

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

B E T W E E N:

AIMIA INC.

Plaintiff / Moving Party

- and -

CHRISTOPHER MITTLEMAN, MITHAQ CAPITAL SPC, MILKWOOD CAPITAL  
(UK) LTD. and AZVALOR ASSET MANAGEMENT SGIC, SAU

Defendants / Responding Parties

**FACTUM OF THE MOVING PARTY AIMIA INC.  
(INJUNCTION MOTION)**

September 14, 2023

**NORTON ROSE FULBRIGHT CANADA LLP**  
222 Bay Street, Suite 3000  
Toronto, ON M5K 1E7

**Linda Fuerst LSO#: 22718U**

Tel: 416.216.2951

[linda.fuerst@nortonrosefulbright.com](mailto:linda.fuerst@nortonrosefulbright.com)

**Fahad Siddiqui LSO#: 67001A**

Tel: 416.216.2424

[fahad.siddiqui@nortonrosefulbright.com](mailto:fahad.siddiqui@nortonrosefulbright.com)

**Erika Anschuetz LSO#: 72120D**

Tel: 416.216.6626

[erika.anschuetz@nortonrosefulbright.com](mailto:erika.anschuetz@nortonrosefulbright.com)

Fax: 416.216.3930

Lawyers for the Plaintiff / Moving Party

TO: **CHRISTOPHER MITTLEMAN**  
442 e. 72nd Street  
New York NY 10021-3907

cmitt24@gmail.com

Defendant

AND TO: **TORYS LLP**  
Barristers and Solicitors  
79 Wellington Street West  
Suite 3000  
Box 270, TD South Tower  
Toronto, ON M5K 1N2

**Andrew Gray LSO#: 46626V**

Tel: 416.865.7630

agrays@torys.com

**Stacey Reisman LSO#: 72184U**

Tel: 416.865.7537

sreisman@torys.com

Tel: 416.865.0040

Fax: 416.865.7380

Lawyers for the Defendant,  
Mithaq Capital SPC

AND TO: **FASKEN MARTINEAU DUMOULIN LLP**  
Barristers and Solicitors  
333 Bay Street, Suite 2400  
Toronto, ON M5H 2T6

**Jonathan Wansbrough LSO#: 62430G**

Tel: 416.943.8839

Fax: 416.364.7813

jwansbrough@fasken.com

Lawyers for the Defendant,  
Milkwood Capital (UK) Ltd.

AND TO: **AZVALOR ASSET MANAGEMENT SGIIC, SAU**  
Paseo de la Castellana 110, 3rd Floor  
Madrid 28046

Defendant

## TABLE OF CONTENTS

Page No.

<b>PART I - OVERVIEW</b> .....	<b>1</b>
<b>PART II - SUMMARY OF FACTS</b> .....	<b>2</b>
<b>A. PARTIES AND PLAYERS</b> .....	<b>2</b>
<b>B. THE <i>SECURITIES ACT</i></b> .....	<b>4</b>
<b>(I) MANDATORY DISCLOSURE: THE EARLY WARNING REGIME</b> .....	<b>4</b>
<b>(II) THE MANDATORY TAKE-OVER BID REQUIREMENT</b> .....	<b>5</b>
<b>(III) ENFORCEMENT</b> .....	<b>6</b>
<b>C. MR. MITTLEMAN'S OBLIGATIONS</b> .....	<b>7</b>
<b>D. DISCLOSURE</b> .....	<b>8</b>
<b>E. MULTIPLE BREACHES</b> .....	<b>8</b>
<b>(I) NOVEMBER 2022 – DECEMBER 2022</b> .....	<b>8</b>
<b>(II) FEBRUARY 2023</b> .....	<b>9</b>
<b>(III) MARCH 2023</b> .....	<b>13</b>
<b>(IV) THE EMAILS STOP</b> .....	<b>15</b>
<b>F. MITHAQ HAS FAILED TO DISCLOSE THIS INFORMATION TO THE MARKET</b> <b>16</b>	
<b>G. MITHAQ HAS FAILED TO MAKE FULL DISCLOSURE TO THE OSC</b> .....	<b>17</b>
<b>PART III - STATEMENT OF ISSUES, LAW &amp; AUTHORITIES</b> .....	<b>17</b>
<b>A. OVERVIEW</b> .....	<b>17</b>
<b>B. THE PLEADING AMENDMENTS OUGHT TO BE AUTHORIZED</b> .....	<b>17</b>
<b>C. AIMIA HAS A STRONG CASE</b> .....	<b>18</b>
<b>(I) PRIOR FINDINGS</b> .....	<b>18</b>
<b>(II) THE CLAIM</b> .....	<b>18</b>
<b>D. IRREPARABLE HARM</b> .....	<b>23</b>
<b>E. BALANCE OF CONVENIENCE</b> .....	<b>24</b>
<b>PART IV - ORDER REQUESTED</b> .....	<b>25</b>

## **PART I - OVERVIEW**

1. Following an internal investigation, production compelled by two injunction orders issued by Justice Conway and cross-examination on this motion, the Plaintiff, Aimia Inc. (**Aimia** or the **Company**) has obtained dozens of emails, WhatsApp messages and testimony establishing a strong *prima facie* case that the following occurred in the run up to the Company's annual general meeting of shareholders held April 18, 2023 (the **AGM**):

- (a) Aimia's largest shareholder, the Respondent Mithaq Capital SPC (**Mithaq**), asked for and received the Company's non-public and confidential information from an Aimia fiduciary, the Defendant Christopher Mittleman;
- (b) Mithaq's engagement with Mr. Mittleman was part of an "Action Plan" to acquire a "30% equity stake" in Aimia, "recompose the board by limiting the board size to 4 shareholder representative directors" and "exit loss making/mediocre businesses";
- (c) Mithaq was working with Mr. Mittleman and another significant shareholder, the Respondent Milkwood Capital (UK) Ltd. (**Milkwood**), to achieve this plan. In email, Mithaq and Milkwood asked another significant shareholder if it was "willing to join the 'group'";
- (d) Mithaq failed to abide by mandatory early warning laws which require it to disclose to the market any joint actors and its true plans or future intentions with respect to Aimia; and
- (e) Mithaq and its joint actors avoided the mandatory take-over bid rules by collectively crossing the 20% ownership threshold without making an offer to all shareholders.

2. On this motion, Aimia seeks orders (i) requiring production from the Respondents about their participation in breaches of fiduciary, contractual and statutory obligations and (ii) orders

requiring Mithaq to correct its public disclosure and restraining Mithaq and Milkwood from dealing with their shares until trial.

3. In the event that the Court does not order Mithaq to correct its public disclosure or restrain Mithaq and Milkwood from dealing with their shares, Aimia seeks an order for an expedited trial in the first quarter of 2023.

## **PART II - SUMMARY OF FACTS**

### **A. Parties and Players**

4. The Plaintiff, Aimia, is a public company registered under the *Canada Business Corporations Act*. The Company's common shares (**Shares**) are traded on the Toronto Stock Exchange. Aimia is a holding company that invests in revenue-generating businesses. Trading in Aimia Shares is regulated by the *Securities Act*, RSO 1990 c S.5 (the **Securities Act**).<sup>1</sup>

5. The Defendant, Mr. Mittleman, is a former member of Aimia's Board of Directors (the **Board**), the former Chief Investment Officer (**CIO**) of Aimia, and the former CIO of Aimia's indirect, wholly-owned subsidiary, Mittleman Investment Management LLC (**MIM**). MIM is an SEC-registered investment advisor that held shares in public companies, including Aimia, in investment accounts on behalf of its clients. At all material times, Mr. Mittleman controlled the voting rights associated with approximately 6% of Aimia's Shares by virtue of his position as CIO and 0.53% of Aimia's Shares in his personal capacity.<sup>2</sup>

6. As a former officer and director of Aimia, Mr. Mittleman owes the Company continuing fiduciary duties and is bound by the provisions in the *Securities Act* that prohibit insiders from

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<sup>1</sup> Affidavit of Michael Lehmann sworn June 19, 2023 [**Lehmann Affidavit**] at para 4-5, Motion Record of Aimia (Injunction Motion) dated June 19, 2023 [**Aimia Injunction MR**], Vol 1, Tab 2, p. 7.

<sup>2</sup> Lehmann Affidavit at paras 8, 96(d), Aimia Injunction MR, Vol 1, Tab 2, pp. 7, 56; Cross-Examination Transcript of Christopher Mittleman, dated May 31, 2023 [**Mittleman May 31 Cross**], qq. 178-181, pp. 46-47, Joint Transcript and Undertakings Brief [**Transcript Brief**], Tab 1, pp. 47-48; Lehmann Affidavit, Exhibit C, Aimia Injunction MR, Vol, 1, Tab 2C, pp. 65-69 (Mr. Mittleman owns approximately 300,000 common shares of Aimia which are in escrow as collateral. These are not included in the approximated value of 0.53%).

disclosing material non-public information. Mr. Mittleman is also bound by an agreement with Aimia dated March 29, 2022 (the **Letter Agreement**) pursuant to which he agreed to protect Aimia's confidential information and to a standstill.<sup>3</sup>

7. Mithaq is a company formed in the Cayman Islands on behalf of a Saudi Arabian family office headquartered in Riyadh. Mr. Asif Seemab is a director of Mithaq and the Managing Director of Mithaq's parent company. At all material times, Mithaq held more than 10% of Aimia's Shares and was bound by the mandatory disclosure and take-over bid requirements made under Part XX of the *Securities Act*.<sup>4</sup>

8. Milkwood is an asset manager based in the United Kingdom. Mr. Rhys Summerton is Milkwood's principal. Between December 2022 and April 2023, Milkwood increased its holdings in Aimia to 2.58% of the Company's Shares.<sup>5</sup>

9. The crux of this motion is whether there is a serious issue to be tried or strong *prima facie* case that Mr. Mittleman, Mithaq and Milkwood (collectively, the **Respondents**) unlawfully conspired to breach the *Securities Act* or Mr. Mittleman's obligations to Aimia or are otherwise liable for breach of confidence—and if so, whether interlocutory remedies or an expedited trial would be the most suitable remedy.

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<sup>3</sup> *Securities Act*, [RSO 1990, c S 5](#), s. 76 [**Securities Act**]; *Cygnal Technologies Corp. v. Taylor*, [2005 CanLII 25889](#) (ONSC), at paras 10-12; *Carlsen v. Physique Health Club Ltd. (Physique Fitness Store)*, [1996 ABCA 358](#) (CanLII) at para 4; Lehmann Affidavit at para 13, Aimia Injunction MR, Vol 1, Tab 2, p. 26.

<sup>4</sup> Affidavit of Asif Seemab sworn July 21, 2023 at paras 1, 7 [**Seemab July 21 Affidavit**], Responding Motion Record of Mithaq (Injunction Motion) dated July 21, 2023 [**Mithaq Injunction MR**], Vol 1, Tab 1, pp. 1, 3; Lehmann Affidavit at para 21, Aimia Injunction MR, Vol 1, Tab 2, p. 29.

<sup>5</sup> Lehmann Affidavit at para 24, Aimia Injunction MR, Vol 1, Tab 1, p. 29; Affidavit of Rhys Summerton sworn August 9, 2023 [**Summerton Affidavit**] at para 1, Milkwood Responding Motion Record dated August 9, 2023 [**Milkwood MR**], Tab 1, p. 1; Answers to Undertakings of Rhys Summerton, Item 5, Transcript Brief, Tab 7B, p. 562.

**B. The Securities Act**

**(i) Mandatory Disclosure: The Early Warning Regime**

10. Part XX of the *Securities Act* and the instruments adopted thereunder establish an early warning regime to provide shareholders with early notice of significant events within a stock.

