Ontario

Capital Markets Tribunal

Tribunal des marchés financiers

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Citation: *Mithaq Canada Inc (Re)*, 2024 ONCMT 9
Date: 2024-03-08
File No. 2023-28

IN THE MATTER OF
MITHAQ CANADA INC.

-and-

IN THE MATTER OF
AIMIA INC.

-and-

IN THE MATTER OF
A HEARING AND REVIEW OF A DECISION OF THE TORONTO STOCK EXCHANGE

REASONS FOR DECISION
(Sections 8, 21.7, 104 and 127 of the *Securities Act*, RSO 1990, c S.5)

Adjudicators:	Timothy Moseley (chair of the panel) James D.G. Douglas Dale R. Ponder	
Hearing:	By videoconference, December 12 and 13, 2023	
Appearances:	Andrew Gray Sarah Whitmore Hanna Singer	For Mithaq Canada Inc.
	Orestes Pasparakis James Renihan Mark Laschuk	For Aimia Inc.
	Eliot Kolers Hamza Mohamadhossen	For Toronto Stock Exchange
	Anna Huculak Jason Koskela David Mendicino Jordan Lavi	For Staff of the Ontario Securities Commission
	David D. Conklin Jerred Kiss	For Special Committee of the Board of Directors of Aimia Inc.
	Teresa M. Tomchak Lauren Harper	For Eagle 1250 Investments Group LLC

TABLE OF CONTENTS

REASONS FOR DECISION

1. OVERVIEW

[1] Mithaq Capital SPC (**Mithaq Capital**) is the largest common shareholder of Aimia Inc., a publicly traded company. Mithaq Capital and its wholly-owned subsidiary, Mithaq Canada Inc. (**Mithaq**), have been engaged in litigation in court and before this Tribunal about Aimia's governance and strategy. On October 5, 2023, Mithaq made an unsolicited take-over bid for Aimia.

[2] In this application, Mithaq asked us to:

a. cease trade a private placement that Aimia implemented, primarily on the ground that it was a defensive tactic; and

b. set aside a decision of the Toronto Stock Exchange (**TSX**) that approved the private placement without requiring that Aimia obtain shareholder approval.

[3] Mithaq also asked us to cease trade a shareholder rights plan that Aimia adopted. That request became moot, as we explain below.

[4] Aimia brought a cross-application asking us to deny Mithaq the benefit of an exemption contained in Ontario securities law that permits a bidder to acquire up to 5% of the target's shares if certain conditions are met.

[5] We heard this application on December 12 and 13, 2023. On December 14, 2023, we dismissed both the application and the cross-application, for reasons to follow.[1] These are our reasons for that decision.

[6] We concluded that the private placement was designed primarily to meet Aimia's serious and immediate need for financing. Aimia began planning the private placement well before Mithaq's bid, when Aimia had no reasonable basis to see a bid as imminent. Indeed, the private placement was near implementation when Mithaq announced its bid. The private placement did end up changing the bid

[1] *Mithaq Canada Inc (Re)*, (2023) 46 OSCB 10387

environment, unfavourably for Mithaq. However, that characteristic was secondary, and was insufficient to justify cease trading the private placement.

[7] We also concluded that there was no basis to interfere with the TSX decision. Contrary to Mithaq's submissions, that decision was thorough and contained no error in principle, and there is no new and compelling evidence that was not before the TSX.

[8] Finally, on Aimia's cross-application, we found no reason to deny Mithaq the exemption that Ontario securities law provides. Specifically, we rejected Aimia's contention that we should decide that Mithaq's bid was not made in good faith.

2. BACKGROUND

[9] In these reasons, all events occurred in 2023 unless otherwise noted.

[10] Aimia is a reporting issuer, whose common shares are listed on the TSX. Mithaq Capital filed early warning reports in February, April and May, disclosing that it owned or controlled 18.74%, 19.99% and 30.96%, respectively, of Aimia's common shares.

[11] In advance of an April annual general meeting of Aimia shareholders, Mithaq Capital announced that it would vote against the re-election of Aimia's board. At the meeting, the board chair was not re-elected, and none of the other director nominees received more than 52.41% of the votes cast. Mithaq Capital asked for a proxy review of the voting results, but Aimia denied the request. Mithaq Capital then applied to the Ontario Superior Court of Justice, seeking relief to facilitate its requested proxy review.

[12] Aimia responded by adding Mithaq Capital to a different court proceeding it had already brought relating to an individual's alleged disclosure to Mithaq Capital of Aimia's confidential information. In adding Mithaq Capital, Aimia sought to prevent it from requisitioning a special shareholder meeting, voting its Aimia shares, or acquiring additional Aimia shares, among other requested relief.

[13] In June, Aimia adopted a shareholder rights plan, which it stated publicly was in response to Mithaq Capital's increased shareholdings. Aimia never sought shareholder approval of the plan.

[14] On September 15, Aimia asked the TSX to give conditional approval for a private placement reflected in a non-binding term sheet. The TSX gave preliminary comments and ultimately gave conditional approval on September 28.

[15] On October 5, Mithaq made an all-cash offer for all outstanding common shares of Aimia at $3.66 per share. The offer was to remain open for acceptance until January 18, 2024, unless extended. On October 10, Aimia announced that it had formed a Special Committee of the board to assess the offer.

[16] On October 11, the TSX decided to maintain its earlier decision to conditionally approve the private placement, but also required Aimia to give advance notice to the market.

[17] On October 13, Aimia announced that it intended to complete a private placement to a group of undisclosed investors, and to close that transaction on October 19. The private placement would be for up to 10,475,000 Aimia common shares and an equal number of common share purchase warrants.

