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IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

JESS LEVENTHAL :
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 & :
 :
 THE LEVENTHAL SUTTON & :
 GORNSTEIN 401(k) PROFIT :
 SHARING PLAN :
 :
 & :
 :
 LEVENTHAL SUTTON & GORNSTEIN, :
 ATTORNEYS AT LAW :
 :
 v. :
 :
 THE MANDMARBLESTONE :
 GROUP LLC :
 :
 & :
 :
 NATIONWIDE TRUST :
 COMPANY FSB :
 :
 Defendants :

CIVIL ACTION NO. _____

JURY TRIAL DEMANDED

COMPLAINT

Plaintiffs Jess Leventhal, the Leventhal Sutton and Gornstein 401(k) Profit Sharing Plan (the “LSG Plan”), and Leventhal, Sutton and Gornstein, Attorneys at Law (the “LSG Firm”), (collectively, “Plaintiffs”), by and through their undersigned counsel, hereby bring this Complaint against Defendants Nationwide Trust Company, FSB (“Nationwide”), as Custodian for the LSG Plan, and The MandMarblestone Group LLC (“MMG”), as Administration Firm for the LSG Plan (collectively, “Defendants”). Plaintiffs sue herein to recover their financial losses arising from Defendants’ unilateral actions -- without any knowledge or involvement whatever on the part of Plaintiffs -- in wiring more than \$400,000 from Plaintiffs’ 401(k) retirement plan to the bank accounts of cyber-criminals in gullible response to fraudulent electronic requests submitted to Defendants by said criminals.

THE PARTIES

1. Mr. Leventhal is a principal in the LSG Firm, as well as a participant in, and trustee of, the LSG Plan. As a plan participant and fiduciary, he is authorized to bring suit herein pursuant to 29 U.S.C. § 1132(a)(1)(B), (a)(2) and (a)(3).
2. The LSG Firm is a Pennsylvania partnership operating as a law firm with its headquarters in Trevose, Pennsylvania. It has standing to proceed herein as a party to certain contracts with MMG and Nationwide.
3. The LSG Plan is the 401(k) plan for the LSG Firm and is authorized to proceed herein pursuant to 29 U.S.C. § 1132(d).
4. Defendant MMG is a Pennsylvania LLC providing retirement plan support services to businesses such as the LSG Firm.
5. Defendant Nationwide is an Ohio company providing retirement plan investment and custodial services to businesses such as the LSG Firm.

JURISDICTION AND VENUE

6. Jurisdiction and venue are proper in this Court pursuant to 29 U.S.C. § 1132(e) because the LSG Plan is administered within the geographic scope of the Eastern District of Pennsylvania.

FACTUAL BACKGROUND

7. On November 10, 2011, the LSG Firm entered into a Retirement Plan Services Agreement (the “MMG Service Agreement”) with MMG to serve as administrator of the LSG Plan. *See Exhibit A.*

8. On December 1, 2014, the LSG Firm entered into a Program Agreement with Nationwide to serve as custodian of the LSG Plan (the “Nationwide Program Agreement”). *See Exhibit B.*

9. Mr. Leventhal was one of the participants in the LSG Plan.

10. On December 31, 2015, Mr. Leventhal sought to withdraw \$15,000 from his account in the LSG Plan.

11. To do so, he prepared a withdrawal request on a form in the “Required Format” as specifically prescribed by Nationwide. Ex. B (at pdf. p. 15). He then provided that form to the Office Administrator of the LSG Firm, Anita Selinsky, who subsequently emailed it to MMG using her office email account.

12. Thereafter, Mr. Leventhal received his fund distribution properly and without incident via a wire sent from Nationwide to Mr. Leventhal’s bank account.

13. Based upon information learned only afterwards, however, it now appears possible that unknown criminal(s) may have been able to obtain a copy of Mr. Leventhal’s

original, legitimate withdrawal form via an unknown method of cyber-fraud possibly relating to the electronic transmission of that form.

