

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

GROSS CAPITAL INC., by its Licensed Insolvency Trustee,
KSV RESTRUCTURING INC.

Plaintiff

and

MARK CRAIG GROSS, SHELDON GROSS, FAUSTO CARNICELLI, MEDICA ONE LTD.,
MAURO CARNICELLI, DOMINIC CARNICELLI, 2771837 ONTARIO INC., 2771839
ONTARIO LIMITED, 2771840 ONTARIO LTD., 2771849 ONTARIO CORP., BURLINGTON
HEALTHCARE CENTRE INC., ALLEN SHELDON GREENSPOON, NANCY
GREENSPOON, WERNER DINGFELD, DENNIS DIVALENTINO, IRINA GROSS, MARK
CRAIG GROSS HOLDINGS INC., MGZ HOLDINGS INC., SGZ HOLDINGS INC.,
WELLINGTON X-RAY & ULTRASOUND LIMITED, BARCLAY DIAGNOSTIC IMAGING
INC., P. H. JORY, LIMITED, MED. CLINIC 2000 CORPORATION, DOCTORS NATURAE
SOUTHMOUNT INC., AVIVA MEDICAL DIAGNOSTICS & SPECIALIST CLINIC INC.,
AVIVA MEDICAL INC., ATMA MEDICAL INC., INTEGRATED MEDICAL OFFICE
SERVICES INC. and MARCIA VILLAFRANCA

Defendants

**STATEMENT DEFENCE AND CROSSCLAIM OF THE DEFENDANTS,
FAUSTO CARNICELLI, MEDICA ONE LTD., BURLINGTON HEALTHCARE
CENTRE INC., DOCTORS NATURAE SOUTHMOUNT INC., AVIVA MEDICAL
DIAGNOSTICS & SPECIALIST CLINIC INC., AVIVA MEDICAL INC., ATMA
MEDICAL INC., and INTEGRATED MEDICAL OFFICE SERVICES INC.**

1. The Defendants, Fausto Carnicelli (“**Fausto**”), Medica One Ltd. (“**Medica One**”), Burlington Healthcare Centre Inc. (“**BHCI**”), Doctors Naturae Southmount Inc. (“**Doctors**”), Aviva Medical Diagnostics & Specialist Clinic Inc. (“**Aviva Medical Diagnostics**”), Aviva Medical Inc. (“**Aviva Medica**”), Atma Medical Inc. (“**Atma Medical**”), Integrated Medical Office Services Inc. (“**Integrated**”) (collectively, the “**Fausto Defendants**”) admit to the allegations contained in paragraphs 58, 61, and 114 of the Statement of Claim.

2. Unless specifically admitted to herein, the Fausto Defendants deny the balance of the allegations contained in the Statement of Claim.

PART 1: THE PARTIES

3. The Defendant, Fausto states that he was the sole officer and sole director of BHCI, Doctors, and Integrated, all of which are provincially incorporated corporations. In addition, Fausto was an officer and/or director of Medica One and Aviva Medical Diagnostics, all of which are provincially incorporated corporations.

4. Aviva Medical is a company incorporated pursuant to the laws of the Province of Ontario.

5. Atma Medical is a company incorporated pursuant to the laws of the Province of Ontario.

PART 2: THE FOUR PROPERTIES

6. In order to maintain consistency with paragraph 32 of the Statement of Claim, the Fausto Defendants will refer to properties listed below as the “**Four Properties**”:

- a. 800 Princess Street, Kingston (the “**Princess Street Property**”);
- b. 6453 Morrison Street, Niagara Falls (the “**Morrison Street Property**”);
- c. 4256 Portage Road, Niagara Falls (the “**Portage Road Property**”); and
- d. 132 Second Street East, Cornwall (the “**Second Street Property**”).

7. Fausto denies that the mortgages registered on the Four Properties, bearing instrument numbers FC237693, SN506385, SN506387, and ST87089 (collectively, the “**Four Properties Mortgages**”), were improperly discharged and denies that the sale of the Four Properties constitute improper preferences and/or transfers under value pursuant to sections 95 and/or 96 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the “**BIA**”).

