

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

JESS LEVENTHAL, et al.,	:	
	:	
Plaintiffs,	:	Civil Action No.
v.	:	
	:	No. 2:18-CV-2727-MSG
THE MANDMARBLESTONE GROUP, LLC, et al.,	:	
	:	
Defendants.	:	
	:	

**ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS  
OF DEFENDANT THE MANDMARBLESTONE GROUP, LLC**

Answering defendant, The MandMarblestone Group, LLC (“MMG”), responds to the allegations of the Complaint filed by plaintiffs, Jess Leventhal (“Mr. Leventhal”), the Leventhal, Sutton and Gorstein 401(k) Profit Sharing Plan (the “LSG Plan”), and Leventhal, Sutton & Gornstein, Attorneys at Law (the “LSG Firm,” and collectively with Mr. Leventhal and the LSG Plan, the “Plaintiffs”), as follows:

**THE PARTIES**

1. It is admitted that Mr. Leventhal is a principal of the LSG Firm as well as a participant in, and named trustee of, the LSG Plan. The remaining allegations of this paragraph are denied as conclusions of law.

2. It is admitted that the LSG Firm is a law firm and has its offices in Trevoese, Pennsylvania. It is admitted that MMG and the LSG Firm are the parties to that certain Retirement Plan Services Agreement dated November 10, 2011 (the “MMG Agreement”). It is also admitted that MMG, the LSG Firm, and defendant Nationwide Trust Company, FSB (“Nationwide”) are, among others, parties (in specified capacities) to the Nationwide Retirement Flexible Advantage Program Agreement (the “Nationwide Agreement”). The remaining

allegations of this paragraph are denied as conclusions of law.

3. It is admitted that the LSG Plan is the qualified 401k plan for the LSG Firm. The remaining allegations of this paragraph are denied as conclusions of law.

4. It is admitted that MMG is a Pennsylvania limited liability company that provides, among other things, certain retirement plan administrative support services to businesses.

5. After reasonable investigation, MMG is without information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, the allegations are denied.

#### **JURISDICTION AND VENUE**

6. Denied as a conclusion of law.

#### **FACTUAL BACKGROUND**

7. It is admitted that MMG and the LSG Firm are the parties to the MMG Agreement, a copy of which is attached as Exhibit A to the Complaint. The remaining allegations of this paragraph are denied as the MMG Agreement speaks for itself as to the nature and details of the third-party administrative service obligations accepted by MMG, which are incorporated herein by reference. For the avoidance of doubt, MMG was not and is not a “named fiduciary” of the LSG Plan and did not agree in any written agreement to be a named fiduciary of the LSG Plan. Additionally, MMG is not and has never been the formal/named “Plan Administrator” of the LSG Plan and did not agree in any written agreement to be the “Plan Administrator” of the LSG Plan. *On the contrary*, pursuant to the 401k Profit Sharing Plan and Trust Agreement By And Between: Leventhal Sutton & Gornstein, Attorneys at Law and Jess Leventhal, Thomas D. Sutton, and Sharon Gornstein, Trustees (the “LSG Plan Agreement”), the

*LSG Firm* is expressly designated/named as the “Plan Administrator” for the LSG Plan (among the LSG Firm’s other official capacities vis-à-vis the LSG Plan, including designation as the “Plan Sponsor” and “Named Fiduciary”). *See* LSG Plan Agreement §§ 2.37, 14.2, 14.3, 15.1, a true and correct copy of which is attached hereto as **Exhibit 1**. ERISA and the case law recognize a legal distinction between a qualified plan’s designated/formal “Plan Administrator” (which is a named fiduciary) and a third-party administrative services provider that provides limited, specified services to the plan (not a named fiduciary and not subject to fiduciary duties unless the “functional fiduciary” standard is satisfied as to a particular activity at issue). MMG avers that vis-à-vis Plaintiffs it was a third-party administrative services provider pursuant to the terms of the MMG Agreement and was not a named fiduciary and/or the formal “Plan Administrator.” MMG also avers that it was not a functional fiduciary with respect to the activities at issue in this action.

8. It is admitted that the LSG Firm and Nationwide executed the Nationwide Agreement. The remaining allegations are denied as the terms of the Nationwide Agreement speak for themselves.

9. Admitted.

10. Upon information and belief, admitted.

11. Denied as stated. It is admitted that the LSG Firm and Mr. Leventhal communicated with MMG for purposes of obtaining services under the MMG Agreement, through their designated employee “contact person” (*see* MMG Services Agr. § IV(a))—Anita C. Selinsky (“Ms. Selinsky”), who at all relevant times used the e-mail address “office2868@aol.com” to communicate with and send documentation to MMG. Upon information and belief, Ms. Selinsky’s above-referenced e-mail address is her personal e-mail

account, however, she continuously used the same for her official duties on behalf of the LSG Firm without objection from Plaintiffs, both before and after Ms. Selinsky and Plaintiffs became aware that her e-mail account had been hacked, otherwise compromised, or otherwise utilized to commit criminal acts against the parties. The remaining allegations of this paragraph are denied.

