preparations made from cereals, namely, **cereal bars**, cereal flakes, cereal pasta, cereal bread, cereal couscous, cereal biscuits.”
- U.S. Registration No. 5718021 for FOOD FOR ALL(ERGIES), which is also referenced above for not covering meat[s] and for covering products that may not even contain meat.
- U.S. Registration No. 5805008 for ZISHAN.

As summarized above, many of the registrations cited by the Examining Attorney do not cover both energy bars and meat, and of the many that do not, they cover products that are different from either those covered by the Registered Mark or those covered by Applicant’s Mark.

Moreover, even assuming the evidence provided by the Examining Attorney were probative of relatedness of goods to some degree, the evidence here would be *de minimis* and inadequate like the evidence in *Coors*. That is, not only do a majority of the cited registrations that cover energy bars not include meat and a majority of the cited marks that cover meat not cover energy bars, the number of pertinent registrations that cover arguably relevant goods are very small

in comparison to the overall number of registrations covering goods and/or services whose descriptions include “meat.” Consider the following information revealed in TESS searches, current as of January 21, 2020:

- There are 21,231 live, registered marks whose goods or services include “meat.”
- There are 641 live, registered marks whose goods or services include both “meat” and “nutritional supplement,” which is 3% of all live, registered marks whose goods or services include “meat.”
- There are 41 live, registered marks whose goods or services include both “meat” and “nutritional supplement energy bars,” which is 0.19% of all live, registered marks whose goods or services include “meat.”
- There are 164 live, registered marks whose goods or services include both “meat” and “meal replacement bars,” which is 0.77% of all live, registered marks whose goods or services include “meat.”
- There are 270 live, registered marks whose goods or services include both “meat” and “energy bars,” which is 1.27% of all live, registered marks whose goods or services include “meat.”
- There are 54 live, registered marks whose goods or services include both “meat” and “fruit-based meal replacement bars,” which is 0.25% of all live, registered marks whose goods or services include “meat.”
- There are 198 live, registered marks whose goods or services include both “meat” and “cereal based energy bars,” which is 0.93% of all live, registered marks whose goods or services include “meat.”
- There are 920 live, registered marks whose goods or services include both “meat” and “cereal bars,” which is 4.3% of all live, registered marks whose goods or services include “meat” (we note again that the Examining Attorney has cited registered marks covering both meat and cereal bars as opposed to meat and one of the nutritional energy bar products covered by Applicant’s application, and that cereal bars are somewhat different than Applicant’s goods).

This is to put the type of evidence the Examining Attorney is relying on into context, and to say even to the extent it could be probative of relatedness of goods, it is not very probative at all. In fact, the rationale relied upon by the Examining Attorney arguably points in the exact opposite direction and indicates the registrant’s goods and Applicant’s goods are unrelated and

would not be expected to emanate from a common source under a single mark. Like in *Coors*, there is a lack of evidence necessary to show the relatedness of meats and energy bars. If we, like in *Coors*, were to take all sources of meat and energy bars in the U.S. (like they looked at all restaurants and brewpubs in the U.S., not just live, registered marks covering them), we would expect the evidence of relatedness to look even more limited and tenuous.

Another distinguishing factor between the marks is that the goods are sold through different channels and to different classes of consumers. The specimen provided for the Registered Mark shows a package of raw pepper-cured bacon. As witnessed by the dictionary meanings provided below, when the general consuming public thinks of the ordinary meaning of “meats,” the type of product sold under the Registered Mark readily comes to mind. Examples of typical dictionary definitions of “meat” include, “the edible flesh of animals, especially that of mammals as opposed to that of fish or poultry” (Houghton Mifflin Harcourt, *The American Heritage Dictionary*, <https://ahdictionary.com/word/search.html?q=meats>, 2020); and “the flesh of an animal when it is used for food...” (Cambridge University Press, *Cambridge Dictionary*, <https://dictionary.cambridge.org/us/dictionary/english/meat>, 2020).

Not only does the specimen show the mark is used on raw bacon, but attached as Exhibit H is the mark used on other “traditional” meats such as holiday hams, turkey, and brisket. These traditional types of “meats” are sliced animal flesh, in the raw form or smoked, and are eaten at a traditional table setting. In contrast, a bar, even a “meat bar,” is processed and artificially shaped and packaged so as not to conjure up the raw flesh of an animal which would be wholly inedible within an energy bar to be eaten on the go.