11. The regime requires shareholders to disclose when they acquire 10% of a company's shares and to make further disclosure when their ownership increases or decreases by 2%.<sup>6</sup>

12. The form of disclosure includes a form of early warning report (**EWR**) that requires a significant shareholder to advise the market of (a) the names and collective shareholdings of any joint actors, (b) the purpose or purposes for which the shareholder and any joint actors are acquiring shares, and (c) a description of any plans or future intentions which the shareholder and its joint actors may have which relate to or would result in material changes to the company.<sup>7</sup>

13. Under securities law, joint actorship describes a concerted effort by two or more persons "to bring about a specified objective", such as an intention or plan to replace a company's board of directors, to acquire shares, to vote shares or to change a company's business. Joint actorship can arise from a shared understanding and can be established based on reasonable inferences and circumstantial evidence such as communications between two parties.<sup>8</sup>

14. The purpose of the early warning regime and the requirement to disclose joint actorship is to alert the market and smaller shareholders to significant acquisitions of a company's stock that may impact investment decisions. It enables shareholders to predict possible take-over bids

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<sup>6</sup> [National Instrument 62-103](#); [National Instrument 62-104](#), s. 5.2; Affidavit of Poonam Puri, Exhibit A at para 24 [**Puri Report**], Reply Record of the Moving Party, (to the Responding Record of the Respondent, Mithaq Capital SPC), dated July 26, 2023 [**Aimia Reply Record**], Tab 1, p. 9; Affidavit of Edward Waitzer, Exhibit A at para 14(b) [**Waitzer Report**], Aimia Reply Record, Tab 2, p. 32.

<sup>7</sup> [Form 62-103F1](#).

<sup>8</sup> *Genesis Land Development Corp. v Smoothwater Capital Corporation*, [2013 ABQB 509](#) [**Smoothwater**] at paras 24-25, 52; *Sterling Centrecorp Inc. et al.*, [2007 ONSEC 9 \(CanLII\)](#) at para 102; [National Instrument 62-103](#), s. 1.1(1).

and to understand the potential for a significant shareholder, or group of shareholders, to assume ownership or control of the company, both of which can impact the liquidity or price of a stock. It also permits smaller shareholders to assess whether they wish to remain invested in light of the identity and background of the significant shareholder(s) who will be in a position to exert influence on the company.<sup>9</sup>

15. In order to achieve these purposes, early warning disclosure must be detailed and clear. Boilerplate language does not provide meaningful disclosure to the market.<sup>10</sup>

**(ii) The Mandatory Take-Over Bid Requirement**

16. The instruments adopted pursuant to Part XX of the *Securities Act* also establish a mandatory take-over bid regime.

17. When a shareholder makes an offer to acquire shares that would result in it and its joint actors collectively controlling 20% or more of a company's shares (a **Triggering Acquisition**), the shareholder is required to make a bid for all of the outstanding shares of the company on the same terms as the Triggering Acquisition (a **Mandatory Take-Over Bid**).<sup>11</sup>

18. A Mandatory Take-Over Bid presents a number of practical benefits to minority shareholders including preventing price discrimination and disclosure about the bidder and its joint actors. Together, early warning disclosure and Mandatory Take-Over Bid disclosure alert minority shareholders and the company to the possibility of a person or a group of joint actors (a) becoming significant shareholders who will likely exercise significant influence over the company and (b) who may become the majority shareholder(s). Minority shareholders use this information to make investment decisions and boards of directors rely on this information to advise

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<sup>9</sup> [Smoothwater](#) at paras 9-11; Puri Report at paras 27-28, 31, Aimia Reply Record, Tab 1, pp. 9-10.

<sup>10</sup> [Smoothwater](#) at para 10.

<sup>11</sup> [National Instrument 62-104](#); Waitzer Report at para 14(a), Aimia Reply Record, Tab 2, p. 32.



shareholders about the Mandatory Take-Over Bid.<sup>12</sup>

19. At the same time, a Mandatory Take-Over Bid imposes significant financial burdens on an acquirer:

- (a) The acquirer must make the bid available for acceptance to all shareholders for at least 105 days, which ties up capital; and
- (b) Because an acquirer may only cross the 20% shareholding threshold if the holders of 50% or more of the securities that are subject to a Mandatory Take-Over Bid agree to tender their shares into the bid, the acquirer will typically have to offer a control premium (**Control Premium**) to ensure that enough shareholders are sufficiently enticed by its bid.<sup>13</sup>

20. Errol Soriano, a valuation expert, examined Aimia's share price throughout February 2023 and comparable Control Premiums. Based on his expert assessment, Mr. Soriano concluded that the midpoint cost of a Mandatory Take-Over Bid for Aimia's shares in February 2023 would have been approximately \$132,000,000.<sup>14</sup>

**(iii) Enforcement**

21. A public company may invoke the Superior Court's broad jurisdiction under the *Securities Act* to remedy non-compliance with the early warning regime and the mandatory take-over bid regime. In cases such as this one, the company plays an important role since it may be the only party with knowledge of the non-compliance.

22. Under section 105 of the *Securities Act*, the Court may make "any interim or final order as

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<sup>12</sup> Waitzer Report at paras 14(b), 22 – 25, Aimia Reply Record, Tab 2, p. 32, 34-35; Puri Report at paras 27, 28, 31, Aimia Reply Record, Tab 1, p. 9-10; [National Instrument 62-103](#); [National Instrument 62-104](#).

<sup>13</sup> Waitzer Report at paras 26-27, Aimia Reply Record, Tab 2, p. 35; [National Instrument 62-104](#).

<sup>14</sup> Affidavit of Errol Soriano dated July 26, 2023, Exhibit A [**Soriano Report**] at para 4.1, Aimia Reply Record, Tab 3A, p. 53.

it thinks fit”, including (a) rescinding an acquisition of shares, (b) requiring any person to dispose of any securities acquired under or in connection with a take-over bid, (c) prohibiting the exercise of voting rights attaching to securities, or (d) requiring the trial of an issue.<sup>15</sup>

23. The Court’s jurisdiction to supervise the capital markets overlaps with the authority of regulators such as the Ontario Securities Commission. It is not uncommon for civil and regulatory proceedings to advance in parallel. As Professor Poonam Puri explains, this is desirable from a policy perspective because it ultimately ensures fairness in the market by deterring misconduct.<sup>16</sup>

### **C. Mr. Mittleman’s Obligations**

24. As a former officer, director and insider of Aimia, Mr. Mittleman owes a number of continuing obligations to Aimia, including an obligation not to divulge or misuse Aimia’s confidential information or any other non-public information pertaining to the Company.

25. Mr. Mittleman’s confidentiality obligations arise from (a) his continuing fiduciary obligations, (b) the anti-tipping provisions of the *Securities Act*, (c) section 8 of the Letter Agreement, which protects a broadly defined range of confidential information (hereinafter referred to as **Confidential Information**) and (d) Mr. Mittleman’s specific written commitment that information about Aimia’s potential acquisition targets constitutes Confidential Information and non-public information (**Non-Public Information**) which he was not permitted to disclose.<sup>17</sup>

26. Under the Letter Agreement, Mr. Mittleman also agreed to abide by a standstill provision, which prohibits him from directly or indirectly taking any step to, or engaging in discussions about,

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<sup>15</sup> *Securities Act*, [RSO 1990, c S.5](#), s. 105; Puri Report at paras 39–40, Aimia Reply Record, Tab 1, p. 12.

<sup>16</sup> Puri Report at paras 36–38, 43, 51, Aimia Reply Record, Tab 1, pp. 12, 14, 16; Transcript of the Cross-Examination of Alan Hibben held August 31, 2023 [**Hibben Cross**], q. 67-70, p. 23-24, Transcript Brief, Tab 9, p. 764-765; See for example *Securities Act*, [RSO 1990, c S.5](#), ss. 104, 105 and *McDonald v. Home Capital Group*, [2017 ONSC 5004](#) (the Court approved a settlement agreement that settled (i) a class action alleging securities laws violations and (ii) parallel proceedings by the OSC).

<sup>17</sup> *Cygnal Technologies Corp. v. Taylor*, [2005 CanLII 25889](#) (ONSC), at paras 10-12; *Carlsen v. Physique Health Club Ltd. (Physique Fitness Store)*, [1996 ABCA 358](#) (CanLII) at para 4; *Securities Act*, s. 76; Lehmann Affidavit, Exhibit F, s. 8, Aimia Injunction MR, Vol 1, Tab 2F, pp. 104–105; Lehmann Affidavit, Exhibit E, Aimia Injunction MR, Vol 1, Tab 2E, pp. 83–86.

the acquisition or voting of Aimia's Shares or attempting to influence the management, Board or policies of Aimia (the **Standstill Provision**).<sup>18</sup>

**D. Disclosure**

27. It is only as a result of its access to Mr. Mittleman's emails and disclosure obtained in this litigation that Aimia has access to records showing that Mr. Mittleman shared Confidential and Non-Public Information with Mithaq and that Mithaq was engaged in undisclosed joint actorship with Mr. Mittleman and Milkwood.

28. Aimia still does not have the benefit of full disclosure. Mithaq and Milkwood have refused to produce their correspondence following the AGM; neither has produced their correspondence with other shareholders; and Mithaq has heavily redacted the records it has included in its record without explanation even though it undertook to provide the same.<sup>19</sup>

**E. Multiple Breaches**

29. Even at this early stage of the action, the record clearly shows that Mithaq was coordinating its acquisitions and activism with Milkwood while also seeking Confidential and Non-Public Information from Mr. Mittleman.

30. As discussed further below, Mithaq received numerous documents from Mr. Mittleman labelled "PRIVILEGED & CONFIDENTIAL". At the same time, Mithaq and Milkwood discussed how to time their acquisitions to avoid inflating Aimia's Share price; disclosed their positions in Aimia to each other before disclosing the same to the market; developed a plan to acquire "up-to 30%" of Aimia's Shares; and planned to take over the Board and change Aimia's business. None of these plans or intentions have been disclosed to the market or the OSC.

**(i) November 2022 – December 2022**

31. Between December 16, 2022 and December 26, 2022, Mr. Mittleman facilitated

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<sup>18</sup> Lehmann Affidavit, Exhibit F, Aimia Injunction MR, Vol 1, Tab 2F, pp. 102–103.

<sup>19</sup> Answers to Undertakings of Asif Seemab, Transcript Brief, Tab 8A, Item 2, p. 697.

introductions between Mr. Seemab and a number of other Aimia shareholders.<sup>20</sup>

32. Starting in or around December of 2022, Mithaq and Milkwood discussed coordinating the timing of their purchases of Aimia Shares. On cross-examination, Mr. Summerton admitted that the purpose of the coordination was to ensure that Mithaq and Milkwood would not drive up the market price of the Shares by purchasing at the same time.<sup>21</sup>

33. Between December 6, 2022, when Milkwood made its first purchase of Shares, and May 25, 2023, when Mithaq made its most recent purchase, Mithaq and Milkwood executed 51 separate acquisitions of Shares over a 170-day period. On all but 3 occasions, Mithaq and Milkwood never acquired Shares on the same day:<sup>22</sup>



**(ii) February 2023**

34. On February 1, 2023, Mr. Mittleman and Mr. Seemab exchanged emails regarding Aimia's pending acquisition of an Indian-based company named Tufropes. Mr. Seemab asked Mr. Mittleman detailed questions about the acquisition. Mr. Mittleman responded by acknowledging that he was not authorized to speak about the acquisition but did so anyway:

Anyway, I am besides myself with frustration. Yet, I am not supposed to be speaking out on the matter so please keep my comments between us. Seriously, Aimia would likely fire me immediately if they saw this email....<sup>23</sup>

35. Mr. Seemab forwarded Mr. Mittleman's email to Mr. Summerton and wrote: "Pls see

<sup>20</sup> Lehmann Affidavit at paras 46-47, 49-50, Aimia Injunction MR, Vol 1, Tab 2, pp. 37-38.

<sup>21</sup> Transcript of the Cross-Examination of Rhys Summerton held August 30, 2023 [Summerton Cross], qq. 89-96, pp. 27-29, Transcript Brief, Tab 7, pp. 377-379.

<sup>22</sup> Seemab July 21 Affidavit, Exhibit B, Mithaq Injunction MR, Vol 1, Tab 1B, pp. 65-67; Answers to Undertakings of Rhys Summerton, Transcript Brief, Tab 7B, pp. 562-563.

