

**IN THE MATTER OF  
MITHAQ CANADA INC.**

- and -

**IN THE MATTER OF  
AIMIA INC.**

- and -

**IN THE MATTER OF  
A HEARING AND REVIEW OF A DECISION OF THE TORONTO STOCK  
EXCHANGE**

**CROSS APPLICATION OF AIMIA INC.**

(In connection with a transactional proceeding under Rule 16, and a hearing and review of a decision of the Toronto Stock Exchange, and under Sections 8, 21.7, 104 and 127 of the *Securities Act*, RSO 1990, c.S.5)

**NOTICE OF CROSS APPLICATION**

**THE CROSS APPLICATION IS FOR:**

- (a) The Applicant Aimia Inc. (**Aimia** or the **Company**), requests that the Capital Markets Tribunal (**Tribunal**) grant the following relief:
  - (i) An order pursuant to section 127 of the *Securities Act* (**Act**) that the exemption created by subsection 2.2(3) of National Instrument 62-104 *Take-Over Bids and Issuer Bids* (**NI 62-104**) to the restrictions on purchases during a take-over bid as set out in subsection 2.2(1) of NI 62-104, shall not apply to the Respondent, Mithaq Canada Inc.; and

- (ii) Scheduling directions for a hearing date on or about January 16, 2024, being after the trial of the Action, defined below, but no later than January 18, 2024 when the Offer will expire (**January 2024 Hearing Date**);
- (b) Such further and other relief as counsel may advise and the Tribunal may deem in the public interest.

## **THE GROUNDS FOR THE CROSS APPLICATION ARE:**

### **A. BACKGROUND**

#### **The parties**

- (a) Aimia is a corporation existing under the *Canada Business Corporations Act* and has its head office in Toronto, Ontario. Its shares are listed for trading on the Toronto Stock Exchange under the symbol “AIM”. Aimia is a holding company with a focus on long-term investments in public and private companies on a global basis;
- (b) Mithaq Canada Inc. is a wholly owned subsidiary of Mithaq Capital SPC (together, **Mithaq**). Mithaq is a company formed in the Cayman Islands, ultimately owned by a Saudi Arabian family office headquartered in Riyadh. Mithaq is the largest shareholder of Aimia;

#### **The Court Action and Application**

- (c) On April 18, 2023, Aimia held its annual meeting of shareholders (**AGM**);
- (d) Preceding the AGM, Mithaq engaged in an “against campaign”, urging Aimia’s shareholders to vote against the re-election of the Aimia board. Its campaign was unsuccessful;

- (e) Mithaq subsequently commenced an application in the Ontario Superior Court, seeking a review of the proxies and ballots from the AGM (**Application**);
- (f) In May of 2023, Aimia amended an action it had commenced before the Ontario Superior Court to name Mithaq as a defendant. Aimia alleged, among other things, that Mithaq had acquired outstanding voting or equity securities of Aimia in violation of the take-over bid requirements of applicable securities laws (the **Action**);
- (g) The Action and Application are scheduled to be heard together before the Ontario Superior Court (Commercial List) between January 8 and 11, 2024;

#### **Mithaq commences an unsolicited take-over bid**

- (h) On October 5, 2023 Mithaq commenced a take-over bid for all the issued and outstanding common shares of Aimia (the **Offer**);
- (i) The Offer is scheduled to close on January 18, 2024 – approximately one week after the conclusion of the trial of Aimia’s Action and Mithaq’s Application;
- (j) The conditions of the Offer, which permit Mithaq to withdraw the Offer at any time, are extensive – there are 20 conditions and 27 sub-conditions many of which are unreasonable and unprecedented, including: that “all litigation relating to Aimia...involving [Mithaq] including the [Action, defined above] shall have been resolved on terms satisfactory to [Mithaq], in its sole discretion”;
- (k) The Offer also includes the unusual condition that Mithaq be provided access to non-public information concerning Aimia, and that Mithaq “shall be satisfied upon completion of its review of such information that such information does not contain

any facts or other information that might make it inadvisable for the Offeror to proceed with the Offer...”;

### **Aimia’s amended claim**

- (l) After the announcement of the Offer, Aimia amended its statement of claim in the Action to request relief in respect of the Offer. Aimia alleges, among other things, that the Offer is improper, as Mithaq was required to commence a take-over bid at an earlier date and at a higher price;
- (m) At a proceeding in connection with the Action, Mithaq took the position that the Court lacks the jurisdiction to adjudicate the relief sought by Aimia in respect of the Offer. The issue of the Court’s jurisdiction will be resolved at the trial in January;