Finally, contrary to the Examining Attorney’s statement that meats and Applicant’s energy bars are “closely related because they are both food products that are commonly consumed in the

same context by the same class of consumers,” meats and energy bars are consumed in different contexts by different classes of consumers, and the products are marketed and sold in distinguishable trade channels. Energy bars are for outdoor enthusiasts and people on the go or otherwise engaged in activities that require a lot of physical exertion, whereas the registrant’s meats are for being cooked and enjoyed in a sit-down-meal fashion. At the very least the products will not be sold in proximity to one another in the same or similar areas or sections of supermarkets or other retail foods outlets. Meat is traditionally sold at the butcher counter and mainly in refrigerated sections of a store. By contrast, energy bars are sold in areas without the need for temperature control such as the nutrition, healthcare or outdoor goods sections. The meat section is always distinct and separate and contains products sold under brands that often do not extend to products in other areas. And as indicated by the registrant’s website, its products are sold through “specialty food stores.” Also, energy bars are often sold in different specialty stores and online by retailers who do not sell meats and who market to people who need nutritional products such as meal replacement energy bars (e.g., athletes, hikers, campers, and other outdoors or fitness enthusiasts). Therefore, like in *August Storck*, the goods are quite different in character and would not normally be expected to emanate from the same producers, would not normally be sold in the same areas or sections of supermarkets or other retail foods outlets, and are not foods subject to complementary use.

Largely because the goods are unrelated and marketed through different trade channels to different classes of consumers, there is no likelihood of confusion between the marks.

Conclusion

Given the foregoing, Applicant respectfully requests that refusal be withdrawn.

EXHIBIT A

<https://alissarumsey.com/nutrition/-the-best-energy-bars>

13. **Epic Bars** – these bars use a base of grass-fed meats including bison, turkey, pork, beef, lamb paired with dried fruit and seeds to offer a unique savory bar. Similar to a soft beef jerky, these bars are low in sugar and pack 10-15 grams of protein.

EXHIBIT B

<https://alissarumsey.com/nutrition/-the-best-energy-bars>

How to Pick an Energy Bar

- **Ingredient List: length & simplicity.** The longer the list of ingredients, the more processed that bar is going to be. Read through and ask yourself “Do I know what most of these ingredients are? Could I reproduce this in my kitchen?”.
Stick to bars with ingredients like nuts, seeds, nut butters, whole grains, fruit and veggies.
- **Watch the sugar.** Even bars labeled “natural” are notorious for adding multiple forms of sugar including honey, brown rice syrup, and agave nectar. While these sweeteners are natural, loading up on several in one sitting is no different from eating a high sugar bar. Be wary of bars that list more than one form of sugar, and aim for a bar with less than 10-15 grams of sugar.
- Go for one with at least **3 grams of fiber** and at least **5 grams of protein**. But be cautious of any bar that touts more than 10 grams of fiber as companies often use fiber additives to get those numbers up. If you’re not used to that much, you could be in for a few uncomfortable hours.

EXHIBIT C

<https://www.google.com/search?q=best+energy+bars&sourceid=ie7&rls=com.microsoft:en-US:IE-Address&ie=&oe=#spf=1579289542019>

The screenshot shows a Google search for "energy bars". The search results include three sponsored product listings:

- Atkins Protein-Rich Meal Bar, Chocolate Chip Granola**, \$6.39, Amazon.com
- Rxbar - Protein Bar - Chocolate Sea Salt (12)**, \$25.99, The Vitamin Shoppe (Special offer)
- Clif Bar Bars, Chocolate Chip**, 2.4 Oz, 12/Box (CCC160004), \$25.99, Quill (Special offer)


Below the listings is an advertisement for **Plant Based Energy Bars | 4 Amazing Flavors | tahoetrailbar.com**. The ad text says: "We love trails. That's why we're giving back 1% of our revenue to impact trails near you. About · Ambassadors · Social Impact · The Fuel · Buy Bars · Blog".

