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

FURTHER AMENDED APPLICATION OF
MITHAQ CANADA 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)

A. ORDER SOUGHT

The Applicant, Mithaq Canada Inc. (the "Offeror"), requests that the Tribunal make the following order(s):

1. **Orders relating to the Shareholder Rights Plan (defined below) as follows:**

   (a) An order pursuant to section 127 of the *Securities Act* cease trading all securities issued, or that may be issued, under the Shareholder Rights Plan (defined below) and under any replacement shareholder rights plan that may be adopted by the board of directors of Aimia (the "Board").

2. **Orders relating to the Private Placement (defined below) as follows:**

(a) An order setting aside any decision of the Toronto Stock Exchange that does not require Aimia to obtain shareholder approval of the Private Placement (the "TSX Decision") pursuant to section 21.7 of the *Securities Act*;

(b) A stay of any TSX Decision pursuant to sections 8(4) and 21.7(2) of the *Securities Act* until such time as the Ontario Securities Commission (the "Commission") determines the issues herein;

(c) An order pursuant to sections 8(3), 104 and 127 of the *Securities Act* directing that Aimia obtain shareholder approval of the Private Placement with the following four conditions:

(i) the Board delay the closing of the Private Placement until after shareholder approval is obtained at the required shareholder meeting,

(ii) the Board obtain shareholder approval of the Private Placement by asking shareholders either to ratify the Private Placement or to instruct the Board to reverse the Private Placement,

(iii) only uninterested shareholders in the Private Placement, namely shareholders who are not proposed investors in the Private Placement nor any voting rights obtained through the Private Placement, be permitted to vote at the required shareholder meeting, and

(iv) that if the shareholders vote to instruct the Board to reverse the Private Placement that the Board implement those instructions by taking all necessary steps to reverse the Private Placement;

(d) An order permanently cease trading the Private Placement pursuant to section 127(1)2 of the *Securities Act*; and

(e) A temporary cease trade order pursuant to section 127(5)2 of the *Securities Act*, effective immediately, cease trading the Private Placement and restraining the exercise of any voting rights acquired thereunder until such time as the Commission determines the issues herein, and in the alternative, an order that any shares issued in the Private Placement not be included in the number of outstanding shares for the purpose of the Offeror satisfying the Statutory Minimum Tender Condition (as defined below).

3. **Orders Relating to the Offer:**

(a) In reliance on section 104 of the *Securities Act* and NI 62-104, an order that any Aimia Shares issued in the Private Placement (including common shares issuable on the exercise of warrants or pre-emptive rights issued in the Private Placement) not be included in the number of outstanding shares for the purpose of the Offeror satisfying the Statutory Minimum Tender Condition (as defined below);

(b) An order that any Aimia Shares issued in the Private Placement (including common shares issuable on the exercise of warrants or pre-emptive rights issued in the Private Placement) not be included in the number of outstanding shares for the purpose of the Offeror satisfying any minority approval requirement under MI 61-101 in connection with a second step business combination that satisfies the requirements of section 8.2 of MI 61-101 (being those requirements that must be satisfied in order for securities acquired under a bid to be included as votes in

favour of a subsequent business combination in determining whether minority approval has been obtained);

(c) An order pursuant to section 104(2)(c) that the Offeror be permitted to rely on the exemption in section 2.2(3) of National Instrument 62-104 Take Over Bids and Issuer Bids ("NI 62-104") permitting it to purchase up to 5% of the outstanding Aimia Shares while the Offer is outstanding; and

(d) Assuming that the conditions to the Offer, statutory and otherwise, are satisfied or waived, an order under sections 104 (d) and (e) of the *Securities Act* requiring Aimia and its directors to comply with NI 62-104 and restraining them from non-compliance by preventing Mithaq from taking up and paying for shares under the Offer as required by NI 61-204, s. 2.32.1.

4. Orders related to the Application:

(a) An order for an expedited hearing;

(b) An order requiring the TSX to produce the written reasons for the TSX Decision, if any, and the TSX Decision record no later than November 13, 2023, the agreed upon date for such production; and

(c) An order consolidating the Application with Aimia's November 17, 2023 Cross-Application and dismissing the Cross-Application.

5. Such further and other relief as counsel may advise and the Commission may deem appropriate.

B. GROUNDS

The grounds for the request are:

Overview

6. This Application arises in the context of three defensive tactics that the Board has adopted in response to Mithaq Canada Inc.'s unsolicited take-over bid of Aimia, announced on October 5, 2023 (defined below as the "Offer"), and in response to Mithaq's exercise of its fundamental rights as a shareholder seeking review of the narrow margins of the Board's re-election at Aimia's annual general meeting on April 18, 2023 (the "Meeting"):

(a) Aimia's continuance of meritless litigation brought against Mithaq in the Ontario Superior Court seeking remedies designed to entrench the Board's position, deny Mithaq a fundamental shareholder right to exercise corporate oversight powers, and impact the ability of shareholders to respond to the Offer;

(b) Aimia's adoption (without shareholder approval) of the Shareholder Rights Plan (defined below) that no longer serves any purpose in light of the Private Placement, and in any event, is more restrictive than the applicable statutory requirements with the result that neither the Offer (nor any other unsolicited take-over bid) will be likely to succeed; and

(c) Aimia's recent announcement of the Private Placement (again without shareholder approval), with a target closing date of October 19, 2023, will have a material dilutive effect on existing shareholders and will effectively prevent the Offer (or any other value enhancing transaction, including at a higher price than

the Offer, as a result of the pricing of the Warrants (defined below)) from succeeding.

