

**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**

**NOTICE OF MOTION
OF MITHAQ CANADA INC.**

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

The Applicant/Moving Party, Mithaq Canada Inc. (“**Mithaq**”) will make a motion to the Capital Markets Tribunal (the “**Tribunal**”) on either November 23, 2023 or as soon as reasonably is practicable.

PROPOSED METHOD OF HEARING: The motion is requested to be heard *via* videoconference.

A. ORDER SOUGHT

The Moving Party, Mithaq, requests that the Tribunal make the following order(s):

1. an order consolidating Mithaq’s Application (as defined below) with Aimia’s Cross Application (as defined below) into one Application (the “**Consolidated Application**”);

2. in the alternative, an order that Mithaq's Application and Aimia's Cross-Application be heard together;
3. an order that any cease trade order or any other order that Aimia seeks from the Tribunal in connection with the Offer be considered at the hearing of Mithaq's Application on December 12 and 13, 2023;
4. costs of this motion; and
5. such further and other relief the Tribunal may seem just.

B. GROUNDS

THE GROUNDS FOR THE MOTION ARE

Background

6. Mithaq Capital SPC ("Mithaq Capital"), the parent of Mithaq, is the largest shareholder of Aimia Inc ("**Aimia**"). On May 25, 2023, Mithaq Capital owned or controlled 30.96% of the common shares of Aimia ("**Aimia Shares**"). Following the Private Placement, Mithaq Capital's ownership has been diluted to 27.53%. Mithaq Capital's share acquisitions and potential plans in respect of its Aimia shareholdings have been disclosed in accordance with Ontario securities law;
7. in response to Mithaq Capital increasing its stake from 19.9% to 30.96%, on June 7, 2023, Aimia's Board adopted a shareholder rights plan (the "**Shareholder Rights Plan**" or "**SRP**");
8. as announced on October 3, 2023, on October 5, 2023, Mithaq made an all-cash offer for all Aimia Shares at a price of \$3.66 per share (the "**Offer**");

9. the Offer is set to expire on January 18, 2024 (being 105 days after the Offer was commenced in accordance with Ontario securities law);
10. on October 13, 2023, Aimia announced a private placement of up to 10,475,000 Aimia Shares and 10,475,000 Aimia Share purchase warrants (the “**Warrants**”) to a group of undisclosed investors (the “**Private Placement**”);
11. on October 19, 2023 an emergency hearing before the Tribunal was held to address Mithaq’s concerns about the Private Placement and other defensive tactics and the Tribunal issued an Order on October 20, 2023 accepting a series of undertakings by Aimia to unwind the Private Placement should Mithaq’s Application be successful;
12. on October 20, 2023 the Private Placement closed;

Litigation between Aimia and Mithaq Capital

13. following Mithaq Capital’s vote “no” campaign in connection with Aimia’s April 18, 2023 annual general meeting, Aimia expanded litigation it originally commenced against a former insider C. Mittleman to add Mithaq Capital (and another shareholder Milkwood Capital (UK) Ltd.) to its claim;
14. Aimia’s expanded litigation alleges that C. Mittleman, Mithaq Capital, and Milkwood were in an undisclosed joint actor relationship, took steps as undisclosed joint actors (such as coordinating purchases of Aimia Shares and crossing the mandatory takeover bid threshold in Q1 2023), made use of confidential Aimia information, and discussed Mithaq Capital’s intentions for its own Aimia investments which Aimia alleges is material non-public information about Aimia;

