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Transparency, Inc.*

**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)**

**APPELLANT COALITION FOR
ICANN TRANSPARENCY, INC.'S
OPPOSITION TO APPELLEE'S
RENEWED MOTION TO DISMISS
APPEAL**

I. INTRODUCTION

Verisign's Motion to Dismiss is without merit and must be denied. As the conduct of this appeal and the merits of the briefs filed by the Appellant Coalition for ICANN Transparency, Inc. ("C.F.I.T.") clearly demonstrate, C.F.I.T. has every intention of pursuing its legal rights and maintaining its corporate standing to do so. Filed with this Opposition is a Certificate of Good Standing, certified by the Secretary of State of Delaware. *See*, Declaration of Bret A. Fausett in Support of Opposition to Motion to Dismiss, filed herewith, at Exhibit "B" (hereafter "Fausett Decl.") Under the law, as detailed below, good standing ends the inquiry and the present motion must be dismissed.

Verisign's overheated rhetoric – claiming that this appeal is a "sham" (Motion, at 4) and accusing counsel of "false assertions" and "blatant misrepresentations" to the Court (*Id.*, at 5) – is wholly unfounded and not reasonably grounded in the facts. As this Opposition makes clear, recordkeeping mistakes were made, such mistakes have been corrected, and Delaware law does not require corporations to forfeit substantive rights because of clerical errors. As unpleasant as the news for Verisign may be, it will have to address this case on the merits.

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II. ARGUMENT

The capacity to seek relief in the courts of the United States of America is established in Federal Rule of Civil Procedure 17(b). For corporations, this rule provides that “[c]apacity to sue or be sued is determined... (2) for a corporation, by the law under which it was organized.” Fed. R. Civ. P. 17(b)(2). Appellant C.F.I.T. is organized under the laws of the State of Delaware, a fact not in dispute. As soon as C.F.I.T. learned of the alleged filing deficiency, steps were taken to correct any deficiencies promptly, and on March 30, 2009, the State of Delaware issued a Certificate of Good Standing. Fausett Decl. at ¶5.

The reason for the lapse was a clerical error. Fausett Decl. at ¶6. Corporate addresses and contacts have been updated and steps taken to ensure future timely filings. *Id.* No rational person looking at the conduct of the present dispute, including the appellate briefs filed with this Court and the argument on the merits in San Francisco in December of last year could conclude that C.F.I.T. had an intention to dissolve itself and cease the prosecution of this lawsuit. The protection from mistakes and clerical errors, however, is precisely one of the reasons that corporations locate themselves in Delaware, which provides a clear process for correcting clerical mistakes without waiving substantive corporate rights.

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Under the law of Delaware, against which C.F.I.T.'s capacity to sue must be judged, the effect of the new certificate is retroactive. Delaware's Code of Corporations specifically provides:

Upon the filing of the certificate in accordance with §103 of this title the corporation shall be renewed and revived with the same force and effect as if its certificate of incorporation had not been forfeited or void pursuant to this title, or had not expired by limitation. Such reinstatement shall validate all contracts, acts, matters and things made, done and performed within the scope of its certificate of incorporation by the corporation, its officers and agents during the time when its certificate of incorporation was forfeited or void pursuant to this title, or after its expiration by limitation, with the same force and effect and to all intents and purposes as if the certificate of incorporation had at all times remained in full force and effect.

See, Del. Code, Title VIII, §312(e). This section of Delaware law could not be more clear. The effect of the document attached to the Fausett Declaration as Exhibit "B" is to ratify, under the law of Delaware, all acts of the corporation, including the conduct of this appeal, as though C.F.I.T.'s certificate of incorporation had never been void. This statute is dispositive of the present issue, *yet mentioned nowhere in Verisign's motion.*

Verisign ignores the crystal clear language of Title VIII §312(e) and instead rests the majority of its argument on an inapposite section of the Franchise Tax Code, Del. Code, Title VIII, §510. Importantly, C.F.I.T. is incorporated as a tax exempt non-profit public benefit corporation. It has *never* owed taxes *nor* failed to pay any tax. C.F.I.T.'s mistake under the Franchise Tax Code was a reporting

mistake, now corrected. Two cases of the Delaware Supreme Court make clear that the purpose of Title VIII, §510 is to raise revenue for the State of Delaware and that any violation of that statute “is an issue solely between the corporation and the State.” *See, Frederic Krapf & Son, Inc. v. Gorson*, 243 A.2d 713, 715, 1968 Del. LEXIS 234 (Del. 1968); *Wax v. Riverview Cemetery Co.*, 41 Del. 424, 434; 24 A.2d 431; 1942 Del. LEXIS 11434 (Del. 1968) (writing that “the Franchise Tax Act is purely a revenue measure” and holding that corporation with unpaid taxes still had legal existence and capacity to be sued). Failure to pay Delaware its annual tax can suspend a corporation’s right to do business under Title VIII, §510, but its right to prosecute legal claims is governed *by Title VIII, §278*.

