

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

B E T W E E N :

**TRUIST BANK, AS AGENT**

Applicant

- and -

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

Respondents

**APPLICATION UNDER SUBSECTION 243(1) OF THE BANKRUPTCY AND  
INSOLVENCY ACT, RSC 1985, C B-3, AS AMENDED, AND SECTION 101 OF THE  
COURTS OF JUSTICE ACT, RSO 1990, C C43, AS AMENDED**

**FACTUM OF THE MOVING PARTIES**

**Motion for an Order: (1) Permanently Lifting the Stay of Proceedings as Against Kew  
Media Group Inc. in Respect of the Class Action; and (2) Directing the Receiver to  
Facilitate the Retention of Defence Counsel in Respect of the Class Action**

**Returnable October 7, 2021**

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**Lawyers for the Class Action Plaintiffs**

**TO: The Service List**

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## PART I - NATURE OF THE MOTION

1. This is a motion brought by Alex Kan and Stuart Rath (collectively, the “**Class Action Plaintiffs**”), the plaintiffs in a securities class action brought against Kew Media Group Inc. (“**KMG**”) and certain of its former directors and officers (collectively, the “**Individual Defendants**”) brought in the Ontario Superior Court of Justice, Toronto, as Court File No. CV-20-00644200-00CP) (the “**Class Action**”).

2. The Class Action Plaintiffs move in the within proceeding, the receivership of KMG, for two forms of relief:

- (a) an order permanently lifting the stay of proceedings imposed by the Order of Justice Koehnen dated February 28, 2020 (the “**Receivership Order**”) against KMG for the limited purpose of allowing the Class Action to proceed against KMG, including a declaration that the Receiver’s decision to not oppose the Lift Stay Relief is not a breach of KMG’s obligation under the D&O Policies (as defined below) to defend and contest the Class Action (the “**Lift Stay Relief**”); and
- (b) an order directing the Receiver to facilitate the retainer of counsel to act for KMG in defence of the Class Action within 30 days (the “**Compelled Defence Relief**”).

3. The Lift Stay Relief is the only thing being brought before the Court on October 7, 2021, and this factum is limited to that issue. There is no known opposition to the Lift Stay Relief. A draft order has been agreed to as between the Class Action Plaintiffs and FTI Consulting Canada Inc. in its capacity as Receiver over all the assets, undertakings and properties of KMG (the “**Receiver**”).<sup>1</sup>

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<sup>1</sup> The order agreed to as between the Class Action Plaintiffs and the Receiver did not contain the language in paragraph 9 of the order, but the Receiver does not take a position on the language in paragraph 9.

4. The Compelled Defence Relief is being adjourned on consent.
5. Counsel to the Class Action Plaintiffs and the Receiver have agreed on a timetable for the adjudication of the Compelled Defence Relief and there is no known opposition to the proposed timetable from any other party.

## **PART II - FACTS**

6. None of the facts below are contested.
7. A more fulsome account of the factual background is detailed in the Receiver's Fourth Report to the Court, dated September 29, 2021 (the "**Receiver's Fourth Report**").

### **A. The Receivership**

8. KMG was a publicly traded company with shares that traded on the Toronto Stock Exchange.
9. KMG issued a press release on December 11, 2019, disclosing that certain reports that had been provided to KMG and its senior lenders by KMG's CFO contained false information regarding KMG's working capital and financial position.
10. KMG's share price dropped precipitously following these and subsequent related disclosures. Its shares were cease traded by the Ontario Securities Commission on January 16, 2020. KMG's public shareholders lost millions.
11. The within receivership proceeding was commenced against KMG shortly thereafter. The proceedings were brought by KMG's secured lenders, namely, a banking syndicate comprised of

Truist Bank, Bank of Montreal and Toronto-Dominion Bank (collectively, the “**Secured Creditors**”).

12. Justice Koehnen granted the receivership order on February 28, 2020. The order included the standard stay of proceedings.

13. Since its appointment 19 months ago, the Receiver has sold almost all of KMG’s assets and distributed the available proceeds to the Secured Creditors, who are expected to incur a shortfall in excess of US\$100 million.

14. As described at paragraph 17 of the Receiver’s Fourth Report, the only remaining assets of the estate are litigation claims: the first an action that has already been commenced by the Receiver against KMG’s former auditors; and the second a potential claim against KMG’s former directors and officers that the Receiver and the Secured Creditors have been investigating for over a year, but have yet to commence.

## **B. The Class Action**

15. The Class Action asserts the statutory cause of action for secondary market misrepresentation under Part XXIII.1 of the *Securities Act* as well as a common law claim for negligent misrepresentation.