8. Moreover, Fausto specifically denies that any of his conduct or dealings amounted to fraud, misrepresentation, breach of fiduciary duty, self-dealing, and/or negligence and puts the Plaintiff to the strict proof thereof.

9. If the Court finds that the transfers of the Four Properties were improper and/or undervalue, which is vehemently disputed, Fausto's actions and/or inactions did not cause the actions to occur, and his actions or omissions do not permit the Plaintiff to seek personally against him.

10. With respect to paragraphs 32 and 33 Statement of Claim, Fausto states that the original deal for the Four Properties closed on September 16, 2016; however, the Four Properties Mortgages were not registered on title until April 6, 2017. Moreover, Fausto has no knowledge of whether the \$6,000,000.00 was ever in fact advanced causing the Four Properties Mortgages to be void and unenforceable.

11. Fausto denies being involved in the original financing of the Four Properties including the registration of the Four Properties Mortgages. In fact, Fausto states that he did not have any involvement with any of the financial matters of 800 Princess Street Holdings Limited, Morrison Street Holdings Limited, Portage Road Holdings Limited, and 132 Second Street Purchaser Limited and had little involvement with any of the day-to-day operations of the Four Companies.

12. With respect to paragraphs 35 to 42 of the Statement of Claim, Fausto states that the Four Properties Mortgages were not discharged without consideration. In fact, Fausto states that over \$21,000,000.00 of consideration was paid for the Four Properties; however, the distribution of those funds were determined by American General Life Insurance ("AIG") who was the first mortgagee of the Four Properties.

13. Moreover, at the time of the sales, the Four Properties were monitored by KPMG Inc. ("KPMG"). To Fausto's knowledge, KPMG was the party who approved, directed, and advocated for the sales of the Four Properties. Moreover, the removal of the Four Properties Mortgages and credits granted to the purchasers from the vendor were done in an effort to make financing easier for the purchaser while retaining equity in the properties as agreed to by Mark Gross ("Mark"), the purchasers' CFO.

14. Fausto had minimal involvement in the sales or the structuring of the sales of the Four Properties. Specifically, he states that his level of involvement was limited to introducing the

parties. With respect to post-closing, Fausto states that he had involvement in property management and clinic recruitment.

15. With respect to paragraph 44 of the Statement of Claim, Fausto specifically denies that any of his conduct was improper or inclusive of undisclosed self-dealings and conflicts of interests. At all times, his relationships and ownership interests were apparent to all involved parties inclusive of KPMG. In the alternative, Fausto's ownership and his relationships with to other corporate parties to this Action were apparent and/or easily accessible and observable.

16. With respect to paragraphs 46 to 48 of the Statement of Claim, Fausto was not involved in the Omnia Group Holdings AG discussions at that time and states that, at all times, Mark was solely responsible for the financing of Gross Capital including, *inter alia*, registering and discharging the Four Properties Mortgages.

17. With respect to paragraph 49 to 53 of the Statement of Claim, Fausto specifically denies causing Gross Capital to default under its loans with AIG (the "**First Mortgage**"). In addition, he denies attempting to conceal said defaults, directly or indirectly, through the sales of the Four Properties.

18. With respect to paragraphs 54 to 56 of the Statement of Claim, the Plaintiff has not incurred any damage as a result of the discharge of the Four Properties Mortgages. No advance was made, and the Four Properties Mortgages were void and unenforceable.

19. Furthermore, the sales of the Four Properties were not fraudulent or rife with fraud, misrepresentation or negligence. Rather, they were reasonable, *bona fide* arm's length and market value transactions overseen by KPMG.

20. In the alternative, if it is found that damages flow from the discharges of the Four Properties Mortgages and sales of the Four Properties, which is vehemently denied, the amounts stipulated by the Plaintiff are excessive and/or remote.

21. Furthermore, Fausto states that the Plaintiff was under an obligation to mitigate its damages however, it has refused or neglected to take steps to do so.

22. In addition, Fausto relies on the *Indoor Management Rule* and states that any damages flowing from the discharges of the Four Properties Mortgages and sales of the Four Properties, were as a result of actions and/or inactions of Gross Capital and/or its controlling minds, Mark and Sheldon Gross (“**Sheldon**”).

