

**IN THE MATTER OF A HEARING AND REVIEW UNDER
SECTION 104 OF THE *SECURITIES ACT*, R.S.O. 1990, c. S.5**

-and-

IN THE MATTER OF MITHAQ CAPITAL SPC

**APPLICATION OF
AIMIA INC.**

(In connection with a proceeding under sections 104 of the *Securities Act*, RSO 1990, c. S.5)

A. ORDER SOUGHT

1. The Applicant, Aimia Inc., requests the following:
 - (a) a declaration under s. 104 of the *Securities Act* that Mithaq Capital SPC breached ss. 2.8 and 5.2(2) of National Instrument 62-104;
 - (b) an order under s. 104 of the *Securities Act* directing Mithaq Capital SPC to comply with s. 2.8 of National Instrument 62-104 by making the take-over bids it offered in February 2023 available to all holders of common shares of Aimia at the highest price per share that Mithaq paid during the period from February 2, 2023 through to February 21, 2023; and
 - (c) such further and other relief under s. 127 of the *Securities Act* as the Tribunal may deem appropriate.

B. GROUNDS

I. The Parties and Other Persons

2. The Applicant, Aimia Inc., is a corporation formed pursuant to the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44, with its head office in Toronto, Ontario. Aimia's common

shares are listed on the Toronto Stock Exchange. Aimia is a holding company, which makes long-term investments in other business through minority or controlling stakes.

3. The Respondent, Mithaq Capital SPC, is a company existing under the laws of the Cayman Islands, and is an investment vehicle of a family office based in Saudi Arabia. Mithaq is an Aimia shareholder, currently holding approximately 28.42% of Aimia's common shares.

4. Turki Saleh AlRajhi and Asif Seemab are the directors of Mithaq. Mr. AlRajhi is the Chairman and Chief Executive Officer of Mithaq.

5. Milkwood Capital (UK) Ltd. is an asset manager based in the United Kingdom. Milkwood is a former shareholder of Aimia.

6. Christopher Mittleman was the Chief Investment Officer of Mittleman Investment Management, a subsidiary of Aimia, until his termination on March 27, 2023. At all material times, Mr. Mittleman held approximately 0.53% of Aimia's shares personally and controlled the voting rights associated with a further approximately 6% of Aimia's shares.

II. Mithaq, Milkwood and Mr. Mittleman Plan to Change Aimia's Board and Business

7. In late 2022, Mithaq and Mr. Mittleman were displeased with Aimia's investment strategy, and wanted to change Aimia's business model to focus on public market investments, rather than private equity.

8. In and around the same period, Mr. Seemab approached Milkwood, an experienced activist investor, about Aimia. Mr. Seemab advised Milkwood that Aimia had significant cash resources and was pursuing a misguided investment strategy. By early December, Milkwood was rapidly purchasing Aimia shares for the purpose of engaging in activism and was sharing information with Mithaq.

9. By at least February 2, 2023, Mithaq, Milkwood and Mr. Mittleman had developed a plan to change Aimia's board and senior management. At this point, Mithaq, Milkwood and Mr. Mittleman collectively held control or direction over more than 20% of Aimia's shares. In furtherance of their plans, Mithaq, Milkwood and Mr. Mittleman:

- (a) jointly drafted and edited press releases, letters, requisitions and other documents in support of their aims;
- (b) coordinated their purchases of shares to avoid increasing Aimia's share price;
- (c) exchanged advice and information about applicable securities rules and strategies for engaging in successful shareholder activism;
- (d) proposed potential new directors for Aimia and interviewed candidates;
- (e) contacted other Aimia shareholders to solicit their support; and
- (f) communicated regularly with each other through phone, email and WhatsApp.

III. The Joint Actors Take Action

10. On February 2, 2023, Mr. Seemab emailed Mr. Mittleman and asked him about the "process/implications if an investor exceeds the 20% equity threshold in the Canadian market?" Mr. Mittleman replied that he thought "an activist's goals can be achieved without incurring the complications of crossing the mandatory build (sic) threshold", so staying at 19.9% was "probably sufficient." Following this email, Mr. Seemab and Mr. Mittleman began to communicate through WhatsApp – an encrypted message service.

11. That same day, February 2, 2023, Mithaq made its first purchase of Aimia shares since May 2022, purchasing 1,974,700 shares, at the time its single largest purchase of Aimia shares. This brought its ownership stake to 14.91%.

12. Mr. Mittleman proceeded to direct Mithaq to a lawyer at Torys and suggested that Mithaq should ask Torys whether it would be better to requisition a special meeting or nominate directors at the next AGM. Mr. Mittleman also offered his views on some pros and cons of both approaches.

13. Mr. Seemab and Mr. Mittleman also discussed their strategy for nominating directors, how many directors Aimia should have and plans to gain support from other shareholders. Mr. Seemab asked Mr. Mittleman “what kind of poison pills they can use to stop us”. Mr. Mittleman, who was still employed by Aimia at the time, insisted that they be careful about how they communicate, as he did not want to “give them an ounce of ammunition to undermine your effort, which they would seek to do by claiming it’s just a front for my personal grievance against them.”

