



Court File No.:

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Toronto

**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 Registrar

Address of court office Superior Court of Justice  
330 University Ave.  
Toronto, ON M5G 1R7

TO: **KEW Media Group Inc.**  
672 Dupont Street, Suite 400  
Toronto, Ontario M6G 1Z6

c/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.

## **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;

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- (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;

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- (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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**ONTARIO**  
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

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