

**IN THE MATTER OF AN INDEPENDENT
REVIEW PROCESS BEFORE THE
INTERNATIONAL CENTRE FOR DISPUTE
RESOLUTION**

GCCIX, W.L.L.,)
)
 Claimant,)
)
 vs.)
)
 INTERNET CORPORATION for)
 ASSIGNED NAMES AND NUMBERS,)
)
 Respondent.)
)
 _____)

**CLAIMANT’S SUR-REPLY BRIEF
IN OPPOSITION TO ICANN’S
MOTION TO DISMISS SECOND
AMENDED REQUEST FOR
INDEPENDENT REVIEW**

April 26, 2024

Claimant hereby provides its Sur-Reply Brief in Opposition to ICANN’s Motion to Dismiss (“MTD”) the Claimant’s Second Amended Request for Independent Review (“IRP Request”). The MTD alleges just one ground for dismissal, “that GCCIX is a defunct entity that is not capable of pursuing an IRP.” (MTD, p.1).¹ However, the ICANN Bylaws specifically state: “No special pleading of a Claimant’s capacity or of the legal existence of a person that is a Claimant shall be required in the IRP proceedings.” Moreover, in fact, GCCIX is not a “defunct entity”, as it has been neither liquidated nor dissolved. So, under controlling Bahraini law it remains capable of pursuing any and all legal claims that it may have, in any forum and for any purpose.

I. STANDARD OF REVIEW

ICANN does not dispute, and thus admits, that to the extent there is any doubt on this question of Claimant’s standing, it must be resolved in favor of GCCIX. Where standing is raised in connection with a motion to dismiss, the panel is to “accept as true all material allegations of the complaint, and . . . construe the complaint in favor of the complaining party.” See, e.g., *Levine v. Vilsack*, 587 F.3d 986, 991 (9th Cir. 2009) (citing *Thomas v. Mundell*, 572 F.3d 756, 760 (9th Cir. 2009) (quoting *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975))).

Here, the Claimant’s IRP Request states at p.4: “Claimant GCCIX is a company organized under the laws of Bahrain, which is the sole applicant to ICANN to operate the .GCC

¹ In its Reply Brief, ICANN doubles down on its fanciful argument that GCCIX could not, if it prevails in this IRP, execute a Registry Agreement because it is defunct. Since GCCIX is not defunct, that argument fails. It also ignores the stated Purpose of the IRP to make ICANN accountable to its community, ignores that Claimant’s operational status is irrelevant in this IRP, and ignores that GCCIX in any event still has ample time to restore its corporate status to ‘Active’ before ICANN awards a contract. Claimant expounds upon these points, *infra*.

generic top-level domain.” The parties vigorously dispute the meaning and impact of Bahraini law as to Claimant’s corporate status, with two experts providing opposite views of the ultimate question before them: can GCCIX maintain this litigation even while it is in “Deleted by Law” status? Surely, ICANN and its expert do not remove any doubt as to this question, in light of Claimant’s learned expert’s contrary opinion. In any event, the ICANN Bylaws specifically obliterate ICANN’s argument.

II. ICANN BYLAWS FORECLOSE ICANN’S ARGUMENT

ICANN Bylaws state that “ICANN shall be accountable to the community for operating in accordance with the Articles of Incorporation and these Bylaws.” (Bylaws, Sec. 4.1 PURPOSE). For the IRP, the term “Claimant” is defined as broadly as possible as “any legal or natural person, group, or entity ... that has been materially affected by a Dispute. To be materially affected by a Dispute, the Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation.” (Bylaws, Sec. 4.1(b)(i)). There is no requirement that any claimant be a “legal ... entity” as ICANN maintains. (Reply, #9). Claimant could be any “legal or natural person” or any “group, or entity”, even if such person, group or entity is not a formal legal entity.

ICANN offers only a weak, misleading and circular rebuttal at Reply, #12. ICANN implies falsely that this Bylaw is limited to pleading of “legal capacity in the initial IRP filing.” But the Bylaw states: “No special pleading of a Claimant's capacity or of the legal existence of a person that is a Claimant shall be required in the IRP proceedings.” (Bylaws, Sec. 4.3(b)(i)(B) (emphasis added)). That is not limited to “the initial IRP filing” as ICANN states, but instead it says that no such pleading shall be required “in the IRP proceedings” – e.g., at any point in these proceedings.

