RONALD L. JOHNSTON (State Bar No. 057418)
ronald.johnston@aporter.com
JAMES S. BLACKBURN (State Bar No. 169134)
james.blackburn@aporter.com
ANGEL L. TANG (State Bar No. 205396)
angel.tang@aporter.com
ARNOLD & PORTER LLP
777 South Figueroa Street, 44th Floor
Los Angeles, California 90017-5844
Telephone: (213) 243-4000
Facsimile: (213) 243-4199

Attorneys for Defendant-Appellee VeriSign, 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)** **APPELLEE'S REPLY IN SUPPORT OF RENEWED MOTION TO DISMISS APPEAL DUE TO APPELLANT'S LACK OF STANDING**

CFIT LACKED CAPACITY TO APPEAL WHILE ITS CORPORATE CHARTER WAS VOID AND THEREFORE DID NOT FILE A TIMELY APPEAL OR PROPERLY INVOKE THIS COURT'S JURISDICTION

Throughout virtually the entire pendency of this appeal, CFIT has been a void and defunct corporation with no legal standing to file or maintain this appeal. As this Court is already well aware, CFIT has repeatedly and blatantly disregarded its corporate obligations (*e.g.*, payment of necessary fees and taxes, and filing of annual reports and other required documents), and has allowed its corporate charter to be deemed "void" and "inactive" by the State of Delaware for deficiencies occurring in 2005, 2006, 2007, and 2008. (*See* VeriSign's Renewed Motion to Dismiss ("Motion") pp. 2-6.) CFIT lacked legal capacity to act during *all* critical junctures of this appeal, including when it filed the Notice of Appeal, when it filed its Opening and Reply Briefs, and, most strikingly, on December 8, 2008, when its counsel appeared before this Court to argue the merits of this appeal. CFIT now asks the Court -- for the *third* time -- to turn a blind eye to its lack of legal standing and permit it yet another opportunity to continue to pursue this appeal.[1] Granting such relief, however, would not only reward CFIT for repeatedly flouting its corporate obligations, it would also reward CFIT for deliberately withholding

[1] CFIT requested relief for its breaches of Delaware laws on two previous occasions. First it requested such relief on December 17, 2007, in its Opposition to VeriSign's original Motion to Dismiss the Appeal Due to Appellant's Lack of Legal Capacity to Appeal (Docket No. 22). Second, it again asked to be excused again on April 10, 2008, in its Reply Brief (Docket No. 30, pp. 9-14).

critical information regarding these defects from this Court. For this reason alone, CFIT's appeal should be dismissed.

As with its previous two pleas, CFIT again claims that "clerical errors" and "record-keeping mistakes" caused the lapse of its corporate charter, and that any deficiency is now retroactively "cured" through application of certain Delaware state laws. (*See* CFIT's Opposition to Renewed Motion to Dismiss Appeal ("Opposition") pp. 2-5.) CFIT's arguments, however, completely miss the mark, as they fail to address the single, incurable factual flaw that dooms this appeal -- that CFIT lacked legal standing at the time it commenced this appeal on June 13, 2007 and therefore failed to timely invoke this Court's jurisdiction within the statutory deadline mandated by 28 U.S.C. § 2107(a) and Rule 4 of the Federal Rules of Appellate Procedure.

Nothing in CFIT's Opposition saves it from this fatal jurisdictional defect. First, CFIT argues in its Opposition that state law should be applied to retroactively confer federal jurisdiction that was lacking at the time CFIT commenced this appeal. Such an argument, however, is wholly without basis because neither 28 U.S.C. § 2107(a) nor Rule 4 permit any such exception to Congress's specific, mandatory, and jurisdictional deadlines for filing an appeal. Tellingly, CFIT does not cite to a single case or authority that demonstrates that federal jurisdiction standing can be retroactively conferred through application of

state law. Second, CFIT relies upon state provisions that are wholly inapplicable to the facts here. CFIT argues that Delaware law permits suspended corporations "to be heard" in court for three years following such suspension, for any purpose whatsoever. But, the plain language of that statute, Del. Code tit. 8 § 278, squarely contradicts CFIT's contention. Section 278 only applies to corporations that, unlike CFIT, are "winding up" their affairs and are not continuing the business for which they were formed.

A. Delaware's State Law Revivor Statute Cannot Retroactively Create Federal Appellate Jurisdiction.

Congress has established specific, mandatory, and jurisdictional deadlines for the filing of a Notice of Appeal. CFIT never had the capacity to comply with any of these deadlines and therefore failed timely to invoke this Court's jurisdiction over this appeal. Delaware state law cannot and does not retroactively confer such jurisdiction upon this Court.

