

IN THE CIRCUIT COURT OF THE
15TH JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

CASE NO: 2005 CA000709 AN AB

HERITAGE MANOR OF MEMORIAL PARK,
INC., MEMORIAL PARK OF BOCA RATON,
INC., KATHLEEN I. MICHAEL, ELISHKA E.
MICHAEL TARNAWA REVOCABLE TRUST
UNDER AGREEMENT DATED AUGUST 9, 2002,
GEORGE G. TARNAWA, TRUSTEE AND
GEORGE G. TARNAWA, AS PERSONAL
REPRESENTATIVE OF THE ESTATE OF
ELISHKA E. MICHAEL TARNAWA,

Plaintiffs,

v.

MICHAEL D. MASANOFF, MICHAEL D. KARSCH
AND SACHS SAX & KLEIN, P.A.,

Defendants.

**DEFENDANTS, MICHAEL D. KARSCH AND SACHS SAX & KLEIN, P.A.'s
ANSWER AND AFFIRMATIVE DEFENSES TO SECOND AMENDED COMPLAINT**

Defendants, MICHAEL D. KARSCH and SACHS SAX & KLEIN, P.A. (hereinafter referred to as "Defendants"), by and through their undersigned counsel, and pursuant to Florida Rules of Civil Procedure, hereby file their Answer and Affirmative Defenses to Plaintiffs, HERITAGE MANOR OF MEMORIAL PARK, INC.; MEMORIAL PARK OF BOCA RATON, INC.; KATHLEEN I. MICHAEL; ELISHKA E. MICHAEL TARNAWA REVOCABLE TRUST UNDER AGREEMENT DATED AUGUST 9, 2002, GEORGE G. TARNAWA, TRUSTEE AND REPRESENTATIVE OF THE ESTATE OF ELISHKA E. MICHAEL TARNAWA'S Second Amended Complaint, and state as follows:

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1. Defendants are without sufficient information and knowledge to either admit or deny the allegations set forth in paragraph 1 of the Second Amended Complaint and therefore deny same and demand strict proof thereof.

2. Defendants are without sufficient information and knowledge to either admit or deny the allegations set forth in paragraph 2 of the Second Amended Complaint and therefore deny same and demand strict proof thereof.

3. Defendants are without sufficient information and knowledge to either admit or deny the allegations set forth in paragraph 3 of the Second Amended Complaint and therefore deny same and demand strict proof thereof.

4. Defendants are without sufficient information and knowledge to either admit or deny the allegations set forth in paragraph 4 of the Second Amended Complaint and therefore deny same and demand strict proof thereof.

5. Defendants are without sufficient information and knowledge to either admit or deny the allegations set forth in paragraph 5 of the Second Amended Complaint and therefore deny same and demand strict proof thereof.

6. Defendants are without sufficient information and knowledge to either admit or deny the allegations set forth in paragraph 6 of the Second Amended Complaint and therefore deny same and demand strict proof thereof.

7. Defendants are without sufficient information and knowledge to either admit or deny the allegations set forth in paragraph 7 of the Second Amended Complaint and therefore deny same and demand strict proof thereof.

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8. Defendants are without sufficient information and knowledge to either admit or deny the allegations set forth in paragraph 8 of the Second Amended Complaint and therefore deny same and demand strict proof thereof.

9. Defendants are without sufficient information and knowledge to either admit or deny the allegations, as phrased, set forth in paragraph 9 of the Second Amended Complaint and therefore deny same and demand strict proof thereof.

10. Defendants admit the allegations set forth in paragraph 9 of the Second Amended Complaint.

11. Defendants admit that Defendant, SACHS SAX & KLEIN, P.A., is a professional association practicing law in Palm Beach County, Florida. Otherwise, Defendants are without sufficient information and knowledge to either admit or deny the remaining allegations set for in paragraph 11 of the Second Amended Complaint and therefore deny same and demand strict proof thereof.