12. Upon information and belief, admitted.

13. After reasonable investigation, MMG is without information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, the allegations are denied as stated. By way of further response, MMG does not deny that some form of criminal fraud was perpetrated by third-parties against all of the parties to this action, which at least in part involved the hacking and/or other misuse of Ms. Selinsky's e-mail account and Mr. Leventhal's withdrawal forms. That said, as the Plaintiffs have acknowledged in their filings with the Court, the factual details of the criminal scheme underlying this action (*e.g.*, the individuals involved and exactly how the fraud was perpetrated) remain unresolved at this time. However, the criminal scheme is currently the subject of investigation by certain government authorities—specifically, at least two criminal prosecutions are pending in Texas state court that appear to relate to the criminal scheme at issue. Though little information is available to the public, Texas authorities have indicated informally that the two individuals currently subject to criminal prosecution in Texas were involved in the criminal fraud that underlies this case. Additionally, the factual details of the criminal conduct at issue remain subject to discovery in this action, which is only partially complete. As this case progresses, the parties' discovery, which likely will include *inter alia* expert forensic analysis of Plaintiffs' computers and the computer of Ms. Selinsky, as well as any information supplied via the criminal prosecutions in Texas, will hopefully shed light on how and by whom the criminal fraud was perpetrated.

14. Denied. MMG incorporates by reference its response to paragraph 13. By way of further response, MMG never wired or transferred any funds for any of the Plaintiffs and had no authority to do so, nor did MMG have access or control over any of Plaintiffs' individual or collective assets. By way of still further response, MMG never expressly directed Nationwide to transfer/wire funds to any individual or entity other than Mr. Leventhal—on the contrary, MMG expressly instructed Nationwide to distribute funds to Mr. Leventhal. MMG had no control over or responsibility for Nationwide.

15. Denied. MMG incorporates by reference its response to paragraph 13.

16. Denied. MMG incorporates by reference its response to paragraph 13.

17. Admitted.

18. Denied. The documents referred to in this paragraph speak for themselves. By way of further response, the allegations of this paragraph are contrived and without proper context—prior to December 31, 2015, Mr. Leventhal already had a history of frequently requesting and receiving large, irregularly timed withdrawals from the LSG Plan and also had outstanding loans from the LSG Plan. By way of example, and without limitation: on May 3, 2014, Mr. Leventhal withdrew **\$33,000**; on October 3, 2014, Mr. Leventhal withdrew **\$31,250**; on April 7, 2015, Mr. Leventhal withdrew **\$75,000**; on June 26, 2015, Mr. Leventhal withdrew **\$25,000**; and on July 8, 2015, Mr. Leventhal withdrew an astounding **\$200,000**—Plaintiffs do not allege that any of these withdrawals were fraudulent or otherwise not received by Mr. Leventhal. Additionally, between January 1, 2016 and the final purportedly fraudulent withdrawal request (on or about May 4, 2016), Ms. Selinsky submitted to MMG several (via her above-identified e-mail account) withdrawal requests that, according to Plaintiffs and/or Ms. Selinsky, were successfully distributed to Mr. Leventhal. Similar to Mr. Leventhal's withdrawal

history prior to December 31, 2015, the successful withdrawals made between January 1, 2016 and May 4, 2016 were large and irregular, including: a distribution of **\$15,000** on or about January 8, 2016; a distribution of **\$18,000** on or about February 29, 2016; and a distribution of **\$85,000** on or about April 6, 2016. Lastly, after the final purportedly fraudulent distribution on or about May 4, 2016, but before Ms. Selinsky first advised MMG (on or about June 16, 2016) that her e-mail account had been hacked, Mr. Leventhal requested and obtained a distribution of **\$48,650** on or about May 16, 2016. In other words, Mr. Leventhal did not have a history or practice of taking modest monthly withdrawals in a consistent amount akin to the average retiree, instead Mr. Leventhal had a history of making large, irregularly timed withdrawals in inconsistent amounts (ranging from \$15,000 to \$200,000). Mr. Leventhal's withdrawal history and practices rendered the purportedly fraudulent withdrawal requests at issue not particularly aberrant and/or apparently fraudulent, but instead these requests were consistent with Mr. Leventhal's pattern of erratically and drastically drawing down his retirement savings. Mr. Leventhal's pattern of erratically and drastically drawing down his retirement savings is among the reasons why MMG reasonably believed that the allegedly fraudulent withdrawal requests originated from Mr. Leventhal and were properly authorized by the named fiduciaries of the LSG Plan (the Plaintiffs). The allegations of this paragraph ignore the foregoing context and are salacious. For the avoidance of doubt, MMG is not and was not hired by the LSG Firm to provide personal financial advice or investment advice of any kind to plan participants—*i.e.*, it was not the role or responsibility of MMG to advise Mr. Leventhal or the LSG Firm as to whether Mr. Leventhal's withdrawal practices were financially reasonable or sound. *See, e.g.*, MMG Agr. § VII(b). As further described *supra* paragraph 23, MMG's responsibilities vis-à-vis withdrawal requests were limited to determining whether the participant was vested and eligible

for such distribution. *See, e.g.*, MMG Agr. § V(c)(3)(i).

