

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., 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**

**PLAINTIFF'S MOTION RECORD**

**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 on a Date to be Fixed**

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Receiver of Kew Media Group**

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Tab 1

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

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COURTS OF JUSTICE ACT, RSO 1990, C C43, AS AMENDED**

**NOTICE OF MOTION**

**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 on a Date to be Fixed**

**ALEX KAN** and **STUART RATH** (collectively, the “**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**”), will make a motion to a judge of the Ontario Superior Court of Justice, Commercial List, on a date and at a time to be fixed.

**PROPOSED METHOD OF HEARING:** The motion will be heard orally via Zoom videoconference due to the COVID-19 pandemic, unless directed otherwise by the Court. The call-in details for the Zoom videoconference are attached hereto as **Schedule “A”**.

**THE MOTION IS FOR:**

1. An order:
  - (a) 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; and
  - (b) directing the Receiver to facilitate the retainer of counsel to act for KMG in defence of the Class Action within 30 days.
2. Such further and other relief as this Honourable Court deems just.

**THE GROUNDS FOR THE MOTION ARE:**

**A. The Receivership**

1. KMG was a publicly traded company with shares that traded on the Toronto Stock Exchange.
2. 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 inaccurate information regarding KMG’s working capital.
3. KMG’s share price dropped precipitously following these and other related disclosures and its shares were cease traded by the Ontario Securities Commission on January 16, 2020.
3. The within receivership proceedings were 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**”).

4. The Receivership Order was granted on February 28, 2020, appointing FTI Consulting Canada Inc. as Receiver over all the assets, undertakings and properties of KMG and certain related entities.
5. The Receivership Order includes the standard stay of proceedings.
6. Since its appointment 17 months ago, the Receiver has sold almost all of KMG's assets and distributed the available proceeds to the Secured Creditors, who are estimated to incur a shortfall on their secured indebtedness in excess of US\$100 million.
7. As reported at paragraph 19 of the Second Interim Report of the Receiver, dated February 12, 2021,<sup>1</sup> the only known property subject to the receivership that has not been sold or realized is: (a) certain post-receivership sales tax refunds; and (b) potential recoveries in respect of possible claims of KMG against "former directors and officers of KMG and other parties" that the Receiver has been investigating since August 2020.

**B. The Class Action**

8. The Class Action asserts the statutory cause of action for secondary market misrepresentation under Part XXIII.1 of the *Securities Act*, R.S.O. 1990, c. S.5 ("**OSA**") as well as a common law claim for negligent misrepresentation.
9. The alleged misrepresentations relate to KMG's financial affairs, its working capital, its internal controls over financial reporting and its disclosure controls and procedures.
10. The Statement of Claim alleges that KMG and the Individual Defendants omitted to disclose in KMG's continuous public disclosure material that, among other things, the Defendants had provided reports to KMG's lenders containing inaccurate information about Kew's working capital; provided inaccurate information to Kew's auditor, Grant Thornton LLP; and that there was a material risk that the revelation of these omissions would lead to regulatory action, including the cease trading of Kew's shares.

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<sup>1</sup> The title page of the Report is mistakenly dated February 12, 2020.

11. The Plaintiffs allege that there were corrective disclosures of these misrepresentations in December 2019 and January 2020, and that the value of KMG's shares fell dramatically as a result, ultimately leading to the receivership, causing KMG's shareholders to lose millions.
12. The within receivership proceedings had already been commenced before the Statement of Claim was prepared. As a result, the stay of proceedings imposed by the Receivership Order precluded the Plaintiffs from having the claim issued.
13. The Plaintiffs obtained a limited lift stay order, dated July 14, 2020, that allowed the claim to be issued and certain other preliminary steps completed (the "**First Lift Stay Order**").
14. Counsel for the Receiver accepted service of the Statement of Claim on July 6, 2021.
15. The First Lift Stay Order explicitly stated that "the Receiver shall not be required to participate in or defend the [Class] Action."
16. The stay of proceedings imposed under the Receivership Order does not preclude the Class Action from proceeding against the Individual Defendants.
17. Since the Fall of 2020, the Plaintiffs have engaged, through counsel, in extensive negotiations with the Individual Defendants over the scope of the proceeding. Those negotiations have culminated in an agreement under which, through separate consent orders: (a) leave to proceed with the statutory claim will be granted under section 138.8(1) of the *OSA*; and (b) the claim will be certified as a class proceeding under section 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.
18. These orders will grant leave and certification only as against the Individual Defendants. Leave and certification will still be required as against KMG.
19. The agreement to consent leave and certification also includes a consent discontinuance as against several of the Individual Defendants. The only individuals that will remain are KMG's former CEO (Steven Silver) and CFO (Geoffrey Webb).



20. The consent leave and certification orders are expected to be granted by the judge case managing the class action at a motion scheduled to be heard on September 27, 2021.

**C. KMG's Action Against its Former Auditor**

21. In February 2021, the Receiver caused KMG to bring an action against its former Canadian auditor, Grant Thornton LLP, and certain of its UK affiliates (the "**Receiver's Action**"). The claim seeks \$100M in relation to damages suffered by KMG on account of Grant Thornton's failure to detect the problems with KMG's financial reporting and the resulting provision of inaccurate financial information to KMG's stakeholders.
22. The Receiver's Action is only legally viable if one assumes that the allegations underlying the Class Action are true. Both claims are based on the same fundamental fact: KMG's financial disclosure was materially misstated.
23. Quoting from the Receiver's Amended Statement of Claim:

[T]he Defendants provided unqualified ("clean") opinions in connection with the audit and review of the Plaintiffs' consolidated financial statements starting with Fiscal 2017. Those financial statements represented that the Plaintiffs' business was financially strong with sufficient working capital to meet ongoing debt obligations....

In reality, and contrary to the financial statements and the clean audit and review opinions, the Plaintiffs' businesses were performing poorly. The business' working capital was significantly overstated, current liabilities far exceeded current assets, and they were in serious default of their debt obligations.

**D. Permanent Lift Stay**

24. The Plaintiffs have advanced the Class Action as far as they can as against the 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.

25. The stay of proceedings is no longer needed in respect of the Class Action. The original purpose of the stay of proceedings was to stabilize the company and prevent creditors from seeking strategic advantage in advancing their claims relative to other creditors by virtue of speed.
26. None of these considerations are applicable in respect of the Class Action. There will be no prejudice to the Receiver or the Secured Creditors if the stay is permanently lifted to allow the Class Action to proceed.
27. The Plaintiffs are not seeking recovery as against KMG assets that are subject to the security held by the Secured Creditors. All of the funds that have been realized by the Receiver from KMG's assets that are available for distribution to creditors have been paid to the Secured Creditors. The same will be true of any additional funds that may still be generated by the Receiver.
28. There are multiple layers of D&O insurance held by KMG (collectively, the "**D&O Policies**"). Those policies are not subject to the security held by the Secured Creditors. Subject to any reservations the insurer may make in respect of coverage in the usual course, the Plaintiffs assert that the D&O Policies likely represent the sole source to satisfy any liability of KMG.

**E. Retention of Defence Counsel**

29. Counsel for the Plaintiff have been provided with the D&O Policies. The Plaintiffs assert that the D&O Policies held by KMG that are responsive to the Class Action, subject to any reservations that the insurer might make in the usual course. The Plaintiffs also assert that the Policies contain the usual stipulation that KMG must defend the claim to avail itself of the coverage provided.
30. In order to defend the claim, KMG must be represented by a lawyer under Rule 15.01(2) of the *Rules of Civil Procedure*, RRO 1990, Reg 194. If KMG does not defend the claim, there is a substantial risk that any responsive insurance coverages for KMG under the D&O Policies will be waived, prejudiced or otherwise compromised.

31. There will be no prejudice to the Receiver or the Secured Creditors in having KMG retain defence counsel in respect of the Class Action because any legal costs incurred will be covered under the D&O Policies.

### **Statutory Provisions**

32. The Plaintiffs rely upon the following statutory provisions:
- (a) *Rules of Civil Procedure*, RRO 1990, Reg 194, in particular, Rules 15.01(2), 16.08 and 37;
  - (b) *Securities Act*, R.S.O. 1990, c. S.5, in particular Part XXIII.1;
  - (c) *Class Proceedings Act, 1992*, S.O. 1992; and
  - (d) such further and other grounds as counsel may advise.

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the motion:

1. The affidavit of Serge Kalloghlian, sworn August 4, 2021.
2. Such further and other material as counsel may advise.

August 4, 2021

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**Lawyers for the Plaintiffs**

- 8 -

**SCHEDULE “A” – ZOOM CALL-IN DETAILS**

Join Zoom Meeting

<https://us02web.zoom.us/j/84470969837?pwd=OWFMejY2NGk5SG56SkgvV1JUWjFpUT09&from=addon>

Meeting ID: 844 7096 9837

Passcode: 668170 One tap mobile

+13017158592,,84470969837#,,,,\*668170# US (Washington DC)

+13126266799,,84470969837#,,,,\*668170# US (Chicago)

Dial by your location

+1 301 715 8592 US (Washington DC)

+1 312 626 6799 US (Chicago)

+1 346 248 7799 US (Houston)

+1 646 558 8656 US (New York)

+1 669 900 9128 US (San Jose)

+1 253 215 8782 US (Tacoma)

Meeting ID: 844 7096 9837

Passcode: 668170 Find your local number: <https://us02web.zoom.us/j/84470969837?pwd=OWFMejY2NGk5SG56SkgvV1JUWjFpUT09&from=addon>

<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>	
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	<p><b>NOTICE OF MOTION</b>  <b>Motion for an Order: (1) Permanently Lifting the Stay of</b>  <b>Proceedings as Against Kew Media Group Inc. in Respect of the</b>  <b>Class Action; and (2) Directing the Receiver to Facilitate the</b>  <b>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>
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## Tab 2

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OF THE COURTS OF JUSTICE ACT, RSO 1990, C C43, AS AMENDED**

**AFFIDAVIT OF SERGE KALLOGHLIAN**

I, **SERGE KALLOGHLIAN**, of the City of Toronto, in the Province of Ontario,  
**SWEAR:**

1. I am a partner with the law firm of Kalloghlian Myers LLP, co-counsel for Alex Kan and Stuart Rath (collectively, the “**Plaintiffs**”), who are plaintiffs in a securities class action (the “**Class Action**”) brought against Kew Media Group Inc. (“**KMG**”) and certain of its former directors and officers (collectively, the “**Individual Defendants**”). I have knowledge of the matters herein deposed. Where my knowledge is based on information obtained from others, I have stated the source of my information and believe that information to be true.

2. I swear this affidavit in support of a motion brought by the Plaintiffs for an order:
  - (a) 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; and
  - (b) directing the Receiver to facilitate the retainer of counsel to act for KMG in defence of the Class Action within 30 days.

**A. The Receivership**

3. A copy of the Receivership Order is attached hereto as **Exhibit “A”**.
4. The Receivership Order included a stay of all proceedings against KMG except with the written consent of the Receiver or leave of the Court.
5. On July 7, 2020, the Plaintiffs, Alex Kan and Stuart Rath, brought a motion for an order lifting the stay of proceedings to permit, among other things:
  - (a) the issuance, filing and service of the Statement of Claim in the Class Action; and
  - (b) serving (as necessary), filing and hearing any motions related to the court approval of a third-party adverse costs indemnity and disbursement funding agreement.
6. The motion was granted by Justice Koehnen on July 14, 2020. A copy of Justice Koehnen’s Order (the “**First Lift Stay Order**”) is attached hereto as **Exhibit “B”**.
7. On July 20, 2020, the Plaintiffs filed the Statement of Claim, a copy of which is attached hereto as **Exhibit “C”**.
8. FTI Consulting Canada Inc., in its capacity as court appointed receiver and manager of KMG (the “**Receiver**”) was provided with a copy of the issued claim shortly afterwards and had been aware of the claim since before the First Stay Order was granted because the Plaintiffs had provided a draft of the unissued claim to the Receiver prior to the July 7, 2020 motion date.



9. Counsel for the Receiver accepted service of the Statement of Claim on July 6, 2021. Attached and marked as **Exhibit “D”** is a true copy of the service jurat executed by David Bish on behalf of the Receiver.

**B. Progress in the Class Action**

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

11. Since the Fall of 2020, the Plaintiffs have engaged, through counsel, in extensive negotiations with the Individual Defendants over the scope of the Class Action. Those negotiations have culminated in an agreement under which, through separate consent orders: (a) leave to proceed with the statutory claim will be granted under section 138.8(1) of the *Securities Act*; and (b) the claim will be certified as a class proceeding under section 5(1) of the *Class Proceedings Act, 1992*.

12. These orders will grant leave and certification only as against the Individual Defendants. Leave and certification will still be required as against KMG.

13. The agreement to consent to leave and certification also includes a consent discontinuance as against several of the Individual Defendants. The only individuals that will remain as defendants are KMG’s former CEO (Steven Silver) and CFO (Geoffrey Webb).

14. The consent leave and certification orders are expected to be granted by the judge case managing the class action at a motion scheduled to be heard on September 27, 2021.

### C. The Need for a Permanent Lift Stay

15. The Plaintiffs have effectively advanced the Class Action as far as they can as against the Individual Defendants. The next step in the litigation will be agreeing to terms of a discovery plan and completing documentary production. These steps cannot be completed without the participation of KMG because, among other things, most of the material is expected to be documentation from KMG. Proceeding as against the Individual Defendants without production from KMG could thus render it more difficult to prove the claims as against the Individual Defendants, causing prejudice to the Plaintiff and the Class.

16. 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.

17. The Plaintiffs are seeking 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 by the Plaintiffs from the Class Action would be funded from multiple layers of D&O insurance held by KMG (collectively, the "**D&O Policies**") and would not be subject to the security held by KMG's secured creditors; and
- (c) without a permanent lift stay the Plaintiffs will be required to seek additional lift stay relief at various junctures as the Class Action progress, which is not cost effective or an efficient use of judicial resources.

#### **D. Retention of Defence Counsel**

18. Plaintiff's counsel have been provided with copies of the D&O Policies which are responsive to the Class Action, subject to any reservations that the insurers may make in the usual course. The coverages under the D&O Policies that apply to KMG specifically, stipulate the usual condition that KMG must defend the claim. If KMG declines to defend the claim, there is a substantial risk that any responsive insurance coverages for KMG under the D&O Policies will be waived, prejudiced or otherwise compromised. As a result, the Plaintiffs will suffer significant prejudice if the Class Action is not defended because this lack of defence appears to preclude recovery under the D&O policies, which will be the only (or at minimum the major) source of recovery.

