

Court File No.: CV-20-00637081-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

TRUIST BANK, AS AGENT

Applicant

- and -

**KEW MEDIA GROUP INC. AND KEW MEDIA INTERNATIONAL
(CANADA) INC.**

Respondents

APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY
ACT*, R.S.C. 1985 C. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF
JUSTICE ACT*, R.S.O. 1990, c. C-43, AS AMENDED

FACTUM OF THE RESPONDENTS

(Motion returnable May 25, 2023)

May 24, 2023

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TO: **The Service List**

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I. OVERVIEW

1. Steven Silver, the former Chief Executive Officer of Kew Media Group Inc. (“**Kew**”) brings this motion for an Order:
 - (a) approving the Consent to Defence to Class Action (the “**Consent**”) proposed to be executed by FTI Consulting Canada Inc. (the “**Receiver**”) in its capacity as the Court-appointed receiver of Kew’s undertaking, property and assets; and,
 - (b) authorizing Mr. Silver to direct Kew’s defence of the shareholder class action commenced against Kew and some of its former directors and officers (the “**Class Action**”) and to represent Kew in any other related litigation, all on the terms of the proposed order.
2. The stakeholders with an economic interest in the relief sought support Mr. Silver’s motion. No such stakeholder opposes it.
3. This motion seeks to solve a specific problem. The Class Action seeks to recover damages allegedly suffered by Kew’s shareholders as a result of alleged misrepresentations. Kew has no funds to pay any damages awarded against it. Kew holds certain insurance policies that may respond to some or all of the damages claimed in the Class Action. But that coverage may not be available if Kew does not defend the Class Action. Insurance coverage is dependant on the insured, Kew, defending any claims made against it.
4. The Receiver did not (and was not required to) defend the Class Action, and it will soon be discharged. Kew has no directors, officers or employees who can direct its defence.

5. Mr. Silver has agreed to direct Kew's defence, and any related litigation, so that the Class Action can proceed in an orderly manner and Kew's insurance coverage can be preserved, subject to coverage restrictions provided for in the policies. The relief sought will protect Kew's assets (the insurance policies) and further the interests of its stakeholders (including the Class Action plaintiffs, who are former Kew shareholders) and it will not prejudice any party.
6. The relief should be granted.

II. FACTS

A. The Receivership

7. The Receiver was appointed as receiver and manager, without security, of all of Kew's assets, undertakings and properties by Order of Justice Koehnen dated February 28, 2020 (the "**Receivership Order**").¹
8. The Receiver has reported that it has substantially completed all of its activities, and has reported that Kew's secured lenders (the "**Secured Lenders**") will suffer a significant shortfall. Unsecured creditors will not receive any distributions.²
9. The Receiver has served a motion for an Order discharging it and terminating the receivership proceedings once certain administrative steps have been completed.
10. Kew does not carry on any business, and it has no directors, officers or employees.³

¹ Fifth Report of the Receiver dated May 5, 2023 (the "**Fifth Report**") at para. 1, Caselines page number ("**CL No.**") [E19](#).

² Fifth Report, paras. 8-9, CL No. [E22](#).

³ Fifth Report, paras. 17, CL No. [E24](#).

B. The Class Action

11. Alex Kan and Stuart Rath (collectively, the “**Plaintiffs**”) commenced the Class Action on behalf of shareholders of Kew against Kew, together with certain of Kew’s former directors and officers (collectively, the “**D&O Defendants**” and together with Kew, the “**Defendants**”).⁴ The Class Action focuses on allegations that the Defendants are liable under the *Securities Act* (Ontario) and at common law for misrepresentations allegedly made in the secondary market.
12. The Receivership Order conferred on the Receiver the right (but not the obligation) to defend the Class Action. But the Receiver concluded that Kew’s assets should not be used to defend the Class Action. Accordingly, Kew has not filed a Statement of Defence.

C. Kew’s insurance policies

13. Kew’s insurance policies are the Plaintiffs’ only potential source of recovery against Kew, but coverage may be denied unless Kew files a Statement of Defence in the Class Action.
14. The Plaintiffs in the Class Action hold equity claims against Kew, and the Receiver has reported that no funds are (or will be) available to pay such claims.
15. Kew carried a primary insurance policy and excess insurance policy in respect of claims against its directors and officers (collectively, the “**D&O Policy**”).⁵ The D&O Policy could potentially respond to certain claims asserted in the Class Action. The insurers under the D&O Policy (collectively, the “**D&O Insurer**”) acknowledged receipt of the claims

⁴ Fifth Report, para. 45, CL No. [E32](#).

