

**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 OF CLAIM

(Notice of Action issued on June 23, 2023)

CLAIM

1. The plaintiff KSV Restructuring Inc., solely in its capacity as the licensed insolvency trustee of Gross Capital Inc. (in such capacity, the **"Trustee"**), makes the following claims as against the defendants:

- (a) jointly and severally as against Mark Craig Gross (**"Mark Gross"**), Sheldon Gross, Fausto Carnicelli, Allen Sheldon Greenspoon (**"Allen Greenspoon"**), Dennis Divalentino, 2771873 Ontario Inc. (**"837 Ontario"**), 2771839 Ontario

Limited ("**839 Ontario**"), 2771840 Ontario Ltd. ("**840 Ontario**") and 2771841 Ontario Corp. ("**841 Ontario**" and, together with 837 Ontario, 839 Ontario and 840 Ontario, the "**Four Companies**"), a constructive trust and/or damages in the amount of \$9,684,020.11, or such other and further amounts as may be proven at trial, for fraud, misrepresentation, breach of fiduciary duty, self-dealing, negligence and/or an improper preference and/or transfer at undervalue pursuant to sections 95 and/or 96 of the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**"), arising out of the improper discharge of one or more mortgages previously granted in favour of Gross Capital Inc. ("**Gross Capital**") on title to the Four Properties (defined below);

- (b) jointly and severally as against Mark Gross, Sheldon Gross, Fausto Carnicelli and Burlington Healthcare Centre Inc. ("**BHCI**"), a constructive trust and/or damages in the amount of \$2,451,505.08, or such other and further amounts as may be proven at trial, for fraud, misrepresentation, breach of fiduciary duty, self-dealing, negligence and/or an improper preference and/or transfer at undervalue pursuant to sections 95 and/or 96 of the BIA, arising out of the improper discharge of a mortgage previously granted in favour of Gross Capital on title to the John Street Properties (defined below);
- (c) as against Mark Gross, Sheldon Gross, Fausto Carnicelli, Allen Greenspoon, Werner Dingfeld, Marcia Villafranca, Dennis Divalentino, Medica One Ltd. ("**Medica One**"), Doctors Naturae Southmount Inc. ("**Doctors Naturae**"), Integrated Medical Office Services Inc. ("**Integrated Medical**"), Atma Medical Inc. ("**Atma Medical**"), Aviva Medical Inc. ("**Aviva Medical**"), Barclay Diagnostic Imaging Inc. ("**Barclay**"), P. H. Jory, Limited ("**PH Jory**") and Enlightened Healthcare Network Inc. ("**EHN**"), a constructive trust and/or damages in the

amount of \$3,365,973.27, or such other and further amounts as may be proven at trial, plus additional amounts to be quantified prior to trial, for fraud, misrepresentation, breach of fiduciary duty, self-dealing, negligence, breach of contract and/or unjust enrichment relating to rent arrears, which the Trustee claims as against these defendants in the following amounts:

- (i) jointly and severally as against Medica One, Fausto Carnicelli, Werner Dingfeld, Mark Gross and Sheldon Gross, damages in the amount of \$936,860.30, or such further and other amount as may be proven at trial relating to the rent arrears of Medica One;
- (ii) jointly and severally as against Doctors Naturae, Fausto Carnicelli, Mark Gross and Sheldon Gross, damages in the amount of \$166,335.37, or such further and other amount as may be proven at trial relating to the rent arrears of Doctors Naturae;
- (iii) jointly and severally as against Integrated Medical, Fausto Carnicelli, Mark Gross and Sheldon Gross, damages in the amount of \$68,214.43, or such further and other amount as may be proven at trial relating to the rent arrears of Integrated Medical;
- (iv) jointly and severally as against Atma Medical, Marcia Villafranca, Mark Gross and Sheldon Gross, damages in the amount of \$201,096.43, or such further and other amount as may be proven at trial relating to the rent arrears of Atma Medical;
- (v) jointly and severally as against Aviva Medical, Marcia Villafranca, Mark Gross and Sheldon Gross, damages in the amount of \$26,635.92, or

such further and other amount as may be proven at trial relating to the rent arrears of Aviva Medical;

- (vi) jointly and severally as against Barclay, Allen Greenspoon, Mark Gross and Sheldon Gross, damages in the amount of \$220,487.23, or such further and other amount as may be proven at trial relating to the rent arrears of Barclay;
 - (vii) jointly and severally as against PH Jory, Werner Dingfeld, Mark Gross and Sheldon Gross, damages in the amount of \$576,356.48, or such further and other amount as may be proven at trial relating to the rent arrears of PH Jory;
 - (viii) jointly and severally as against EHN, Fausto Carnicelli, Marcia Villafranca, Dennis Divalentino, Mark Gross and Sheldon Gross, damages in the amount of \$187,547.38, or such further and other amount as may be proven at trial relating to the rent arrears of EHN; and
 - (ix) jointly and severally as against Mark Gross and Sheldon Gross, damages in the amount of \$982,439.73, or such further and other amount as may be proven at trial relating to rent arrears owing by certain non-party tenants of the Medical Properties (as defined below).
- (d) jointly and severally as against Mark Gross, Sheldon Gross, Fausto Carnicelli, Mauro Carnicelli and Dominic Carnicelli, a constructive trust and/or damages in the amount of \$3,900,000.00, or such other and further amounts as may be proven at trial, for fraud, misrepresentation, breach of fiduciary duty, self-dealing and/or negligence arising out of improper payments from and/or on behalf of

Southmount Healthcare Centre Inc. previously known as Carriage Gate Group Inc. (collectively, "**Southmount**");

- (e) jointly and severally as against:
 - (i) Mark Gross and MGZ Holdings Inc. ("**MGZ**"), a constructive trust and/or damages in the amount of \$545,118.00 or such other and further amounts as may be proven at trial, for fraud, misrepresentation, breach of fiduciary duty, self-dealing and/or negligence arising out of their dealings with Zedd Customer Solutions Inc. and the business known more generally as Zedd (collectively, "**Zedd**"); and
 - (ii) Sheldon Gross and SGZ Holdings Inc. ("**SGZ**"), a constructive trust and/or damages in the amount of \$436,556.43 or such other and further amounts as may be proven at trial, for fraud, misrepresentation, breach of fiduciary duty, self-dealing and/or negligence arising out of their dealings with Zedd;
- (f) jointly and severally as against Mark Gross, Sheldon Gross and Fausto Carnicelli, a constructive trust and/or damages in the amount of \$60,000,000.00, or such other and further amounts as may be proven at trial, for negligent and/or fraudulent misrepresentation, breach of fiduciary duty and self-dealing generally;
- (g) jointly and severally as against Fausto Carnicelli and Medica One, damages in the amount of \$2,800,000.00 for breach of contract and/or unjust enrichment;
- (h) as against Fausto Carnicelli, damages in the amount of \$1,000,000.00 for breach of contract and/or unjust enrichment;
- (i) as against all defendants:

- (i) orders for restitution, an accounting and disgorgement of all assets, properties and funds belonging to Gross Capital and improperly diverted by or to any of the defendants or any person, corporation or other entity on such defendant's behalf;
- (ii) a declaration that the Trustee is entitled to trace the assets, properties and funds of Gross Capital into the hands of any of the defendants, and a declaration that such defendants hold those assets, properties and funds as constructive trustee for the Trustee;
- (iii) a constructive trust and tracing or following order in respect of all assets, properties and funds belonging to Gross Capital and improperly diverted by or to any of the defendants or any person, corporation or entity on such defendant's behalf, and in respect of all the traceable products thereof;
- (iv) pre and post-judgment interest, as follows:
 - (1) on the amount claimed at sub-paragraph 1(a), pre-judgment interest from June 24, 2023, and post-judgment interest, at the rate of 8.00% per annum, or, in the alternative, in accordance with the *Courts of Justice Act*, RSO 1990, c. C 43, as amended (the "**CJA**");
 - (2) on the amount claimed at sub-paragraph 1(b), pre-judgment interest from June 24, 2023, and post-judgment interest, at the rate of 10.00% per annum, or, in the alternative, in accordance with the CJA; and

- (3) in all other cases, pre-judgment interest from June 24, 2023 or such other date as is just, and post-judgment interest, in accordance with the CJA; and
- (v) costs of this action on a full indemnity basis; and
- (j) such further and other relief as to this Honourable Court seems just.