These three defensive tactics adopted by the Board are designed to frustrate an open and even-handed take-over bid process and to deny shareholders the opportunity to respond to the Offer (or any other take-over bid or value enhancing transaction) while entrenching a Board that is subject to an ongoing review of their recent election. None of the defensive tactics have any *bona fide* corporate objectives. They were not designed to maximize value to shareholders "in a genuine attempt to obtain a better bid." In the circumstances, the Commission's public interest mandate is engaged. The Commission ought to exercise its discretion to intervene to remedy the harmful consequences to all Aimia shareholders from the defensive measures adopted and to preserve the integrity of Ontario's capital markets.

Background

7. Mithaq Canada Inc. (the "Offeror") is a wholly-owned subsidiary of Mithaq Capital SPC ("Mithaq"). Mithaq is the largest shareholder of Aimia Inc. As of May 25, 2023, Mithaq owns or controls 30.96% of the common shares of Aimia ("Aimia Shares"). Its share acquisitions and potential plans in respect of its Aimia shareholdings have been disclosed in accordance with Ontario securities law.

8. On February 21, 2023, Mithaq disclosed that it owned or controlled 19.99% of Aimia Shares.

9. On March 3, 2023, Aimia filed its notification of its 2023 Annual General Meeting for a record date of March 6, 2023 (the "Meeting"), effectively providing no notice to shareholders.

Although Aimia was permitted to abridge the requirement that notification of meeting and record dates be sent 25 days before the record date, Aimia failed to file the abridgement certificate as required under Ontario securities law contrary to the requirements of section 2.20 of National Instrument 54-101 *Communications with Beneficial Owners of Securities of a Reporting Issuer*.

10. Aimia called the Meeting for April 18, 2023, weeks earlier than Aimia had historically held its annual general meetings.

11. Leading up to the Meeting, Mithaq and other shareholders, including Milkwood Capital (UK) Ltd. ("Milkwood") and Christopher Mittleman, communicated about their investments in Aimia and concerns they had with the Board. The law encourages such communications as part of the regime allowing shareholders to oversee and hold management accountable.

12. Mithaq and other Aimia shareholders explored whether to nominate an alternative slate of directors in connection with the Meeting. No agreement was reached to pursue a dissident slate and no joint actor relationships, as defined in securities law, and requiring disclosure to the market, were formed.

13. On April 6, 2023, Mithaq issued a press release disclosing that it intended to vote against the re-election of the Aimia Board of Directors (the "Board"). Mithaq encouraged other shareholders to vote "no".

14. Mithaq promoted the vote "no" campaign before the Meeting. In doing so, it cited Mithaq's concerns that Aimia was plagued by mismanagement and poor governance and that the Board was not suited to act in the best interests of Aimia and its stakeholders. In addition to problematic capital allocation decisions and acquisitions, Mithaq was concerned about Aimia's

disappointing performance, misaligned investment strategies and misguided focus on private markets, the low share ownership of the Board (in the aggregate, less than 3% of the Aimia Shares), and unfair compensation structure.

15. Aimia responded by issuing numerous press releases and filing a complaint with the Commission alleging that Mithaq had failed to disclose that it was acting jointly or in concert with other Aimia shareholders, including Milkwood and Mittleman. Mithaq denied (and continues to deny) the undisclosed joint actor allegations and responded to the complaint on April 14, 2023.

16. In advance of the Meeting, Mithaq requested that an independent chair, not affiliated with Aimia and whose position was not at stake in the Meeting, chair the Meeting to ensure impartiality. Aimia did not respond.

17. The Meeting went ahead on April 18, 2023. Mithaq's procedural fairness concerns were not addressed. The Meeting was chaired by Lehmann, a director and member of Aimia senior management. Mr. Lehmann was not an independent chair: a "no" vote at the Meeting would have led to him resigning as a director and a new set of directors could have removed him from senior management.

18. Mithaq voted against the re-election of the Board at the Meeting.

19. On April 19, 2023, Aimia reported that the chair of the Board was not re-elected at the Meeting and none of the other director nominees received greater than 52.41% of the votes cast at the Meeting in their favour.

20. In light of the closeness of the results and the lack of independence governing the vote at the Meeting, Mithaq requested the ability to review the proxies voted in connection with the Meeting. Aimia repeatedly rejected that request primarily on the basis of shareholder privacy.

