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12 NAMES AND NUMBERS

13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
14 **COUNTY OF SAN FRANCISCO**
15 **(UNLIMITED JURISDICTION)**

16 CORPORATE CONCEPTS,
17 Plaintiff,
18 v.
19 INTERNET CORPORATION FOR
20 ASSIGNED NAMES AND NUMBERS; and
21 DOES 1-10,
22 Defendants.

CASE NO. CGC-12-518251

**INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS'
NOTICE OF DEMURRER AND
DEMURRER TO FIRST AMENDED
COMPLAINT; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

[Proposed Order Filed Concurrently
Herewith]

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

First Amended Complaint Filed:
April 5, 2012

ENDORSED
FILED
Superior Court of California
County of San Francisco

MAY 04 2012

CLERK OF THE COURT
BY: MICHAEL RAY RAY
Deputy Clerk

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TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:


PLEASE TAKE NOTICE THAT, on June 1, 2012, at 9:30 a.m., or as soon thereafter as counsel may be heard, in Department 302 of the above-entitled Court, located at 400 McAllister Street, San Francisco, California, 94102, Defendant Internet Corporation for Assigned Names and Numbers will and hereby does generally demur to the First Amended Complaint of Plaintiff Corporate Concepts.

The Demurrer is made pursuant to Code of Civil Procedure section 430.10, subdivision (e) on the grounds that the allegations contained in Corporate Concepts' Breach of Written Contract claim (First Cause of Action), Breach of Implied Contract claim (Second Cause of Action), Goods and Services Rendered claim (Third Cause of Action) and Negligent Misrepresentation claim (Fourth Cause of Action) fail to state facts sufficient to constitute causes of action.

This Demurrer is based on this Notice of Demurrer, the attached Demurrer, the attached Memorandum of Points and Authorities in support thereof, all records and proceedings in this action, and on such other and further matter as may be presented to the Court in connection with the hearing on this Demurrer.

Dated: May 4, 2012

JONES DAY

By: 
Kate Wallace

Attorneys for Defendant
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

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DEMURRER

Defendant Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby demurs to Plaintiff Corporate Concepts’ (“Plaintiff”) First Amended Complaint on each of the following grounds:

DEMURRER TO THE FIRST CAUSE OF ACTION

1. Plaintiff’s purported First Cause of Action, alleging a breach of written contract, fails to state facts sufficient to constitute a cause of action against Defendant ICANN, pursuant to California Code of Civil Procedure section 430.10, subdivision (e).

DEMURRER TO THE SECOND CAUSE OF ACTION

2. Plaintiff’s purported Second Cause of Action, alleging a breach of implied contract, fails to state facts sufficient to constitute a cause of action against Defendant ICANN, pursuant to California Code of Civil Procedure section 430.10, subdivision (e).

DEMURRER TO THE THIRD CAUSE OF ACTION

3. Plaintiff’s purported Third Cause of Action, alleging goods and services rendered, fails to state facts sufficient to constitute a cause of action against Defendant ICANN, pursuant to California Code of Civil Procedure section 430.10, subdivision (e).

DEMURRER TO THE FOURTH CAUSE OF ACTION

4. Plaintiff’s purported Fourth Cause of Action, alleging negligent misrepresentation, fails to state facts sufficient to constitute a cause of action against Defendant ICANN, pursuant to California Code of Civil Procedure section 430.10, subdivision (e).

WHEREFORE, Defendant ICANN prays that its Demurrer to each cause of action in Plaintiff’s First Amended Complaint be sustained without leave to amend.

