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adequately alleges facts sufficient to constitute a cause of action against the demurring defendants; and

2. Civil conspiracy is a recognized cause of action in California, and the Tenth Cause of Action (in both the original Complaint and in the FAC) is both certain and adequately alleges facts sufficient to constitute a cause of action against the demurring defendants.

Dated: \_\_\_\_\_

\_\_\_\_\_  
[redacted], Attorney for Plaintiffs

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2 **Memorandum of Points and Authorities**

3 Plaintiffs note that the Demurrer refers on page 2, line 3, to “the plaintiff’s First  
4 Amended Complaint” but Plaintiffs have only filed an original Complaint.

5 Plaintiffs note that the Demurrer refers on page 5, line 14, and also on page 6, line 24,  
6 to the “Fourth Cause of Action” which is, as alleged in the Complaint, for  
7 “CANCELLATION OF VOID DEED OBTAINED BY FRAUD” (Complaint, page 8, line  
8 12). However, the demurrer offers no argument remotely connected to such cause of action.

9

10 **1. Defendants did owe Plaintiffs a fiduciary duty.**

11 Plaintiffs have filed a First Amended Complaint (“FAC”) that changes “fiduciary  
12 relationship” in both ¶ 15 and ¶ 23 of the original Complaint to “confidential relationship” in  
13 the same paragraphs of the FAC. Either way, a fiduciary duty was owned and was breached.

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15 The demurrer insists that more is required to establish a fiduciary duty than the repose  
16 of confidence and trust of one person in the another, and the other accepting such confidence  
17 and trust. Case law differs as to whether a “fiduciary relationship” and a “confidential  
18 relationship” are identical. Without question, however, both create a fiduciary duty. The  
19 following case holds they are identical:

20 Suffice it to say that the evidence clearly establishes that decedent  
21 reposed trust and confidence in the integrity and fidelity of both  
22 appellants. These are the elements of a confidential or fiduciary  
relationship, which in law are synonymous...

23 *Rieger v. Rich* (1958) 163 Cal.App.2d 651@664 [329 P.2d 770].

24 In contrast, the following case holds they differ, but that a “confidential relationship”  
25 still imposes a fiduciary duty:

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2 We review first the basic principles of fiduciary and confidential  
3 relations. The two terms are often said to be synonymous, but there are  
4 “significant differences.” Both relationships give rise to a fiduciary  
5 duty, that is, a duty “to act with the utmost good faith for the benefit of  
6 the other party.” ... “Technically, a fiduciary relationship is a  
7 recognized legal relationship such as guardian and ward, trustee and  
8 beneficiary, principal and agent, or attorney and client ... whereas a  
9 “confidential relationship” may be founded on a moral, social,  
10 domestic, or merely personal relationship as well as on a legal  
11 relationship.’ ” ... A confidential relation may exist where there is no  
12 fiduciary relation. ... FN8 “Because confidential relations do not fall  
13 into well-defined categories of law and depend heavily on the  
14 circumstances, they are more difficult to identify than fiduciary  
15 relations.” ... The existence of a confidential relationship is a question  
16 of fact, and “the question is only whether the plaintiff actually  
17 reposed such trust and confidence in the other, and whether the other  
18 “accepted the relationship.”’ ” ... A “relationship” must exist over a  
19 period of time.

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21 FN8. “The prerequisite of a confidential relationship is the reposing of  
22 trust and confidence by one person in another who is cognizant of this  
23 fact. The key factor in the existence of a fiduciary relationship lies in  
24 control by a person over the property of another. It is evident that  
25 while these two relationships may exist simultaneously, they do not  
26 necessarily do so.” ”

27 *Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141@1160 [23 Cal.Rptr.3d 335],  
28 citations omitted.

29 Without question, both the original Complaint and the FAC allege all the elements of  
30 a “confidential relationship” among the parties, in which the defendants held a position of  
31 power and influence over the plaintiffs. The FAC pinpoints the relationship as  
32 “confidential.” Hence the defendants owed a fiduciary duty to the plaintiffs, which the  
33 defendants breached.

## 34 **2. Civil conspiracy is a recognized cause of action in California.**

35 The FAC does not change the Tenth Cause of Action. The following argument  
36 applies to the demurrer and also to any contemplated demurrer as to the FAC.

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2 Tort law and criminal law treat conspiracy in a fundamentally different manner. To  
3 begin with, the object contemplated by a criminal conspiracy is a crime, and that of a civil  
4 conspiracy is a tort.

5 In criminal law, the act of conspiring is a crime unto itself, regardless of whether the  
6 object of the conspiracy is actually effectuated. See Penal Code § 182, which includes no  
7 requirement of carrying out such object crime. In contrast, under tort law, conspiracy is only  
8 actionable when its object is effectuated—and damages the plaintiff. Absent commission of  
9 the underlying tort, civil conspiracy is not a cause of action.

10 The demurrer quotes the California Supreme Court out of context in *Applied*  
11 *Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503@510-511 [28 Cal.Rptr.2d  
12 475] in an attempt to assert that civil conspiracy is, quite simply, never a cause of action.  
13 This is not so. Just beyond the passage quoted in the demurrer, the Supreme Court states:

14 Standing alone, a conspiracy does no harm and engenders no tort  
15 liability. It must be activated by the commission of an actual tort. ““A  
16 civil conspiracy, however atrocious, does not per se give rise to a  
17 cause of action unless a civil wrong has been committed resulting in  
18 damage.’ ... We have summarized the elements and significance of a  
19 civil conspiracy: ““The elements of an action for civil conspiracy are  
20 the formation and operation of the conspiracy and damage resulting to  
21 plaintiff from an act or acts done in furtherance of the common  
22 design...””

19 *Id.* @511.

20 Thus, the Supreme Court was pointing out that civil conspiracy cannot be a cause of  
21 action *unless the underlying tort actually takes place and damages the plaintiff*. It was not  
22 saying the cause of action never exists.

23 Plaintiffs have pleaded the elements of civil conspiracy, and in fact, in preparing the  
24 Complaint, relied upon (without quoting) *Applied Equipment Corp. v. Litton Saudi Arabia*  
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*Ltd., supra*, as their authority for its elements, which are two: (a) “the formation and operation of the conspiracy,” and (b) “damage resulting to plaintiff from an act or acts done in furtherance of the common design.” Complaint ¶ 66 alleges the first: that the defendants conspired to defraud the plaintiffs, and Complaint ¶ 66 alleges the second: that the defendants carried out the object of the conspiracy thereby damaging the plaintiffs.

### Conclusion

For all the foregoing reasons, the Court should OVERRULE the Demurrer.

Dated: \_\_\_\_\_

\_\_\_\_\_  
[redacted], Attorney for Plaintiffs:

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2 **PROOF OF SERVICE**

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4 I, the undersigned, declare:

5 I am a citizen of the United States of America, am over the age of eighteen (18) years, and  
6 am not a party to the within action. My business address is [redacted].

7 On \_\_\_\_\_, 2006, I caused to be served the following document(s): **PLAINTIFFS’  
8 OPPOSITION TO DEFENDANTS’ DEMURRER TO PLAINTIFFS’ COMPLAINT,**  
9 on the parties involved addressed as follows:

10 [redacted]

11 XX BY MAIL: I placed each document in a sealed envelope, with postage fully prepaid,  
12 and caused it to be placed in the United States mail at Los Angeles, California.

13 I declare under penalty of perjury under the laws of the State of California that the foregoing  
14 is true and correct.

15 Executed on \_\_\_\_\_, 2006, at \_\_\_\_\_, California,

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