19. In order to defend the claim, KMG must be represented by a lawyer under Rule 15.01(2) of the *Rules of Civil Procedure*.

20. The Receiver's position to date has been that it will not defend the Class Action and the First Lift Stay Order does not obligate the Receiver to do so.

21. Accordingly, the Plaintiffs seek an order requiring the Receiver to arrange for KMG to retain defence counsel in respect of the Class Action.

22. There will be no prejudice to the Receiver or KMG's secured creditors in having defence counsel appointed for KMG because the D&O policies will cover the defence costs.

#### **E. Kew Media Group Inc. Claim Against Grant Thornton LLP**

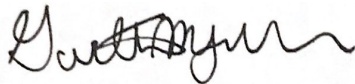
23. In February 2021, the Receiver caused KMG to bring an action against its former Canadian auditor, Grant Thornton LLP, and certain of its UK affiliates (the "**Receiver's Action**"). The Receiver Action seeks \$100M in relation to damages suffered by KMG on account of Grant Thornton's failure to detect the problems with KMG's financial reporting and the resulting provision of inaccurate financial information to KMG's stakeholders.

24. On June 22, 2021, Kalloghlian Myers LLP obtained a copy of an Amended Statement of Claim in the Receiver's Action from the Ontario Superior Court of Justice Registry. Attached hereto as **Exhibit "E"** is a copy of this Amended Statement of Claim. Quoting from the Receiver's Amended Statement of Claim:

[T]he Defendants provided unqualified ("clean") opinions in connection with the audit and review of the Plaintiffs' consolidated financial statements starting with Fiscal 2017. Those financial statements represented that the Plaintiffs' business was financially strong with sufficient working capital to meet ongoing debt obligations....

In reality, and contrary to the financial statements and the clean audit and review opinions, the Plaintiffs' businesses were performing poorly. The business' working capital was significantly overstated, current liabilities far exceeded current assets, and they were in serious default of their debt obligations.

SWORN BEFORE ME by  
videoconference at the City of  
Toronto, in the Province of  
Ontario, on August 4, 2021.

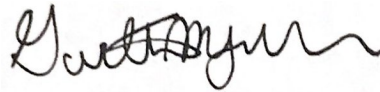


\_\_\_\_\_  
Commissioner for Taking  
Affidavits



\_\_\_\_\_  
SERGE KALLOGHLIAN

This is Exhibit A to the  
affidavit of Serge Kalloghlian

A handwritten signature in black ink, appearing to be 'Serge Kalloghlian', written in a cursive style.

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A Commissioner, etc.



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

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

THE HONOURABLE  
JUSTICE KOEHNEN

)  
)  
)

FRIDAY, THE 28TH  
DAY OF FEBRUARY, 2020

**TRUIST BANK, AS AGENT**

Applicant

- and -

**KEW MEDIA GROUP INC., KEW MEDIA INTERNATIONAL (CANADA) INC., AND  
ARCHITECT FILMS 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

**ORDER  
(appointing Receiver)**

**THIS APPLICATION** made by the Applicant, Truist Bank (“**Truist**”), in its capacity as agent for a syndicate of lenders consisting of Truist, Bank of Montreal and The Toronto-Dominion Bank, for an Order pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the “**BIA**”) and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the “**CJA**”) appointing FTI Consulting Canada Inc. (“**FTI**”) as receiver and manager (in such capacities, the “**Receiver**”) without security, of all of the assets, undertakings and properties of Kew Media Group Inc. (“**Kew**”), and Kew Media International (Canada) Inc. (“**KMICI**”), acquired for, or used in relation to a business carried on by Kew and KMICI (together, Kew and KMICI are the “**Debtors**”), was heard this day at 330 University Avenue, Toronto, Ontario.

**ON READING** the affidavit of Juan De Jesus-Caballero sworn February 27, 2020, and the Exhibits thereto, and on hearing the submissions of counsel for the Applicant, counsel for the Debtors, counsel for the Receiver, [and counsel for Bank of Montreal as financier to certain production subsidiaries of the Debtors] no one else appearing although duly served as appears from the affidavit of service of Amanda Campbell sworn February 27, 2020, and on reading the consent of FTI to act as the Receiver,

### **SERVICE**

1 **THIS COURT ORDERS** that the time for service of the Notice of Application and the Application is hereby abridged and validated so that this motion is properly returnable today and hereby dispenses with further service thereof.

### **APPOINTMENT**

2 **THIS COURT ORDERS** that pursuant to section 243(1) of the BIA and section 101 of the CJA, FTI is hereby appointed Receiver, without security of all of the assets, undertakings and properties of the Debtors Kew and KMICI acquired for, or used in relation to a business carried on by Kew and KMICI, including all proceeds thereof (the "**Property**").

### **RECEIVER'S POWERS**

3 **THIS COURT ORDERS** that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

- (a) to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;
- (b) to receive, preserve, and protect the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent

- 3 -

security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;

- (c) to manage, operate, and carry on the business of the Debtors Kew and KMICI, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtors Kew and KMICI;
- (d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;
- (e) to purchase or lease such machinery, equipment, inventories, supplies, premises or other assets to continue the business of the Debtors Kew and KMICI or any part or parts thereof;
- (f) to receive and collect all monies and accounts now owed or hereafter owing to the Debtors and to exercise all remedies of the Debtors in collecting such monies, including, without limitation, to enforce any security held by the Debtors;
- (g) to settle, extend or compromise any indebtedness owing to the Debtors;
- (h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtors, for any purpose pursuant to this Order;
- (i) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Debtors, the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby



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conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;

- (j) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;
- (k) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business,
  - (i) without the approval of this Court in respect of any transaction not exceeding \$2,500,000, provided that the aggregate consideration for all such transactions does not exceed \$10,000,000; and
  - (ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause;

and in each such case notice under subsection 63(4) of the Ontario *Personal Property Security Act*, or section 31 of the Ontario *Mortgages Act*, as the case may be, shall not be required;

- (l) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;
- (m) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate on all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;
- (n) to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property;

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- (o) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Receiver, in the name of the Debtors Kew and KMICI;
- (p) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtors, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Debtors Kew and KMICI;
- (q) to exercise any shareholder, partnership, joint venture or other rights which the Debtors may have;
- (r) with the consent of the Applicant, to make such payments as the Receiver may deem necessary or appropriate to or for the benefit of employees, contractors, suppliers, counterparties, joint venture partners, consultants, advisors, and creditors of any direct or indirect subsidiary of the Debtors; and
- (s) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations.

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtors, and without interference from any other Person.

#### **DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER**

4 **THIS COURT ORDERS** that (i) the Debtors, (ii) all of their current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being “**Persons**” and each being a “**Person**”) shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant

immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request.

5 **THIS COURT ORDERS** that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Debtors, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "**Records**") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

6 **THIS COURT ORDERS** that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information. *See para 6A attached vllk*

7 **THIS COURT ORDERS** that the Receiver shall provide each of the relevant landlords with notice of the Receiver's intention to remove any fixtures from any leased premises at least

6A. THIS COURT ORDERS that the Receiver shall not destroy during its appointment any Records of the Debtors or any books, documents, contracts, orders, accounting and corporate records or any other papers, records or information of any kind related to the business or affairs of the Debtors' affiliates in the possession, custody or control of the Receiver, whether in hard copy or electronic form (the "Affiliate Records"). The Receiver shall, subject to applicable privacy law, provide the current and former directors and officers of the Debtors and their affiliates with reasonable access at their expense (excluding the costs of the Receiver or its counsel) to the Records and the Affiliate Records, and such directors and officers shall have the right to make and retain copies of such records at their expense (excluding the costs of the Receiver or its counsel). This paragraph may only be amended by Court order following reasonable notice to the directors and officers of the Debtor and its affiliates as of the date of this Order.

seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Receiver's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Receiver, or by further Order of this Court upon application by the Receiver on at least two (2) days notice to such landlord and any such secured creditors. If the Receiver occupies and has the use and enjoyment of any premises that are subject to a real property lease entered into by the Debtors Kew and KMICI, the Receiver shall pay all amounts constituting rent or payable as rent under the real property lease (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to the landlord under the lease) or as otherwise may be negotiated between the Receiver and the landlord from time to time ("**Rent**"), for the period commencing from and including the date of this Order, twice-monthly in equal payments on the first and fifteenth day of each month in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.

#### **NO PROCEEDINGS AGAINST THE RECEIVER**

8 **THIS COURT ORDERS** that no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

#### **NO PROCEEDINGS AGAINST THE DEBTORS OR THE PROPERTY**

9 **THIS COURT ORDERS** that no Proceeding against or in respect of the Debtors or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtors or the Property are hereby stayed and suspended pending further Order of this Court.

#### **NO EXERCISE OF RIGHTS OR REMEDIES**

10 **THIS COURT ORDERS** that all rights and remedies against the Debtors, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that this stay and suspension does not apply in

respect of any "eligible financial contract" as defined in the BIA, and further provided that nothing in this paragraph shall (i) empower the Receiver or the Debtors to carry on any business which the Debtors is not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtors from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

#### **NO INTERFERENCE WITH THE RECEIVER**

11 **THIS COURT ORDERS** that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtors, without written consent of the Receiver or leave of this Court.

#### **CONTINUATION OF SERVICES**

12 **THIS COURT ORDERS** that all Persons having oral or written agreements with the Debtors or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtors are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and that the Receiver shall be entitled to the continued use of the Debtors' current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the Debtors or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

#### **RECEIVER TO HOLD FUNDS**

13 **THIS COURT ORDERS** that all funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this

Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Receiver (the “**Post Receivership Accounts**”) and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further Order of this Court.

#### **EMPLOYEES**

14 **THIS COURT ORDERS** that all employees of the Debtors shall remain the employees of the Debtors until such time as the Receiver, on the Debtors' behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA, other than such amounts as the Receiver may specifically agree in writing to pay, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*.

#### **PIPEDA**

15 **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the *Canada Personal Information Protection and Electronic Documents Act*, the Receiver shall disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a “**Sale**”). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtors, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

### **LIMITATION ON ENVIRONMENTAL LIABILITIES**

16 **THIS COURT ORDERS** that nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Ontario Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

### **LIMITATION ON THE RECEIVER'S LIABILITY**

17 **THIS COURT ORDERS** that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation.

### **RECEIVER'S ACCOUNTS**

18 **THIS COURT ORDERS** that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts, and that the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "**Receiver's Charge**") on the Property, as security for such fees and disbursements, both before and after the making of



this Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

19 **THIS COURT ORDERS** that the Receiver and its legal counsel shall pass its accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

20 **THIS COURT ORDERS** that prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including legal fees and disbursements, incurred at the standard rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

#### **FUNDING OF THE RECEIVERSHIP**

21 **THIS COURT ORDERS** that the Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed US\$2,200,000 (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "**Receiver's Borrowings Charge**") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge and the charges as set out in sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

22 **THIS COURT ORDERS** that neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

23 **THIS COURT ORDERS** that the Receiver is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "A" hereto (the "**Receiver's Certificates**") for any amount borrowed by it pursuant to this Order.

24 **THIS COURT ORDERS** that the monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

### **SERVICE AND NOTICE**

25 **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at <http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/>) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL <http://cfcanda.fticonsulting.com/kmg>.

26 **THIS COURT ORDERS** that if the service or distribution of documents in accordance with the Protocol is not practicable, the Receiver is at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Debtors' creditors or other interested parties at their respective addresses as last shown on the records of the Debtors and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

**GENERAL**

27 **THIS COURT ORDERS** that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

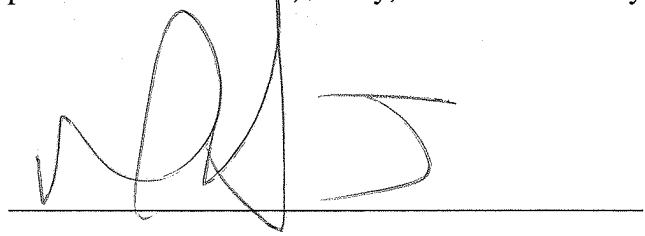
28 **THIS COURT ORDERS** that nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Debtors.


29 **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

30 **THIS COURT ORDERS** that the Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

31 **THIS COURT ORDERS** that the Plaintiff shall have its costs of this motion, up to and including entry and service of this Order, provided for by the terms of the Plaintiff's security or, if not so provided by the Plaintiff's security, then on a substantial indemnity basis to be paid by the Receiver from the Debtors' estate with such priority and at such time as this Court may determine.

32 **THIS COURT ORDERS** that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the end, positioned above a horizontal line.

SUPERIOR COURT OF JUSTICE  
ENTERED  
FEB 28 2020  
  
COUR SUPÉRIEURE DE JUSTICE  
ENTRÉ

**SCHEDULE "A"**

**RECEIVER CERTIFICATE**

CERTIFICATE NO. \_\_\_\_\_

AMOUNT \$ \_\_\_\_\_

33 THIS IS TO CERTIFY that FTI Consulting Canada Inc., the receiver (the "**Receiver**") of the assets, undertakings and properties Kew Media Group Inc. ("**Kew**") and Kew Media International (Canada) Inc. ("**KMICI**") acquired for, or used in relation to a business carried on by Kew and KMICI, including all proceeds thereof (collectively, the "**Property**"), appointed by Order of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") dated the \_\_\_ day of February, 2020 (the "**Order**") made in an action having Court file number \_\_-CL-\_\_\_\_\_, has received as such Receiver from the holder of this certificate (the "**Lender**") the principal sum of US\$\_\_\_\_\_, being part of the total principal sum of US\$\_\_\_\_\_ which the Receiver is authorized to borrow under and pursuant to the Order.

34 The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon. Interest is to be calculated at a rate equal to the Base Rate as defined in the Credit Agreement, plus 4.75%. Interest shall be calculated on the basis of a year of 365 days and paid for the actual number of days elapsed by capitalizing such interest to the principal balance of the advances made hereunder on the last day of each month.