Under the ad is a "Recipes" section with three images of energy bars.


On the right side of the search results is a "Energy Bar" knowledge panel. It includes a "Nutrition Facts" table:

Nutrition Facts	
Energy Bar	
Amount Per 1 bar (40 g)	
Calories	140
	% Daily Value*
Total Fat	4 g 6%


energy bars



5-Ingredient Energy Bars
Kroll's Kerner
5.0 ★★★★★ (3)
20 min
Almond butter, coconut oil, maple syrup, chocolate chips,



Oatmeal Peanut Butter Energy Bars
FIVEheartHOME
5.0 ★★★★★ (1)
15 min
Peanut butter, chia seeds, dried cranberries, old fashioned oats,



Energy Bars
Food Network
4.6 ★★★★★ (117)
35 min
Whole wheat pastry, wheat germ, maple syrup, sunflower

Show more

allissarumsey.com › nutrition › the-best-energy-bars

The 16 Best Energy Bars That Are Actually Good For You
Nov 9, 2015 - **Energy** and **protein bars** are everywhere, and I get asked about a new brand or product on a daily basis. ... Ideally, you want a **bar** that provides high-quality protein, fiber, and heart-healthy fats. ... Stick to **bars** with ingredients like nuts, seeds, nut butters, whole grains, fruit and ...

People also ask

Which is the best energy bar? ▾

Are energy bars healthy for you? ▾

Calories 140		
	% Daily Value*	
Total Fat 4 g	6%	
Saturated fat 1.4 g	7%	
Polyunsaturated fat 0.9 g		
Monounsaturated fat 1.4 g		
Trans fat 0 g		
Cholesterol 0 mg	0%	
Sodium 90 mg	3%	
Potassium 179 mg	5%	
Total Carbohydrate 28 g	9%	
Dietary fiber 9 g	36%	
Sugar 10 g		
Protein 2 g	4%	
Caffeine 1 mg		
Vitamin A	0% Vitamin C	0%
Calcium	10% Iron	2%
Vitamin D	0% Vitamin B-6	20%
Cobalamin	0% Magnesium	19%

*Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs.


energy bars

What is in an energy bar? ▾


When should you eat an energy bar? ▾

Feedback


Popular products




Clif Energy Bars, Crunchy
\$6+
★★★★★ (5k+)




Millville elevation white
\$18+



Honey Stinger Energy Bar
—
★★★★★ (85)




Freccia Rossa Market
—




Larabar Larabar Mint Chip
—

*Percent Daily Values are based on a 2,000 calorie diet. Your daily values may be higher or lower depending on your calorie needs.


People also search for View 10+ more




Protein bar




Flapjack



Granola



Sports drink



Meal replace...

Feedback

www.amazon.com › slp › best-energy-bars

Best Energy Bars: Amazon.com

Buy products related to **best energy bars** and see what customers say about **best energy bars** on Amazon.com ✓ FREE DELIVERY possible on eligible ...

www.gearhungry.com › best-energy-bars

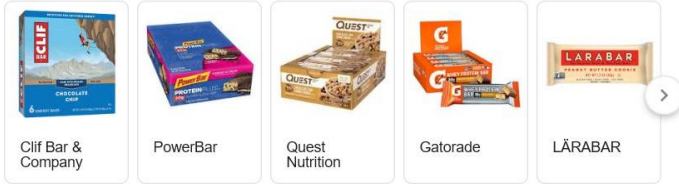
14 Best Energy Bars in 2020 [Buying Guide] - Gear Hungry

Apr 16, 2019 - 1 **KIND Energy Bars**, Dark Chocolate Nuts & Sea Salt. 2 **Larabar Gluten Free Energy Bar**, Peanut Butter Chocolate Chip. 3 **CLIF BAR Energy Bar** – Chocolate Chip. 4



energy bars

Refine by brand



[www.insidehook.com](#) > article > health-and-fitness > healthiest-energy...
The Healthiest Energy Bars According to a Nutritionist ...

Jul 17, 2019 - We asked a nutritionist to rank **energy bars** by looking only at their ingredients. Here's where Clif Bars, KIND Bars, Nature Valley and more ...