Dated: May 4, 2012

JONES DAY

By: 
Kate Wallace

Attorneys for Defendant
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 ICANN did not enter into a contract with Corporate Concepts. Corporate Concepts has
4 not and cannot allege otherwise. Corporate Concepts tries to create a “contract” out of a series of
5 communications it had with a third party representing a separate organization—not ICANN.
6 There are no facts alleged—nor can they be—establishing that the third party was ICANN’s
7 agent. Absent an agency relationship, no facts can support a breach of contract claim against
8 ICANN. ICANN therefore requests that this Court sustain its demurrer without leave to amend.¹

9 Specifically, Corporate Concepts’ (“Plaintiff”) lawsuit against Defendant Internet
10 Corporation for Assigned Names and Numbers (“ICANN”) for breach of contract and associated
11 causes of action is premised entirely on Plaintiff’s alleged communications not with ICANN, but
12 with ICANN’s purported agent. Plaintiff, however, does not allege any facts supporting the
13 existence of an agency relationship. Indeed, the First Amended Complaint is devoid of any
14 allegation even arguably suggesting that ICANN, the alleged principal, undertook any conduct or
15 made any representations to Plaintiff that would reasonably cause Plaintiff to believe that ICANN
16 had authorized this “agent” to contract on ICANN’s behalf. This is fatal to each of Plaintiff’s
17 claims. Without intentional or negligent conduct by the alleged principal creating a reasonable
18 belief in the minds of third persons that an agency relationship exists, no such relationship can
19 exist. Plaintiff’s entire First Amended Complaint should be dismissed on this ground alone.

20 Second, the so-called “contract” upon which Plaintiff has sued is nothing more than a
21 vague and uncertain email from ICANN’s purported “agent” to Plaintiff (ICANN was not copied
22 on the communication) that fails to identify the essential terms of the “contract.” There is no
23 articulation of what services would be provided or the cost for such services. The performance
24 promised by Plaintiff in this so-called “contract” is not articulated, and the supposed “contract”
25 does not set out any obligations agreed to by any party. The email itself, therefore, is not a valid

26
27 ¹ Plaintiff filed its initial Complaint on February 14, 2012. ICANN demurred to
28 Plaintiff’s Complaint on March 16, 2012. Instead of opposing ICANN’s demurrer, Plaintiffs
opted to withdraw their Complaint and subsequently filed the First Amended Complaint that is
the subject of ICANN’s instant demurrer.

1 contract and Plaintiff's First and Second Causes of Action should be dismissed on this separate
2 and independent ground.

3 Third, because Plaintiff's Third Cause of Action, a common count for goods and services
4 rendered, is premised on the same facts and seeks the same recovery demanded in Plaintiff's
5 breach of contract claims, it must be dismissed for the same reasons the contract claims fail.

6 Finally, Plaintiff's Fourth Cause of Action for negligent misrepresentation must be
7 dismissed because Plaintiff has not alleged facts sufficient to establish that Plaintiff's reliance on
8 ICANN's "agent's" alleged representations was justified, as there was no representation or
9 conduct by ICANN confirming this agent's authority to act on ICANN's behalf.

10 ICANN respectfully requests that Plaintiff's entire First Amended Complaint be dismissed
11 with prejudice.

12 **II. SUMMARY OF PLAINTIFF'S ALLEGATIONS**

13 Plaintiff is in the business of planning and executing corporate events. (FAC ¶ 6.)
14 Defendant ICANN is a not-for-profit public benefit corporation that administers certain features
15 of the Internet's domain name system pursuant to a series of agreements with the United States
16 Government. (*See id.* at ¶ 7.) On "information and belief," Plaintiff alleges that ICANN relies on
17 organizations called Internet Societies ("ISOCs"), including the San Francisco Bay Internet
18 Society ("SF Bay ISOC"), to plan and organize local events for ICANN. (*Ibid.*)

19 On November 21, 2010, Ms. Annalisa Roger, the Vice Chair of the SF Bay ISOC,
20 contacted Plaintiff and allegedly identified herself as ICANN's "agent." (*Id.* at ¶ 8.) Ms. Roger
21 purportedly told Plaintiff that ICANN had asked her to plan a gala event in connection with
22 ICANN's annual meeting, to be held in San Francisco, California from March 12-17, 2011.
23 (*Ibid.*)

24 Upon a purported request by Ms. Roger, Plaintiff subsequently submitted to SF Bay ISOC
25 (through Ms. Roger) three budgets for three different proposed venues for the gala event, each
26 containing a "management fee" of \$40,000.00. (*Id.* at ¶ 9.) Plaintiff does not allege that Ms.
27 Roger, SF Bay ISOC or ICANN approved any of the three budgets submitted by Plaintiff.

