

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
West Palm Beach Division

Case No. 16-cv-80855-Middlebrooks

TRIPLE7VAPING.COM, LLC,  
& JASON W. CUGLE

Plaintiffs,

vs.

SHIPPING & TRANSIT LLC,

Defendant.

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**PLAINTIFFS' PARTIALLY UNOPPOSED MOTION FOR  
LIMITED CONSOLIDATION, OR ALTERNATIVELY, FOR  
LEAVE TO FILE AN AMICUS BRIEF**

Pursuant to Rule 42(a) and Local Rule 7.1, Plaintiffs Triple7Vaping.com, LLC and Jason Cugle (collectively "Triple7") hereby file this motion to have this matter consolidated, in part, with a similar action pending before this same division – *Shipping and Transit, LLC v. Conn's, Inc.*, Case No. 9:16-cv-80744-Middlebrooks – filed on May 17, 2016 (referred to as "Conn's"). As explained below, Triple7 seeks consolidation solely for the purpose of deciding critical threshold issues relating to patentability under 35 U.S.C. §§ 101 and 112. It is not currently requesting consolidation for any other purpose.

In the alternative, Triple7 requests leave to file an amicus brief in that case in support of Defendant Conn's July 13, 2016 motion to dismiss. [D.E. 9 in *Conn's*].

**I. PROCEDURAL POSTURE**

**A. *Shipping and Transit, LLC Sues Conn's, Inc.***

On May 17, 2016, Shipping and Transit, LLC ("S&T") sued Conn's alleging

infringement of (i) U.S. Patent No. 7,400,970 (“the ’970 patent”), (ii) reexamined U.S. Patent No. 6,904,359 (“the ’359 patent”), (iii) U.S. Patent No. 6,763,299 (“the ’299 patent”), and (iv) U.S. Patent No. 6,415,207 (“the ’207 patent”) (collectively the “patents-in-suit”). [D.E. 1 in *Conn’s*].

On July 13, 2016, *Conn’s* filed a motion to dismiss, arguing *inter alia*, that the patents-in-suit failed to meet the requirements of 35 U.S.C. §§ 101 and 112. [D.E. 9 in *Conn’s*]. That motion remains pending.

**B. *Triple7Vaping.com, LLC Sues Shipping & Transit, LLC***

On May 31, 2016, Triple7 sued S&T alleging that the same patents-in-suit at issue in *Conn’s* are invalid for, *inter alia*, failing to meet the requirements of 35 U.S.C. §§ 101 and 112.<sup>1</sup> Simultaneously with the filing of its complaint, Triple7 filed a notice of related cases, specifically mentioning *Conn’s* as a case related to the action filed by Triple7. [D.E. 7].

**C. *Shipping & Transit’s Nationwide Litigation Practice***

S&T, including through its predecessor-in-interest ArrivalStar S.A., has sued hundreds of companies throughout the United States for patent infringement concerning the same or highly related patents-in-suit. Any number of other companies have received demand letters and have settled without any lawsuit being filed. A nationwide PACER search responded with Shipping and Transit, LLC (also listed as Shipping & Transit, LLC) as a party to 185 lawsuits filed since January 1, 2015.<sup>2</sup> The overwhelming number of cases it has filed have been filed in the Southern District of Florida because S&T is based in Palm Beach County. The noteworthy exception appears to be cases in which Shipping & Transit sues an entity actually based in Florida, in

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<sup>1</sup> Triple7 also alleged that S&T violated Maryland’s statute barring bad faith assertions of patent infringement.

<sup>2</sup> S&T’s predecessor ArrivalStar, S.A. is listed as a party to 457 cases nationwide, with the majority of cases being filed in the Southern District of Florida. Those cases concerned the same patents-in-suit or patents related to the patents-in-suit.

which case it files suit against the Florida entity in the Central District of California.<sup>3</sup>

To the best of Triple7's knowledge, no court has ever determined the validity of the patents-in-suit, and no court has ever resolved S&T's claims of infringement on the merits. In fact, despite the patents-in-suit or related patents being at issue in over 600 district court cases, PACER reveals that they have never been the subject of an appeal to the Federal Circuit, ever.