<sup>23</sup> Lehmann Affidavit, Exhibit X, Aimia Injunction MR, Vol 1, Tab 2X, pp. 237-241.

below. I think he would support us if we really plan it well”.<sup>24</sup>

36. On February 2, 2023, Mr. Seemab sent an email to Mr. Mittleman with the subject line “Exceeding 20%?” and asked for help understanding “the process/implications if an investor exceeds the 20% equity threshold in the Canadian market?”.<sup>25</sup>

37. Mr. Mittleman responded on the same day with the requested information and stated that “if an activist’s goals can be achieved without incurring the complications of crossing the mandatory build [*sic*] threshold, that’s probably the easier / less expensive / better path. So I think 19.9% is probably sufficient”.<sup>26</sup>

38. On February 3, 2023, Mr. Mittleman wrote to another Aimia shareholder: “Methinks the Saudis are sharpening their long swords”.<sup>27</sup>

39. On February 6, 2023, Mr. Seemab requested that Mr. Mittleman disclose when the pending Tufropes transaction “is going to be closed”. At that time, Aimia had not made public the date on which the deal would close.<sup>28</sup>

40. On February 8, 2023, Mr. Seemab asked Mr. Mittleman for a register of Aimia’s shareholders. Mr. Mittleman responded that he did not have a register, but would send Mr. Seemab an internal Aimia report “that shows the major share holders from that time”. Later that day, Mr. Mittleman sent Mr. Seemab a non-public study commissioned by the Company that

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<sup>24</sup> Affidavit Asif Seemab sworn August 25, 2023, Exhibit E1 [**Seemab August 25 Affidavit**], Supplemental Responding Motion Record of Mithaq (Injunction Motion) dated August 25, 2023 [**Mithaq Supp. Injunction MR**], Vol 1, Tab 1E, p. 27.

<sup>25</sup> Lehmann Affidavit, Exhibit Z, Aimia Injunction MR, Vol1, Tab 2Z, p. 250.

<sup>26</sup> Lehmann Affidavit, Exhibit Z, Aimia Injunction MR, Vol 1, Tab 2Z, p. 249.

<sup>27</sup> Lehmann Affidavit, Exhibit CC, Aimia Injunction MR, Vol 1, Tab 2CC, p. 259.

<sup>28</sup> Seemab July 21 Affidavit, Exhibit T, Mithaq Injunction MR, Vol 2, Tab 1T, p. 709; Lehmann Affidavit at para 83(a), Aimia Injunction MR, Vol 1, Tab 2, pp. 48–49.

contained a list of significant Aimia shareholders.<sup>29</sup>

41. On February 10 and 11, 2023, Mr. Seemab told Mr. Mittleman over WhatsApp that their “British friend” would be taking the lead, and that Mithaq and Milkwood’s plan was to have representation on the Board and to reduce its size:

[2/10/23, 1:03:33 AM] Chris Mittleman: Has Torys offered any ideas on action plans given the limited time frame?

[2/10/23, 1:06:28 AM] Asif Seemab: They explained a few options. From our side, our British friend is taking lead so he is finalizing best option with his own lawyer.

[2/10/23, 1:09:56 AM] Chris Mittleman: Excellent. Has Rhys any experience with executing an activist campaign? I’m not saying it’s a prerequisite for a successful outcome here, at all, just curious if he’s done anything similar before.

[2/10/23, 1:10:50 AM] Asif Seemab: He has done plenty of activism before.

[2/10/23, 1:11:40 AM] Chris Mittleman: Great. I will look into his background more thoroughly....

[2/11/23, 1:04:50 AM] Chris Mittleman: Do you have any idea if Rhys is thinking about requisitioning a special meeting or just nominating directors at regular AGM? I ask because if calling a special meeting I could provide notes for requisition letter, or for announcement of nominations for AGM. Also I think you said he didn’t want to be involved in running Aimia assuming successful change of control, but wouldn’t he want a board seat for himself at least?

[2/11/23, 2:40:28 AM] Asif Seemab: We’re exploring options. Nothing is finalized yet. I mentioned on the lines that 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.<sup>30</sup>

42. On February 11, 2023, Mr. Mittleman sent an email to Mr. Seemab with the heading “CONFIDENTIAL – DO NOT FORWARD” (the **February 11 Email**). In the body of the February 11 Email, Mr. Mittleman wrote as follows:

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<sup>29</sup> Seemab July 21 Affidavit, Exhibits T and T2, Mithaq Injunction MR, Vol 2, Tab 1T, pp. 710, 720; Lehmann Affidavit at para 83(f), Aimia Injunction MR, Vol 1, Tab 2, pp. 50.

<sup>30</sup> Seemab July 21 Affidavit, Exhibit T, Mithaq Injunction MR, Vol 2, Tab 1T, pp. 711-712.

This is the email that got me kicked off the Board, and demoted from CIO. I trust you'll keep this in confidence. I share it with you at great risk to myself, but as Aimia's effectively controlling shareholder now, it's important that you know this history. No one else outside of Aimia does.<sup>31</sup>

43. Attached to the February 11 Email were a number of documents containing Confidential and Non-Public Information (the **Confidential Attachments**) including emails between Board members concerning potential investment targets and the Company's investment strategy. One of the attachments was labelled "PRIVILEGED & CONFIDENTIAL".<sup>32</sup>

44. Mr. Seemab did not object to receiving the February 11 Email or the Confidential Attachments. In fact, he kept a copy of the email and the Confidential Attachments and acknowledges reviewing at least some of them out of curiosity. On cross-examination, Mr. Seemab insisted that he repeatedly told Mr. Mittleman over the phone not to share anything Non-Public with him.<sup>33</sup> This evidence is directly contradicted by:

- (a) The absence of any such objection in the contemporaneous documents;
- (b) Mr. Mittleman's evidence that Mr. Seemab never objected to receiving non-public information from him ("he never conveyed that thought to me");<sup>34</sup> and
- (c) Mr. Seemab's receipt of another document labelled "PRIVILEGED AND CONFIDENTIAL" nearly a month after the February 11 Email.<sup>35</sup>

45. On February 11, 2023, at 6:12 pm, just hours after Mr. Mittleman sent Mr. Seemab the February 11 Email and Confidential Attachments, Mr. Seemab told Mr. Mittleman that his counsel had raised concerns about their ongoing discussions with other shareholders because this could

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<sup>31</sup> Lehmann Affidavit, Exhibit EE, Aimia Injunction Record, Vol 1, Tab 2EE, p. 270.

<sup>32</sup> Lehmann Affidavit at para 63, Aimia Injunction MR, Vol 1, Tab 2, p. 42.

<sup>33</sup> Cross Examination of Asif Seemab held August 30, 2023 [**Seemab Cross**], qq. 235-246, pp. 64-66, Transcript Brief, Tab 8, pp. 634-636.

<sup>34</sup> Mittleman May 31 Cross, qq. 205-206, p. 53, Transcript Brief, Tab 1, p. 54; Seemab Cross, qq. 261 - 265, pp. 69-71, Transcript Brief, Tab 8, pp. 639-641.

<sup>35</sup> July 21 Seemab Affidavit, Exhibit T11, Mithaq Injunction MR, Vol 2, Tab 2T, pp. 833-862.

be considered “tipping”:

[2/11/23, 6:12:24 PM] Asif Seemab: So the thing is: my lawyer has stopped me talking to other larger investors otherwise the conversation might fall into “tipping” and would be illegal in their view. A reason I haven’t spoke to Alvaro after my 1<sup>st</sup> call with him. I’ll let you know as soon as my lawyer allows me. To get support, I would talk to everyone and explain our plan in detail.<sup>36</sup>

**(iii) March 2023**

46. On March 1, 2023, Mr. Mittleman delivered a draft press release to Mr. Seemab. The press release was titled “Milkwood Capital and Mithaq Capital to Requisition Special Meeting of Aimia Shareholders; Nominate Four Directors to Realign Current Board with Shareholders”. It also described Mithaq and Milkwood as part of a group of shareholders that controlled more than 20% of the Company’s shares. Mr. Seemab did not object to the draft or correct anything in it. Instead, he responded by thanking Mr. Mittleman.<sup>37</sup>

47. On March 6, 2023, Mr. Mittleman sent Mr. Seemab:

- (a) Exchanges with the Board regarding certain acquisitions Aimia was considering at the time, which were both Confidential and Non-Public Information; and
- (b) a Confidential Information Memorandum that had been made available to Aimia’s management team during the due diligence phase of the Tufropes acquisition. The document is labelled “PRIVILEGED & CONFIDENTIAL” and contains a range of Non-Public Information that had not been disclosed to the market. On cross-examination, Mr. Seemab testified that the information in this document was public. When he could not identify any details of how the information had been publicized, he was given an opportunity to do so by way of undertaking. The written answer Mr. Seemab ultimately delivered is entirely non-responsive, and Mr. Seemab’s

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<sup>36</sup> Seemab July 21 Affidavit, Exhibit T, Mithaq Injunction MR, Vol 2, Tab 2T, p. 712.

<sup>37</sup> Seemab July 21 Affidavit, Exhibit T6, Mithaq Injunction MR, Vol 2, Tab 2T, pp. 760-765.



evidence on this point lacks credibility.<sup>38</sup>

48. Again, there is no written evidence that Mr. Seemab objected to receiving this Confidential and Non-Public Information.

49. While Mr. Mittleman and Mr. Seemab were exchanging Confidential and Non-Public Information, Mr. Seemab and Mr. Summerton were coordinating their strategy with respect to Aimia through counsel. Between March 7 and March 10, 2023, Milkwood and Mithaq's counsel exchanged correspondence over which they have asserted common interest privilege.<sup>39</sup>

50. At approximately the same time, Mithaq and Milkwood were also interviewing Board candidates and put together a slate of candidates which included, among others, Mr. Summerton, Mr. Seemab and Turki Saleh Al Rajhi, the CEO and Chairman of Mithaq.<sup>40</sup>

51. By March 10, 2023, Mithaq and Milkwood had advanced to drafting documents to replace the Board including:

- (a) A letter to Aimia shareholders dated March 10, 2023 setting out "Mithaq's Action Plan" for the operation and management of Aimia. Among other things, the action plan states that "The new Board will have 23.99% equity stake (Mithaq 19.99% and Milkwood Capital 4%); "We intended to obtain up-to to [sic] 30% equity stake...but were unable to complete such purchases before Aimia's surprise announcement of the upcoming shareholder meeting"; and "We intend to recompose the board by limiting the board size to 4 shareholder representative

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<sup>38</sup> Seemab July 21 Affidavit, Exhibits T10 and T11, Mithaq Injunction MR, Vol 2, Tab 2T, pp. 821-863; Answers to Undertakings of Asif Seemab, Item 11, Transcript Brief, Tab 8A, p. 700.

<sup>39</sup> Answers to Undertakings of Rhys Summerton, Items 10, 14, Transcript Brief, Tab 7A, pp. 556-557.

<sup>40</sup> Seemab August 25 Affidavit, Exhibits F3, F5, F6, F8, F11, F12, F13, Mithaq Supp. Injunction MR, Vol 2, Tab 1F, pp. 461, 475, 477, 487, 523, 526, 532-536; Summerton Cross, qq. 271-278, 283-287, pp. 75-78, Transcript Brief, Tab 7, pp. 425-428.

directors”. None of these plans were disclosed to the market. In fact, Mithaq did not publish an EWR announcing that it had increased its stake to 19.9% until nearly a month later, on April 6, 2024.<sup>41</sup>

- (b) A nomination form in which Mithaq and Milkwood set out their intention to jointly nominate 6 nominees for Board positions, including representatives of both Mithaq and Milkwood, and attached the biographies of the nominees;<sup>42</sup>
- (c) A press release and EWR prepared by counsel that Mithaq would send to Milkwood for “review and sign off”, after which “our legal counsel would make it public today”.<sup>43</sup>

52. On March 10, 2023, Mr. Seemab wrote to another significant shareholder, the University of Michigan, copied Mr. Summerton, and asked if the University of Michigan was “willing to join the ‘group’”.<sup>44</sup>

**(iv) The Emails Stop**

53. Shortly after their counsel engaged in common interest privileged discussions, the email communications between Messrs. Seemab and Summerton dried up. Between March 11, 2023 and April 18, 2023 (the end of the period for which Mithaq and Milkwood agreed to disclose records), Mithaq and Milkwood exchanged only two emails, a significant decrease from their email activity in the previous months.<sup>45</sup>

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<sup>41</sup> Seemab August 25 Affidavit, Exhibit F15, Mithaq Supp. Injunction Record, Vol 2, Tab 1F, pp. 569-572; Summerton Cross, q. 341, p. 92, Transcript Brief, Tab 7, p. 442; Seemab July 21 Affidavit, Exhibit A, Mithaq Injunction MR, Vol 1, Tab 1A, pp. 24-63.

<sup>42</sup> Seemab August 25 Affidavit, Exhibit F12, Mithaq Supp. Injunction MR, Vol 2, Tab 1F, pp. 532-536. Some of the information in this crucial exhibit has been redacted without explanation.