28 Plaintiff alleges that Ms. Roger subsequently entered into a contract with Plaintiff on behalf of

1 ICANN by email on December 4, 2010, in which “Ms. Roger stated that she had ‘just finished a
2 meeting with ICANN’ in which ICANN and Ms. Roger had agreed to hire Corporate Concepts
3 and to pay its management fee, with the choice of venue to be decided.” (*Id.* at ¶ 10; Ex. A to
4 FAC.) Plaintiff does not allege that ICANN was an author or recipient of the December 4, 2010
5 email or that Plaintiff had any oral or written communication with ICANN—as opposed to Ms.
6 Roger, ICANN’s purported agent—at any time prior to the formation of the alleged contract on
7 December 4, 2010.

8 On January 6, 2011, Plaintiff summarized the terms to which ICANN had allegedly
9 agreed in a formal Letter of Agreement. (FAC ¶ 17; Ex. B to FAC.) The Letter of Agreement
10 was sent to Ms. Roger at SF Bay ISOC, not ICANN, and was never executed by either party.
11 (Ex. B to FAC.) On January 11, 2011, Plaintiff allegedly forwarded to ICANN an invoice in the
12 amount of \$206,142.50; this was Plaintiff’s first direct communication with ICANN. (FAC ¶ 18.)
13 The invoice indicated that it was “per [the] Letter of Agreement, dated January 6, 2011.” (Ex. B
14 to FAC.)

15 Plaintiff alleges that, on February 4, 2011, ICANN informed Plaintiff that it had engaged
16 another company to plan the gala event and that Plaintiff’s services were not required. (FAC
17 ¶ 20.) Plaintiff brings this lawsuit because ICANN has “refused to compensate Plaintiff for its
18 services, and has refused to pay the [\$40,000.00] non-refundable management fee under the
19 contract.” (*Id.* at ¶ 21.)

20 Based on the foregoing alleged conduct, Plaintiff asserts four causes of action against
21 ICANN: (1) breach of written contract; (2) breach of implied contract; (3) goods and services
22 rendered; and (4) negligent misrepresentation. Each of these claims fails as a matter of law, as
23 explained below.

24 **III. LEGAL STANDARD ON DEMURRER**

25 The function of a demurrer is to test the sufficiency of the allegations of the complaint.
26 (Code Civ. Proc., § 589; *Schmidt v. Foundation Health* (1995) 35 Cal.App.4th 1702, 1706.) A
27 demurrer is appropriate where the complaint “does not state facts sufficient to constitute a cause
28 of action.” (Code Civ. Proc., § 430.10, subd. (e).) A court is to “treat the demurrer as admitting

1 all material facts properly pleaded, but not contentions, deductions, or conclusions of fact or law.”
2 (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

3 **IV. ARGUMENT**

4 **A. Because The First Amended Complaint Is Devoid Of Any Facts To**
5 **Substantiate Plaintiff’s Bare Legal Conclusion That Ms. Roger Was ICANN’s**
6 **“Agent,” Each Of Plaintiff’s Claims Fails As A Matter Of Law.**

7 Each of Plaintiff’s claims is premised on Plaintiff’s conclusory allegation that
8 Ms. Roger—who is the Vice Chair of SF Bay ISOC and not an ICANN employee—entered into a
9 contract with Plaintiff as ICANN’s “agent.” (FAC ¶ 7.) The incurable problem faced by
10 Plaintiff, however, is that ICANN never authorized Ms. Roger or SF Bay ISOC to contract on its
11 behalf and never undertook any conduct toward Plaintiff that would reasonably cause Plaintiff to
12 believe that Ms. Roger or SF Bay ISOC was so authorized. This is made clear by the complete
13 dearth of facts in the First Amended Complaint linking ICANN to Ms. Roger or SF Bay ISOC.
14 Instead, Plaintiff asserts only the legal conclusion (“[o]n information and belief,” FAC ¶ 7),
15 wholly unsubstantiated by a single fact, that ICANN relies on SF Bay ISOC to act “as ICANN’s
16 agent to plan and organiz[e] local events.” (*Ibid.*) Case law could not be clearer: The court does
17 not assume the truth of such conclusions on demurrer. (*Barnett v. Fireman’s Fund Insurance Co.*
18 (2001) 90 Cal.App.4th 500, 505.)

