

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
Case No. 16-CV-80855-DMM**

TRIPLE7VAPING.COM, LLC,
and JASON W. CUGLE

Plaintiffs,

vs.

SHIPPING & TRANSIT LLC,

Defendant.

_____ /

**DECLARATION OF MATTHEW SARELSON PURSUANT TO RULE 56(d)
IN OPPOSITION TO DEFENDANT’S MOTION TO DISMISS**

I, MATTHEW SARELSON, declare and state:

1. I am an attorney duly licensed to practice law in the courts of the State of Florida, and am a member of the bar of this district. I am counsel of record to the Plaintiffs, Triple7Vaping.com, LLC and Jason W. Cugle, in this action. I am familiar with the records and proceedings in this action.

2. Shipping & Transit LLC (“Defendant”) has not filed an answer to the complaint in this case, and discovery has just begun. Defendant, however, attached two affidavits (D.E. 17 & D.E. 18-1, the “Affidavits”) reciting facts not of record in support of Defendant’s Motion to Dismiss (D.E. 16, the “Motion”). Pursuant to Rule 12(d), the Court may convert Defendant’s Motion to one for summary judgment pursuant should the Affidavits not be excluded.¹ In light of this potential, Plaintiffs are compelled to invoke their rights under Rule 56(d) to have an

¹ Plaintiffs maintain this material should be excluded and not considered, and this affidavit should not be considered a waiver of their objection to the material. Plaintiffs ask the Court not to convert the Rule 12(b)(6) motion to a motion for summary judgment but file this affidavit in an abundance of caution.

opportunity to conduct discovery to obtain “facts essential to justify its opposition” to summary judgment.

3. Plaintiffs alleged substantial facts in their Complaint that establish genuine issues as to material facts surrounding Defendant’s allegations of infringement of the four patents in suit, as well as Defendant’s failure to reasonably investigate Plaintiffs’ products and services prior to sending a demand for patent licensing.

4. Plaintiffs respectfully submit that if this Court considers Defendant’s Motion as one for summary judgment, Plaintiffs should be given the opportunity to not only test the basis of the statements made in the Affidavits, but also conduct discovery into the numerous factual allegations in Plaintiffs’ complaint.

5. Further information supporting Plaintiffs’ opposition to Defendant’s Motion is in the hands of other parties and witnesses, including Defendant’s and the Affiants. Discovery is likely to reveal additional facts that will help demonstrate that there are genuine issues of material fact that preclude granting Defendant’s Motion.

6. The evidence that Plaintiffs intend to uncover through discovery is available through several channels, as outlined below.

7. Among other things, Plaintiffs would take the deposition of Defendant’s representatives regarding their business and assertions of patent infringement, and in particular what investigation, if any, is conducted prior to sending a demand letter. Plaintiffs would seek depositions of at least Peter Sirianni, Martin Kelly Jones, and Edward Turnbull.

8. Plaintiffs would also take the deposition of Jason P. Dollard, attorney for Defendant, who has an independent duty to investigate, and who affirms in his Affidavit as to the due diligence he conducted prior to alleging Plaintiffs infringed Defendant’s patents, including

testimony regarding Mr. Dollard's knowledge and information regarding his duties as defined by the Court of Appeals for the Federal Circuit.

9. Plaintiffs would seek further written discovery seeking information regarding all activities done to research infringement prior to sending a demand letter to Plaintiffs, as well as information regarding the number of demand letters sent that included identical allegations of infringement, the steps taken to ensure allegations of infringement were not being made against those using licensed products, the list of all licensed companies, and any other information relating to Defendant's campaign of sending demand letters alleging infringement.

10. Plaintiffs would also seek document discovery regarding allegations made by Defendant in other litigation regarding the scope of its patents and claims, as well as documents relating to the prosecution of the patents in suit, which may shed light on whether Defendant has previously disclaimed a reading of the patents in suit which they assert against Plaintiffs.