[18] Aimia also announced that under the terms of the private placement, the investor group would get up to three of the eight board seats and, if the private placement were fully subscribed and all warrants exercised, the shares issuable would represent 24.89% of the then-outstanding common shares (on an undiluted basis). The private placement was expected to raise up to $32.5 million in gross proceeds, the stated purpose of which was to fund Aimia's operations over the next 12 to 24 months and to support its strategic investment plan and other contingencies.

[19] Following Aimia's announcement, Mithaq commenced this application. On October 19, we held an expedited hearing to consider Mithaq's request for interim relief. By order that day,[2] for reasons we issued on December 6,[3] we granted some of the interim relief that Mithaq had sought. We considered an undertaking that Aimia had given us about steps it would take to unwind the private placement if Mithaq ultimately succeeded in its application. We also considered Aimia's representation about what securities would be issued under

[2] *Mithaq Canada Inc (Re)*, (2023) 46 OSCB 8654

[3] *Mithaq Canada Inc (Re)*, 2023 ONCMT 48

the private placement. We decided that we would cease trade the private placement unless Aimia gave an additional undertaking that any securities issued under the private placement could not be tendered to any alternative take-over bid or issuer bid. Soon after we issued that order, Aimia gave the additional undertaking. The private placement was not cease traded.

[20] The following day, on October 20, the TSX confirmed that it had considered the result of the October 19 hearing, and that it was giving its conditional approval of the private placement. On that same day, Aimia issued a directors' circular that disclosed the private placement investors' stated intention not to tender to Mithaq's bid.

[21] Aimia's shareholder rights plan expired on its own terms on December 7. On that day, Aimia announced that it had adopted a replacement plan the previous day. At the hearing before us on December 12 and 13, Aimia undertook to withdraw the replacement plan on the issuance of our decision (which, as it turned out, was December 14).

3. INTERVENORS

[22] Eagle 1250 Investments Group LLC (**Eagle**), the lead investor in the private placement, sought intervenor status in this proceeding, with full rights of participation. Aimia's Special Committee did the same. By order issued by a separate panel on November 23,[4] for reasons issued on December 20,[5] this Tribunal granted those intervenor requests.

4. PRELIMINARY ISSUE – EXPERT REPORTS

4.1 Introduction

[23] Before turning to our main analysis, we address one preliminary issue relating to expert reports.

[24] Each of Mithaq and Aimia sought to introduce into evidence two expert reports, one about the Aimia board's process in responding to the Mithaq bid, and one about the proper valuation of the shares and warrants issued under the private

[4] *Mithaq Canada Inc (Re)*, (2023) 46 OSCB 9591

[5] *Mithaq Canada Inc (Re)*, 2023 ONCMT 51

placement. After hearing submissions, we decided to exclude the competing reports about the board's process, but to admit the competing valuation reports. We deal first with the reports about the board's process.

4.2 Reports about the board's process

[25] Mithaq tendered a report from Alan Hibben, who has extensive experience as an investment banker, executive, board member and advisor to public companies. Mithaq asked Hibben to address three topics:

a. the approach of Aimia's directors to the private placement and alternatives;

b. the financial terms of the private placement and the alternatives Aimia's board could have pursued; and

c. the impact of the private placement on the take-over bid process.

[26] Commission Staff objected to the admission of Hibben's report, on the ground that this Tribunal is expert in capital markets matters, and does not need expert opinion evidence on the questions covered in that report.

[27] In resolving that issue, we were guided by the Supreme Court of Canada's decision in *R v Mohan*,[6] which sets out a framework for considering expert evidence. One of the threshold criteria that *Mohan* establishes is necessity; in other words, does the tribunal need the expert opinion to understand evidence that would otherwise be beyond the tribunal's understanding? If the tribunal does not need the expert opinion, then the tribunal should not admit the report.

[28] Mithaq submitted that Hibben's opinions were necessary and that they would be helpful. However, the test is necessity, not helpfulness. As *Mohan* tells us, "helpful" sets too low a bar.[7]

[29] The issues in Hibben's report are for us to decide. Hibben bases his opinions on his review of various documents, including continuous disclosure documents, board presentations, and investor communications. This Tribunal regularly reviews such documents, and decides issues like those that Hibben addresses,

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[6] [1994] 2 SCR 9 (***Mohan SCR***), 1994 CanLII 80 (SCC)

[7] *Mohan SCR* at 23

without assistance.[8] The issues are squarely within the Tribunal's expertise. We do not need Hibben's opinions. We therefore ruled Hibben's report inadmissible.

[30] For similar reasons, we ruled inadmissible a report that Aimia tendered, written by Edward Waitzer. That report responds directly to Hibben's and covers the same issues. We did not need it in order to decide those issues.

4.3 Valuation reports

[31] Mithaq and Aimia also tendered expert reports that give financial analysis of the value implications of the private placement's terms. Mithaq's report was written by Ernst & Young LLP, and Aimia's was written by KSV Soriano Inc.

[32] Both reports adopt a technical approach. Ernst & Young, for example, uses the well-established Black-Scholes method to calculate the value of the warrants issued in the private placement, and then derives the value of the shares from that figure. In other words, the value of a share is the total price paid per unit in the private placement, less the calculated value of a warrant.

[33] We agreed with Mithaq's submission that a calculation of this kind was necessary in this case to enhance our understanding of the valuation issues.

[34] Aimia's responding report from KSV Soriano adopts a different approach. It first values the shares issued in the private placement, and then derives the value of the warrants from that.