19 An agency is either actual or ostensible. (Cal. Civ. Code, § 2298.) An agency is actual
20 when the agent is really employed by the principal. (Cal. Civ. Code, § 2299.) An agency is
21 ostensible when the principal intentionally, or by want of ordinary care, causes a third person to
22 believe another to be his agent, but is not really employed by him. (Cal. Civ. Code, § 2300.)

23 First, Plaintiff alleges no facts suggesting that Ms. Roger or any SF Bay ISOC
24 representative were employed or engaged by ICANN in any manner sufficient to give rise to an
25 actual agency relationship.² Second, any attempt by Plaintiff to plead an ostensible agency
26 relationship likewise fails because an ostensible agency cannot be established by the
27 representations or conduct of the purported agent; the statements or acts of the principal must be

28 ² To the contrary, Plaintiff alleges that Ms. Roger was the Vice Chair of the SF Bay ISOC.
(FAC ¶ 8.)
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1 such as to cause the third party to reasonably believe the agency existed. Specifically, to prevail
2 on an ostensible agency theory, a plaintiff must establish three elements:

- 3 1. The third party (here, Plaintiff) must have had a reasonable belief in the agent’s
4 authority;
- 5 2. That belief must be generated by some act or negligence of the principal (here,
6 ICANN); and
- 7 3. The third party (here, Plaintiff) must be non-negligent in relying on the agent’s
8 apparent authority.

9 (*Kaplan v. Coldwell Banker Residential Affiliates, Inc.* (1997) 59 Cal.App.4th 741, 747)

10 Notably, in proving the second element, California courts are clear that “[o]stensible
11 authority of an agent cannot be based on the agent’s conduct alone; there must be evidence of
12 conduct by the principal which causes a third party reasonably to believe the agent has authority.”

13 (*Lindsay-Field v. Friendly* (1995) 36 Cal.App.4th 1728, 1734; *see also Kaplan, supra*,

14 59 Cal.App.4th at p. 747 [“The ostensible authority of an agent cannot be based solely upon the

15 agent’s conduct.”]; *McMurry v. Pacific Ready-Cut Homes, Inc.* (1931) 111 Cal.App. 341, 343

16 [“To state the same requirements in different terms and in reverse order, there must be some

17 intentional conduct or neglect on the part of the alleged principal creating a belief in the minds of
18 third persons that an agency exists, and a reasonable reliance thereon by such third persons.”].)

19 Plaintiff does not allege that ICANN, the purported principal, undertook any conduct or
20 made any representations to Plaintiff that would reasonably cause Plaintiff to believe that ICANN

21 had authorized Ms. Roger or SF Bay ISOC to contract on its behalf.³ All Plaintiff alleges is that

22 the purported agent Ms. Roger—not ICANN—made statements to Plaintiff that Plaintiff believed
23 showed a valid agency relationship. (FAC ¶¶ 8 [“Annalisa Roger of SFBayISOC contacted

24 Ms. Tonneson of Corporate Concepts, identifying herself as an agent of ICANN”], emphasis
25 added; *id.* [“Ms. Roger told Ms. Tonneson ICANN had designated her to plan a gala event”],

26 emphasis added; ¶ 9 [“At Ms. Roger’s request, Corporate Concepts . . . submitted three estimated

27 ³ As noted, while Plaintiff alleges “[o]n information and belief” that ICANN relies on SF
28 Bay ISOC to act “as ICANN’s agent to plan and organiz[e] local events” (FAC ¶ 7), Plaintiff
cannot overcome demurrer by pleading bare legal conclusions wholly unsubstantiated by facts.
(*Barnett v. Fireman’s Fund Insurance Co.* (2001) 90 Cal.App.4th 500, 505.)

