

**CITATION:** Kan v. Kew Media Group Inc., 2023 ONSC 6224  
**COURT FILE NO.:** CV-20-00644200-00CP  
**DATE:** 20231102

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** ALEX KAN and STUART RATH, Plaintiffs

– and –

KEW MEDIA GROUP INC., STEVEN SILVER, and GEOFFREY WEBB,  
Defendants

**BEFORE:** E.M. Morgan J.

**COUNSEL:** *Paul Guy, Garth Myers, Jonathan Foreman, and Sarah Bowden*, for the Plaintiffs

*Mark Dunn*, for the Defendants, Steven Silver and Kew Media Group Inc.

No one appearing for the Defendant, Geoffrey Webb

**HEARD:** November 2, 2023

**LEAVE TO PROCEED AND CERTIFICATION**

**Background**

[1] In this proposed class action, the Plaintiffs advance a statutory claim for misrepresentation under Part XXIII.1 of the *Securities Act*, RSO 1990, c. S.5 (“OSA”), as well as a common law claim for negligent misrepresentation. The action is brought against Kew Media Group Inc. (“Kew”) and two individual Defendants, Steven Silver the former CEO and Geoffrey Webb the former CFO.

[2] The Plaintiffs move against Kew for leave to proceed under section 138.3 of the OSA as well as certification as a class action under section 5(1) of the *Class Proceedings Act, 1992*, SO 1992, c. 6 (“CPA”).

[3] Kew has consented to the orders sought here. Similar orders were granted in September 2021, also on consent, as against the two individual Defendants. Neither of the individual Defendants opposes the orders sought here against Kew.

**Leave to proceed**

[4] Kew is a reporting issuer in Ontario. Its common shares traded on the Toronto Stock Exchange.

[5] The Plaintiffs allege that Kew released documents containing certain misrepresentations. The alleged misrepresentations concern:

- (a) Kew's working capital;
- (b) Kew's compliance with the covenants in its credit facility;
- (c) the sufficiency of Kew's financial resources;
- (d) Kew's compliance with international financial reporting standards and international accounting standards;
- (e) the existence of a material uncertainty as to Kew's ability to continue as a going concern;
- (f) the design, evaluation and effectiveness of Kew's disclosure controls and procedures and internal controls over financial reporting; and
- (g) compliance with Kew's Code of Business Conduct and Ethics.

[6] The Plaintiffs allege that there were corrective disclosures of these misrepresentations in December 2019 and January 2020. Following these alleged corrective disclosures, the value of Kew's shares fell precipitously.

[7] The Plaintiffs and the class members acquired Kew's shares after the impugned documents were released and before the misrepresentations contained in them were publicly corrected. The record establishes that the Plaintiffs assert the right of action under Part XXIII.1 of the OSA in good faith, and that there is a reasonable possibility that the claim under Part XXIII.1 will be resolved in their favour.

[8] The Plaintiffs also seek a parallel order for leave to proceed, if necessary, under the securities legislation of other provinces in Canada. The securities legislation in those provinces contain provisions that are substantially the same as those contained in Part XXIII.1 of the OSA.

[9] Given these facts and the consent of Kew, the record supports the granting of leave under section 138.3 of the OSA and, if necessary for the purposes of this action, similar legislation elsewhere in Canada.

### **Certification**

[10] The grounds for certification under section 5(1) of the CPA are well known. They all appear to be met by the Plaintiff's claim against Kew. More specifically:

- (a) the Class is objectively defined, is not unnecessarily broad, and shows a rational relationship between the Class and the common issues. The common issues as against Kew, which are to be combined in a common issues trial with those already certified with respect to the two individual Defendants, are as follows:

All persons or entities who acquired securities issued by in the secondary market between March 28, 2017 and January 16, 2020 inclusive (the “Class Period”) other than Kew and its directors and officers (the “Class” and the “Class Members”).