14. Thereafter, these criminals appear to have posed electronically as Ms. Selinsky by transmitting a series of emails -- that fraudulently appeared to come from Ms. Selinsky's office email account and attached fraudulent withdrawal forms -- to MMG seeking additional withdrawals from Mr. Leventhal's account at the LSG Plan. On these occasions, however, the forms requested that funds be sent to a different bank account, one that was not Mr. Leventhal's. In response, Defendants then wired the requested funds to the criminals' bank account.

15. By using this method repeatedly over the course of a month, these criminals were able -- with Defendants' assistance -- to drain Mr. Leventhal's account in the LSG Plan of his entire retirement savings, a total of more than \$400,000.

16. At the time, Plaintiffs had no idea these fraudulent withdrawal requests were even being made, much less processed by Defendants.

17. Since then, however, Plaintiffs have obtained from MMG some of the documents surrounding these fraudulent transactions.

18. What is particularly shocking about the documents Plaintiffs obtained is that MMG itself remarked upon the frequency and peculiar nature of the fraudulent withdrawal requests it had received from the criminals. On at least two occasions, in fact, MMG's own internal emails reflected its surprise regarding the withdrawals.

19. Thus, on April 7, 2016, MMG personnel wrote to each other in surprise, "Another one!"

20. Shortly thereafter, on April 15, 2016, the same MMG personnel wrote in an email: “Another one! This guy will be out of money soon.”

21. Sadly, MMG proved prescient. Mr. Leventhal’s account would soon be emptied.

22. Unfortunately, MMG did not communicate its concerns and observations to Plaintiffs.

23. Instead, MMG credulously forwarded each of the fraudulent requests to Nationwide for prompt execution without further inquiry or analysis.

24. By doing so, MMG breached the requirement of the MMG Service Agreement that it provide “support to you, the Plan Sponsor, on participant distributions.” Ex. A (at pdf. p. 8).

25. MMG further breached its obligation under the MMG Service Agreement to “confirm accurate vesting and eligibility for each distribution” under the LSG Plan. Ex. A (at pdf. p. 14).

26. Needless to say, the cyber-criminals were not “eligible” to receive distributions from Mr. Leventhal’s retirement account.

27. MMG breached these obligations notwithstanding the compensation it received for assuming such responsibilities.

28. MMG charged participants (Mr. Leventhal’s account in this instance) \$75 per distribution, and charged the LSG Plan many other fees as well. Ex. A (at pdf. pp. 14, 20).

29. MMG also breached its duties as the designated “Administration Firm” under the Nationwide Program Agreement to fulfill its responsibility “[t]o instruct Nationwide to make loan disbursements or make cash payments to Participants and to provide all information

required by Nationwide to make such loan disbursements or cash payments. Administration Firm will obtain any necessary Plan Sponsor approvals prior to providing such instructions to Nationwide.” Ex. B (at pdf. p. 23).

30. MMG did not, however, obtain “Plan Sponsor approvals” prior to forwarding the fraudulent distribution requests.

31. For its part, Nationwide then distributed the funds to the bank account fraudulently designated by the cyber-criminals, even though that account did not actually belong to Mr. Leventhal and had never been authorized or used by him previously.

32. By doing so, Nationwide also acted in violation of the requirements of the Nationwide Program Agreement, which provided that, “Nationwide shall comply with Written Instructions concerning” Plan assets and that “any action to be taken by Nationwide under the Agreement shall be taken upon Written Instruction from the Plan Sponsor or Administration Firm.” Ex. B (at pdf. pp. 17, 19).

33. Nationwide itself, in the Nationwide Program Agreement, had specifically defined the phrase “Written Instruction” as requiring a “Signature” or “Original Signature” – that is, “an *authentic*, hard-copy non-reproduced signature of the Plan Sponsor or Plan Administrator or Administration Firm.” Ex. B (at pdf. p. 15-16) (emphasis added).

34. The requirement of an “authentic” signature was thus inserted into the Nationwide Program Agreement by Nationwide itself. According to Nationwide’s own agreement, then, Nationwide was not authorized to distribute plan assets without first confirming the authenticity of the signatures contained on any distribution form Nationwide received.

35. The signatures on the fraudulent withdrawal forms were not, however, “authentic.” Nor were they the signatures of the Plan Sponsor, Plan Administrator, Plan

Participant or Administration Firm. They were forgeries. As a result, Nationwide's actions (as well as MMG's) were improper and unauthorized by the terms of Nationwide's own standard form agreement.

