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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

COALITION FOR ICANN  
TRANSPARENCY, INC., a Delaware  
corporation

Appellant,

v.

VERISIGN, INC., a Delaware  
corporation

Appellee.

**No.: 07-16151  
(D.C. No. CV-05-04826 RMW)**

**APPELLEE'S RENEWED MOTION  
TO DISMISS APPEAL DUE  
TO APPELLANT'S LACK  
OF STANDING**

**MOTION TO DISMISS APPEAL**

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure, appellee VeriSign, Inc. (“VeriSign”) hereby moves to dismiss the appeal filed by corporate appellant Coalition for ICANN Transparency, Inc. (“CFIT”) for lack of standing on the ground that CFIT is an inactive Delaware corporation with a void charter. By operation of Delaware law, through application of Federal Rule of Civil Procedure 17(b), CFIT is deprived of the ability to bring an appeal in this Court. The motion is based on the following Memorandum, Declaration of Ronald L. Johnston, and accompanying Motion Requesting Judicial Notice.

**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS APPEAL**

**Introduction**

For the *second* time during the pendency of this appeal, due to CFIT's repeated failure to pay its corporate taxes, CFIT is an inactive corporation under Delaware law with no legal standing to pursue this appeal. CFIT's lack of standing to maintain this appeal deprives this Court of jurisdiction to rule on the appeal. Accordingly, VeriSign respectfully requests that the Court dismiss this appeal without a ruling on the merits.

VeriSign recently discovered that CFIT, a Delaware corporation, failed to pay its corporate taxes or file its Annual Report for 2007 as required on March 1, 2008, and then compounded its flouting of Delaware law by failing to pay its taxes or file its Annual Report for 2008 on March 1, 2009. CFIT's breaches of its legal obligations under Delaware law rendered CFIT not in good standing as of March 2008. Thus, CFIT lacked standing when it filed its reply brief in April 2008 *and* when it stood before this Court to argue the merits of its appeal in December 2008.

This situation is a virtual repeat of CFIT's misconduct earlier in this appeal. As this Court is aware, in December 2007, VeriSign moved to dismiss this appeal for lack of standing based on CFIT's failure to pay its corporate taxes or file its Annual Reports for 2005 and 2006. CFIT opposed this motion, arguing that it had "cured" its standing defect by reactivating its corporate status with the Delaware

Secretary of State on December 7, 2007. On February 27, 2008, the Court denied VeriSign's motion to dismiss without prejudice to VeriSign renewing its arguments before the merits panel. VeriSign subsequently raised CFIT's lack of standing in its reply papers. (*See* Reply at 10 [Filed on April 10, 2008].)

VeriSign has now discovered that CFIT's purported "cure" for its lack of standing was ephemeral. On March 1, 2008, a mere three days after denial of VeriSign's original motion to dismiss, CFIT *again* failed to pay its taxes and was deemed not in good standing by the Delaware Secretary of State. Nonetheless, CFIT continued to pursue this appeal and, indeed, brazenly trumpeted its purported "good standing" to the Court. In its reply brief filed with this Court April 10, 2008, CFIT falsely asserted it was "now in good standing under the laws of the state of its incorporation, Delaware."

It is now clear that CFIT has not been in good standing at *any* critical juncture during the course of this appeal. It was not an active corporation in good standing when it filed its Notice of Appeal on June 13, 2007, when it filed its opening brief on October 16, 2007, when it filed its reply brief in April 2007, or when it argued the merits of its appeal in December 2008. In substance, CFIT has not had standing or any right to maintain this appeal save for three short months during the nearly two-year time span this appeal has been pending. VeriSign respectfully requests that the Court end this sham, and dismiss this appeal by a

non-existent company for lack of standing. As a void corporation, CFIT is barred from pursuing this appeal, and this appeal must be dismissed. *In re Christian & Porter Aluminum Co.*, 584 F.2d 326, 331 (9th Cir. 1978).

### **Background**

The Delaware Secretary of State first declared CFIT inactive and its charter void in March 2007, due to CFIT's failure to pay its corporate taxes or file its annual reports for the years 2005 and 2006. (VeriSign's Request for Judicial Notice, Ex. A.) VeriSign immediately brought this to CFIT's and the Court's attention when it discovered this fact in December 2007. (*See* VeriSign's Motion to Dismiss Appeal Due to Appellant's Lack of Legal Capacity to Appeal ("Motion to Dismiss"), filed on December 5, 2007.) CFIT opposed VeriSign's Motion to Dismiss, arguing that it had reactivated its corporate status (albeit only after VeriSign had filed its motion), and that this alleged "cured" status should be applied retroactively to grant it standing which, admittedly, had not legally existed at the time it filed this appeal. On February 27, 2008, the Court denied VeriSign's Motion to Dismiss but did so without prejudice to VeriSign renewing its arguments before the merits panel.