[www.consumerreports.org](#) > Health > Food > Healthy snacks
Best Energy Bars Review | Snack Bars - Consumer Reports

Aug 23, 2018 - In this review of the best **energy bars**, Consumer Reports scrutinized the market to serve up the top choices. Can you find an **energy bar** that ...

[en.wikipedia.org](#) > wiki > Energy_bar
Energy bar - Wikipedia

Energy bars are supplemental bars containing cereals and other high energy foods targeted at people who require quick energy but do not have time for a meal.

[www.runnersworld.com](#) > nutrition > recipes > best-homemade-energ...
10 of the best homemade energy bars - Runner's World

EXHIBIT D

https://en.wikipedia.org/wiki/Energy_bar

The screenshot shows the Wikipedia article for "Energy bar". At the top, there is a navigation bar with "Article" and "Talk" tabs, and a search box. The article title "Energy bar" is prominently displayed. Below the title, a notice states: "This article needs additional citations for verification. Please help improve this article by adding citations to reliable sources. Unsourced material may be challenged and removed." The main text of the article begins with "Protein bars are nutrition bars that contain a high proportion of protein to carbohydrates/fats." A table of contents is provided, listing sections such as "Dietary purpose", "Protein bar niche", "Issues", "Sugar content", and "References". On the right side, there is a "Protein bars" section with "Main ingredients" (Various protein foods, sugar) and "Media" (Cookbook: Protein bars, Media: Protein bars). Below this, there are two images: one showing three protein bars (Kind, Cliff, and LUNA) and another showing a Cricket Energy Bar wrapper. The Cricket Energy Bar image has a caption: "A cricket flour energy bar with the equivalent of approximately 40 crickets in each bar." The left sidebar contains various navigation links like "Main page", "Contents", "Featured content", "Current events", "Random article", "Donate to Wikipedia", "Wikipedia store", "Interaction", "Help", "About Wikipedia", "Community portal", "Recent changes", "Contact page", "Tools", "What links here", "Related changes", "Upload file", "Special pages", "Permanent link", "Page information", "Wikidata item", "Cite this page", "Print/export", "Download as PDF", "Printable version", "Languages", "Danak", "Turkpe", and "Edit links".

EXHIBIT E

<https://epicprovisions.com/collection/performance-bars>

//21/2019 1:08:43 PM
https://epicprovisions.com/collections/performance-bars

LOG IN CAR

EPIC™

HOME PRODUCTS ▾ ABOUT ▾ ANIMALS BLOG ▾ FIND WHOLESALE

CORE PRODUCTS


- ALL PRODUCTS
- MEAT BARS
- PERFORMANCE BARS
- BITES
- PORK SKINS
- SNACK STRIPS
- BONE BROTH
- ANIMAL FATS
- TRIMMINGS

DIETS & VALUES

- AIP
- WHOLE 30
- LOW-CARB
- NON-GMO PROJECT VERIFIED

APPAREL

- ALL APPAREL
- TEES
- HOODIES
- HATS & ACCESSORIES



Made from simple, non-GMO ingredients and protein from cage-free egg whites, EPIC Performance Bars are an ideal snack for athletes, adventurers, and anyone seeking a simple yet powerful diet.

EXHIBIT F

<https://epicprovisions.com/collection/performance-bars>

https://epicprovisions.com/collections/performance-bars

LOG IN CART (0) Q

EPIC™

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CORE PRODUCTS	DIETS & VALUES	APPAREL	 <p>Made from simple, non-GMO ingredients and protein from cage-free egg whites, our EPIC Performance Bars are an ideal snack for athletes, adventurers, and anyone seeking a simple yet powerful diet.</p>
<ul style="list-style-type: none">ALL PRODUCTSMEAT BARSPERFORMANCE BARSBITESPORK SKINSSNACK STRIPSBONE BROTHANIMAL FATSTRADITIONAL JERKYRITS	<ul style="list-style-type: none">AIPWHOLE 30LOW-CARBNON-GMO PROJECT VERIFIED	<ul style="list-style-type: none">ALL APPARELTEESHOODIESHATS & ACCESSORIES	

EXHIBIT G

<https://epicprovisions.com>

The screenshot shows the Epic Provisions website. At the top, there is a navigation bar with the URL <https://epicprovisions.com>, a search bar, and a shopping cart icon. Below the navigation bar is a large banner with the text "SURVIVING THE CARB COUNT?" in a yellow box, followed by "THRIVE WITH EPIC". To the right of the text are several Epic Provisions product packages, including "CHICKEN SRIRACHA BAR", "VENISON SEA SALT PEPPER", and "PORK CRACKLINGS".