16. The alleged misrepresentations relate to KMG’s financial affairs, its working capital, its internal controls over financial reporting (ICFR) and its disclosure controls and procedures (DC&P)—the same problems that gave rise to the receivership.

17. There are multiple layers of D&O insurance held by KMG. As noted in the Receiver's Fourth Report, "the target of the Class Action, being the proceeds available from the D&O Policy, is not an asset in the Receivership."<sup>2</sup>

18. The form of lift stay order sought explicitly precludes the Class Action Plaintiffs from seeking to enforce any claim against KMG or the Receiver, and limits recovery in respect of any liability of KMG in the Class Action to any proceeds available under the D&O insurance policies.

19. The stay of proceedings imposed by the Receivership Order initially precluded the Statement of Claim from being issued.

20. The Class Action Plaintiffs obtained a limited lift stay order from Justice Koehen on July 14, 2020, that allowed the claim to be issued and certain other preliminary steps to be completed (the "**First Lift Stay Order**").

21. The stay of proceedings imposed under the Receivership Order does not preclude the Class Action from proceeding against the Individual Defendants.

22. The Class Action Plaintiffs have advanced the case against the Individual Defendants significantly over the past year-and-a-half. Following extensive negotiations over many months regarding the scope of the claim, the Class Action Plaintiffs and the Individual Defendants reached an agreement under which:

- (a) leave to proceed with the statutory claim would be granted under section 138.8(1) of the *OSA*;
- (b) the claim would be certified as a class proceeding under section 5(1) of the *Class Proceedings Act, 1992*; and

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<sup>2</sup> Receiver's Fourth Report, para 61.

- (c) the action would be discontinued as against all of the Individual Defendants except for KMG's former CEO (Steven Silver) and CFO (Geoffrey Webb).

23. The leave, certification and discontinuance orders as against the remaining Individual Defendants, Silver and Webb, were granted by Justice Morgan on September 27, 2021.

24. Leave and certification is still required as against KMG.

### **C. The Lift Stay Relief**

25. The Plaintiffs have advanced the Class Action as far as they can as against the remaining Individual Defendants. The next step in the litigation, namely, agreeing to terms of a discovery plan and completing documentary production, cannot be completed without the participation of KMG because, among other things, most of the material is documentation from KMG.

26. Furthermore, proceeding as against the Individual Defendants alone, without the participation of KMG at this stage, will result in wasted resources, a less efficient proceeding and significant delay arising from the potential of multiple rounds of discovery.

27. The Class Action Plaintiffs seek a permanent lift stay in relation to KMG vis-à-vis the Class Action for several reasons, including that:

- (a) the purpose of the standard stay of proceedings (to prevent competing creditors from gaining tactical advantage in a race to judgement against the debtor) is no longer required given that the Receiver has largely completed the liquidation and distribution of KMG's assets;
- (b) any proceeds recovered in the Class Action would be funded only from the multiple layers of D&O insurance held by KMG; and
- (c) without a permanent lift stay the Class Action Plaintiffs will be required to seek additional lift stay relief from this Court at various junctures as the Class Action progress, which is not cost effective or an efficient use of judicial resources.



28. Counsel for the Class Action Plaintiffs and the Receiver have had extensive discussions surrounding the Lift Stay Relief. As detailed in the Receiver's Fourth Report, the Receiver is not taking a position on the Lift Stay Relief, but it has agreed on a form of order assuming this Court concludes that the Lift Stay Relief is appropriate (other than in respect of paragraph 9 of the order, as described herein at footnote 1).

### **PART III - ARGUMENT**

29. Courts consider a number of factors in assessing whether to lift a stay of proceedings imposed in connection with a court-supervised insolvency proceeding. These factors are typically grouped under three headings: (a) the relative prejudice to parties; (b) the balance of convenience; and (c) where relevant, the merits.<sup>3</sup>

30. These factors all favour the issuance of a permanent lift stay order in this instance. As detailed in the Receiver's Fourth Report, "such relief is customary in comparable circumstances"<sup>4</sup>

31. The form of order agreed to by counsel to the Class Action Plaintiffs and the Receiver (again quoting from the Receiver's Fourth Report) "fairly and adequately balances the [Class Action Plaintiffs'] interests in accessing available insurance proceeds while preserving the integrity of the receivership process and not permitting a preference or "end run" around the priorities and treatment afforded creditor and equity claims in the receivership proceedings."<sup>5</sup>

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<sup>3</sup> See e.g., *Timminco Limited (Re)*, 2012 ONSC 2515, para. 17.

<sup>4</sup> Receiver's Fourth Report, para 8(a).

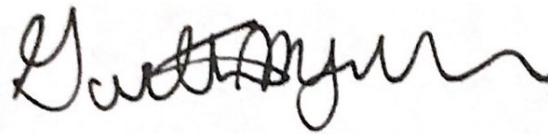
<sup>5</sup> Receiver's Fourth Report, para 38.