<sup>43</sup> Seemab August 25 Affidavit, Exhibit F14, Mithaq Supp. Injunction MR, Vol 2, Tab 1F, p. 544; Summerton Cross, qq. 276-277, p. 76, Transcript Brief, Tab 7, p. 426.

<sup>44</sup> Seemab August 25 Affidavit, Exhibit F14, Mithaq Supp. Injunction MR, Vol 2, Tab 1F, p. 544.

<sup>45</sup> Seemab August 25 Affidavit, Exhibits F17 and G, Mithaq Supp. Injunction MR, Vol 2, Tab 1F, pp. 577, 599. Between February 1 and March 10, 2023, Mithaq and Milkwood exchanged roughly 35 emails.

54. Similarly, starting on March 8, 2023, Mr. Seemab stopped responding substantively to Mr. Mittleman's WhatsApp messages and instead repeatedly invited him to contact him over the phone ("Let's have a call by Friday"; "Let's have a call tomorrow evening my time"; "Let's discuss on the call tomorrow, please!").<sup>46</sup>

55. On March 30, 2023, Mr. Seemab and Mr. Summerton began communicating cryptically by WhatsApp. For example, on April 9, 2023, Mr. Seemab sent Mr. Summerton a draft press release, but rather than email the press release to Mr. Summerton as a single document as he had on numerous occasions in the past, Mr. Seemab split the press release across four photographs and sent them to Mr. Summerton over WhatsApp.<sup>47</sup>

56. It appears that Mr. Seemab and Mr. Summerton continued to exchange messages regarding Aimia up to and after the date of the AGM, but those messages have been redacted.<sup>48</sup>

#### **F. Mithaq Has Failed to Disclose This Information to the Market**

57. Mithaq is required to file EWRs disclosing to the market any joint actorship, the plans and future intentions of it and its joint actors, and whether a Mandatory Take-Over Bid has been triggered. Instead, it has never disclosed any joint actorship or its self-described "plan" to acquire up to 30% of Aimia's stock, recompose the Board, and change Aimia's investing strategy. To the contrary, Mithaq's expert witness acknowledged, Mithaq's EWRs contained only "boilerplate" language that reflects a "throw in the kitchen sink" approach.<sup>49</sup>

58. The market has therefore been deprived of this important information. Absent corrected disclosure, the Company and its shareholders will never know if Mithaq has improperly avoided a Mandatory Take-Over Bid or withheld a Control Premium owing to minority shareholders.

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<sup>46</sup> Seemab July 21 Affidavit, Exhibit T, Mithaq Injunction MR, Vol 2, Tab 1T, p. 716.

<sup>47</sup> Seemab August 25 Affidavit, Exhibits H1, H11, H12, H13 and H14, Mithaq Supp. Injunction MR, Vol 2, Tab 1H, pp. 604, 637-643.

<sup>48</sup> See redacted messages following April 18, 2023 at Seemab August 25 Affidavit, Exhibit H1, Mithaq Supp. Injunction MR, Vol 2, Tab 1H, pp. 606-613.

<sup>49</sup> Hibben Cross, at q. 99, p. 31, Transcript Brief, Tab 9, p. 772.

**G. Mithaq Has Failed to Make Full Disclosure to the OSC**

59. In his affidavit evidence, Mr. Seemab adverts to a letter that Mithaq delivered to the OSC. The letter did not disclose Mithaq's relationship with Milkwood; Mithaq and Milkwood's discussions about coordinating the timing of their acquisitions; or the "Action Plan" to acquire up to 30% of Aimia's shares and recompose the Board.<sup>50</sup>

**PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES**

**A. Overview**

60. On this motion, Aimia seeks an order authorizing the amendments to its Statement of Claim and injunctive relief.

**B. The Pleading Amendments Ought to be Authorized**

61. After it received production from Mr. Mittleman pursuant to Justice Conway's injunction orders, Aimia wrote to Mr. Mittleman, Mithaq, Milkwood and Azvalor to seek their consent to the amendments and for the latter to be added as parties. No consent has been provided. Milkwood has provided no substantive response to Aimia's requests. Mr. Mittleman has not provided any explanation for his opposition to the amendments.<sup>51</sup> Azvalor has simply not responded to Aimia's multiple emails. Mithaq has reserved its rights "to challenge the legal sufficiency of the pleading" but has not provided Aimia with particulars.<sup>52</sup>

62. Rule 26.01 provides that pleading amendments shall be authorized unless non-compensable prejudice would result, and Rule 5.04(2) provides that the Court may add a party to a proceeding unless non-compensable prejudice would result. None of the Respondents have led any evidence of non-compensable prejudice.

63. The only issue in such circumstances is whether, taking the allegations in the pleading to be true and provable, the pleading discloses all of the necessary components of an identifiable

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<sup>50</sup> Seemab May 19 Affidavit, Exhibit M, Mithaq Application Record, Tab 3, p. 107-112.

<sup>51</sup> Affidavit of Katie Parent sworn June 16, 2023, Exhibit V, Aimia Injunction MR, Vol 3, Tab 3V, pp. 1187.

<sup>52</sup> Affidavit of Katie Parent sworn June 16, 2023, Exhibit QQ, Aimia Injunction MR, Vol 3, Tab 3QQ, pp. 1247-1249.

cause of action.<sup>53</sup> Unlawful means conspiracy and breach of confidence are well-established causes of action and the Court appears to have accepted that inducing breach of fiduciary duty is a tenable cause of action.<sup>54</sup> The amendments should be authorized.

**C. Aimia Has a Strong Case**

64. Aimia has a strong *prima facie* case or, in the alternative, has satisfied the “serious issue to be tried” standard by showing that its case is neither frivolous or vexatious.<sup>55</sup>

**(i) Prior Findings**

65. Justice Conway has already found that Aimia has established a serious issue to be tried with respect to Mr. Mittleman’s breaches of the Letter Agreement and a strong *prima facie* case with respect to Mr. Mittleman’s disclosure of Confidential Information.<sup>56</sup>

**(ii) The Claim**

66. Unlawful conduct in the context of unlawful means conspiracy includes (i) breaches of the fiduciary obligations of directors, (ii) breaches of contract such as the Letter Agreement, and (iii) breaches of statutes such as the *Securities Act*.<sup>57</sup> The record shows that Aimia has a strong *prima facie* case that the Respondents acted in concert, committed each of the pleaded unlawful means, directed their conduct at Aimia, ought to have known that injury was likely to occur, and harm has occurred.

67. First, with respect to the disclosure, inducement of disclosure and receipt of Confidential and Non-Public Information:

(a) Directors and officers owe continuing fiduciary duties to not misuse confidential

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<sup>53</sup> *Schembri v. Way*, [2012 ONCA 620](#) at para 27.

<sup>54</sup> *The Catalyst Capital Group Inc. and Callidus Capital Corporation v. West Face Capital Inc. et al*, [2021 ONSC 7957 \[Catalyst\]](#) at para 366, aff’d on appeal; *ADGA Systems International Ltd. v. Valcom Ltd.*, [1999 CanLII 1527 \(ON CA\)](#) at para 8; *RH20 North America v Bergmann*, [2023 ONSC 2378](#) at para 31.

<sup>55</sup> *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994 CanLII 117](#) (SCC) at p. 337.

<sup>56</sup> Lehmann Affidavit, Exhibit MM at para 6, Aimia Injunction MR, Vol 1, Tab 2MM, p. 355.

<sup>57</sup> [Catalyst](#) at para 366.

information for their own benefit even after they are no longer with the company.<sup>58</sup>

- (b) In addition, this Court has found that a conspirator may be held liable where it knew or ought to have known of the wrongdoing of its co-conspirator, or was wilfully or recklessly blind to the truth. For example, a conspirator will be found liable if it is aware that its co-conspirator is dishonestly breaching its fiduciary duties and participated in the scheme.<sup>59</sup>
- (c) Mr. Seemab was alive to the importance of safeguarding non-public information.<sup>60</sup> He and his principal at Mithaq were aware that Mr. Mittleman was a former director and officer of Aimia who had access to the Company's Confidential and Non-Public Information.<sup>61</sup> Mithaq understood that Mr. Mittleman "would continue to be engaged in Aimia's investing strategy" after he ceased to be a director and officer.<sup>62</sup> And Mithaq was also aware that Mr. Mittleman continued to be an insider bound by the anti-tipping provisions in the *Securities Act*.<sup>63</sup>
- (d) Mr. Seemab acknowledged that Mithaq was aware in the spring of 2022 that Mr. Mittleman was no longer an authorized representative of Aimia;<sup>64</sup>
- (e) Mr. Mittleman wrote to Mithaq on February 1, 2023 that he was "not supposed to be speaking out" and "Aimia would likely fire me immediately if they saw this email";<sup>65</sup>

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<sup>58</sup> *B. Love Ltd. v. Bulk Steel & Salvage Ltd.*, [1982 CanLII 1901](#) (ON SC) at para 19; *AC Tire v. Honeywood Tire Ltd.*, [1999] OJ No 4055 (ON SC), at para 9, Aimia Book of Authorities, Tab 1.

<sup>59</sup> *Canadian National Railway Co. v. Holmes*, [2022 ONSC 1682](#) at paras 174-176, 196.

<sup>60</sup> Seemab Cross, p. 149, p. 42, Transcript Brief, Tab 8, p. 612.

<sup>61</sup> Seemab Cross, q. 122-125, pp. 35-36, Transcript Brief, Tab 8, pp. 605-606.

<sup>62</sup> Seemab May 19 Affidavit, Exhibit M, Mithaq Application Record, Tab 3M, p. 108.

<sup>63</sup> Seemab July 21 Affidavit, Exhibit T, Mithaq Injunction MR, Vol 2, Tab 2T, p. 712.

<sup>64</sup> Seemab Cross, qq. 137-138, p. 39, Transcript Brief, Tab 8, p. 609.

<sup>65</sup> Lehmann Affidavit, Exhibit X, Aimia Injunction MR, Vol 1, Tab 2X, pp. 237-238; Seemab August 25 Affidavit, Exhibit E1, Mithaq Supp. Injunction MR, Vol 1, Tab 1E, p. 27.

(f) Mr. Seemab nevertheless asked Mr. Mittleman to divulge Non-Public Information to him (e.g. “Do you have any rough idea when this Indian deal is going to be closed?”); was content to receive and keep files labelled “PRIVILEGED & CONFIDENTIAL” that he received from Mr. Mittleman; and never objected in writing to receiving Confidential or Non-Public Information. Instead, on each occasion where Mr. Mittleman sent such information to Mr. Seemab, Mr. Seemab continued his dialogue with Mr. Mittleman. It was only on this motion that Mr. Seemab proffered that he was an unwilling recipient or that the information he received was already public. Mr. Seemab’s evidence is contradicted by his contemporaneous writings and his inability to point to any public disclosure to support his assertion that the Confidential and Non-Public Information he received was, in fact, public.<sup>66</sup>

68. The same facts support a finding that there is a strong case that Mithaq will also be found liable for breach of confidence. The Confidential and Non-Public Information Mr. Mittleman conveyed to Mithaq was confidential; Mithaq knew that the information was confidential (indeed some of the documents were labelled “PRIVILEGED & CONFIDENTIAL”); and Mithaq received the information in the course of its campaign to take over the Company.<sup>67</sup> As the case law holds, any unauthorized use of confidential information constitutes misuse.<sup>68</sup>

69. Second, the record shows that Mithaq conspired with each of Mr. Mittleman and Milkwood to breach the *Securities Act* by (i) failing to disclose their joint actor relationship, (ii) failing to

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<sup>66</sup> Seemab July 21 Affidavit, Exhibit T, Mithaq Injunction MR, Vol 2, Tab 1T, p. 709; Cross Examination of Asif Seemab, sworn August 30, 2023, QQ. 235-246, pp. 64–66; Answers to Undertakings of Asif Seemab, Item 11, Transcript Brief, Tab 8A, p. 700; See also: *Courtesy Chrysler (1987) Ltd. v. Chrysler Canada Inc.*, [2012 ABQB 658](#) at paras 42-45, 88; *Towers, Perrin, Forster & Crosby Inc. v. Cantin*, [1999 CanLII 15100](#) (ONSC) at paras 72, 81.

<sup>67</sup> *A.G.C. v. Madeleine Rundle c.o.b. NEC Plus Ultra*, [2013 ONSC 2747](#) at para 23.