Below the banner is a section titled "Keto Consumer Friendly Options" in a yellow box. This section features four product images with their respective captions:

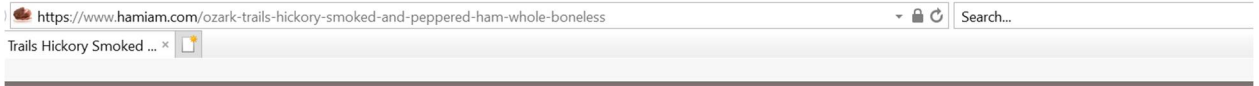
- KETO CONSUMER FRIENDLY**: A collection of various Epic Provisions products, including "100% CHICKEN SRIRACHA BAR" and "PORK CRACKLINGS".
- CHICKEN SRIRACHA BAR**: A box of Epic Provisions "100% CHICKEN SRIRACHA BAR".
- VENISON SEA SALT PEPPER**: A box of Epic Provisions "VENISON SEA SALT PEPPER".
- PORK SKINS VARIETY PACK**: A variety pack of Epic Provisions "PORK SKINS".

On the right side of the "Keto Consumer Friendly Options" section, there is a "NEW PRODUCT ALERT!" box with the following text:

NEW PRODUCT ALERT!
Kick off your day in a classic way. Our new Turkey Sweet Potato and Egg Yolk protein bars are made with 100% natural turkey, sweet potatoes, egg yolks, and spices.

Below the alert box is a "SHOP NOW" button.

EXHIBIT H



Ham I Am!
800-742-6426

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OZARK TRAILS HICKORY SMOKED AND PEPPERED HAM, BONELESS

(9)

\$38.95

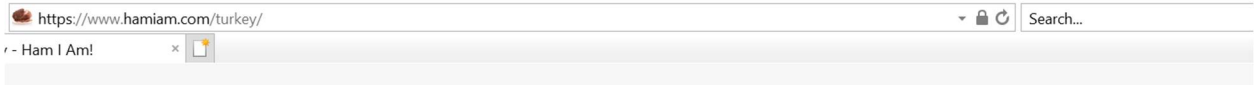
Shipping: \$25.00 (Fixed shipping cost)

* Choose Your Size:

- Whole Ham, \$69.95, 8-10 lbs, Serves 20-25, Boneless
- Half Ham, \$38.95, 4-5 lbs, Serves 10-12, Boneless

* Please deliver by::

wards



Ham I Am!
800-742-6426

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TURKEY

No stuffing or baking required, our turkeys are a delicious solution for the busy holiday season. Hickory smoked to perfection until they are pink, tender, and delicious. We offer four flavors to please even the most discerning of palates.

Sort by: [Featured Items](#)



Whole Hickory Smoked & Peppered Turkey

[CHOOSE OPTIONS](#)



Whole Hickory Smoked Turkey

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Whole Chardonnay Herb Turkey

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Whole Cajun Smoked Turkey

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BACON

Our award winning bacon is amazing. Edging out all others in blind taste tests, our hickory smoked bacon is hand trimmed and sliced thick. Bacon freezes beautifully, so order extra packages to keep on hand.

Sort by: Featured Items



Ozark Trails Smoked & Peppered Bacon 12 oz, 6-pack

Compare



Ozark Trails Smoked & Peppered Bacon 24 oz, 6-pack

Compare



Ozark Trails Hickory Smoked Bacon - 12 oz, 6-pack

Compare



Ozark Trails Hickory Smoked Bacon and Peppered Bacon Combo 6 Pack

Compare

ds

HOME > OTHER MEATS

OTHER MEATS

Sort by: Featured Items



Smoked and Peppered Pork Tenderloin

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Smoked Beef Brisket

Compare



Semi-Boneless Quail

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Gift Certificate

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