21. On April 27, 2023, Mithaq filed an Application in the Ontario Superior Court seeking various relief to facilitate its requested proxy review. Notwithstanding its shareholder privacy objection to the proxy review, Aimia produced certain proxy records to Mithaq without taking any steps to redact or protect any shareholder personal information.

22. On the basis of a preliminary review of the proxy records produced by Aimia, Mithaq has concerns that the Board improperly excluded proxies to manipulate the results of the Meeting in its favour.

23. In response to Mithaq's attempts to conduct the proxy review, Aimia commenced litigation in the Ontario Superior Court to prevent Mithaq from, among other things, requisitioning a special shareholder meeting, voting its Aimia Shares, and acquiring additional Aimia Shares.

24. Since the Offer, Aimia has proposed additional grounds of relief and raised additional allegations in an amended pleading, which Mithaq has not consented to and for which a Court order will be required before the amendments can be made.

25. The amended allegations repeat the allegation that leading up to the Meeting Mithaq was in an undisclosed joint actor relationship with Milkwood and Mittleman. However, there are no allegations that Mithaq is currently in an undisclosed joint actor relationship nor are there any allegations that the Offer was made as part of any undisclosed joint actorship.

26. On May 25, 2023, Mithaq disclosed its ownership of 30.96% of Aimia Shares. At the same time, Mithaq disclosed that it was contemplating a number of alternatives with respect to its investment in Aimia (the "May 25 Early Warning Report"). This was a continuation of its disclosure made in its February 3, 2023 Early Warning Report, in which Mithaq disclosed that it may explore, "alternatives with respect to its investment in Aimia, including, but not limited to, developing plans or intentions or taking actions itself or with joint actors".

27. In light of the above steps taken by the Board and Mithaq's related concerns, on June 5, 2023, counsel to Mithaq wrote to the TSX advising of its concerns that the Board might adopt additional defensive tactics to further entrench itself and to hinder corporate democratic processes.

28. Of particular concern to Mithaq was the possibility that the Board would adopt a shareholder rights plan or commence a private placement of Aimia Shares, without shareholder approval, to dilute Mithaq's holdings and to materially affect control of Aimia. Doing so would permit the Board to manipulate the outcome of any proxy contest or take-over bid, possible alternatives Mithaq had outlined it was considering in the May 25 Early Warning Report.

29. With respect to Aimia's shareholders, there is: (i) no evidence of an Aimia shareholder complaint or concern about Mithaq, the Meeting or Mithaq's share ownership, even after Aimia's allegations were well-publicized by it before the Meeting; (ii) no evidence of an Aimia shareholder making a regulatory or civil litigation complaint; and (iii) no evidence of an Aimia shareholder supporting Aimia's litigation against Mithaq despite Aimia well-publicizing the litigation.

The Offer

30. On October 3, 2023, the Offeror announced its intention to make an offer for all the issued and outstanding common shares of Aimia that it or its affiliates did not already own.

31. On October 5, 2023, the Offeror made an all-cash offer for all Aimia Shares at a price of $3.66 per share (the "Offer"). The Offer represents a premium of 20% over the October 2, 2023 unaffected, pre-announcement trading price of Aimia Shares and a 23% premium over the 20-day VWAP. The Offer was validly commenced by the Offeror, publishing an advertisement as contemplated by section 2.9(1)(a) of NI 62-104, and in connection with commencing the Offer, the Offeror satisfied the requirements of sections 2.10(1) and 2.10(2)(a) of NI 62-104. The Offeror has also taken the necessary steps to ensure that the requirements of section 2.10(2)(b) are satisfied by the deadline contemplated therein.

32. The Offer will remain open for acceptance until 11:59 p.m. (Vancouver time) on January 18, 2024, unless otherwise extended, accelerated, or withdrawn by the Offeror. The Offer is subject to customary conditions, including, among others, the non-waivable condition that there have been validly deposited under the Offer and not withdrawn that number of Aimia Shares representing more than 50% of the outstanding Aimia Shares, together with the associated rights, excluding those Aimia Shares beneficially owned, or over which control or direction is exercised, by the Offeror, any associate or affiliate of the Offeror, or any person acting jointly or in concert with the Offeror. This condition is consistent with the minimum tender condition provided for in Ontario securities law (the "Statutory Minimum Tender Condition").

33. Aimia issued a press release on October 10, 2023 indicating that it had formed a special committee of the Board to assess the Offer. Aimia advised that a director's circular setting out

the Board's recommendation with respect to the Offer is expected to be filed by October 20, 2023, as required by applicable securities laws. However, the Board's decision to proceed with the Private Placement, which is expected to close around October 19, 2023, and the commentary on the Offer contained in Aimia's October 10, 2023 press release indicate that the Board and special committee have prejudged the Offer.