15. Aimia's allegations against Mithaq Capital also include allegations relating to the Offer, including an allegation that a formal valuation was required for the Offer (the "Formal Valuation Allegation") and that Mithaq Capital and its alleged joint actors crossed the mandatory takeover bid threshold in Q1 2023 and at that time a higher price as compared to the Offer price of \$3.66 would have been required for a takeover bid (the "Higher Price Allegation");
16. Aimia requests orders under section 105 of the *Securities Act* to prohibit Mithaq Capital from voting Aimia shares and to require Mithaq Capital to sell Aimia shares that Mithaq Capital allegedly acquired in breach of Ontario securities law yet Aimia seeks no relief from the Court in connection with the Formal Valuation Allegation or the Higher Price Allegation;
17. Aimia's litigation against Mithaq Capital and others scheduled for trial the week of January 8 to 11, 2024 in the Ontario Superior Court;
18. although Aimia did not allege that the Offer was deficient for failing to include a formal valuation or for not being higher priced (in accordance with the Higher Price Allegation) in the Directors' Circular, Aimia did rely on its litigation against Mithaq Capital, its allegations about the Offer, and Mithaq Capital's alleged "suspected unlawful conduct" and "unlawful avoidance" of the mandatory takeover bid requirements in its submissions to the TSX in connection with the Private Placement;
19. the TSX failed to appropriately assess Aimia's allegations against Mithaq Capital and the Offer, as well as, Aimia's motives for its litigation in approving the Private Placement without requiring a shareholder vote;

The Application and Cross Application

20. on October 17, 2023 Mithaq commenced an Application for a Transactional Proceeding before the Tribunal seeking relief related to Aimia's improper defensive tactics, including its Shareholder Rights Plan and the Private Placement (the "**Application**", as it may be amended);
21. the Application is scheduled to be heard before the Capital Markets Tribunal on December 12 and 13, 2023;
22. on October 20, 2023, Aimia notified Mithaq that it did not "current plan" [sic] to bring its own application before the Tribunal and that [i]f that changes, we will let you know very soon";
23. a month later, without any other notice of its change in plans, on November 17, 2023, Aimia commenced a Cross-Application (the "**Cross-Application**");
24. in its Cross-Application, in anticipation of the expiry of its SRP on December 7, 2023 (since it will not obtain shareholder approval for the SRP), Aimia seeks an order denying Mithaq Capital the benefit of exemptions under subsection 2.2(3) of National Instrument 62-104, which would permit Mithaq Capital to purchase Aimia Shares and reverse the dilution in its investment caused by the Private Placement;
25. Aimia also seeks in its Cross-Application a cease trade order in connection with the Offer;
26. Aimia's requested cease trade order is presumably, although it is not clear from Aimia's Notice of Motion, sought (i) on the basis of the Higher Price Allegation and the Formal Valuation Allegation and (ii) on the basis that the Court will not grant

Aimia any relief in connection with those allegations at the trial the week of January 8 to 11, 2024 either because no relief has been requested by Aimia, because relief relating to those allegations is available from the Tribunal under section 104 of the *Securities Act* or because the allegations fail to be made out;

27. Aimia's Notice of Cross-Application incorrectly states that "Mithaq took the position that the Court lacks the jurisdiction to adjudicate the relief sought by Aimia in respect of the Offer" (no such relief is sought by Aimia and, in any event, Mithaq Capital's submission on this point to the Court was that Aimia may not be seeking relief from the Court relating to the Formal Valuation Allegation and the Higher Price Allegation because orders requiring Mithaq to address those alleged deficiencies are within the Tribunal's jurisdiction to award under section 104 of the *Securities Act*);

28. in light of the absence of any relief sought from the Court by Aimia relating to the Formal Valuation Allegation or the Higher Price Allegation, Aimia's Notice of Cross-Application also incorrectly states that "[t]he issue of the Court's jurisdiction will be resolved at the trial in January";

29. Aimia proposes that the Cross-Application be heard on or about January 16, 2024, two days before the Offer is set to expire;

The Cross-Application is an abuse of process

The Cross-Application is tactical to forum shop and delay the Offer from closing

30. until November 17, 2023, when the Cross-Application was brought, Aimia took no steps to raise the alleged deficiencies with the Offer with the Tribunal despite the Tribunal's applicable (and now admittedly relevant) jurisdiction under section 104 of the *Securities Act*;