[35] To reach our own conclusion, if necessary, about the value of the shares and warrants, we had to consider both reports, particularly because each took a different approach to that valuation. We say "if necessary" because the parties disputed whether the reports were relevant at all. Aimia submitted its report because Mithaq had submitted one, and Aimia felt obliged to respond. However, Aimia submitted that the discussion about the value of the shares and warrants has little to do with the application, because the issue we must decide is whether Aimia needed financing, not whether Aimia could have obtained a better deal.

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[8] See, *e.g.*, *The Catalyst Capital Group Inc (Re)*, 2020 ONSEC 6 at paras 28, 44, 55-70, 92-131; *HudBay Minerals Inc (Re)*, 2009 ONSEC 15 (***HudBay***) at paras 28-29, 140-149; *Hecla Mining Company (Re)*, 2016 ONSEC 31 (***Hecla***) at paras 96, 103-117

Aimia submitted that the fact that the shares might have been issued at a discount to market does not make the private placement a defensive tactic.

[36] We had some sympathy for that argument, but we decided to admit the two reports. We did so because, as we explain in greater detail below, analysis of whether a private placement is a defensive tactic includes consideration of whether the private placement was of value to Aimia shareholders. The answer to that question depended, at least in part, on the value of the shares and warrants issued under the private placement. Accordingly, the reports were relevant. For reasons we set out later, we ultimately decided not to place weight on the reports, despite their relevance.

5. PRIVATE PLACEMENT

5.1 Introduction

[37] We turn now to Mithaq's principal complaint, which was that Aimia's private placement is a defensive tactic designed to thwart Mithaq's take-over bid.

[38] We disagree. The private placement was designed primarily to meet Aimia's serious and immediate need for financing. It did have the additional characteristic of changing the dynamics of the bid environment in a way that was unfavourable to Mithaq. However, that characteristic, while of some consequence, was secondary to the main purpose. It did not warrant interfering with the private placement.

5.2 Legal framework

[39] In assessing Mithaq's complaint, we begin with the purposes of provisions in Ontario securities law that relate to take-over bids. First, a general statement is in order about a policy that mentions those purposes.

[40] National Policy 62-202 *Take-Over Bids – Defensive Tactics* (**NP 62-202**) contains guidance relating to defensive tactics in the context of take-over bids. While NP 62-202 is not itself part of Ontario securities law, this Tribunal has

consistently applied many of its provisions.[9] In these reasons, wherever we cite part of NP 62-202, we adopt it.

[41] The first part of NP 62-202 we adopt identifies two of the main objectives of provisions in Ontario securities law related to take-over bids. The primary objective is "the protection of the *bona fide* interests of the shareholders of the target company". A secondary objective is to provide "an open and even-handed environment" in which bids can proceed.

[42] As we examine in detail the private placement and its effect on the bid environment, we must remember our role. We have broad discretion to intervene, but that discretion is not unlimited.[10] Its exercise will be informed by the purposes of the *Securities Act* (the ***Act***)[11] (including the fostering of fair and efficient capital markets, confidence in the capital markets, and capital formation)[12] and the objectives of the take-over bid provisions.

[43] For private placements, we must balance the legitimate corporate objectives of the private placement (and there may be more than one objective) against facilitating shareholder choice, all while being cautious not to interfere unduly with the business judgment of the issuer's board.[13]

[44] Indeed, this Tribunal previously held, in *Hecla Mining Company (Re)*, that we should block a private placement only where there is "a clear abuse of the target shareholders and/or the capital markets."[14] During the hearing, we questioned whether the standard of "clear abuse" should persist, given that the genesis of that standard pre-dates the 1994 amendments to the *Act* that added, as purposes of the *Act*, the protection of investors against "unfair" practices[15] and the fostering of "fair" capital markets.[16]

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[9] See, *e.g.*, *ESW Capital LLC (Re)*, 2021 ONSEC 7 (***ESW***) at para 72; *Aurora Cannabis Inc (Re)*, 2018 ONSEC 10 at para 145; *Hecla* at paras 75-83

[10] *Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37 at para 45

[11] RSO 1990, c S.5

[12] *Act*, ss 1.1(b), 1.1(b.1)

[13] *Hecla* at paras 81, 82, 88

[14] *Hecla* at para 89, citing *Red Eagle (Re)*, 2015 BCSECCOM 401 at para 89

[15] *Act*, s 1.1(a)

[16] *Act*, s 1.1(b)

[45] In response, Aimia noted that no party, in their written submissions, was seeking a change to the "clearly abusive" standard, and that all parties' submissions had been predicated on the assumption that the "clearly abusive" standard applied. As for Mithaq, we did not understand it to be advocating that we depart from the "clear abuse" standard set out in *Hecla*. Accordingly, we have applied that standard in our analysis. It remains to be seen whether, in some future proceeding, a party will submit that the standard ought to change. Because no party suggested that to us, and because we therefore did not have the benefit of submissions about the relevance, if any, of the 1994 amendments or of any other legislative or policy developments that may bear on the question, we do not express a view.

[46] Having identified the applicable standard, we will next summarize ongoing court proceedings between Mithaq Capital and Aimia, which Mithaq submitted we should consider in our analysis. Following that, we will describe and apply the two-stage test set out in *Hecla*,[17] which helped us determine whether we should cease trade the private placement.

5.3 Litigation in court between Mithaq Capital and Aimia

[47] In its submissions, Mithaq referred extensively to ongoing court litigation between Mithaq Capital and Aimia. On April 12, 2023, Aimia brought the first claim, in the Ontario Superior Court of Justice. In that proceeding, Aimia alleged that Christopher Mittleman, a former Aimia insider, gave Aimia's confidential information to Mithaq Capital and others. Following the annual general meeting, Mithaq Capital applied to the Court for a review of the proxies and ballots cast at the meeting. Aimia responded by joining Mithaq Capital and others to its claim against Christopher Mittleman.