34. Aimia's October 10 press release states that "the Offer is subject to unprecedented terms that create significant uncertainty with respect to whether the Offer will be completed." This statement is misleading. There is nothing unprecedented about the number or scope of bid conditions, which are consistent with other unsolicited takeover bids. The conditions are necessary to protect all shareholders' investment in the company, including Mithaq's, as they discourage the Board and Aimia management from taking more self-interested defensive actions that could further depreciate company value and deprive shareholders of the Offer.

Aimia's litigation against Mithaq is an abuse of process

35. Since the Offer, as noted above, Aimia has broadened the scope of its litigation against Mithaq. In particular, Aimia makes a number of allegations and seeks various relief designed to frustrate the Offer, including allegations that the Offer fails to comply with various securities law requirements, such as the formal valuation requirement for insider bids, the pre-bid integration rule, the mandatory early warning regime, and the moratorium provisions. There is no basis for these allegations. Contrary to Aimia's allegations, the Offer complies with the requirements of Ontario securities law.

36. A fundamental allegation in Aimia's litigation against Mithaq is that Mithaq received material non-public information from an alleged joint actor. Since first raising this allegation,

Aimia's President Michael Lehman, has acknowledged on cross-examination that the allegation is baseless. Aimia's counsel has similarly confirmed there is no merit to the allegation on the basis of the evidence Aimia has received.

37. In the circumstances, Aimia's litigation against Mithaq is an abuse of process and a clearly abusive defensive tactic serving no *bona fide* corporate objective.

No requirement for formal valuation

38. In its litigation against Mithaq, Aimia incorrectly asserts that a formal valuation was required to be included in the take-over bid circular for the Offer.

39. While the Offer is an "insider offer", as defined in Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions* ("MI 61-101"), no formal valuation was required to be included in the take-over bid circular because neither the Offeror nor any of its affiliates or joint actors has or has had any board or management representation of Aimia or knowledge of any material information concerning Aimia or Aimia shares that has not been generally disclosed. As a result, the Offeror was entitled to rely on the exemption under section 2.4 of MI 61-101.

40. As set out above, the Offeror was not, and is not, in a joint actor relationship with Milkwood and/or Mittleman, nor any other person. Mithaq did not fail to disclose any such relationship in accordance with Ontario securities law.

41. Even if the Offeror and any of Milkwood and/or Mittleman were joint actors, none of them have or have had, in the past 12 months prior to the Offer date, any board or management

representation in respect of Aimia or knowledge of any material information concerning Aimia that has not been generally disclosed.

42. Mittleman ceased to be an officer of Aimia on March 29, 2022 and ceased to be a director of Aimia on May 6, 2022. After that time, he was an officer of a subsidiary of Aimia until March 27, 2023; however, a subsidiary of an offeree does not qualify as an "offeree issuer" for purposes of MI 61-101.

43. In addition, the Offer was not made by Mithaq with knowledge of any material information concerning Aimia that has not been generally disclosed.

44. Although Aimia alleges in its litigation that Mithaq received material non-public information from Mittleman, Aimia and its counsel have since conceded that, based on the evidence available to Aimia, Mithaq was not provided with any such material non-public information.

No requirement for a "higher price" in the Offer

45. Under the Ontario securities law pre-bid integration rule in section 2.4(1) of National Instrument 62-104 *Take Over Bids and Issuer Bids* ("NI 62-104"), the law imposes a minimum floor for the consideration offered in a takeover bid, namely the highest price paid by the offeror for common shares of the offeree in the 90 days leading up to the date of the take-over bid.

46. In its litigation against Mithaq, Aimia wrongly asserts that Mithaq's acquisition of shares in Q1 2023 triggered a formal takeover bid as a result of its alleged joint actorship with Milkwood and/or Mittleman. Aimia also alleges that the price that would have been required at that time for a take-over bid, as a result of Mithaq's purchase history in the 90 days leading up to

the triggering of the mandatory take-over bid requirements in Q1 2023 and the application of the pre-bid integration rule, would have been higher than Aimia Share's trading price on October 2, 2023, which is the basis of the Offer.

47. The implication of these allegations is that the Offer is at a lower price than the price that would have been offered to shareholders had Mithaq complied with the mandatory take-over bid requirements and the pre-bid integration requirements in Q1 2023. There is no basis for this.

48. As set out above, the joint actorship allegations are without foundation.

49. In any event, even if the mandatory take-over bid requirements were triggered in Q1 2023, Mithaq was entitled to rely on the exemption to the pre-bid integration requirements under 2.6 of NI 62-104, because the purchases made by the Offeror were made in the normal course on a published market and satisfied all of the following conditions:

(a) no broker acting for the Offeror performed services beyond the customary broker's functions in regard to the purchases;

(b) no broker acting for the Offeror received more than the usual fees or commissions in regard to the purchases than are charged for comparable services performed by the broker in the normal course;

(c) the Offeror or any person acting for the Offeror did not solicit or arrange for the solicitation of offers to sell securities of the class subject to the bid, except for the solicitation by the Offeror or members of the soliciting dealer group under the bid; and

(d) the seller or any person acting for the seller does not, to the knowledge of the offeror, solicit or arrange for the solicitation of offers to buy securities of the class subject to the bid.