The Parties

Gross Capital

2. The Trustee was appointed upon Gross Capital filing an assignment in bankruptcy on June 25, 2021.

3. Prior to its bankruptcy, Gross Capital was a real estate investment firm, incorporated pursuant to the laws of Ontario, owned and operated from Toronto by Mark Gross and Sheldon Gross, whose sole officers and directors were Mark Gross and Sheldon Gross. At the direction of Mark Gross and Sheldon Gross, Gross Capital raised funds from investors to invest and hold interests, directly and indirectly, in various real properties.

4. In the course of its business, Gross Capital acquired ownership interests in real properties directly, and through holding corporations, nominee corporations and/or co-tenancy agreements, as applicable.

5. In the course of its business, Gross Capital also provided secured real property financing.

The Defendants

6. Mark Gross is an individual resident in Toronto. At all relevant times, including, without limitation, immediately prior to Gross Capital's bankruptcy, he was one of the two officers and directors of Gross Capital. He is also a director of the defendant, Medica One, the sole officer and director of the defendant, Mark Craig Gross Holdings Inc. ("**Mark Craig Gross Holdings**"), an officer and director of the defendant, MGZ, and an officer and/or director of certain other companies which had dealings with Gross Capital, including, without limitation, Zedd.

7. Sheldon Gross is an individual resident in Ontario, and is Mark Gross' father. At all relevant times, including, without limitation, immediately prior to Gross Capital's bankruptcy, Sheldon Gross was one of the two officers and directors of Gross Capital. He is also an officer and director of the defendant, SGZ, and an officer and/or director of certain other companies which had dealings with Gross Capital, including, without limitation, Zedd.

8. Fausto Carnicelli is an individual resident in Ontario. He is the sole officer and director of the defendants, BHCI, Doctors Naturae and Integrated Medical, an officer and director of the defendants, Medica One and the Four Companies, and an officer and/or director (or, as applicable, held himself out to have authority to act on behalf) of certain other companies which had dealings with Gross Capital, including, without limitation, certain other tenants that leased space from real property owned directly or indirectly by Gross Capital, including, without limitation, EHN (as defined below).

9. Mauro Carnicelli is an individual resident in Ontario. He is the brother of Fausto Carnicelli and Dominic Carnicelli. He was also an officer and/or director of one or more companies which had dealings with Gross Capital, including, without limitation, Southmount.

10. Dominic Carnicelli is an individual resident in Ontario. He is the brother of Fausto Carnicelli and Mauro Carnicelli. He was also an officer and/or director of one or more companies which had dealings with Gross Capital, including, without limitation, Southmount.

11. Marcia Villafranca is an individual resident in Ontario. She is an officer and/or director of certain companies which had dealings with Gross Capital, including, without limitation: (i) the defendants Atma Medical Inc. ("**Atma Medical**") and Aviva Medical Inc. ("**Aviva Medical**"); and (ii) EHN.

12. Allen Greenspoon is an individual resident in Ontario. He is an officer and director of certain companies which had dealings with Gross Capital, including, without limitation, the defendants, 837 Ontario, 839 Ontario and Barclay.

13. Werner Dingfeld is an individual resident in Ontario. He is an officer and/or director of certain companies which had dealings with Gross Capital, including, without limitation, the defendants Medica One and PH Jory.

14. Dennis Divalentino is an individual resident in Ontario. He is an officer and/or director of certain companies which had dealings with Gross Capital, including, without limitation: (i) the defendants 837, 839 and 840; and (ii) EHN.

15. Irina Gross is an individual resident in Toronto. She is Mark Gross' wife and the sole purported shareholder of the defendant Mark Craig Gross Holdings.

16. Mark Craig Gross Holdings is a company incorporated pursuant to the laws of Ontario. Its sole officer and director is Mark Gross, and its sole shareholder is Irina Gross.

17. MGZ is a company incorporated pursuant to the laws of Ontario. Its sole officer and director is Mark Gross.

18. SGZ is a company incorporated pursuant to the laws of Ontario. Its sole officer and director is Sheldon Gross.

19. Medica One is a corporation incorporated pursuant to the laws of Ontario. Its directors and officers include the defendants, Fausto Carnicelli, Mark Gross and Werner Dingfeld.

20. 837 Ontario is a corporation incorporated pursuant to the laws of Ontario. Its directors and officers are the defendants, Fausto Carnicelli, Dennis Divalentino and Allen Greenspoon.

21. 839 Ontario is a corporation incorporated pursuant to the laws of Ontario. Its directors and officers are the defendants, Fausto Carnicelli, Dennis Divalentino and Allen Greenspoon.

22. 840 Ontario is a corporation incorporated pursuant to the laws of Ontario. Its directors and officers are the defendants, Fausto Carnicelli and Dennis Divalentino.

23. 841 Ontario (incorrectly styled as 2771849 Ontario Corp. in the style of cause, but otherwise correctly identified as 2771841 Ontario Corp. throughout the Notice of Action and Statement of Claim), is a corporation incorporated pursuant to the laws of Ontario. Its sole director and officer is the defendant, Fausto Carnicelli.

24. BHCI is a corporation incorporated pursuant to the laws of Ontario. Its sole director and officer is the defendant, Fausto Carnicelli.

25. Doctors Naturae is a corporation incorporated pursuant to the laws of Ontario. Its sole director and officer is the defendant, Fausto Carnicelli.

26. Integrated Medical is a corporation incorporated pursuant to the laws of Ontario. Its sole director and officer is the defendant, Fausto Carnicelli.

27. Aviva Medical is a corporation incorporated pursuant to the laws of Ontario. Its sole director is the defendant, Marcia Villafranca.

28. Atma Medical is a corporation incorporated pursuant to the laws of Ontario. Its sole director is the defendant, Marcia Villafranca.

29. Barclay is a corporation incorporated pursuant to the laws of Ontario. Its sole director and officer is the defendant, Allen Greenspoon.

30. PH Jory is a corporation incorporated pursuant to the laws of Ontario. Its sole officer and former director is the defendant, Werner Dingfeld.

31. Enlightened Health Care Network Inc. (“**EHN**”) is a corporation incorporated pursuant to the laws of Ontario. Its directors are Dennis Divalentino and Marcia Villafranca, and its officers are Fausto Carnicelli and Marcia Villafranca. The Trustee recently learned about the existence and possible involvement of EHN in the matters described herein through examinations it conducted pursuant to s. 163 of the BIA. The Trustee reserves the right to seek to add EHN as a defendant to this proceeding.

Discharge of Mortgages – Four Properties

32. Gross Capital held registered mortgages in its favour on title to the following real properties, each in the principal amount of \$6,000,000.00 plus interest at the rate of 8.0% per annum and subject to standard charge terms 200033, as follows (collectively, the “**Gross Capital Mortgages**”):

- (a) as instrument number FC237693, on title to the real property located at 800 Princess Street, Kingston, bearing PIN 36024-0009 (LT) (the “**Princess Street Property**”);
- (b) as instrument number SN506385, on title to the real property located at 6453 Morrison Street, Niagara Falls, bearing PIN 64310-0251 (LT) (the “**Morrison Street Property**”);

(c) as instrument number SN506387, on title to the real property located at 4256 Portage Road, Niagara Falls, bearing PINs 64323-0312 (LT) and 64323-0313 (LT) (the “**Portage Road Property**”); and

(d) as instrument number ST87089, on title to the real property located at 132 Second Street East, Cornwall, bearing PIN 60166-0015 (LT) (the “**Second Street Property**” and, together with the Princess Street Property, the Morrison Street Property and the Portage Road Property, the “**Four Properties**”).