19. Denied. MMG incorporates by reference its response to paragraph 18 as if set forth at length herein.

20. Denied. MMG incorporates by reference its response to paragraph 18 as if set forth at length herein.

21. Denied.

22. Denied. MMG met all of its obligations under the MMG Agreement, the Nationwide Agreement, and ERISA/applicable law.

23. Denied. Each of the withdrawal requests that was received by MMG was administratively processed in accordance and compliance with: (i) the LSG Plan Agreement, (ii) the MMG Agreement, (iii) MMG's limited obligations as the "administrative firm" under the Nationwide Agreement, and (iv) applicable law. More specifically, pursuant to the foregoing written agreements, it was the responsibility of, and within the sole authority of, the named fiduciaries of the LSG Plan, including the trustees (Mr. Leventhal and his law partners) and/or the named Plan Administrator (the LSG Firm), to authorize and approve the merits of each distribution request and provide the required authorized signature. Subsequently, Plaintiffs' employee "contact person" Ms. Selinsky then e-mailed the signed and approved withdrawal request to MMG with an instruction to (i) process the request, and (ii) instruct Nationwide to tender the requested distribution. Upon receipt of the signed withdrawal request form from Ms. Selinsky, MMG provided limited "support" services to the LSG Firm as agreed to in the MMG Agreement. (MMG Agr. § III(c)(1)). Precisely, the "support" services that MMG agreed to provide, and that it did provide, were as follows: "MMG will confirm accurate vesting and eligibility for each distribution." (MMG Agr. § V(c)(3)(i)). MMG confirmed vesting and

eligibility pursuant to the terms of the LSG Plan Agreement, particularly Articles XI and XII thereof. Once MMG confirmed that the LSG Plan participant associated with the withdrawal request (here, Mr. Leventhal) was vested and eligible for the requested distribution under the LSG Plan Agreement, MMG's obligations under the MMG Agreement vis-à-vis a distribution request were complete (most administrative services discussed in the MMG Services Agreement are unrelated to distributions). MMG then sent to Nationwide, via facsimile, the following: (i) the subject withdrawal request form, and (ii) a facsimile cover page with an instruction in the form of, or substantially in the form of, the following: "Please process the attached in-service distribution request for Jess Leventhal. Should you have any questions, please do not hesitate to contact me." (emphasis added). Once the foregoing communication and the enclosed withdrawal request form signed by Plaintiffs were successfully sent to Nationwide, MMG completed its distribution related obligations under the Nationwide Agreement "[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. Administrative Firm will obtain any necessary Plan Sponsor approvals prior to providing such instructions to Nationwide." (Compl., Ex. B p. 22, Responsibilities of Administration Firm no. 4). The processing functions that MMG performed were ministerial and of the type that the Department of Labor has specifically found to be non-fiduciary in nature. By way of still further response, and for the avoidance of doubt, with respect to the withdrawal transactions at issue, MMG never expressly directed Nationwide to distribute Plaintiffs' funds to any individual or entity other than Mr. Leventhal. On the contrary, with respect to all relevant transactions, MMG instructed Nationwide to distribute the funds to Mr. Leventhal.

24. Denied as a conclusion of law. MMG did not breach the MMG Agreement and,



in any event, the Court dismissed Plaintiffs' breach of contract claim as preempted by ERISA. By way of further response, MMG incorporates by reference its response to paragraph 23.

25. Denied as a conclusion of law. MMG did not breach the MMG Agreement and, in any event, the Court dismissed Plaintiffs' breach of contract claim as preempted by ERISA. By way of further response, MMG incorporates by reference its response to paragraph 23.

26. Denied. MMG did not breach the MMG Agreement and, in any event, the Court dismissed Plaintiffs' breach of contract claim as preempted by ERISA. By way of further response, MMG never made a determination that purported "cyber criminals" were eligible for distributions from Mr. Leventhal's LSG Plan account. On the contrary, with respect to all withdrawal transactions, MMG considered whether Mr. Leventhal (and only Mr. Leventhal) was vested and eligible within the meaning of the LSG Plan Agreement. By way of still further response, MMG actually and reasonably believed that the subject withdrawal requests originated from Mr. Leventhal and were properly authorized by the named fiduciaries of the LSG Plan (the Plaintiffs) because, *inter alia* (i) Mr. Leventhal had a history and practice of making large, irregularly timed withdrawals in varying amounts (from \$15,000 to \$200,000), and (ii) like all other withdrawal requests, the withdrawal requests at issue were delivered to MMG via e-mail from Ms. Selinsky's e-mail address (Mrs. Selinsky was Plaintiffs' designated "contact person"). Indeed, during the time period that the distributions at issue were made, Ms. Selinsky continued to transact other business with MMG through her e-mail address and even made withdrawal requests that resulted in distributions to Mr. Leventhal without incident (*see supra* § 18). MMG was not aware, and under the circumstances could not reasonably have been aware, of any fraud, criminal actors, or criminal acts at the time of the subject transactions—only after the subject transactions were complete did Ms. Selinsky inform MMG that her e-mail account had been

hacked and that fraud had occurred. By way of still further response, MMG never expressly directed Nationwide to distribute Plaintiffs' funds to any individual or entity other than Mr. Leventhal. By way of still further response, MMG incorporates by reference its response to paragraph 23.

27. Denied as a conclusion of law. MMG did not breach any obligations or agreement and, in any event, the Court dismissed Plaintiffs' breach of contract claim as preempted by ERISA.

28. Denied. MMG was paid in accordance with the terms of the MMG Agreement, which speaks for itself.

29. Denied as a conclusion of law. MMG did not breach the Nationwide Agreement and, in any event, the Court dismissed Plaintiffs' breach of contract claim as preempted by ERISA. By way of still further response, MMG incorporates by reference its response to paragraphs 23 and 26.

30. Denied as a conclusion of law. MMG did not breach the Nationwide Agreement and, in any event, the Court dismissed Plaintiffs' breach of contract claim as preempted by ERISA. By way of still further response, MMG incorporates by reference its response to paragraphs 23 and 26.

31. After reasonable investigation, MMG is without information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, the allegations are denied. By way of still further response, MMG never expressly directed Nationwide to distribute Plaintiffs' funds to any individual or entity other than Mr. Leventhal. On the contrary, with respect to all relevant transactions, MMG instructed Nationwide to distribute the funds to Mr. Leventhal.