36. Similarly, the Nationwide Program Agreement authorized Nationwide only to "[a]ccept instructions in the Required Format from the Plan Sponsor or Administration Firm regarding the allocation, distribution or other disposition of the assets of the Account. . . ." In this case, however, the "Required Format" (*i.e.*, the form prescribed by Nationwide itself) was not completed by *either* the Plan Sponsor or the Administration Firm. Instead, it appears to have been completed by the cyber-criminals.

37. Neither Nationwide nor MMG implemented procedures, steps, or safeguards to ensure that a designated receiving bank account was actually correct, authorized and associated with an eligible participant in the LSG Plan.

38. Moreover, even a cursory review of the documents surrounding the fraudulent transfers (documents that were provided to Plaintiffs by MMG only afterwards) reveals that both MMG and Nationwide carelessly failed to notice and investigate the numerous red flags that characterized each of the fraudulent requests submitted by the cyber-criminals.

39. Among those red flags were misspelled proper names ("Glen" and "Jess Levanthal"), a bank (Wells Fargo) that Mr. Leventhal had never previously used, forged signatures that clearly do not match Mr. Leventhal's actual signature, multiple withdrawal requests submitted within a one-month period, and questions and requests that were strikingly odd (such as "How much can we get in total?" and "Jess Levanthal [sic] would like to take all funds out of his account and close the account, Please let me know how much he will be getting. . .").

40. Moreover, neither Nationwide nor MMG implemented commonly employed procedures, steps or safeguards to notify Mr. Leventhal and confirm the propriety of the withdrawals at the same time as those withdrawals were actually occurring.

41. As a result, Mr. Leventhal knew nothing about the thefts from his retirement account until he received and reviewed his quarterly statement on or about July 5, 2016. He was shocked, then, to learn that his account had been emptied without his knowledge, involvement or approval.

42. Since that time, Plaintiffs have reported their losses to law-enforcement authorities, but those authorities have been unable to apprehend the culprits or recover the stolen funds. Plaintiffs have also submitted insurance claims, which were denied.

43. Plaintiffs also sought reimbursement from the Defendants, who had been entrusted with safeguarding the assets. The Defendants, however, have failed and refused to reimburse the Plaintiffs for their losses, even though those losses arose from the Defendants' unilateral, unauthorized, negligent and careless actions.

44. Both MMG and Nationwide functioned as fiduciaries pursuant to 29 U.S.C. § 1002(21)(A) because they (i) exercised discretionary authority or discretionary control respecting management of the LSG Plan and/or exercised authority or control respecting management or disposition of its assets, and (ii) they had discretionary authority or discretionary responsibility in the administration of the LSG Plan.

45. Such discretionary authority was specifically afforded them under the above-referenced provisions of the MMG Service Agreement and the Nationwide Program Agreement.

46. Pursuant to 29 U.S.C. § 1110(a), any contrary provisions in the parties' agreements that may self-servingly seek to relieve MMG or Nationwide from their responsibilities as fiduciaries are void as against public policy.

**COUNT ONE:
BREACH OF CONTRACT**

47. The allegations of the foregoing paragraphs are incorporated herein by reference.

48. Valid contracts exist between the parties as described above.

49. Defendants' performance thereunder is defective relative to the terms of their agreements.

50. Defendants' actions also constitute a breach of the implied covenant of good faith and fair dealing.

51. Plaintiffs have suffered damages thereby.

WHEREFORE, Plaintiffs demand the relief described below in the Prayer for Relief and incorporated herein by reference.

**COUNT TWO:
BREACH OF FIDUCIARY DUTY / ERISA**

52. The allegations of the foregoing paragraphs are incorporated herein by reference.

53. The Defendants are fiduciaries of the LSG Plan.

54. As such, they owe fiduciary duties of both care and loyalty to Plaintiffs.

55. The Defendants breached their fiduciary duties.

56. By doing so, Defendants violated (among other laws) 29 U.S.C. § 1132(a)(1), (a)(2) and (a)(3), and are thus subject to claims and remedies thereunder and as otherwise provided by ERISA.