33. At all relevant times during which the Gross Capital Mortgages were registered on title to the Four Properties: (i) the Four Properties were owned by corporations of which Fausto Carnicelli and Mark Gross were the sole officers and directors; and (ii) Gross Capital and certain of its investors also had significant ownership interests in these corporations. The Gross Capital Mortgages arose as a result of Gross Capital lending at least \$6 million to these corporations to enable them to purchase the Four Properties. The Gross Capital Mortgages were registered on April 6, 2017.

34. More than three years later (and without any monies having yet been repaid under the Gross Capital Mortgages), the Four Properties were sold to the Four Companies pursuant to agreements of purchase and sale dated August 17, 2020, which transactions closed on or about September 14, 2020. In addition to being an officer and/or director, as applicable, of each of the vendors, Fausto Carnicelli was also an officer and/or director, as applicable, of each of the Four Companies. Dennis Divalentino and/or Allen Greenspoon were also officers and/or directors of certain of the Four Companies, as pleaded at paragraphs 20 to 23 of this Statement of Claim.

35. After the agreements of purchase and sale to sell the Four Properties to the Four Companies were entered into on August 17, 2020, but before the transactions closed on or about September 14, 2020, each of the Gross Capital Mortgages was discharged from title on

August 26, 2020, without consideration, by Gross Capital at the direction of Mark Gross and/or Sheldon Gross. Ostensibly, this was done on the basis that the Four Properties did not have sufficient equity to satisfy the Gross Capital Mortgages, in full or in part, which is patently false and inconsistent with the conduct of the applicable parties, as reflected by their conduct as pleaded in this Statement of Claim, including, without limitation, the following paragraphs.

36. In purchasing the Four Properties, the Four Companies received credits from the vendors totalling almost \$10 million. The underlying agreements of purchase and sale provided that these credits were to be *“taken from proceeds on closing in order to offset existing obligations, building condition adjustments and ownership.”*

37. Mark Gross has admitted to the Trustee under oath that these credits were in respect of obligations that factually did not exist. In the alternative, even had these obligations existed, they would have ranked in priority behind the Gross Capital Mortgages, had the Gross Capital Mortgages not been improperly discharged from title without consideration after the agreements of purchase and sale had already been entered into.

38. These credits were applied against the purchase prices of the Four Properties as follows:

- (a) the Princess Street Property was sold to 840 Ontario for a purchase price of \$4,925,000.00 less a credit of \$1,400,000.00, yielding a reported transfer on title for the resulting consideration of \$3,525,000.00 pursuant to instrument number FC309324. Dennis Divalentino signed the agreement of purchase and sale on behalf of 840 Ontario, and Mark Gross signed the agreement of purchase and sale on behalf of the vendor;
- (b) the Morrison Street Property was sold to 839 Ontario for a purchase price of \$13,000,000.00 less a credit of \$3,900,000.00, yielding a reported transfer on

title for the resulting consideration of \$9,100,000.00 pursuant to instrument number SN641861. Allen Greenspoon signed the agreement of purchase and sale on behalf of 839 Ontario, and Mark Gross signed the agreement of purchase and sale on behalf of the vendor;

- (c) the Portage Road Property was sold to 837 Ontario for a purchase price of \$7,200,000.00 less a credit of \$2,150,000.00, yielding a reported transfer on title for the resulting consideration of \$5,050,000.00 pursuant to instrument number SN641866. Allen Greenspoon signed the agreement of purchase and sale on behalf of 837 Ontario, and Mark Gross signed the agreement of purchase and sale on behalf of the vendor; and

- (d) the Second Street Property was sold to 841 Ontario for a purchase price of \$5,250,000.00 less a credit of \$2,200,000.00, yielding a reported transfer on title for the resulting consideration of \$3,050,000.00 pursuant to instrument number ST116008. Dennis Divalentino signed the agreement of purchase and sale on behalf of 841 Ontario, and Mark Gross signed the agreement of purchase and sale on behalf of the vendor.

39. Fausto Carnicelli, together where applicable with Dennis Divalentino and/or Allen Greenspoon, then caused new mortgages in favour of third parties to be registered on title to each of the Four Properties on the same day as the Four Properties were transferred on title to the Four Companies, as follows:

- (a) a mortgage in favour of The Bank of Nova Scotia registered as instrument number FC309325 on title to the Princess Street Property in the principal amount of \$5,210,000.00;

- (b) a mortgage in favour of The Toronto-Dominion Bank registered as instrument number SN641862 on title to the Morrison Street Property in the principal amount of \$13,000,000.00;
- (c) a mortgage in favour of The Toronto-Dominion Bank registered as instrument number SN641867 on title to the Portage Road Property in the principal amount of \$5,000,000.00; and
- (d) a mortgage in favour of Cornerstone Capital Inc. registered as instrument number ST116009 on title to the Second Street Property in the principal amount of \$2,100,000.00.

40. In relation to the Princess Street Property and the Morrison Street Property, the new mortgages were for registered amounts well in excess of the corresponding transfer prices from earlier that day. The principals of the Four Companies knew or ought to have known that they did not pay market value for the Four Properties.

41. By the time the Trustee was appointed in late June 2021, all of the Four Properties were fully encumbered.

42. Had the Four Companies not received almost \$10 million in fictitious or preferential credits, as particularized above, there would have been sufficient proceeds from the sale of the Four Properties to satisfy the Gross Capital Mortgages. Each of Mark Gross, Sheldon Gross, Fausto Carnicelli, Allen Greenspoon and Dennis Divalentino knew or ought to have known that these credits were fictitious or preferential.

43. Mark Gross, Sheldon Gross, Fausto Carnicelli, Allen Greenspoon and Dennis Divalentino were motivated to enter into the aforementioned improvident sales of the Four Properties to the Four Companies because they wanted to conceal improper and undisclosed

self-dealing and conflicts of interest, including, without limitation, as further particularized later in this Statement of Claim beginning at paragraph 72.

44. At a high-level, the improper and undisclosed self-dealing and conflicts of interest included Mark Gross and Sheldon Gross fraudulently and/or negligently permitting Fausto Carnicelli and his companies (including, without limitation, those in which Allen Greenspoon had an interest) to divert and withhold millions of dollars from multiple real properties. This conduct caused Gross Capital and its related companies to have significant liquidity issues, which caused them to be in default of a series of secured loans to American General Life Insurance Company (“**AIG**”) by early 2020. These secured loans included first-ranking mortgages on the Four Properties.

45. Prior to their sale to the Four Companies, the Four Properties (with the exception of the Second Street Property) were also subject to second-ranking mortgages in favour of Cannect International Mortgage Corporation (formerly 1592106 Ontario Inc.) (“**Cannect International**”). At all relevant times, Cannect International and/or its related corporation Cannect Mortgage Investment Corporation (together with Cannect International, “**Cannect**”) were also registered mortgagees on title to Sheldon Gross’ then-home residence in Innisfill, Ontario (which, at the time, he owned on title with his wife) and on title to Mark Gross’ then-home residence in Forest Hill, Ontario (which was registered on title solely in the name of his wife, Irina Gross, but in respect of which Mark Gross was listed as a co-borrower). Moreover, following the sale of the Four Properties, both of these home residences were further encumbered by mortgages in favour of Cannect.

46. In an effort to keep their improper conduct hidden from Gross Capital’s then-existing creditors and investors – and Mark Gross’ and Sheldon Gross’ personal creditors – each of Mark Gross, Sheldon Gross and Fausto Carnicelli sought to obtain replacement financing for

Gross Capital from overseas. A Swiss company, Omnia Group Holdings AG, was engaged to assist with structuring a reverse takeover transaction (the “**Proposed RTO**”).