### **The private placement**

- (n) On October 13, 2023, Aimia announced a private placement of common shares (the **Private Placement**);
- (o) Mithaq commenced an application on October 17 before this Tribunal seeking a cease trade of the Private Placement. Mithaq alleges that the Private Placement is an improper defensive measure in the context of the Offer;
- (p) Mithaq’s application is scheduled to be heard before this Tribunal on December 12 and 13, 2023;

### **The 5% exemption**

- (q) Subsection 2.2(1) of NI 62-104 – “the 5% exemption” – prohibits an offeror from acquiring target company shares during a take-over bid except where certain

conditions are met (which conditions are set out in subsection 2.2(3) of NI 62-104). When these conditions are met, an offeror may acquire a maximum of 5% of the outstanding target securities;

- (r) Mithaq has reserved its right to acquire beneficial ownership of Company shares prior to the expiry of its Offer in accordance with these conditions;
- (s) Aimia's shareholder rights plan (the **Rights Plan**), adopted on June 7, 2023, effectively prohibits Mithaq from acquiring Aimia shares;
- (t) The Rights Plan does not, however, impede or otherwise impact Permitted Bids, as defined in the Rights Plan;
- (u) The Rights Plan is scheduled to terminate on December 7, 2023;
- (v) Aimia has requested that Mithaq undertake not to avail itself of the 5% exemption during the one week period between the termination of the Rights Plan and the Tribunal hearing. Mithaq refused;
- (w) Aimia is considering the adoption of a replacement rights plan that expressly provides that the Mithaq Bid is a Permitted Bid (as defined in the replacement rights plan) to ensure the Offeror is restricted in its ability to buy additional common shares of the Company prior to the expiry of its Offer;

## **B. GROUNDS FOR RELIEF SOUGHT**

### **Aimia has standing to bring this Cross Application**

- (a) Aimia, as the target of Mithaq's purported Offer and the respondent to Mithaq's application before this Tribunal, has standing under section 127 of the Act to bring this cross-application to deny Mithaq the benefit of the exemptions permitting

purchases during a take-over bid, which would otherwise be permitted under subsection 2.2 of NI 62-104;

### **Order Sought**

- (b) Given the number of conditions attached to the Offer, and the nature of certain of those conditions – which are unreasonable and unprecedented – the Offer is not one upon which Aimia shareholders can place reliance. Mithaq should not be able to use its highly conditional Offer as a shield to increase its ownership position in Aimia from 30.96% to almost 36%;
- (c) The order sought is in the public interest and furthers the objectives of the take-over bid regime, including that Mithaq not be able to increase its shareholdings in Aimia as part of that regime in the face of an Offer that is not *bona fide*;
- (d) The Tribunal should exercise its discretion in the public interest to issue an order in the circumstances;

### **January 2024 Hearing Date**

- (e) The trial of the Action is currently scheduled to commence on January 8, 2024;
- (f) The Offer remains open for acceptance until 11:59 pm (PST) on January 18, 2024;
- (g) Mithaq has put at issue whether the Court – as opposed to this Tribunal – has the jurisdiction to adjudicate the *bona fides* of the Offer, per Mithaq’s arguments on the November Motion: “Aimia is ... seeking a remedy in a forum not contemplated by the legislation...”;

- (h) The Court may determine that it does not have jurisdiction to grant a remedy in respect of the Offer or that this Tribunal is the more appropriate forum to grant relief in respect of the Offer;
- (i) A placeholder date before this Tribunal is required, on or about January 16, 2024 (after close of trial in the Action but no later than January 18, 2024 being the expiry date of the Offer), for a cease trade hearing in the event the Court makes such a determination.

**C. OTHER GROUNDS:**

- (a) Rules 1 and 16 of the *Capital Markets Tribunal Rules of Procedure*;
- (b) Section 127 of the Act, including subsection 127(1) paragraph 3; and
- (c) Such further and other grounds as the lawyers may advise.

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

- (a) The Affidavit of Gianni Bianchi, sworn November 16, 2023; and
- (b) Such further and other evidence as counsel may advise and the Tribunal may permit.

November 17, 2023

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