1 budgets.”], emphasis added; ¶ 10 [“On December 4, 2010, Ms. Roger accepted Corporate
2 Concepts’ bid on behalf of ICANN by email. Ms. Roger stated that she had ‘just finished a
3 meeting with ICANN’ in which ICANN and Ms. Roger had agreed to hire Corporate Concepts . .
4 . .”], emphasis added.)

5 But representations by the agent are not sufficient, as the law is clear that statements made
6 by the purported agent cannot establish an ostensible agency. (*Kaplan, supra*, 59 Cal.App.4th at
7 p. 747; *Lindsay-Field, supra*, 36 Cal.App.4th at p. 1734; *see also McMurry, supra*, 111 Cal.App.
8 at p. 343 [“[T]he third person must believe that the agent possessed the authority assumed, and []
9 this belief must have arisen by reason of the acts and declaration of the principal, recognizing the
10 authority of the agent in similar previous transactions.”]; *cf. Howell v. Courtesy Chevrolet, Inc.*
11 (1971) 16 Cal.App.3d 391, 401 [“The declarations of an agent are not admissible to prove the fact
12 of his agency or the extent of his power as such agent.”].)⁴

13 In short, Plaintiff cannot establish that its belief in the purported agency relationship was
14 generated by some act or negligence of ICANN. Plaintiff therefore cannot establish that either
15 Ms. Roger or SF Bay ISOC was ICANN’s ostensible agent as a matter of law. Accordingly,
16 ICANN’s demurrer to every single cause of action should be sustained, without leave to amend.

17 **B. Plaintiff’s First and Second Causes Of Action For Breach Of Contract Fail As**
18 **A Matter Of Law Because The December 4, 2010 Email Is Too Uncertain To**
Constitute An Acceptance Of A Definite Offer.

19 Even had ICANN authorized Ms. Roger or SF Bay ISOC to contract with Plaintiff on
20 ICANN’s behalf (which it did not), the December 4, 2010 email from Ms. Roger to Plaintiff does
21 not constitute a valid contract. (*See Ex. A to FAC.*) A valid contract requires an offer,
22 acceptance and consideration. An offer must be sufficiently definite, or must call for such
23 definite terms in the acceptance, that the performance promised is reasonably certain.
24 (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 811-812 [“A proposal ‘cannot
25 be accepted so as to form a contract unless the terms of the contract are reasonably certain. . . .

26 _____
27 ⁴ Moreover, the fact that Plaintiff forwarded ICANN an (unsolicited) invoice on January
28 6, 2011 does not, absent further evidence of an agreement, establish the existence of an agency
relationship or a contract. (*India Paint & Lacquer Co. v. United Steel Products Corp.* (1954) 123
Cal.App.2d 597, 607 [“The prevailing rule is that an invoice, standing alone, is not a contract.”].)
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1 The terms of a contract are reasonably certain if they provide a basis for determining the
2 existence of a breach and for giving an appropriate remedy.”], citation omitted.) “If, by contrast,
3 a supposed ‘contract’ does not provide a basis for determining what obligations the parties have
4 agreed to, and hence does not make possible a determination of whether those agreed obligations
5 have been breached, there is no contract.” (*Ibid.* (quoting 1 Williston on Contracts (4th ed. 1990)
6 § 4:18, p. 414 [“It is a necessary requirement that an agreement, in order to be binding, must be
7 sufficiently definite to enable the courts to give it an exact meaning.”])); *see also* Cal. Civ. Code,
8 § 3390, subd. 5 [a contract is not specifically enforceable unless the terms are “sufficiently certain
9 to make the precise act which is to be done clearly ascertainable.”].)