47. Under the Proposed RTO, Gross Capital would have subscribed for shares of a public company having its registered office in Switzerland with shares listed on the SIX Swiss Exchange (the “**Swiss Company**”), in exchange for Gross Capital contributing certain assets to the Swiss Company, including, without limitation, Gross Capital’s ownership interests in the Four Properties. Had it been completed, the Proposed RTO would have resulted in: (i) Gross Capital taking control of, and raising additional investor money through, the Swiss Company; (ii) Gross Capital repaying the amounts owed to AIG; and (iii) the Gross’ business and personal residence mortgages with Cannect not being adversely impacted (including, without limitation, then-anticipated personal residence mortgages that Cannect had not yet approved).

48. Under the Proposed RTO, the shares of the resulting publicly-traded company were to be valued at \$63,369,399.00 (i.e., net of any debt), and Gross Capital was to have received 80% of these shares.

49. The Proposed RTO was targeted to close in the third quarter of 2020, but it became clear as this quarter started (and then advanced) that the Proposed RTO would not close in time. Faced with the increasing prospect of Gross Capital’s defaults under the loans with AIG becoming known publicly – including, most notably, the improper conduct of Mark Gross, Sheldon Gross and Fausto Carnicelli that caused these defaults – these individuals became highly-motivated to sell the Four Properties as quickly as possible.

50. Fausto Carnicelli, Allen Greenspoon and Dennis Divalentino were prepared to purchase the Four Properties, as applicable, and caused the Four Companies to be incorporated on August 14, 2020 for this purpose. However, they refused (or had insufficient time) to raise the necessary capital to purchase the Four Properties at market value, and it was in the personal

interests of Mark Gross, Sheldon Gross and Fausto Carnicelli to avoid any further delay in selling the Four Properties that would have been caused by running a marketing and sale process to achieve proper market value for the Four Properties.

51. Mark Gross and Sheldon Gross therefore agreed to grant fictitious purchase credits to the Four Companies totalling almost \$10 million so that the Four Companies could purchase the Four Properties quickly, but at a significant discount. This significant discount meant that the encumbrances on title to the Four Properties could not all be satisfied, and so Mark Gross and Sheldon Gross caused the Gross Capital Mortgages to be deleted from title to the Four Properties shortly before the sales closed.

52. Both the draft marketing materials for the Proposed RTO that were prepared shortly before the sale of the Four Properties to the Four Companies, and the encumbrances that were registered on title immediately following the sale of the Four Properties to the Four Companies, are consistent with there having been sufficient equity in the Four Properties for the Gross Capital Mortgages to have been satisfied in full had the Four Properties been properly marketed to potential purchasers.

53. In the alternative, to the extent that the Four Properties did not possess adequate equity to satisfy the Gross Capital Mortgages, such inadequate equity is the direct result of Mark Gross, Sheldon Gross and/or Fausto Carnicelli's misconduct as described later in this Statement of Claim.

54. The Trustee pleads and relies on all the terms of the Gross Capital Mortgages, including, without limitation, the standard charge terms referenced therein. A total of \$7,793,510.27 in principal (\$6,000,000.00) and interest (\$1,793,510.27) was owing pursuant to and under the terms of the Gross Capital Mortgages when they were improperly discharged from title without consideration on August 26, 2020.

55. Gross Capital has suffered damages in the amount of \$6,000,000.00 plus interest at the rate of 8.0% per annum from April 6, 2017, arising from the Gross Capital Mortgages having been discharged from title without the underlying debt having been repaid. This amount represents \$9,684,020.11 as of the date the Trustee commenced the Notice of Action.

56. Mark Gross, Sheldon Gross, Fausto Carnicelli, Dennis Divalentino, Allen Greenspoon and the Four Companies are jointly and severally liable to Gross Capital for their improper actions relating to the foregoing.

Discharge of Mortgages – John Street Property

57. Gross Capital, together with an individual named Andre Papadakos, jointly held a registered mortgage in their favour (the “**Joint Mortgage**”) on title to the real property located at 511 and 515 John Street, Burlington, bearing PINs 07067-0010 (LT) and 07067-0011 (LT) (collectively, the “**John Street Property**”). The Joint Mortgage was registered on April 30, 2018 as instrument number HR1539609 in the principal amount of \$3,000,000.00, bearing interest of 10.0% per annum and subject to standard charge terms 200033.

58. At all relevant times during which the Joint Mortgage was registered on title to the John Street Property, the John Street Property was owned by BHCI, a corporation of which Fausto Carnicelli is the sole officer and director.

59. On December 21, 2018, the Joint Mortgage was discharged from title pursuant to instrument number HR1594568, without consideration. The discharge of Gross Capital’s 50% share of the Joint Mortgage was done at the direction of Mark Gross and/or Sheldon Gross, and was done for reasons only known to Mark Gross, Sheldon Gross and Fausto Carnicelli.

60. Fausto Carnicelli, as the sole officer and director of the John Street Property’s owner, BHCI, knew that the Joint Mortgage was improperly discharged without consideration. Three

days later, on December 24, 2018, Fausto Carnicelli caused the John Street Property to be encumbered with a new mortgage registered on title as instrument number HR1594688 in favour of third parties, 1716944 Ontario Inc., LMI Management Inc. and Vince Scorniaenchi.

61. Fausto Carnicelli has since caused BHCI to further encumber the John Street Property.

62. After the Joint Mortgage was discharged from title to the John Street Property, Mark Gross and Sheldon Gross caused false financial statements to be sent to Gross Capital's investors that still listed the Joint Mortgage, as if the Joint Mortgage were still registered on title to the John Street Property with a 50% interest in favour of Gross Capital, when, in fact, Mark Gross and Sheldon Gross knew that the Joint Mortgage had been discharged for no consideration.

63. The Trustee pleads and relies on all the terms of the Joint Mortgage, including, without limitation, the standard charge terms referenced therein. A total of \$1,596,575.34 in principal (\$1,500,000.00) and interest (\$96,575.34) was owing pursuant to and under the terms of Gross Capital's 50% interest in the Joint Mortgage when it was improperly discharged from title without consideration on December 21, 2018.

64. Gross Capital has suffered damages in the amount of \$1,500,000 plus interest at the rate of 10.0% per annum from April 30, 2018, arising from the Joint Mortgage having been discharged from title without the underlying debt having been repaid.

65. Mark Gross, Sheldon Gross, Fausto Carnicelli and BHCI are jointly and severally liable to Gross Capital for their improper actions relating to the foregoing.

The Medical Properties

(a) *Overview of the Medical Properties*

66. As part of its business, Gross Capital had an ownership position in multiple real properties, which ownership positions were often achieved through nominee/holding corporations in which Gross Capital held a material ownership interest (together with Gross Capital, the “**Gross Capital Corporations**”). The Gross Capital Corporations, as landlords, entered into leases with tenants at these real property locations (or, in the alternative, assumed leases already in existence at the time these real property locations were purchased).

67. Gross Capital, through the Gross Capital Corporations, sought to acquire ownership positions in properties that would generate predictable and reliable cashflow from high-quality commercial tenants. Gross Capital focused in particular on commercial use buildings located across Ontario that operated as medical centres containing, *inter alia*, family physicians’ offices, pharmacies and specialist clinics.

68. Gross Capital’s core objectives as a business enterprise accordingly included: (i) acquiring a portfolio of medical-related revenue-producing commercial real estate properties in Ontario; and (ii) making distributions to investors resulting from the predictable and reliable revenue generated from high-quality tenants at the properties.

69. Mark Gross has confirmed to the Trustee, under oath, that: (i) the quality of the commercial tenant, and specifically its financial ability to pay rent and related obligations on a timely basis, was the primary metric in determining whether or not to accept a particular tenant at any of the locations where a Gross Capital Corporation was the landlord; (ii) he would personally need to approve any tenancy in order for it to be accepted by a Gross Capital Corporation; and (iii) the decision to purchase a property by a Gross Capital Corporation would need to be made in each instance by Sheldon Gross and Mark Gross, or either of them.