35 Credit Agreement means the Amended and Restated Revolving Credit and Term Loan Agreement dated as of July 23, 2018 (as amended, supplemented or otherwise modified from time to time) among Truist Bank ("**Truist**"), as the Agent for syndicate of lenders comprising Truist, Bank of Montreal, and The Toronto Dominion Bank, as lenders, and Kew and Kew Media International Limited, as co-borrowers.

36 Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property, in priority to the security interests of any other person, but subject to the priority of the charges set out in the

Order and in the *Bankruptcy and Insolvency Act*, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

37 All sums payable in respect of principal and interest under this certificate are payable at the office of the Agent in Charlotte, North Carolina.

38 Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

39 The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property as authorized by the Order and as authorized by any further or other order of the Court.

40 The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the \_\_\_\_ day of \_\_\_\_\_, 2020.

FTI Consulting Canada Inc., solely in its capacity as Receiver of the Property, and not in its personal capacity

Per: \_\_\_\_\_

Name:

Title:

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

TRUIST BANK, AS AGENT

- and -

KEW MEDIA GROUP INC., et al.

Applicant

Respondents

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

PROCEEDING COMMENCED AT TORONTO

**ORDER  
(appointing Receiver)**

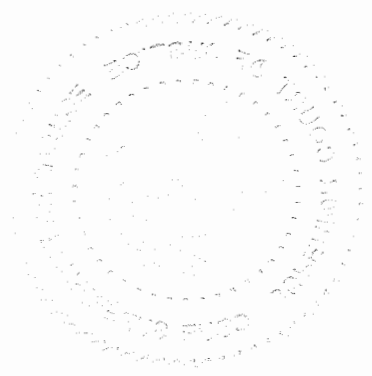
**DENTONS CANADA LLP**  
77 King Street West, Suite 400  
Toronto-Dominion Centre  
Toronto, ON M5K 0A1

**Kenneth Kraft** (LSO # 31919P)  
Tel: (416) 863-4374  
Fax: (416) 863-4592  
[kenneth.kraft@dentons.com](mailto:kenneth.kraft@dentons.com)

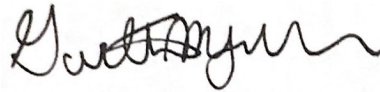
**Robert Kennedy** (LSO # 47407O)  
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*Lawyers for the Applicant, Truist Bank, as Agent*



This is Exhibit B to the  
affidavit of Serge Kalloghlian

A handwritten signature in black ink, appearing to be 'Serge Kalloghlian', written in a cursive style.

---

A Commissioner, etc.



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

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

THE HONOURABLE	)	TUESDAY, THE 14TH
	)	
JUSTICE KOEHNEN	)	DAY OF JULY, 2020

BETWEEN:

**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**

**LIFT STAY ORDER**

**THIS MOTION**, made by Alex Kan and Stuart Rath (the proposed representative plaintiffs in a putative securities class proceeding against Kew Media Group Inc. (“**Kew Media**”)) (collectively, the “**Plaintiffs**”) for an Order:

(1) temporarily lifting the stay of proceedings in place as against Kew Media for the limited purposes of:

(i) issuing, filing and serving the proposed Statement of Claim (the “**Action**”);

(ii) filing the Plaintiffs’ Motion for Certification and Leave under Part XXIII.1 of the Ontario *Securities Act*;

(iii) serving (as necessary), filing, and hearing any motion(s) related to the service of the Statement of Claim and/or the Plaintiffs’ Motion for Certification and Leave; and

(iv) serving (as necessary), filing and hearing any motions related to the court approval of a third-party adverse costs indemnity and disbursement funding agreement;

(2) appointing Thornton Grout Finnigan LLP, Kalloghlian Myers LLP and Foreman & Company as counsel to prosecute the Action and declaring that no other proceeding may be commenced in Ontario on behalf of Kew Media shareholders in respect of the subject matter of the Action without leave of this Court; and

(3) directing that FTI Consulting Canada Inc., in its capacity as the Court-appointed receiver (in such capacity, the “**Receiver**”) of the undertaking, property and assets of, *inter alia*, Kew Media, disclose and produce to the Plaintiffs all potentially responsive insurance policies under which an insurer may be liable to satisfy all or part of any judgment against Kew Media or any of its Directors, Officers or advisors in the Action and ancillary information (the “**Insurance Policy Disclosure Relief**”), was heard this day in Toronto by way of judicial video conference via Zoom, with the Insurance Policy Disclosure Relief being adjourned on consent to July 21, 2020 at 2:15 pm.

**ON READING** the Plaintiffs’ Motion Record (dated July 8, 2020), Supplemental Motion Record (dated July 10, 2020) and Factum (dated July 13, 2020), all filed;

**AND UPON** hearing the submissions of counsel for the Plaintiffs and the Receiver, no one else appearing for any other person on the Service List, although duly served as appears from the affidavits of service of Rose Bozzelli sworn July 8, 2020, July 10 and July 13, all filed:

### **TIME FOR SERVICE**

1. **THIS COURT ORDERS** that the time for service of the Plaintiffs’ Motion Record and Supplemental Motion Record be and is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with any further service thereof.

### **LIFT STAY**

2. **THIS COURT ORDERS** that the stay of proceedings (the “**Stay of Proceedings**”) provided for in the Order of this Court appointing the Receiver in the within proceedings dated

February 28, 2020 (the “**Appointment Order**”), be and is hereby lifted for the sole and limited purpose of: (i) granting the Plaintiffs leave to issue and file with the court and serve the Statement of Claim in substantially the form attached hereto as **Schedule “A”** (the “**Statement of Claim**”); (ii) granting the Plaintiffs leave to file with the court the Plaintiffs’ Motion for Certification and for Leave under Part XXIII.1 of the Ontario *Securities Act*; (iii) serving (as necessary), filing with the court and hearing any motion(s) related to the service of the Statement of Claim and/or the Plaintiffs’ Motion for Certification and Leave under Part XXIII.1 of the Ontario *Securities Act*; and (iv) serving (as necessary), filing with the court and hearing any motions related to the court approval of a third-party adverse costs indemnity and disbursement funding agreement, provided that no further steps shall be taken in the Action in respect of Kew Media or the Receiver without further Order of this Court.

3. **THIS COURT ORDERS** that, subject to further Order of this Court, the Receiver shall not be required to participate in or defend the Action or any hearing authorized in paragraph 2 above, or to incur any costs in respect of the Action or such hearings. Subject to: (i) an agreement between the Plaintiffs and the Receiver; or (ii) further Order of this Court, the Plaintiffs and defendants in the Action shall not:

- (a) seek, make, or obtain, whether directly or indirectly, as the case may be, any further claim, counterclaim or recovery from, against, or in respect of the Receiver, Kew Media or any other entity that is, or has assets, subject to the Appointment Order (collectively, the “**Receiver and Debtor Entities**”);
- (b) add any of the Receiver and Debtor Entities, other than Kew Media, to the Action;
- (c) seek, or obtain, any costs awards, judgments or any relief of any kind against, or in respect of the Receiver and Debtor Entities in the Action; or
- (d) seek, or obtain, any discovery from, or examination or participation of, the Receiver and Debtor Entities in the Action.

4. **THIS COURT ORDERS** that except as expressly provided for in this Order: (i) all other stays of proceedings provided for in the Appointment Order; and (ii) all rights and protections in favour of the Receiver, remain in full force and effect in accordance with the terms of the Appointment Order.

5. **THIS COURT ORDERS** that nothing herein shall affect the rights of the Plaintiffs or the putative class members in the Action to submit proofs of claim in the within proceedings or any other restructuring, insolvency, receivership, bankruptcy or other similar proceedings in respect of the subject matter of the Statement of Claim or otherwise, and to share in any distribution made in such proceedings to creditors in accordance with their respective entitlements, if any.

6. **THIS COURT ORDERS** that nothing herein shall affect the rights of the Plaintiffs or the putative class members in the Action as against the current and/or future defendants, named in or later added to the Statement of Claim, who are not subject to the Appointment Order.

7. **THIS COURT ORDERS** that to the extent that any statute of limitations or other notice or limitation period (or any other time period of similar effect) under Canadian law or any other applicable law, or any rule of civil procedure (a “**Limitation Period**”) in connection with any of the claims against Kew Media that are the subject of the Statement of Claim (the “**Tolled Claims**”) expires on or after the date hereof (the “**Effective Date**”), such Limitation Period shall be and is hereby tolled such that it ceases to continue running as of the Effective Date and, for greater certainty, that all time elapsing on or after the Effective Date shall not be counted in determining any such Limitation Period. Kew Media may not raise the expiration of any Limitation Period as a defence, estoppel, limitation or bar to any Tolled Claims as against them unless such Limitation Period had already expired prior to the Effective Date.

8. **THIS COURT ORDERS AND DECLARES** that this Order is not, and shall not be deemed to be, an acknowledgement of any merits or substance of the Action, and no party to the Action shall be deemed by virtue of this Order to have made any admission, acknowledgment or acquiescence of or to any liability in the Action. All rights, remedies and defences of the parties, including regarding whether the Stay of Proceedings should be lifted to permit the continuation of the Action, are expressly reserved.

9. **THIS COURT ORDERS AND DECLARES** that, subject to further Order of this Court, it retains exclusive jurisdiction with respect to the within proceedings, the Receiver, the assets, property and undertaking of Kew Media, and the other matters that are set out in or the subject of the Appointment Order (including, without limitation, the Stay of Proceedings).

#### **CARRIAGE**

10. **THIS COURT ORDERS** that Thornton Grout Finnigan LLP, Kalloghlian Myers LLP and Foreman & Company are hereby appointed to prosecute the Action.

11. **THIS COURT ORDERS** that no other action may be commenced in Ontario on behalf of Kew Media shareholders in respect of the subject matter of the Action without leave of this Court granted on notice to the Receiver and the Plaintiffs.

#### **GENERAL**

12. **THIS COURT MAKES NO ORDER** as to costs of this Motion.

13. **THIS COURT ORDERS** that this Order shall have full force and effect in all provinces and territories in Canada against all persons, firms, corporations, governmental, municipal and regulatory authorities against whom it may be enforceable.

14. **THIS COURT ORDERS AND REQUESTS** the aid and recognition of any court or any judicial, regulatory or administrative body in any province or territory of Canada and the Federal Court of Canada and any judicial, regulatory or administrative tribunal or other court constituted pursuant to the Parliament of Canada or the legislature of any province to act in aid of and to be complementary to this Court in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

15. **THIS COURT ORDERS** that this order is effective from today's date and is not required to be entered.

\_\_\_\_\_  
RAJ

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

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**(COMMERCIAL LIST)**  
Proceeding commenced at Toronto

**LIFT STAY ORDER**

**Thornton Grout Finnigan LLP**  
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Fax: (647) 243-6620

**Lawyers for Alex Kan and Stuart Rath**

**Foreman & Company**  
4 Covent Market Place  
London, ON N6A 1E2

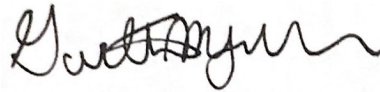
**Jonathan J. Foreman (LSO# 45087H)**  
jforeman@foremancompany.com

**Sarah A. Bowden (LSO# 56835D)**  
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**Anne E. Legate-Wolfe (LSO# 76832J)**  
alegatewolfe@foremancompany.com

Tel: (519) 914-1175  
Fax: (226) 884-5340

This is Exhibit C to the  
affidavit of Serge Kalloghlian

A handwritten signature in black ink, appearing to read "Serge Kalloghlian", written in a cursive style.

---

A Commissioner, etc.





Electronically issued : 20-Jul-2020  
 Délivré par voie électronique  
 Toronto

Court File No.:

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**B E T W E E N :**

**ALEX KAN and STUART RATH**

Plaintiffs

- and -

**KEW MEDIA GROUP INC., STEVEN SILVER,  
 GEOFFREY WEBB, DAVID FLECK, MAURICE KAGAN,  
 PATRICE MERRIN, PETER SUSSMAN and ERICK KWAK**

Defendants

**PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992, S.O. 1992, c.6***

**STATEMENT OF CLAIM**

**TO THE DEFENDANTS**

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the *Rules of Civil Procedure*, serve it on the plaintiff's lawyer and file it, with proof of service, in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your statement of defence.

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IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM, and costs, within the time for serving and filing your statement of defence, you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and costs and have the costs assessed by the court.

Date: July \_\_, 2020

Issued by \_\_\_\_\_  
Local RegistrarAddress of court office Superior Court of Justice  
330 University Ave.  
Toronto, ON M5G 1R7TO: **KEW Media Group Inc.**  
672 Dupont Street, Suite 400  
Toronto, Ontario M6G 1Z6c/o FTI Consulting Canada Inc. in its capacity as receiver of certain  
assets of KEW Media Group Inc.AND TO: **Steven Silver**, c/o KEW Media Group Inc.AND TO: **Geoffrey Webb**, c/o KEW Media Group Inc.AND TO: **David Fleck**, c/o KEW Media Group Inc.AND TO: **Maurice Kagan**, c/o KEW Media Group Inc.AND TO: **Patrice Merrin**, c/o KEW Media Group Inc.AND TO: **Peter Sussman**, c/o KEW Media Group Inc.AND TO: **Erick Kwak**, c/o KEW Media Group Inc.

- 3 -

## **I. RELIEF SOUGHT**

### 1. The Plaintiffs claim:

- (a) an order granting leave to proceed with the statutory claim for misrepresentation under Part XXIII.1 of the *OSA* and, if necessary, the corresponding provisions of the Other Securities Legislation;
- (b) an order pursuant to the *CPA* certifying this action as a class proceeding and appointing the Plaintiffs as the representative plaintiffs for the Class;
- (c) a declaration that the Impugned Documents contained one or more misrepresentations within the meaning of the *OSA* and the Other Securities Legislation, and at common law;
- (d) a declaration that the Individual Defendants authorized, permitted or acquiesced in the making of the misrepresentations while knowing them to be misrepresentations;
- (e) a declaration that KEW is vicariously liable for the acts and omissions of the Individual Defendants;
- (f) damages, including punitive damages, in an amount to be proven at trial;
- (g) an order directing a reference or giving such other directions as may be necessary to determine any issues not determined in the trial of the common issues;
- (h) an equitable rate of interest on all sums found due and owing to the plaintiff and the class members or, in the alternative, prejudgment interest and post judgment interest, pursuant to sections 128 and 129 of the *CJA*;
- (i) costs of this action, plus the costs of notices and of administering the plan of distribution of the recovery in this action pursuant to s. 26(9) of the *CPA*; and
- (j) such further and other relief as this Honourable Court deems just.

