

ESTTA Tracking number: **ESTTA942168**

Filing date: **12/18/2018**

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

Proceeding	92068100
Party	Defendant Brian Prince
Correspondence Address	KEVIN J KEENER KEENER & ASSOCIATES PC 161 N CLARK ST STE 1600 CHICAGO, IL 60601 UNITED STATES kevin.keener@keenerlegal.com, rishi.nair@keenerlegal.com 312-523-2164
Submission	Reply in Support of Motion
Filer's Name	Kevin Keener
Filer's email	kevin.keener@keenerlegal.com
Signature	/kevinkeener/
Date	12/18/2018
Attachments	Reply in support of motion for summary judgment.pdf(258826 bytes) Declaration of Kevin Keener for exhibits.pdf(354808 bytes) Angie Lane Declaration.pdf(56540 bytes)

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

In the matter of:

Registration No. 4,376,833

Registration Date: July 30, 2013

Mark: ALLEZ CUISINE

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)	
Fuji Television Network, Inc.)	
)	
Petitioner,)	
)	
v.)	Opposition No. 92068100
)	
Brian Prince)	
)	
Respondent.)	
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)	

RESPONDENT’S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Respondent Brian Prince hereby submits this Reply in support of his Motion for Summary Judgment seeking an order dismissing the Petition to Cancel with prejudice.

I. PETITIONER’S “COUNTERMOTION” IS NOT PROPER

Petitioner’s response to Mr. Prince’s motion was to assert a “countermotion” for summary judgment. Petitioner asks the Board to hold that Mr. Prince’s registration is invalid since allegedly Mr. Prince has never used the ALLEZ CUISINE mark in commerce. Petitioner’s “countermotion” is improper because nonuse is not a matter in the pleadings and Petitioner’s claim of nonuse is futile.

A. Petitioner’s Claim of Nonuse Has Not Been Pleaded

Mr. Prince objects to any claim of nonuse being asserted at this late stage of the proceeding and to an amendment to the pleadings. Petitioner cannot seek summary judgment on

any unpleaded matter. “A party may not obtain summary judgment on an issue that has not been pleaded.” TBMP 528.07(a); *See also* Fed. R. Civ. P. 56(a); *Omega SA (Omega AG) (Omega Ltd.) v. Alpha Phi Omega*, 118 USPQ2d 1289, 1291 n.2, 1292 (TTAB 2016) (applicant may not obtain summary judgment on unpleaded defense); *Asian and Western Classics B.V. v. Lynne Selkow*, 92 USPQ2d 1478, 1480 (TTAB 2009) (petitioner cannot obtain summary judgment on an insufficiently pleaded fraud claim). Likewise, “[a] party may not defend against a motion for summary judgment by asserting the existence of genuine disputes of material fact as to an unpleaded claim or defense.” TBMP 528.07(b); *See Perma Ceram Enterprises Inc. v. Preco Industries Ltd.*, 23 USPQ2d 1134, 1135 n.2 (TTAB 1992) (no consideration given to three unpleaded grounds asserted by opposer in response to applicant’s motion for summary judgment).

Petitioner’s claim of nonuse is not present in the pleadings and Mr. Prince objects to any amendment of the pleadings. Thus, Mr. Prince requests that the Board give no consideration to Petitioner’s “countermotion” for summary judgment.

B. Petitioner’s Claim of Nonuse is Futile

Even if Petitioner had filed a motion to amend its pleading in connection with its “countermotion,” Petitioner’s claim of nonuse would not be permitted because it is futile. *See Embarcadero Technologies, Inc. v. Dephix Corp.*, 117 USPQ2d 1518, 1523 (TTAB 2016) (because proposed claims are untimely and futile, the motion for leave to amend denied).