(b) the claims alleged in the Statement of Claim raise common issues, the determination of which will finally dispose of or substantially move the litigation forward. The proposed common issues are:

**A. Part XXIII.1 of the OSA and other provinces’ similar securities legislation:**

1. Did all or any of the representations (the “Representations”) made in the impugned documents (the “Impugned Documents”) as listed in Schedule A to the order constitute misrepresentations within the meaning of s. 138.3 of the Ontario *Securities Act*?

2. Are the certifications signed by each of the Individual Defendants for the filing of Kew’s interim and annual financial statements non-core documents? If they are non-core documents, did Kew:

(i) know at the time that these Impugned Documents were released, that these Impugned Documents contained misrepresentations;

(ii) at or before the time that these Impugned Documents were released, deliberately avoid acquiring knowledge that these Impugned Documents contained Misrepresentations; or

(iii) through action or failure to act, guilty of gross misconduct in connection with the release of these Impugned Documents?

3. In respect of s. 138.4(6) and (7) of the *OSA*, did Kew:

(i) conduct or cause to be conducted a reasonable investigation; or

(ii) have no reasonable grounds, at the time the Impugned Documents were released, for believing that the Impugned Documents contained misrepresentations?

4. Is Kew liable to the Class?

5. In respect of s. 138.7(2), did Kew make the misrepresentations while knowing that they were misrepresentations?

6. Does Kew have any other defences available to any of the Plaintiffs’ claims?

7. If Kew is liable to the Class pursuant to s. 138.3 of the *OSA*, what is the appropriate method of calculating the damages?

8. If damages can be assessed on an aggregate basis for the Class or any group of them pursuant to sections 24 and 25 of the CPA or otherwise in respect of Part XXIII.1 of the OSA, what is the quantum of damages to be assessed in favour of the Class or any group of them?

9. What limits on damages, if any, apply to Kew pursuant to section 138.1 and 138.7 of the OSA?

10. What is the proportionate liability for Kew under s. 138.6 of the OSA?

**B. Common law claims of negligent misrepresentation:**

11. Did Kew owe a duty of care to the Class Members for the Representations in the Impugned Documents?

12. Did Kew make any of the Representations in the Impugned Documents?

13. Were any of the Representations in the Impugned Documents untrue, inaccurate or misleading?

14. Did Kew make the Representations negligently?

15. Did Kew intend that Class Members rely upon the Representations made?

**C. Punitive damages:**

16. Is Kew liable for punitive damages?

17. If Kew is liable for punitive damages, what is the quantum of punitive damages for which it is liable?

**D. Costs of administration and distribution:**

18. Should Kew pay the cost of administering and distributing recovery to the Class?

(c) in light of the access to justice concerns and with regard to achieving judicial economy, a class proceeding is the preferable procedure for resolving these claims. A class proceeding in this case would constitute the fairest, most efficient and manageable means of adjudicating the common issues;

(d) the proposed representative Plaintiffs appear able to fairly and adequately represent the interests of the Class. They do not appear to have any conflict with the class members in

relation to the common issues. They have produced a workable litigation plan for advancing the claims on behalf of the Class up to the common issues trial and afterwards.

[11] Plaintiffs also seek an order that Class Members shall be notified that this proceeding has been certified as a class proceeding, as follows:

(a) by posting a copy of the notice attached hereto as Schedule “A” to the within Notice of Motion on the Kalloghlian Myers LLP and Foreman & Company websites;

(b) by sending copies of the notice to all individuals and entities who have contacted class counsel;

(c) by sending a copy of the notice to anyone who requests it;

(d) by sending a copy of the notice to the Service List for Kew’s insolvency proceeding currently pending before the Ontario Superior Court of Justice, Commercial List; and

(e) by issuing the notice as a press release.

### **Disposition**

[12] Leave to Proceed under section 138.3 of the OSA and Certification under section 5(1) of the CPA are hereby granted.

[13] The Class is defined as in paragraph 9(a) above. The common issues are as set out in paragraph 9(b) above. Notice of these proceedings shall be given to Class Members as set out in paragraph 10 above.

[14] Plaintiffs’ counsel are appointed as class counsel.

[15] There will be Orders to go as submitted by Plaintiffs’ counsel.

**Date:** November 2, 2023

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**Morgan J.**