[48] Aimia sought relief from the Court based on allegations of:

a. improprieties relating to the solicitation of proxies and votes for the annual general meeting; and

b. breaches of the early warning and take-over bid provisions of the *Act*.

[17] *Hecla* at paras 94-95

[49] The parties' claims and the relief they sought evolved over time, including after Mithaq launched its bid on October 5, with Aimia expanding its allegations of breaches of the take-over bid provisions and Mithaq countering that Aimia's claim was a defensive tactic aimed at frustrating Mithaq's bid.

[50] Mithaq asked us to consider the litigation broadly in the context of its request that we cease trade the private placement. Mithaq submitted that the positions Aimia took in the litigation were part of Aimia's overall defensive posture, and that we should see through these tactics.

[51] In contrast, Aimia's references to the litigation were more limited. Aimia submitted that while the litigation gave us context, the issues raised in the litigation were for the Court to decide.

[52] We agree with Aimia. The parties chose the issues to put before the Court. If we were to take the litigation into account as Mithaq suggested, we would have had to assess not only the merits of the claims that the parties made against one another, but also whether the parties had acted in good faith in bringing those claims. We decided that we should not do that, for two main reasons.

[53] First, any time this Tribunal is asked to decide issues that are before a court at the same time, there is a real risk of duplication of effort, and of inconsistent findings. A duplication of effort is contrary to the objectives of courts and of this Tribunal to conduct proceedings efficiently and to minimize the costs that parties incur. Inconsistent findings raise concerns about fairness and about the integrity of the justice system.

[54] Second, the record in this proceeding was not sufficient for us to decide the issues in the court litigation, especially since there are claims and issues in that litigation that are beyond the scope of the issues in this proceeding (*e.g.*, about the validity of proxies at the annual general meeting).

[55] In some cases, this Tribunal should decide certain issues even if they are the subject of parallel court proceedings, *e.g.*, if there is a need for a speedy resolution, or because of the Tribunal's expertise. This is not one of those cases. Mithaq did not persuade us that the circumstances of this case would justify overriding the strong presumption that we should not prejudge the very issues that the parties asked the Court to adjudicate.

[56] As a result, the claims in the litigation did not influence our analysis of any of the issues in this proceeding.

5.4 The test for whether to cease trade the private placement

[57] We turn now to the analytical framework set out in *Hecla*, in which the Tribunal prescribed a two-stage test to help determine whether a private placement should be cease traded as being a defensive tactic in response to a take-over bid.

[58] At the first stage, the panel must determine if the private placement is "clearly not" a defensive tactic designed, in whole or in part, to alter the dynamics of the bid process.[18] If it is clearly not such a defensive tactic, then the principles in NP 62-202 do not apply, and the Tribunal would not cease trade the private placement unless there was some other independent and sufficient reason for it to do so. On the other hand, if it cannot be said that the private placement is clearly not such a defensive tactic, the analysis passes to a second stage.

[59] At the second stage, the Tribunal will balance the corporate objectives of the private placement against facilitating shareholder choice. That balancing takes into account a number of factors, which we review below.

5.5 Is the private placement "clearly not" a defensive tactic?

5.5.1 Introduction

[60] The first of the two stages of the test asks whether the private placement is clearly not a defensive tactic. A preliminary step in that stage is to determine which party has the onus on the issue.

[61] Ordinarily, the applicant (Mithaq in this case) bears the burden of establishing elements of its case. On this issue, then, Mithaq would have to show that it is at least unclear whether the private placement was a defensive tactic.

[62] However, the Tribunal held in *Hecla* that the onus in this first stage may shift. If Mithaq were to begin by showing that the private placement's impact on the existing bid environment was material (*i.e.*, without reference to whether the

[18] *Hecla* at para 94

private placement was a defensive tactic), then it would be Aimia that had the burden of showing that the private placement is clearly not a defensive tactic.[19]

[63] Accordingly, we begin our analysis by asking whether the private placement's impact on the existing bid environment was material. We concluded that it was. The onus therefore shifted to Aimia for the first stage, *i.e.*, to show that the private placement was clearly not a defensive tactic. We concluded that Aimia did not meet that burden. We therefore moved to the second stage, in which we balanced the corporate objectives of the private placement against shareholder choice, and considered whether the circumstances warranted our interfering with the private placement. We concluded that they did not.

[64] We turn now to our assessment of the preliminary question about onus, *i.e.*, whether Mithaq established that the private placement's impact on the existing bid environment was material.

5.5.2 Evidentiary onus

5.5.2.a Introduction

[65] In assessing whether the private placement had a material impact on the bid environment, we considered its effects on:

a. the cost of the bid;

b. the likelihood of success of Mithaq's bid; and

c. other potential bids.

5.5.2.b The private placement's effect on the cost of the bid

[66] First, Aimia says the private placement did not have a material effect on the cost of Mithaq's bid. It was not disputed that the cash outlay required to achieve the bid's minimum tender condition would be greater following the private placement. The debate was about whether that increase was material.

[67] Mithaq might also incur additional financing costs or be subject to more onerous financing terms, either of which would increase Mithaq's cost of acquisition.

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[19] *Hecla* at para 96

Mithaq's potential additional cost would be further increased if the warrants issued under the private placement were exercised.