70. The buildings in which Gross Capital obtained an ownership interest through the Gross Capital Corporations included, amongst others, the properties municipally known as (collectively, the "**Medical Properties**"):

- (a) 2009 Long Lake Road, Sudbury, Ontario ("**2009 Long Lake**"), in which Gross Capital held an approximately 80% ownership interest;
- (b) 849 Alexander Court, Peterborough, Ontario ("**849 Alexander**"), in which Gross Capital held an approximately 80% ownership interest;
- (c) 35 Upper Centennial Parkway, Stoney Creek, Ontario ("**Southmount**"), in which Gross Capital held an approximately 78% ownership interest;
- (d) 100 Colborne Street, Orillia, Ontario ("**100 Colborne**"), in which Gross Capital held an approximately 80% ownership interest;
- (e) 249 Ontario Street, Port Hope, Ontario ("**249 Ontario**"), in which Gross Capital held an approximately 77% ownership interest;
- (f) 65 Larch Street, Sudbury, Ontario ("**65 Larch**"), in which Gross Capital held an approximately 80% ownership interest;
- (g) 180 Vine Street, St. Catharines, Ontario ("**180 Vine**"), in which Gross Capital held an approximately 77% ownership interest; and
- (h) 240 Old Penetanguishene Road, Midland, Ontario ("**240 Old Penetanguishene**"), in which Gross Capital held an approximately 80% ownership interest.

71. Between late 2020 and 2022, the Medical Properties were sold under distress proceedings, in some cases by way of court-ordered receiverships, due to the conduct of certain of the defendants described herein.

(b) *Mark Gross and Sheldon Gross become acquainted with Fausto Carnicelli*

72. In or around 2008, Gross Capital and/or its related companies began purchasing real property from entities owned and/or controlled by Fausto Carnicelli.

73. In the course of and following that initial transaction or series of transactions, Mark Gross and Sheldon Gross became better acquainted with Fausto Carnicelli. They developed an interest in the structure of the business he operated through his various companies (including, most notably, Medica One), which they considered unique.

74. Fausto Carnicelli's business involved leasing (or, where applicable, leasing back) large commercial spaces and, in turn, effectively subletting the premises to physicians. The physician subtenants paid Medica One a percentage of their billings, in exchange for Medica One handling the business side of their respective practices, including, without limitation, paying rent to the landlord, providing and paying for staff and supplies and carrying out or assisting with the physicians' billings to the Ontario Health Insurance Plan.

75. As described herein, Mark Gross, Sheldon Gross and Fausto Carnicelli essentially became business partners, with Mark Gross and Fausto Carnicelli both becoming directors of Medica One in 2009, and Fausto Carnicelli becoming more and more involved in Gross Capital's business (to the point whereby Fausto Carnicelli confirmed under oath to the Trustee that he became Gross Capital's "*spreadsheet guy*"). Through the course of their business dealings, Mark Gross, Sheldon Gross and Fausto Carnicelli ultimately placed themselves in various conflicts of interest, and engaged in a scheme of misrepresentation, self-dealing and

contractual breaches, which caused damages to the Gross Capital Corporations, and, therefore, Gross Capital.

(c) *The defendants' scheme in relation to the Medical Properties*

76. Broadly speaking, the scheme in relation to the Medical Properties perpetrated by Mark Gross, Sheldon Gross and Fausto Carnicelli, together with other defendants in certain circumstances, which caused damages to Gross Capital, involved the following:

- (a) causing the Gross Capital Corporations to enter into lease agreements with tenant corporations owned and/or controlled by Fausto Carnicelli ("**Fausto Carnicelli Tenant Corporations**") for multiple units in the Medical Properties, which lease agreements contained misrepresentations. Such misrepresentations included, most notably, higher rents than Mark Gross, Sheldon Gross and Fausto Carnicelli believed the Fausto Carnicelli Tenant Corporations could pay;
- (b) maintaining rent rolls and other financial records for the Medical Properties which contained false statements and misrepresentations, including representing that certain vacant units were occupied (when, frequently, they were leased but unoccupied and accumulating significant rent arrears), and misrepresenting the rental income being earned, all for the purpose of inflating the Medical Properties' value;
- (c) purporting to represent to each other that the Medical Properties were worth more than they were in fact worth, based on false or inaccurate rent rolls and financial records;
- (d) causing the Gross Capital Corporations to purchase real properties from corporations owned and/or controlled by Fausto Carnicelli at inflated purchase

prices, where the purchase prices were calculated based on misrepresentations as to the rental income being generated by the properties;

- (e) permitting Fausto Carnicelli to execute documents on behalf of, and operate the business of, certain of the Gross Capital Corporations, without authority;
- (f) permitting the Fausto Carnicelli Tenant Corporations to accrue millions of dollars in rental arrears, without taking any enforcement action; and
- (g) permitting the Fausto Carnicelli Tenant Corporations to sublease certain units in the Medical Properties to third-party physicians and to receive a portion of the physicians' billings, without paying the full amount of rent due to the landlord Gross Capital Corporations, or, in many cases, any rent at all.

77. The Fausto Carnicelli Tenant Corporations included corporations of which Allen Greenspoon, Werner Dingfeld, Dennis Divalentino and Marcia Villafranca were officers, directors and/or shareholders, namely: Medica One, Aviva Medical, Atma Medical, Barclay, PH Jory and EHN.

78. In this regard, the Trustee pleads that Allen Greenspoon, Werner Dingfeld, Dennis Divalentino and Marcia Villafranca worked alongside Sheldon Gross, Mark Gross and/or Fausto Carnicelli in carrying out their scheme and benefited from this scheme, to Gross Capital's detriment, by virtue of the lack of any enforcement efforts being taken to collect overdue rent owing by their corporations as tenants of the Medical Properties.

79. Full particulars of the scheme perpetrated by the defendants are solely within their knowledge. Additional particulars of the scheme as currently known to the Trustee are set out below.

(d) Lease misrepresentations

80. The Gross Capital Corporations entered into lease agreements in respect of the Medical Properties at the direction of Mark Gross, or received assignments of lease agreements in respect of the Medical Properties at the direction of Mark Gross and/or Sheldon Gross, which, in both cases, Mark Gross and/or Sheldon Gross knew or ought to have known contained misrepresentations. Mark Gross and/or Sheldon Gross further directed that Gross Capital or the Gross Capital Corporations maintain records in respect of the Medical Properties which contained misrepresentations. Without in any way limiting the generality of the foregoing, leases and rent rolls relating to Gross Capital's and the Gross Capital Corporations' operations reflected higher rents than were actually paid by tenants, thereby misrepresenting the value and profitability of the applicable real property investment.

81. Fausto Carnicelli, Mauro Carnicelli, Dominic Carnicelli, Dennis Divalentino, Marcia Villafranca, Allen Greenspoon, and Werner Dingfeld directed or participated in entering into lease agreements on behalf of their respective corporations that they knew or ought to have known contained misrepresentations.

82. With respect to Southmount, for example, Mauro Carnicelli and Dominic Carnicelli signed various lease agreements on behalf of the landlord, which were countersigned by, amongst others, Werner Dingfeld and Fausto Carnicelli on behalf of certain tenant corporations. These lease agreements misrepresented, *inter alia*, that each of the tenants would pay higher rents than what they were knowingly able to pay (which, in certain cases, was nothing or close to nothing).

83. As a result of these misrepresentations, the Gross Capital Corporations paid inflated sale prices for certain real properties when such real properties were purchased from the applicable vendor, being corporations owned and/or controlled by Fausto Carnicelli.