32. Denied as a conclusion of law. By way of still further response, MMG never expressly directed Nationwide to distribute Plaintiffs' funds to any individual or entity other than Mr. Leventhal. On the contrary, with respect to all relevant transactions, MMG instructed Nationwide to distribute the funds to Mr. Leventhal.

33. Denied—the Nationwide Agreement speaks for itself.

34. Denied as a conclusion of law and because the Nationwide Agreement speaks for itself.

35. Denied as a conclusion of law. By way of further response, to the extent that the Nationwide Agreement imposed any signature authentication requirement on Nationwide, it was not among the limited responsibilities of MMG as the “Administrative Firm” under the terms of the agreement. By way of still further response, MMG never expressly directed Nationwide to distribute Plaintiffs' funds to any individual or entity other than Mr. Leventhal. On the contrary, with respect to all relevant transactions, MMG instructed Nationwide to distribute the funds to Mr. Leventhal. By way of still further response, MMG incorporates by reference its response to paragraphs 13, 23, and 26.

36. Denied as a conclusion of law. By way of still further response, MMG incorporates by reference its response to paragraphs 13, 23, 26, and 35.

37. Denied as a conclusion of law. By way of further response, MMG fulfilled its responsibilities under the MMG Agreement, the Nationwide Agreement, and the LSG Plan and otherwise met all applicable standards of care. By way of still further response, ERISA as well as its associated regulations have not established any standard procedures, steps, and/or safeguards for cyber-crime, cyber-fraud, or similar misconduct. By way of still further response, MMG had no contractual responsibilities with respect to the Plaintiffs' bank accounts, which

were under the custodial control of Nationwide. Indeed, MMG had no control or access to Plaintiffs' bank accounts and was not involved in transacting funds directly to or from any such bank accounts. By way of still further response, MMG had no obligation to ensure the security of Plaintiffs' computer and IT systems, including their e-mail. By way of still further response, MMG never expressly directed Nationwide to distribute Plaintiffs' funds to any individual or entity other than Mr. Leventhal. On the contrary, with respect to all relevant transactions, MMG instructed Nationwide to distribute the funds to Mr. Leventhal. By way of still further response, MMG incorporates by reference its response to paragraphs 13, 23, 26, and 35.

38. Denied as a conclusion of law. By way of further response, MMG fulfilled its responsibilities under the MMG Agreement, the Nationwide Agreement, and the LSG Plan and otherwise acted in compliance with applicable standards of care at all times. On the contrary, Plaintiffs' own carelessness with respect to their employees and their computer/IT systems and policies, including their decision to permit Ms. Selinsky to work remotely from Texas and use her personal e-mail for official employment duties, permitted the cyber-fraud or other criminal fraud to occur. To the extent MMG is liable under ERISA as alleged, Mr. Leventhal, his law partners, and the LSG Firm, are equally liable in their capacity as the named fiduciaries of the LSG Plan. By way of still further response, MMG incorporates by reference its response to paragraph 26.

39. Denied as a conclusion of law. By way of further response, MMG incorporates by reference its response to paragraphs 18 and 26.

40. Denied as a conclusion of law. By way of further response, MMG fulfilled its responsibilities under the MMG Agreement, the Nationwide Agreement, and the LSG Plan and otherwise acted in compliance with applicable standards of care at all times. By way of further

response, MMG incorporates by reference its response to paragraphs 18, 26, and 38.

41. After reasonable investigation, MMG is without information sufficient to form a belief as to the truth of the allegations contained in this paragraph and, therefore, the allegations are denied. By way of further response, Mr. Leventhal presumptively received his quarterly statement for the first quarter (when several allegedly fraudulent withdrawals were made) several months earlier than July 5, 2016. Therefore, had Mr. Leventhal exercised reasonable care as a named fiduciary of the LSG Plan and/or as a participant and timely read his account statements, he should or would have discovered the fraud sooner and potentially in time to prevent some of the allegedly fraudulent withdrawals. By way of further response, Plaintiffs' own carelessness permitted the cyber-fraud or other criminal fraud to occur. To the extent MMG is liable under ERISA as alleged, Mr. Leventhal, his law partners, and the LSG Firm, are equally liable.

42. Denied. As Plaintiffs are aware, at least two individuals are currently being criminally prosecuted in Texas state court for their roles in perpetrating the fraud underlying this action. Further, with respect to Plaintiffs' purported submission of insurance claims, upon information and belief, each participant in the LSG Plan is insured by a \$200k bond and those funds may be available to satisfy all or part of Plaintiffs' purported losses. It is unknown whether or not Plaintiffs have attempted to collect on this bond.

43. Denied. To the extent MMG is liable under ERISA as alleged, Mr. Leventhal, his law partners, and the LSG Firm are equally liable.

44. Denied as a conclusion of law. By way of further response, MMG was not a named fiduciary or a functional fiduciary under ERISA.

45. Denied as a conclusion of law and because the MMG Agreement, Nationwide Agreement, and LSG Plan Agreement each speak for themselves. By way of further response,

neither the MMG Agreement, the Nationwide Agreement, nor the LSG Plan Agreement grant MMG discretionary authority with respect to withdrawal requests and/or the processing of withdrawal requests within the meaning of ERISA.