Opposer’s sole basis for claiming Mr. Prince never used the ALLEZ CUISINE mark in commerce is that the specimen submitted to the USPTO “contains *lorem ipsum* gibberish.” Petitioner’s claim of “nonuse” is solely a challenge to the sufficiency of Mr. Prince’s specimen submitted to the USPTO. Such a claim is futile because the Board has long held that the

insufficiency of a specimen does not constitute grounds for opposing an application or cancelling a registration. *See Century 21 Real Estate Corp. v. Century Life of Am.*, 10 USPQ2d 2034, 2035 (TTAB 1989) (insufficiency of specimens not a ground for sustaining an opposition); *Marshall Field & Co. v. Mrs. Fields Cookies*, 11 USPQ2d 1355, 1358 (TTAB 1989) (claim to cancel pleaded registration based on allegation that specimen in underlying application shows only trade name use and not service mark use fails to state a claim upon which relief can be granted because insufficiency of specimens does not constitute grounds for cancelling registration).

II. PETITIONER PRESENTS NO EVIDENCE TO CONSIDER IN ITS RESPONSE

It is clear from Petitioner's response that there is no evidence for the Board to consider. There are no genuine issues of material fact for the Board to consider. Petitioner's sole response is to attack the sufficiency of Mr. Prince's evidence rather than present any evidence in contradiction. Thus, based on the record before the Board, summary judgment should be granted in favor of Mr. Prince.

Mr. Prince has moved solely for summary judgment on the issue of his intent to resume use. Assuming, *arguendo*, that he abandoned his registration for ALLEZ CUISINE, Mr. Prince has presented sufficient evidence to support his intent to resume such use. *See Rivard v. Linville*, 133 F.3d 1446, 45 USPQ2d 1374, 1376 & n.1 (Fed. Cir. 1998) (the party contesting the abandonment must produce evidence of either (1) use of the mark during the statutory period, or (2) an intent to resume use). There is no evidence presented in contradiction to Mr. Prince's evidence of shipments made by Mr. Prince of products bearing the ALLEZ CUISINE mark, of Mr. Prince's business card with the ALLEZ CUISINE mark, of incorporation documents for Allez Cuisine, Inc., of economic activity by Mr. Prince under the name ALLEZ CUISINE, of

bank account records of Mr. Prince operating under the ALLEZ CUISINE mark, or of Mr. Prince's website promoting goods under the ALLEZ CUISINE mark. All of this objective evidence is sufficient to establish resumption of use or intent to resume use by Mr. Prince.

Petitioner attacks the sufficiency of Mr. Prince's evidence and argues that the evidence does not establish that Mr. Prince has used the mark in commerce. Regardless of whether the evidence establishes Mr. Prince's use of the ALLEZ CUISINE mark in commerce, it is sufficient and objective evidence of Mr. Prince's intent to resume such use. Petitioner offers no evidence to contradict Mr. Prince's intent to resume use of the ALLEZ CUISINE mark. There is no genuine issue of material fact for the Board to consider at trial in this case. Mr. Prince has presented more evidence than just a self-serving declaration or nebulous statements of his intent to resume use of the ALLEZ CUISINE mark. Instead, Mr. Prince has submitted objective evidence of his intent to resume use of the ALLEZ CUISINE mark.

Petitioner challenges some of Mr. Prince's evidence as not constituting use of the ALLEZ CUISINE mark in commerce. For instance, because Mr. Prince's shipment of products was sent to Mr. Prince's counsel, Petitioner argues that such use was not legitimate and does not constitute use in commerce. Petitioner's sole basis for this argument is case law for the proposition that intra-company shipments do not constitute use in commerce. However, Petitioner's arguments are not applicable. Mr. Prince did not ship his food products to himself. Mr. Prince sent his products through interstate commerce to a third party. See Declaration of Angie Lane. Mr. Prince's shipments of frozen food to a third party constitutes legitimate use of the mark in commerce. See *Christian Faith Fellowship Church v. adidas AG*, 841 F.3d 986, 995 (Fed. Cir. 2016) (It is beyond dispute that "the definition of commerce in the Lanham Act means

exactly what the statute says, i.e. ‘all commerce which may lawfully be regulated by Congress.’”) (citations omitted).