84. Furthermore, after Gross Capital purchased ownership interests in the Medical Properties, Mark Gross signed various lease agreements on behalf of the applicable landlord, which were countersigned by Fausto Carnicelli, Allen Greenspoon, and/or Marcia Villafranca on behalf of certain tenant corporations, which lease agreements also misrepresented, *inter alia*, that each of the tenants would pay higher rents than what they were knowingly able to pay (which, in certain cases, was nothing or close to nothing).

85. In other instances, Fausto Carnicelli purported to sign lease agreements regarding the Medical Properties on behalf of the applicable Gross Capital Corporation as landlord, without corporate authority, which were then countersigned by Fausto Carnicelli or others known to him on behalf of the applicable Fausto Carnicelli Tenant Corporation. These lease agreements also misrepresented, *inter alia*, that the Fausto Carnicelli Tenant Corporation would pay higher rents than what it was knowingly able to pay (which, in certain cases, was nothing or close to nothing).

86. In each of these cases, Mark Gross, Sheldon Gross and Fausto Carnicelli knew or ought to have known that the applicable Fausto Carnicelli Tenant Corporation had no ability to pay the higher rent reflected in the lease agreement, or, in certain cases, would not even be occupying the space or paying any rent at all.

87. As a result of these misrepresentations, the Gross Capital Corporations (and, therefore, Gross Capital) received lower income from the Fausto Carnicelli Tenant Corporations (or, in some cases, no material income at all) than ought to have been received over the term of the applicable leases.

88. The Trustee pleads that Mark Gross and Sheldon Gross knowingly or negligently allowed the non-payment of rent and/or chronic underpayment of rent to occur for years, sometimes in respect of the same tenant at multiple locations, notwithstanding that the primary

metric for Gross Capital in investing in real property was predictable and reliable cashflow from high-quality commercial tenants.

(e) *Rent arrears*

89. As a result of the conduct of the defendants, Gross Capital's records reflect millions of dollars in rent arrears owing to the Gross Capital Corporations by tenants owned and/or controlled by the individual defendants, including:

- (a) \$295,850.36 in arrears owing by Medica One in relation to 2009 Long Lake;
- (b) in relation to 849 Alexander: (i) \$32,265.64 in arrears owing by Atma Medical; (ii) \$33,374.57 in arrears owing by Aviva Medical; and (iii) \$21,013.94 in arrears owing by Medica One, for a total of \$86,654.15;
- (c) in relation to Southmount: (i) \$150,246.48 in arrears owing by Atma Medical; (ii) \$115,871.24 in arrears owing by Doctors Naturae; (iv) \$241,026.29 in arrears owing by EHN; (v) \$39,696.20 in arrears owing by Integrated Medical; (vi) \$465,928.38 in arrears owing by Medica One; and (vii) \$267,040.24 in arrears owing by PH Jory, for a total of \$1,279,808.83;
- (d) in relation to 100 Colborne: (i) \$72,763.65 in arrears owing by Atma Medical; (ii) \$94,850.70 in arrears owing by Doctors Naturae; (iii) \$398,394.50 in arrears owing by Medica One; and (iv) \$458,936.27 in arrears owing by PH Jory, for a total of \$1,024,945.12;
- (e) \$274,548.59 in arrears owing by Barclay in relation to 65 Larch; and
- (f) \$48,605.39 in arrears owing by Integrated Medical in relation to 180 Vine.

90. In addition, Mark Gross and Sheldon Gross failed to take any steps to collect payment of the rent arrears from certain third-party tenants that do not appear to be related to Fausto Carnicelli, including:

- (a) in relation to Southmount: (i) \$123,927.86 in arrears owing by Concession X-ray and Ultrasound Inc.; (ii) \$67,791.46 in arrears owing by KMH Cardiology Centres Incorporated; (iii) \$91,876.09 in arrears owing by One Vascular Corporation o/a One Vascular & Hamilton Vascular Imaging; (vi) \$265,379.34 in arrears owing by Southmount Physiotherapy; and (v) \$454,432.88 in arrears owing by Wharton Medica Clinic, for a total of \$1,003,407.63 (bringing the total arrears for Southmount, together with the amount pleaded at paragraph 89(c) above, to \$2,283,216.46);
- (b) in relation to 65 Larch: (i) \$27,095.49 in arrears owing by Dynacare-Gamma Laboratory Partnership; and (ii) \$44,239.74 in arrears owing by Colligan Management Ltd., for a total of \$71,335.23 (bringing the total arrears for 65 Larch, together with the amount pleaded at paragraph 89(e) above, to \$345,883.82);
- (c) \$132,803.52 in arrears owing by Dynacare-Gamma Laboratory Partnership in relation to 240 Old Penetanguishene; and
- (d) \$49,126.79 in arrears owing by Metro Radiology Ltd. in relation to 249 Ontario.

91. The Trustee pleads that, but for Mark Gross, Sheldon Gross, Fausto Carnicelli, Mauro Carnicelli, Dominic Carnicelli, Dennis Divalentino, Marcia Villafranca, Allen Greenspoon and Werner Dingfeld's conduct, the underpaying or non-paying tenants purportedly occupying units in the Medical Properties, which they intentionally concealed through fabricated lease agreements and rent rolls, otherwise would have been occupied by commercial tenants paying

rent at fair market value to the applicable Gross Capital Corporations, for the benefit of Gross Capital and the Gross Capital Corporation's other investors.

92. The Trustee further pleads that, had the rent amounts specified in the applicable leases for the underpaying or non-paying tenants actually been paid to the applicable Gross Capital Corporations, or in the event the units had otherwise been occupied by commercial tenants paying rent at fair market value, the revenue and associated valuations of the Medical Properties would have been higher in 2020, there would have been no insolvency proceedings in respect of these locations and they would not have been sold under distress.

93. As a consequence, Gross Capital has suffered damages, including but not limited to the following rent arrears owing by the tenants of the Medical Properties:

- (a) arrears in respect of 2009 Long Lake in the amount of \$237,594.46, based on the approximately 80% ownership interest for this location pleaded at paragraph 70;
- (b) arrears in respect of 849 Alexander in the amount of \$69,157.81 based on the approximately 80% ownership interest for this location pleaded at paragraph 70;
- (c) arrears in respect of Southmount in the amount of \$1,776,616.39 based on the approximately 78% ownership interest for this location pleaded at paragraph 70;
- (d) arrears in respect of 100 Colborne in the amount of \$823,123.17 based on the approximately 80% ownership interest for this location pleaded at paragraph 70;
- (e) arrears in respect of 249 Ontario in the amount of \$37,726.42 based on the approximately 77% ownership interest for this location pleaded at paragraph 70;
- (f) arrears in respect of 65 Larch in the amount of \$277,775.83 based on the approximately 80% ownership interest for this location pleaded at paragraph 70;

(g) arrears in respect of 180 Vine in the amount of \$37,326.02 based on the approximately 77% ownership interest for this location pleaded at paragraph 70; and

(h) arrears in respect of 240 Old Penetanguishene in the amount of \$106,653.17, based on the approximately 80% ownership interest for this location pleaded at paragraph 70,

for a total of \$3,365,973.27 in rent arrears owing in relation to the Medical Properties, or such further and other amounts as will be particularized in the course of these proceedings in accordance with the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the “**Rules**”).

94. Gross Capital has also suffered additional damages in the form of, *inter alia*, lost opportunities flowing from the Medical Properties, enjoyment of the Medical Properties, the depreciation in value of the Medical Properties and their premature sale at undervalue, when they otherwise would not have been sold and instead would have generated increased revenue with higher valuations, in such amounts as will be particularized prior to trial.

(f) Breaches by the defendants in relation to the Medical Properties

95. The Trustee states that Mark Gross, Sheldon Gross, Fausto Carnicelli, Mauro Carnicelli, Dominic Carnicelli, Allen Greenspoon, Werner Dingfeld, Dennis Divalentino and Marcia Villafranca have made fraudulent misrepresentations and that the defendant corporations owned and/or controlled by them breached their contractual duties under the applicable lease agreements regarding the Medical Properties.