⁵ Fourth Report of the Receiver dated September 29, 2021 (the “**Fourth Report**”), para. 21, CL No. [E55](#).

asserted in the Class Action generally, subject to a reservation of rights, but have not yet taken a coverage position.⁶

16. Importantly, the D&O Insurer has noted that the failure to defend Kew in the Class Action could negate coverage under the D&O Policy, and has reserved its right to deny coverage if Kew does not defend the Class Action. Such a denial could potentially have an adverse impact on the Plaintiffs in the Class Action (who would lose their only potential source recovery for claims against Kew) and the former directors and officers of Kew who are named in the Class Action.⁷

D. Status of the Class Action

17. By Order of Justice Koehnen dated July 14, 2020 (the “**First Lift Stay Order**”), the Court lifted the stay of proceedings imposed pursuant to the Receivership Order for the limited purpose of:⁸

- (a) granting the Plaintiffs leave to issue and file with the court and serve the Statement of Claim in the Class Action;
- (b) granting the Plaintiffs leave to file with the court the Plaintiff’s Motion for Certification and for Leave pursuant to the *Securities Act*;
- (c) allowing the Plaintiffs to serve (as necessary), file with the court and advance to a determination any motion(s) related to the service of the Statement of Claim or third party adverse costs indemnity and disbursements funding agreements.

⁶ Fourth Report, para. 24, CL No. [E56](#).

⁷ Fourth Report, para. 21, CL No. [E55](#).

⁸ Fifth Report, para. 47, CL Nos. [E32-E33](#).

18. Pursuant to the First Lift Stay Order, the Receiver was not required to participate in or defend the Class Action.
19. The Statement of Claim in the Class Action was issued July 20, 2020.⁹
20. The Plaintiffs and the originally named individual Defendants who had been former directors and or officers, entered into a Standstill and Tolling Agreement dated May 10, 2021. The Standstill and Tolling Agreement narrowed the Class Action by reducing the number of defendants and set out the terms of the consent to the Plaintiffs' motions for leave under Part XXIII.1 of the *Securities Act* and certification under the *Class Proceedings Act*.
21. Pursuant to the Standstill and Tolling Agreement, the Plaintiffs agreed to serve an Amended Statement of Claim (the "**Amended Claim**") naming only Mr. Silver, Geoffrey Webb (Kew's former Chief Financial Officer) and Kew as defendants. The Plaintiffs discontinued the action against the balance of the D&O Defendants (the "**Standstill Defendants**").
22. The parties to the Standstill Agreement also agreed:¹⁰
 - (a) The running of all limitation periods in respect of the misrepresentations pleaded in the Amended Claim are suspended as against the Standstill Defendants. This standstill can be terminated by written notice or by a Court Order disposing of the Class Action and the exhaustion of appeal rights.

⁹ Fifth Report, para. 44, CL No. [E31](#).

¹⁰ Affidavit of Luke Devine sworn May 19, 2023 (the "**Devine Affidavit**"), Exhibit "B", CL Nos. [F26- F79](#).

- (b) The Plaintiffs reserved their right to seek relief in respect of any additional misrepresentations and impugned documents that may be revealed in the course of the Plaintiffs' ongoing investigation, documentary production and discovery. The Defendants similarly reserved their rights, including their right to assert the expiry of applicable limitation periods to object to any effort to introduce additional misrepresentations and impugned documents.
 - (c) The Plaintiffs may, on 30 days written notice to counsel to the D&O Defendants, add any or all of the Standstill Defendants back to the Class Action. In the event the Plaintiffs seek to do so, the Standstill Defendant or Standstill Defendants shall have all of the rights and defences which may be available to them, including to oppose the Plaintiffs' motion for leave.
23. In accordance with the Standstill and Tolling Agreement, and to facilitate the narrowing of the action, Mr. Silver consented to an Order granting leave to issue the Amended Claim and proceed with the statutory claims for misrepresentation under the *Securities Act*, certifying the Class Action as a class proceeding pursuant to the *Class Proceedings Act* and appointing the Plaintiffs as representative Plaintiffs.
24. Mr. Webb, who is separately represented by Fasken Martineau LLP, also signed the Standstill and Tolling Agreement and consented to the Order granting leave.
25. By Orders of Justice Morgan dated September 27, 2021, the Court approved the Standstill and Tolling Agreement and granted leave to issue and serve the Amended Claim. The Amended Claim was issued September 27, 2021.