CFIT does not dispute that it was a void corporation on June 13, 2007, the deadline for the filing this appeal. CFIT's subsequent attempts to revive its corporate status do not alter the fact that it lacked the power to prosecute, litigate, or file a valid appeal by the congressionally established deadline. CFIT relies upon Delaware's revivor provision, Del. Code. tit. 8 § 312, to support its claim that state law, operating through Rule 17 of the Federal Rules of Civil Procedure, can compel the retroactive conferral of federal appellate jurisdiction upon this Court.

However, concerns for separation of powers, federalism, and equity all counsel against allowing state law to retroactively validate the actions of a party whose failure to meet its corporate obligations deprived it of the power to file a timely federal appeal.

First, CFIT failed to invoke this Court's jurisdiction by the statutorily established deadline of June 13, 2007, so it cannot use Rule 17 – a purely procedural rule – to create appellate jurisdiction at this late date. CFIT was legally incapable of filing a valid Notice of Appeal on June 13, because its corporate status and legal existence were void at the time. CFIT therefore could not comply with the requirement established by 28 U.S.C. § 2107(a) that it must file its Notice of Appeal within 30 days of the district court's entry of judgment on May 14, 2007. That 30-day deadline is "mandatory and jurisdictional," because it is an assertion of "Congress's power under Article III to determine the subject matter jurisdiction of the lower federal courts...." *United States v. Sadler*, 480 F.3d 932, 936-37 (9th Cir. 2007). As a consequence, CFIT did not invoke this Court's jurisdiction within the required timeframe.

Nonetheless, CFIT asks the Court to ignore all of this and retroactively validate its Notice of Appeal by applying Delaware's revivor statute through Rule 17. *See* Fed. R. Civ. P. 17(b)(2) (determining a corporation's capacity to sue or be sued "by the law under which it was organized"). CFIT argues that Rule 17 not

only lets Delaware state law determine CFIT's present capacity to file suit, but also lets Delaware law redefine CFIT's past capacity to appeal and invoke this Court's jurisdiction by the June 13 appeals deadline. In other words, CFIT wants to use Rule 17 to create appellate jurisdiction retroactively after CFIT failed to invoke that jurisdiction when it was required to do so.

CFIT's argument fails because "Rule 17 does not affect jurisdiction. The Rule relates only to the determination of proper parties and the capacity to sue." 4 Moore's Federal Practice § 17.13[1]. It is purely "a procedural rule which does not extend or limit the subject matter jurisdiction of a federal court." *Airlines Reporting Corp. v. S and N Travel, Inc.*, 58 F.3d 857, 862 n.4 (2d Cir. 1995). *See also Sadler*, 480 F.3d at 937 ("Procedural rules created by the judiciary cannot shrink or expand the scope of federal jurisdiction."). As a procedural rule, Rule 17 cannot create jurisdiction over an appeal where none previously existed. CFIT was incapable of filing an appeal before Congress's mandatory and jurisdictional deadline passed, so no valid appeal was ever taken. Rule 17 cannot alter that fact.[2]

[2] Although this Court has looked to state law to determine whether a corporation's subsequent revival retroactively empowered its earlier filing of a federal antitrust complaint within the federal statute of limitations, *see Cmty. Elec. Serv. of Los Angeles, Inc. v. Nat'l Elec. Contractors Ass'n, Inc.*, 869 F.2d 1235 (9th Cir. 1989), *abrogated on other grounds by Townsend v. Holman Consulting Corp.*, 914 F.2d 1136 (9th Cir. 1990), the Court has also noted that "statutes of limitations are not jurisdictional," in contrast with the jurisdictional timely filing requirement of 28 U.S.C. § 2107(a). *George v. Camacho*, 119 F.3d 1393, 1399 n.14 (9th Cir. 1997) (*en banc*).

Second, federal appellate jurisdiction should not be dictated by the vagaries of a corporate appellant's state of incorporation. Under CFIT's theory of retroactive jurisdiction, Delaware state law and Rule 17 require that CFIT be deemed as having possessed the legal power on June 13 to file a timely notice of appeal that successfully conferred jurisdiction upon this Court. Yet if CFIT – or any other corporate appellant – had been incorporated in some other state whose revivor statute did not have a retroactivity provision, then the application of this other state's law would necessarily compel the opposite jurisdictional conclusion. For example, in Mississippi and the District of Columbia, corporate reinstatement following a suspension for tax delinquency does not retroactively validate acts taken during the suspension.[3] The uncertainties and potentially unequal treatment inherent in CFIT's argument further weighs against its merits.