<sup>68</sup> *Canadian National Railway Co. v. Holmes*, [2022 ONSC 1682](#) at para. 166.

disclose their plans and future intentions, and (iii) failing to make a Mandatory Take-Over Bid:

- (a) A finding of joint actorship can be made on the basis of circumstantial evidence—all that is required is a finding that “the parties were making a concerted effort to bring about a specified objective”.<sup>69</sup> In this case, Mithaq worked with each of Mr. Mittleman and Milkwood to acquire Shares and reconstitute the Board without having to make a Mandatory Take-Over Bid or pay a Control Premium;
- (b) As early as October 27, 2022, Mr. Mittleman described Mithaq and MIM as part of a group of “MIM-aligned shareholders”;<sup>70</sup>
- (c) Mithaq and Milkwood discussed coordinating the timing of their purchases of Aimia Shares to avoid driving up the market price and, in fact, avoided purchasing Shares on the same day. An agreement with respect to the acquisition of shares is one of the enumerated grounds of joint actorship in National Instrument 62-104;<sup>71</sup>
- (d) Mr. Seemab forwarded his correspondence with Mr. Mittleman to Mr. Summerton and wrote “I think he would support us if we really plan it well”;<sup>72</sup>
- (e) Mr. Seemab asked Mr. Mittleman for a register of Aimia’s shareholders.<sup>73</sup> In response, Mr. Mittleman sent Mr. Seemab a confidential tax analysis listing Aimia’s major shareholders;<sup>74</sup>
- (f) Mr. Seemab told Mr. Mittleman that Mithaq and Milkwood would “lay down the roadmap with mutual consent”, that Milkwood “will have board representation” and

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<sup>69</sup> [Smoothwater](#), at para 25.

<sup>70</sup> Lehmann Affidavit, Exhibit R, Aimia Injunction MR, Vol 1, Tab 2R, p. 191.

<sup>71</sup> Summerton Cross, qq. 89–96, pp. 27–29, Transcript Brief, Tab 7, pp. 377-379; [National Instrument 62-104](#), s 1.9(1).

<sup>72</sup> Seemab August 25 Affidavit, Exhibit E1, Mithaq Supp. Injunction MR, Vol 1, Tab 1E, p. 27.

<sup>73</sup> Seemab July 21 Affidavit, Exhibit T, Mithaq Injunction MR, Vol 2, Tab 1T, p. 710.

<sup>74</sup> Seemab July 21 Affidavit, Exhibits T and T2, Mithaq Injunction MR, Vol 2, Tab 1T, pp. 710, 720.



that Mithaq and Milkwood “intend to reduce the size of the board so we will see whether Rhys appoints 1 or 2 directors”;<sup>75</sup>

- (g) Mithaq and Milkwood shared a common interest privilege, which is based on “parties sharing a goal or seeking a common outcome”;<sup>76</sup>
- (h) Mithaq and Milkwood jointly interviewed Board candidates;<sup>77</sup>
- (i) Mithaq and Milkwood agreed that they would each have representation on the new Board;<sup>78</sup>
- (j) Mithaq and Milkwood exchanged drafts of an “Action Plan” which described their plan to sit on the Board together and their joint shareholdings: “The new Board will have 23.99% equity stake (Mithaq 19.99% and Milkwood Capital 4%)”. This statement was made nearly one month before Mithaq published an EWR disclosing that it had raised its stake in Aimia to a 19.99% interest;<sup>79</sup>
- (k) The “Action Plan” described an intention “to obtain up-to to [sic] 30% of equity stake” in Aimia and stated that “We intend to recompose the board by limiting the board size to 4 shareholder representative directors”;<sup>80</sup>
- (l) Mithaq and Milkwood exchanged copies of a nomination form which stated that

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<sup>75</sup> Seemab July 21 Affidavit, Exhibit T, Mithaq Injunction MR, Vol 2, Tab 1T, pp. 711-712.

<sup>76</sup> Answers to Undertakings of Rhys Summerton, Items 10, 14, Transcript Brief, Tab 7A, pp. 556-557; *Pritchard v. Ontario (Human Rights Commission)*, [2004 SCC 31](#) at para 24.

<sup>77</sup> Seemab August 25 Affidavit, Exhibits F3, F5, F6, F8, F11, F12, F13, Mithaq Supp. Injunction MR, Vol 2, Tab 1F, pp. 461, 475, 477, 487, 523, 526, 532-536; Summerton Cross, qq. 271-278, 283-287, pp. 75-78, Transcript Brief, Tab 7, pp. 425-428.

<sup>78</sup> Seemab July 21 Affidavit, Exhibit T, Mithaq Injunction MR, Vol 2, Tab 1T, pp. 711-712; Seemab August 25 Affidavit, Exhibit F12, Mithaq Supp. Injunction MR, Vol 2, Tab 1F, pp. 532-536.

<sup>79</sup> Seemab August 25 Affidavit, Exhibit F15, Mithaq Supp. Injunction Record, Vol 2, Tab 1F, pp. 569-572.

<sup>80</sup> Seemab August 25 Affidavit, Exhibit F15, Mithaq Supp. Injunction Record, Vol 2, Tab 1F, pp. 569-572.

they were jointly nominating 6 candidates for Board positions;<sup>81</sup>

- (m) Mr. Seemab stated that Mithaq was planning to circulate an EWR and press release for Milkwood's "review and sign off";<sup>82</sup>
- (n) Mr. Seemab wrote to another significant shareholder, copied Mr. Summerton, and asked if the significant shareholder was "willing to join the 'group'";<sup>83</sup> and
- (o) Mr. Seemab sent a draft press release encouraging other shareholders to vote "Against" the incumbent Board to Mr. Summerton for his review and comment.<sup>84</sup>

70. The facts show that the Respondents were making a concerted effort to bring about a re-composition of Aimia's Board and that Mithaq had developed plans and future intentions for Aimia. None of this information was disclosed to the market.<sup>85</sup>

71. Assuming joint actorship with either Mr. Mittleman or Milkwood, Mithaq and its joint actors also crossed the 20% Mandatory Take-Over Bid threshold but avoided having to extend a bid or Control Premium to all shareholders.<sup>86</sup>

72. The harm occasioned to Aimia by the unlawful acts is discussed further below.

#### **D. Irreparable Harm**

73. Justice Conway has already found that the divulging of Aimia's Confidential Information and interference with its AGM would constitute irreparable harm to Aimia.<sup>87</sup> The information since produced to Aimia shows that further Confidential Information was disclosed and that Mithaq may

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<sup>81</sup> Seemab August 25 Affidavit, Exhibit F12, Mithaq Supp. Injunction MR, Vol 2, Tab 1F, pp. 532-536.

<sup>82</sup> Seemab August 25 Affidavit, Exhibit F14, Mithaq Supp. Injunction MR, Vol 2, Tab 1F, p. 544.

<sup>83</sup> Seemab August 25 Affidavit, Exhibit F14, Mithaq Supp. Injunction MR, Vol 2, Tab 1F, p. 544.

<sup>84</sup> Seemab August 25 Affidavit, Exhibits H1, H11, H12, H13, H14, Mithaq Supp. Injunction MR, Vol 2, Tab 1H, pp. 604, 637-643.

<sup>85</sup> [National Instrument 62-104](#), s. 5.2(2); [Form 62-103F1](#).

<sup>86</sup> See Schedule C.

<sup>87</sup> Lehmann Affidavit, Exhibit MM at para 6-7, Aimia Injunction MR, Vol 1, Tab 2MM, p. 355.

have voted shares at the AGM or may vote shares at future shareholder meetings that it acquired in breach of securities laws.

74. In addition, where a moving party seeks injunctive relief to enforce a negative or restrictive covenant, proof of irreparable harm is not required. It is also well-established that irreparable harm need not be shown if a clear breach of a fiduciary duty is shown. The courts have explained that this modified approach accords with the principles of justice because it holds the parties to terms and obligations to which they have already agreed to be bound.<sup>88</sup>

75. The same principle ought to apply to breaches of the *Securities Act*. Compliance with the statute is not optional, and requiring compliance in this case would put the Respondents in exactly the same position they ought to have been in all along.

76. Moreover, Aimia has led unchallenged and uncontroverted evidence of the ongoing irreparable harm to its business resulting from (a) the continuing circulation of its Confidential Information and Non-Public Information and (b) the confusion about whether the Company's shareholders ought to have received a Mandatory Take-Over Bid and opportunity to benefit from a Control Premium.<sup>89</sup>

#### **E. Balance of Convenience**

77. Justice Conway has already found that an injunction to enforce the Letter Agreement will result in "no countervailing prejudice to Mr. Mittleman".<sup>90</sup> Mr. Mittleman's cross-examinations have shown that he continues to withhold correspondence that he has exchanged with shareholders in breach of the Letter Agreement and Justice Conway's prior orders on the basis of specious

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<sup>88</sup> *Parkland Corporation v SRAA Inc.*, [2021 ONSC 2874](#) at para 88; *Singh v 3829537*, [2005 CanLII 20816](#) (ONSC) at para 53, 55; *2152222 Ontario Limited v 2173435 Ontario Inc.*, [2016 ONSC 2978](#) at para 9; *Canpark Services Ltd. v. Imperial Parking Canada Corp*, [2001 CanLII 28004](#) (ONSC) at paras 15-19; *3058354 Nova Scotia Co. v. On\*Site Equipment Ltd.*, [2007 ABQB 695](#), at para 24.

<sup>89</sup> Lehmann Affidavit at paras 95-97, Aimia Injunction MR, Vol 1, Tab 2, pp. 55-57; Answers to Undertakings of Michael Lehmann, Item 18, Transcript Brief, Tab 12A, pp. 1098.

<sup>90</sup> Lehmann Affidavit, Exhibit MM at para 8, Aimia Injunction MR, Vol 1, Tab 2MM, p. 355.

interpretations of his obligations.<sup>91</sup> There is no inconvenience in requiring Mr. Mittleman to comply with his contractual obligations and the directions of the Court.

78. Mithaq and Milkwood have effectively consented to the requests for orders requiring them to disclose their correspondence with Mr. Mittleman. Each has advised that it has already produced these records. Aimia continues to seek these orders to ensure a continuing obligation to produce in case new records are found.

79. With respect to an order for corrected public disclosure, no inconvenience would result from requiring Mithaq to do what it is required to do by law, and proper disclosure would benefit the market as a whole

80. Finally, Aimia seeks an order restraining Mithaq and Milkwood from dealing with their Shares until trial.<sup>92</sup> The purpose of the remedy is to ensure that a final determination on the merits can be made before the Respondents seek to leverage the Shares that Aimia alleges they have obtained unlawfully to end the litigation against them—a possibility that counsel has specifically adverted to in prior submissions.<sup>93</sup> Aimia has given an undertaking as to damages and the impacts to Mithaq and Milkwood would be limited through an order for an expedited trial, which Aimia seeks regardless of any other relief the Court determines to be appropriate on this motion.

#### **PART IV - ORDER REQUESTED**

81. Aimia respectfully seeks an order as set out in its Notice of Motion.

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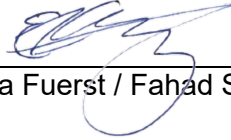
<sup>91</sup> Mittleman May 31 Cross, qq. 238-241, pp. 64-65, Transcript Brief, Tab 1, pp. 65-66; Transcript of Cross-Examination of Christopher Mittleman held August 28, 2023, qq. 165-166, p. 56, Transcript Brief, Tab 3, p. 161.

<sup>92</sup> See, e.g., *Hirakawa v Bonner*, [2021 BCSC 2387](#) at paras 9, 82.

<sup>93</sup> Affidavit of Katie Parent sworn July 14, 2023, Exhibit A, Responding Application Record of Aimia dated July 18, 2023, Tab 5, pp. 194-195.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 14<sup>th</sup> day of September, 2023.