26. By Order of Justice McEwen dated October 7, 2021 (the “**Second Lift Stay Order**”), the Stay of Proceedings was lifted to allow the Class Action to proceed against Kew in the ordinary course provided that the claims in the Class Action, if established, would only be sought to be enforced against: (i) any insurers of Kew under any relevant insurance policies issued to Kew and/or the other defendants in the Class Action; and, (ii) the other defendants in the Class Action other than Kew, but not against the Receiver or any present or future property, assets or undertaking of Kew.
27. Pursuant to the Second Lift Stay Order, the Receiver was not required to participate in or defend the Class Action.

E. Steven Silver

28. Steven Silver was Kew’s CEO until his resignation on or about February 28, 2019. He is a D&O Defendant. Since the Standstill and Tolling Agreement was executed, Mr. Silver has been the primary party responsible for instructing defence counsel.
29. Goodmans is currently counsel to Mr. Silver and the Standstill Defendants. The remaining D&O Defendant, Mr. Webb, has separate counsel.
30. The Receiver has reported that, following its appointment, it took possession of 154 boxes of records together with various electronic storage media containing Kew records. The parties to the Class Action, wish to ensure that certain of the Debtors’ books and records related to the Class Action are preserved. The Receiver and Goodmans (in its capacity as counsel to the D&O Defendants) agreed that, subject to court approval, certain records and electronic storage media would be transferred to Goodmans prior to or concurrently with

the Receiver's discharge and the termination of the receivership proceedings in connection with Kew's intended defence of the Class Action.¹¹

F. A settlement of the Class Action will require court approval

31. The order sought grants Mr. Silver the authority to defend the claim on behalf of Kew, or to enter into negotiations or settle the Class Action on behalf of Kew. However, any settlement between Kew, the individual defendants and the Class Action Plaintiffs would require approval of the Court pursuant to the *Class Proceedings Act* (the "*CPA*").¹² The *CPA* provides that any settlement of a class proceeding must be approved by the Court and that approval shall not be granted unless the Court determines that the settlement is fair and reasonable.¹³

G. Stakeholder support

32. The Plaintiffs, Mr. Webb, the Receiver and Kew's insurers support Mr. Silver having responsibility for conducting Kew's defence and asserting any necessary or appropriate claims for contribution and indemnity. This will provide a practical solution to the potential impact on the D&O Policy which could arise from the Receiver's discharge, and it will protect the interests of the various Kew stakeholders involved in the Class Action.

H. Kew's Insurers' Support

33. Kew's primary and secondary insurers have confirmed they support the relief sought, and having Mr. Silver direct Kew's defence. That support is subject to the insurers' continuing reservation of whatever rights they may have to deny coverage depending on facts that may

¹¹ Fifth Report, paras. 80-81, CL No. [E44](#).

¹² *Class Proceedings Act*, s. [27.1](#)

¹³ *Class Proceedings Act* s. [27.1\(1\)](#) and [27.1\(5\)](#)

be determined through the litigation. The other insurers have not expressed a contrary view and are expected to follow this approach.

III. ISSUES

34. The only issue on this motion is whether the Order sought should be granted, and whether the Court should:

- (a) approve the Consent proposed to be executed by the Receiver; and,
- (b) authorize Mr. Silver, on behalf of Kew, to conduct the defence of the Class Action in accordance to the terms of the Consent and the draft Order.

IV. LAW AND ARGUMENT

35. The Receiver was appointed pursuant to section 243(1) of the *Bankruptcy and Insolvency Act* (“**BIA**”) and section 101 of the *Courts of Justice Act*. Both of these statutes confer on this Court the broad authority to make such orders as are required to preserve and realize on the assets of the debtor company for the benefit of affected stakeholders.¹⁴

36. The order sought by Mr. Silver – and supported by every stakeholder with an economic interest – will further these goals.

37. The D&O Policy is a Kew asset. It is the only asset that may provide recovery to the Plaintiffs in respect of the Class Action. If Kew does not defend the Class Action and coverage is not available, the Plaintiffs’ claim would be effectively limited to the claims that they assert against the D&O Defendants. Those claims present different liability and

¹⁴ *Ontario Securities Commission v. Bridging Finance Inc.*, 2023 ONSC 2140 at paras. [17-18](#).

recovery risks than the claims against Kew. For example, misrepresentation claims against Kew under the *Securities Act* (if they are made out) are limited to 5% of Kew's market capitalisation as of the date of the misrepresentation. In contrast, claims against individuals under the *Securities Act* are limited to 50% of the compensation earned in the 12 months preceding a misrepresentation.