23. Furthermore, Fausto pleads and relies upon the *Limitations Act*, 2002.

PART 3: THE JOHN STREET PROPERTY

24. Fausto and BHCI deny that the mortgage registered on 511 and 515 John Street, Burlington, (collectively, the “**John Street Property**”), bearing instrument number HR1539609 (the “**John Street Mortgage**”) was improperly discharged and therefore deny that said discharge constitutes an improper preference and/or transfer at undervalue pursuant to sections 95 and/or 96 of the BIA.

25. Moreover, Fausto and BHCI specifically deny that any of their conduct or dealings amounted to fraud, misrepresentation, breach of fiduciary duty, self-dealing, and/or negligence and puts the Plaintiff to the strict proof thereof.

26. In the alternative, if the Court finds the discharge of the John Street Mortgage and subsequent encumbrances to John Street Property amount to a transfer that was improper and/or undervalue, which is vehemently disputed, Fausto’s and BHCI’s actions and/or inactions do not permit the Plaintiff to claim personally against Fausto.

27. With respect to paragraphs 57 to 60 of the Statement of Claim, although Gross Capital registered the John Street Mortgage, they neglected or refused to advance their \$1,500,000.00 share of the John Street Mortgage. As such, contrary to paragraph 59 of the Statement of Claim, the John Street Mortgage was not discharged “without consideration” as, contrary to the terms of

the John Street Mortgage, no consideration was ever provided by Gross Capital and the John Street Mortgage was void and unenforceable.

28. With respect to paragraph 62 of the Statement of Claim, Fausto has no knowledge of Mark's and Sheldon's actions alleged. At no time was Fausto a director or officer of Gross Capital and was not privy to the information that Mark and Sheldon chose to represent to their investors.

29. With respect to paragraphs 63 to 65 of the Statement of Claim, the Plaintiff has not incurred any damages as the funds for the John Street Mortgage were never advanced by Gross Capital.

30. In the alternative, if it is found that damages flow from the discharge of the John Street Mortgage, which is vehemently denied, the amounts stipulated by the Plaintiff are excessive and/or remote.

31. Furthermore, Fausto and BHCI state that the Plaintiff is under an obligation to mitigate its damages however, it has refused or neglected to take steps to do so.

32. In addition, Fausto and BHCI rely on the *Indoor Management Rule* and state that any damages flowing from the discharge of the John Street Mortgage and subsequent encumbrances of the John Street Property, were as a result of actions and/or inactions of Gross Capital and/or its controlling minds, Mark and Sheldon.

33. Furthermore, Fausto and BHCI plead and rely upon the *Limitations Act, 2002*.

PART 4: THE MEDICAL PROPERTIES

34. In order to maintain consistency with paragraph 70 of the Statement of Claim, the Fausto Defendants will refer to properties listed below as the "**Medical Properties**":

- a. 2009 Long Lake Road, Sudbury, Ontario ("**2009 Long Lake**");

- b. 849 Alexander Court, Peterborough, Ontario (“**849 Alexander**”);
- c. 35 Upper Centennial Parkway, Stoney Creek, Ontario (“**Southmount**”);
- d. 100 Colborne Street, Orillia, Ontario (“**100 Colborne**”);
- e. 249 Ontario Street, Port Hope, Ontario (“**249 Ontario**”);
- f. 65 Larch Street, Sudbury, Ontario (“**65 Larch**”);
- g. 180 Vine Street, St. Catherines, Ontario (“**180 Vine**”); and
- h. 240 Old Penetanguishene Road, Midland, Ontario (“**240 Old Penetanguishene**”).

35. The Fausto Defendants specifically deny that any of their conduct or dealings with respect to the Medical Properties amounted to fraud, misrepresentation, breach of fiduciary duty, self-dealing, negligence, breach of contract and/or unjust enrichment and put the Plaintiff to the strict proof thereof. Therefore, if it is found that any amounts are owed with respect to the Medical Properties, which is vehemently disputed for the reasons below, Fausto’s actions and/or inactions do not permit the Plaintiff to seek personally against him.