11. Plaintiffs would further seek documents, testimony, and other evidence relating to Defendant's knowledge that the patents were expired, and what steps Defendant takes in order to ensure patents are not asserted against products and services that did not exist at the time the patents in suit were in force.

12. Plaintiffs would further seek documents, testimony, and other evidence relating to the claims of patent infringement alleged against the United States Government for acts carried out by the United States Postal Service. Such facts may demonstrate that Defendant knows its rights are exhausted yet chose to send its demand letter regardless.

13. Each of the topics of specific discovery outlined above is highly likely to yield further evidence of either genuinely disputed material facts, or facts in Plaintiffs favor that would result in Plaintiffs filing a motion for summary judgment. Specifically, Plaintiffs believe the

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- When tracking your package with USPS, if you encounter a "not found" error, this usually means that your package has been processed by triple7vaping.com but is not yet being tracked by the carrier U.S.P.S. Or that Stamps dot com's label system isn't as fast as U.S.P.S advanced systems. In which case try the tracking directly on the U.S.P.S web site it should be available moments after we print the label.
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- Free priority mail shipping is not typical and is under administrative discretion.
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U.S.P.S. offers speedy and reliable service at a low cost. However, they can and will occasionally make the mistake of mis-routing or losing a package.

Unfortunately these errors are out of our control and triple7vaping.com / triple7tradingco.com cannot be held liable for any shipment that is late, lost or damaged by the United States postal Service. However we will assist in tracking / locating packages lost or mis-routed through the U.S.P.S advanced tracking systems. For assistance Please call united States Postal Service toll free #1-800-ask-usps ... triple7vaping.com does not guarantee transit time. Actual transit times may vary from the estimates listed in these policies.

- Shipping fees are non-refundable as are some offers of free shipping on orders returned. (Please see return policy)
- Orders are usually processed within 24 hours of being placed SAME DAY (except Weekends and Holidays).
- triple7vaping.com does most business in the evening hours, We make 1 single guaranteed trip daily to the Post Office in the Morning hours usually 9am-11am(EST)
- All delivery issues (Shipments that are late, lost or damaged) should be addressed with your local U.S.P.S. post office.
- If your packaged is marked "delivered" and you have not received it. Please call the United States Postal Service. 1-800-ask-usps

Return policy

- triple7vaping.com carefully selects every product for Quality and Value. We carry mainly Aspire Hardware and other high end gear. We have selected these brands for there industry leading manufacturing & quality control standards. Aspire's hardware is rigorously tested for durability and consistency before being factory sealed. We have had very little or no problems with Aspire equipment malfunctions. However we do understand mistakes could be made on anything

mass produced.

- For your convenience triple7vaping.com offers a 7 day return policy on products that are NOT opened and NOT damaged. Returns must be initiated within 7 days of product delivery confirmation. No Returns on opened products after 24 hours and only on defective or broken products.
- If you receive a product that doesn't work or is considered D.O.A dead on arrival, please contact us within 24 hours of delivery confirmation to initiate a return.
- If you wish to return an item you ordered by mistake our free shipping offer will be revoked. Meaning we will refund your payment minus the actual cost of the postage we paid to ship the item to you. Cost varies by package size, weight, & destination. aprox shipping values range from 1.93\$ - 20\$ + dollars.
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- If you have ordered a product by mistake and believe your within the limits of triple7vaping.com's return policy. And you would like to return the item for a refund or exchange please call 1-877-750-7845 or Email: info@triple7vaping.com we are always here to help.
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discovery would, among other things, lead to evidence supporting Plaintiffs' factual allegations as made in the complaint. The discovery would likely confirm that many, if not all, of the salient points necessary for Plaintiffs to make their claims.

14. Attached hereto as Exhibit A is a true and correct copy of the webpage <http://triple7vaping.com/shopcontent.asp?type=policies>, as it existed on September 7, 2015 as archived by the Internet Archive's "Wayback Machine," retrieved on July 13, 2016.

I declare under penalty of perjury that the forgoing is true and correct.

Executed at Miami, Florida, this 14th day of July, 2016.

/s/ Matthew Sarelson
Matthew Sarelson