In *Krapf & Son*, the Delaware Supreme Court examined the precise issue now before this Court: whether §510 or §278 governed a corporation’s right to be heard in the courts when its corporate charter had lapsed. The Court expressly rejected the argument made by Verisign here that §510 controlled, writing: “Krapf & Son also argues that it was powerless to sue Wilmington Boneless Beef once its charter had been forfeited [under §510]. Such, however, is not the case for *Del.C.*,

§278 keeps a dissolved corporation alive for a period of three years for purpose of suit....” *Krapf & Son*, 243 A.2d at 715 (emphasis added).¹

Verisign cited a single Delaware case for the expansive proposition that “a void charter deprives a Delaware corporation of ‘any standing to appeal and be heard.’” *See*, Verisign’s Renewed Motion to Dismiss, at p. 7, *citing Transpolymer Industries, Inc. v. Chapel Main Corp.*, 582 A.2D 936 (DEL. 1990). Verisign’s argument not only flies in the face of the plain language of the governing Delaware statutes (Title VIII §278 and §312(e)), but it comes out of a case holding only that a corporation cannot represent itself *pro se* in Delaware litigation, even if the corporate charter had lapsed. Verisign’s Motion ignores the case law specifically rejecting its argument here (*Krapf & Son*), and it fails to cite directly applicable Delaware statutes (§278 and §312(e)). It appears to rely wholly on a misreading of a Delaware case and out-of-state case law. None of the cases cited by Verisign from outside of Delaware are relevant, however, as C.F.I.T.’s rights under Fed. R. Civ. P. 17(b) can be measured only by Delaware law.

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¹ In same spirit as Title VIII, §312(e)’s retroactivity provision, the *Krapf & Son* Court similarly held that subsequent reinstatement of a corporate charter, as here with C.F.I.T., validates all acts done during the period of the lapsed charter: “To be sure, the performance of corporate acts following forfeiture is wrongful at the time, but the later reinstatement of the charter validates the corporate acts.” *Krapf & Son*, 243 A.2d at 715.

III. CONCLUSION

Delaware law is clear. A corporation that cures its filing and tax deficiencies is reinstated into good standing *retroactively*, and all acts of the corporation taken during the lapsed period are validated retrospectively. Title VIII, §312(e); *Krapf & Son*, 243 A.2d at 715. For purposes of Delaware law, C.F.I.T. is now, and always has been, in good standing.

Further, corporations have the right to sue for up to three years after a corporate charter has lapsed. Title VIII §278; *Krapf & Son*, 243 A.2d at 715. Under the laws of Delaware, C.F.I.T. now has, and always has had, the power to pursue its litigation against Verisign, including pursuit of this appeal. Accordingly, Verisign's motion must be denied.

DATED: April 16, 2009

Respectfully submitted,

ADORNO YOSS ALVARADO & SMITH
A Professional Corporation

By: /s/ Bret A. Fausett
Bret A. Fausett

*Attorneys for Plaintiff / Appellant
Coalition for ICANN Transparency Inc.*

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

I hereby certify that on April 16, 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 prepared, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

Courtney M. Schaberg, Esq.
Eric P. Enson, Esq.
Sean Jaquez, Esq.
Jason C. Murray, Esq.
JONES DAY
555 South Flower Street, 50th Floor
Los Angeles, CA 90071

Executed this 16th day of April, 2009 in Los Angeles, California.

/s/ Liliana R. Hernandez
[signature]

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VERISIGN, INC., a Delaware)
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Appellee.)
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**No.: 07-16151
(D.C. No. CV-05-04826 RMW)**

**DECLARATION OF BRET A.
FAUSETT IN SUPPORT OF
APPELLANT C.F.I.T.'S
OPPOSITION TO APPELLEE'S
RENEWED MOTION TO DISMISS
APPEAL**

I, Bret A. Fausett, declare:

1. I am an attorney licensed in practice in the State of California and before this Court. I am an attorney in the law firm of Adorno, Yoss, Alvarado & Smith, attorneys of record for Appellant Coalition for ICANN Transparency, Inc. (“C.F.I.T.”). I have personal knowledge of the facts stated in this Declaration, and if I were called as a witness in this matter, I could and would testify competently to these facts.

2. On or about Monday, March 23, 2009, I received a telephone call from Ronald Johnston, counsel for Appellant Verisign, Inc. Mr. Johnston left a voicemail on my answering service informing me that my client’s corporate status with the State of Delaware was designated as “inactive.” I was not previously aware of this change in designation and attempted to verify the status and, if true, alert the CFIT Board of Directors so corrective action could be taken.

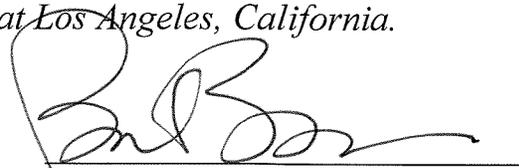
3. After investigating the corporate status of my client with the State of Delaware and discussing the status with the C.F.I.T. corporate secretary, I caused actions to be taken on C.F.I.T.’s behalf to update and correct its status with the State of Delaware.