57. Plaintiffs have suffered damages thereby.

WHEREFORE, Plaintiffs demand the relief described below in the Prayer for Relief and incorporated herein by reference.

**COUNT THREE:
NEGLIGENCE**

58. The allegations of the foregoing paragraphs are incorporated herein by reference.

59. The Defendants were under a duty recognized by law that required them to conform to a certain standard of conduct.

60. The Defendants failed to conform to the required standard.

61. There was a causal connection between the conduct of the Defendants and the resulting injury suffered by the Plaintiffs.

62. Plaintiffs have suffered damages thereby.

WHEREFORE, Plaintiffs demand the relief described below in the Prayer for Relief and incorporated herein by reference.

PRAYER FOR RELIEF

23. The allegations of the foregoing paragraphs are incorporated herein by reference.

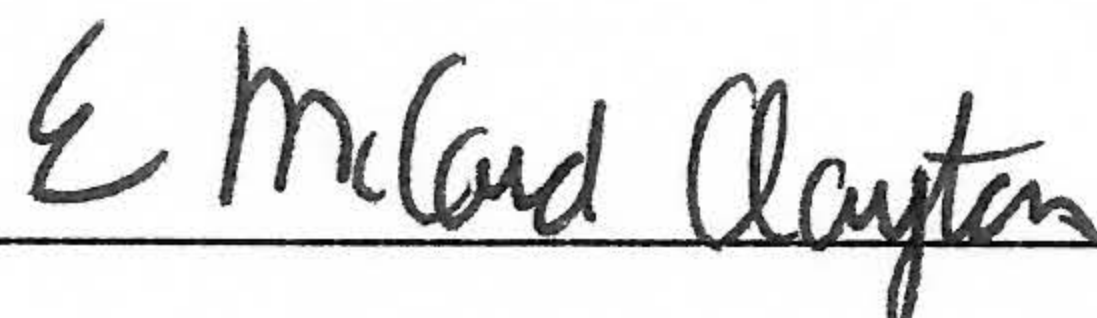
24. **WHEREFORE**, Plaintiffs demand judgment in their favor, and against Defendants, as follows:

24.1. Pecuniary damages, including but not limited to:

- 1) Compensatory and consequential damages;
- 2) Investment losses and opportunity costs;
- 3) Punitive damages;
- 4) Interest, costs and attorneys' fees (including but not limited to pursuant to 29 U.S.C. § 1132(g)(1)); and
- 5) Such other relief as is reasonable and just.

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a jury trial on all issues so triable.



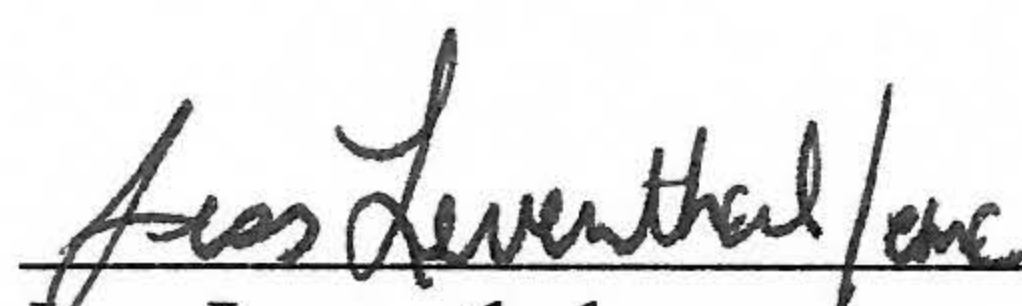
E. McCord Clayton, Esq.

Dated: June 26, 2018

AFFIDAVIT, VERIFICATION AND DECLARATION

I, Jess Leventhal, hereby state that I am authorized to make this affidavit, verification and declaration, that I have personal knowledge of the factual statements made in the foregoing document, and that those statements are true and correct to the best of my knowledge, information and belief.

I understand that the statements made in this declaration are made subject to the penalties of perjury relating to unsworn falsification to authorities and, pursuant to 28 U.S.C. § 1746, declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct.



Jess Leventhal

Dated: June 26, 2018