31. Aimia has taken no steps to address the Offer's alleged deficiencies with the Tribunal yet it has raised those deficiencies with the TSX and continues to publicly advance these allegations in disclosure and other shareholder communications such as a letter from its CEO on October 23, 2023 in an improper attempt to discredit the Offeror and the Offer;
32. Aimia's requested timing for the hearing of the Cross-Application on January 16, 2024 is an improper request to relitigate facts and law that will be before the Tribunal at the December 12 to 13, 2023 hearing, in particular, in determining Mithaq's requested relief relating to the TSX Decision and the alternative order that the Tribunal order a shareholder vote in connection with the Private Placement;
33. Aimia's requested timing for the hearing of the Cross-Application on January 16, 2024 is also an improper attempt by Aimia to relitigate facts and law that will be before the Court at the January 8 to 11, 2024 trial in an attempt to "re-do" or obtain a "second kick at the can" if the Court declines to grant Aimia any relief relating to the Higher Price Allegation and/or the Formal Valuation Allegation (which, as noted above, are currently not advanced with any requested relief by Aimia in its Court proceeding);
34. the clear inference from the above is that Aimia is seeking to forum shop and to do so in a manner that delays the Tribunal from considering, and finally disposing of, the Higher Price Allegation and Formal Valuation Allegation with a view to delaying the closing of the Offer;

Delaying the Tribunal's consideration of the Offer will be prejudicial

35. section 104 of the *Securities Act* provides the Tribunal with jurisdiction to consider deficiencies with takeover bids while the bids are “live” with a view to making orders for compliance with Ontario securities law;
36. the Tribunal’s jurisdiction and exercise of discretion under section 104 of the *Securities Act* requires it to consider the public interest, the efficient operation of capital markets, and all shareholders whose interests might be affected by a live takeover bid;
37. Aimia’s Cross-Application concedes that the Tribunal is the proper forum for resolution of any relief relating to the Higher Price Allegation or the Formal Valuation Allegation yet Aimia seeks to have the Tribunal delay such consideration until two days before the Offer is set to expire on January 18, 2024
38. Aimia’s request is made to permit the trial to proceed first on January 8 to 11, 2024 but no relief from the Court is sought in connection with the Higher Price Allegation or the Formal Valuation Allegation (*i.e.*, the Court is not asked to order that the Offer be varied or amended in any way nor is an order seeking a formal valuation sought from the Court);
39. delaying the Tribunal’s consideration of the Higher Price Allegation and the Formal Valuation Allegation to January 16, 2024 is prejudicial and done for no reason other than tactical delay to prevent the Offer from closing on January 18, 2024;
40. if the Tribunal orders relief in the Cross-Application in the form of an order requiring an amendment or variation to the Offer, the Offeror will need to extend the expiry

time of the Offer beyond January 18, 2024 and thus the timeline for the Offer will be delayed causing prejudice to Mithaq, Mithaq Capital, Aimia shareholders, and the efficient functioning of the Capital Markets;

41. having the Cross-Application heard on January 16, 2024 will have the effect of frustrating the Offer and prejudicing shareholder rights thus undermining the policy objectives of the takeover bid regime to facilitate shareholder choice;

The Application and Cross-Application should be consolidated

42. the Application and Cross-Application raise numerous questions of law and fact;

43. the relief claimed in both Applications arises out of the same series of transactions or occurrences;

44. the same parties are named in both Applications;

45. the Applications can effectively be heard on the dates currently set by the Tribunal of December 12 and 13, 2023;

46. consolidation of the Applications will not add complexity or time to the proceeding;

47. consolidation will save all parties time and expense through the avoidance of duplicative proceedings;

48. section 26 of the *Securities Commission Act*, 2021, S.O. 2021, c. 8, Sched. 9;

49. sections 104 and 105 of the *Securities Act*, R.S.O. 1990, c. S.5; and

50. such further and other grounds as the lawyers may advise and this Capital Markets Tribunal may permit.

C. EVIDENCE

The Moving Party, Mithaq, intends to rely on the following evidence for the motion:

51. Mithaq's Application dated October 17, 2023, as amended;
52. Aimia's Cross-Application dated November 17, 2023
53. the evidence filed in respect of Mithaq's Application and Aimia's Cross-Application;
and
54. such further and other evidence as the lawyers may advise and the Tribunal may
permit.

November 20, 2023

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

**CAPITAL MARKETS
TRIBUNAL**

Proceeding commenced at TORONTO

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