38. The D&O Policy is also critical to the D&O Defendants and the Standstill Defendants, who served as Kew's directors and officers. Appointing Mr. Silver to direct Kew's defence, so that the D&O Policy can be preserved and the Class Action can move forward, will, subject to coverage being accepted, make resolution easier to achieve by ensuring that all defendants including Kew are in a position to make contributions should that be appropriate.
39. The Receiver has confirmed that Kew's estate has no economic interest in the Class Action, because Kew has no funds available to pay a judgment against it apart from whatever amount might be payable under the D&O Policy. It therefore takes no position on the relief sought.
40. There are three groups of stakeholders with an economic interest in the Class Action:
 - (a) the Insurers may respond under the D&O Policy to fund defence costs and damages, if all of the requirements of those policies are met;
 - (b) the Plaintiffs, who may potentially recover from the D&O Policy if they are able to prove their case or negotiate a resolution and coverage is available under the D&O Policy; and


(c) the Defendants who may look to the D&O Policy for coverage.

41. All of these affected stakeholders support the relief sought. This support should carry significant weight in assessing whether this proposed order is appropriate given the Receiver's impending discharge. No party opposes the order sought.
42. It is also important that the relief sought by Mr. Silver will not affect the substantive rights of any party in the Class Action, or under the D&O Policy. If the Order is granted it will simply allow the parties to move the Class Action forward in an orderly manner. To the extent that the parties reach a settlement, that settlement will require court approval pursuant to the terms of the *Class Proceedings Act*.

V. CONCLUSION

43. For the reasons set out above, Mr. Silver respectfully submits that the relief sought in his Notice of Motion should be granted.

May 24, 2023



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SCHEDULE A
LIST OF AUTHORITIES

1. [*Ontario Securities Commission v. Bridging Finance Inc.*, 2023 ONSC 2140](#)

**SCHEDULE B
RELEVANT STATUTES AND REGULATIONS**

Class Proceedings Act, 1992, S.O. 1992, c. 6, section [27.1](#)

Settlement

27.1 (1) A proceeding under this Act may be settled only with the approval of the court. 2020, c. 11, Sched. 4, s. 25.

Subclass

(2) A settlement may be concluded in relation to the common issues affecting a subclass only with the approval of the court. 2020, c. 11, Sched. 4, s. 25.

Not binding without court approval

(3) A settlement under this section is not binding unless approved by the court. 2020, c. 11, Sched. 4, s. 25.

Effect of settlement

(4) If a proceeding is certified as a class proceeding, a settlement under this section that is approved by the court binds every member of the class or subclass, as the case may be, who has not opted out of the class proceeding, unless the court orders otherwise. 2020, c. 11, Sched. 4, s. 25.

Settlement must be fair and reasonable

(5) The court shall not approve a settlement unless it determines that the settlement is fair, reasonable and in the best interests of the class or subclass members, as the case may be. 2020, c. 11, Sched. 4, s. 25.

Differences not a bar

(6) The court may approve a settlement even if individual class or subclass members, including a representative party, are subject to different settlement terms. 2020, c. 11, Sched. 4, s. 25.

Evidentiary requirements

(7) On a motion for approval of a settlement, the moving party shall make full and frank disclosure of all material facts, including, in one or more affidavits filed for use on the motion, the party's best information respecting the following matters, which the court shall consider in determining whether to approve the settlement:

1. Evidence as to how the settlement meets the requirements of subsection (5).
2. Any risks associated with continued litigation.
3. The range of possible recoveries in the litigation.
4. The method used for valuation of the settlement.
5. The total number of class or subclass members, as the case may be.
6. A plan for allocating and distributing the settlement funds, including any proposal respecting the appointment of an administrator under subsection (14), and the anticipated costs associated with the distribution.
7. The number of class or subclass members expected to make a claim under the settlement and, of them, the numbers of class or subclass members who are and who are not expected to receive settlement funds.
8. The number of class or subclass members who have objected or are expected to object to the settlement, and the nature or anticipated nature of the objections.
9. A plan for giving notice of the settlement to class or subclass members in the event of an order under section 19, and the number of class or subclass members who are expected to obtain the notice.
10. Any other prescribed information. 2020, c. 11, Sched. 4, s. 25.