Ms. Lane, a third party not employed by or under any contractual relationship with Mr. Prince, received frozen meals bearing the ALLEZ CUISINE mark. See Declaration of Angie Lane. Ms. Lane personally prepared the frozen meals for personal consumption and served the frozen meals to her immediate family. See Declaration of Angie Lane. The shipment of ALLEZ CUISINE frozen meal products from Mr. Prince crossed multiple state lines to travel from California to Ohio. The frozen meal products were then consumed by a third party. See Declaration of Angie Lane. This is use of the ALLEX CUISINE mark far beyond intra-company shipments. Particularly since there is a public use aspect of Mr. Prince’s mark.

Mr. Prince placed food products bearing the ALLEZ CUISINE mark in a box, relinquished his control of the box, and shipped the box from California to Ohio. If the transportation of the goods across three-quarters of the country from Mr. Prince to a third party (and subsequent consumption of the product by that third party) does not constitute use in commerce, then no transportation of the goods bearing a trademark constitutes use in commerce.

Regardless, even if the shipment of products bearing the ALLEZ CUISINE mark across the country does not constitute use of ALLEZ CUISINE in commerce, the shipment of products is at the very least evidence of Mr. Prince’s intent to resume use of the ALLEZ CUISINE mark. It is undisputed that all of the evidence submitted to the Board supports Mr. Prince’s intent to resume use. There is no contrary evidence that supporting Mr. Prince’s lack of intent to resume use for the Board to consider. Mr. Prince has submitted a substantial amount of objective evidence illustrating, at the very least, his intent to resume use of the ALLEZ CUISINE mark. The evidence is established by more than just a self-serving declaration by Mr. Prince, but is

established by evidence of concrete actions Mr. Prince has taken to resume use of the ALLEZ CUISINE mark.

For these reasons, Mr. Prince requests that the Board grant his motion for summary judgment and dismiss Petitioner's complaint with prejudice.

III. RESPONDENT'S MOTION IS TIMELY AND PROPER

Mr. Prince's motion for summary judgment is timely and proper, contrary to Petitioner's statements. Petitioner claims that Mr. Prince's motion was filed to avoid discovery in this matter. Such a claim is without foundation. Under the schedule set forth by the Board, the discovery period opened on July 10, 2018. If Mr. Prince were solely concerned about avoiding discovery, he would have filed his motion immediately after this period. Petitioner had four months to send discovery requests to Mr. Prince but failed to do so. It was not until after Mr. Prince filed his motion for summary judgment that Petitioner served its belated discovery requests. See Declaration of Kevin Keener.

Furthermore, a motion for summary judgment may not be filed until a party has served its initial disclosures. See TBMP 528.02. Counsel for Mr. Prince submitted initial disclosures prior to filing the motion for summary judgment. See Declaration of Kevin Keener. Thus, Mr. Prince's motion for summary judgment was timely and proper.

IV. DISCOVERY IS NOT REQUIRED IN THIS PROCEEDING

In the closing of its response, Petitioner requested that if the Board does not grant summary judgment in its favor then the Board should deny Mr. Prince's motion to permit discovery to proceed. The prospect of discovery is not a sufficient reason to deny Mr. Prince's motion for summary judgment. Any relevant evidence needed to decide this matter has been submitted in Mr. Prince's motion for summary judgment and is in the Board's possession. Mr.

Prince is the sole source of any relevant information or evidence in this case. Petitioner's initial disclosures illustrate that there are no other individuals from whom testimony or evidence is needed. See Exhibit 4 to Declaration of Kevin Keener.

Mr. Prince has submitted detailed and objective evidence of his use of the ALLEZ CUISINE mark in commerce and of his intent to resume such use. All relevant testimony and evidence to decide this proceeding has been provided to the Board. Thus there is no need to delay a decision on Mr. Prince's motion for unnecessary discovery.

V. CONCLUSION

For the reasons herein, Mr. Prince requests that the Board issue an order granting his Motion for Summary Judgment.