Per:



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Linda Fuerst / Fahad Siddiqui

**NORTON ROSE FULBRIGHT CANADA LLP**

222 Bay Street, Suite 3000  
Toronto, ON M5K 1E7

**Linda Fuerst LSO#: 22718U**

Tel: 416.216.2951  
linda.fuerst@nortonrosefulbright.com

**Fahad Siddiqui LSO#: 67001A**

Tel: 416.216.2424  
fahad.siddiqui@nortonrosefulbright.com

**Erika Anschuetz LSO#: 72120D**

Tel: 416.216.6626  
erika.anschuetz@nortonrosefulbright.com

Fax: 416.216.3930

Lawyers for the Plaintiff

## SCHEDULE "A"

### LIST OF AUTHORITIES

1. *Cygnal Technologies Corp. v. Taylor*, [2005 CanLII 25889](#) (ONSC)
2. *Carlsen v. Physique Health Club Ltd. (Physique Fitness Store)*, [1996 ABCA 358](#) (CanLII)
3. *Genesis Land Development Corp. v Smoothwater Capital Corporation*, [2013 ABQB 509](#)
4. *Sterling Centrecorp Inc. et al.*, [2007 ONSEC 9 \(CanLII\)](#)
5. *McDonald v. Home Capital Group*, [2017 ONSC 5004](#)
6. *The Catalyst Capital Group Inc. and Callidus Capital Corporation v. West Face Capital Inc. et al*, [2021 ONSC 7957](#)
7. *B. Love Ltd. v. Bulk Steel & Salvage Ltd.*, [1982 CanLII 1901](#) (ON SC)
8. *AC Tire v. Honeywood Tire Ltd.*, 1999 CarswellOnt 3444 [1999] OJ No 4055 (ON SC)
9. *Schembri v. Way*, [2012 ONCA 620](#)
10. *ADGA Systems International Ltd. v. Valcom Ltd.*, [1999 CanLII 1527 \(ON CA\)](#)
11. *RH20 North America v Bergmann*, [2023 ONSC 2378](#)
12. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994 CanLII 117](#) (SCC)
13. *Canadian National Railway Co. v. Holmes*, [2022 ONSC 1682](#)
14. *Courtesy Chrysler (1987) Ltd. v. Chrysler Canada Inc.*, [2012 ABQB 658](#)
15. *Towers, Perrin, Forster & Crosby Inc. v. Cantin*, [1999 CanLII 15100](#) (ONSC)
16. *A.G.C. v. Madeleine Rundle c.o.b. NEC Plus Ultra*, [2013 ONSC 2747](#)
17. *Pritchard v. Ontario (Human Rights Commission)*, [2004 SCC 31](#)
18. *Parkland Corporation v SRAA Inc.*, [2021 ONSC 2874](#)
19. *Singh v 3829537*, [2005 CanLII 20816](#) (ONSC) \
20. *2152222 Ontario Limited v 2173435 Ontario Inc.*, [2016 ONSC 2978](#)
21. *Canpark Services Ltd. v. Imperial Parking Canada Corp*, [2001 CanLII 28004](#) (ONSC)
22. *3058354 Nova Scotia Co. v. On\*Site Equipment Ltd.*, [2007 ABQB 695](#)
23. *Hirakawa v Bonner*, [2021 BCSC 2387](#)

## SCHEDULE "B"

### TEXT OF STATUTES, REGULATIONS & BY - LAWS

<b>Rules of Civil Procedure, R.R.O. 1990, Reg. 194</b>
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#### **Misjoinder, Non-Joinder and Parties Incorrectly Named Proceeding not to be Defeated**

**5.04** (1) No proceeding shall be defeated by reason of the misjoinder or non-joinder of any party and the court may, in a proceeding, determine the issues in dispute so far as they affect the rights of the parties to the proceeding and pronounce judgment without prejudice to the rights of all persons who are not parties. R.R.O. 1990, Reg. 194, r. 5.04 (1).

#### **Adding, Deleting or Substituting Parties**

**(2)** At any stage of a proceeding the court may by order add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment. R.R.O. 1990, Reg. 194, r. 5.04 (2).

#### **General Power of Court**

**26.01** On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment. R.R.O. 1990, Reg. 194, r. 26.01.

#### **When Amendments may be Made**

**26.02** A party may amend the party's pleading,

- (a) without leave, before the close of pleadings, if the amendment does not include or necessitate the addition, deletion or substitution of a party to the action;
- (b) on filing the consent of all parties and, where a person is to be added or substituted as a party, the person's consent; or
- (c) with leave of the court. R.R.O. 1990, Reg. 194, r. 26.02.

#### **How Obtained**

**40.01** An interlocutory injunction or mandatory order under section 101 or 102 of the *Courts of Justice Act* may be obtained on motion to a judge by a party to a pending or intended proceeding. R.R.O. 1990, Reg. 194, r. 40.01.

#### **Where Motion Made without Notice**

##### **Maximum Duration**

**40.02** (1) An interlocutory injunction or mandatory order may be granted on motion without notice for a period not exceeding ten days. R.R.O. 1990, Reg. 194, r. 40.02 (1).

**Courts of Justice Act, R.S.O. 1990, c. C.43**

**Injunctions and receivers**

**101 (1)** In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

**Terms**

(2) An order under subsection (1) may include such terms as are considered just. R.S.O. 1990, c. C.43, s. 101 (2).

**Securities Act, RSO 1990, c S.5**

**Trading where undisclosed change**

**76 (1)** No person or company in a special relationship with an issuer shall purchase or sell securities of the issuer with the knowledge of a material fact or material change with respect to the issuer that has not been generally disclosed. R.S.O. 1990, c. S.5, s. 76 (1); 2015, c. 20, Sched. 39, s. 2 (1-3).

**Tipping**

(2) No issuer and no person or company in a special relationship with an issuer shall inform, other than in the necessary course of business, another person or company of a material fact or material change with respect to the issuer before the material fact or material change has been generally disclosed. R.S.O. 1990, c. S.5, s. 76 (2); 2015, c. 20, Sched. 39, s. 2 (1-4).

**Same**

- (3) No person or company that is considering or evaluating whether, or that proposes,
- (a) to make a take-over bid, as defined in Part XX, for the securities of an issuer;
  - (b) to become a party to a reorganization, amalgamation, merger, arrangement or similar business combination with an issuer; or
  - (c) to acquire a substantial portion of the property of an issuer,

shall inform another person or company of a material fact or material change with respect to the issuer before the material fact or material change has been generally disclosed except where the information is given in the necessary course of business relating to the take-over bid, business combination or acquisition. R.S.O. 1990, c. S.5, s. 76 (3); 2013, c. 2, Sched. 13, s. 2 (1, 2); 2015, c. 20, Sched. 39, s. 2 (1-3).

**Recommendation**

(3.1) No issuer, no person or company in a special relationship with an issuer, and no person or company that is considering or evaluating whether, or that proposes to take one or more of the actions described in clause (3) (a), (b) or (c) shall recommend or encourage, other than in the necessary course of business, another person or company to purchase or sell securities of the



issuer with the knowledge of a material fact or material change with respect to the issuer that has not been generally disclosed. 2016, c. 5, Sched. 26, s. 2 (1).

## **PART XX TAKE-OVER BIDS AND ISSUER BIDS**

### **Application to the Tribunal**

**104 (1)** On application by an interested person, if the Tribunal considers that a person or company has not complied with, or is not complying with, a requirement under this Part or the regulations related to this Part, the Tribunal may make an order,

- (a) restraining the distribution of any document or any communication used or issued in connection with a take-over bid or an issuer bid;
- (b) requiring an amendment to or variation of any document or any communication used or issued in connection with a take-over bid or an issuer bid and requiring the distribution of amended, varied or corrected documents or communications;
- (c) directing any person or company to comply with a requirement under this Part or the regulations related to this Part;
- (d) restraining any person or company from contravening a requirement under this Part or the regulations related to this Part; and
- (e) directing the directors and officers of any person or company to cause the person or company to comply with or to cease contravening a requirement under this Part or the regulations related to this Part. 2007, c. 7, Sched. 38, s. 8; 2015, c. 38, Sched. 18, s. 4 (1); 2021, c. 8, Sched. 9, s. 40 (30).

### **Application to the court**

**105 (1)** On application by an interested person, if the Superior Court of Justice is satisfied that a person or company has not complied with a requirement under this Part or the regulations related to this Part, the Superior Court of Justice may make such interim or final order as the Court thinks fit, including, without limitation, an order,

- (a) compensating any interested person who is a party to the application for damages suffered as a result of a contravention of a requirement of this Part or the regulations related to this Part;
- (b) rescinding a transaction with any interested person, including the issue of a security or an acquisition and sale of a security;
- (c) requiring any person or company to dispose of any securities acquired under or in connection with a take-over bid or an issuer bid;
- (d) prohibiting any person or company from exercising any or all of the voting rights attaching to any securities; or
- (e) requiring the trial of an issue. 2007, c. 7, Sched. 38, s. 8.

**National Instrument 62-104 Take-Over Bids and Issuer Bids**

**Definitions**

**1.1 In this Instrument,**

"take-over bid" means an offer to acquire outstanding voting securities or equity securities of a class made to one or more persons, any of whom is in the local jurisdiction or whose last address as shown on the books of the offeree issuer is in the local jurisdiction, where the securities subject to the offer to acquire, together with the offeror's securities, constitute in the aggregate 20% or more of the outstanding securities of that class of securities at the date of the offer to acquire but does not include an offer to acquire if the offer to acquire is a step in an amalgamation, merger, reorganization or arrangement that requires approval in a vote of security holders.

**Acting jointly or in concert**

**1.9 (1)** In this Instrument, it is a question of fact as to whether a person is acting jointly or in concert with an offeror or an acquiror and, without limiting the generality of the foregoing,

(a) the following are deemed to be acting jointly or in concert with an offeror or an acquiror:

(i) a person that, as a result of any agreement, commitment or understanding with the offeror, the acquiror or with any other person acting jointly or in concert with the offeror or the acquiror, acquires or offers to acquire securities of the same class as those subject to the offer to acquire;

(ii) an affiliate of the offeror or the acquiror;

(b) the following are presumed to be acting jointly or in concert with an offeror or an acquiror:

(i) a person that, as a result of any agreement, commitment or understanding with the offeror, the acquiror or with any other person acting jointly or in concert with the offeror or the acquiror, intends to exercise jointly or in concert with the offeror, the acquiror or with any person acting jointly or in concert with the offeror or the acquiror any voting rights attaching to any securities of the offeree issuer;

(ii) an associate of the offeror or the acquiror.

**(2)** Subsection (1) does not apply to a registered dealer acting solely in an agency capacity for the offeror in connection with a bid and not executing principal transactions in the class of securities subject to the offer to acquire or performing services beyond the customary functions of a registered dealer.

**(3)** For the purposes of this section, a person is not acting jointly or in concert with an offeror solely because there is an agreement, commitment or understanding that the person will tender securities under a take-over bid or an issuer bid, made by the offeror, that is not exempt from Part 2.

**Duty to make bid to all security holders**

**2.8** An offeror must make a take-over bid or an issuer bid to all holders of the class of securities subject to the bid who are in the local jurisdiction by sending the bid to

(a) each holder of that class of securities whose last address as shown on the books of the offeree issuer is in the local jurisdiction, and

(b) each holder of securities that, before the expiry of the deposit period referred to in the bid, are convertible into securities of that class, whose last address as shown on the books of the offeree issuer is in the local jurisdiction.

### **Early warning**

**5.2 (1)** An acquiror who acquires beneficial ownership of, or control or direction over, voting or equity securities of any class of a reporting issuer, or securities convertible into voting or equity securities of any class of a reporting issuer, that, together with the acquiror's securities of that class, constitute 10% or more of the outstanding securities of that class, must

(a) promptly, and, in any event, no later than the opening of trading on the business day following the acquisition, issue and file a news release containing the information required by section 3.1 of National Instrument 62-103 *The Early Warning System and Related Take-Over Bid and Insider Reporting Issues*, and

(b) promptly, and, in any event, no later than 2 business days from the date of the acquisition, file a report containing the information required by section 3.1 of National Instrument 62-103 *The Early Warning System and Related Take-Over Bid and Insider Reporting Issues*.

**(2)** An acquiror who is required to make disclosure under subsection (1) must make further disclosure, in accordance with subsection (1), each time any of the following events occur:

(a) the acquiror or any person acting jointly or in concert with the acquiror, acquires or disposes beneficial ownership of, or acquires or ceases to have control or direction over, either of the following:

(i) securities in an amount equal to 2% or more of the outstanding securities of the class of securities that was the subject of the most recent report required to be filed by the acquiror under subsection (1) or under this subsection;

(ii) securities convertible into 2% or more of the outstanding securities referred to in subparagraph (i);

(b) there is a change in a material fact contained in the most recent report required to be filed under paragraph (1)(b) or under paragraph (a) of this subsection.