Notice of settlement hearing

(8) The court shall consider whether notice of a hearing of a motion for approval of a settlement should be given under section 19, and whether such notice should include,

- (a) a statement of the purpose of the hearing;
- (b) the process for objecting to the approval of the settlement;
- (c) any other prescribed information; and
- (d) any other information the court considers appropriate. 2020, c. 11, Sched. 4, s. 25.

Public Guardian and Trustee

(9) Notice of a motion for approval of a settlement and other materials filed on the motion, as well as any notice given under subsection (8), shall be served on the Public Guardian and Trustee, if there is a reasonable possibility that the Public Guardian and Trustee is authorized to act on behalf of one or more class or subclass members. 2020, c. 11, Sched. 4, s. 25.

Same

(10) An entitlement to receive materials under subsection (9) includes an entitlement to make submissions at the hearing of the motion, unless the court orders otherwise. 2020, c. 11, Sched. 4, s. 25.

Children's Lawyer

(11) If there is a reasonable possibility that the class or subclass includes minors, the court may direct that,

- (a) the notice of motion and other materials filed on the motion be served on the Children's Lawyer; and
- (b) the Children's Lawyer make any recommendations it may have in connection with the proposed settlement in writing to the court. 2020, c. 11, Sched. 4, s. 25.

Notice of settlement approval

(12) In approving a settlement, the court shall consider whether notice of the settlement should be given under section 19, and whether such notice should include,

- (a) an account of the conduct of the proceeding;
- (b) a statement of the result of the proceeding;
- (c) a description of any plan for distributing settlement funds;
- (d) any other prescribed information; and
- (e) any other information the court considers appropriate. 2020, c. 11, Sched. 4, s. 25.

Supervisory role of the court

(13) The court shall supervise the administration and implementation of the settlement. 2020, c. 11, Sched. 4, s. 25.

Court-appointed administrator

(14) The court may appoint a person or entity to act as an administrator to administer the distribution of settlement funds. 2020, c. 11, Sched. 4, s. 25.

Duty of administrator, other person or entity

(15) An administrator appointed by the court or, if no administrator is appointed, the person or entity who administers the distribution of the settlement funds, shall administer the distribution in a competent and diligent manner. 2020, c. 11, Sched. 4, s. 25.

Report

(16) No later than 60 days after the date on which the settlement funds are fully distributed, including any distribution under section 27.2, the administrator or other person or entity who administered the distribution shall file with the court a report containing their best information respecting the following:

1. The amount of the settlement funds before distribution.
2. The total number of class or subclass members.
3. Information respecting the number of class members identified in each affidavit filed under subsection 5 (3) in the motion for certification.
4. The number of class members who received notice associated with the distribution, and a description of how notice was given.
5. The number of class or subclass members who made a claim under the settlement and, of them, the numbers of class or subclass members who did and who did not receive settlement funds.
6. The amount of the settlement funds distributed to class or subclass members and a description of how the settlement funds were distributed.
7. The amount and recipients of any distribution under section 27.2, and the amount, if any, that was subject to reversion or otherwise returned to the defendant.
8. The number of class or subclass members who objected to the settlement and the nature of their objections.
9. The number of class or subclass members who opted out of the class proceeding.
10. The smallest and largest amounts distributed to class or subclass members, the average and the median of the amounts distributed to class or subclass members, and any other aggregate data respecting the distribution that the administrator or other person or entity who administered the distribution considers to be relevant.
11. The administrative costs associated with the distribution of the settlement funds.
12. The solicitor fees and disbursements.
13. Any amount paid to the Class Proceedings Fund established under the *Law Society Act* or to a funder under a third-party funding agreement approved under section 33.1.
14. Any other information the court requires to be included in the report. 2020, c. 11, Sched. 4, s. 25.

Same

(17) Once the court is satisfied that the requirements of subsection (16) have been met with respect to a filed report, the court shall make an order approving the report and append the report to the order. 2020, c. 11, Sched. 4, s. 25.

Same

(18) If the regulations so provide, the administrator or other person or entity who administered the distribution, or such other person or entity as may be prescribed, shall provide, in accordance with the regulations, a copy of the approved report to the person or entity specified by the regulations. 2020, c. 11, Sched. 4, s. 25.

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3, section [243\(1\)](#)

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
- (c) take any other action that the court considers advisable.

Courts of Justice Act, R.S.O. 1990, c. C.43, section [101](#)

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

Terms

(2) An order under subsection (1) may include such terms as are considered just. R.S.O. 1990, c. C.43, s. 101 (2).

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