Respectfully submitted,

Date: 12/18/18

/Kevin Keener/
Kevin J. Keener, Esq.
Rishi Nair, Esq.
KEENER & ASSOCIATES, P.C.
161 N. Clark Street, Suite 1600
Chicago, IL 60601
Telephone: (312) 375-1573
rishi.nair@keenerlegal.com
kevin.keener@keenerlegal.com
Attorneys for Respondent

CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Respondent's Motion for Summary Judgment was served upon Petitioner by email, on this 18th day of December, 2018, at the following addresses:

Jennifer Lee Taylor
Morrison & Foerster LLP
425 Market Street
San Francisco, CA 94105

TMDocket@mofo.com, JTaylor@mofo.com,
droumiantseva@mofo.com, ggabriel@mofo.com

/Kevin Keener/
Kevin Keener, Esq.

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

In the matter of:

Registration No. 4,376,833

Registration Date: July 30, 2013

Mark: ALLEZ CUISINE

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Fuji Television Network, Inc.)	
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Petitioner,)	
)	
v.)	Opposition No. 92068100
)	
Brian Prince)	
)	
Respondent.)	
_____)	

**DECLARATION OF KEVIN KEENER IN SUPPORT OF REPLY IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT**

I, Kevin Keener, being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. 1001, and that such willful false statements and the like may jeopardize the validity of the application or document or any registration resulting therefrom, declares that the following statements made of his own knowledge are true; and all statements made on information and belief are believed to be true.

1. I prepared and sent initial disclosures for Brian Prince prior to filing Mr. Prince's Motion for Summary Judgment.
2. Attached as Exhibit 1 is a true and accurate copy of the email of service of Mr. Prince's initial disclosures to Petitioner.

3. I sent the email serving Mr. Prince's initial disclosures on November 5, 2018 at 5:08 PM Eastern Time.
4. Petitioner never objected to the late service of Mr. Prince's initial disclosures prior to the service on November 5, 2018.
5. I filed the Motion for Summary Judgment in this matter on November 5, 2018 at 5:18 PM Eastern Time.
6. Attached as Exhibit 2 is a true and accurate copy of the ESTTA Filing Receipt for the Motion for Summary Judgment in this matter.
7. Petitioner served its discovery requests on me on November 5, 2018 at 6:59 PM Eastern Time.
8. Attached as Exhibit 3 is a true and accurate copy of the service email for Petitioner's discovery requests.
9. Attached as Exhibit 4 is a true and accurate copy of Petitioner's initial disclosures.

Dec. 15, 2018
Date

/Kevin J. Keener /
Kevin Keener

EXHIBIT 1



Kevin Keener <kevin.keener@keenerlegal.com>

Brian Prince Initial Disclosures

1 message

Kevin Keener <kevin.keener@keenerlegal.com>

Mon, Nov 5, 2018 at 5:08 PM

To: TMDocket <TMDocket@mofo.com>, "Taylor, Jennifer Lee (SF)" <JTaylor@mofo.com>, "Roumiantseva, Dina" <droumiantseva@mofo.com>, "Gabriel, Grace F." <ggabriel@mofo.com>

I realized that I had not provided these before.

--

Kevin Keener
Keener and Associates, P.C.
161 North Clark Street
Suite 1600
Chicago, IL 60601
Office: 312-523-2164
Cell: 773-562-5902
www.keenerlegal.com
kevin.keener@keenerlegal.com

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 **Initial Disclosures Brian Prince.pdf**
156K

EXHIBIT 2



Kevin Keener <kevin.keener@keenerlegal.com>

ESTTA Filing Receipt: Proceeding or Serial or Registration No. 92068100 Motion for Summary Judgment Filing Receipt for ESTTA Tracking No: ESTTA933026

estta@uspto.gov <estta@uspto.gov>

Mon, Nov 5, 2018 at 5:14 PM

To: kevin.keener@keenerlegal.com, rishi.nair@keenerlegal.com

ESTTA Filing Receipt

This ESTTA Filing Receipt confirms receipt of your filing associated with the above-identified ESTTA Tracking Number.

Your filing may be viewed on TTABVUE at <http://ttabvue.uspto.gov/ttabvue/> . If you don't see your filing on TTABVUE a week after you file, or if you received an error message or experienced a technical issue while submitting your filing on ESTTA, please send an email to estta@uspto.gov and provide the ESTTA Tracking Number and the Serial, Registration or Proceeding Number identified above, and a brief description of the error message or technical issue you encountered.