**(3)** An acquiror must issue and file a news release and file a report in accordance with subsection (1) if beneficial ownership of, or control or direction over, the outstanding securities of the class of securities that was the subject of the most recent report required to be filed by the acquiror under this section decreases to less than 10%.

**(4)** If an acquiror issues and files a news release and files a report under subsection (3), the requirements under subsection (2) do not apply unless subsection (1) applies in respect of a subsequent acquisition of beneficial ownership of, or control or direction over, voting or equity securities of any class of a reporting issuer, or securities convertible into voting or equity securities of any class of a reporting issuer, that, together with the acquiror's securities of that class, constitute 10% or more of the outstanding securities of that class.

### **Moratorium provisions**

**5.3 (1)** During the period beginning on the occurrence of an event in respect of which a report is required to be filed under section 5.2 and ending on the expiry of the first business day following the date that the report is filed, an acquiror, or any person acting jointly or in concert with the acquiror, must not acquire or offer to acquire beneficial ownership of, or control or direction over, any securities of the class in respect of which the report is required to be filed or any securities convertible into securities of that class.

**(2)** Subsection (1) does not apply to an acquiror that has beneficial ownership of, or control or direction over, securities that, together with the acquiror's securities of that class, constitute 20% or more of the outstanding securities of that class.

<b>National Instrument 62-103 <i>The Early Warning System and Related Take-Over Bid and Insider Reporting Issues</i></b>
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### **Definitions**

#### **1.1 (1) In this Instrument**

"joint actor" means, in relation to an entity and a security, another entity acting jointly or in concert with the entity in connection with the ownership of, or control over, the security;

### **Contents of News Releases and Reports**

**3.1 (1)** A news release and report required under the early warning requirements shall contain the information required by Form 62-103F1 *Required Disclosure under the Early Warning Requirements*.

**(2)** Despite subsection (1), a news release required under the early warning requirements may omit the information otherwise required by Items 2.3, 3.3, 3.5 through 3.8, 4.2, 4.3, 6 and 9, and Item 7 to the extent that the information relates to those sections and items, of Form 62-103F1 *Required Disclosure under the Early Warning Requirements*, if

(a) the omitted information is included in the corresponding report required by the early warning requirements, and

(b) the news release indicates the name and telephone number of an individual to contact to obtain a copy of the report.

**(3)** The acquiror shall send a copy of the report referred to in paragraph (2)(a) promptly to any entity requesting it.

<b>Form 62-103F1 Required Disclosure Under the Early Warning Requirements</b>
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State if the report is filed to amend information disclosed in an earlier report. Indicate the date of the report that is being amended.

**Item 1 – Security and Reporting Issuer**

**1.1** State the designation of securities to which this report relates and the name and address of the head office of the issuer of the securities.

**1.2** State the name of the market in which the transaction or other occurrence that triggered the requirement to file this report took place.

**Item 2 – Identity of the Acquiror**

**2.1** State the name and address of the acquiror.

**2.2** State the date of the transaction or other occurrence that triggered the requirement to file this report and briefly describe the transaction or other occurrence.

**2.3** State the names of any joint actors.

*INSTRUCTION*

*If the acquiror is a corporation, general partnership, limited partnership, syndicate or other group of persons, provide its name, the address of its head office, its jurisdiction of incorporation or organization, and its principal business.*

**Item 3 – Interest in Securities of the Reporting Issuer**

**3.1** State the designation and number or principal amount of securities acquired or disposed of that triggered the requirement to file the report and the change in the acquiror's securityholding percentage in the class of securities.

**3.2** State whether the acquiror acquired or disposed ownership of, or acquired or ceased to have control over, the securities that triggered the requirement to file the report.

**3.3** If the transaction involved a securities lending arrangement, state that fact.

**3.4** State the designation and number or principal amount of securities and the acquiror's securityholding percentage in the class of securities, immediately before and after the transaction or other occurrence that triggered the requirement to file this report.

**3.5** State the designation and number or principal amount of securities and the acquiror's securityholding percentage in the class of securities referred to in Item 3.4 over which

- a. the acquiror, either alone or together with any joint actors, has ownership and control,

- b. the acquiror, either alone or together with any joint actors, has ownership but control is held by persons or companies other than the acquiror or any joint actor, and
- c. the acquiror, either alone or together with any joint actors, has exclusive or shared control but does not have ownership.

**3.6** If the acquiror or any of its joint actors has an interest in, or right or obligation associated with, a related financial instrument involving a security of the class of securities in respect of which disclosure is required under this item, describe the material terms of the related financial instrument and its impact on the acquiror's securityholdings.

**3.7** If the acquiror or any of its joint actors is a party to a securities lending arrangement involving a security of the class of securities in respect of which disclosure is required under this item, describe the material terms of the arrangement including the duration of the arrangement, the number or principal amount of securities involved and any right to recall the securities or identical securities that have been transferred or lent under the arrangement.

State if the securities lending arrangement is subject to the exception provided in section 5.7 of NI 62-104.

**3.8** If the acquiror or any of its joint actors is a party to an agreement, arrangement or understanding that has the effect of altering, directly or indirectly, the acquiror's economic exposure to the security of the class of securities to which this report relates, describe the material terms of the agreement, arrangement or understanding.

#### **INSTRUCTIONS**

*(i) "Related financial instrument" has the meaning ascribed to that term in NI 55-104. Item 3.6 encompasses disclosure of agreements, arrangements or understandings where the economic interest related to a security beneficially owned or controlled has been altered.*

*(ii) For the purposes of Items 3.6, 3.7 and 3.8, a material term of an agreement, arrangement or understanding does not include the identity of the counterparty or proprietary or commercially sensitive information.*

*(iii) For the purposes of Item 3.8, any agreements, arrangements or understandings that have been disclosed under other items in this Form do not have to be disclosed under this item.*

#### **Item 4 – Consideration Paid**

**4.1** State the value, in Canadian dollars, of any consideration paid or received per security and in total.

**4.2** In the case of a transaction or other occurrence that did not take place on a stock exchange or other market that represents a published market for the securities, including an issuance from treasury, disclose the nature and value, in Canadian dollars, of the consideration paid or received by the acquiror.

**4.3** If the securities were acquired or disposed of other than by purchase or sale, describe the method of acquisition or disposition.

### **Item 5 – Purpose of the Transaction**

State the purpose or purposes of the acquiror and any joint actors for the acquisition or disposition of securities of the reporting issuer. Describe any plans or future intentions which the acquiror and any joint actors may have which relate to or would result in any of the following:

- a. the acquisition of additional securities of the reporting issuer, or the disposition of securities of the reporting issuer;
- b. a corporate transaction, such as a merger, reorganization or liquidation, involving the reporting issuer or any of its subsidiaries;
- c. a sale or transfer of a material amount of the assets of the reporting issuer or any of its subsidiaries;
- d. a change in the board of directors or management of the reporting issuer, including any plans or intentions to change the number or term of directors or to fill any existing vacancy on the board;
- e. a material change in the present capitalization or dividend policy of the reporting issuer;
- f. a material change in the reporting issuer's business or corporate structure;
- g. a change in the reporting issuer's charter, bylaws or similar instruments or another action which might impede the acquisition of control of the reporting issuer by any person or company;
- h. a class of securities of the reporting issuer being delisted from, or ceasing to be authorized to be quoted on, a marketplace;
- a. the issuer ceasing to be a reporting issuer in any jurisdiction of Canada;
- j. a solicitation of proxies from securityholders;
- k. an action similar to any of those enumerated above.

### **Item 6 – Agreements, Arrangements, Commitments or Understandings With Respect to Securities of the Reporting Issuer**

Describe the material terms of any agreements, arrangements, commitments or understandings between the acquiror and a joint actor and among those persons and any person with respect to securities of the class of securities to which this report relates, including but not limited to the transfer or the voting of any of the securities, finder's fees, joint ventures, loan or option arrangements, guarantees of profits, division of profits or loss, or the giving or withholding of proxies. Include such information for any of the securities that are pledged or otherwise subject to a contingency, the occurrence of which would give another person voting power or investment power over such securities, except that disclosure of standard default and similar provisions contained in loan agreements need not be included.

### ***INSTRUCTIONS***

(i) *Agreements, arrangements or understandings that are described under Item 3 do not have to be disclosed under this item.*

(ii) *For the purposes of Item 6, the description of any agreements, arrangements, commitments or understandings does not include naming the persons with whom those agreements, arrangements, commitments or understandings have been entered into, or proprietary or commercially sensitive information.*

**Item 7 – Change in material fact**

If applicable, describe any change in a material fact set out in a previous report filed by the acquiror under the early warning requirements or Part 4 in respect of the reporting issuer's securities.

**Item 8 – Exemption**

If the acquiror relies on an exemption from requirements in securities legislation applicable to formal bids for the transaction, state the exemption being relied on and describe the facts supporting that reliance.

**Item 9 – Certification**

The acquiror must certify that the information is true and complete in every respect. In the case of an agent, the certification is based on the agent's best knowledge, information and belief but the acquiror is still responsible for ensuring that the information filed by the agent is true and complete.

This report must be signed by each person on whose behalf the report is filed or his authorized representative.

It is an offence to submit information that, in a material respect and at the time and in the light of the circumstances in which it is submitted, is misleading or untrue.

**Certificate**

The certificate must state the following:

I, as the acquiror, certify, or I, as the agent filing the report on behalf of an acquiror, certify to the best of my knowledge, information and belief, that the statements made in this report are true and complete in every respect.

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Date

---

Signature

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Name/Title







## Summary of the Ownership Interest in Aimia Inc. Held by Mithaq Capital SPC and Alleged Joint Actors

Date	Cumulative Number of Shares Held						Ownership Interest in Aimia				
	Number of Aimia Shares Outstanding	Mithaq Capital SPC	Milkwood Capital (UK) Ltd	Christopher Mittleman	Mittleman Investment Management	Total	Mithaq Capital SPC	Milkwood Capital (UK) Ltd	Christopher Mittleman	Mittleman Investment Management	Total
	[1] A	Sch 2 B	Sch 3 C	Sch 4, [2] D	[3] E	F=B+C+D+E	G=B/A	H=C/A	I=D/A	J=E/A	K=F/A
14-Apr-23	84,164,610	16,824,500	1,867,400	449,601	-	19,141,501	19.99%	2.22%	0.53%	0.00%	22.74%
21-Apr-23	84,164,610	16,824,500	1,984,092	449,601	-	19,258,193	19.99%	2.36%	0.53%	0.00%	22.88%
24-Apr-23	84,164,610	16,824,500	2,086,592	449,601	-	19,360,693	19.99%	2.48%	0.53%	0.00%	23.00%
26-Apr-23	84,164,610	16,824,500	2,135,392	449,601	-	19,409,493	19.99%	2.54%	0.53%	0.00%	23.06%
28-Apr-23	84,164,610	16,824,500	2,167,892	449,601	-	19,441,993	19.99%	2.58%	0.53%	0.00%	23.10%
25-May-23	84,164,610	26,059,000	2,167,892	449,601	-	28,676,493	30.96%	2.58%	0.53%	0.00%	34.07%

[1] Source: S&P Capital IQ.

[2] Represents the cumulative number of shares held, excluding an estimated 300,000 non-voting shares that we assume to be held in escrow.

[3] We have assumed that Mittleman Investment Management held 6% of Aimia's outstanding shares until March 27, 2023.