No breach of the early warning regime or the moratorium provisions by the Offeror

50. Aimia's litigation against Mithaq also contains baseless allegations relating to the Offeror's breach of the early warning regime and the moratorium provisions set out in NI 62-103 and in NI 62-104.

51. For the reasons set out above, because Mithaq was not in an undisclosed joint actor relationship at any time (including prior to the Offer), it has not failed to comply with the early warning regime set out in NI 62-103 and in NI 62-104 nor did its purchases of Aimia Shares on or after December 6, 2022 breach the moratorium provisions in section 5.3 of NI 62-104.

Shareholder Rights Plan is an abusive defensive tactic

52. On June 7, 2023, the Board adopted a shareholder rights plan (the "Shareholder Rights Plan" or the "SRP").

53. In its press release announcing the SRP, Aimia indicated that the SRP was adopted in response to Mithaq increasing its stake from 19.9% to its current 30.96% position. The purpose of the SRP was to ensure that "all shareholders are treated fairly in connection with any offer to acquire the outstanding common shares of Aimia and that the Board has the opportunity to identify, solicit, develop and negotiate value-enhancing alternatives to any unsolicited take-over bid."

54. The SRP is more restrictive than applicable Ontario securities law. In particular, the SRP imposes on prospective takeover bids a minimum tender condition that is broader than the minimum tender condition provided for in NI 62-104 (the "Statutory Minimum Tender Condition"). The Statutory Minimum Tender Condition requires that the bid be subject to a minimum tender condition of more than 50% of the common shares excluding only those common shares held by the offeror or anyone acting jointly or in concert with the offeror.

55. By contrast to the Statutory Minimum Tender Condition, under the SRP, to be a permitted take-over bid (*i.e.*, one that will not trigger the SRP), the bid must be subject to a minimum tender condition of more than 50% of the Aimia Shares held by "independent shareholders", a defined term in the SRP which extends significantly beyond the requirements of the Statutory Minimum Tender Condition to exclude, for example, Aimia Shares held by Aimia employees under various benefit plans. These plans are controlled by Aimia and could thus be manipulated to impact the minimum tender condition under the SRP in the Board's discretion.

56. In the case of the Offer, the effect of this broad minimum tender condition in the SRP is that the take-up of Aimia Shares under the Offer would almost certainly trigger the SRP.

57. Additionally, the shareholder ratification requirement in the SRP is inconsistent with the TSX rules as it fails to require a vote that would both include and exclude Mithaq as a securityholder that is exempted from the SRP (as a result of Mithaq holding in excess of the 20% triggering threshold contained in the SRP).

58. These elements of the SRP, in addition to the timing of its adoption to respond to Mithaq's current ownership of Aimia Shares, suggest that rather than providing an opportunity

for identifying value-enhancing alternatives to unsolicited takeover bids, the true aim of the SRP is to prevent any unsolicited takeover bid, particularly one from Mithaq, from succeeding.

59. As of the date of the Offer, Aimia had not announced an intention to seek approval of the SRP by December 7, 2023, six months from adopting the SRP in accordance with TSX rules. However, it is not clear that the Board will not adopt a Replacement SRP to become effective December 7, 2023.

60. Subsection 1.1(2) of National Policy 62-202 *Take-Over Bids – Defensive Tactics* ("NP 62-202") provides that the primary objective of the take-over bid provisions of the *Securities Act* is "the protection of the *bona fide* interest of shareholders of the target company." A secondary objective is "to provide a regulatory framework within which take-over bids may proceed in an open and even-handed environment."

61. Section 127 of the *Securities Act* provides the Commission with a "broad discretion" and jurisdiction to intervene in activities related to the Ontario capital markets when it is in the public interest to do so. In the context of take-over bids, the Commission's public interest jurisdiction affords it the ability to preserve an "open take-over bid process" by preventing defensive measures by a target's management that are abusive of shareholder rights without furthering a *bona fide* corporate objective.

62. NP 62-202 expressly states that the issuance of securities representing a significant percentage of the outstanding securities of the target, such as occurs when a shareholders rights plan is triggered, could constitute a defensive tactic warranting the Commission's oversight. A shareholders rights plan will no longer serve a *bona fide* corporate objective when the plan no longer serves the purpose of maximizing shareholder value.

63. In this case, the SRP does not serve the purpose of maximizing shareholder value and choice, and instead has the effect of denying shareholders the ability to participate in the Offer (and any other unsolicited takeover bid). Although the Offer complies with the requirements for a takeover bid under Ontario Securities law, the effect of the broad minimum tender condition in the SRP is that the take-up of Aimia Shares under the Offer would trigger the SRP.

64. Further, the commencement of the Private Placement confirms that there is no longer any *bona fide* corporate objective for the SRP.