[68] We concluded that while it was reasonably likely that the cost of Mithaq's bid would increase as a result of the private placement, we cannot be sufficiently certain, based on the evidentiary record before us, that such an increase would be material. Therefore, we cannot conclude on this factor alone that the private placement had a material impact on the bid environment.

5.5.2.c The private placement's effect on the likelihood of success of Mithaq's bid

[69] Second, Aimia noted that Mithaq led no evidence to show that the private placement affected Mithaq's appetite to proceed with the bid. We did not accept the implication that Mithaq needed to adduce evidence about its own appetite to proceed. Bidders may reasonably choose not to declare their intentions in this way. As a result, we focused on the likelihood of success of Mithaq's bid should Mithaq proceed with it.

[70] Aimia also submitted that the private placement did not make it impossible that Mithaq's bid would succeed. That submission is factually accurate, but it applies an incorrect standard. We had to determine not whether success was possible, but instead whether the private placement materially affected the likelihood of success of Mithaq's bid. We concluded it did.

[71] At the time of Mithaq's bid, Mithaq Capital held 30.96% of Aimia's shares (*i.e.*, not clear control). Mithaq submitted that the new shares in the hands of private placement investors who had declared their intention not to tender to the bid would materially interfere with its ability to achieve the minimum tender condition. The number of shares needed to be tendered to satisfy the condition would increase from approximately 29 million to approximately 34.3 million. Mithaq asserted that if the private placement investors chose not to tender, 59% of all remaining Aimia common shares would need to be tendered in order for Mithaq to meet the minimum tender condition. This percentage would increase if any warrants issued under the private placement were exercised before the bid expired.

[72] We concluded that the private placement did have a material effect on the bid environment, because of the impact on Mithaq's ability to satisfy the minimum tender condition and therefore on the likelihood of success of Mithaq's offer.

5.5.2.d The private placement's effect on other potential bids

[73] Finally with respect to the evidentiary onus, we considered the effect of the private placement on other potential bids. In doing so, we were mindful that our role is not to ensure the success of a particular bid, but rather to ensure that the bid process is fair and open and that we give appropriate protection to the interests of Aimia's shareholders.

[74] Mithaq argued that the $3.70 exercise price of the warrants, which was four cents higher than Mithaq's offer price of $3.66, might discourage any competing bid at a price higher than $3.70. Mithaq submitted that a bid higher than $3.70 would cause the warrants to be exercised, either for purposes of tendering to the higher bid or for market trading purposes at what would likely be a higher prevailing market price for the shares. Either way, there would be an increase in the number of outstanding shares, resulting in higher acquisition costs to a competing bidder.

[75] We therefore concluded that the warrant exercise price might discourage other potential bidders for Aimia or might discourage Mithaq from improving its bid. These effects on the bid environment are material, and while our conclusion on this point is based on speculation (an exercise that we should avoid except where necessary), that speculation is necessary here, given the forward-looking nature of this criterion.

5.5.2.e Conclusion about the evidentiary onus

[76] Mithaq showed that the private placement had a material impact on the bid environment because of its effect on Mithaq's ability to meet the minimum tender condition and its effect on other potential bids. The onus therefore shifted to Aimia to establish that the private placement was clearly not a defensive tactic. We now turn to consider that question.

5.5.3 Aimia cannot show that the private placement was clearly not a defensive tactic

5.5.3.a Introduction

[77] We decided that Aimia cannot show that the private placement was clearly not a defensive tactic. In reaching that decision, we considered the following three relevant factors set out in *Hecla*, none of which alone is necessarily determinative, although each could be:[20]

a. whether the private placement was designed to respond to Aimia's serious and immediate need for financing (we concluded this was its primary purpose);

b. whether the private placement was planned or modified in response to, or in anticipation of, a take-over bid (we concluded that it was not, other than an inconsequential pricing change); and

c. whether the private placement was part of a good faith, non-defensive, business strategy (we concluded that it was, but that it could also reasonably be seen to have taken on a defensive aspect).

[78] We now review each factor in detail. Given our conclusion on the third, it might not be necessary to analyze the first two. However, some facts overlap, and later in these reasons we return to some of this analysis. We therefore consider it useful to address each of the three factors.

5.5.3.b Serious and immediate need for financing

[79] For the first factor, Mithaq and Aimia disputed whether Aimia had a serious and immediate need for financing. We concluded that it did.

[80] We agreed with Aimia's contention that when we were assessing its need for financing, we had to bear in mind the type of business that it carries on. Aimia does not directly operate any business. Instead, it purchases interests in other companies. As a result, it aims to maintain cash sufficient to allow it to take advantage of suitable investment opportunities as they arise.

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[20] *Hecla* at para 97

[81] Aimia also described its difficulty in obtaining debt financing at the parent level of the company. It attributed that difficulty to lenders' concerns that Aimia has limited cash flow at the parent level and that it cannot easily access cash sitting at the subsidiary level.

