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# *Ontario Capital Markets Tribunal Considers Aimia Inc.'s Private Placement during an Unsolicited Takeover Bid*

On October 5, 2023, Mithaq Canada Inc. ("**Mithaq**"), a subsidiary of Mithaq Capital SPC ("**Mithaq Capital**"), made an unsolicited take-over bid for Aimia Inc. ("**Aimia**"). Aimia is a publicly traded company, and Mithaq Capital is Aimia's largest common shareholder. Shortly thereafter, on October 13, 2023, Aimia publicly announced a private placement with the transaction to close on October 19, 2023.

In its application to the Ontario Capital Markets Tribunal ("**OCMT**"), Mithaq sought a cease trade order against Aimia's private placement, primarily on the ground that the placement was an improper defensive tactic to defeat Mithaq's takeover bid. Mithaq also sought to set aside a Toronto Stock Exchange ("**TSX**") decision that approved Aimia's private placement without requiring that Aimia obtain shareholder approval (the "**TSX Decision**").

On December 14, 2023, the OCMT dismissed Mithaq's application.

In its recently released reasons, the OCMT concluded that the primary purpose of Aimia's private placement was to meet its serious and immediate need for financing. The OCMT also found that Aimia had began planning its private placement well before Mithaq's bid, when it had no reasonable basis to foresee an imminent bid. Although the private placement did change the bid environment unfavourably for Mithaq, this was secondary to Aimia's main purpose and insufficient to justify cease trading the private placement.

**Background**

On September 15, 2023, Aimia requested conditional approval from the TSX for a private placement, which the TSX granted on September 28, 2023. Subsequently, on October 5, Mithaq made an all-cash offer to acquire all outstanding common shares of Aimia at a price of C$3.66 per share, with the offer remaining open for acceptance until January 18, 2024, unless extended (the "**Mithaq Bid**").

On October 11, 2023, the TSX upheld its conditional approval of the private placement, but mandated Aimia to provide advance notice to the market. On October 13, 2023, Aimia publicly announced its intention to finalize the private placement for October 19, 2023. The private placement, if fully subscribed, would result in a total dilution of 24.89% of Aimia's then outstanding common shares. Aimia disclosed that the proceeds would be allocated towards funding its operations for the next 12 to 24 months, supporting its strategic investment plan, and addressing other contingencies. As part of the private placement, the investor group would obtain rights to select three out of eight board seats.

On October 19, Mithaq filed an application to cease trade the private placement, claiming it was an improper defensive tactic to thwart its bid. Following an expedited hearing, the OCMT permitted the private placement to proceed on Aimia's undertaking to unwind the transaction if the OCMT ultimately concluded that the placement was an improper defensive tactic.

Subsequently, the TSX confirmed its conditional approval of the private placement, taking into account the result of the OCMT hearing. On that same day, Aimia issued a directors' circular revealing that the investors in the private placement expressed their intention not to tender to the Mithaq Bid.

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**The Decision**

The OCMT applied criteria outlined in National Instrument 62-202 – *Take-Over Bids – Defensive Tactics* ("**NP 62-202**") and principles established in *Hecla Mining Company (Re)* to assess whether Aimia's private placement constituted a "clear abuse" of Aimia shareholders' rights or the capital markets, and should be blocked.

*Hecla* prescribes a two-stage test to determine whether to cease trade a private placement used as a defensive tactic in response to a takeover bid. The first stage examines if the private placement was unequivocally not a defensive maneuver aimed at altering the dynamics of a takeover bid. If found not to be a defensive tactic, the principles of NP 62-202 would not apply, and the OCMT would not intervene unless warranted by other independent reasons. The second stage balances corporate objectives of the private placement against the interests of facilitating shareholder choice.

Ordinarily, the initial burden of proof rests with the applicant, Mithaq. However, the OCMT recognized that if Mithaq could demonstrate the material impact of the private placement on the existing bid environment, independent of its classification as a defensive tactic, the burden of proof of assessing the defensiveness of the private placement would shift to Aimia.

The OCMT determined that the private placement indeed exerted a material influence on the bid environment. This was evident from its effects on inflating bid costs, reducing the likelihood of bid success, and increasing acquisition expenses for other potential bids. Consequently, the burden shifted to Aimia to demonstrate that the private placement was not defensive in nature.

I. First Stage of Hecla Analysis

The OCMT found that Aimia's private placement was not a defensive tactic for the following reasons:

i. Serious and Immediate Need for Financing

In reviewing the private placement, the OCMT determined that Aimia faced a demonstrable "serious and immediate" need for financing. This need arose because the company lacked sufficient cash flow to pursue beneficial investment opportunities, mainly due to the absence of debt financing at the parent company level. The OCMT clarified that "immediate" did not imply urgency, but rather indicated a current need rather than one based on speculation.

Furthermore, the OCMT noted that Aimia had begun planning the private placement financing months before Mithaq's bid announcement, when there were no signs of an impending takeover bid.

ii. Whether the Private Placement was Planned or Modified in Response to, or in Anticipation of, the Bid

The OCMT also concluded that the private placement was not devised as a response to or in anticipation of a bid. Aimia's perception of an "imminent" bid from Mithaq only arose when Mithaq publicly announced its intention to make a takeover bid on October 13. Prior to this announcement, Mithaq's actions suggested the possibility of a takeover bid but did not clearly indicate that Mithaq was actively considering such a bid. Aimia had initiated planning for the private placement six months before Mithaq's announcement, when there were no indications of an imminent takeover bid.

iii. Good Faith, Non-Abusive, Business Strategy

The OCMT concluded that the private placement served as a genuine business strategy devoid of defensive motives, based on two primary reasons. Firstly, it directly met Aimia's need for financing. Secondly, although a secondary purpose may have been to influence the bid environment in response to Mithaq's growing activism, the OCMT observed that this additional aim did not diminish or overshadow the initial and ongoing legitimate goals of the private placement.

II. Second Stage of Hecla Analysis

The OCMT determined that as a result of the private placement's material impact on the bid environment and Mithaq's inability to prove the private placement was clearly not a defensive tactic, the principles of NP 62-202 applied in deciding whether to cease trade the private placement.

In the second phase of the Hecla analysis, the OCMT concluded that the circumstances did not warrant intervention as the placement was not clearly abusive.

The OCMT determined that the benefits of the private placement to Aimia shareholders outweighed any adverse effects on the bid environment. In making this determination, the OCMT assessed the advantages, including the private placement's fulfillment of Aimia's financing needs and its commencement before the bid announcement. Conversely, the OCMT also noted drawbacks, such as deficiencies in oversight by Aimia's board regarding the interplay between the placement and Mithaq's takeover bid. The OCMT deemed factors such as the relationship between investors and Aimia, as well as the influence of other Aimia shareholders' perspectives, neutral in its evaluation.

**Going Forward**

The OCMT's decision highlights instances where a private placement carried out amidst a takeover bid might not be considered an improper defensive tactic. It demonstrates that, given the right conditions, share issuances with dilutive effects can proceed even in the presence of a takeover bid.