VeriSign has since learned that on March 1, 2008, a mere *three days* after the Court denied VeriSign's Motion to Dismiss, CFIT *again* failed to pay its taxes and file its annual report for the year 2007. (SRJN, Ex. B); *see also* Del. Code

tit. 8 § 502. Although VeriSign accepted the Court's invitation to raise its jurisdictional arguments in its answering brief filed on March 26, 2008, it was unaware at that time of CFIT's *renewed defective* status. CFIT responded with its reply brief filed on April 10, 2008, wherein CFIT falsely asserted that "no grounds exist to dismiss the appeal" because CFIT was "now in good standing under the laws of the state of its incorporation, Delaware." (Reply at 10 [filed on April 10, 2008].)

Contrary to CFIT's blatant misrepresentation, CFIT was *not* in good standing when it filed its reply brief in April 2008. (*See* SRJN, Ex. B.) In fact, CFIT has not been in good standing at *any* critical juncture during the course of this appeal. It was not an active corporation in good standing when it filed its Notice of Appeal on June 13, 2007, when it filed its opening brief on October 16, 2007, when it filed its reply brief in April 2007, or when it stood before this Court and argued the merits of its appeal in December 2008. Indeed, there was only one less-than-three-month stint when CFIT possessed some corporate legitimacy – from December 7, 2007 to March 1, 2008. And this brief revival of its corporate status was only because VeriSign alerted the Court to CFIT's defunct corporate status, causing CFIT to "cure" the defect for purposes of opposing VeriSign's Motion to Dismiss. Of course, CFIT only "cured" its standing defect after VeriSign filed its motion; CFIT essentially ignored VeriSign's earlier, pre-filing

warning regarding CFIT's inactive status. (See Declaration of Ronald L. Johnston in support of Appellee's Motion to Dismiss Appeal ¶ 2.) CFIT's corporate charter has now again been deemed *void* and "and all powers conferred by law upon the corporation [have been] declared inoperative," as a result of CFIT's failure to meet its basic corporate obligations for the years 2007 and 2008. (Del. Code tit. 8 § 510; (see also Exhibit A).)

### Argument

Standing is a threshold question that must be resolved before proceeding to the merits of a case. *L.A. County Bar Ass'n v. Eu*, 979 F.2d 697, 700 (9th Cir.1992); see also *Warth v. Seldin*, 422 U.S. 490, 517-18 (1975) ("The rules of standing, ... are threshold determinants of the propriety of judicial intervention."). Article III standing, like other bases of jurisdiction, must be present at the *inception* of as well as *throughout* the lawsuit. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570 n. 5 (1992) (plurality opinion) ("[S]tanding is to be determined as of the commencement of suit."); see also *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64, 67 (1997) (holding that standing is an aspect of the case or controversy requirement, which must be satisfied "at all stages of review"); *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993) ("[T]he jurisdiction of the Court depends upon the state of things at the time of the action brought."). Pursuant to

Article III, “standing ... is jurisdictional and not subject to waiver.” *Lewis v. Casey*, 518 U.S. 343, 349 n. 1 (1996).

The capacity of a corporate litigant to sue in federal court is “directly controlled” by Federal Rule of Civil Procedure 17(b). *In re Christian & Porter Aluminum Co.*, 584 F.2d at 331. Rule 17(b) provides that the capacity of a corporation “to sue or be sued” is determined by the law under which the corporation was organized. Fed. R. Civ. P. 17(b)(2) (effective Dec. 1, 2007). *See also* Fed. R. Civ. P. 17(b) (effective until Dec. 1, 2007) (same); *United States v. 2.61 Acres of Land, More or Less, Situated in Mariposa County, State of Cal.*, 791 F.2d 666, 668 (9th Cir. 1985). As a Delaware corporation, appellant CFIT’s capacity to sue is governed by Delaware state law. *See* AOB at C-1 (“Corporate Disclosure Statement”); Fed. R. Civ. P. 17(b)(2).

Under Delaware law, a corporation’s failure to pay taxes owed for one year will void its corporate charter and render inoperative all powers conferred upon it by law. Del. Code Ann. tit. 8 § 510 (1994). A void charter deprives a Delaware corporation of “any standing to appeal and be heard.” *Transpolymer Indus., Inc. v. Chapel Main Corp.*, 582 A.2d 936, 1990 WL 168276, \*1 (Del. 1990); *accord, e.g., Metro. Interconnect, Inc. v. Alexander & Hamilton, Inc.*, No. Civ. A. 04-2896, 2005 WL 1431670, \*2 (E.D. La. May 26, 2005) (interpreting § 510 and citing *Transpolymer* to conclude that “all powers conferred by law upon the [Delaware]



corporation are declared inoperative, including the power to sue in court”). *Cf.* *2.61 Acres of Land*, 791 F.2d at 668 (noting that it is “well-settled that a delinquent corporation may not bring suit . . . [nor] appeal an adverse ruling.”).