**PART IV - ORDER REQUESTED**

32. The Class Action Plaintiffs request an order in the form of the proposed draft order.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

October 5, 2021

A handwritten signature in black ink, appearing to be "Paul Guy" or "Garth Myers", written in a cursive style.

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**Paul Guy / Garth Myers /  
Jonathan Foreman / Sarah Bowden**

**SCHEDULE "A" - LIST OF AUTHORITIES**

1. *Timminco Limited (Re)*, 2012 ONSC 2515

**SCHEDULE "B" - LEGISLATION**

None

<p>TRUIST BANK, AS AGENT</p> <p style="text-align: right;">Applicant</p> <p>-and-</p> <p>KEW MEDIA GROUP INC. and KEW MEDIA INTERNATIONAL (CANADA) INC.</p> <p style="text-align: right;">Respondents</p>	<p style="text-align: right;">Court File No: CV-20-00637081-00CL</p>		
	<p style="text-align: center;"><b>ONTARIO</b> <b>SUPERIOR COURT OF JUSTICE</b> <b>(COMMERCIAL LIST)</b> <b>Proceeding Commenced at TORONTO</b></p> <p style="text-align: center;"><b>FACTUM OF THE MOVING PARTIES</b> <b>Motion for an Order: (1) Permanently Lifting the Stay of</b> <b>Proceedings as Against Kew Media Group Inc. in Respect of</b> <b>the Class Action; and (2) Directing the Receiver to Facilitate</b> <b>the Retention of Defence Counsel in Respect of the Class Action</b></p> <table border="0" style="width: 100%;"> <tr> <td style="width: 50%; vertical-align: top;"> <p><b>Kalloghlian Myers LLP</b> 250 Yonge Street, Unit 2201 Toronto, ON M5B 2L7</p> <p><b>Paul Guy</b> (LSO#: 49794K) <a href="mailto:paul@kalloghlianmyers.com">paul@kalloghlianmyers.com</a> Tel: 647.988.1974</p> <p><b>Garth Myers</b> (LSO#: 62307G) <a href="mailto:garth@kalloghlianmyers.com">garth@kalloghlianmyers.com</a> Tel: 647.969-4472 Fax: 647.243-6620</p> </td> <td style="width: 50%; vertical-align: top;"> <p><b>Foreman &amp; Company</b> <b>Professional Corporation</b> 4 Covent Market Place London, ON N6A 1E2</p> <p><b>Jonathan J. Foreman</b> (LSO #45087H) <a href="mailto:jforeman@foremancompany.com">jforeman@foremancompany.com</a> Tel: 519.914.1175 x 102</p> <p><b>Sarah A. Bowden</b> (LSO #56835D) <a href="mailto:sbowden@foremancompany.com">sbowden@foremancompany.com</a> Tel: 519.914.1175 x 103</p> <p><b>Anne E. Legate-Wolfe</b> (LSO #76832J) <a href="mailto:alegatewolfe@foremancompany.com">alegatewolfe@foremancompany.com</a> Tel: 519.914-1175 x 105 Fax: (226) 884-5340</p> </td> </tr> </table> <p><b>Lawyers for the Plaintiffs</b></p>	<p><b>Kalloghlian Myers LLP</b> 250 Yonge Street, Unit 2201 Toronto, ON M5B 2L7</p> <p><b>Paul Guy</b> (LSO#: 49794K) <a href="mailto:paul@kalloghlianmyers.com">paul@kalloghlianmyers.com</a> Tel: 647.988.1974</p> <p><b>Garth Myers</b> (LSO#: 62307G) <a href="mailto:garth@kalloghlianmyers.com">garth@kalloghlianmyers.com</a> Tel: 647.969-4472 Fax: 647.243-6620</p>	<p><b>Foreman &amp; Company</b> <b>Professional Corporation</b> 4 Covent Market Place London, ON N6A 1E2</p> <p><b>Jonathan J. Foreman</b> (LSO #45087H) <a href="mailto:jforeman@foremancompany.com">jforeman@foremancompany.com</a> Tel: 519.914.1175 x 102</p> <p><b>Sarah A. Bowden</b> (LSO #56835D) <a href="mailto:sbowden@foremancompany.com">sbowden@foremancompany.com</a> Tel: 519.914.1175 x 103</p> <p><b>Anne E. Legate-Wolfe</b> (LSO #76832J) <a href="mailto:alegatewolfe@foremancompany.com">alegatewolfe@foremancompany.com</a> Tel: 519.914-1175 x 105 Fax: (226) 884-5340</p>
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