[82] Philip Mittleman, Aimia's CEO, testified that in early 2023, he was in regular contact with Jefferies Securities Inc., which Mittleman described as a trusted advisor. As early as February, Mittleman discussed with Jefferies the idea of a private placement as one possible financing vehicle. Aimia describes the most significant events leading up to those discussions, and eventually resulting in the October completion of the private placement, as follows:

a. In late 2022, Aimia began to pursue two separate investment opportunities – Tufropes Private Limited, a manufacturer based in India, and Giovanni Bozzetto S.p.A., an Italian-based provider of specialty chemicals. At the time, Aimia had approximately $550 million in cash and liquid investments. It planned to use a combination of cash and debt financing to make these acquisitions.

b. In November 2022, Aimia began trying to secure debt financing for the Tufropes transaction. Aimia and its consultant contacted 105 potential lenders. Most lenders who responded said they were not interested. Of the twenty-four who signed a non-disclosure agreement, four presented non-binding potential terms for a financing. Three of the four withdrew quickly. Aimia began negotiations with the one remaining lender.

c. On January 31, 2023, Aimia announced that it had signed definitive agreements to acquire all of Tufropes's shares for approximately $250 million. Paladin Private Equity LLC, the firm that had approached Aimia with this opportunity, obtained an option to acquire up to 19.9% of Tufropes within a year of the closing of the transaction.

d. On March 6, Aimia announced that it had signed definitive agreements to acquire approximately 94% of the shares of Bozzetto (the other opportunity) for approximately $328 million. Paladin obtained an option to acquire up to 19.9% of Bozzetto within one year.

e. Paladin has not exercised either option. Had Paladin exercised both, as Aimia expected it would, Paladin would have paid Aimia approximately $115 million.

f. On March 17, Aimia closed the Tufropes transaction, for a total cost of approximately $253 million. At the time, Aimia had approximately $505 million in cash, which was less than the approximately $584 million Aimia expected to need to close the Tufropes and Bozzetto transactions.

g. As of March 31, Aimia had $244 million in cash. That amount included cash held at its subsidiaries, which Aimia could not easily access.

h. On May 9, Aimia closed the Bozzetto transaction, for a total cost of approximately $219 million. As part of the transaction, Aimia had to repay approximately $84 million of debt that Bozzetto owed. Aimia secured some debt financing through Bozzetto, as a result of which Aimia's net cash outlay was approximately $215 million.

i. Mittleman, Aimia's CEO, testified that shortly after May 25, the date on which Mithaq Capital announced that it had acquired additional shares of Aimia, the potential lender with whom Aimia had been negotiating advised that it was not willing to provide financing.

j. Shortly thereafter, Aimia began to pursue a private placement.

k. On June 6, Aimia retained Clarus Securities to provide an independent opinion about: (i) whether Aimia required funds from a potential private placement for liquidity and investment purposes; (ii) whether the potential private placement featured a relatively low cost of capital; and (iii) whether the potential private placement would result in Aimia having strong strategic shareholders who would gain board representation.

l. On June 26, Aimia formally retained Jefferies. Jefferies was to be Aimia's sole agent for a private placement, and was to identify and negotiate with potential investors.

m. As of June 30, Aimia had approximately $64 million in cash, of which approximately $7 million, $21 million and $36 million was held at each of Aimia, Bozzetto and Tufropes, respectively. Aimia could not access the

cash at Bozzetto and Tufropes due to covenants with lenders and significant withholding tax exposure.

n. On July 11, Aimia announced that it had made another corporate acquisition for approximately $27 million in cash, an acquisition that had to be accelerated because of interest from other potential buyers. This resulted in a cash expenditure that had not been planned for that time.

o. On August 10, Clarus presented its preliminary opinion to Aimia's board. Its view was that Aimia required a capital injection. It canvassed various potential methods of financing, including debt financing, but concluded that debt financing would be a more expensive and restrictive source of capital than an equity financing at that time, due to market conditions.

p. On September 8, Clarus presented its final opinion to Aimia's board. It confirmed that Aimia required additional capital. It noted that Aimia had an available cash balance of approximately $7 million as of July 31. It calculated that Aimia would have a cash outflow of approximately $3 million over the next 12 months and a further $23 million over the succeeding 12 months. These outflows would result in an expected cash deficit of approximately $19 million by the end of the 24-month period.

q. Clarus noted other potential significant expenses in the near term. Taking those into account and assuming Aimia liquidated all the funds and public securities it held, there could still be a funding gap of more than $80 million. It confirmed that the most accessible source of capital for Aimia was a private placement of equity, due to Aimia's inability to access debt financing, and the disadvantages of selling existing investments.

r. In early October, immediately following the announcement of Mithaq's bid, the Aimia board formed a Special Committee. That committee retained Canaccord Genuity Corp. to provide financial advice. On October 9, Canaccord concluded that a near-term capital injection was warranted. Aimia had readily available cash of $8.2 million as of September 30, but was projected to have a negative cash balance of $8.3 million by the end of 2023. That result could be avoided only by deviating from Aimia's investment strategy and accepting the risk that

cash might not be available as required. Even that approach would leave unaddressed contingent liabilities of approximately $133 million.

[83] Mithaq challenges, on several grounds, Aimia's assertion that it had a serious and immediate need for financing.

[84] First, Mithaq submits that the credibility of Aimia's purported need for financing is undermined by Aimia's statements that it had ample cash and that it intended to buy back some of its shares. For example:

a. On March 6, Aimia announced its intention to repurchase some of its shares through a renewal of its normal course issuer bid, which was due for renewal in June. We agree with Aimia that there is no inconsistency, since the news release announcing its intention to repurchase shares provided that any buybacks were conditional upon Aimia "closing one or both external debt financings, both of which are actively progressing, for the… Bozzetto and Tufropes acquisitions."

b. In a press release and Q1 earnings call on May 12, Aimia management stated that the company expected to have approximately $126 million of cash and liquid investments on hand after the closing of the Bozzetto acquisition, and that "We're confident we will have plenty of cash to execute what we need to execute". Aimia advised of its intention to renew its normal course issuer bid when it expired in June 2023. Again, we see no inconsistency, since these statements were made shortly before the anticipated debt financing fell through.

c. Aimia's September 27 "Investor Day Presentation" advised that Aimia would re-initiate its normal course issuer bid and would engage in "aggressive" share buybacks "on closing of Tufropes financing". The presentation gives no details about what that pending financing was, but it must be different than the failed financing described above, given the date of this presentation. While the disclosure may have been overly optimistic about the prospects of concluding financing for the Tufropes transaction, we see no inconsistency between this statement and the purported need for financing through the private placement, since the

mention of share buybacks was explicitly conditional on the successful closing of an unspecified financing.