96. In particular, Fausto Carnicelli, Mauro Carnicelli, Dominic Carnicelli, Allen Greenspoon, Werner Dingfeld, Dennis Divalentino and Marcia Villafranca used dishonest and deceptive practices to obtain and benefit from the use of leased premises owned by the Gross Capital

Corporations, without paying the rent amounts that the defendant tenant corporations owned and operated by them agreed to pay to the applicable Gross Capital Corporations under the lease agreements.

97. The Trustee pleads and relies on the provisions of the lease agreements entered into with the underpaying and non-paying tenant corporations for the Medical Properties, and particularly the provisions that require the timely payment of rent to the landlord Gross Capital Corporations in the amounts set out in the applicable lease agreements.

98. Mark Gross, Sheldon Gross and Fausto Carnicelli made repeated and dishonest representations to Gross Capital and its stakeholders that the units of the Medical Properties were all occupied by tenants who were contributing significant amounts of rent to the Gross Capital Corporations, while knowing that this was false and that certain units were neither occupied nor generating any (or very little) rent. Such representations were made when Mark Gross, Sheldon Gross and Fausto Carnicelli knew them to be untrue, so as to conceal the extent of their personal business failures and continue generating salary and other forms of compensation from Gross Capital and the Gross Capital Corporations, all to the eventual detriment of Gross Capital and its stakeholders.

99. In addition, Mark Gross and Sheldon Gross failed to take adequate, or any, steps to collect the rent amounts that ought to have been paid to the applicable Gross Capital Corporations by certain tenants of the Medical Properties, including by failing to deliver any demand letters, notices of default or notices of eviction to the respective defaulting tenants purportedly occupying the Medical Properties.

100. Further or in the alternative, the defendants took rent amounts owing in relation to the Medical Properties that ought to have been paid to the applicable Gross Capital Corporations, and used these funds for their personal benefit. Full particulars of these amounts and the

manner in which the funds were used for the defendants' personal benefit are solely within the defendants' knowledge.

101. Mark Gross and Sheldon Gross failed to take steps to ensure that the Medical Properties were being utilized to generate a commercially reasonable amount of rental income from tenants, and instead participated with Fausto Carnicelli in a deliberate scheme to misrepresent the vacancy rate of units in the Medical Properties by, *inter alia*, manipulating the start dates of tenancies on the rent rolls, exaggerating the number of tenants occupying and paying rent to the Gross Capital Corporations and exaggerating the rent paid by tenants.

102. Gross Capital utilized a property manager, Prime Real Estate Group Inc. ("**Prime**"), to assist with collecting rent from tenants. Gross Capital held a 50% ownership interest in Prime. Mark Gross and Sheldon Gross specifically directed Prime *not* to inquire with Fausto Carnicelli Tenant Corporations regarding unpaid rent, and advised Prime's personnel that Mark Gross would personally deal with the collection of rent arrears from the Fausto Carnicelli Tenant Corporations, which he never did.

103. The Trustee pleads that Mark Gross and Sheldon Gross failed to conduct sufficient due diligence in respect of the lease agreements regarding the Medical Properties prior to Gross Capital's obtaining an ownership interest in them, and failed to take adequate or any steps afterwards to verify whether the tenants described on the lease agreements and rent rolls were in fact occupying the units as reflected on Gross Capital's books and records.

104. In subsequently deciding to misrepresent the vacancy rate and revenue streams being generated by the Medical Properties, favouring the Fausto Carnicelli Tenant Corporations (including, without limitation, Medica One, where Mark Gross was a registered director) and integrating Fausto Carnicelli more and more in the affairs of Gross Capital as the rent arrears from the Fausto Carnicelli Tenant Corporations grew and grew, Mark Gross and Sheldon Gross

placed themselves in an inevitable conflict of interest, and placed their own self-interest above that of Gross Capital and its investors and other stakeholders. The Trustee pleads in this regard that Mark Gross and Sheldon Gross failed to put in place or to follow any policies, practices or procedures whatsoever to prevent such conflicts of interest from occurring.

105. Mark Gross, Sheldon Gross, Fausto Carnicelli, Mauro Carnicelli, Dominic Carnicelli, Allen Greenspoon, Werner Dingfeld, Dennis Divalentino and Marcia Villafranca: (i) breached their duty of care to Gross Capital; (ii) acted fraudulently and/or negligently; and (iii) fell below the standard of reasonable skill, care and diligence required of directors and officers of the corporations operated and owned by them.

106. Mark Gross and Sheldon Gross in particular, as officers and directors of Gross Capital: (i) breached their common law and statutory duties towards Gross Capital; and (ii) failed to act honestly and in good faith with a view to the best interests of Gross Capital, and failed to exercise the care, diligence and skill that a reasonably prudent person would have in comparable circumstances, contrary to section 134 of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B-16 (the "**OBCA**"). The Trustee pleads and relies on the provisions of the *OBCA*.

107. Mark Gross, Sheldon Gross, Fausto Carnicelli, Mauro Carnicelli, Dominic Carnicelli, Allen Greenspoon, Werner Dingfeld, Dennis Divalentino and Marcia Villafranca, and the defendant corporations operated, directed and/or owned by them, by virtue of their position as tenants of the Gross Capital Corporations, knew or ought to have known Gross Capital would suffer losses in relation to the Medical Properties in the form of rent arrears and reduced cashflow. As such, these defendants had a legal and/or equitable duty to exercise reasonable care to ensure that the representations contained in the lease agreements, including the promise of the respective tenant corporations to pay rent, were true. As a result of the close

relationship between these defendants and Gross Capital, they owed Gross Capital a duty of care in connection with the representations contained in the lease agreements.

108. There was a sufficiently close relationship between Gross Capital on the one hand and the defendants as the tenant corporations of Gross Capital's Corporations (or their owners, directors and/or operators) on the other such that, in the reasonable contemplation of the these defendants, failing to honour their lease obligations would cause damage to Gross Capital. There are no considerations which ought to negate or limit the scope of that duty, to exclude Gross Capital from the class of persons to whom is owed a duty of care or to limit the damages to which a breach of it may give rise.

109. Mark Gross, Sheldon Gross, Fausto Carnicelli, Mauro Carnicelli, Dominic Carnicelli, Allen Greenspoon, Werner Dingfeld, Dennis Divalentino and Marcia Villafranca, and the defendant corporations operated, directed and/or owned by them, made ongoing and repeated false misrepresentations to conceal the lack of revenue being generated by the Medical Properties. As a result of these misrepresentations, Gross Capital has incurred significant damages in the form of Gross Capital's *pro rata* interest in the rent arrears owing by the tenants of the Medical Properties, as particularized above, plus other damages that will be particularized prior to trial.

110. Mark Gross, Sheldon Gross, Fausto Carnicelli, Mauro Carnicelli, Dominic Carnicelli, Allen Greenspoon, Werner Dingfeld, Dennis Divalentino and Marcia Villafranca, and the defendant corporations operated, directed and/or owned by them, are liable to Gross Capital for their improper actions relating to the foregoing.

Improperly Diverting Monies from Southmount

111. At all relevant times, Southmount was the owner of the real property at 35 Upper Centennial Parkway, Stoney Creek. Gross Capital had, by far, the largest ownership interest in Southmount (being approximately 78% as of December 31, 2020).

112. Fausto Carnicelli, Dominic Carnicelli and Mauro Carnicelli purported to enter into agreements on behalf of Southmount.

113. Fausto Carnicelli, Dominic Carnicelli and/or Mauro Carnicelli improperly directed the use of funds belonging to Southmount to pay obligations relating to certain other corporations or ventures in which they were involved, for which they ought to be held liable.

114. Following the commencement of receivership proceedings against Southmount on June 29, 2021, it was assigned into bankruptcy by its Court-appointed receiver on August 29, 2022. Prior to its bankruptcy, the officers and directors of Southmount were Fausto Carnicelli and Mark Gross.