65. As such, the Shareholder Rights Plan is an improper defensive tactic within the meaning of NP 62-202. To ensure that Aimia's shareholders have the opportunity to respond to the Offer, the Commission ought to exercise its public interest jurisdiction to cease trade the rights issuable under the SRP. In the event that a replacement shareholder rights plan is adopted that also frustrates the ability of Aimia's shareholders to respond to the Offer, the rights issuable under it must also be cease traded.

Private Placement is an abusive defensive tactic

66. 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 new group of undisclosed investors (the "Private Placement"). The terms of the Private Placement provide this investor group with up to 3 out of 8 Board seats.

67. As disclosed in Aimia's press release announcing the Private Placement, each Aimia Share and accompanying Warrant is intended to be issued at $3.10 and each Warrant will be exercisable at $3.70 per Aimia Share. Assuming the Private Placement is fully subscribed and all

Warrants are exercised, the maximum number of Aimia Shares issuable under the Private Placement represents 24.89% of the currently issued and outstanding Aimia Shares (on an undiluted basis).

68. Aimia claims that the Private Placement is expected to raise gross proceeds of up to $32.5 million, which Aimia says is required and which it will use to fund its operations over the next 12 to 24 months and to support its strategic investment plan and other contingencies.

69. Aimia also claims the Private Placement will not materially affect control of Aimia and that no investor will beneficially own more than 10% of the issued and outstanding Aimia Shares as a result of the Private Placement.

70. Aimia's disclosure of the Private Placement omitted significant material information, including the identities of the proposed investors, whether or not the proposed investors are existing Aimia shareholders, and the respective terms of their investments. There was also insufficient disclosure justifying the need for the capital with only a vague reference to Aimia's capital needs.

71. Contrary to Aimia's claims, the Private Placement is not designed to maximize value to shareholders and is instead an abusive defensive tactic intended to (i) entrench the Board, (ii) manipulate the outcome of the Offer (or subsequent offers), and (iii) materially affect control of Aimia. The following support these conclusions:

(a) The dilutive effect of the Private Placement will materially affect shareholders' voting rights, including in connection with any meeting of shareholders to vote on the election of directors (as Mithaq is seeking from the Ontario Superior Court in

its ongoing litigation against Aimia) and in connection with ratification of the SRP (if it is sought).

(b) The issuance of a material number of additional Aimia Shares in the face of the Offer, which requires satisfaction of the Statutory Minimum Tender Condition, materially raises the bar for such condition to be satisfied and accordingly raises the possibility that the Offer (or any other subsequent offer) will not succeed.

(c) The price of the Warrants is $3.70 per Aimia Share, just four cents higher than the Offer price of $3.66 per Aimia Share, which effectively discourages anyone from making a take-over bid (or from proposing another value-enhancing transaction) at a price higher than $3.70, because if such an offer were made the Warrants would likely be immediately exercised resulting in a material dilution thereby increasing the likelihood that any such offer would not succeed.

(d) Aimia did not extend the Private Placement opportunity to existing Aimia shareholders (contrary to Aimia's commitment at the time of the SRP to treat all shareholders fairly in connection with any offer to acquire the outstanding common shares of Aimia).

(e) The proposed new investor group will receive up to 3 out of 8 Aimia board seats, amounting to disproportionate board representation.

72. The effects of the Private Placement outlined above are contrary to the purposes of acceptable defensive measures, as set out in NP 62-202, which are ones designed to enhance and maximize value to shareholders "in a genuine attempt to obtain a better bid."

73. Moreover, contrary to the TSX Manual (as set out below), Aimia failed to obtain shareholder approval of the Private Placement where the issuance of rights in the Private Placement will materially affect Aimia's control. Given the effect that the Private Placement will have on the Offer, failing to require shareholder approval for the Private Placement has the effect of depriving shareholders of making a fully-informed collective decision on the Offer. Such an effect is contrary to the take-over bid rules and expressed as a concerning feature of a defensive measure in NP 62-202.

74. When exercising its discretion to review a private placement in accordance with NP 62-202 and section 127 of the *Securities Act*, the Commission needs to balance the extent to which the private placement serves *bona fide* corporate objectives with the securities law principles of facilitating shareholder choice with regard to corporate control transactions and promoting open and even-handed bid environments.

75. Weighing against the abusive effects of the Private Placement outlined above, which includes the effect of frustrating shareholders choice and ability to consider the Offer, are no *bona fide* corporate objectives for the Private Placement. The financing to be derived from the Private Placement is not necessary to support Aimia's operations.

76. While Aimia's press release announcing the Private Placement refers to an undisclosed "independent" opinion confirming Aimia's need for capital as of September 5, 2023, no additional details are provided, including in respect of Aimia's capital needs. Such an opinion is highly unusual and the fact that it was sought raises an inference that the need for the purported financing was not supported by Aimia's cash position disclosed in Aimia's most recent financial statements.