10 Putting aside the fact that ICANN was not even copied on the December 4, 2010 email
11 from Ms. Roger to Plaintiff,⁵ the email itself is too uncertain to constitute an acceptance of a
12 definite offer. Indeed, it is impossible to discern the elements of the contract. There is no
13 articulation of what services would be provided or the cost for such services. The performance
14 promised by Plaintiff in this so-called “contract” is not articulated, and the supposed “contract”
15 does not provide a basis for determining what obligations the parties have agreed to. The email
16 itself, therefore, is not a valid contract and Plaintiff’s First and Second Causes of Action must be
17 dismissed. (*Weddington Productions, supra, Inc.*, 60 Cal.App.4th at pp. 811-812.)⁶

18 **C. Plaintiff’s Third Cause Of Action For Goods And Services Rendered Falls**
19 **With Plaintiff’s Breach Of Contract Claims.**

20 Plaintiff’s third cause of action is framed as a common count for goods and services
21 rendered. (FAC ¶¶ 35-38.) “A common count is not a specific cause of action, however; rather,
22 it is a simplified form of pleading normally used to aver the existence of various forms of

23 ⁵ Nor did ICANN (or Ms. Roger or any other representative of SF Bay ISOC) sign the
24 January 6, 2011 formal Letter of Agreement, which allegedly summarized the terms to which
ICANN had agreed. (Ex. B to FAC.)

25 ⁶ Moreover, Ms. Roger was clear in her December 4, 2010 email that her ability to host
26 the gala was contingent upon the SF Bay ISOC’s ability to raise the funds needed to cover the
27 event, thus constituting a condition precedent to Ms. Roger executing any “contract” with
28 Corporate Concepts. (*See* Ex. A to FAC [Ms. Roger’s expressly stated that she “still [has] the
challenge of sponsorship to confirm.”].) Thus, even if the December 4, 2010 email could be
properly construed as a contract (which it cannot), it would not become binding until Ms. Roger
raised the funds sufficient to cover the event, which never happened. (*Paratore v. Scharetg*
(1942) 53 Cal.App.2d 710, 713.)

1 monetary indebtedness” (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 394-395,
2 citation omitted.) When a common count is used as an alternative way of seeking the same
3 recovery demanded in a specific cause of action, and is based on the same facts, the common
4 count is demurrable if the cause of action is demurrable. (*Id.*; see also *Zumbrun v. Univ. of*
5 *Southern Cal.* (1972) 25 Cal.App.3d 1, 14 [“[I]f plaintiff is not entitled to recover under one
6 count in a complaint wherein all the facts upon which his demand is based are specifically
7 pleaded, it is proper to sustain a demurrer to a common count set forth in the complaint, the
8 recovery under which is obviously based on the set of facts specifically pleaded in the other
9 count.”].)

10 Here, Plaintiff’s claim for goods and services rendered is premised on the same facts and
11 seeks the same recovery demanded in Plaintiff’s breach of contract claims. Thus, Plaintiff’s
12 common count for goods and services rendered must fall with its first and second causes of
13 action. Dismissal is appropriate for the same reasons articulated above in Sections IV.A and
14 IV.B.

15 **D. Plaintiff’s Fourth Cause Of Action For Negligent Misrepresentation Fails**
16 **Because Plaintiff Has Not Sufficiently Alleged “Justifiable Reliance.”**

17 The elements of negligent misrepresentation are: (1) the misrepresentation of a past or
18 existing material fact; (2) without reasonable ground for believing it to be true; (3) with intent to
19 induce another’s reliance on the fact misrepresented; (4) justifiable reliance on the
20 misrepresentation; and (5) resulting damage. (*Apollo Capital Fund, LLC v. Roth Capital*
21 *Partners, LLC* (2007) 158 Cal.App.4th 226); *Agosta v. Astor* (2004) 120 Cal.App.4th 596, 603)
22 [“The tort of negligent misrepresentation . . . does, of course, require proof of justifiable reliance
23 and resulting damage.”].)