For non-technical status or information inquiries, please contact the TTAB Assistance Center at ttabinfo@uspto.gov or 571-272-8500 Monday through Friday from 8:30 a.m. to 5:00 p.m. Eastern Time (ET).

Tracking No.: ESTTA933026
Filing date: 11/05/2018

Proceeding No.: 92068100
Filing Party: Defendant
Brian Prince

Filing Party's Correspondence Address: KEVIN J KEENER
KEENER & ASSOCIATES PC
161 N CLARK ST STE 1600
CHICAGO, IL 60601
UNITED STATES
kevin.keener@keenerlegal.com, rishi.nair@keenerlegal.com
312-523-2164

Submission: Motion for Summary Judgment

Filer's Name: Kevin Keener
Filer's email: kevin.keener@keenerlegal.com
Signature: /kevinkeener/
Date: 11/05/2018

Attachments: Motion for Summary Judgment.pdf
Declaration of Brian Prince.pdf
exhibits.pdf

EXHIBIT 3



Kevin Keener <kevin.keener@keenerlegal.com>

ALLEZ CUISINE Discovery Requests

Roumiantseva, Dina <DRoumiantseva@mofo.com>

Mon, Nov 5, 2018 at 6:59 PM

To: Kevin Keener <kevin.keener@keenerlegal.com>

Cc: "Taylor, Jennifer Lee (SF)" <JTaylor@mofo.com>, TMDocket <TMDocket@mofo.com>, "Gabriel, Grace F." <GGabriel@mofo.com>

Please see attached.

Regards,

Dina

DINA ROUMIANTSEVA

Associate | Morrison & Foerster LLP

425 Market St. | San Francisco, CA 94105

P: +1 (415) 268-6356

mofo.com | [LinkedIn](#) | [Twitter](#)

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3 attachments

 **2018-11-05 ALLEZ_CUISINE_1st_Set_of_RFAs.pdf**
39K

 **2018-11-05 ALLEZ_CUISINE_1st_Set_of_ROGs.pdf**
45K

 **2018-11-05 ALLEZ_CUISINE_1st_Set_of_RFPs.pdf**
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EXHIBIT 4

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

FUJI TELEVISION NETWORK, INC.,

Petitioner,

vs.

BRIAN PRINCE,

Respondent.

Cancellation No.: 92068100

Registration No.: 4,376,833

Issued: July 30, 2013

Mark: ALLEZ CUISINE

PETITIONER'S INITIAL DISCLOSURES

Pursuant to Rule 26(a)(1) of the Federal Rules of Civil Procedure and 37 C.F.R. § 2.120(a), without waiving any claim of privilege, work product, or other basis for non-disclosure, Fuji Television Network, Inc. ("Petitioner") hereby makes these initial disclosures ("Initial Disclosures"). Petitioner's Initial Disclosures are based on information that is currently reasonably available to Petitioner. Petitioner's investigation in this matter is ongoing and it thus reserves the right to correct, modify, or supplement these disclosures as newly discovered information becomes available.

I. INDIVIDUALS

Pursuant to Federal Rule of Civil Procedure 26(a)(1)(A)(i), Petitioner identifies the following individuals who may have discoverable information that Petitioner may use to support its claims or defenses in this action. Petitioner does not authorize any communications with the listed individuals prohibited by any applicable rule of professional conduct. Any contact must be made through Petitioner's counsel of record. Petitioner similarly does not authorize any communications otherwise prohibited by any applicable rule of professional conduct. The witnesses identified in these Disclosures may possess information or knowledge protected by the

attorney-client privilege, the work-product doctrine, and/or other applicable legal privileges and protections. By listing a witness, Petitioner does not waive its right to assert any applicable privilege or protection at an appropriate time.

1. **Brian Prince**, Respondent (P.O. Box 3334, Beverly Hills, CA 90212). Mr. Price has knowledge regarding Respondent's adoption and use of Respondent's ALLEZ CUISINE mark.