## **II. DEFINED TERMS**

### 2. The capitalized terms used in this claim have the following meanings:

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- (a) “**AIF**” means Annual Information Form;
- (b) “**CEO**” means Chief Executive Officer;
- (c) “**CFO**” means Chief Financial Officer;
- (d) “**CJA**” means the *Courts of Justice Act*, R.S.O 1990, c. C.43;
- (e) “**Class**” or “**Class Members**” means all persons or entities who acquired **KEW**’s securities in the secondary market during the **Class Period**, other than the **Excluded Persons**;
- (f) “**Class Period**” means the period from March 28, 2017 to January 16, 2020;
- (g) “**CPA**” means the *Class Proceedings Act, 1992*, S.O. 1992, c. 6;
- (h) “**Credit Facility**” means the agreement between **KEW** and its **Lenders**, as originally entered into and as amended;
- (i) “**CSA**” means the Canadian Securities Administrators;
- (j) “**DC&P**” means disclosure controls and procedures, as defined in section 1(1) of NI 52-109;
- (k) “**Defendants**” means **KEW** and the **Individual Defendants**;
- (l) “**Excluded Persons**” means **KEW** or any of its directors and the **Individual Defendants**;
- (m) “**Fleck**” means the defendant, David Fleck, who was a director of **KEW** and a Chair of its Audit Committee during the **Class Period**;
- (n) “**GAAP**” means generally accepted accounting principles;
- (o) “**IAS**” means International Accounting Standard;
- (p) “**ICFR**” means internal controls over financial reporting, as defined in section 1(1) of NI 52-109;
- (q) “**IFRS**” means International Financial Reporting Standards;
- (r) “**Impugned Documents**” means **KEW**’s:
  - (i) Audited Annual Financial Statements for the year ended December 31, 2016 filed on **SEDAR** on March 28, 2017;
  - (ii) **MD&A** for the year ended December 31, 2016 filed on **SEDAR** on March 28, 2017;

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- (iii) **AIF** for the year ended December 31, 2016 filed on **SEDAR** on March 28, 2017;
- (iv) Form 52-109FA Certification of Annual Filings (CEO), filed on **SEDAR** on March 28, 2017;
- (v) Form 52-109FA Certification of Annual Filings (CFO), filed on **SEDAR** on March 28, 2017;
- (vi) Interim Financial Statements for the three months ended March 31, 2017, filed on **SEDAR** on May 15, 2017;
- (vii) **MD&A** for the three months ended March 31, 2017, filed on **SEDAR** on May 15, 2017;
- (viii) Form 52-109F2 Certification of Interim Filings (CEO), filed on **SEDAR** on May 15, 2017;
- (ix) Form 52-109F2 Certification of Interim Filings (CFO), filed on **SEDAR** on May 15, 2017;
- (x) Interim Financial Statements for the three month period ended June 30, 2017, filed on **SEDAR** on August 10, 2017;
- (xi) **MD&A** for the three month period ended June 30, 2017, filed on **SEDAR** on August 10, 2017;
- (xii) Form 52-109F2 Certification of Interim Filings (CEO), filed on **SEDAR** on August 10, 2017;
- (xiii) Form 52-109F2 Certification of Interim Filings (CFO), filed on **SEDAR** on August 10, 2017;
- (xiv) Interim Financial Statements for the three months ended September 30, 2017, filed on **SEDAR** on November 9, 2017;
- (xv) **MD&A** for the three months ended September 30, 2017, filed on **SEDAR** on November 9, 2017;
- (xvi) Form 52-109F2 Certification of Interim Filings (CEO), filed on **SEDAR** on November 9, 2017;
- (xvii) Form 52-109F2 Certification of Interim Filings (CFO), filed on **SEDAR** on November 9, 2017;
- (xviii) Audited Annual Financial Statements for the year ended December 31, 2017 filed on **SEDAR** on April 3, 2018;

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- (xix) **MD&A** for the year ended December 31, 2017 filed on **SEDAR** on April 3, 2018;
- (xx) **AIF** for the year ended December 31, 2017 filed on **SEDAR** on April 3, 2018;
- (xxi) Form 52-109FA Certification of Annual Filings (CEO), filed on **SEDAR** on April 3, 2018;
- (xxii) Form 52-109FA Certification of Annual Filings (CFO), filed on **SEDAR** on April 3, 2018;
- (xxiii) Interim Financial Statements for the three months ended March 31, 2018, filed on **SEDAR** on May 15, 2018;
- (xxiv) **MD&A** for the three months ended March 31, 2018, filed on **SEDAR** on May 15, 2018;
- (xxv) Form 52-109F2 Certification of Interim Filings (CEO), filed on **SEDAR** on May 15, 2018;
- (xxvi) Form 52-109F2 Certification of Interim Filings (CFO), filed on **SEDAR** on May 15, 2018;
- (xxvii) Management Information Circular dated May 11, 2018, filed on **SEDAR** on May 16, 2018;
- (xxviii) Interim Financial Statements for the three months ended June 30, 2018, filed on **SEDAR** on August 14, 2018;
- (xxix) **MD&A** for the three months ended June 30, 2018, filed on **SEDAR** on August 14, 2018;
- (xxx) Form 52-109F2 Certification of Interim Filings (CEO), filed on **SEDAR** on August 14, 2018;
- (xxxi) Form 52-109F2 Certification of Interim Filings (CFO), filed on **SEDAR** on August 14, 2018;
- (xxxii) Interim Financial Statements for the three months ended September 30, 2018, filed on **SEDAR** on November 13, 2018;
- (xxxiii) **MD&A** for the three months ended September 30, 2018, filed on **SEDAR** on November 13, 2018;
- (xxxiv) Form 52-109F2 Certification of Interim Filings (CEO), filed on **SEDAR** on November 13, 2018;

- 7 -

- (xxxv) Form 52-109F2 Certification of Interim Filings (CFO), filed on **SEDAR** on November 13, 2018;
- (xxxvi) Audited Annual Financial Statements for the year ended December 31, 2018, filed on **SEDAR** on April 1, 2019;
- (xxxvii) **MD&A** for the year ended December 31, 2018, filed on **SEDAR** on April 1, 2019;
- (xxxviii) **AIF** for the year ended December 31, 2018 filed on **SEDAR** on April 1, 2019;
- (xxxix) Form 52-109FA Certification of Annual Filings (CEO), filed on **SEDAR** on April 1, 2019;
- (xl) Form 52-109FA Certification of Annual Filings (CFO), filed on **SEDAR** on April 1, 2019;
- (xli) Management Information Circular dated April 4, 2019, filed on **SEDAR** on April 11, 2019;
- (xlii) Interim Financial Statements for the three months ended March 31, 2019, filed on **SEDAR** on May 14, 2019;
- (xliii) **MD&A** for the three months ended March 31, 2019, filed on **SEDAR** on May 14, 2019;
- (xliv) Form 52-109F2 Certification of Interim Filings (CEO), filed on **SEDAR** on May 14, 2019;
- (xlv) Form 52-109F2 Certification of Interim Filings (CFO), filed on **SEDAR** on May 14, 2019;
- (xlvi) Interim Financial Statements for the three months ended June 30, 2019, filed on **SEDAR** on August 13, 2019;
- (xlvii) **MD&A** for the three months ended June 30, 2019, filed on **SEDAR** on August 13, 2019;
- (xlviii) Form 52-109F2 Certification of Interim Filings (CEO), filed on **SEDAR** on August 13, 2019;
- (xlix) Form 52-109F2 Certification of Interim Filings (CFO), filed on **SEDAR** on August 13, 2019;
- (l) Form 52-109F2R Certification of Refiled Interim Filings (CEO), filed on **SEDAR** on August 16, 2019;

- 8 -

- (li) Form 52-109F2R Certification of Refiled Interim Filings (CFO), filed on **SEDAR** on August 16, 2019;
- (lii) Interim Financial Statements for the three months ended September 3, 2019, filed on **SEDAR** on November 14, 2019;
- (liii) **MD&A** for the three months ended September 3, 2019, filed on **SEDAR** on November 14, 2019;
- (liv) Form 52-109F2 Certification of Interim Filings (CEO), filed on **SEDAR** on November 14, 2019;
- (lv) Form 52-109F2 Certification of Interim Filings (CFO), filed on **SEDAR** on November 14, 2019;

in each case, where applicable, including all documents incorporated by reference therein;

- (s) “**Independent Auditor’s Reports**” means the two audit opinions in respect of **KEW**’s consolidated financials statements provided by Grant Thornton LLP for the fiscal years ended December 31, 2017 and December 31, 2018;
- (t) “**Individual Defendants**” means **Silver, Webb, Fleck, Kagan, Merrin, Sussman** and **Kwak**, collectively;
- (u) “**Kagan**” means the defendant, Maurice Kagan, who was a director of **KEW** and a member of its Audit Committee during the **Class Period**;
- (v) “**KEW**” means the defendant, KEW Media Group Inc.;
- (w) “**Kwak**” means the defendant, Erick Kwak, who was the Executive Vice President, Head of Legal & Business Affairs and Chief Legal Officer during the **Class Period**;
- (x) “**Lenders**” means a syndicate of SunTrust Bank (now Truist Bank), SunTrust Robinson Humphrey, Inc., The Toronto-Dominion Bank and Bank of Montreal;
- (y) “**MD&A**” means Management’s Discussion and Analysis;
- (z) “**Merrin**” means the defendant, Patrice Merrin, who was a director of **KEW** and a member of its Audit Committee during the **Class Period**;
- (aa) “**NI 52-109**” means CSA National Instrument 52-109 *Certification of Disclosure in Issuers’ Annual and Interim Filings*;
- (bb) “**OSA**” means the Ontario *Securities Act*, R.S.O. 1990, c. S.5, as amended;



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- (cc) “**Other Securities Legislation**” means, collectively, the *Securities Act*, RSA 2000, c S-4, as amended; the *Securities Act*, RSBC 1996, c 418, as amended; the *Securities Act*, CCSM c S50, as amended; the *Securities Act*, SNB 2004, c S-5.5, as amended; the *Securities Act*, RSNL 1990, c S-13, as amended; the *Securities Act*, SNWT 2008, c 10, as amended; the *Securities Act*, RSNS 1989, c 418, as amended; the *Securities Act*, S Nu 2008, c 12, as amended; the *Securities Act*, RSPEI 1988, c S-3.1, as amended; the *Securities Act*, RSQ c V-1.1, as amended; the *Securities Act*, 1988, SS 1988-89, c S-42.2, as amended; and the *Securities Act*, SY 2007, c 16, as amended;
- (dd) “**SEDAR**” means the System for Electronic Document Analysis and Retrieval, which is a filing system developed for the CSA;
- (ee) “**Silver**” means the defendant, Steven Silver, who was **KEW**’s **CEO** and a director of **KEW** during the **Class Period**;
- (ff) “**Sussman**” means the defendant, Peter Sussman, who was the Executive Chairman of **KEW**’s Board of Directors during the **Class Period**.
- (gg) “**TSX**” means the Toronto Stock Exchange; and
- (hh) “**Webb**” means the defendant, Geoffrey Webb, who was **KEW**’s **CFO** until his departure from the company on December 10, 2019.

### III. OVERVIEW

3. This action concerns a failure to properly manage and disclose fundamentally material information at the level of the C-Suite, the board of directors and the company’s audit committee. The Defendants were, at all material times, high level executives, officers, directors and members of the company’s audit committee with proximity to the information that was misrepresented and/or which they failed to disclose.

4. **KEW** was formed in 2015 as a special purpose acquisition company to acquire businesses in the media production and distribution sectors. It listed on the **TSX**. By 2017, **KEW** had already acquired stakes in 11 companies. **KEW**’s acquisitions continued over the following two years, and by 2019 it had a library boasting some of the biggest TV

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shows in the world and appeared to be well on its way to becoming a major player in the global TV production and distribution industry.

5. All of this growth made KEW appear to be an attractive investment, but all of these acquisitions put significant pressure on KEW's cash flow and working capital. Unbeknownst to investors at the time, KEW masked its working capital deficiencies by accessing funds from the bank accounts of its affiliates and supplying false information to its Lenders.

6. Commencing on December 11, 2019, KEW initiated a cascade of sequential information releases which revealed for the first time that there were enormous and fundamental problems within the company. KEW had materially misstated integral economic metrics pertaining to its working capital. Furthermore, a senior financial officer in the company had provided materially inaccurate information to KEW's Lenders. The results for the company were catastrophic and included but were not limited to:

- (a) KEW announcing on December 11, 2019 that its CFO, Webb had provided inaccurate information regarding working capital to the company and to KEW's Lenders;
- (b) KEW announcing on December 11, 2019 the departure of its CFO Webb from the company;
- (c) the formation of a special committee to investigate strategic transactions on December 11, 2019;
- (d) the Lenders for the company's senior secured Credit Facility issuing a Notice of an Event of Default on December 12, 2019;
- (e) the company issuing an amended borrowing base certificate showing a collateral deficiency of approximately \$56 million on December 16, 2020;

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- (f) KEW's auditors withdrawing and disclaiming the Independent Auditor's Reports and its interim review reports to the audit committee for each interim period within the 2017, 2018 and 2019 fiscal years on January 15, 2020;
  - (g) the company forming a second special committee to investigate misrepresentations in the financial statements on January 15, 2020;
  - (h) the Ontario Securities Commission issuing a temporary cease-trade order on January 16, 2020;
  - (i) the Ontario Securities Commission issuing a permanent cease-trade order on January 29, 2020;
  - (j) the company being placed into Court-Ordered receivership on February 28, 2020; and,
  - (k) the TSX delisting all KEW securities effective April 9, 2020.
7. As a result of material misrepresentations made by the Defendants, KEW's share price plummeted and the market value of KEW's shares owned by Class Members was decimated.
8. This claim seeks to recover the significant damages that were suffered by KEW's shareholders who were left holding shares that are now worthless on account of the misconduct of KEW, its senior management and the audit committee.