## II. LIMITED CONSOLIDATION PROMOTES EFFICIENCY

### A. *The Actions Involve Common Questions of Law and Fact*

Rule 42(a) provides that:

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

The purpose of Rule 42(a) "is to give the court broad discretion to decide how cases on its docket are to be tried so that the business of the court may be dispatched with expedition and economy while providing justice to the parties." Wright & Miller, 9A Fed. Prac. & Proc. Civ. § 2381 (3d ed. 2016). The Eleventh Circuit "[has] encouraged trial judges to make good use of Rule 42(a) . . . in order to expedite the trial and eliminate unnecessary repetition and confusion." *Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492, 1495 (11th Cir. 1985). Even if there are some questions that are not identical, consolidation should still be considered. *See Batazzi v. Petroleum Helicopters, Inc.*, 664 F.2d 49, 50 (5th Cir. 1981); *Central Motor Co. v. United States*, 583 F.2d 470 (10th Cir. 1978).

Common questions of law and fact abound in these cases. The same patents are at issue in both actions. Importantly, the allegedly infringing party in both cases allege that the patents-

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<sup>3</sup> *See, e.g., Shipping and Transit LLC v. Neptune Cigars, Inc.*, Case No. 2:16-cv-03836 (C.D. Cal. filed June 1, 2016). Neptune Cigar is a small, Miami-based company. [D.E. 1 & 6 in *Neptune Cigars*].

in-suit are invalid for failing to meet the requirements of 35 U.S.C. §§ 101 and 112. Triple7 has, therefore, a direct interest in the outcome of any decision made by this Court in deciding Conn's motion.<sup>4</sup>

**B. *This Court Should Exercise Its Discretion and Order Limited Consolidation***

A court has broad discretion in determining whether consolidation is practical. *See Atlantic States Legal Foundation Inc. v. Koch Refining Co.*, 681 F. Supp. 609, 615 (D. Minn. 1988). In exercising this discretion, a court should weigh the time and effort consolidation would save with any inconvenience or delay it would cause. *Hendrix*, 776 F.2d at 1495; *Huene v. United States*, 743 F.2d 703, 704 (9th Cir. 1984). *See also Kramer v. Boeing Co.*, 134 F.R.D. 256 (D. Minn. 1991).

Consolidation offers efficiency and convenience in this case. Triple7 and Conn's raise similar issues regarding the patents-in-suit. Through consolidation, this Court can decide the issue once, rather than having to address the issues on multiple occasions. Both cases are at similar stages in litigation. Consolidation will result in one order which will bind all plaintiffs and defendants, rather than requiring this Court to address the issue on multiple occasions. This will save time and avoid unnecessary costs to parties in two actions and this Court.

Consolidation will not delay the disposition of this case. In fact, it will minimize delays. Triple7 has already prepared their briefing regarding 35 U.S.C. §§ 101 and 112 and has attached it to this motion. *See* Exhibit A. Triple7 requests that this Court consolidate the actions and accept Triple7's brief for filing. Regardless of the Court's ruling on this motion, Triple7 intends to file its motion regarding invalidity under 35 U.S.C. §§ 101 and 112 as soon as possible in its case. Allowing Triple7 to instead address the issues consolidated with *Conn's* would therefore

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<sup>4</sup> In fact, a dispositive ruling on the patentability and validity of the patents-in-suit will impact cases throughout the Southern District of Florida and nationwide.

minimize delay and allow this Court to promptly resolve the issues for all parties.

**III. ALTERNATIVELY, THIS COURT SHOULD ALLOW TRIPLE7 TO FILE A BRIEF AS *AMICUS CURIAE***

Triple7 believes that this Court should order limited consolidation. Alternatively, if the Court is not inclined to grant consolidation, Triple7 requests leave to file the brief attached as Exhibit A as *amicus curiae*.