14. On February 8, 2023, Mr. Mittleman provided Mr. Seemab with a confidential study that identified Aimia’s major shareholders as of June 2021. Mr. Mittleman suggested it was preferable to use this older list than demand a new one from Aimia, because “obviously that would reveal an intent to take action.”

15. Meanwhile, Milkwood was taking a lead role. Mr. Seemab advised Mr. Mittleman that “our British friend is taking lead so he is finalizing best option with his own lawyer.” The “British friend” to whom Mr. Seemab referred was Mr. Summerton of Milkwood. Mr. Seemab assured Mr. Mittleman that Mr. Summerton “has done plenty of activism before.”

16. Mr. Seemab described Milkwood’s role as follows:

he would play the activist role for us and would let Mithaq manage afterwards. However we’ll lay down the roadmap with mutual consent. He will have board representation. We intend to reduce the size of the board so we will see whether Rhys appoints 1 or 2 directors.

17. On March 1, 2023, Mr. Mittleman sent Mr. Seemab a draft press release on behalf of Mithaq and Milkwood, announcing the requisitioning of a special meeting of Aimia’s shareholders

for the purpose of replacing Aimia's board of directors and CEO/President. Mr. Seemab and Mr. Mittleman discussed the content of the release.

18. On March 3, 2023, Aimia announced that it would hold its annual general meeting of shareholders on April 18, 2023. Over the course of March, Mithaq and Milkwood took steps to jointly prepare a slate of directors. Among other things, they:

- (a) contacted and jointly interviewed potential director nominees;
- (b) engaged in communications which they claim were protected by common interest privilege;
- (c) jointly prepared a draft letter to be sent to Aimia nominating candidates, including Mr. AlRajhi, Mr. Seemab, and Mr. Summerton, to stand for election at the AGM;
- (d) jointly prepared a draft letter to be addressed to Aimia shareholders from Mithaq, outlining Mithaq and Milkwood's "action plan" to reconstitute the board. The letter outlined that Mithaq had intended to acquire up to 30% of Aimia's shares, but was unable to do so before Aimia's surprise AGM; and
- (e) communicated with other Aimia shareholders, including the University of Michigan, in order to have them join the "group".

19. Mithaq, Milkwood and Mr. Mittleman ended up not nominating an alternate slate of directors. Instead, they urged shareholders to vote against the incumbent board. All but one member of the incumbent board was re-elected at the AGM.

IV. Mithaq's Breaches of the Early Warning Disclosure Regime

20. At all material times, Mithaq held more than 10% of Aimia's issued and outstanding shares and was required to file early warning reports (**EWRs**). Mithaq filed EWRs on February 3, February 9, April 6 and April 19 of 2023.

21. Those EWRs were materially deficient as they failed to disclose:

(a) **That Mithaq was acting jointly or in concert with Milkwood and Mr. Mittleman.**

Instead, each of the four EWRs stated "not applicable" in response to the requirement to disclose the names of any joint actors.

(b) **Mithaq's plan to change the members of Aimia's board and management, reduce the size of Aimia's board and to change Aimia's business model.**

Instead, Mithaq's EWRs issued on February 3 and February 9 stated that Mithaq had acquired its shares for "investment purposes" and merely reserved Mithaq's right to take other actions in the future. Mithaq did not disclose its plans to change the company, even though it was actively pursuing that plan. In its April 6 EWR, Mithaq disclosed its plan to vote against the re-election of Aimia's board, but still failed to disclose its intentions to reduce the size of the board, change management and change Aimia's business. Mithaq's EWR on April 19 reverted to simply asserting that Mithaq was acquiring shares for investment purposes.

(c) **Mithaq's plans to acquire additional Aimia shares.** As early as February 2,

2023, Mithaq planned to acquire up to 19.9% of Aimia's shares (which it accomplished by February 21, 2023), but it never disclosed this plan. By March 8, 2023 at the latest, Mithaq planned to acquire up to 30% of Aimia's shares – a goal it achieved on May 25, 2023 – but again never disclosed that intention.

22. Pursuant to s. 5.2(2), Mithaq was required to make disclosure of all of the above facts upon either: (i) the acquisition of an additional 2% of Aimia’s outstanding shares; or (ii) a material change from its most recent disclosure. All of these facts—the joint actor relationship, Mithaq’s plans for Aimia and its board and Mithaq’s intention to acquire further shares—were material, and had to be disclosed immediately.

