

IN THE MATTER OF
AIMIA INC.
AND
MITHAQ CAPITAL SPC

MOTION
OF MITHAQ CAPITAL SPC

(For an order dismissing the application of Aimia Inc.)

A. ORDER SOUGHT

The Moving Party, Mithaq Capital SPC (“Mithaq”), requests with notice, that the Capital Markets Tribunal (the “Tribunal”) make the following orders:

1. An order pursuant to sections 104 and 127 of the *Securities Act* (the “Act”) dismissing the application of Aimia Inc. (“Aimia”), currently set to be heard May 1-2, 2024 (“Aimia’s May 2024 Application”); and
2. Such further and other relief as the Tribunal may deem just.

B. THE GROUNDS

The grounds for the motion are:

Overview

3. The Tribunal is not obliged to hear the merits of a public interest application just because one is commenced by a private party, in particular where that party lacks standing and where the application is an abuse of the Tribunal's process;
4. The parties to Aimia's May 2024 Application have (directly or through a subsidiary) been involved in numerous civil and regulatory proceedings before the February 12, 2024 launch of Aimia's May 2024 Application, as a result of: (i) Mithaq's significant shareholdings in Aimia; (ii) its privately and publicly-expressed concerns about Aimia's management and the challenge that poses to Aimia's incumbent board and management; (iii) Mithaq's concerns about the conduct of Aimia's 2023 annual general meeting and Mithaq's application to the court regarding voting at that meeting; and (iv) the Offer made by the Offeror subsidiary of Mithaq (as those capitalized terms are defined below). A chart setting out the various civil and regulatory proceedings involving the parties was provided to the Tribunal in connection with Mithaq's December Application and Aimia's December Cross-Application (as those terms are defined below) and an updated version of that is now attached as Schedule "A";
5. The proceedings in Schedule "A" initiated by Aimia have included the joint actor allegation now regurgitated in Aimia's May 2024 Application, but those proceedings have varied from time to time as to the relief situationally and tactically sought by Aimia: (i) initially, interfering with Mithaq's shareholder rights when shareholder meetings were Aimia's primary entrenchment interest; (ii) next, interfering with the Offer when the Offer was Aimia's primary entrenchment interest; and (iii) now, for new tactical reasons, requiring a new takeover bid to be made (an issue tactically avoided by Aimia in responding to the Offer itself);

Background

6. Mithaq is a family office company organized under the laws of the Cayman Islands and is the largest shareholder of Aimia, beneficially owning 26,893,588 common shares, representing approximately 28.4% of the issued and outstanding shares of Aimia;
7. Mithaq Canada Inc. (formerly, the “Offeror”) is a wholly owned subsidiary of Mithaq;
8. On October 5, 2023, the Offeror made an offer for all Aimia Shares at a price of \$3.66 per share (the “Offer”);
9. In connection with the Offer, the Offeror applied to the Tribunal for relief, *inter alia*, in respect of a private placement initiated by Aimia (“Mithaq’s December 2023 Application”). In response, Aimia brought a cross-application (the “Aimia December 2023 Cross-Application”) seeking relief: (i) denying the Offeror the use of the 5% exemption under the takeover bid rules; and (ii) relating, *inter alia*, to alleged joint actorship, where relief would be sought from the Tribunal on January 17, 2024 following a civil proceeding to be heard January 8-11, 2024, including the trial of an action premised on the joint actorship allegation (“Aimia’s 2023 Civil Claim”);
10. The record relating to the joint actorship allegations had been put before the Tribunal by the Offeror through its application materials (that record was completed and publicly filed during the summer of 2024). When Aimia’s December 2023 Cross-Application arose, including relating to the joint actorship allegations, the Offeror sought to consolidate it with the Application, but Aimia resisted that relief. Nonetheless, Aimia raised and relied on the joint actorship allegation in the Tribunal hearing on December 12-13, 2023;
11. Following the Tribunal hearing on December 12-13, 2023, Mithaq’s December 2023 Application was dismissed and Aimia’s December 2023 Cross-Application with respect

to the 5% exemption was dismissed. The relief relating to joint actorship remained outstanding and was to be the subject of a hearing on January 17, 2024;

12. The civil proceeding did not proceed on January 8, 2024, including the trial of Aimia's 2023 Civil Claim. A tentative settlement had been reached, and that fact communicated to the court and Staff of the Ontario Securities Commission, but it was not completed;

13. Aimia vacated the January 17, 2024 hearing date set aside to hear the second part of Aimia's December 2023 Cross-Application. The civil proceedings remain outstanding, including the application commenced by Mithaq in respect of Aimia's 2023 annual general meeting and Aimia's 2023 Civil Claim;

14. The Offer was set to expire January 18, 2024 but was extended and expired on February 15, 2024;

15. Aimia commenced Aimia's May 2024 Application on February 13, 2024 – two days before the Offer as extended was set to expire – alleging that the Offeror is obliged to make an offer at \$4.13 per Aimia share;