46. Denied as a conclusion of law.

**COUNT ONE:  
BREACH OF CONTRACT**

47. Dismissed pursuant to the Court's Order entered on May 2, 2019.

48. Dismissed pursuant to the Court's Order entered on May 2, 2019.

49. Dismissed pursuant to the Court's Order entered on May 2, 2019.

50. Dismissed pursuant to the Court's Order entered on May 2, 2019.

51. Dismissed pursuant to the Court's Order entered on May 2, 2019.

WHEREFORE, defendant, The MandMarblestone Group, LLC, respectfully requests that the Complaint be dismissed with prejudice and that the Court grant such other relief as it deems just and appropriate.

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

52. MMG incorporates the above and below paragraphs by reference herein.

53. Denied as a conclusion of law. By way of further response, MMG was not a named fiduciary, was not the formal/named Plan Administrator, and was not a functional fiduciary of the LSG Plan. *See supra* ¶ 7, which MMG incorporates herein by reference. Indeed, MMG was merely a third-party administrative services provider with certain, limited contractual obligations to the LSG Plan/the LSG Firm and, in all relevant respects, provided ministerial and/or other administrative services that were not fiduciary in nature under ERISA. To be sure, MMG lacked discretionary authority and/or control over all relevant aspects of the

administration and/or management of the LSG Plan and had no authority and/or control with respect to the management and/or disposition of any asset of the LSG Plan. On the contrary, plaintiffs Mr. Leventhal and the LSG Firm as well as Mr. Leventhal's non-party law partners are the named fiduciaries of the LSG Plan and, therefore, they were the individuals and entities with discretionary authority and/or control over the LSG Plan and its assets.

54. Denied as a conclusion of law. By way of further response, MMG is not a fiduciary with respect to the LSG Plan and, therefore, MMG owes no fiduciary duties to any of the Plaintiffs. On the contrary, plaintiffs Mr. Leventhal and the LSG Firm as well as Mr. Leventhal's non-party law partners owe fiduciary duties to the LSG Plan and its participants.

55. Denied as a conclusion of law. By way of further response, MMG owes no fiduciary duties to any of the Plaintiffs and, therefore, breached no fiduciary duty to any of the Plaintiffs.

56. Denied as a conclusion of law. By way of further response, MMG owes no fiduciary duties to any of the Plaintiffs and, therefore, did not violate and could not have violated any provision of 29 U.S.C. § 1132 and/or any other section or part of ERISA relied upon by Plaintiffs.

57. Denied as a conclusion of law.

WHEREFORE, defendant The MandMarblestone Group, LLC requests that the Complaint be dismissed with prejudice and that the Court grant such other relief as it deems just and appropriate.

**COUNT THREE:  
NEGLIGENCE**

58. Dismissed pursuant to the Court's Order entered on May 2, 2019.

59. Dismissed pursuant to the Court's Order entered on May 2, 2019.

60. Dismissed pursuant to the Court's Order entered on May 2, 2019.

61. Dismissed pursuant to the Court's Order entered on May 2, 2019.

62. Dismissed pursuant to the Court's Order entered on May 2, 2019.

WHEREFORE, defendant The MandMarblestone Group, LLC requests that the Complaint be dismissed with prejudice and that the Court grant such other relief as it deems just and appropriate.

**PRAYER FOR RELIEF**

63. [incorrectly numbered in Complaint as paragraph 23] Denied. MMG incorporates the above and below paragraphs by reference herein.

64. [incorrectly numbered in Complaint as paragraph 24] WHEREFORE, defendant The MandMarblestone Group, LLC requests that the Complaint be dismissed with prejudice and that the Court grant such other relief as it deems just and appropriate

64.1. [incorrectly numbered in Complaint as paragraph 24.1] Denied as a conclusion of law. By way of further response, pecuniary damages are not available under ERISA and Plaintiffs are not otherwise entitled to such damages.

1) Denied as a conclusion of law. By way of further response, compensatory and consequential damages are not available under ERISA and Plaintiffs are not otherwise entitled to such damages;

2) Denied as a conclusion of law. By way of further response, Plaintiffs are not entitled to investment losses and opportunity costs;

3) Denied as a conclusion of law. By way of further response, punitive damages are not available under ERISA and Plaintiffs are not otherwise entitled to such damages;



4) Denied as a conclusion of law. By way of further response, Plaintiffs are not entitled to an award of interest, cost, and/or attorneys' fees; and

5) Denied as a conclusion of law. By way of further response, Plaintiffs are not entitled to any relief vis-à-vis MMG.

### **DEMAND FOR JURY TRIAL**

It is denied that a jury trial is permitted on any issue and/or claim in this action under ERISA. Plaintiffs' demand for a jury trial should be denied as a matter of law.

### **GENERAL DENIAL**

To the extent not specifically admitted, MMG denies each and every allegation in the Complaint.

### **AFFIRMATIVE DEFENSES**

1. MMG incorporates the above and below paragraphs by reference herein.
2. The averments set forth in the Complaint fail to state a cause of action against MMG.
3. MMG was not a named fiduciary, was not the formal/named Plan Administrator, and was not a functional fiduciary of the LSG Plan. *See supra* Ans. ¶ 7, which MMG incorporates herein by reference.
4. MMG was merely a third-party administrative services provider with certain, limited contractual obligations to the LSG Plan/the LSG Firm and, in all relevant respects, provided ministerial and/or other administrative services that were not fiduciary in nature under ERISA.
5. The Nationwide Agreement provides that MMG was the "Administrative Firm," as that term is defined therein, and not the formal "Plan Administrator" of the LSG Plan.