Third, the equities alone disfavor CFIT's interpretation because of CFIT's unexcused and repeated failure to satisfy its corporate obligations. CFIT was

[3] *See* Miss. Code Ann. § 27-13-27(4) ("Upon [revival, a corporation] shall be restored to all rights of which it was deprived by such administrative dissolution or revocation of certificate of authority, and authorized to resume all activities as though said administrative dissolution or revocation of certificate of authority had not been imposed" (emphasis added)); *PLM v. E. Randle Co.*, 797 F.2d 204, 205-06 (5th Cir. 1986) (holding that Section 27-13-27(4) did not retroactively validate a breach of contract suit filed during corporate suspension, because "[t]he phrase ['resume all activities'] does not imply a retroactive dispensation from the suspension, but only suggests that the restoration of corporate powers is complete or unconditional" (emphasis in original)); D.C. St. § 29-301.90(a) (providing that upon revival, a corporation "shall have such powers, rights, duties, and obligations as it had at the time of the issuance of the proclamation with the same force and effect as to such corporation as if the proclamation had not been issued"); *Community Credit Union Services, Inc. v. Federal Exp. Services Corp.*, 534 A.2d 331, 335-36 (D.C. 1987) (holding that Section § 29-301.90(a) did not retroactively reinstate corporation or validate actions taken during suspension).

formed solely to pursue this litigation. (ER 7; ER 92 ¶ 16; ER 193 ¶ 7.) Yet never once throughout its entire existence did CFIT satisfy the minimal corporate obligations required to maintain that existence – at least, not until prompted by a motion by VeriSign. Time and time again CFIT has represented to this Court that it has "cured" its corporate deficiencies, but each time, CFIT (and only shortly after making such representations) allowed its charter to lapse and its corporate status to fall void. CFIT should not be allowed to benefit from its repeated flouting of the most basic of corporate obligations, and for its utter disregard for this Court's valuable time and resources. Simply, any further relief in favor of CFIT would be futile. As demonstrated above, there is simply no basis upon which the Court may retroactively create jurisdiction over this appeal.

B. Delaware's "Winding Up" Statute Is Inapplicable.

Notwithstanding the jurisdictional defect discussed above, which alone defeats this appeal, CFIT's arguments also fail because they rely upon a Delaware state statute that is wholly inapplicable to the facts of this appeal. Section 278 of Title 8 of the Delaware Code, a statute that exists to protect the interests of corporate creditors, empowers defunct corporations to continue to act for the purposes of "winding up" their affairs. *See* Del. Code tit. 8 § 278. In its Opposition, CFIT contends that Section 278 of Title 8 of the Delaware Code gave it the capacity to file an appeal in this litigation for reasons unrelated to "winding up," for up to three years after its corporate charter was suspended for failure to

pay corporate taxes. (*See* Opposition at 4-6.). The plain language of Section 278, however, squarely contradicts CFIT's claim. *See* Del. Code tit. 8 § 278.

In its entirety, Section 278 provides:

> All corporations, whether they expire by their own limitation or are otherwise dissolved, shall nevertheless be continued, for the term of 3 years from such expiration or dissolution or for such longer period as the Court of Chancery shall in its discretion direct, bodies corporate for the purpose of prosecuting and defending suits, whether civil, criminal or administrative, by or against them, and of enabling them gradually to settle and close their business, to dispose of and convey their property, to discharge their liabilities and to distribute to their stockholders any remaining assets, but not for the purpose of continuing the business for which the corporation was organized. With respect to any action, suit or proceeding begun by or against the corporation either prior to or within 3 years after the date of its expiration or dissolution, the action shall not abate by reason of the dissolution of the corporation; the corporation shall, solely for the purpose of such action, suit or proceeding, be continued as a body corporate beyond the 3-year period and until any judgments, orders or decrees therein shall be fully executed, without the necessity for any special direction to that effect by the Court of Chancery.

Del. Code tit. 8 § 278 (emphasis added).