12. Defendants admit the allegations set forth in paragraph 12 of the Second Amended Complaint.

13. Defendants are without sufficient information and knowledge to either admit or deny the allegations, as phrased, set forth in paragraph 13 of the Second Amended Complaint and therefore denies same and demands strict proof thereof.

14. Defendants are without sufficient information and knowledge to either admit or deny the allegations set forth in paragraph 14 of the Second Amended Complaint and therefore denies same and demands strict proof thereof.

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15. Defendants are without sufficient information and knowledge to either admit or deny the allegations set forth in paragraph 15 of the Second Amended Complaint and therefore denies same and demands strict proof thereof.

16. Defendants deny the allegations set forth in paragraph 16 of the Second Amended Complaint and demand strict proof thereof.

17. Defendants deny the allegations set forth in paragraph 17 of the Second Amended Complaint and demand strict proof thereof.

18. Defendants are without sufficient information and knowledge to either admit or deny the allegations set forth in paragraph 18 of the Second Amended Complaint and therefore deny same and demand strict proof thereof.

19. Defendants deny the allegations, as phrased, set forth in paragraph 19 of the Second Amended Complaint and demand strict proof thereof.

20. Defendants deny the allegations, as phrased, set forth in paragraph 20 of the Second Amended Complaint and demand strict proof thereof.

21. Defendants admit the allegations set forth in paragraph 21 of the Second Amended Complaint.

22. Defendants are without sufficient information and knowledge to either admit or deny the allegations set forth in paragraphs 22 of the Second Amended Complaint and therefore deny same and demand strict proof thereof.

23. Defendants are without sufficient information and knowledge to either admit or deny the allegations set forth in paragraph 23 of the Second Amended Complaint and

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therefore denies same and demand strict proof thereof. Defendants further state that the Purchase and Sale Agreement is a document, the terms of which speak for themselves.

24. Defendants deny the allegations set forth in paragraph 24 of the Second Amended Complaint and demand strict proof thereof.

25. Defendants deny the allegations set forth in paragraph 25 of the Second Amended Complaint and demand strict proof thereof.

**COUNT I
(Breach of Fiduciary Duty)**

26. In paragraph 26 of the Second Amended Complaint, Plaintiffs repeat and reallege the allegations and statements set forth in paragraph 1 through 25 of the Second Amended Complaint. Accordingly, for their response to paragraph 26 of the Second Amended Complaint, Defendants adopt and reallege their responses to paragraphs 1 through 25 as if fully set forth herein.

27. Defendants deny the allegations, as phrased, set forth in paragraph 27 of the Second Amended Complaint and demand strict proof thereof.

28. Defendants deny the allegations set forth in paragraph 28 of the Second Amended Complaint and demand strict proof thereof.

29. Defendants deny the allegations set forth in paragraph 29 of the Second Amended Complaint and demand strict proof thereof.

30. Defendants deny the allegations set forth in paragraph 30 of the Second Amended Complaint and demand strict proof thereof.

COUNT II
(Professional Negligence - Legal Malpractice)

31. In paragraph 31 of the Second Amended Complaint, Plaintiffs repeat and reallege the allegations set forth in paragraphs 1 through 30 of the Second Amended Complaint. Accordingly, for their response to paragraph 31 of the Second Amended Complaint, Defendants adopt and reallege their responses to paragraphs 1 through 30 as if fully set forth herein.

32. Defendants deny the allegations, as phrased, as set forth in paragraph 32 of the Second Amended Complaint and demand strict proof thereof.

33. Defendants deny the allegations set forth in paragraph 33 of the Second Amended Complaint and demand strict proof thereof.

34. Defendants deny the allegations, as phrased, as set forth in paragraph 34 of the Second Amended Complaint and demand strict proof thereof.

35. Defendants deny the allegations set forth in paragraph 35 of the Second Amended Complaint and demand strict proof thereof.

36. Defendants deny the allegations set forth in paragraph 36 of the Second Amended Complaint and demand strict proof thereof.

AFFIRMATIVE DEFENSES

37. As their First Affirmative Defense, Defendants state that Plaintiffs' causes of action are barred by the Statute of Limitations.