#### **IV. THE PARTIES**

##### **A. The Plaintiffs**

9. The Plaintiff, Alex Kan, resides in Toronto, Ontario. Mr. Kan purchased 1,600 KEW shares on the TSX during the Class Period and continued to own these shares at the end of the Class Period.

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10. The Plaintiff, Stuart Rath, resides in Truro, Nova Scotia. Mr. Rath purchased 30,000 KEW shares on the TSX during the Class Period and continued to own these shares at the end of the Class Period.

**B. The Defendants**

11. The Defendant KEW is incorporated under the *Business Corporations Act* (Ontario). Its registered office is in Toronto, Ontario. At all material times, KEW was a publicly traded company with its shares listed on the TSX under the symbol “KEW”.

12. The Defendant Silver was KEW’s CEO and a member of the board of directors from November 3, 2015 until his resignation from the company on February 28, 2020.

13. The Defendant Webb was KEW’s CFO during the Class Period until his departure from the company on December 10, 2019.

14. As CEO and CFO, Silver and Webb were both responsible for ensuring that KEW established and maintained DC&P and ICFR. Silver and Webb both certified, pursuant to NI 52-109, KEW’s Impugned Documents that were interim and annual financial statements and MD&As, and in doing so, adopted as their own the false statements in them. As CEO and CFO, Silver and Webb caused KEW to make the misrepresentations set out below.

15. The Defendant Sussman was the Executive Chairman of KEW’s Board of Directors during the Class Period. During the Class Period, Sussman, on behalf of the Board of Directors, signed each of the company’s interim and annual financial statements issued between April 3, 2018 and November 14, 2019, and in doing so, he adopted as his own the false and misleading statements made in them.

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16. The Defendants, Fleck, Kagan and Merrin were all directors of KEW and were financially literate members of its audit committee at various times during the Class Period, as set out in the chart below:

	2017	2018	2019
Fleck	✓ (Chair)	✓ (Chair)	✓ (Chair)
Kagan		✓	✓
Merrin	✓	✓	✓

17. KEW's Board of Directors carried out its responsibility for the company's financial reporting principally through its audit committee. The audit committee reviewed KEW's continuous financial disclosure at issue in this claim. The audit committee also met regularly with KEW's management and external auditors (Grant Thornton LLP) to discuss DC&P, ICFR, auditing matters and other financial reporting issues and made recommendations to the board of directors as required.

18. Fleck, on behalf of the board of directors, signed all annual audited financial statements issued during the Class Period and all interim statements between April 3, 2018 and November 14, 2019, and in doing so, he adopted as his own the false and misleading statements made in those documents.

19. As a board member, Kagan adopted, as his own, the false and misleading statements made in each of KEW's consolidated interim and audited annual financial statements released while he was a board member, when such statements were signed on his behalf.

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20. As a board member, Merrin adopted, as her own, the false and misleading statements made in each of KEW's consolidated interim and audited annual financial statements released while she was a board member, when such statements were signed on her behalf.

21. The defendant Kwak was appointed as the Executive Vice President, Head of Legal & Business Affairs, and Chief Legal Officer of KEW on March 20, 2017 and continues at the present time to hold that position. As an officer, he authorized, permitted, or acquiesced in KEW making the misrepresentations and/or omissions particularized below.

22. All of the Individual Defendants caused KEW to make the misrepresentations particularized below and adopted as their own those false statements when they approved them and when they were signed on their behalf.

## **V. FACTUAL BACKGROUND**

23. KEW's primary business is the acquisition and management of film and television development, production and distribution companies.

24. KEW commenced trading on the TSX as a special purpose acquisition company in July of 2016, under the symbols KEW.A and KEW.WT.

25. On March 20, 2017, KEW closed the special purpose acquisition by acquiring all of the issued and outstanding shares of each of Content Media Corporation plc, Architect Films Inc., Bristow Global Media Inc., Frantic Films Corporation, Media Headquarters Film & Television Inc. and Our House Media Inc., for total consideration of approximately

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\$120.3 million, including the assumption of \$56 million of borrowings. Following the close of the special purpose acquisition, KEW's common stock qualified to trade on the TSX.

26. On March 23, 2017, the company's shares began trading under the symbol KEW.

27. On May 15, 2017, KEW released its first quarter interim financial statements and

MD&A, for the 11 days following the Qualifying Acquisition. The company stated:

On May 4, 2017, Content Media Corporation International Limited, part of CMC, signed a commitment letter with SunTrust Robinson Humphrey, Inc. to establish a new US\$75 million senior secured revolving credit facility. The facility will be originally secured against all the assets of CMC (excluding Spirit Digital Media LLC, Collins Avenue LLC, Jigsaw Productions LLC, Preferred Film & Television LLC and Aito Media OY and all of the subsidiaries of the above listed companies) and it will also be guaranteed by Kew.

28. Subsequently, on June 29, 2017, KEW announced in a press release the signing of a second commitment letter that increased the facility to USD \$100 million and provided for a syndicate of lenders.

29. In the second quarter MD&A released on August 2, 2017, KEW announced that SunTrust Bank, SunTrust Robinson Humphrey, Inc., The Toronto-Dominion Bank and Bank of Montreal finalized the terms of a USD \$100 million credit facility with an additional USD \$25 million accordion feature.

30. On August 13, 2019, KEW reported in its second quarter MD&A and interim financial statements. Further, KEW announced that the Lenders commitment under the Credit Facility had increased by USD \$10 million.

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31. On November 14, 2019, KEW reported its third quarter financial results. KEW stated in its third quarter MD&A and interim consolidated financial statements that the leverage coverage ratio under the lending facility would not have been met upon filing of the September 2019 compliance certificate with the Syndicate. KEW announced a further amendment to the lending facility that removed the leverage coverage ratio provision, amended the library and unsold credits in the borrowing base, reclassified a portion of the debt as a term loan, and increased the interest rate.

32. On December 11, 2019, without any prior public announcements, KEW announced that Webb had provided inaccurate information regarding working capital to KEW's Lenders and the company. KEW further announced Webb's departure from the company, and the formation of a special committee to consider strategic alternative transactions for the company.

33. In its press release of December 11, 2019, KEW stated:

KEW has also learned that certain reports provided by Geoff Webb, the Company's Chief Financial Officer, to the Company and its senior lenders contained inaccurate information regarding working capital. Mr. Webb has now left the Company. The Company is conducting a detailed review of these matters with the support of its financial and legal advisors and is currently in discussions with its senior lenders regarding this and its short-term liquidity requirements. ...

## **VI. KEW'S MISREPRESENTATIONS TO THE MARKET**

34. As a reporting issuer in Ontario, KEW was required throughout the Class Period to issue and file on SEDAR:

- (a) annual and interim financial statements within 45 days of the end of each fiscal quarter;



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- (b) annual financial statements within 90 days of the end of the fiscal year;
  - (c) MD&A contemporaneously with each of the above (MD&As being a narrative explanation of how the company performed during the period covered by the financial statements, as well the company's financial condition and future prospects); and
  - (d) an AIF within 90 days of the end of the fiscal year (AIFs being an annual disclosure document intended to provide material information about the company and its business at a point in time in the context of its historical and future development.
35. As set out below, the Impugned Documents, all of which were public disclosures made by KEW as required under the *OSA*, each contained one or more misrepresentations as defined by section 1 of the *OSA* and the Other Securities Legislation.

**A. Misrepresentation Relating to Working Capital**

36. During the Class Period, the Defendants reported inaccurate financial results and figures relating to KEW's working capital. Working capital is a measure of a company's liquidity. It is calculated by subtracting current liabilities from current assets.

37. The Impugned Documents that were quarterly and annual financial statements, MD&As and AIFs each contained misrepresentations regarding KEW's current assets and current liabilities and/or other financial information impacting the calculation of KEW's working capital. Such incorrect figures, directly and indirectly, resulted in a material overstatement in the calculation of KEW's working capital.

**B. Misrepresentation Relating to Meeting Credit Facility Loan Covenants**

38. During the Class Period, the Defendants falsely represented that KEW complied with the covenants in its Credit Facility.

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39. The Credit Facility contained standard covenants, including in relation to KEW's liquidity and leverage coverage ratios.

40. The Credit Facility also required KEW to provide accurate information to its Lenders in the form of a compliance certificate within 60 days of the end of each fiscal quarter in relation to KEW's cash flow and working capital, among other things.

41. Each of KEW's quarterly or annual financial statements and MD&A issued between Q3 2017 and the end of the Class Period stated that KEW met all the lending covenants in its Credit Facility with the Lenders.

42. These representations were false. KEW did not meet all applicable covenants under the Credit Facility with the Lenders during the Class Period, including in relation to KEW's cash flow and working capital.

43. In its interim financial statements for the period ending September 30, 2019, KEW disclosed that it would not have met the terms of the leverage coverage ratio under the Credit Facility. As a result, KEW renegotiated the terms of the Credit Facility on November 12, 2019 to delete the leverage coverage ratio in its entirety.

44. Crucially, KEW failed to disclose at that time that in the process, it had utilized inaccurate information, including in respect of KEW's cash flow and working capital, in the information that it had provided to its Lenders.

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**C. Misrepresentation Relating to Availability of Sufficient Financial Resources**

45. During the Class Period, the Defendants represented that KEW had sufficient financial resources at its disposal to fund ongoing operations, both through cash flows from operations and through the funds available under the company's Credit Facility. The Defendants failed and omitted to disclose the deficiency underlying the base borrowing certificates and/or that funds to support the company's ongoing operations were being accessed from KEW's subsidiaries.

46. Each of KEW's interim or annual financial statements and MD&A's issued between Q3 2017 and the end of the Class Period contained misrepresentations regarding KEW's financial resources and the company's ability to fund its ongoing operations. Such misrepresentations materially overstated the financial position of the company and the availability of access to sufficient financial resources to maintain the company as a going concern.

**D. Misrepresentation About IFRS and IAS Compliance**

47. During the Class Period, the Defendants falsely stated that KEW's financial results were reported in accordance with IFRS and IAS.

48. Each of the Impugned Documents that were quarterly and annual financial statements, MD&As, and AIFs stated that KEW's annual financial statements were prepared in accordance with IFRS, and that its interim financial statements were prepared in accordance with IAS 34.

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49. These statements were false because, among other things, KEW's current assets and current liabilities were not reported in accordance with IFRS or IAS 34.

50. Further, IFRS and IAS 34 both require disclosure of all material uncertainties that could affect a company's ability to continue as a going concern.

51. KEW's failure to maintain working capital and cash flow in compliance with its Credit Facility created a material risk that KEW's Lenders would issue a default notice under the Credit Facility or otherwise terminate the lending relationship with KEW. This, in turn, would create a material uncertainty as to KEW's ability to continue as a going concern.

52. The Defendants' failure to disclose these material uncertainties in KEW's financial disclosure during the Class Period in relation to its ability to continue as a going concern was a breach of IFRS and IAS 34 and constituted misrepresentations under the *OSA* and the Other Securities Legislation.

**E. Misrepresentations About DC&P and ICFR**

53. During the Class Period, the Defendants made misrepresentations regarding the design, evaluation, and effectiveness of KEW's internal controls, including DC&P and ICFR.

54. DC&P are intended to provide reasonable assurance that material information relating to the company is made known to senior management, including the CEO and CFO, and that information required to be disclosed by the company is recorded, processed, summarized and reported as required by legislation.

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55. ICFR is intended to provide reasonable assurance regarding the reliability of the company's financial reporting and preparation of financial statements in accordance with IFRS.

56. Each of KEW's quarterly and annual MD&As that were issued during the Class Period represented that KEW's DC&P and ICFR were effective and/or did not suffer from any material weaknesses (except as disclosed therein). For example, the Q2 2019 MD&A stated that KEW's CEO and CFO:

- (a) concluded that the design of the DC&P were effective and have established processes to ensure that they are provided with sufficient knowledge to support the representations made in the annual certificates required to be filed under NI 52-109; and
- (b) have assessed the design effectiveness of KEW's ICFR using the Internal Control-Integrated Framework ("COSO Framework") and have not identified any material weaknesses relating to such design.

57. During the Class Period, Silver and Webb each filed certifications under NI 52-109 certifying that they had reviewed KEW's financial statements and MD&A for the relevant period, and that based on their knowledge, having exercised reasonable diligence, the filings did not contain any misrepresentation as defined in the *OSA*.

58. Specifically, Silver and Webb certified that:

- (a) the interim and annual filings do not contain any untrue statement of material factor omit to state a material fact required to be stated or that is necessary to make a statement not misleading in light of the circumstances under which it was made;
- (b) the interim and annual filings fairly present in all material respects the financial condition, financial performance and cash flows of KEW;

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- (c) they have designed or caused to be designed under their supervision DC&P to provide reasonable assurance that:
  - (i) material information relating to KEW is made known to them by others; and
  - (ii) information required to be disclosed by KEW in its interim and annual filings and other reports filed or submitted by it under securities legislation is recorded, processed, summarized and reported within the time periods specified in securities legislation;
- (d) they have designed or caused to be designed under their supervision ICFR to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with the KEW's GAAP;
- (e) the control framework used to design the KEW's ICFR is the Internal Control – Integrated Framework (COSO Framework) published by the Committee of Sponsoring Organizations of the Treadway Commission (COSO); and
- (f) they have evaluated or caused to be evaluated under their supervision the effectiveness of KEW's DC&P and ICFR, and KEW has disclosed in its quarterly and annual MD&A their conclusions about the effectiveness of DC&P and ICFR.

59. These representations in the MD&As and the certifications by Silver and Webb were false because:

- (a) KEW's DC&P and ICFR were ineffective and suffered from material weaknesses;
- (b) Silver and Webb did not design nor cause to be designed DC&P to provide reasonable assurance that:
  - (i) material information relating to KEW is made known to them by others; and
  - (ii) information required to be disclosed by KEW in its interim and annual filings and other reports filed or submitted by it under securities legislation is recorded, processed, summarized and reported within the time periods specified in securities legislation;

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- (c) Silver and Webb did not design nor cause to be designed ICFR to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with the KEW's GAAP;
  - (d) KEW's ICFR did not meet the criteria set forth in the COSO Framework published by COSO;
  - (e) Silver and Webb did not properly evaluate or cause to be evaluated the effectiveness of KEW's DC&P and ICFR; and
  - (f) because of these control deficiencies, KEW made misrepresentations in its interim and annual financial statements and MD&A and gave inaccurate information to the Lenders concerning cash flow and working capital.
60. Silver and Webb made these misrepresentations with knowledge at the time the certifications were filed that they contained misrepresentations.