**Aimia Inc. and Mithaq Capital SPC**  
**Mithaq Capital SPC's Acquisitions of Aimia Shares**

**Schedule 2**

<u>Transaction Date</u>	<u>Number of Shares Acquired</u>	<u>Cumulative Number of Shares Held</u>
<b>[1]</b>	<b>[1]</b>	
28-Jul-20	2,657	2,657
28-Jul-20	2,657	5,314
28-Jul-20	5,792	11,106
28-Jul-20	42,453	53,559
28-Jul-20	22,939	76,498
28-Jul-20	18,123	94,621
28-Jul-20	1,079	95,700
03-Mar-21	60,800	156,500
05-Mar-21	55,500	212,000
05-Mar-21	177,500	389,500
08-Mar-21	30,000	419,500
09-Mar-21	74,600	494,100
10-Mar-21	6,800	500,900
11-Mar-21	37,800	538,700
12-Mar-21	13,100	551,800
15-Mar-21	16,600	568,400
16-Mar-21	23,800	592,200
17-Mar-21	16,600	608,800
18-Mar-21	6,900	615,700
19-Mar-21	75,400	691,100
22-Mar-21	328,900	1,020,000
23-Mar-21	980,900	2,000,900
24-Mar-21	25,000	2,025,900
25-Mar-21	7,800	2,033,700
26-Mar-21	65,900	2,099,600
29-Mar-21	52,800	2,152,400
30-Mar-21	61,600	2,214,000
31-Mar-21	12,800	2,226,800
31-Mar-21	141,700	2,368,500
01-Apr-21	56,000	2,424,500
05-Apr-21	81,900	2,506,400
06-Apr-21	190,600	2,697,000
07-Apr-21	267,700	2,964,700
08-Apr-21	243,500	3,208,200
09-Apr-21	263,300	3,471,500
12-Apr-21	87,800	3,559,300
13-Apr-21	120,700	3,680,000
14-Apr-21	108,100	3,788,100
15-Apr-21	22,900	3,811,000
16-Apr-21	88,300	3,899,300
19-Apr-21	266,700	4,166,000
20-Apr-21	47,800	4,213,800
21-Apr-21	300	4,214,100
21-Apr-21	115,500	4,329,600
22-Apr-21	16,800	4,346,400
23-Apr-21	139,700	4,486,100
26-Apr-21	19,100	4,505,200
27-Apr-21	27,900	4,533,100
28-Apr-21	7,600	4,540,700
29-Apr-21	14,900	4,555,600

**Aimia Inc. and Mithaq Capital SPC**  
**Mithaq Capital SPC's Acquisitions of Aimia Shares**

**Schedule 2**

<u>Transaction Date</u>	<u>Number of Shares Acquired</u>	<u>Cumulative Number of Shares Held</u>
[1]	[1]	
03-May-21	747,600	5,303,200
04-May-21	31,900	5,335,100
05-May-21	7,000	5,342,100
06-May-21	31,600	5,373,700
07-May-21	11,200	5,384,900
13-May-21	17,200	5,402,100
14-May-21	48,300	5,450,400
17-May-21	37,700	5,488,100
18-May-21	41,600	5,529,700
19-May-21	27,300	5,557,000
20-May-21	49,000	5,606,000
21-May-21	71,300	5,677,300
25-May-21	25,800	5,703,100
26-May-21	19,900	5,723,000
27-May-21	11,500	5,734,500
28-May-21	36,100	5,770,600
01-Jun-21	25,400	5,796,000
02-Jun-21	34,100	5,830,100
03-Jun-21	20,000	5,850,100
04-Jun-21	33,700	5,883,800
07-Jun-21	18,500	5,902,300
08-Jun-21	31,400	5,933,700
09-Jun-21	7,000	5,940,700
10-Jun-21	8,200	5,948,900
11-Jun-21	8,300	5,957,200
14-Jun-21	4,000	5,961,200
15-Jun-21	15,100	5,976,300
16-Jun-21	14,100	5,990,400
17-Jun-21	17,000	6,007,400
18-Jun-21	7,200	6,014,600
21-Jun-21	13,500	6,028,100
22-Jun-21	7,300	6,035,400
23-Jun-21	6,600	6,042,000
24-Jun-21	9,200	6,051,200
25-Jun-21	13,300	6,064,500
28-Jun-21	23,700	6,088,200
29-Jun-21	6,700	6,094,900
30-Jun-21	10,000	6,104,900
02-Jul-21	25,000	6,129,900
05-Jul-21	23,300	6,153,200
06-Jul-21	18,700	6,171,900
07-Jul-21	22,700	6,194,600
08-Jul-21	37,800	6,232,400
09-Jul-21	23,700	6,256,100
12-Jul-21	18,700	6,274,800
13-Jul-21	14,400	6,289,200
14-Jul-21	66,800	6,356,000
03-Aug-21	9,800	6,365,800
04-Aug-21	23,100	6,388,900
05-Aug-21	137,200	6,526,100

**Aimia Inc. and Mithaq Capital SPC**  
**Mithaq Capital SPC's Acquisitions of Aimia Shares**

**Schedule 2**

<u>Transaction Date</u>	<u>Number of Shares Acquired</u>	<u>Cumulative Number of Shares Held</u>
[1]	[1]	
06-Aug-21	9,900	6,536,000
01-Sep-21	525,400	7,061,400
07-Sep-21	300	7,061,700
20-Sep-21	15,800	7,077,500
23-Mar-22	25,000	7,102,500
24-Mar-22	435,600	7,538,100
25-Mar-22	240,900	7,779,000
28-Mar-22	119,300	7,898,300
29-Mar-22	143,379	8,041,679
29-Mar-22	179,200	8,220,879
30-Mar-22	1,188,321	9,409,200
31-Mar-22	173,800	9,583,000
01-Apr-22	94,200	9,677,200
04-Apr-22	44,600	9,721,800
05-Apr-22	62,800	9,784,600
06-Apr-22	97,500	9,882,100
07-Apr-22	30,100	9,912,200
11-Apr-22	50,000	9,962,200
13-Apr-22	35,600	9,997,800
08-Apr-22	33,800	10,031,600
12-Apr-22	24,500	10,056,100
14-Apr-22	95,800	10,151,900
18-Apr-22	35,300	10,187,200
19-Apr-22	21,300	10,208,500
20-Apr-22	37,200	10,245,700
21-Apr-22	43,400	10,289,100
22-Apr-22	44,000	10,333,100
25-Apr-22	17,400	10,350,500
26-Apr-22	36,100	10,386,600
27-Apr-22	77,800	10,464,400
06-May-22	135,000	10,599,400
09-May-22	2,400	10,601,800
18-May-22	43,700	10,645,500
02-Feb-23	1,974,700	12,620,200
03-Feb-23	5,900	12,626,100
07-Feb-23	191,800	12,817,900
08-Feb-23	537,100	13,355,000
09-Feb-23	2,498,500	15,853,500
13-Feb-23	339,300	16,192,800
14-Feb-23	142,200	16,335,000
15-Feb-23	87,100	16,422,100
16-Feb-23	153,000	16,575,100
17-Feb-23	45,100	16,620,200
21-Feb-23	204,300	16,824,500
25-May-23	3,519,000	20,343,500
25-May-23	5,715,500	26,059,000

[1] Source: Exhibit B of the Affidavit of Asif Seemab dated July 21, 2023.

Transaction Date	Number of Shares Acquired	Cumulative Number of Shares Held
[1]	[1]	
06-Dec-22	300	300
08-Dec-22	10,000	10,300
08-Dec-22	2,500	12,800
08-Dec-22	10,000	22,800
08-Dec-22	10,000	32,800
14-Dec-22	8,900	41,700
15-Dec-22	200	41,900
16-Dec-22	14,400	56,300
19-Dec-22	15,900	72,200
19-Dec-22	1,100	73,300
20-Dec-22	8,400	81,700
21-Dec-22	13,200	94,900
22-Dec-22	9,600	104,500
23-Dec-22	4,900	109,400
28-Dec-22	36,200	145,600
29-Dec-22	6,100	151,700
04-Jan-23	100	151,800
05-Jan-23	600	152,400
06-Jan-23	14,900	167,300
06-Jan-23	[2] 1,500	168,800
09-Jan-23	100,000	268,800
10-Jan-23	23,000	291,800
10-Jan-23	36,300	328,100
10-Jan-23	3,600	331,700
11-Jan-23	100,000	431,700
11-Jan-23	87,000	518,700
13-Jan-23	141,600	660,300
13-Jan-23	148,200	808,500
16-Jan-23	14,500	823,000
18-Jan-23	14,200	837,200
20-Jan-23	100,000	937,200
26-Jan-23	60,600	997,800
31-Jan-23	10,000	1,007,800
31-Jan-23	10,000	1,017,800
31-Jan-23	100,000	1,117,800
01-Feb-23	62,900	1,180,700
03-Feb-23	100,000	1,280,700
03-Feb-23	7,800	1,288,500
07-Feb-23	2,400	1,290,900
13-Feb-23	17,100	1,308,000
06-Mar-23	82,000	1,390,000
06-Mar-23	100	1,390,100
06-Mar-23	70,400	1,460,500
07-Mar-23	53,400	1,513,900
08-Mar-23	100,000	1,613,900
29-Mar-23	5,200	1,619,100
30-Mar-23	11,000	1,630,100
30-Mar-23	12,900	1,643,000
12-Apr-23	11,800	1,654,800
13-Apr-23	100,000	1,754,800

<u>Transaction Date</u>	<u>Number of Shares Acquired</u>	<u>Cumulative Number of Shares Held</u>
<b>[1]</b>	<b>[1]</b>	
13-Apr-23	13,100	1,767,900
14-Apr-23	99,500	1,867,400
21-Apr-23	<b>[2]</b> 100,000	1,967,400
21-Apr-23	<b>[2]</b> 15,592	1,982,992
21-Apr-23	<b>[2]</b> 1,100	1,984,092
24-Apr-23	<b>[2]</b> 100,000	2,084,092
24-Apr-23	<b>[2]</b> 2,500	2,086,592
26-Apr-23	<b>[2]</b> 48,800	2,135,392
28-Apr-23	<b>[2]</b> 7,000	2,142,392
28-Apr-23	<b>[2]</b> 25,000	2,167,392
28-Apr-23	<b>[2]</b> 500	2,167,892

**[1]** Source: document entitled "Milkwood Acquisitions".

**[2]** Acquisition of Aimia shares over the counter (AIMFF) in USD.



**Aimia Inc. and Mithaq Capital SPC**  
**Christopher Mittleman's Acquisitions of Aimia Shares**

**Schedule 4**

<b>Transaction Date</b>	<b>Number of Shares Acquired/(Sold)</b>	<b>Cumulative Number of Shares Held (Including Shares Held in Escrow)</b>	<b>Less: Estimated Number of Shares Held in Escrow</b>	<b>Cumulative Number of Shares Held (Excluding Shares Held in Escrow)</b>
<b>[1]</b>	<b>[1]</b>	<b>[1]</b>	<b>[2]</b>	
	<b>A</b>	<b>B</b>	<b>C</b>	<b>D=B-C</b>
27-Apr-18	63,000	63,000	-	63,000
07-May-18	2,300	65,300	-	65,300
16-Nov-18	4,700	70,000	-	70,000
19-Jun-20	438,569	508,569	300,000	208,569
19-Jun-20	291,032	799,601	300,000	499,601
22-Jun-20	100,000	899,601	300,000	599,601
22-Jun-20	29,100	928,701	300,000	628,701
23-Jun-20	21,300	950,001	300,000	650,001
25-Jun-20	50,000	1,000,001	300,000	700,001
16-Nov-20	25,000	1,025,001	300,000	725,001
10-May-22	(25,000)	1,000,001	300,000	700,001
03-Jun-22	(75,800)	924,201	300,000	624,201
06-Jun-22	(74,200)	850,001	300,000	550,001
22-Jun-22	(21,600)	828,401	300,000	528,401
22-Jun-22	(8,400)	820,001	300,000	520,001
30-Jun-22	(70,400)	749,601	300,000	449,601

**[1]** SEDI Report of Christopher Mittleman for Aimia Inc. (Direct Ownership).

**[2]** We have assumed that 300,000 of Mr. Mittleman's shares were non-voting shares held in escrow.

AIMIA INC.  
Plaintiff

-and- CHRISTOPHER MITTLEMAN et al.  
Defendants

Court File No. CV-23-00697772-00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

PROCEEDING COMMENCED AT  
TORONTO

**FACTUM OF THE MOVING PARTY, AIMIA INC.  
(INJUNCTION MOTION)**

**NORTON ROSE FULBRIGHT CANADA LLP**

222 Bay Street, Suite 3000  
Toronto, ON M5K 1E7

**Linda Fuerst LSO#: 22718U**

Tel: 416.216.2951

[linda.fuerst@nortonrosefulbright.com](mailto:linda.fuerst@nortonrosefulbright.com)

**Fahad Siddiqui LSO#: 67001A**

Tel: 416.216.2424

[fahad.siddiqui@nortonrosefulbright.com](mailto:fahad.siddiqui@nortonrosefulbright.com)

**Erika Anschuetz LSO#: 72120D**

Tel: 416.216.6626

[erika.anschuetz@nortonrosefulbright.com](mailto:erika.anschuetz@nortonrosefulbright.com)

Lawyers for the Plaintiff / Moving Party