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38. As their Second Affirmative Defense, Defendants state that Plaintiffs are guilty of comparative negligence and that any damages assessed against Defendants, based upon the claims set forth in the Second Amended Complaint, should be reduced by the comparative degree of Plaintiffs' own negligence.

39. As their Third Affirmative Defense, Defendants state that any damages alleged by Plaintiffs were proximately caused by the conduct and/or acts of third parties and/or entities not under the custody, nor under the control of Defendants and therefore Defendants are entitled to an apportionment of fault among all parties responsible for Plaintiffs' damages.

40. As their Fourth Affirmative Defense, Defendants state that Plaintiffs should be barred from maintaining the causes of actions set forth within the Second Amended Complaint based upon Plaintiffs' failure to mitigate their own damages.

41. As their Fifth Affirmative Defense, Defendants state that Plaintiffs should be barred from maintaining the causes of action set forth in this Second Amended Complaint based upon the proper application of the various Doctrines of Estoppel, including Equitable Estoppel and Estoppel in Pais. At all material times, Plaintiffs, with the full knowledge of the consequences of their actions and/or in all alleged actions undertaken by Defendants, not only approved, but were fully involved in and kept apprised about all actions taken regarding the subject transaction.

42. As their Sixth Affirmative Defense, Defendants state that Plaintiffs should be barred from maintaining this action based upon the Doctrine of Unclean Hands. At all

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materials times, Plaintiffs were fully aware of any alleged action and/or inaction undertaken by them or at their request. Upon information and belief, despite said knowledge, Plaintiffs failed to reveal pertinent information and/or undertook actions for their own purpose. Based upon the Doctrine of Unclean Hands, Plaintiffs' claims against Defendants should be barred.

43. As their Seventh Affirmative Defense, Defendants state that Plaintiffs should be barred from maintaining their action based upon the Doctrine of Ratification. At all material times, Plaintiffs ratified any alleged conduct of the Defendants which formed a basis for the claims set forth in the Second Amended Complaint. Based upon the proper application of the Doctrine of Ratification, Plaintiffs should be barred from maintaining their claims.

44. As their Eighth Affirmative Defense, Defendants state that Plaintiffs should be barred from maintaining their action based upon the Doctrine of Waiver. At all material times, Plaintiffs ratified any alleged conduct of the Defendants which formed a basis of the claims set forth in the Second Amended Complaint. Based upon the proper application of the Doctrine of Waiver, Plaintiffs should be barred from maintaining their claims.

45. As their Ninth Affirmative Defense, Defendants state that the claims set forth in the Second Amended Complaint are barred by the Doctrine of Judgmental Immunity. During the course and scope of Defendants' alleged representation of Plaintiffs as set forth in the Second Amended Complaint, the Defendants, at all materials times, acted in a reasonable manner, based upon reasonable interpretations of existing case law and the

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fact presented to the Defendants. At all materials times, the Defendants' actions were based upon a reasonable exercise of good faith professional judgment and were in fact reasonable when made. Thus, the Doctrine of Judgmental Immunity as recognized by Florida law, would bar Plaintiffs' action against the Defendants.

46. As their Tenth Affirmative Defense, Defendants state that the Second Amended Complaint fails to state a cause of action upon which relief can be granted.

47. As their Eleventh Affirmative Defense, Defendants state that Plaintiffs have failed to set forth any basis either in law or in fact which would entitle Plaintiffs to an award of attorneys fees as plead in the Second Amended Complaint and, as such, said claim for attorneys fees should be barred.

DEMAND FOR JURY TRIAL

48. Defendants, MICHAEL D. KARSCH and SACHS SAX & KLEIN, P.A., hereby demand a trial by jury of all issues so triable.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been transmitted via regular mail this 2^d day of August, 2005, to: Edward M. Ricci, Esq., RICCI ~ LEOPOLD, 2925 PGA Boulevard, Suite 200, Palm Beach Garden, Florida 33410 and

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