61. In the alternative, at or before the time the certifications were filed, Silver and Webb deliberately avoided acquiring knowledge that the certifications contained misrepresentations or through their actions or failure to act they were guilty of gross misconduct in connection with the release of the certifications.

#### **F. Misrepresentations About Compliance with the Code of Conduct**

62. During the Class Period, the Defendants made misrepresentations that they complied with KEW's Code of Business Conduct and Ethics. The Code stated, among other things, that KEW requires "honest and accurate recording and reporting of information of the Corporation" and that "all of the Corporation's financial statements and the books, records and accounts on which they are based must appropriately reflect the Corporation's activities and confirm to applicable legal, accounting and auditing requirements."

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63. The Impugned Documents released by KEW during the Class Period contained statements affirming KEW's compliance with its Code of Ethics. For example, KEW's Management Information Circular dated May 11, 2018 stated that as of as of the date of the Circular, there had been no material violations of the Code of Business Conduct and Ethics.

64. The representations made by KEW in the Impugned Documents in relation to KEW's compliance with its Code of Ethics were false.

65. As set out above, the Defendants failed to ensure that KEW's financial reporting during the Class Period was accurate and confirmed to all applicable legal, accounting and audit requirements.

**G. KEW's Omissions During the Class Period**

66. KEW failed to disclose in the Impugned Disclosure that KEW had:

- (a) provided reports to its Lenders containing inaccurate information about working capital;
- (b) provided inaccurate information to its auditor Grant Thornton;
- (c) improperly used cash from its subsidiaries to remedy KEW's cash flow and working capital deficiencies; and
- (d) there was a material risk that the revelation of these omissions would lead to regulatory action, including the cease trading of KEW's shares.

67. These were omissions of material facts that were required to be stated by KEW pursuant to the *OSA* and the Other Securities Legislation.



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## **VII. THE TRUTH IS DISCLOSED**

68. The truth about KEW was disclosed through press releases in late December 2019 and January 2020, as well as an online story published by Deadline (an entertainment industry publication). All of these, as set out below, were public corrections within the meaning of the *OSA* and the Other Securities Legislation.

69. On December 11, 2019, KEW issued a press release announcing that:

- (a) it had learned that certain reports provided by Webb to KEW and its Lenders contained inaccurate information about working capital;
- (b) Webb had left KEW; and
- (c) KEW was conducting a review of these matters with the support of its financial and legal advisors.

70. On this news, the price of KEW's shares decreased on heavy volume from \$3.88 on December 10, 2019, the day before the press release, to \$2.50 on December 11, 2019.

71. On December 16, 2019, KEW issued another press release announcing that its Lenders had provided notice of an event of default under KEW's Credit Facility due to the inaccurate information provided to the Lenders by Webb.

72. On this news, the price of KEW's shares decreased on heavy volume from \$2.46 on December 13, 2019, the day before the press release, to \$1.92 on December 16, 2019.

73. On January 15, 2020, KEW issued another press release announcing that Grant Thornton had notified KEW that it had withdrawn the following reports:

- (a) its audit report dated April 2, 2018 on KEW's consolidated financial statements as at and for the years ended December 31, 2017 and 2016;

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- (b) its audit report dated April 1, 2019 on KEW's consolidated financial statements as at and for the years ended December 31, 2018 and 2017; and
  - (c) its interim review reports to the audit committee of KEW for each interim period within the 2017, 2018 and 2019 fiscal years.
74. KEW further announced that:
- (a) these reports should no longer be relied upon;
  - (b) Grant Thornton informed KEW that the withdrawal was a result of the actions of Webb and its inability to rely on representations he made to Grant Thornton in the course of its audits and review of KEW's financial statements;
  - (c) KEW's board of directors formed a second special committee of independent directors to investigate Webb actions, whose mandated included an investigation of:
    - (i) the extent to which working capital and the other financial information of KEW was misreported to KEW and its Lenders; and
    - (ii) whether KEW's historical financial statements were impacted by such inaccurate information and require any amendment or restatement; and
  - (d) as a result of the withdrawal of these reports and the time expected to complete the investigation, KEW expected that it would not be able to meet the filing deadline for its financial statements for the year ended December 31, 2019.
75. On this news, the price of KEW's shares decreased on heavy volume from \$0.80 on January 14, 2020, the day before the press release, to \$0.69 on January 15, 2020.
76. On January 16, 2020, KEW issued another press release announcing that the OSC had issued a temporary cease trade order preventing trading of KEW's shares for 15 days. The temporary cease trade order was as a result of KEW's announcement of the withdrawal of Grant Thornton audit reports.

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77. On January 29, 2020, the OSC issued a permanent cease trade order pursuant to which all trading in the securities of KEW was ceased by order of the Ontario Securities Commission until the order was revoked.

78. On March 3, 2020, Deadline published an article entitled “Kew Media: How The Production Group Behind ‘The Inventor’ & ‘Dance Moms’ Collapsed After One Acquisition Too Many” written by Jake Kanter. The article reported that:

- (a) KEW “made the mistake of dipping into the accounts of its distributors KMD and TCB to cash flow the business when things turned sour”;
- (b) following the acquisition of Essential Media Group in July 2018, cash flow issues emerged, and KEW “started dipping into the bank accounts – or “treasuries” as they are known internally – of distribution arms KMD and TCB”;
- (c) one source reported that “between \$14M and \$17M was taken out of the KMD treasury and not returned”; and
- (d) these funds were used to help producers within the group when they had cash-flow issues, such as delays to productions, and was put towards corporate overhead.

79. On March 9, 2020, the TSX announced the delisting of KEW’s securities from the exchange effective April 9, 2020 for failure to meet continued listing requirements.

## **VIII. RIGHTS OF ACTION**

### **A. Statutory Claim: Part XXIII.1 of the OSA**

80. The Plaintiffs plead on behalf of themselves and the Class the right of action in Part XXIII.1 of the OSA and, if necessary, the equivalent provisions of the Other Securities Legislation against the Defendants.

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81. KEW was a responsible issuer within the meaning of the *OSA* and the Other Securities Legislation for the entirety of the Class Period.

82. Each of the Impugned Documents is a document under section 138.1 of the *OSA* and the corresponding provisions of the Other Securities Legislation.

83. The Impugned Documents that are financial statements, MD&As, AIFs, and Management Information Circulars are core documents under section 138.1 of the *OSA* and corresponding provisions of the Other Securities Legislation.

84. KEW was a responsible issuer at the time that each of the Impugned Documents was released by it.

85. The Individual Defendants were officers and/or directors of KEW at the time that each of the Impugned Documents were released, and each of them authorized, permitted and/or acquiesced in the release of such documents.

86. The Individual Defendants knew, at the time the Impugned Documents were released, that the documents contained misrepresentations.

87. In the alternative, the Individual Defendants deliberately avoided acquiring such knowledge or, in the alternative, were guilty of gross misconduct in connection with the making of the misrepresentations.

88. Accordingly, the Defendants are liable in respect of the misrepresentations made by them that are contained in the Impugned Documents, as particularized above, pursuant to *OSA* section 138.3(1).

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**B. Common Law Claim: Negligent Misrepresentation**

89. The Plaintiffs plead on behalf of themselves and the Class negligent misrepresentations at common law in respect of all of the misrepresentations particularized above contained in the Impugned Documents as against the Defendants.

90. Each of the misrepresentations set out above were untrue for the reasons particularized above.

91. The Impugned Documents were prepared for the purpose of attracting investment and inducing members of the investing public to purchase KEW securities. The Defendants undertook to provide the Impugned Documents to those current and prospective securities holders (i.e., the Class Members) for the purpose of allowing them to make informed decisions as to whether to acquire KEW's securities.

92. The Defendants knew and intended at all material times that those documents had been prepared for that purpose, and that the Class Members would reasonably rely to their detriment upon such documents in making their decision to purchase KEW's securities.

93. The Defendants had a duty at common law to exercise care and diligence to ensure that the Impugned Documents were free from material misstatement. The Defendants breached that duty by making the misrepresentations particularized above.

94. The Plaintiffs and other Class Members directly or indirectly relied upon the misrepresentations in making decisions to purchase KEW's securities and suffered damages when the falsity of the information was revealed.

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95. In the alternative, the Plaintiffs and other Class Members relied upon the misrepresentations by the act of acquiring KEW's securities in an efficient market that promptly incorporated into the price of those securities all publicly available information regarding KEW, including the misrepresentations, which were false. As a result, the repeated publication of these misrepresentations caused the price of KEW's securities to trade at inflated prices during the Class Period, thus directly resulting in damages to the Plaintiffs and Class Members.

#### **IX. RELATIONSHIP BETWEEN THE MISREPRESENTATIONS AND THE PRICE OF KEW'S SECURITIES**

96. The price of KEW's securities was directly affected during the Class Period by the release of the Impugned Documents containing the misrepresentations as particularized above.

97. The Defendants were aware at all material times of the effect of KEW's disclosure documents upon the price of KEW's securities.

98. The Impugned Documents were filed, among other places, with SEDAR, and thereby became immediately available to the Class Members other members of the investing public, financial analysts and the financial press.

99. KEW routinely transmitted the Impugned Documents to the financial press, financial analysts and certain prospective and actual holders of KEW's securities. KEW provided either copies of the Impugned Documents or links to the documents on its website.

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100. KEW regularly communicated with investors and financial analysts via established market communication mechanisms, including through regular disseminations of their disclosure documents, including on newswire services in Canada, the United States and elsewhere. When KEW communicated that new material information about KEW's business, and operations and its financial results to the public, the price of KEW's securities was directly affected.

101. KEW was the subject of analysts' reports that incorporated certain of the information contained in the Impugned Documents, with the effect that any recommendations to buy, hold or sell KEW's securities in such reports during the Class Period were based, in whole or in part, upon that information.

102. KEW's securities were traded on the TSX, which is an efficient and automated market. The price at which KEW's securities traded promptly incorporated material information from KEW's disclosure documents about KEW's business and affairs, including the misrepresentations alleged herein, which were disseminated to the public through the Impugned Documents distributed by KEW, as well as by other means.

## **X. DAMAGES**

103. The Class Members suffered damages as a result of the Defendants' misrepresentations. The Plaintiffs and the other Class Members suffered damages equivalent to the inflation in the price of the KEW securities they acquired during the Class Period which was related to the misrepresentations set out above.

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104. If the Defendants had not made the misrepresentations described above, KEW's securities would not have traded or been sold at artificially high levels that Class Members paid for them, and the Class Members would not have suffered losses.

105. The Defendants' conduct was outrageous and renders the Defendants liable to pay punitive damages.

## **XI. VICARIOUS LIABILITY**

106. KEW is vicariously liable for the acts and omissions of the Individual Defendants.

107. The acts or omissions alleged herein to have been done by KEW were authorized, ordered and done by the Individual Defendants and other agents, employees and representatives of KEW, while engaged in the management, direction, control and transaction of the business and affairs of KEW. Such acts and omissions are, therefore, not only the acts and omissions of the Individual Defendants, but are also the acts and omissions of KEW.

108. At all material times, the Individual Defendants were officers and/or directors of KEW. As their acts and omissions are independently tortious, they are personally liable to the Plaintiffs and the other Class Members.

## **XII. LEGISLATION**

109. The Plaintiffs plead and rely upon the *Courts of Justice Act*, RSO 1990, c C43, the *Class Proceedings Act, 1992*, *The Negligence Act*, R.S.O. 1990, c.N.1, the *OSA*, and the *Other Securities Legislation*, all as amended.



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### **XIII. REAL AND SUBSTANTIAL CONNECTION WITH ONTARIO**

110. The Plaintiffs plead that this action has a real and substantial connection with Ontario because, among other things:

- (a) KEW was a reporting issuer in Ontario at all material times;
- (b) KEW is an Ontario Corporation;
- (c) KEW carries on business in Ontario;
- (d) KEW's registered head office is in Toronto, Ontario;
- (e) securities of KEW traded publicly on the securities market in Ontario during the class period;
- (f) a substantial proportion of the Class Members reside in Ontario;
- (g) the misrepresentations alleged herein were disseminated in Ontario;  
and
- (h) a substantial portion of the damages sustained by the class were sustained by persons and entities domiciled in Ontario.

### **XIV. SERVICE OUTSIDE ONTARIO AND PLACE OF TRIAL**

111. If necessary, the Plaintiffs rely on Rules 17.02(a), (g), (n), and (p) of the *Rules of Civil Procedure* to serve this Statement of Claim outside Ontario without leave.

112. The Plaintiffs propose that this action be tried in the City of Toronto.

July \_\_, 2020

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**Lawyers for the Plaintiffs**

**ALEX KAN and STUART RATH**  
Plaintiffs

and **KEW MEDIA GROUP INC. ET AL.**  
Defendants

**ONTARIO**  
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

**STATEMENT OF CLAIM**

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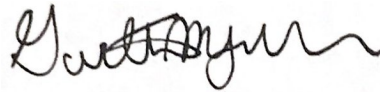
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This is Exhibit D to the  
affidavit of Serge Kalloghlian

A handwritten signature in black ink, appearing to be 'Serge Kalloghlian', written in a cursive style.

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A Commissioner, etc.

**ALEX KAN and STUART RATH**  
Plaintiffs

and **KEW MEDIA GROUP INC. ET AL.**  
Defendants

**ONTARIO**  
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

I, DAVID BISH, hereby accept service of  
this Statement of Claim on behalf of the Defendant Kew  
Media Group Inc. this 6th day of July, 2021.

Firm: TORYS LLP  
Per: David Bish

**STATEMENT OF CLAIM**

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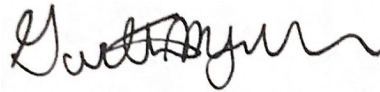
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A Commissioner, etc.