ICANN seeks to dismiss this case based on Claimant’s alleged lack of legal capacity, but ICANN’s own Bylaws do not require that a claimant be a “legal entity” since a claimant can be *any* “legal or natural person, group or entity”. And indeed, the Bylaws clearly state that claimants are not required to plead – much less prove – legal capacity at any point in an IRP proceeding. The Bylaws only require that a claimant alleges to have suffered injury, and ICANN does not dispute that this Claimant has made many such allegations here. At this stage of the proceeding, all of those allegations must be accepted as true and in the light most favorable to Claimant. ICANN argues that “[e]ven if GCCIX suffered some type of harm, GCCIX is not a proper IRP Claimant.” (Reply, #13.). But this ignores the plain text of ICANN Bylaws, which define a Claimant as any person, group or entity who is materially affected by a Dispute.

ICANN further neglects to address that its own Bylaws further define the only circumstance by which standing may be denied; namely, “if the IRP Panel ... concludes based on evidence submitted to it that the Claimant does not fairly or adequately represent the interests of those on whose behalf the Claimant purports to act.” Here, the Claimant GCCIX – regardless of its current corporate status – purports to act on behalf of itself and its shareholders, as well as the broader ICANN community which has specific interest in this case. ICANN presents no evidence or even any argument to the contrary, and thus cannot successfully deny GCCIX standing in this Dispute.

Moreover, ICANN does not address Claimant’s further argument about the Purpose of the IRP, which further eviscerates ICANN’s flimsy basis for its MTD. (Opp., p.3). A recent IRP

panel has confirmed that the Bylaws standing provisions must be analyzed in light of the broader purposes of the IRP.²

29. The IRP is a creation of ICANN's Bylaws. ICANN has established its own special rules for standing in those Bylaws. Accordingly, in deciding ICANN's motion, the Panel has referred primarily to the Bylaws in rendering this decision—including not only the provision specifically addressing standing, but also the overall accountability regime established in the Bylaws and the role of IRP proceedings within that regime. ...

40. Notably, the Bylaws provide that "[t]his Section 4.3 [concerning IRPs] shall be construed, implemented, and administered in a manner consistent with [the foregoing] Purposes of the IRP." This means that the standing requirement in Section 4.3 ... must also be construed and implemented in a manner consistent with those purposes. ...

This Dispute stems from ICANN behavior beginning in 2013, many years before there became any ambiguity about GCCIX' corporate status in 2018. Had ICANN acted in good faith from the beginning, rather than ignoring GCCIX for more than seven years during the so-called, sham "Cooperative Engagement Process", then this issue never would have arisen. ICANN cannot be allowed to escape accountability now – to its broad community, or to this Claimant -- for its actions and inaction then (and over such a long period of time), based on later developments and technicalities as to Claimant's corporate status. That not only would ignore the Bylaws which specifically state that a claimant's legal capacity shall not be made at issue in an IRP, but also it would eviscerate the entire stated Purpose of the IRP, and leave ICANN wholly unaccountable for its egregious, bad faith actions as alleged.

The ICANN Bylaws confirm that GCCIX is a proper Claimant in this IRP, regardless of any question as to its legal corporate status, particularly in light of the clear Purpose of the IRP to make ICANN accountable to its community.

² Namecheap v. ICANN, Proc. Order No. 8, (<https://www.icann.org/en/system/files/files/irp-namecheap-procedural-order-8-10mar21-en.pdf>).

III. GCCIX IS NOT DEFUNCT -- SO IT MAINTAINS FULL RIGHTS TO CONTRACT, OPERATE, AND LITIGATE ANY CLAIMS IN ANY FORUM

In its Motion and Reply, ICANN argues that GCCIX is “defunct” such that it is not currently capable to execute a Registry Agreement, operate a TLD registry, or litigate anything other than a debt-collection lawsuit in Bahrain. The notion that GCCIX is defunct is contradicted by ICANN’s own expert, who acknowledges that “Appeal No. 349 of 2012 is “good law” in the Kingdom of Bahrain.” (Al Ali Reply Decl., #6). She further states (*Id.*, #4) that this decision:

stands only for the proposition that a company in liquidation retains a “legal personality” to the extent necessary to “carry out the liquidation.” Put simply, Appeal No. 349 establishes that a company maintains the right to seek to recover assets while it is in the process of dissolving.

Thus, Ms. Al Ali acknowledges that GCCIX still retains a “legal personality” and at least can sue “to recover assets”.³ Clearly, she admits that GCCIX is not “defunct” as ICANN asserts.