4. A true and correct copy of the document filed by C.F.I.T. to have its standing reinstated retroactively is attached to this Declaration as Exhibit “A.”

5. On March 30, 2009, the Secretary of State for the State of Delaware certified C.F.I.T.'s corporate status as active and in good standing. A true and correct copy of the Secretary of State's Certification of Good Standing is attached as Exhibit "B."

6. The C.F.I.T Corporate Secretary informed me that the registered agent in Delaware had incorrect addresses for the corporation and so any notices were sent to an incorrect address and not forwarded. This also has been corrected. It was C.F.I.T.'s intention to keep its corporate status current and in good standing at all times, and any deficiencies were due to clerical errors and have been dutifully corrected.

I declare under penalty of perjury under the law of the State of California and the United States of America that the foregoing statements are true and correct. Signed and sworn this 2nd day of April, 2009, at Los Angeles, California.



Bret A. Fausett

EXHIBIT A

State of Delaware
Secretary of State
Division of Corporations
Delivered 04:19 PM 03/24/2009
FILED 04:19 PM 03/24/2009
SRV 090297736 - 4062041 FILE

STATE OF DELAWARE CERTIFICATE FOR RENEWAL AND REVIVAL OF CHARTER

The corporation organized under the laws of the State of Delaware, the charter of which was voided for non-payment of taxes and/or for failure to file a complete annual report, now desires to procure a restoration, renewal and revival of its charter, and hereby certifies as follows:

1. The name of the corporation is Coalition for ICANN Transparency Inc.
2. Its registered office in the State of Delaware is located at Suite 101
160 Greentree Drive (street), City of Dover
Zip Code 19904 County of Kent the
name of its registered agent is National Registered Agents, Inc.
3. The date of filing of the original Certificate of Incorporation in Delaware was November 16, 2005
4. The date when restoration, renewal, and revival of the charter of this company is to commence is the 28 day of February 2009, same being prior to the date of the expiration of the charter. This renewal and revival of the charter of this corporation is to be perpetual.
5. This corporation was duly organized and carried on the business authorized by its charter until the 1 day of March, 2009, at which time its charter became inoperative and void for non-payment of taxes and/or failure to file a complete annual report and this certificate for renewal and revival is filed by authority of the duly elected directors of the corporation in accordance with the laws of the State of Delaware.

IN TESTIMONY WHEREOF, and in compliance with the provisions of Section 312 of the General Corporation Law of the State of Delaware, as amended, providing for the renewal, extension and restoration of charters the last and acting authorized officer hereunto set his/her hand to this certificate this 24 day of March, 2009

By: 
Authorized Officer
Name: John Berryhill, Director & Sec
Print or Type

EXHIBIT B

Delaware

PAGE 1

The First State

I, JEFFREY W. BULLOCK, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE CERTIFICATE OF RENEWAL OF "COALITION FOR ICANN TRANSPARENCY INC.", FILED IN THIS OFFICE ON THE TWENTY-FOURTH DAY OF MARCH, A.D. 2009, AT 4:19 O'CLOCK P.M.

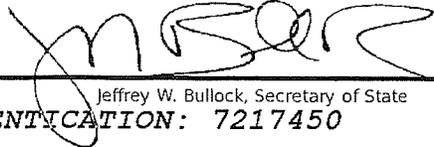
A FILED COPY OF THIS CERTIFICATE HAS BEEN FORWARDED TO THE KENT COUNTY RECORDER OF DEEDS.



4062041 8100

090297736

You may verify this certificate online
at corp.delaware.gov/authver.shtml


Jeffrey W. Bullock, Secretary of State
AUTHENTICATION: 7217450

DATE: 03-30-09

Delaware

PAGE 1

The First State

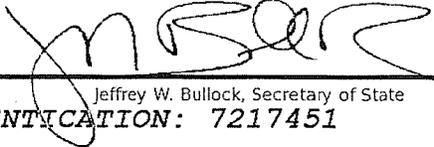
I, JEFFREY W. BULLOCK, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY "COALITION FOR ICANN TRANSPARENCY INC." IS DULY INCORPORATED UNDER THE LAWS OF THE STATE OF DELAWARE AND IS IN GOOD STANDING AND HAS A LEGAL CORPORATE EXISTENCE SO FAR AS THE RECORDS OF THIS OFFICE SHOW, AS OF THE THIRTIETH DAY OF MARCH, A.D. 2009.



4062041 8300

090297736

You may verify this certificate online
at corp.delaware.gov/authver.shtml


Jeffrey W. Bullock, Secretary of State
AUTHENTICATION: 7217451

DATE: 03-30-09

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

I hereby certify that on April 16, 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.

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Eric P. Enson, Esq.
Sean Jaquez, Esq.
Jason C. Murray, Esq.
JONES DAY
555 South Flower Street, 50th Floor
Los Angeles, CA 90071

Executed this 16th day of April, 2009 in Los Angeles, California.

/s/ Liliana R. Hernandez
[signature]