AMENDED THIS June 2/21 PURSUANT TO  
 MODIFIÉ CONFORMÉMENT À

RULE/LA RÈGLE 26.02 ( A )

THE ORDER OF \_\_\_\_\_  
 L'ORDONNANCE DU \_\_\_\_\_  
 DATED/FAIT LE \_\_\_\_\_

Court File No.: CV-21-00656707-0000

REGISTRAR GREFFIER  
 SUPERIOR COURT OF JUSTICE COUR SUPÉRIEURE DE JUSTICE

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

B E T W E E N:

KEW MEDIA GROUP INC. and  
 KEW MEDIA INTERNATIONAL (CANADA) INC.

Plaintiffs

and

GRANT THORNTON LLP, GRANT THORNTON UK LLP and  
 GRANT THORNTON UK LLC

Defendants

**AMENDED STATEMENT OF CLAIM**  
**(NOTICE OF ACTION ISSUED ON FEBRUARY 9, 2021)**

**CLAIM**

1. The Plaintiffs claim against each of the Defendants:
  - (a) damages in the amount of \$100,000,000 for breach of contract, breach of duty, breach of fiduciary duty, negligence and negligent misrepresentation;
  - (b) an order requiring the Defendants to repay to the Plaintiffs all fees, payments and monies paid to them by the Plaintiffs;
  - (c) a declaration that any indemnity or limitation of liability provisions in favour of the Defendants, express or implied, are void or voidable or in the alternative unenforceable;

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- (d) pre- and post-judgment interest in accordance with the *Courts of Justice Act*, R.S.O. 1990, c. C. 43, as amended;
- (e) the Plaintiffs' costs of this action; and
- (f) such further and other relief as this Honourable Court permits.

### **Overview**

2. The Plaintiffs, Kew Media Group Inc. and Kew Media International (Canada) Inc., seek damages for auditing and accounting failures by the Defendants that resulted in, among other things, the provision of inaccurate financial information to the Plaintiffs' board of directors, management, and creditors.

3. With respect to the claim, the Defendants provided unqualified ("clean") opinions in connection with the audit and review of the Plaintiffs' consolidated financial statements starting with Fiscal 2017. Those financial statements represented that the Plaintiffs' business was financially strong with sufficient working capital to meet ongoing debt obligations. The Plaintiffs' board of directors and senior management relied on these audited and reviewed financial statements in managing the company and, in particular, pursuing their business strategy of rapid expansion through acquisitions.

4. In reality, and contrary to the financial statements and the clean audit and review opinions, the Plaintiffs' businesses were performing poorly. The business' working capital was significantly overstated, current liabilities far exceeded current assets, and they were in serious default of their debt obligations. When these facts were discovered, the Plaintiffs' creditors demanded immediate repayment of their loans and initiated receivership proceedings.



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5. The Defendants ought to have detected and disclosed the misstatements contained in the Plaintiffs' books, records, and financial reporting. The Defendants were uniquely positioned by reason of their represented expertise, access to the Plaintiffs' records and employees, and collective and cumulative experience in dealing with financial reporting for the Plaintiffs' businesses, that they ought to have had uncovered the misstatements.

6. Furthermore, the Defendants ought to have critically assessed any representation made to them by management with respect to the financial statements and compliance with the Plaintiffs' credit agreements, loan agreements, the terms of such debt agreements, and accounting procedures.

7. The Defendants were negligent and breached their contracts with the Plaintiffs. Had the Defendants acted in accordance with their duties and the applicable standard of care, the financial and other compliance irregularities would have been uncovered and disclosed, and the Plaintiffs would have adopted a different business strategy, refrained from assuming further onerous liabilities, would not have become insolvent, and would have avoided claims now being asserted by shareholders and other creditors of the Plaintiffs.

8. The Plaintiffs suffered significant and serious harm and loss as a result of the Defendants' breach of their obligations to the Plaintiffs.

### **The Parties**

9. Kew Media Group Inc. ("**KMG Canada**") is a corporation incorporated under the laws of the Province of Ontario and is headquartered in Toronto. KMG Canada was incorporated in 2015 as a special purpose vehicle.

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10. KMG Canada began trading on the Toronto Stock Exchange under the symbol “KEW” on March 20, 2017.

11. Kew Media International (Canada) Inc. (“**KMI Canada**”) is a corporation incorporated under the laws of the Province of Ontario with a registered head office in Toronto. It is a wholly-owned subsidiary of KMG Canada.

12. At all material times, KMG Canada was the parent company of a group of companies in Canada, the United States, the United Kingdom, Australia and New Zealand that developed, produced and distributed multi-genre audiovisual content worldwide. These companies included:

- (a) KMI Canada;
- (b) Kew Media International Limited (“**KMIL**”), a company incorporated under the laws of England and Wales (formerly known as Content Media Corporation International Limited);
- (c) Kew Media Group UK Holdings Limited (“**KMG Holdings**”), a company incorporated under the laws of England and Wales; and
- (d) Kew Media Group UK Limited (“**KMG UK**”), a company incorporated under the laws of England and Wales, and KMG UK's subsidiaries.

13. Together, KMG Canada and all of its subsidiaries are referred to in this Claim as the “**Kew Group**”.

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13.1 KMG Canada is entitled to sue the Defendants on its own behalf and on behalf of the individual Kew Group companies on the basis that, among other things, the Defendants were providing services to Kew Canada and the group of related companies, in connection with the preparation of consolidated financial statements.

14. The defendant, Grant Thornton LLP (“**GT Canada**”), was, at all material times, a limited liability partnership of certified public accountants, auditors and consultants formed under the laws of the Province of Ontario, with its principal place of business in Toronto.

15. The defendant, Grant Thornton UK LLP, was, at all material times, a limited liability partnership of certified public accountants, auditors and consultants registered in England and Wales, with a registered office at 30 Finsbury Square, London, United Kingdom.

16. The Plaintiffs believe the defendant, Grant Thornton UK LLC (together with Grant Thornton UK LLP, “**GT UK**”), was, at all material times, a limited liability corporation formed under the laws of the United Kingdom carrying on business providing auditing and accounting services from the United Kingdom.

17. GT Canada and GT UK (together, “**Grant Thornton**”) served as the auditors for the Kew Group. They worked together to prepare consolidated financial statements for the entire Kew Group, and each provided audit and other services to members of the Kew Group in their respective jurisdictions.

### **The JP Morgan and Comerica Credit Facilities**

18. Prior to its acquisition by KMG Canada, KMG UK and its subsidiaries had accrued a significant amount of debt.

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19. On March 24, 2004, KMG UK and/or one or more of its subsidiaries entered into a credit facility with JP Morgan Chase Bank (the “**JP Morgan Facility**”). The size of the facility was initially USD\$20 million and increased to as high as USD\$45 million in 2008.

20. In or around July 2008, the JP Morgan Facility was amended to introduce a borrowing base calculation, which took into account KMG UK’s and its subsidiaries’ receivables and the annual value of their film and television rights library.

21. The JP Morgan Facility matured on August 1, 2016, but was extended to June 30, 2017 and then to July 31, 2017.

22. On December 9, 2016, the JP Morgan Facility was reduced from USD\$45 million to USD\$35 million. That same day, KMG UK and/or its subsidiaries and Comerica Bank agreed to a new USD\$15 million revolving credit facility with a December 17, 2019 maturity date (the “**Comerica Facility**”).

### **The Truist Credit Facility**

23. Some of KMG Canada’s new acquisitions had varying degrees of credit risk. The Kew Group began negotiations in 2017 with Truist Bank (previously SunTrust Bank) (“**Truist**”) to open a new credit facility to assist with the credit risk facing the newly acquired businesses.

24. On July 28, 2017, KMIL, one of KMG Canada’s wholly-owned subsidiaries signed a five-year revolving credit facility (the “**Truist Facility**”) with a syndicate of lenders led by Truist acting as administrative agent for itself, the Toronto-Dominion Bank and Bank of Montreal (the “**Syndicate**”). The Truist Facility provided a five-year USD\$80 million senior

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secured revolving credit facility and a USD\$20 million senior secured term loan facility, with an additional USD\$25 million accordion feature.

25. Over time, other Kew Group subsidiaries also became parties to the Truist Facility Agreement pursuant to various joinder agreements. For example, on June 29, 2019, KMG Canada became a borrower under the Truist Facility.

26. The relevant terms of the Truist Facility were as follows:

- (a) the loan obligation was guaranteed by: (i) KMG Canada and several of its Canadian wholly-owned subsidiaries; (ii) some of the KMG UK entities; and (iii) certain other direct and indirect subsidiaries of KMG Canada, KMIL, KMG UK Holdings and KMG UK;
- (b) KMG Canada and certain of its subsidiaries signed general security agreements, security agreements, debentures and other instruments (collectively, the "**Truist Security Agreements**") providing various fixed and floating charges, assignments and other security interests to Truist for the term of the Truist Facility. The collateral under the Truist Security Agreements included the right, title and interest in all tangible and intangible personal property, wherever located or situated and whether now owned, presently existing or hereafter acquired or created;
- (c) the amount of funds available from the facility was based on accounts receivable and other amounts permitted as collateral (the "**Borrowing Base**"). KMG Canada

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was required to periodically submit a certificate to Truist confirming its calculation of the Borrowing Base ("**Borrowing Base Certificate**"); and

- (d) KMG Canada was required to periodically submit a compliance certificate with respect to certain negative covenants within 60 days of the end of the fiscal quarter (the "**Compliance Certificate**").

### **KMG Canada Uses the Truist Facility to Support Rapid Expansion**

27. After finalizing the Truist Facility, CAD\$46,800,000 was immediately drawn down to repay the JP Morgan and Comerica Facilities.

28. KMG Canada then quickly seized on the available credit under the Truist Facility to support its operations and the operations of its subsidiaries, and to fuel its continued rapid growth through business acquisitions. By December 31, 2018, KMG Canada and its subsidiaries had drawn down CAD\$123,870,000 on the Truist Facility and CAD\$138,856,000 by September 30, 2019.

### **Grant Thornton's Engagement as Auditor of the Kew Group Companies**

28.1 The Defendants acted as auditors in two separate but related types of audits: the consolidated audit for the Kew Group; and (for GT UK) the statutory audit for certain United Kingdom subsidiaries in the Kew Group.

29. GT Canada was engaged to provide audit services to KMG Canada after it was first incorporated in 2015 and until 2019. The audit services included auditing KMG Canada's annual consolidated financial statements, which provided a financial picture of the entire Kew

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Group. GT Canada's audit engagement with KMG Canada was governed by engagement letters executed by the parties.

29.1 Beginning in Fiscal 2017, the engagement letters identified GT UK as a component auditor to perform audit work in respect of KMG Canada's United Kingdom subsidiaries for the consolidated financial statements. GT UK was responsible for auditing the financials of the subsidiaries using procedures and materiality levels appropriate to KMG Canada's consolidated financial statements.

29.2 In addition to, and as part of, auditing the annual financial statements, Grant Thornton also undertook to review the consolidated quarterly financial statements of KMG Canada. The terms of the review were set out in other engagement letters executed by the parties. GT Canada reviewed the interim financial statements starting in 2015 and until the third quarter of 2019.

29.3 Pursuant to the review engagements, GT Canada undertook to review the financial statements and determine whether the statements were prepared in accordance with IFRS. After each review engagement, GT Canada reported to KMG Canada's board of directors that it was not aware of any material misstatement.

30. GT UK was also engaged to provide separate but related audit services to certain entities in the Kew Group pursuant to local statutory requirements. GT UK acted as the auditor for KMG UK and/or its subsidiaries, including KMIL, starting in January 2005. This separate engagement continued after KMG Canada acquired KMG UK in 2017, using procedures and materiality levels appropriate to KMG UK's consolidated financial statements. GT UK's audit engagement with KMG UK was governed by engagement letters executed by the parties.

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31. In summary, the Defendants provided audit and review services to the Kew Group in respect of:

- (a) KMG Canada's annual consolidated financial statements from Fiscal 2015 to Fiscal 2019;
- (b) quarterly financial statements from Fiscal 2015 to Fiscal 2019; and,
- (c) KMG UK's and/or its subsidiaries' financial statements from Fiscal 2004 to Fiscal 2019,

(the "**Kew Group Financials**").

32. In performing its audit functions, the Defendants had full and unfettered access to the Kew Group's books and records, its confidential, corporate, financial, operating, and business information, and key members of management. Specifically, but without limitation, the Defendants had access to and examined or should have examined the following records of the Kew Group:

- (a) balance sheets, profit and loss statements, and unaudited financial statements for each year and each quarter and the backup for the entries that underlay those statements financials;
- (b) contracts and the provisions therein;
- (c) Compliance Certificates;



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- (d) Borrowing Base Certificates and the underlying calculations and assumptions;  
and,
- (e) the general ledgers and sub-ledgers.

### **Discovery of the Misstatements**

33. In December 2019, the Plaintiffs discovered that KMG Canada's Chief Financial Officer, Geoff Webb, had misreported and manipulated the books and records of the Kew Group to present a false financial picture of the performance of the business.

34. In particular, but without limiting the foregoing, Webb misreported working capital, current liabilities, compliance with debt obligations, and other financial information. This misreporting included representing that the Kew Group was in compliance with the Borrowing Base requirement under the Truist Facility when in fact it was not in compliance.

35. For example, each of KMG Canada's quarterly and annual financial statements from 2017 Q3 to 2019 Q2 stated that, "[t]he amount available at any point in time is based on a borrowing base calculation", there were amounts available "beyond the borrowings", and that KMG Canada "met all covenants". These statements were incorrect.

36. The quarterly financial statement for 2019 Q3 stated that, "[t]he amount available at any point in time is based on a borrowing base calculation" and that there were amounts available "beyond the borrowings". These statements were incorrect.

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37. The full extent of the scope of the misreporting of financial information and those responsible for misreporting is currently unknown to the Plaintiffs. Others in addition to Webb may have also been involved in the misreported financial information.

38. On December 12, 2019, KMG Canada issued a press release stating that the company had learned that “certain reports provided by Geoff Webb, the Company’s Chief Financial Officer, to the Company and its senior lenders contained inaccurate information regarding working capital”. The reports referred to in the press release were the Borrowing Base Certificates.

39. Shortly after the press release, KMG Canada notified Truist that financial information provided to the Syndicate in 2018 and 2019 contained material misstatements, omissions and overstatements, including that:

- (a) the Borrowing Base information provided to the Syndicate was overstated by USD\$42,557,537 on December 31, 2018;
- (b) the Borrowing Base information provided to the Syndicate was overstated by USD\$49,305,421 on November 30, 2019;
- (c) the value of the Kew Group’s library of distribution and exploitation rights related to various audiovisual works (which is a key asset of a media company) had been overstated; and
- (d) the book value of various acquisitions made by KMG Canada was not accurately reflected in the 2018 financial statements.