[85] Second, Mithaq submits that if the need for debt financing were so material, it would have been raised at the meeting of the board of directors in early 2023. There is no evidence of that having happened. We share Mithaq's concern on this point, to some extent. However, we cannot conclude from the absence of any record of such a discussion that the need for financing did not exist as described. There are other possible explanations, including that the issue was discussed but not recorded, or that the issue was not canvassed by the board. Neither of these possibilities would be satisfying from a corporate governance perspective, but that is not the issue. What is most important is that Mithaq has not persuaded us that the most likely inference is that the need for financing did not exist or was exaggerated.

[86] Third, Mithaq made some submissions about other possible sources of financing, including a potential rights offering. There was no evidence about possible sources not pursued. It is clear that the environment was challenging for capital raising generally. It would be too speculative for us to draw conclusions adverse to Aimia from the fact that it did not explore a rights offering.

[87] Fourth, Mithaq questioned the "immediacy" of Aimia's need, although in its written submissions, Mithaq conceded that a need over the next 12 months could fairly be described as "immediate". We agree with that view, despite Staff's contrary submission that implied an equivalency between "immediate" and "financial distress". The panel in *Hecla* used the word "immediate" in formulating this criterion, but did not explore the meaning of the word in that context. On the facts of that case, it was likely unnecessary to do so. In any event, in our view the word "immediate" does not necessarily imply urgency. It does imply that the need currently exists, as opposed to being speculative.

[88] While we agree with Mithaq's characterization of immediacy, we reject Mithaq's suggestion that we should disapprove of the amount Aimia raised. Canaccord projected that Aimia would have a deficit of $8.3 million at the end of 2023, growing to deficits of $18.7 million and $43.5 million by the ends of 2024 and

2025, respectively. The amount raised through the private placement was not disproportionate to the information that Aimia had at the time.

[89] Mithaq also attempted to have us confine our analysis to the bid period, *i.e.*, only from the commencement of the bid on October 5 until its expiry on January 18, 2024. We do not accept that approach. The terms of the private placement were negotiated before Mithaq announced its bid and its expiry date. We must assess the "immediacy" contemplated by this element of the test in the context of Aimia's circumstances, not the external and independent circumstances that Mithaq later added by making its bid.

[90] Finally, Mithaq submitted that we should find that there was no serious and immediate need for financing, for the following reasons:

a. *Aimia disclosed no specifics about its intended use of the funds.* We rejected this submission because: (i) such specifics may reasonably have been unknown at the time, and/or confidential; and (ii) the fact that in *Hecla*, for example, the issuer had a quantified need does not mean that quantification is essential in all cases.

b. *Aimia never raised its funding concerns with Mithaq Capital.* We rejected this submission because Aimia was under no obligation to do so, particularly given the fraught environment between Aimia and Mithaq Capital at the time.

c. *There is no evidence that Paladin actually decided, or when it decided, not to exercise its options.* We rejected this submission because Paladin had not yet exercised its options, so it had not contributed to Aimia's cash position. Further, the options were to remain open until early 2024.

d. *Given that a principal of Paladin is the son of a principal of Eagle, Paladin may have deliberately chosen not to exercise its options, to support Aimia's defence against Mithaq's bid.* We rejected this submission because it was speculative and lacked any supporting evidence. Further, this suggestion was not put to Aimia's CEO in cross-examination. It would be an impermissible leap to infer, without further evidence, that Aimia's need for financing was manufactured with Paladin's willing assistance.

e. *Neither Clarus nor Canaccord independently confirmed Aimia's funding concerns, and Canaccord's report was designed to help Aimia's board resist Mithaq's offer rather than to provide an independent analysis.* We rejected these submissions because Mithaq neither led evidence, nor successfully challenged existing evidence, so as to undermine the factual basis on which those firms reached their conclusions, especially with respect to Aimia's near-term cash requirements.

f. *Aimia obtained the Clarus opinion to help block Mithaq's bid, and the changes between Clarus's preliminary and final opinions may have resulted from instructions to revise its opinion.* We rejected these submissions because there was no evidence that directly supports them, and the existing circumstantial evidence did not reasonably lead to either of those inferences.

g. *The Canaccord opinion does not help Aimia, because it was delivered after the bid.* We rejected this submission even though it was factually accurate, because that timing does not undermine the Canaccord opinion's value in corroborating a pre-existing need for financing, as opposed to it being the sole authority for a new conclusion about a need for financing.

[91] We had concerns about some of Mittleman's testimony, which was occasionally evasive or excessively self-serving. For example, Mittleman sometimes resisted adopting words that he himself had used in affidavits that he swore. Further, his antagonism toward Mithaq was evident. However, our concerns about some of his testimony do not dislodge the material facts. Mithaq neither contradicted nor otherwise undermined Mittleman's testimony. In the elements that matter, Mittleman's testimony was largely corroborated by testimony from Karen Basian, chair of the Special Committee. Basian was a candid and straightforward witness, and we have no reason to reject any of her testimony.

[92] To summarize, none of Mithaq's concerns sufficiently undermined Aimia's contention that it had a serious and immediate need for financing. We therefore concluded that Aimia successfully demonstrated that at the relevant time, it did have a serious and immediate need for financing.