6. MMG did not owe Plaintiffs, whether individually or collectively, any fiduciary duties.

7. MMG had no duty to police or ensure the security of Plaintiffs' and/or any of their employees' (including, Ms. Selinsky's) respective computers, IT systems, and/or e-mail accounts.

8. MMG had no control over or access to Plaintiffs' and/or any of their employees' (including, Ms. Selinsky's) respective computers, IT systems, and/or e-mail accounts.

9. MMG had no contractual responsibilities with respect to the administration or management of the LSG Plan's bank account(s) and had no control, access, or authority to unilaterally or directly distribute, transfer, wire, or otherwise dispose of any assets of the LSG Plan.

10. MMG is not and was not hired by the LSG Firm to provide personal financial advice or investment advice of any kind to plan beneficiaries/participants. *See, e.g.*, MMG Agr. § VII(b).

11. MMG, even if found to be a fiduciary, is not strictly or per se liable for Plaintiffs' alleged losses.

12. MMG did not breach any duty of care and/or any fiduciary duty to Plaintiffs, whether individually or collectively.

13. MMG lacked discretionary authority and/or control over all relevant aspects of the administration and/or management of the LSG Plan and had no authority and/or control with respect to the management and/or disposition of any asset of the LSG Plan. Indeed, the MMG Agreement emphasizes that, among other "Plan Sponsor Responsibilities":

***It is critical*** in every phase of our work for you ***that we have access to one key person (the 'contact person') who is authorized to make retirement***

*plan decisions.* [T]he *Plan Sponsor must designate the contact person as the ultimate authority with respect to the plan*, and agree that this individual will be responsive to MMG communication in a timely manner.

(MMG Agr. § IV(a) (emphasis in heading original, emphasis in text added)).

14. The named fiduciaries of the LSG Plan are Mr. Leventhal, the LSG Firm, and Mr. Leventhal's law partners and, as such, they are the parties who each owe fiduciary duties to the LSG Plan and/or its participants and are the parties responsible for the alleged losses and breaches of fiduciary duty, if any.

15. Pursuant to the LSG Plan Agreement, the LSG Firm, *not MMG*, is the formally designated "Plan Administrator" for the LSG Plan.

16. Mr. Leventhal and the LSG Firm as well as Mr. Leventhal's law partners, as the named fiduciaries of the LSG Plan, were the individuals and entities with discretionary authority and/or control over the LSG Plan and its assets.

17. If MMG is found liable under ERISA as alleged, Mr. Leventhal, his non-party law partners, and the LSG Firm should be held equally liable in their capacity as the named fiduciaries of the LSG Plan.

18. With respect to the withdrawal transactions at issue, MMG never expressly directed Nationwide to distribute Plaintiffs' funds to any individual or entity other than Mr. Leventhal. On the contrary, with respect to all relevant transactions, MMG instructed Nationwide to distribute the funds to Mr. Leventhal.

19. Plaintiffs' remaining claim against MMG is barred or precluded by the terms of the MMG Agreement, the Nationwide Agreement, and/or the LSG Plan Agreement.

20. Pursuant to the terms of the MMG Agreement, MMG was entitled to rely upon information supplied by the LSG Firm, Mr. Leventhal, Mr. Leventhal's law partners, and their

designated contact person, Ms. Selinsky:

MMG Reliance on Data

We will rely exclusively on the information that you or your advisors provide to us. ***We have no responsibility to verify such information independently and we are not liable for any errors or omissions made as a result of incompetence or incorrect data provided to us by you or your advisors,*** whether orally or in writing.

(MMG Agr. § IV(d)(8) (emphasis added)).

21. MMG did not have administrative responsibilities beyond those it agreed to in the MMG Agreement and, to a more limited extent, in the Nationwide Agreement.

22. Plaintiffs' remaining cause of action and/or relief sought is barred and/or precluded by virtue of the fact that the actions and/or omissions complained of were the direct and proximate result of a third party or third parties over whom MMG exercised no control, such as the individuals currently subject to criminal prosecution in Texas for perpetrating the fraud underlying this action.

23. The criminal actors that perpetrated the fraud underlying this action, including, without limitation, the individuals currently subject to criminal prosecution in Texas, are solely or predominantly responsible for Plaintiffs' damages, if any.

24. The criminal acts and/or criminal actors that perpetrated the fraud broke any causal connection between the purported actions or inactions of MMG and Plaintiffs' alleged losses.

25. MMG was not aware and could not reasonably have been aware of the criminal fraud being perpetrated against the parties to this action.

26. MMG actually and reasonably believed that the purportedly fraudulent withdrawal requests originated from Mr. Leventhal and were properly authorized by the named fiduciaries of the LSG Plan (the Plaintiffs) because, *inter alia* (i) Mr. Leventhal had a history and

practice of making large, irregularly timed withdrawals in varying amounts (from \$15,000 to \$200,000), and (ii) like all other withdrawal requests, the withdrawal requests at issue were delivered to MMG by e-mail from Ms. Selinsky's e-mail address. The foregoing rendered the withdrawal requests at issue not particularly aberrant or apparently fraudulent.

27. This action is premature and risks prejudice to MMG until the related criminal prosecutions are completed and the details of the same made publicly available.

28. If Plaintiffs have sustained any injuries or damages as a result of the matters alleged in the Complaint, then such injuries and damages resulted from Plaintiffs' own breach(es) of fiduciary duty and/or their negligent, reckless, careless, and/or culpable conduct (such as failing to adopt reasonable computer and IT security practices, including by failing to prevent Ms. Selinsky from performing her duties remotely from Texas and/or through her personal e-mail account)—said conduct operates as a bar, setoff, or defense to the remaining claim against MMG. In the alternative, any recovery must be reduced in proportion to Plaintiffs' own conduct which caused or contributed to Plaintiffs' damages.