115. Prior to Southmount's receivership and bankruptcy, Mark Gross and Sheldon Gross knowingly or negligently allowed Fausto Carnicelli, Dominic Carnicelli and/or Mauro Carnicelli to cause Southmount to divert monies to other corporations or ventures, to the detriment of Gross Capital.

116. Mark Gross' testimony under oath to the Trustee is that approximately \$5,000,000.00 was improperly diverted from Southmount.

Zedd

117. Mark Gross and Sheldon Gross are two of Zedd Customer Solutions Inc.'s officers, and its two directors.

118. Zedd's business, a telemarketing call-in centre, was previously owned, in full or in part, by Gross Capital. To fund its ownership interest in Zedd, Gross Capital obtained a loan from certain investors (the "**Zedd Loan**").

119. Mark Gross and/or Sheldon Gross subsequently caused Gross Capital's ownership interest in Zedd to be transferred to them personally and/or to their holding companies, MGZ and/or SGZ, without adequate or any disclosure to Gross Capital's stakeholders, all to the detriment of Gross Capital.

120. In parallel, Mark Gross and/or Sheldon Gross caused Gross Capital's interest (as borrower) in the Zedd Loan to be assigned to Mark Gross, Sheldon Gross, MGZ and SGZ, but continued to cause Gross Capital to pay the interest on the Zedd Loan on behalf of Mark Gross, Sheldon Gross, MGZ and SGZ. This was also done without adequate or any disclosure to Gross Capital's stakeholders, all to the detriment of Gross Capital.

121. As a result of the foregoing:

- (a) Gross Capital has been deprived of the value of Zedd's business, which Mark Gross, Sheldon Gross, MGZ and SGZ have improperly taken for themselves, the value of which is only known to the defendants Mark Gross, Sheldon Gross, MGZ and SGZ; and
- (b) in addition, or in the alternative, Mark Gross, Sheldon Gross, MGZ and SGZ owe the following amounts to Gross Capital for the interest payments that they improperly caused Gross Capital to pay on their behalf:
 - (i) in the case of Mark Gross and MGZ, \$545,118.00; and
 - (ii) in the case of Sheldon Gross and SGZ, \$436,556.43.

122. Mark Gross, Sheldon Gross, MGZ and SGZ are liable to Gross Capital for their improper actions relating to the foregoing.

Misrepresentations and Self-Dealing Generally

123. In the course of operating the business of Gross Capital, Mark Gross, Sheldon Gross and Fausto Carnicelli made negligent and/or fraudulent misrepresentations, engaged in self-dealing and failed to recognize obvious conflicts of interest, as pleaded in detail in the previous paragraphs of this Statement of Claim. This conduct resulted in Gross Capital suffering damages, and ultimately resulted in Gross Capital's bankruptcy, and the insolvency proceedings of many of its subsidiaries, including, without limitation, the Gross Capital Corporations. But for this conduct, Gross Capital's bankruptcy and the other associated insolvency proceedings would not have occurred.

124. Mark Gross, Sheldon Gross and Fausto Carnicelli ought to be held liable for the foregoing.

125. As pleaded earlier in this Statement of Claim, Mark Gross, Sheldon Gross and Fausto Carnicelli caused Gross Capital to represent in 2020 as part of the Proposed RTO that a subset of Gross Capital's assets, net of debt, was worth \$50,695,519.20. Gross Capital has incurred damages in this amount, plus other damages that will be particularized prior to trial.

Restitution and Tracing

126. The Trustee pleads that all the defendants have been unjustly enriched at Gross Capital's expense and are liable to Gross Capital for all amounts by which they have been unjustly enriched. Gross Capital has been correspondingly deprived of the benefit of these amounts, and there is no juristic reason for the defendants' enrichment. The Trustee pleads

and relies upon the doctrine of unjust enrichment and claims that it is entitled to restitution from all the defendants.

127. Without limiting the generality of the foregoing, Mark's wife, Irina Gross, together with Mark's holding company, Mark Craig Gross Holdings, of which Irina Gross is the sole purported shareholder, have been unjustly enriched at Gross Capital's expense and are liable to Gross Capital for all amounts by which they have been unjustly enriched.

128. Mark Gross confirmed to the Trustee under oath that Irina Gross has not worked since they had children, which was nearly twenty years ago. Home ownership in Forest Hill, Ontario, and the continuing mortgages that were registered on title to their family home (including, without limitation, by Cannect, which was a frequent mortgagee on Gross Capital's properties), would not have been possible but for the ongoing and material financial contributions from Mark Gross, which, in turn, were sourced from Gross Capital. Indeed, Mark Gross was listed as a co-borrower on at least one of these residential mortgages, notwithstanding that his name was absent from title.

129. Registration on title of the family home in Forest Hill, Ontario solely in Irina Gross' name is not an accurate or fair representation of who Mark Gross and Irina Gross understood really owned the home. When examined under oath by the Trustee, Irina Gross could not recall the basic features of many of the mortgages that encumbered the home, including, without limitation, their amounts or interest rates, notwithstanding that some of these mortgages were for millions of dollars and accrued interest at over 20 percent per annum.

130. Similarly, Mark Craig Gross Holdings is, as its name describes, Mark Gross' holding company. It engaged in multiple transactions involving Gross Capital and received funds from Gross Capital, about which Irina Gross had no recollection under oath.

131. The Trustee pleads that the defendants (including, without limitation, Irina Gross and Mark Craig Gross Holdings) hold any amounts by which they have been unjustly enriched at Gross Capital's expense as trust funds and/or pursuant to a constructive trust, and that Gross Capital is the beneficiary of those funds. The Trustee further pleads that, given the circumstances, there are no factors that would render the imposition of a constructive trust in favour of the Trustee unjust.

132. Any funds originating with or that should have been paid to Gross Capital and obtained by any of the defendants by way of fraud, misrepresentation, breach of fiduciary duty, self-dealing, negligence or other improper conduct should be impressed with a trust in favour of Gross Capital.

133. The Trustee seeks such orders as may be necessary to trace such misappropriated funds, including any such funds or assets currently held by or transferred to any of the defendants, or transferred to individuals or entities not yet known to the Trustee.

134. The Trustee further seeks orders requiring the defendants to disgorge and/or pay restitution in relation to any benefit obtained directly or indirectly as a consequences of the fraud, misrepresentation, breach of fiduciary duty, self-dealing, negligence or other improper conduct as pleaded herein, including any assets obtained with funds originating with or that should have been paid to Gross Capital.

Additional Indebtedness

135. In or around 2009, Medica One borrowed the sum of \$2,800,000.00 from Gross Capital. Fausto Carnicelli acknowledged this indebtedness in writing on August 6, 2021. To date, and despite demand being issued, Medica One has failed or refused to repay this indebtedness. For the reasons pleaded earlier in this Statement of Claim, Fausto Carnicelli and Medica One are liable jointly and severally for Fausto Carnicelli's improper conduct in directing Medica One.

136. On October 4, 2021, Fausto Carnicelli acknowledged in writing that he personally owes a debt of at least \$1,000,000.00 to Gross Capital, separate and apart from the \$2,800,000.00 debt referenced in the preceding paragraph. To date, and despite demand being issued, Fausto Carnicelli has failed or refused to repay this indebtedness.

137. The Trustee pleads and relies on the provisions of the *Negligence Act*, R.S.O. 1990, c. N.1, the BIA, the CJA and the *Rules*, and in particular Rule 5.04(2).

138. The Trustee proposes that this action be tried in the City of Toronto.

Date: July 21, 2023

AIRD & BERLIS LLP

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

and

MARK CRAIG GROSS et al.
Defendants

Court File No. CV-23-00701647-0000

**ONTARIO
SUPERIOR COURT OF JUSTICE**
PROCEEDING COMMENCED AT TORONTO

STATEMENT OF CLAIM

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