36. With respect to paragraph 70 (c) and (g) of the Statement of Claim, Fausto states that Gross Capital never held an ownership interest of more than 40% in Southmount and 50% in Vine Street.

37. With respect to paragraph 74 of the Statement of Claim, Fausto states, in general terms, that his business mainly provided practice management services to medical doctors.

38. With respect to paragraph 75 of the Statement of Claim, Fausto states that the use of “spreadsheet guy” is misleading. His comment was made while giving evidence speaking specifically to properties that he had a direct ownership interests in.

39. Fausto reiterates that he was not a controlling mind of Gross Capital: decision making powers of Gross Capital were solely with Mark and Sheldon. Fausto is not responsible for the risks assumed by Mark and Sheldon on behalf of Gross Capital including, *inter alia*, if they failed to or neglected to conduct their own due diligence prior to pursuing certain business ventures.

(a) *There Was No “Scheme”*

40. With respect to paragraphs 76 to 79 of the Statement of Claim, the Fausto Defendants deny these allegations and to the “scheme” broadly alluded to/suggested by the Plaintiff (the “**Scheme**”) and put the Plaintiff to the strict proof thereof. At a high level, which will subsequently be addressed in reference to the specific allegations made in the Statement of Claim, the Fausto Defendants state that:

- a. Any and all lease agreements between themselves and Gross Capital, with respect to the Medical Properties, were *bona fide* arm’s length agreements (the “**Lease Agreements**”);
- b. The Lease Agreements did not contain misrepresentations;
- c. For some of the leases, medical clinics did not open as planned and/or anticipated;
- d. Many Lease Agreements were conditional and dependent on refinancing or sale;
- e. None of the Fausto Defendants caused Gross Capital to purchase an interest in properties owned by Fausto; and
- f. To Fausto’s knowledge, he did not execute documents or operate businesses of Gross Capital.

41. With respect to paragraphs 80 and 81 of the Statement of Claim, the Fausto Defendants state that all Lease Agreements were *bona fide* arm’s length agreements that did not contain misrepresentations. Specifically, they state that, if the rents paid by tenants were lower than those represented in rent rolls, the difference was caused not by misrepresentation, but rather by factors (the “**Factors**”) such as, *inter alia*, clinics not opening as anticipated or many leases being conditional on refinancing or sale: Factors which were know by Gross Capital and/or the controlling minds of Gross Capital, Mark and Sheldon, at the time that the Lease Agreements were entered into.

42. With respect to the example provided at paragraph 82 of the Statement of Claim and Southmount, the Fausto Defendants deny that there were misrepresentations in those Lease Agreements. Moreover, Fausto, Mauro Carnicelli (“**Mauro**”), and Domenic Carnicelli

("Domenic") were majority owners of Southmont and were therefore entitled to sign those Lease Agreements.

43. With respect to paragraph 83 of the Statement of Claim, the Fausto Defendants state that there were never acquisitions of properties. In fact, there was never an Agreement of Purchase and Sale or any agreement that establish what Gross Capital claims to have paid for said properties. Rather, ownership interests were determined through negotiations by the involved parties, including Mark and Sheldon, based on their proportionate share of the AIG First Mortgage.

44. With respect to paragraph 85 of the Statement of Claim, Fausto has no knowledge or recollection of this alleged conduct.

(b) *Res Judicata*

45. With respect to paragraphs 89 and 94 to 97 of the Statement of Claim, the Fausto Defendants deny these allegations. Firstly, any amounts outstanding as rent arrears or damages flowing from the Lease Agreements have been settled by the Court-appointed monitor, KPMG. The issue is therefore barred from being relitigated as it is *res judicata*.

46. In addition, there was no fraud, misrepresentation, breach of fiduciary duty, self-dealing, negligence, breach of contract and/or unjust enrichment by the Fausto Defendants. Moreover, Fausto's actions and/or inactions do not permit the Plaintiff to claim personally against him.