Moreover, if GCCIX retains its legal personality and maintains the right to recover assets, then it follows that GCCIX can maintain this IRP seeking to hold ICANN accountable for destroying the value of a core GCCIX asset – its application contract with ICANN. Mr. Sayyar has repeatedly and clearly stated that GCCIX retains full operational and legal rights unless and until it is fully liquidated and dissolved. (Opp., p.4-5; Sayyar Decl.). That is based on the Court of Cassation ruling: “[a company] does not cease until its liquidation is completed and retains it to the extent necessary to carry out the liquidation actions, *including recovering the company’s rights from others.*” (Emphasis added). That opinion does not limit the scope of possible

³ Ms. Al Ali has changed her opinion in the face of Mr. Sayyar’s Declaration and cited authorities, as in her first Declaration (at #24) she had opined “without legal personality, GCCIX may not take part in legal disputes”.

litigation to “recover assets” but is broader and encompasses any “rights” as Mr. Sayyar has clearly opined. That must include GCCIX’ right to seek to hold ICANN accountable in this IRP.

Indeed, Mr. Sayyar originally opined that “*deleted by law is a status [that] does not affect in any aspect the company’s rights and contract and its abilities to gain such rights.*” Then, he reiterated in his sworn Opposition Declaration (#2): “GCCIX maintains all rights to litigate against any party.” He maintains that position despite Ms. Al Ali’s contrary opinion based on the purported “three-year rule”.⁴ Previously, he had testified that the “three-year rule” is not even a legitimate “implementing regulation” because it is inconsistent with higher Bahraini legal authorities; namely, the Court of Cassation and the Bahraini law (Article 13). (Sayyar Decl. dated Mar. 15, 2024, #12-13, Exh. B). He reiterates this again now in his Sur-Reply Declaration submitted herewith, #2 and #3, Mr. Sayyar states:

2. GCCIX maintains full and unfettered rights to litigate against any party, as to any claim, in any court or before any tribunal anywhere in the world. Moreover, GCCIX maintains full and unfettered rights to commercially operate in Bahrain or anywhere in the world. Nothing in the Court of Cassation opinion or the Bahraini law limits a “deleted by law” company from litigating or operating to its fullest extent, unless and until the company is fully liquidated and dissolved. ...

3. The “three-year rule” cited by Ms. Al Ali is not a legitimate “implementing regulation” because it is inconsistent with higher Bahraini legal authorities; namely, the Court of Cassation and the Bahraini law (Article 13).

Given that any and all doubt must be resolved in favor of Claimant, it should not be possible for this Panel to side with ICANN on this issue, particularly in light of, 1) ICANN’s Bylaws and prior IRP precedents relating to IRP standing, 2) Mr. Sayyar’s opinions (including his specific refutation of Ms. Al Ali’s opinion, on four separate grounds), and 3) the clear and

⁴ Ms. Al Ali states in #9 of her Reply Declaration that she contacted MOIC and they “confirmed” the three-year rule. But this is unsubstantiated hearsay and lacks critical detail as to who she spoke with, what authority that person has, what she said to them, and what exactly they said. Therefore, this testimony cannot be given any credence.

controlling opinion of the Court of Cassation. Since GCCIX is neither liquidated nor dissolved, it maintains full rights to contract, operate and litigate any claims in any forum.

IV. GCCIX MAINTAINS THE ABILITY TO OPERATE, BUT THAT IS IRRELEVANT IN THIS IRP SEEKING ICANN ACCOUNTABILITY

ICANN’s arguments as to standing under ICANN Bylaws and the Bahraini law cannot succeed, so ICANN relies on an alternative argument that the case must be dismissed because it somehow “lacks substance” because GCCIX “is not permitted to engage in commercial activities and therefore cannot operate a gTLD.” (Reply, Sec. II). This argument fails for several reasons.

First, ICANN relies solely on Ms. Al Ali’s opinion that GCCIX is not permitted to engage in commercial activities while it is ‘deleted by law’. But that opinion is directly contradicted by Mr. Sayyar’s opinion, discussed *supra*. He now further states that he has represented another entity that continued to operate while it was in “deleted by law” status, and that he personally restored that entity’s “active” status even though it had been “deleted by law” more than three years prior. (Sayyar Sur-Reply Decl., #4). Since any doubt must be resolved in favor of Claimant, it should be impossible for the Panel to credit Ms. Al Ali’s opinion over Mr. Sayyar’s.

Second, ICANN merely hypothesizes as to several things that may or may not ever happen. ICANN speculates not only that Claimant will prevail in this IRP, but then that ICANN of its own volition would decide to award the .GCC gTLD Registry Agreement to Claimant. Only at that point, at least a year or two from now, could it possibly be relevant whether Claimant is able to conduct commercial activities *at that future time*. But anyway, that is beside the point in this IRP, which only seeks to hold ICANN accountable for actions and inactions *in the past*. The Claimant’s IRP Request alleges a great deal of “substance” as to those actions and inactions, and how ICANN thus allegedly violated its Bylaws. ICANN does not argue

otherwise. ICANN merely sets up a strawman argument about things that may occur in the future but have no relevance to the IRP now.