Aimia's May 2024 Application Should be Dismissed

16. Aimia's May 2024 Application is an abuse of process and ought to be dismissed pursuant to sections 104 and 127 of the Act;

Aimia lacks standing

17. Aimia has no standing to bring an application under section 104 or 127 of the Act;

18. Aimia is not an interested party within the meaning of section 104 of the Act and, as a private party, Aimia cannot commence a proceeding under section 127 of Act as a matter of right;
19. Aimia's May 2024 Application does not meet the narrow exceptions in which this Tribunal can, at its discretion, exercise that jurisdiction at the request of private parties;
20. In addition and in the alternative, the Tribunal should use its discretion under section 104 of the Act to decline to hear Aimia's May 2024 Application;
21. The Tribunal is not required to hold a hearing on the merits simply because an interested person has made an application under section 104 of the Act, and in any event (as pleaded above) Aimia is not an interested person within the meaning of section 104;
22. The Tribunal possesses the inherent authority to govern its own processes and may dismiss an application on any ground that it deems appropriate;

Aimia's May 2024 Application is abusive litigation

23. Aimia has had full and ample opportunity to be heard by the Tribunal and the courts in prior proceedings and declined then to pursue the remedy it now raises on a substantively identical factual record;
24. Among other things, the joint actor allegation raised in Aimia's May 2024 Application was the subject of Aimia's 2023 Civil Claim which remains outstanding and which Aimia declined to settle. While it made the joint actor allegation, for tactical reasons Aimia did not initially pursue the remedy now sought although that possibility was raised with it by Mithaq in September 2023. Nor was the relief sought in connection with the Offer in previous Tribunal proceedings involving the parties or during the pendency of the Offer;

25. The joint actor allegation was relied upon by Aimia in the context of Aimia's December 2023 Cross-Application and the evidence of alleged joint actorship was before the Tribunal in that matter. Aimia was invited through the Offeror's consolidation motion to deal with the issues at the December 12-13, 2023 Tribunal hearing and declined to do so, later also vacating the January 17, 2024 hearing date in relation to Aimia's December 2023 Cross-Application;
26. Aimia's May 2024 Application is therefore an abuse of the Tribunal's process as it undermines the integrity of the adjudicative process by misappropriating the Tribunal's jurisdiction for its own, situational tactical purposes and violates the fundamental principles of finality and judicial economy;
27. Aimia's May 2024 Application is also a collateral attack on the Tribunal's December 14, 2023 order which protected the Offeror's ability to use the 5% exemption under subsection 2.2(3) of National Instrument 62-104. Aimia relied on the joint actor allegation in its Aimia's December 2023 Cross-Application relating to the exemption and could have and ought to have sought the new, takeover bid relief at that time;
28. Aimia's May 2024 Application violates the doctrine of cause of action estoppel as Aimia declined to raise the issues in the new Tribunal proceeding when it previously had the opportunity to do so;

Other Grounds

29. Sections 104 and 127 of the Act and other statutory provisions under the Act; and
30. Such further and other grounds as counsel may advise.

C. EVIDENCE

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

31. The affidavit of Nancy Chaves, to be filed; and
32. Such further and other evidence as the lawyers may advise.

DATED this 5th day of March 2024

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

Andrew Gray LSO#: 61104E
416.865.7630
agray@torys.com

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

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

Lawyers for Mithaq Capital SPC

Schedule “A”

OVERVIEW OF PROCEEDINGS

CIVIL LITIGATION		
Party/Matter	Issues	Relief Sought
<p>Aimia’s Fresh as Amended Statement of Claim</p>	<ul style="list-style-type: none"> • Alleged undisclosed joint actorship between Mithaq, Milkwood and Chris Mittleman • Flowing from undisclosed joint actorship allegation, alleged deficiency in public disclosure and non-compliance with take-over bid requirements • Alleged use of confidential and non-public information • Alleged unlawful conspiracy among Mithaq, Milkwood, Azvalor, and Chris Mittleman • Alleged involvement in Chris Mittleman’s breach of contract, fiduciary, and confidence 	<ul style="list-style-type: none"> • Declarations in respect of Mithaq: unlawful conspiracy, shares acquired in the run-up to the AGM in breach of the <i>Securities Act</i>; shares acquired and voted in breach of the <i>Securities Act</i> • Orders in respect of Mithaq: requiring Mithaq to correct public disclosure; enjoining Mithaq from breaching the <i>Securities Act</i> provisions re: the tipping, take-over bid, and disclosure; prohibiting Mithaq from acquiring or disposing of Aimia shares, requisitioning shareholders meetings, and voting; enjoining Mithaq from using or divulging confidential information; damages
<p>Aimia’s Second Fresh as Amended Statement of Claim</p>	<ul style="list-style-type: none"> • Alleged undisclosed joint actorship between Mithaq, Milkwood and Chris Mittleman • Alleged possession and misuse of Aimia-generated confidential information • Alleged Mithaq-generated MNPI regarding its investment intentions 	<ul style="list-style-type: none"> • Declarations in respect of Mithaq: undisclosed joint actorship; breach of the take-over bid regime; possession of MNPI • Orders in respect of Mithaq: prohibition from proceeding with Mithaq’s October 5, 2023 offer subject to making disclosure and selling shares; correction of Mithaq’s disclosure; requiring Mithaq to sell shares acquired in breach of securities law and prohibiting voting those shares; damages