47. Moreover, it was not the responsibility of Fausto or any of the Fausto Defendants to enforce leases: ensuring Gross Capital utilized remedies available to them at law was solely in the control of Mark and Sheldon. As such, any damages or losses incurred by Gross Capital with respect to the Lease Agreements are solely the responsibility of Gross Capital and/or Mark and Sheldon.

48. With respect to paragraph 98 of the Statement of Claim, Fausto denies making any representations to Gross Capital stakeholders.

49. With respect to paragraph 100 of the Statement of Claim, the Fausto Defendants deny this allegation.

50. With respect to paragraph 101 of the Statement of Claim, the Fausto Defendants reiterate that there were no misrepresentations; many clinics did not open as anticipated and leases were provisional, subject to financing.

51. With respect to paragraph 107 of the Statement of Claim, the Fausto Defendants state that, to their knowledge, tenants did their best to successfully operate clinics; however, certain tenants were not successful.

52. Gross Capital as landlord had remedies available to them under the Lease Agreements which were set out in the Lease Agreements. The Fausto Defendants cannot speak to why Gross Capital and/or Mark and Sheldon, did not pursue the remedies available to Gross Capital, assuming they did not, for the non-payment by tenants, especially since KPMG as receiver did (or could have) pursued said remedies.

53. With respect to paragraph 108 of the Statement of Claim, the Fausto Defendants deny that such a duty existed or was owed. Gross Capital, Mark, and Sheldon were sophisticated business parties who had full knowledge of the risks, terms, and remedies provide in the Lease Agreements.

54. In the alternative, if negligence is found against any of the Fausto Defendants, which is denied, there was contributory negligence by Gross Capital and its principals.

55. In addition, the Fausto Defendants rely on the *Indoor Management Rule* and state that any damages flowing from the Lease Agreements were as a result of actions and/or inactions of Gross Capital and/or it's controlling minds, Mark and Sheldon.

56. The Fausto Defendants state that the Plaintiff is under an obligation to mitigate its damages however, it has refused or neglected to take steps to do so.

57. In the alternative, the amounts claimed are excessive and/or remote.

58. Furthermore, the Fausto Defendants plead and rely upon the *Limitations Act*, 2002.

PART 5: THE SOUTHMOUNT PROPERTY

59. With respect to paragraphs 111 and 112 of the Statement of Claim, Fausto denies that Gross Capital held the largest ownership interest in Southmount. In fact, Fausto states that Gross Capital's ownership was never more than 40%. At all material times, Fausto and his brothers, Domenic and Mauro, were majority shareholders. As such, Fausto and his brothers had the right to enter into agreements on behalf of Southmount.

60. With respect to paragraphs 113 and 115 of the Statement of Claim, Fausto denies that he improperly diverted monies out of Southmount. He states that Southmount funds were occasionally used to pay mortgage costs related to other buildings; however, Gross Capital was a stakeholder in those other properties and benefited from said payments. Moreover, Mark and Gross Capital were at all times aware of these payments.

61. With respect to Southmount's receivership, Fausto states that a disproportionate amount of the cross collateralized AIG First Mortgage was registered against Southmount resulting in a dilution of Southmount's value of approximately \$5,000,000.00.

62. With respect to paragraph 116 of the Statement of Claim, Fausto denies this allegation and states that the amount is grossly exaggerated. He states that Southmount funds were used to make the AIG First Mortgage payments on behalf of Southmount, Vine Street, and Peterborough.

63. Fausto states that the Plaintiff has not incurred any damages arising from Southmount.

64. In the alternative, if it is found that damages arising from Southmount, which is vehemently denied, the amounts stipulated by the Plaintiff are excessive and/or remote.

65. Furthermore, Fausto states that the Plaintiff is under an obligation to mitigate its damages however, it has refused or neglected to take steps to do so.

66. Furthermore, Fausto pleads and relies upon the *Limitations Act, 2002*.

PART 6: THERE WERE NO MISREPRESENTATIONS OR SELF-DEALING IN GENERAL

67. With respect to paragraphs 123 to 125 of the Statement of Claim, Fausto was not an officer or director of Gross Capital and denies operating said business. At all times, Mark and Sheldon were the controlling minds of Gross Capital; all final decisions were solely in their power and purview. Fausto actions and/or inactions therefore do not permit the Plaintiff to seek personally against him.