29. Plaintiffs are solely responsible for the security of their computer and IT systems, including the security of their employees' personal e-mail accounts when those accounts are used for employment and business functions.

30. Plaintiffs' own carelessness with respect to their computer/IT systems and policies, including their decision to permit Ms. Selinsky to work remotely from Texas and use her personal e-mail for official employment duties, solely or in substantial part allowed the cyber-fraud or other criminal fraud to occur.

31. Plaintiffs' remaining cause of action and/or relief sought is precluded by their failure to mitigate the damages sustained, including, but not limited to, by failing to take

reasonable steps to, among other things, review, audit, and/or otherwise monitor their bank accounts, quarterly reports, and transaction activity.

32. Plaintiffs' remaining claim is precluded, reduced, or setoff by their respective breaches of fiduciary duty.

33. The Complaint should be dismissed because any acts or omissions of MMG were not the proximate cause of Plaintiffs' alleged damages.

34. Plaintiffs' remaining claim against MMG is barred, in whole or in part, by the doctrines of waiver, estoppel, and/or equitable estoppel.

35. MMG, at all times, acted properly, appropriately, reasonably, lawfully and in good faith.

36. The Complaint must be dismissed for Plaintiffs' failure to join indispensable parties, including the two individuals currently subject to criminal prosecution in Texas and any of their co-conspirators.

37. MMG fulfilled any and all of its alleged duties and/or obligations, whether arising through contract, common law, federal common law, statute (including ERISA), and/or otherwise.

38. To the extent that Plaintiffs demand pecuniary, consequential, compensatory, and/or punitive damages, such remedies are not permitted under ERISA.

39. Plaintiffs do not have a right to a jury trial on any issue or claim under ERISA.

40. Plaintiffs' remaining cause of action and/or relief sought is barred and/or must be reduced by the doctrine of setoff.

41. Plaintiffs' remaining cause of action and/or relief sought is barred and/or precluded by the doctrine of avoidable consequences.

42. Plaintiffs' remaining cause of action and/or relief sought is barred and/or precluded by the applicable Statute of Limitations.

43. Plaintiffs' remaining cause of action and/or relief sought is barred and/or precluded by way of their individual or collective authorization and/or acquiescence in the actions and/or omissions complained of in the Complaint, including, without limitation, Ms. Selinsky's use of her private e-mail account to administer and request distributions from the LSG Plan.

44. Plaintiffs' have failed to exhaust or claim potential insurance and bond benefits that may be available to satisfy some or all of their alleged losses, including without limitation the \$200k bond insuring the LSG Plan.

45. No act or failure to act on the part of MMG was a factual or legal cause of Plaintiffs' alleged harm and/or damages.

46. Plaintiffs' remaining claim is barred by one or more equitable doctrines including the doctrines of laches, unclean hands, good faith, and/or impossibility.

47. Plaintiffs' remaining cause of action and/or relief sought is barred and/or precluded because the damage, if any, sustained by the Plaintiffs was not the proximate result of or caused by any error, act, or omission of MMG.

48. Plaintiffs' remaining cause of action and/or relief sought is barred and/or precluded to the extent that their employee/agent Ms. Selinsky was involved or participated in the criminal or fraudulent conduct underlying Plaintiffs' purported losses.

49. MMG is not liable for the actions or inactions of Nationwide, the LSG Firm, Mr. Leventhal, and/or Ms. Selinsky.

50. MMG is not liable for the actions or inactions of the individuals currently subject

to criminal prosecution in Texas for perpetrating the criminal fraud underlying this action.

51. The Complaint is barred, in whole or in part, by the doctrine of in pari delicto.

52. MMG substantially performed any contractual duty owed to any of the parties.

53. The LSG Firm agreed to indemnify MMG in the MMG Agreement for some or all of the relief requested. *See* MMG Agr. § VII(d).

54. MMG reserves the right to assert additional defenses, counterclaims, crossclaims and/or third-party claims as may be deemed appropriate as discovery and this action proceeds.

WHEREFORE, defendant The MandMarblestone Group, LLC requests that the Complaint be dismissed with prejudice and that the Court grant such other relief as it deems just and appropriate.

### **COUNTERCLAIMS**

Defendant, The MandMarblestone Group, LLC, hereby asserts counterclaims against plaintiffs Mr. Leventhal, the LSG Firm, and the LSG Plan individually and/or collectively, and in support thereof avers as follows:

#### **(COUNT I) CONTRIBUTION PURSUANT TO FEDERAL COMMON LAW AND/OR ERISA (MMG V. MR. LEVENTHAL AND THE LSG FIRM)**

1. MMG hereby incorporates by reference, for purposes of this counterclaim only, all well-pleaded allegations contained in Plaintiffs' Complaint, all liability on the part of MMG being specifically denied, and directs the Complaint's allegations toward plaintiffs Mr. Leventhal and the LSG Firm, individually and collectively.

2. MMG hereby incorporates by reference the responses allegations in its foregoing Answer and Affirmative Defenses as affirmative allegations against plaintiffs Mr. Leventhal and the LSG Firm, individually and collectively.