Although a corporation may have the capacity to sue at the time it files a complaint, it can lose that capacity at a later date by operation of state law. 6A Wright, Miller, & Kane § 1559; *see Mather Constr. Co. v. United States*, 475 F.2d 1152, 1155 (Ct. Cl. 1973) (dismissing action brought by California corporation whose corporate status was suspended 20 days after it filed the action). Indeed, where a corporate appellant’s capacity to sue is suspended for nonpayment of taxes owed to its state of incorporation, it is “barred from pursuing an appeal of the order from the district court” in this Court. *In re Christian & Porter Aluminum Co.*, 584 F.2d at 331. An appeal from such a corporation must be dismissed. *Id.* at 332 (dismissing appeals by fourteen California corporations whose corporate powers were suspended for failing to pay California franchise taxes).

Here, CFIT certainly cannot be said to have possessed constitutional standing “at all stages of review” (*Arizonans for Official English*, 520 U.S. at 67), as it was a void corporation when it commenced this appeal, and it is a void corporation now. (*See* RFJ, Ex. A; SRJN Ex. A.) By operation of federal and Delaware law, CFIT’s defunct status deprives it of the right to sue and be sued. Standing is jurisdictional and a lack of standing precludes a ruling on the merits.

*Media Technologies Licensing, LLC v. Upper Deck Co.*, 334 F.3d 1366, 1370 (Fed. Cir. 2003) (Cal). The Court must, therefore, dismiss this appeal.

In its opposition to VeriSign's original motion to dismiss, CFIT argued that Delaware's "winding up" statute conferred the status to sue or be sued on a void corporation. Contrary to CFIT's assertion, Delaware's "winding up" statute cannot save CFIT from jurisdictional defeat, because this appeal does not fall within the ambit of winding up corporate affairs, as is required by the statute. *See* Del. C. tit. 8 § 278 ("Section 278.") "Section 278 balances two purposes, it inhibits dissolved corporations from avoiding their liabilities, and it allows corporations to wind up their business." *AmeriPride Services, Inc. v. Valley Indus. Service, Inc.* 2008 WL 5068672 at \* 4 (E.D. Cal. Nov. 25, 2008). Neither purpose would be served here. CFIT was "formed for the purpose of challenging the allegedly anticompetitive agreements and activities of VeriSign and ICANN as set forth in the [Second Amended Complaint]." (Excerpts of Record ("ER") 7.) CFIT has no other stated purpose.

CFIT cannot argue that it is not required to meet its corporate obligations because all of its activities related to this appeal are within the ambit of it "winding up" its affairs. This is clearly not the case and would permit CFIT a complete end-run around its corporate obligations. Indeed, Section 278 expressly prohibits a corporation from continuing after it has expired or dissolved "for the purpose of

continuing the business for which the corporation was organized.” *See* Del. C. tit. 8 § 278. This is exactly what CFIT is doing here. Furthermore, CFIT’s consistent disregard for its corporation obligations and its blatant misrepresentations to this Court should deprive it of the benefit of any leniency with respect to enforcement of the strict prohibition against a defunct corporation bringing lawsuits in continuation of its original business purpose.

Accordingly, CFIT’s appeal is barred and must be dismissed.

Dated: March 25, 2009

Respectfully submitted,

ARNOLD & PORTER LLP

By /s/ Angel L. Tang  
Attorneys for Appellee VeriSign, Inc.

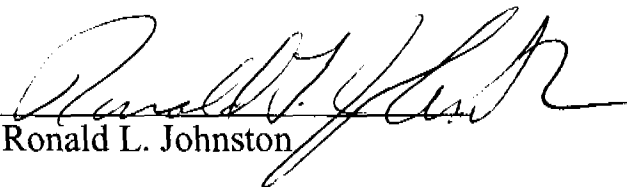
**DECLARATION OF RONALD L. JOHNSTON**

I, Ronald L. Johnston, declare:

1. I am an attorney licensed to practice in the State of California and before this Court. I am a partner of Arnold & Porter LLP, attorneys of record for appellee VeriSign, Inc. ("VeriSign"). I have been lead counsel for VeriSign in this action from its inception. I have personal knowledge of the facts stated below, and if called upon as a witness, I would testify competently to those facts.

2. On March 23, 2009, I left a voicemail for Brett Fausett of Cathcart Collins LLP, who is counsel for plaintiff Coalition for ICANN Transparency, Inc. ("CFIT") in this action. I advised Mr. Fausett that CFIT again is suspended for non-payment and that we contemplate bringing a motion to dismiss the appeal. I said that I was calling to find out their position on this matter. As of this filing, he has not returned my call.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on March ~~23~~<sup>25</sup>, 2009, at Los Angeles, California.

By   
Ronald L. Johnston

LA: 538487v2

**CERTIFICATE OF SERVICE**  
**When Not All Case Participants are Registered for the**  
**Appellate CM/ECF System**

I hereby certify that on March 25, 2009, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

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Signature: /s/ Annette Wasson