68. Fausto therefore relies on the *Indoor Management Rule*.

69. In the alternative, to the extent that Fausto was involved in Gross Capital's operations, he denies that any of his conduct or dealings amounted to negligent and/or fraudulent misrepresentations, self-dealings or conflicts of interests, and puts the Plaintiff to the strict proof thereof.

70. Fausto denies causing Gross Capital to incur damages and states that any damages Gross Capital suffered were solely a result of its own negligence or fraud and/or the negligence or fraud of its principals, Mark and Sheldon.

PART 7: ADDITIONAL INDEBTEDNESS

(a) *Medica One*

71. With respect to paragraph 135 of the Statement of Claim, Fausto and Medica One dispute that \$2,800,000.00 (the "**Loan**") is owed. Although the \$2,800,000.00 was not repaid, Fausto

states that, to the best of his knowledge, additional funds were raised and directed to Gross Capital and/or its related entities as satisfaction for the Loan.

72. In the alternative, if it is found that Medica One is indebted to Gross Capital for the Loan, \$2,800,000.00 is excessive as it does not factor in the transferred funds. In addition, Fausto's actions and/or inactions with respect to the Loan do not permit the Plaintiff to seek personally against him.

73. Furthermore, Fausto and Medica One state that the Plaintiff is under an obligation to mitigate its damages however, it has refused or neglected to take steps to do so.

74. Fausto and Medica One plead and rely upon the *Limitations Act*, 2002.

(b) *Fausto*

75. With respect to paragraph 136 of the Statement of Claim, Fausto disputes this allegation. Fausto states that he and Mark had reached a verbal agreement whereby Gross Capital would receive \$1,000,000.00 to \$1,500,000.00 from the successful development of John Street Property by BHCI. Moreover, Fausto provided Gross Capital with an offer to pledge shares in BHCI estimated to be between \$1,000,000.00 to \$1,500,000.00. Fausto did not verbally guarantee the payment.

76. Fausto therefore denies personally owing Gross Capital any debts whatsoever and states that the Plaintiff has not incurred any damages with respect to the alleged indebtedness.

77. In the alternative, if it is found that the Plaintiff has incurred damages, which is vehemently denied, the amounts stipulated by the Plaintiff are excessive and/or remote.

78. Furthermore, Fausto states that the Plaintiff is under an obligation to mitigate its damages however, it has refused or neglected to take steps to do so.

79. In addition, Fausto pleads and relies upon the *Limitations Act*, 2002.

PART 8: NO LIABILITY ON BEHALF OF THE FAUSTO DEFENDANTS

80. The Fausto Defendants deny the Plaintiff suffered any damages by any actions and/or inactions by any of the Fausto Defendants.

81. The Fausto Defendants therefore state that they are not liable, jointly or severally for any of the Plaintiff's alleged damages.

82. As a result of the allegations of fraud, misrepresentation, breach of fiduciary duty, self-dealing, and/or negligence, when the Plaintiff knows or ought to know that there is no evidence to support same, the Fausto Defendants individually and/or collectively ask that the claim be dismissed with costs on a substantial indemnity basis.

CROSSCLAIM

83. The Fausto Defendants claim as against the Co-Defendants, Mark and Sheldon, the following:

- a. Contribution, indemnity, and other relief should there be any finding of liability against any of the Fausto Defendants, pursuant to the common law and the *Negligence Act*, R.S.O. 1990, c. N;
- b. Pre-judgment interest and post judgment interest pursuant to the provisions of the *Courts of Justice Act*, R.S.O. 1990, c. C.43;
- c. Their costs for defending the main action and prosecuting this Crossclaim, on a substantial, on alternatively partial, indemnity basis; and
- d. Such further and other relief as this Honorable Court may deem just.

84. The Fausto Defendants repeat and rely on the allegations contained in their Statement of Defence as though the same were separately pleaded herein.

85. The Fausto Defendants propose that this Crossclaim be tried together with the trial of the main action.

Date: February 16, 2024

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