77. In any event, any alleged need for financing is not supported by the cash position disclosed in Aimia's most recent financial statements and is contrary to recent statements made by Aimia management.

78. For example, Aimia's second quarter earnings release, issued on August 11, 2023, note that as of June 30, 2023, Aimia had $116.9 million in cash, cash equivalents, and liquid securities. Further, on September 27, 2023 Aimia management disclosed that during 2023 to 2024 investors should expect "re-initiation of NCIB [normal-course issuer bids] and aggressive share buybacks." Such plans are inconsistent with the need for additional financing. Moreover, these capital plans and business strategies are diametrically opposed in effect on existing shareholders to the materially dilutive Private Placement.

79. As such, the Private Placement is an improper defensive tactic within the meaning of NP 62-202. To ensure that Aimia's shareholders have the opportunity to respond to the Offer, the Commission ought to exercise its public interest jurisdiction to cease trade the Private Placement. In the alternative, the Commission ought to make an order that the shares in the Private Placement not be included in the number of outstanding shares for the purpose of the Statutory Minimum Tender Condition.

80. Section 604(a)(i) of the TSX Company Manual (the "Manual") sets out that security holder approval will generally be required if an issuance materially affects control of the listed issuer. "Materially affect control" is defined in the Manual as the ability of any security holder or combination of security holders acting together to influence the outcome of a vote of security holders.

81. The record suggests that the undisclosed investors in the Private Placement may be acting together, whether in a joint actor relationship or otherwise. Together with the dilutive impact the Private Placement will have on existing shareholders rights as well as the number of Aimia Shares that are issuable under the Private Placement, there can be no doubt that the undisclosed investors in the Private Placement will act together to influence the outcome of a vote of Aimia shareholders. Shareholder approval is therefore required pursuant to section 604(a)(i) of the Manual.

82. Section 603 of the Manual gives the TSX further discretion to impose conditions on the issuance of securities. This requires TSX to consider the effect that the Private Placement will have on the quality of the marketplace, including factors such as the involvement of insiders or other related parties and the material effect on control of the listed issuer.

83. In response to Aimia's announcement of the Private Placement, on October 16, 2023, Mithaq's counsel wrote to the TSX outlining its concerns with the Private Placement and its view that the Private Placement will require that Aimia obtain shareholder approval.

84. In its letter to the TSX, Mithaq disclosed its intention to commence this Application. On the basis of the Commission's broad public interest jurisdiction to address absusive defensive measures and with a view to ensuring an efficient process, Mithaq requested that the TSX defer any consideration of the Private Placement until after this Application has been heard.

85. Section 104 of the *Securities Act* provides the Commission with jurisdiction to make an order requiring compliance with Part XX of the *Act* and the regulations related to this Part, including NP 62-202. Subsection 8(3) of he *Securities Act* confers upon the Commission the

authority to review a decision of the TSX and to "make such other decision as the Commission considers proper."

86. The TSX proceeded on incorrect principles in interpreting and applying the "materially affect control" standard, relevant in both sections 603 and 604 of the Manual. In particular, the two fundamental issues with the TSX Decision, permitting the Tribunal to review the Decision on a *de novo* basis, and justifying an order requiring shareholder approval for the Private Placement are the following.

(a) The lack of any analysis of how the Private Placement impacts "the economics of the Offer." This issue is directly relevant to whether the Private Placement "materially affects control" of Aimia since the Offer is a "significant transaction" and whether the Private Placement will effectively "block" the Offer needed to be evaluated by the TSX in reaching a decision on whether the Private Placement "material affects control". No such analysis was undertaken.

(b) The absence of any consideration of Mithaq's outstanding Proxy Review Application and the orders it seeks from the Ontario Superior Court: (i) calling a special meeting of shareholders for the election of directors, and (ii) setting a date for the special meeting at the earliest date allowed by the *Canada Business Corporations Act* and Ontario securities law. The Tribunal confirmed in *Eco Oro* that the impact of a transaction on a pending shareholder vote, or in circumstances where an ongoing proxy challenge exists, need to be considered in interpreting "materially affect control." This same analysis was required in the context of Mithaq's Proxy Review Application and the relief it seeks, particularly given the

irregularities leading to the Meeting, the closeness of the Board election results at the Meeting, Aimia's refusal to permit the proxy review, and Mithaq's disclosure of these concerns to the TSX as early as June 2023 and on October 16, 2023.

(c) There was also no consideration by the TSX of the Board's pattern of choosing not to seek shareholder approval when implementing defensive tactics to the Offer. The TSX was aware of the SRP and the fact that shareholder approval was required by December 7, 2023 yet the Board had taken no steps to obtain such approval and ought to have turned its mind to the fact that the Board was again seeking to put in place a defensive tactic without obtaining shareholder approval.

(d) The TSX did not consider whether the lead investor's Board nomination rights materially affects control of Aima.