**A. *Amicus Briefs Are Favored***

District courts possess the inherent authority to accept amicus briefs. *See In re Bayshore Ford Truck Sales, Inc.*, 471 F.3d 1233, 1249 n.34 (11th Cir. 2006) (“[D]istrict courts possess the inherent authority to appoint ‘friends of the court’ to assist in their proceedings.”); *Jin v. Ministry of State Security*, 557 F. Supp. 2d 131, 136 (D.D.C. 2008) (“district courts have inherent authority to appoint or deny amici which is derived from Rule 29 of the Federal Rules of Appellate Procedure”); *United States v. Davis*, 180 F. Supp. 2d 797, 800 (E.D. La. 2001) (noting that district courts have authority to permit the filing of amicus briefs).

The standard for leave to file an amicus brief is simply whether it will assist the Court. *Neonatology Assocs., P.A. v. C.I.R.*, 293 F.3d 128, 133 (3d Cir. 2002) (Alito, J) (“[I]f a good brief is rejected, the merits panel will be deprived of a resource that might have been of assistance.”); *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1064 (7th Cir. 1997) (“An amicus brief should normally be allowed . . . when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.”); *Massachusetts Food Ass’n v. Massachusetts Alcoholic Beverages Control Comm’n*, 197 F.3d 560, 567 (1st Cir. 1999) (“[A] a court is usually delighted to hear additional arguments from able amici that will help the court toward right answers . . . .”); *see also Phillips v. AWH Corp.*, 376 F.3d 1382, 1383-84 (Fed. Cir. 2004) (“*Amicus curiae* briefs may be filed by bar

associations, trade or industry associations, government entities, and other interested parties.”).

**B. *Triple7’s Brief Will Assist the Court By Providing Detailed Reasoning Why the Patents-in-Suit Are Invalid, Showing the Broader Impact On Parties Not Otherwise Represented In Front Of This Court***

Triple7’s brief, attached as Exhibit A, provides detailed legal and factual reasoning as to why S&T’s patents are plainly invalid on their face under prevailing Supreme Court and Federal Circuit law. It shows how the patents-in-suit claim nothing more than abstract ideas. It also shows how, for claims that are governed by 35 U.S.C. § 112 (6) (recodified as § 112(f)), there is no supporting structure in the specification as required by that section, and thus the claims are invalid under 35 U.S.C. § 112(2) (recodified as § 112(b)).

The Court’s decision as to these issues is highly significant to other parties not otherwise represented in this Court. S&T has brought over 400 lawsuits relating to one or more of the patents-in-suit and served countless demand letters that results in presuit settlements. Despite serious concerns regarding the patentability of the claims made in the patents-in-suit, no court has ever addressed whether the claims meet the requirements of 35 U.S.C. §§ 101 and 112.

A decision by this Court that invalidates the claims under either section would work to collaterally estop S&T from asserting infringement. *See generally Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313 (1971) (holding that a patent owner is collaterally estopped from asserting patents that previously have been found invalid). Given the volume of litigation generated by S&T and the breadth they ascribe to their claims, such a finding would likely work to prevent hundreds of cases of patent infringement.

Numerous parties, including Triple7, have defenses and claims that would be affected by any decision in *Conn’s*. This Court would benefit from hearing from those that would be affected.

## CONCLUSION

For the reasons stated above, Triple7 requests that the Court consolidate this matter with the pending *Conn's* action for the limited purpose of determining patentability under 35 U.S.C. §§ 101 and 112. Alternatively, Triple7 requests that the attached brief be accepted as an amicus brief in the *Conn's* case in support of Conn's motion to dismiss.

Respectfully submitted,  
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and Jason W. Cugle**

**CERTIFICATE OF CONFERENCE**

Pursuant to Local Rule 7.1.A.3, undersigned counsel certifies that on July 18 and 20, 2016 counsel for Triple 7 communicated with Shipping and Transit's counsel, Jason P. Dollard, and Conn's Inc. counsel, Jennifer Olmedo-Rodriguez, prior to filing the instant Motion in an effort to resolve the issues raised herein. As of this filing, Conn's does not oppose Triple7's motion. Shipping and Transit has not responded and it is unknown whether it consents to the relief sought.

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing along with all attachments was served via CM/ECF on July 20, 2016 on all counsel or parties of record on the service list below.

By: /s/ Matthew Sarelson  
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