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7 SUPERIOR COURT FOR THE STATE OF CALIFORNIA
8 COUNTY OF SAN FRANCISCO
9 UNLIMITED JURISDICTION
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11 CORPORATE CONCEPTS,

12 Plaintiff

13 v.

14 INTERNET CORPORATION FOR
15 ASSIGNED NAMES AND NUMBERS;
and DOES 1-10

16 Defendants

Case No.: CGC-12-518251

**PLAINTIFF CORPORATE CONCEPTS'
OPPOSITION TO DEMURRER**

Date: June 1, 2012
Time: 9:30 a.m.
Dept: 302

Complaint Filed: February 14, 2012
Trial Date: Unassigned

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21 **INTRODUCTION**

22 Defendant Internet Corporation for Assigned Names and Numbers (“ICANN”) contends
23 that Plaintiff has not pled and cannot allege sufficient facts for any cause of action. To support its
24 argument, Defendant ignores the legal standard governing demurrers, quotes selectively from the
25 Complaint, and disregards inconvenient facts. Despite Defendant’s attempts to reinterpret
26 California law and overlook the Complaint, its Demurrer is without merit.

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LEGAL ARGUMENT

Judicial policy favors resolving cases on their merits rather than through technical challenges to the pleadings. A demurrer raises issues of law, not fact, regarding the opposing party’s pleading. *Donabedian v. Mercury Ins. Co.*, 116 Cal. App. 4th 968, 994 (Cal. Ct. App. 2004). A court is to assume all facts pled in the complaint to be true and may not consider facts asserted in memorandum supporting demurrer. *Afuso v. U.S. Fid. & Guar. Co., Inc.*, 169 Cal. App. 3d 859, 862 (Cal. Ct. App. 1985); *Blank v. Kirwan*, 39 Cal. 3d 311, 318 (Cal. 1985). “The existence of an agency relationship is a factual question for the trier of fact Only when the essential facts are not in conflict will an agency determination be made a matter of law.” *Garlock Sealing Technologies, LLC v. Nak Sealing Technologies Corp.*, 148 Cal. App 4th 937, 965 (Cal. Ct. App. 2007) (citing *Violette v. Shoup*, (1993) 16 Cal. App. 4th 611, 619 (Cal. Ct. App. 1993).

I. Defendant’s Own Legal Standard and Arguments Support That Ms. Roger Was ICANN’s Agent, or in the Alternative, That a Question Of Fact Exists as to Agency and Negligent Misrepresentation.

As stated in ICANN’s Demurrer and Memorandum in Support Thereof, the Court is to treat ICANN as admitting all material facts pled. As an initial matter, the First Amended Complaint in this matter alleges Ms. Roger was ICANN’s agent.

An agent is an individual who represents a principal in dealings with a third party. *Jacoves v. United Merchandising Corp.*, 9 Cal. App. 4th 88, 103 (Cal. Ct. App. 1992); CIV. CODE § 2295. When a principal intentionally, or by want of ordinary care, causes a third party to believe another is an agent, then the principal establishes an ostensible agency. *Id.*; CIV. CODE §§ 2300, 2317. Notably, an ostensible agency may be created by the silence of the principal: “A principal is . . . liable when the principal knows the agent holds . . . herself out as clothed with certain authority and remains silent.” *Id.*; *see also Leavens v. Pinkham & McKevitt* 164 Cal. 242, 247-48 (1912); *Preis v. Am. Indem. Co.* 220 Cal. App. 3d 752, 761(Cal Ct. App. 1990). Scope and course of agency are fact-based inquiries. *Perez v. Van Groningen & Sons, Inc.*, 41 Cal. 3d 962, 968 (Cal. 1986).

1 Defendant conveniently ignores the facts supporting ostensible agency in this case. Those
2 facts are:

- 3 • On November 21, 2010, Annalisa Roger identified herself to Plaintiff as ICANN’s agent
4 for purposes of planning the San Francisco event. (Compl. ¶ 8.)
- 5 • On December 4, 2010, Ms. Roger told Plaintiff that Corporate Concepts was hired to plan
6 the event. (Compl. ¶ 10.)
- 7 • On December 8, 2010, Ms. Roger emailed Plaintiff, stating “ICANN has asked the San
8 Francisco Bay Internet Society to organize the March 16th GALA dinner. We are
9 working with *our* event planner called Corporate Concepts.” (Compl., ¶ 11 (*emphasis*
10 *added*).)
- 11 • The December 8, 2010, email was copied to ICANN’s Senior Director, Meeting and
12 Language Services. (Compl., ¶ 11.)

13 Thus, within the span of two weeks, Plaintiff was told Ms. Roger represented ICANN and that
14 ICANN had agreed to hire Corporate Concepts, and at least one email confirming the arrangement
15 included ICANN as a recipient. Ms. Tonnesen therefore reasonably relied on ICANN’s silence in
16 the face of Ms. Roger’s representations, concluding that Ms. Roger was ICANN’s agent and that
17 ICANN had hired Corporate Concepts’. Based on that understanding, Ms. Tonnesen blocked out
18 January through March 2011 to plan the event. (Compl. ¶ 12.)

19 Moreover, as the Complaint alleges, ICANN knew the time frame to coordinate the gala
20 was short. Furthermore, ICANN received an invoice for Plaintiff’s work for more over \$200,000
21 on January 6, 2011. (Compl. ¶ 13 and Exhibit B.) Yet Defendant unreasonably waited to
22 inform Ms. Tonnesen until she completed two months of planning and work—one month remained
23 before Defendant’s event—that Corporate Concepts’ would in fact not be paid for its work and
24 that Ms. Roger was not their agent, despite the fact that Defendant would be using Corporate
25 Concepts’ Union Square proposal for the event. ICANN’s silence in response to Ms. Roger’s
26 December 8, 2010 email and Corporate Concepts January 11, 2011 invoice is sufficient to
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1 establish an ostensible agency and justified reliance both for Plaintiff's agency and negligent
2 misrepresentation claims or, at the very least, to create questions of fact regarding those issues.