Third, even assuming *arguendo* that Ms. Al Ali is correct that GCCIX currently is restricted from commercial operations, there remains ample time for GCCIX to restore its active corporate status. Mr. Sayyar testifies that he has regained active status from the MOIC for another “Deleted by Law” company, even more than three years after the deletion date. (Sayyar Sur-Reply Decl., #4). Mr. Sayyar continues to diligently pursue Claimant’s efforts in Bahrain to restore its corporate status and expects that status to be ‘Active’ long before ICANN ever awards a Registry Agreement to GCCIX. (*Id.*, #5).

Ms. Al Ali did not address the hierarchy of Bahraini legal authorities in either of her Declarations, instead merely arguing in her latest opinion that “GCCIX’s ‘legal personality’ under Bahraini law is not at issue here; rather, the issue is whether GCCIX has the ability to operate in the Kingdom of Bahrain, which it does not.” (Al Ali Decl., #4). This differs from her original Declaration, which focused on Claimant’s alleged lack of legal personality in Bahrain. (Al Ali Decl., #24 (“without legal personality, GCCIX may not take part in legal disputes”).) Regardless, the issue here is Claimant’s standing to maintain this IRP. Whether GCCIX currently has the ability to operate is not at issue in this IRP, and so ought not be at issue in this Motion.

V. ICANN HAS WAIVED, ACQUIESCED AND/OR IS EQUITABLY ESTOPPED FROM DENYING CLAIMANT’S STANDING NOW

ICANN acknowledges that GCCIX has been “Deleted by Law” since 2018. This IRP was brought in June 2021. Since then, ICANN has caused GCCIX to spend very large amounts of time and money to fight ICANN on many different preliminary and procedural issues, without ever raising this issue until extremely late in these IRP proceedings. ICANN first forced an

Emergency Panelist to decide if Claimant’s IRP Request should be redacted, forcing Claimant to file an Amended IRP Request. Then, ICANN forced the IRP Panel to decide whether the IRP should be stayed while ICANN tried to remedy some of Claimant’s IRP claims. Then, ICANN engaged in discovery requests, responses, document production, and discovery disputes for many months. Then, only after all of that was resolved did ICANN file its Motion to Dismiss due to alleged lack of standing.

By litigating this matter for so long, forcing GCCIX to do the same, ICANN at this point has waived, acquiesced and/or is equitably estopped from asserting lack of standing at this late date.⁵ In *Thompson*, the Zoning Hearing Board “held a hearing on the landowner's variance requests, at which the Board granted [Edwin R.] Thompson party status without any objection by [the landowner].” *Id.* at 624. “Thompson appealed [the Board's decision] to the trial court, and the landowner filed a motion to quash the appeal, arguing that Thompson lacked standing.” *Id.* “[T]he trial court denied [the landowner's] motion to quash, reasoning that [the landowner] waived any challenge to Thompson's standing by failing to object” at the initial hearing. *Id.* The Commonwealth Court affirmed the trial court's denial. *Id.* at 625.

⁵ See, e.g., *In re Condemnation by Urban Redevelopment Auth. of Pittsburgh*, 913 A.2d 178, 181 n.6 (Pa. 2006) (“Unlike the federal courts, where standing is a nonwaivable jurisdictional issue, the courts of this Commonwealth view the issue of standing as nonjurisdictional and waivable.”); *E. Allen Reeves, Inc. v. Old York, LLC*, 293 A.3d 284, 292 (Pa. Super. 2023) (claim that contractor lacked standing to sue on contract was waived where it was not raised in petition to vacate or modify arbitration award: “in Pennsylvania, whether a party has standing to maintain an action is not a jurisdictional question. Thus, an issue relating to standing is subject to waiver.”); *In re Estate of Brown*, 30 A.3d 1200, 1204 (Pa. Super. 2011) (citation omitted) (finding the issue of standing may be waived “if not objected to at the earliest possible opportunity”), citing and quoting, *Thompson v. Zoning Hearing Bd. of Horsham Twp.*, 963 A.2d 622, 625 n. 6 (Pa. Commw. 2009).

In this case, there were several motions, hearings and conferences long before ICANN raised this issue. By waiting so long and causing so much expense to GCCIX already, ICANN must not be allowed to assert lack of standing now.

VI. CONCLUSION

For all of the foregoing reasons, ICANN's Motion to Dismiss must be denied.

Respectfully submitted,

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