On its face, this statute (1) only applies to the "winding up" of a corporation's affairs after expiration or dissolution, and (2) is wholly inapplicable to activities by which the corporation pursues its original business purpose. The Delaware Supreme Court has confirmed that Section 278's purpose is to "provide a mechanism for the assertion of claims [against defunct corporations] as part of the 'winding up' process." *City Investing Co. Liquidating Trust v. Continental Cas. Co.*, 624 A.2d 1191, 1194 (Del. 1993). Section 278's location in the Delaware

Code further confirms its limited application to "winding up" corporations. The Section is located in a subchapter entitled "Sale of Assets, Dissolution and Winding Up," and is itself entitled "Continuation of Corporation After Dissolution for Purposes of Suit and Winding Up Affairs." *See* Online Delaware Code, *Subchapter X. Sale of Assets, Dissolution and Winding Up*, http://delcode.delaware.gov/title8/c001/sc10/index.shtml.

Clearly, Section 278's extension of corporate capacity for "winding up" activities is inapplicable to CFIT and this litigation. CFIT has previously outright conceded that it has "no intention of winding up its affairs...." (Declaration of Brett A. Fausett in Support of Appellant CFIT's Opposition to Appellee's Motion to Dismiss ¶ 3 (*See* Docket No. 22).) CFIT has also conceded that this litigation is in furtherance of the business purpose for which it was formed. CFIT repeatedly alleged that it was "formed for the purpose" of bringing this litigation in order to challenge VeriSign's purportedly anticompetitive activities. (ER 92 ¶ 16; ER 193 ¶ 7; *see also* ER 7). CFIT has no other stated purpose. By definition, then, CFIT's attempt to appeal the judgment below is an act to continue the business for which it was established.[4] However, Section 278's extension of corporate capacity expressly does not apply to any action taken "for the purpose of continuing the

[4] Indeed, seeking monetary damages through a federal antitrust lawsuit is "the very antithesis of winding up." *Gamble v. Penn Valley Crude Oil Corp.*, 104 A.2d 257, 260 (Del. Ch. 1954) ("Generally speaking the acquisition of additional capital would seem to be the very antithesis of winding up.").

business for which the corporation was organized." Del. Code tit. 8 § 278. Since CFIT was organized to bring this litigation, all of CFIT's litigation activities – including CFIT's attempt to file a Notice of Appeal – are necessarily outside the scope of Section 278.[5]

CONCLUSION

CFIT lacked standing to pursue this appeal when it submitted its Notice of Appeal on June 13, 2007. Because that defect cannot be cured, this Court lacks jurisdiction over this appeal. Accordingly, VeriSign's Renewed Motion to Dismiss this Appeal should be granted.

Dated: April 23, 2009

Respectfully submitted,

ARNOLD & PORTER LLP

By s/ Angel L. Tang

Attorneys for Appellee VeriSign, Inc.

---

[5] CFIT relies on a Delaware Supreme Court opinion, *Frederick G. Krapf & Son, Inc. v. Gorson*, 243 A.2d 713 (Del. 1968), and claims that the following passage demonstrates that Section 278 gives "a corporation[] [the] right to be heard in the courts when its corporate charter had lapsed:"

> Krapf & Son [the plaintiff-creditor] also argues that it was powerless to sue Wilmington Boneless [the dissolved corporation] 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. . . .

(Opposition at 4 (quoting *Krapf & Son*, 243 A.2d at 715) (emphasis added).) However, CFIT misreads *Krapf & Son* and misconstrues its holding. The voided charter referenced in the above quote does not refer to the charter of the plaintiff Krapf & Son (or, by way of comparison, CFIT). Rather, the voided charter in question was that of Wilmington Boneless Beef, the dissolved corporation, whose president was being sued. *Krapf & Son*, 243 A.2d at 714. Thus, consistent with the goal of protecting creditors' interests, *Krapf & Son* merely stands for the narrow principle that Section 278 permits defunct corporations to be sued for the protection of creditors. The case in no way supports CFIT's broader contention that a defunct Delaware corporation may "be heard" in court to affirmatively pursue litigation for reasons unrelated to "winding up."

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

I hereby certify that on April 23, 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 3 calendar days to the following non-CM/ECF participants:

Courtney M. Schaberg JONES DAY 50th Floor 555 South Flower Street Los Angeles, CA 90071	Jason C. Murray JONES DAY 50th Floor 555 South Flower Street Los Angeles, CA 90071
Imani Gandy 42nd Floor 444 South Flower Street Los Angeles, CA 90071	Eric P. Enson 50 FL 555 South Flower Street Los Angeles, CA 90071
Sean Jaquez 50th Floor 555 South Flower Street Los Angeles, CA 90071	

Signature: /s/ Camille M. Baez