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40. As a result of the misreporting, there were material and significant misstatements in the Kew Group's annual and quarterly financial statements from Fiscal 2017 to 2019 (collectively, the "**Misstatements**").

41. On December 16, 2019, the Syndicate delivered a notice of an event of default under the Truist Facility due to the inaccurate information provided in the Borrowing Base Certificates.

42. On January 15, 2020, KMG Canada issued another press release announcing that GT Canada had withdrawn the audited and interim financial statements and reports they had released, as they could no longer certify the accuracy of the statements made in these financial reports. GT Canada withdrew the following reports:

- (a) its audit report dated April 2, 2018 on KMG Canada's consolidated financial statements as at and for the years ended December 31, 2016 and 2017;
- (b) its audit report dated April 1, 2019 on KMG Canada's consolidated financial statements as at and for the years ended December 31, 2017 and 2018; and
- (c) its interim review reports to the audit committee of KMG Canada for each interim period for Kew's 2017, 2018 and 2019 fiscal years.

43. KMG Canada also publicly stated that these financial statements audited by GT Canada could no longer be relied upon because GT Canada no longer had faith in the accuracy of the representations made to it as auditor by management.

44. On February 27, 2020, the Syndicate terminated the Truist Facility and demanded immediate repayment of all outstanding amounts.

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45. On February 28, 2020, FTI Consulting Canada Inc. was appointed receiver and manager of KMG Canada and KMI Canada by order of the Court (the “**Receivership Order**”). On the same date, Andrew Johnson and Simon Kirkhope, insolvency practitioners of FTI Consulting LLP, were appointed as administrators for KMG UK, and KMIL, and KMG Holdings.

### **The Defendants’ Legal Obligations to the Plaintiffs**

#### Contractual Duties

46. The Defendants owed contractual obligations, express and implied, to the Plaintiffs pursuant to the audit and review engagement letters. The Defendants’ contractual obligations included, but were not limited to, requirements to:

- (a) perform their audit and review functions in accordance with generally accepted auditing standards (“**GAAS**”) and generally accepted standards for review engagements (“**GASR**”);
- (b) comply with ethical requirements;
- (c) obtain reasonable assurance whether the financial statements are free from material misstatement;
- (d) use their judgment as professional auditors to assess the risks of material misstatement of the financial statements, whether due to fraud or error, and to select appropriate audit and review procedures in light of their assessments;

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- (e) evaluate the appropriateness of the companies' accounting policies, the reasonableness of management's accounting estimates and the overall presentation of the financial statements;
- (f) consider the companies' internal controls and design audit and review procedures that were appropriate in the circumstances; and
- (g) advise the client in writing of any significant deficiencies in internal control relevant to the audit or review.

#### Statutory Duties

47. The Defendants owed the Plaintiffs statutory duties as the Plaintiffs' auditors. Pursuant to the Ontario *Business Corporations Act*, RSO 1990, c. B.16, the Defendants were required to:

- (a) examine the financial statements to enable them to report on the financial statements in accordance with any prescriptions and in accordance with GAAS;
- (b) report any error or misstatement of which they become aware in the financial statements if the error or misstatement is significant; and
- (c) ~~to~~ examine the financial statements for compliance with International Financial Reporting Standards ("**IFRS**").

48. Legislation in the United Kingdom establishes similar obligations, which the Plaintiffs plead and rely on.

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Duty of Care

49. The Defendants owed a duty of care to the Plaintiffs. As audit professionals and the Plaintiffs' professional advisors, the Defendants were obligated to act in a reasonable manner and with care and diligence in carrying out their audit and review functions and in accordance with industry standards for accountants and auditors. Specifically, the Defendants had a duty to:

- (a) plan and conduct the audits and reviews with reasonable skill and care as audit and accounting professionals in the particular circumstances of the Kew Group's business, operating history and management;
- (b) design appropriate audit procedures and establish appropriate levels of materiality;
- (c) conduct the audits and reviews of the Kew Group in accordance with GAAS, GASR, and any higher standards of care set out in the Defendants' own manuals and other internal sources of guidance, or the Plaintiffs' internal accounting policies;
- (d) conduct the engagement with competent persons with sufficient experience who understand KMG Canada's audiovisual production and distribution business in the context of the audiovisual industry as a whole;
- (e) ensure that the Kew Group's financial statements were reported in accordance with stated accounting policies and IFRS, and to warn the appropriate level of authority of any unjustified or previously undisclosed departures from IFRS at the earliest opportunity;

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- (f) monitor the Kew Group during their tenure as auditor, in relation to material aspects on its financial statements, and warn the appropriate level of authority of any material financial misstatement or omission at the earliest opportunity;
- (g) discover and disclose any underlying frauds and material adverse facts or the risk of their existence where those frauds and material adverse facts or the risk of their existence were discoverable through the application of reasonable care or skill as was appropriate, and to warn the appropriate level of authority at the earliest opportunity;
- (h) exercise a degree of care commensurate with the moral hazard or risk to be avoided. The Kew Group's heavy reliance on revolving credit facilities created a going concern risk, which the auditors were or should have been aware of. In the circumstances, the auditors had a duty to thoroughly investigate, understand and eliminate the possibility of non-compliance with the credit facility terms; and
- (i) act in accordance with IFRS standards and their duties and obligations as accountants under the *Chartered Professional Accountants of Ontario Act, 2017*, S.O. 2017, c. 8, Sched. 3, and the *Public Accounting Act, 2004*, S.O. 2004, c. 8, and all other statutes that may be applicable and govern their profession in Canada and the UK.

### Fiduciary Duties

50. The Defendants owed fiduciary duties to the Plaintiffs. The Plaintiffs placed complete confidence in the Defendants given their role as auditors. The Plaintiffs provided the Defendants

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complete and confidential access to the Plaintiffs' businesses and all requested records and information. The Plaintiffs placed and were encouraged to place substantial reliance on the Defendants. The Defendants represented that they had superior expertise through their prior audit work with KMIL and KMG UK, their status as one of the world's largest and most reputable auditing firms, and their specific expertise in the audiovisual production and distribution industry. The Plaintiffs' reliance on the Defendants put the Plaintiffs in a position of vulnerability with respect to the Defendants.

51. The Defendants' fiduciary duties to the Plaintiffs included, among others, duties of loyalty, good faith, candour, an obligation to avoid conflict of interests and an obligation to act in the Plaintiffs' best interest.

#### **Breach of the Defendants' Obligations to the Plaintiffs**

52. The Defendants breached their obligations owed to the Plaintiffs including under their engagement agreements, the duty of care owed to the Plaintiffs, under statute, and as fiduciaries. Given their role and duties as auditors, they should have discovered the Misstatements in the annual and quarterly financial statements from Fiscal 2017 to 2019 and reported them to the Plaintiffs. Instead, the Defendants provided clean audit opinions to the Plaintiffs and at no point did they identify any of the Misstatements to the Plaintiffs or to anyone.

53. The failure of the Defendants to identify the Misstatements was the result of, *inter alia*:

- (a) opining that the Kew Group Financials were presented in conformity with IFRS when they were not;



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- (b) representing that the Defendants' engagements for the years in question were conducted in accordance with GAAS, GASR, and the Defendants' own standards, when they were not;
- (c) issuing unqualified audit and review reports when doing so was not warranted in the circumstances;
- (d) failing to adequately plan the audit and design audit and review procedures to search for and detect the existence of errors and irregularities which materially affected the Kew Group Financials;
- (e) inadequately staffing the engagements;
- (f) failing to gain a proper understanding of the audiovisual distribution and production industry in general and the Kew Group's own business and history;
- (g) failing to take a holistic view of the Kew Group Financials in light of the information obtained by the Defendants over the years;
- (h) failing to sufficiently understand the Kew Group's internal control structure and to modify or expand its substantive audit and review work accordingly;
- (i) placing undue reliance on internal controls at the Kew Group that they knew or ought to have known were inadequate and faulty;

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- (j) failing to obtain sufficient evidence to confirm that the Kew Group Financials fairly reported Kew's financial position and results of operations, including failing to:
  - (i) obtain or request confirmation or independent verification of managements representations; or
  - (ii) obtain or request back-up information and calculations;
- (k) failing to critically analyze and investigate any and all "red flags" coming to their attention throughout the course of the engagements;
- (l) allowing improper classification of debt obligations and not detecting false statements about the Kew Group's compliance with its credit facility agreements;
- (m) failing to exercise the statutory right to attend all meetings of the Board's audit committee (the "**Audit Committee**") in order to:
  - (i) keep fully apprised of all significant issues discussed at the Audit Committee;
  - (ii) be aware of management representations made to the Audit Committee;
  - (iii) alert the Audit Committee to any of their concerns; and
  - (iv) work in tandem with the Audit Committee to provide an effective check on Webb and other management;

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- (n) failing to ensure that the Audit Committee and the Board of Directors were apprised prior to the release of quarterly or audited financial results of the Kew Group's position with respect to accounting and compliance issues;
- (o) failing to warn the appropriate level of authority on a timely basis with respect to misstatements or omissions contained in quarterly or audited financial statements of which they became aware;
- (p) failing to exercise the degree of care commensurate with the going concern risk created by heavy reliance on the Plaintiffs' credit facilities, including specifically, failing to investigate compliance with the Borrowing Base requirements and the accuracy of the Borrowing Base Certificates; and,
- (q) failing to investigate and obtain supporting documents for the false representations in the financial statements that KMG Canada was in compliance with all covenants, including the Borrowing Base (see paragraph 34).

54. As a result of the Defendants' failures as set out above, the Defendants breached the audit and review engagement agreements and violated the statutory duties, duties of care, and fiduciary duties owed to the Plaintiffs.

55. The Plaintiffs plead and rely upon the *Negligence Act*, R.S.O. 1990, c. N.1.

### **Liability for Negligent Misrepresentation**

56. The Defendants are also liable to the Plaintiffs for negligent misrepresentation:

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- (a) the Defendants were in a special relationship with the Plaintiffs given the Defendants' role as the Plaintiffs' auditors;
- (b) by issuing "clean" or unqualified audit and review opinions, the Defendants misrepresented to the Plaintiffs that the Kew Group Financials fairly presented, in all material respects, the Kew Group's financial position in conformity with IFRS, when in fact they did not. For example, the financial statements stated that KMG Canada met all covenants, including the Borrowing Base requirements (see paragraph 34), when this was not true;
- (c) the Defendants were negligent in issuing the clean audit and review opinions and making the misrepresentations for the reasons pleaded above at paragraph 50; the Plaintiffs reasonably relied on the Defendants' misrepresentations. Among other things, the Plaintiffs continued to draw on the Truist Facility to fund their operations and the operations of the Kew Group and to pursue their acquisition strategy. The Plaintiffs' reliance was reasonable because the purpose of the audit and review opinions was to inform and assist the Plaintiffs' business planning and affairs;
- (d) the Plaintiffs detrimentally relied on the Defendants' misrepresentations. By relying on the Defendants' clean audit and review opinions, the Plaintiffs were deprived of the opportunity uncover the Misstatements earlier. As a result, the Plaintiffs:
  - (i) incurred significant exposure for breaching its contractual obligations;

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- (ii) assumed further onerous liabilities under the Truist Facility and elsewhere;  
and
- (iii) depleted its cash and other working capital in pursuing a rapid expansion strategy.

### **Damages**

57. As a result of the Defendants' breaches, the Plaintiffs have suffered damages in the amount of at least \$100 million, the particulars of which will be provided prior to the trial of this action. Because of the Misstatements, the Plaintiffs were in breach of the terms of the Truist Facility. Consequently, the Syndicate accelerated the loan, terminated the facility, and had the Plaintiffs put into receivership. The Plaintiffs lost all of the value of their business.

58. Had the Defendants fulfilled their obligations to the Plaintiffs, they would have uncovered and disclosed the Misstatements. The Plaintiffs would not have lost all of their value. If the defendant had performed their duties to the Plaintiffs on a timely basis, the resultant exposure of their true financial position and/or the Misstatements would have reduced or eliminated the losses, liabilities and damages incurred after that date.

59. In addition and in the alternative, the Plaintiffs seek the repayment of fees paid to each of the Defendants by them on a restitutionary basis. It would be inequitable to allow the Defendants to be unjustly enriched by retaining the benefits they received in the expectation that they had competently performed the duties they owed to the Plaintiffs in light of their subsequently revealed breaches of duty.

60. In addition and in the alternative, the Plaintiffs state that the Defendants are liable for:

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- (a) contribution and indemnity with respect to any damages or other monies that the Plaintiffs are required to pay third parties in judgement or settlement of a class action by KMG Canada's shareholders and any other proceedings based on similar allegations; and
- (b) indemnification for all costs in defending class action by KMG Canada's shareholders or any other similar proceedings, including legal fees, experts fees, disbursements, court filing fees, and any taxes relating to payment of same.

61. The Plaintiffs claim that each of the Defendants is jointly and severally liable for the entire quantum of the losses incurred after the date of each defendant's breach of duty.

61.1 Any indemnity or limitation of liability provisions in favour of the Defendants, express or implied, are inapplicable, unenforceable or alternatively, void or voidable.

62. The Plaintiffs suffered damages in the Province of Ontario due to the services provided to them by Defendants. The Plaintiffs rely on Rule 17.02 (f), and (g) of the *Rules of Civil Procedure*.

63. The Plaintiffs propose that this action be tried in the City of Toronto, Province of Ontario.

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~~March 11, 2021~~  
June 2

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Plaintiffs

-and-

GRANT THORNTON LLP et al.  
Defendants

Court File No. CV-21-00656707-0000

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

**AMENDED STATEMENT OF CLAIM**

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Applicant

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

KEW MEDIA GROUP INC. and KEW MEDIA INTERNATIONAL  
(CANADA) INC.

Respondents

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

**Proceeding Commenced at TORONTO**

**MOTION RECORD**

**(Motion for: (1) Lifting the Stay of Proceedings Against Kew Media Group Inc.; and (2) Directing the Receiver to Facilitate the Retainer of Counsel)**

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