II. DOCUMENTS

Pursuant to Federal Rule of Civil Procedure 26(a)(1)(A)(ii), Petitioner identifies the following categories of documents and tangible things that are in its possession, custody, or control and that it may use to support its claims in this action. The documents and tangible things generally are maintained at the offices of Petitioner's counsel at 425 Market St, San Francisco, CA. The categories of documents referenced as part of these Disclosures may include documents protected by the attorney-client privilege, the work product doctrine, and/or other applicable legal privileges and protections. By identifying these categories of documents, Petitioner does not waive its right to assert, at an appropriate time, any applicable privilege or protection to the production of any particular document. Petitioner reserves its right to object to the production of any documents within the described categories on any basis permitted by the Federal Rules of Civil Procedure.

1. Documents filed in connection with U.S. Registration No. 4,376,833.

III. DAMAGES

Disclosures pursuant to Federal Rule of Civil Procedure 26(a)(1)(A)(iii) regarding damages are not required in proceedings before the Trademark Trial and Appeal Board. *See* T.B.M.P. § 401.02.

Respectfully submitted,

Dated: August 9, 2018

By:

A handwritten signature in black ink, appearing to read "Jennifer Lee Taylor", written over a horizontal line.

Jennifer Lee Taylor
Attorney for Petitioner
Fuji Television Network, Inc.

Morrison & Foerster LLP
425 Market Street
San Francisco, California 94105-2482
Telephone: (415) 268-6538
Facsimile: (415) 268-7522

CERTIFICATE OF SERVICE

I declare that I am employed with the law firm of Morrison & Foerster LLP, whose address is 425 Market Street, San Francisco, California, 94105. I am not a party to the within cause, and I am over the age of eighteen years.

I HEREBY CERTIFY that on August 9, 2018, I caused a true and correct copy of the foregoing PETITIONER'S INITIAL DISCLOSURES to be sent via e-mail, to Respondent's Attorney of Record:

**Kevin Keener
Keener and Associates, P.C.
161 North Clark Street
Suite 1600
Chicago, IL 60601**

kevin.keener@keenerlegal.com

Dina Roumiantseva

(typed)

/s/Dina Roumiantseva

(signature)

sf-3929675

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

In the matter of:
Registration No. 4,376,833
Registration Date: July 30, 2013
Mark: ALLEZ CUISINE

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Fuji Television Network, Inc.)	
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Petitioner,)	
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v.)	Opposition No. 92068100
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Brian Prince)	
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Respondent.)	
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DECLARATION OF ANGIE LANE

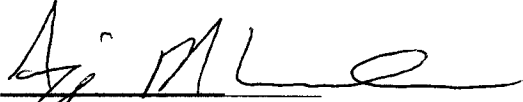
I, Angie Lane, being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. 1001, and that such willful false statements and the like may jeopardize the validity of the application or document or any registration resulting therefrom, declares that the following statements made of his own knowledge are true; and all statements made on information and belief are believed to be true.

1. I am over the age of 18 and am a resident of Wadsworth, Ohio.
2. I am a paralegal by profession and work for Keener and Associates, P.C.
3. I have reviewed Exhibit 11, Exhibit 12, and Exhibit 13 to Respondent's Motion for Summary Judgment in the above captioned matter.
4. I recognize the frozen meals displayed in Exhibit 11, Exhibit 12, and Exhibit 13 to be frozen meals that I personally received into my possession for my personal enjoyment.

5. I personally prepared the Passion Fruit Chicken bearing the ALLEZ CUISINE mark displayed in Exhibit 12. I served the Passion Fruit Chicken bearing the ALLEZ CUISINE mark to my husband and children in my personal residence in Wadsworth, Ohio.
6. I personally prepared the Hawaiian Style BBQ Ribs bearing the ALLEZ CUISINE mark displayed in Exhibit 13. I served the Hawaiian Style BBQ Ribs bearing the ALLEZ CUISINE mark to my husband and children in my personal residence in Wadsworth, Ohio.
7. I have no personal relationship with Brian Prince, the Respondent in this matter, and from my recollection have never communicated with Mr. Prince.
8. I do not work for Mr. Prince or otherwise have any contractual relationship with Mr. Prince.

12-18-18

Date



Angie Lane