23. Mithaq bought shares on the following occasions on or after February 2, all of which occurred while its disclosure was deficient:

Date	Number of Shares	Percent of Aimia
February 2, 2023	1,974,700	2.35%
February 3, 2023	5,900	0.01%
February 7, 2023	191,800	0.23%
February 8, 2023	537,100	0.64%
February 9, 2023	2,498,500	2.97%
February 13, 2023	339,300	0.4%
February 14, 2023	142,200	0.17%
February 15, 2023	87,100	0.1%
February 16, 2023	153,000	0.18%
February 17, 2023	45,100	0.05%
February 21, 2023	204,300	0.24%
May 25, 2023	3,519,000	4.18%
May 25, 2023	5,715,500	6.79%
Total	15,413,500	18.31%

V. Mithaq’s Breach of the Take-over Bid Regime

24. By February 2, 2023, Mithaq, Milkwood, and Mr. Mittleman were joint actors with control or direction over more than 20% of Aimia’s shares. Mithaq’s purchase of 2,498,500 shares on February 9, 2023 caused it to hold 20% in conjunction with Milkwood alone, even if Mr. Mittleman was not acting jointly or in concert with Mithaq.

25. Given this collective shareholding, pursuant to NI 62-104, any offer Mithaq subsequently made to a person in the local jurisdiction was a take-over bid, and had to comply with the take-

over bid regime. Mithaq was not able to purchase additional shares, unless pursuant to a take-over bid or exemption.

26. Each of Mithaq's purchases between February 2, 2023 and February 21, 2023 were take-over bids under the definition in NI 62-104. They were offers made to persons in the local jurisdiction at a time when Mithaq, jointly with Milkwood and Mr. Mittleman, held 20% or more of Aimia's common shares. Even if Mr. Mittleman was not a joint actor, the purchases Mithaq made between February 9, 2023 and February 21, 2023 were take-over bids as a result of the joint actor relationship between Mithaq and Milkwood.

27. Mithaq was prohibited from making these purchases without also making the offers available to all of Aimia's shareholders, unless one of the exemptions in Division 1 of NI 62-104 applied. No exemption applied, and Mithaq never purported to rely on any exemption for these purchases.

28. Mithaq should never have acquired the 6,179,000 shares it purchased during this period.

VI. Impact of Mithaq's Breaches

29. Mithaq's breaches of securities laws detailed above allowed it to amass a holding of more than 30% of Aimia's common shares without: (i) providing shareholders with proper disclosure; or (ii) presenting shareholders with an offer to purchase their shares pursuant to the take-over bid regime.

30. The evidence in this application will demonstrate that Mithaq plainly breached ss. 2.8 and 5.2(2) of National Instrument 62-104. Those breaches were hidden from the market and the OSC and were only uncovered because of complicated litigation proceedings. Mithaq went as far as to delete records of its communications with Milkwood that occurred via WhatsApp. Mithaq's efforts to hide its breaches nearly succeeded.

31. While Mithaq ended up commencing a take-over bid on October 5, 2023, that bid was made at a lower price than what Mithaq was required to offer as a result of its unlawful purchases in February 2023.

32. Mithaq improperly purchased shares between February 2, 2023 and February 21, 2023. On February 16, 2023, the selling price of Aimia's shares reached a height of \$4.13 a share. On that day, Mithaq itself accounted for 153,000 of the 199,945 shares sold over the market. Mithaq's purchases on this day were take-over bids. It was obligated to present an offer of \$4.13 to all shareholders but did not do so, depriving shareholders of the opportunity to tender to such a price.

33. The take-over bid Mithaq commenced in October was for a price of only \$3.66, almost 50 cents per share lower than what Mithaq was required to offer on February 16, 2023.

34. Mithaq's actions have prejudiced Aimia's shareholders. The shareholders are now offered a bid at a materially lower price, but the alternative to tendering into the bid is to remain shareholders of a company of which Mithaq owns almost 30% of the issued shares without having paid any control premium. Mithaq's outsized shareholding and efforts to take control of Aimia have depressed Aimia's share price.

35. Given Mithaq's shareholding and historically low voter turnout at Aimia's shareholder meetings, it is possible that Mithaq will be able to replace Aimia's board at the next annual general meeting with the support of very few other shareholders. If Mithaq successfully replaces Aimia's board of directors at the company's next annual general meeting, Aimia's shareholders will be stuck in a company controlled by Mithaq. This is an untenable outcome in light of Mithaq's multiple breaches of its disclosure obligations and its unlawful share acquisitions.

36. Aimia's shareholders should not be forced to make the unpalatable choice of either: (i) continuing to hold their investment in a company controlled by an entity that has no respect for

Ontario's securities laws; and (ii) selling their shares at a depressed price. The relief sought in this application would provide shareholders with a third option.

37. An order directing Mithaq to comply with NI 62-104 and present an offer of \$4.13 to all Aimia shareholders will restore the choice that shareholders always should have had. If Mithaq successfully replaces Aimia's board, any shareholder that does not wish to invest in a company controlled by Mithaq will have the option to tender into the take-over bid. Shareholders will have the opportunity to make an informed choice as to whether to tender for the first time.

C. EVIDENCE

38. Aimia intends to rely upon written submissions and the following evidence at the hearing:

- (a) affidavit evidence, to be filed; and
- (b) such further and other evidence as counsel for Aimia may advise.

February 13, 2024

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