3 **II. Defendant Disregards Inconvenient Facts In the Complaint That Plaintiff Properly**
4 **Pleaded for a Breach of Contract Cause of Action.**

5 Additionally, Defendant claims the December 4, 2010 email does not constitute a valid
6 contract because of insufficient certainty. Uncertainty is a disfavored argument for demurrer.
7 "A demurrer for uncertainty is strictly construed, even where a complaint is in some respects
8 uncertain, because ambiguities can be clarified under modern discovery procedures." *Khoury v.*
9 *Maly's of Cal., Inc.*, 14 Cal. App. 4th 612, 615 (Cal. Ct. App. 1993) (citing 5 Witkin, CAL. PRO.
10 PLEADING, § 927, (3d ed. 1985); Weil & Brown et al., CAL. PRAC. GUIDE: CIV. PRO. BEFORE
11 TRIAL § 7:85 (The Rutter Group 2011)). The California Supreme Court and several appellate
12 courts have ruled that a plaintiff need only plead the existence and legal effect of a contract, and
13 need not recite or provide the exact terms. *Constr. Protective Serv., Inc. v. TIG Specialty Ins. Co.*,
14 29 Cal. 4th 189, 198-99 (Cal. 2002) ("In an action based on a written contract, a plaintiff may
15 plead the legal effect of the contract rather than its precise language."); *Perry v. Robertson*, 201
16 Cal. App. 3d 333, 341 (Cal. Ct. App. 1988) ("a written contract can also be pleaded by alleging the
17 making and the substance of the relevant terms." (citing 4 Witkin, CAL. PRO. §§ 467-68);
18 *Hillsman v. Sutter Cmty. Hosp.*, 153 Cal. App. 3d 743, 749-50 (Cal. Ct. App. 1984) ("Ordinarily a
19 written contract is sufficiently pleaded if it is set out in full or its terms alleged according to their
20 legal effect.").

21 Defendant's argument that the December 4, 2010 email is too uncertain to constitute the
22 creation of a contract raises questions of fact, not law, regarding the contract's creation. Plaintiff
23 alleged the terms of the contract sufficiently in the Complaint for Defendant to respond:

24 As of December 4, 2010, Plaintiff and Defendant entered into a contract, which was
25 reduced to writing in a series of emails and a written contract dated January 6, 2011.
26 The written contract specifies that Plaintiff will perform certain services on behalf
27 of ICANN in preparation for ICANN's March 16, 2011 gala in San Francisco. In
28 exchange, ICANN was obligated to pay Plaintiff a non-refundable "good faith
deposit" of \$40,000.00.

1 (Compl. ¶24.) The “certain services” that were to be performed were detailed in additional
2 emails and in Plaintiff’s invoice to ICANN. (Compl. ¶¶ 17, 18, Exhs. A, B.) California
3 pleading standards are not nearly as restrictive as Defendant portrays and Plaintiff’s Complaint
4 properly pleaded its breach of contract cause of action. *Constr. Protective Serv.*, 29 Cal. 4th at
5 198-99. Defendant’s demurrer cannot raise issues of fact and successfully challenge the opposing
6 party’s pleading. *Donabedian*, 116 Cal. App. 4th at 994. Defendant’s misrepresentation of
7 Plaintiff’s Complaint aside, the Complaint and discovery will clarify any uncertainty regarding
8 Defendant’s contractual obligations towards Plaintiff.

9 Plaintiff need not attach a contract to the complaint or cite its contents verbatim to
10 withstand Defendant’s demurrer. *Constr. Protective Serv.*, 29 Cal. 4th at 198-99. Therefore,
11 Plaintiff properly pleaded the general terms in its Complaint and this Court should not find the
12 Complaint uncertain to a level granting demurrer.

13 **III. Plaintiff Cause of Action For Goods And Services Rendered Withstands Defendant’s**
14 **Demurrer When Facts Of Any Cause of Action Are Alleged.**

15 Defendants demurer against Plaintiff’s common count for goods and services rendered.
16 Any valid cause of action overcomes demurrer. Weil & Brown et al., CAL. PRAC. GUIDE: CIV.
17 PRO. BEFORE TRIAL § 7:41 (The Rutter Group 2011). When the essential facts of any cause of
18 action are alleged, then the complaint is good against a general demurrer. *Quelimane Co., Inc. v.*
19 *Stewart Title Guar. Co.*, 19th Cal. 4th 26, 38-39 (Cal. 1998); *Sheehan v. San Francisco 49ers, Ltd.*,
20 45 Cal. 4th 992, 998 (Cal. 2009).

21 Defendant’s demurrer to Plaintiff’s common count for goods and services rendered is based
22 on the selective interpretation of facts described above. As a result, Defendant continues to
23 highlight issues of fact to be decided by the trier of fact and not issues of law needed to sustain a
24 demurrer. The Court’s denial of Defendant’s demurrer is appropriate

25 **CONCLUSION**

26 As described above, the Complaint in this matter is detailed and complete. Defendant’s
27 reinterpretation of past events creates clear issues of fact that should be decided on their merits

1 rather than inappropriate technical challenges to the pleadings. Accordingly, this Court should
2 overrule Defendant's demurrer.

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4 Dated: May 18, 2012

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