87. The TSX Decision is entirely silent on these fundamental issues. There is no discussion, assessment, or evaluation of any of these issues. However, a *de novo* review of these issues supports Mithaq's request for an alternative order requiring shareholder approval for the Private Placement.

88. Together with the Commission's public interest jurisdiction under section 127, the Commission's jurisdiction under sections 8(3) and 104 is broader than the TSX's jurisdiction. The Commission is entitled to review any TSX Decision under Section 603 or 604 of the Manual on a *de novo* basis. If the TSX does not defer and does not require shareholder approval of the Private Placement, the Commission ought to exercise its jurisdiction to require that Aimia obtain shareholder approval of the Private Placement before it closes on the four conditions set out above.

89. The four conditions sought by the Applicant are required to give practical and legal effect to a decision by the Commission requiring a shareholder vote on the Private Placement. These conditions are as minimally intrusive as is reasonably possible in the circumstances and are not unduly burdensome.

90. The shareholder vote must ask shareholders to either ratify the Private Placement or to instruct the Board to reverse the Private Placement.

91. If the shareholders vote against the Private Placement at the requested shareholders' meeting, a reversal of the Private Placement will be required to give effect to the shareholder vote to which they would be entitled to under TSX rules. A failure to reverse in such circumstances would reward Aimia for its inadequate process in seeking to close the Private Placement.

92. The factors relevant in determining whether it is in the public interest for the Commission to impose the reversal condition sought by the Applicant weigh in favour of imposing such a condition, including for the following reasons:

(a) Aimia reasonably ought to have known of the Offeror's objections to the TSX Decision without shareholder approval but nonetheless deliberately chose to close the Private Placement without sufficient time to permit shareholders to effectively communicate their objections to the TSX or the Commission;

(b) the proposed investors in the Private Placement reasonably ought to have known of the Applicant's objections in light of the proxy review, the Offer, and the ongoing litigation between the parties and ought to have known that the TSX, and

the Commission upon a review of the TSX decision, has discretion to require shareholder approval in appropriate circumstances;

(c) Aimia failed to adequately disclose material information relating to the Private Placement in its public announcement of the transaction; and

(d) there will be no impracticalities or hardship suffered by the reversal in the circumstances.

93. Fairness dictates that only those shareholders who are not proposed investors in the Private Placement ought to be entitled to vote at a shareholder meeting seeking ratification of the Private Placement or its reversal. Moreover, the shareholder vote should not include any voting rights obtained through the Private Placement.

Relief relating to the Offer

94. For the reasons set out in its written submissions, Mithaq is entitled to the relief relating to the Offer to give effect to the other relief sought and to ensure no further impediments exist or are erected to prevent shareholders responding to the Offer in accordance with the principles of Ontario securities law.

Expedited hearing and cease trade orders are required

95. Given the date that Aimia intends to close the Private Placement (October 19, 2023), Mithaq seeks a temporary cease trade order pursuant to section 127(5) of the *Securities Act* and an expedited hearing.

96. In the absence of a temporary cease trade order, the Private Placement will materially impact the Offer and will also serve the Board's entrenching aims in the context of other

shareholder votes that are or may be required in the coming months by diluting the relative voting power of Mithaq and other shareholders dissatisfied with the Board and Aimia management's performance. These votes include ratification of the SRP (if it is sought) as well as any new vote on the election of Aimia directors that may be ordered by the Court in Mithaq's litigation against Aimia. Both are votes in which the Board has a clear interest in the outcome.

97. In addition, the cease trade order pursuant to section 127(5) is required to give practical effect to the requested order sought under subsection 8(3) of the *Securities Act* to require a shareholder vote on the Private Placement.

98. The Applicant requests the record of any TSX Decision and any written reasons for the Decision.

99. For the reasons set out in its Notice of Motion, dated November 20, 2023, Mithaq seeks an order consolidating the Application with Aimia's Cross-Application, and an order dismissing the Cross-Application, to ensure that the ability of Aimia shareholders to respond to the Offer is not frustrated by litigation tactics and delay.

100. The Applicant reserves the right to supplement its grounds for this Application, including once it has received any TSX Decision.

C. EVIDENCE AND SUBMISSIONS

The Applicant intends to rely on written submissions and the following evidence at the hearing:

(a) the Affidavit of Asif Seemab to be affirmed;

(b) any TSX Decision, together with the record of the Decision and any written reasons for the Decision; and

(c) such other evidence as counsel for the Applicant may advise.

Dated: ~~October 17, 2023~~ November 20, 2023

Torys LLP
79 Wellington St. W., 30th Floor
Box 270, TD South Tower
Toronto, ON M5K 1N2
Fax: 416.865.7380

Andrew Gray (LSO #: 46626V)
Tel: 416.865.7630
agray@torys.com

Sarah Whitmore (LSO #: 61104E)
Tel: 416.865.7315
swhitmore@torys.com

Hanna Singer (LSO #: 81994W)
Tel: 416.865.7664
hsinger@torys.com

Lawyers for the Applicant
Mithaq Capital SPC