24 Here, Plaintiff’s negligent misrepresentation claim fails because Plaintiff has not—and
25 cannot—allege facts sufficient to establish that Plaintiff’s reliance on Ms. Roger’s alleged
26 representations was justified. As explained above, ICANN never authorized Ms. Roger or SF
27 Bay ISOC to contract on its behalf (and there is no allegation to the contrary). Nor is ICANN
28 alleged to have undertaken any conduct toward Plaintiff that would reasonably cause Plaintiff to

1 believe that Ms. Roger or SF Bay ISOC were authorized to contract on ICANN’s behalf. As
2 noted, all Plaintiff alleges is that Ms. Roger—not ICANN—made statements to Plaintiff that
3 Plaintiff believed showed a valid agency relationship. Absent any representation or conduct by
4 ICANN confirming Ms. Roger or SF Bay ISOC’s authority to act on ICANN’s behalf, Plaintiff
5 could not reasonably or justifiably rely on Ms. Roger’s purported statements. (*Lindsay-Field*,
6 *supra*, 36 Cal.App.4th at p. 1734 [“there must be evidence of conduct by the principal which
7 causes a third party reasonably to believe the agent has authority”].)

8 Moreover, Ms. Roger’s own statements to Plaintiff make it impossible for Plaintiff to now
9 claim that Plaintiff reasonably and justifiably relied on Ms. Roger’s alleged statements that
10 ICANN had authorized her to plan ICANN’s gala event. Specifically, Ms. Roger told Plaintiff in
11 her December 4, 2010 email that her (Ms. Roger’s) ability to host the gala was contingent upon
12 the SF Bay ISOC’s ability to raise the funds needed to cover the event. (*See* Ex. A to FAC [Ms.
13 Roger’s expressly stated that she “still [has] the challenge of sponsorship to confirm.”].) Plaintiff
14 therefore cannot reasonably assert that its reliance on Ms. Roger’s purported representation that
15 she was acting as ICANN’s agent was justified.

16 Plaintiff’s fourth cause of action for negligent misrepresentation therefore fails as well.⁷

17 **E. Plaintiff’s First Amended Complaint Should Be Dismissed Without Leave To**
18 **Amend.**

19 When a demurrer is sustained, leave to amend should be denied where the plaintiff cannot
20 make a sufficient offer of proof demonstrating that the complaint can be cured through a truthful
21 amendment. (*See Taxpayers for Improving Pub. Safety v. Schwarzenegger* (2009) 172
22 Cal.App.4th 749, 781; *see also Vaillette v. Fireman’s Fund Insurance Co.* (1993) 18 Cal.App.4th
23 680, 685 [leave to amend should not be granted when “in all probability, amendment would be

24 ⁷ Plaintiff also concludes (albeit in passing) that ICANN “directly” made “knowing and/or
25 reckless false and misleading statements about its intent to hire Plaintiff and pay Plaintiff for its
26 work” (FAC ¶ 40), but Plaintiff does not allege any facts supporting this conclusion. Indeed, the
27 First Amended Complaint does not contain any facts supporting the notion that ICANN directly
28 represented to Plaintiff that ICANN was interested in Plaintiff’s services or that ICANN had
authorized Ms. Roger or SF Bay ISOC to contract with Plaintiff on ICANN’s behalf. The only
allegation regarding an ICANN-to-Plaintiff communication was ICANN’s statement to Plaintiff
in February 2011 that ICANN was not interested in Plaintiff’s services. (FAC ¶ 20.) Plaintiff’s
conclusory allegations need not be accepted as true and do not state a claim for negligent
misrepresentation. (*Barnett, supra*, 90 Cal.App.4th at p. 505.)

1 futile”].)

2 Here, ICANN did not undertake any conduct or make any representations to Plaintiff that
3 would reasonably cause Plaintiff to believe that ICANN had authorized Ms. Roger or SF Bay
4 ISOC to contract on its behalf. As such, Plaintiff cannot plead any facts demonstrating the
5 existence of an agency relationship, ostensible or otherwise, between ICANN and Ms. Roger or
6 SF Bay ISOC. This is fatal to each of Plaintiff’s claims and warrants dismissal with prejudice,
7 without leave to amend.

8 **V. CONCLUSION**

9 Under no circumstances could Plaintiff state a claim for relief against ICANN.
10 Accordingly, Plaintiff’s entire First Amended Complaint should be dismissed with prejudice.

11 Dated: May 4, 2012

JONES DAY

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By: 
Kate Wallace

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Attorneys for Defendant
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

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