	<ul style="list-style-type: none"> • Flowing from the undisclosed joint actorship allegation, non-compliance with take-over bid requirements in spring 2023 – the higher price allegation • Flowing from the MNPI allegation, non-compliance with the takeover bid regime – failure to obtain a valuation in respect of Mithaq’s October 5, 2023 offer • Alleged unlawful conspiracy to harm Aimia • Alleged participation in Chris Mittleman’s alleged breach of contract, breach of fiduciary duty, and breach of confidence 	
<p>Mithaq’s Fresh as Amended Statement of Defence and Counterclaim</p>	<ul style="list-style-type: none"> • Defence: <ul style="list-style-type: none"> • No joint actorship as alleged • Proper disclosure by Mithaq, contrary to allegation • No alleged misuse of confidential information and no MNPI • Share-related remedies inappropriate • Counterclaim: <ul style="list-style-type: none"> • If not unwound by the Capital Markets Tribunal, damages in respect of the private placement given the alleged purpose and economic effect of the transaction • Damages in respect of the wind-up of Mittleman Investment Management given the alleged purpose and effect of the transaction 	<ul style="list-style-type: none"> • Defence: dismissal of action • Counterclaim: if not unwound by the Capital Markets Tribunal, damages to Aimia for alleged economic harm caused by private placement; damages to Aimia in respect of the winding up of Mittleman Investment Management; no entitlement of individual defendants to indemnification; a <i>CBCA</i> compliance order in respect of the individual defendants; declarations of oppression and breach of fiduciary duties

	<ul style="list-style-type: none"> • A compliance order against the individual defendants prohibiting further alleged entrenchment in respect of Mithaq's October 5, 2023 offer 	
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CAPITAL MARKETS TRIBUNAL LITIGATION		
Party/Matter	Issues	Relief Sought
Mithaq's Capital Markets Tribunal Amended Application	<ul style="list-style-type: none"> • Aimia's shareholder rights plan and any replacement shareholder rights plan are alleged to be defensive measures contrary to the public interest • The private placement is alleged to be a defensive measure contrary to the public interest and the TSX alleged to have erred in failing to require an Aimia shareholder vote • With respect to Mithaq's October 5, 2023 offer: the status of the private placement shares for the minimum tender condition and in respect of approval of a second-step transaction; reliance by Mithaq on the 5% exemption during the offer; compliance by Aimia and its board with the takeover bid rules • When to hear Aimia's cross application 	<ul style="list-style-type: none"> • With respect to the shareholder rights plan and any replacement shareholder rights plan, a cease-trade order • With respect to the private placement, an order cease trading the private placement or an order setting aside the TSX approval decision and ordering a shareholder vote on the private placement • With respect to Mithaq's October 5, 2023 offer, orders: excluding the private placement shares from the minimum tender condition and from the minority for minority approval in respect of a second-step transaction; allowing Mithaq to rely on the 5% exemption; requiring compliance by Aimia and its board with the takeover bid rules • With respect to Aimia's cross application, an order consolidating it with the application

Aimia's Capital Markets Tribunal Cross Application	<ul style="list-style-type: none"> • Use by Mithaq of the 5% exemption relating to purchases of Aimia shares during Mithaq's October 5, 2023 offer • Scheduling a Capital Markets Tribunal hearing of an Aimia application, if needed 	<ul style="list-style-type: none"> • Order prohibiting Mithaq from relying on the exemption relating to purchases of Aimia shares during Mithaq's October 5, 2023 offer • Placeholder date before the Tribunal for cease trade hearing at around January 16, 2024
Aimia's Capital Markets Tribunal Application (hearing scheduled for May 2024)	<ul style="list-style-type: none"> • Mithaq's share purchases in February 2023 and its discussion with Milkwood and Chris Mittleman about Aimia's board, management, and 2023 AGM are alleged to be joint actor conduct • Mithaq's early warning reports disclosures are alleged to be deficient with respect to its share acquisition and its interaction with Milkwood and Chris Mittleman • Whether Mithaq's share acquisition during February 2023 were take-over bids 	<ul style="list-style-type: none"> • Declaration that Mithaq breached NI 62-104 ss. 2.8 and 5.2(2) (duty to make bid to all security holders and early warning disclosure) • Order Mithaq to make the take-over bids available to all common shares holders at the highest price per share