3. Plaintiff Mr. Leventhal was and is a trustee and/or a named fiduciary of the LSG Plan.

4. Plaintiff the LSG Firm was and is the Plan Sponsor, the Plan Administrator, and/or a named fiduciary of the LSG Plan.

5. As such, Mr. Leventhal and the LSG Firm each owed and continue to owe fiduciary duties to the LSG Plan and its participants.

6. MMG avers that if the contentions as alleged in the Complaint are proven, then any injuries or damages sustained by Plaintiffs are solely due or primarily due to the individual and/or collective actions, inactions, omissions, and/or breaches of fiduciary duty of Mr. Leventhal and the LSG Firm and are not due to any act, omission, liability, and/or breach of any kind on the part of MMG.

7. In the event that it is judicially determined that Plaintiffs are entitled to recover on their remaining cause of action against MMG, then Mr. Leventhal and the LSG Firm are alone liable, jointly and severally liable, or liable over to MMG by way of contribution, all liability on the part of MMG being specifically denied.

8. Alternatively, MMG avers that if the contentions as alleged in the Complaint are proven as against MMG, then any injuries or damages sustained by Plaintiffs arose from the joint and/or individuals acts and omissions of Mr. Leventhal, the LSG Firm, and MMG that combined to cause a single injury to Plaintiffs, for which Mr. Leventhal and the LSG Firm are equally or proportionally liable and owe contribution to MMG.

9. Accordingly, while denying any and all liability on its part, MMG demands contribution from Mr. Leventhal and/or the LSG Firm pursuant to and in accordance with federal common law and/or ERISA.

**WHEREFORE**, defendant and counterclaim plaintiff The MandMarblestone Group, LLC demands judgment against Mr. Leventhal and the LSG Firm, an award of counsel fees and costs, and any other relief that the Court deems just and appropriate.

**(COUNT II) FEDERAL COMMON LAW, STATUTORY,  
AND CONTRACTUAL INDEMNIFICATION  
(MMG V. PLAINTIFFS)**

1. MMG hereby incorporates by reference, for purposes of this counterclaim only, all well-pleaded allegations contained in Plaintiffs' Complaint, all liability on the part of MMG being specifically denied, and directs the Complaint's allegations toward Plaintiffs, individually and collectively.

2. MMG hereby incorporates by reference the responsive allegations in its foregoing Answer and Affirmative Defenses as affirmative allegations against Plaintiffs, individually and collectively.

3. In Section VII(d) of the MMG Agreement, the LSG Firm and the LSG Plan agreed to indemnify MMG as follows:

Except in the case of willful misconduct, professional malfeasance or gross negligence, the Plan and the Sponsor agree to indemnify MMG ... and to hold ... MMG ... harmless from any loss, penalty, cost or expense (including attorneys' fees, court costs and expenses of litigation) relating to the failure of the Plan or the Sponsor to perform any of their duties or responsibilities or from the Plan or the Sponsor performing said responsibilities late or inaccurately, or from the Plan or the Sponsor failing to furnish all requested information for MMG to perform its services.

(MMG Agr. § VII(d)).

4. Plaintiff Mr. Leventhal was and is a trustee and/or a named fiduciary of the LSG Plan.

5. Plaintiff the LSG Firm was and is the Plan Sponsor, the Plan Administrator, and/or a named fiduciary of the LSG Plan.

6. As such, Mr. Leventhal and the LSG Firm owed and owe fiduciary duties to the LSG Plan and its participants.

7. MMG avers that if the contentions as alleged in the Complaint are proven, then any injuries or damages sustained by Plaintiffs are due solely or primarily to the actions, inactions, omissions, and/or breaches of fiduciary duty of Plaintiffs and are not due to any act, omission, liability, and/or breach of any kind on the part of MMG.

8. In the event that it is judicially determined that Plaintiffs are entitled to recover on their remaining cause of action against MMG, then Plaintiffs are alone liable, jointly and severally liable, liable over to MMG, or liable for MMG, all liability on the part of MMG being specifically denied.

9. Accordingly, while denying any and all liability on its part, MMG demands indemnification from Plaintiffs pursuant to and in accordance with federal common law, ERISA, and/or the terms of the MMG Agreement.

**WHEREFORE**, defendant and counterclaim plaintiff The MandMarblestone Group, LLC demands judgment against Plaintiffs, an award of counsel fees and costs, and any other relief that the Court deems just and appropriate.

[intentionally blank]

**ANSWER TO CROSS-CLAIMS (IF ANY)**

MMG denies each and every allegation contained in all cross-claims including but not limited to all cross-claims for contribution, indemnification and/or otherwise as may heretofore or hereinafter be filed against MMG.

WHEREFORE, defendant The MandMarblestone Group, LLC demands judgment dismissing all cross-claims with prejudice, costs of suit, reasonable attorney fees and such other relief as the court deems equitable and just.

Respectfully submitted,

/s/ Marjorie Obod

Marjorie Obod, Esquire

Erik L. Coccia, Esquire

**DILWORTH PAXSON LLP**

1500 Market Street, Suite 3500E

Philadelphia, PA 19102-2101

(215) 575-7000

*Attorney for Defendant,*

*The MandMarblestone Group, LLC*

Dated: May 15 2019

**CERTIFICATE OF SERVICE**

I, Marjorie Obod, hereby certify that I caused to be served, this 15<sup>th</sup> day of May, 2019, via the Court's ECF system and First Class Mail, a true and correct copy of the foregoing Answer, Affirmative Defenses, and Counterclaims, upon the following counsel of record:

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/s/ Marjorie Obod  
Marjorie Obod