5.5.3.c Was the private placement planned or modified in response to, or in anticipation of, a bid?

[93] The next factor in assessing whether the private placement was a defensive tactic is whether it was planned or modified in response to, or in anticipation, of a take-over bid. Mithaq submitted that the private placement was designed in anticipation of, and to block, Mithaq's offer. We disagree.

[94] One indicator of whether Aimia took any steps "in anticipation of" a bid would be whether Aimia's board had "reason to believe that a bid might be imminent", wording that NP 62-202 uses in this context. To evaluate whether Aimia's board had reason to believe that a bid might be imminent, we review the following events:

a. In February, Mithaq Capital increased its Aimia shareholding and filed early warning reports.

b. In April, Mithaq Capital began its shareholder activism, including its vote "no" campaign leading up to Aimia's annual general meeting.

c. On April 19, Mithaq Capital filed an early warning report that included a take-over bid as one of many possible next steps.

d. Also in or around April, Aimia began a comprehensive process of considering available financing options (according to Aimia's October 13 announcement about the private placement).

e. On May 15, Eagle signed a non-disclosure agreement with Aimia and hired a financial analyst to conduct further due diligence.

f. On May 25, Mithaq Capital announced that it had increased its shareholding to 30.96%, and filed an early warning report that included a take-over bid as one of many possible next steps.

g. On June 5, Mithaq Capital issued a news release that it says put Aimia on notice that it would defend against tactics that Mithaq Capital regarded as potentially abusive and entrenching.

h. Aimia management prepared a draft report, dated June 5, to the board about a potential $63 million private placement. That draft report

described one of the purposes of the private placement as being "to establish a strong moat to protect [Aimia] against the distracting attacks of opportunistic raiders, allowing the company to transact, raise debt, and operate its businesses without the damaging effects of such attacks that have hindered those efforts."

i. On June 6, Mithaq Capital's counsel wrote a letter to Aimia that stated that Mithaq Capital was "presently contemplating a number of alternatives with respect to its investment in Aimia (including requisitioning a shareholder meeting to replace the board or acquiring additional shares by way of take-over bid or otherwise)". The letter also cautioned that "any private placement that dilutes Mithaq [Capital]'s holdings can only be viewed as an improper defensive tactic solely designed to manipulate the outcome of a proxy contest or take-over bid, particularly in light of the fact that Aimia does not require new equity financing and management has recently stated that the Company has ample cash."

j. On June 7, Aimia announced its adoption of the shareholder rights plan in response to "Mithaq [Capital]'s attempts to acquire effective control of Aimia through share acquisitions (i.e. a creeping bid)".

k. According to Eagle, in the summer of 2023 it suggested the investment opportunity to potential investors, some of whom pursued negotiations with Jefferies or Aimia.

l. According to Aimia, Aimia began robust arm's-length negotiations with potential investors in or around July, culminating in the private placement (according to Aimia's October 13 announcement). Mithaq neither contradicted nor successfully challenged this evidence.

m. On September 15, Eagle and Aimia entered into a non-binding term sheet that anticipated a closing date of September 28.

n. On September 28, the TSX conditionally approved the private placement.

o. On October 3, Mithaq announced its intention to make a take-over bid. Mithaq commenced the bid on October 5.

[95] The question of when a board has reason to believe a bid is "imminent" requires consideration of how likely it is that any specific bid will be made. Too low a bar could effectively freeze a business's capital-raising activities. For an issuer like Aimia, with its high dependency on having capital available to make acquisitions, the consequences of too low a bar would be particularly acute.

[96] We concluded that it was not until October 3, when Mithaq announced its intention to make a take-over bid, that the Aimia board had sufficient reason to believe that a bid was imminent. There had been indications that a take-over bid was possible. However, we must consider these indications in context, *i.e.*, that a take-over bid was one among a range of options. For example, Mithaq submits that the early warning reports made clear as early as April that Mithaq Capital was considering making a take-over bid. While those reports did identify a take-over bid as a possibility, that falls short of "making clear" that Mithaq Capital was "considering" making a bid. This is so because the reports contain lengthy, largely boilerplate text designed to preserve Mithaq Capital's ability to pursue a long list of very disparate options. A take-over bid is only one such option, and it gets no more than a mention.

[97] Almost six months passed between the first indication that a take-over bid was a possibility and Mithaq's announcement. Similarly, almost four months passed between Mithaq Capital's June 6 warning letter to Aimia and Mithaq's announcement. Those periods of time are too long for Aimia to have refrained from pursuing its legitimate need for capital due to the possibility, without any time limitation, that Mithaq Capital would make a take-over bid. In this case, it would not be reasonable to conclude that a bid was imminent for that long a period of time.

[98] We therefore conclude that the private placement was not planned in response to, or in anticipation of, a bid. That leaves the question of whether it was modified in response to Mithaq's bid. It was, but only to increase the price of the shares and the exercise price of the warrants. These changes had only positive effects for Aimia shareholders, and Mithaq did not suggest that they constituted a defensive tactic.

5.5.3.d Good faith, non-defensive, business strategy

[99] The last criterion we considered in assessing whether the private placement is clearly not a defensive tactic was whether it was part of a good faith, non-defensive, business strategy. We concluded that it was, for two reasons.

[100] The first is our conclusion, explained above, that the private placement directly responded to Aimia's need for financing.

[101] Second, according to Aimia, the private placement supported its strategy of strengthening its board. Aimia added what it considered to be two experienced public company directors, both of whom are independent of Aimia and of Eagle.

[102] The private placement was therefore part of a good faith, non-defensive, business strategy, but it was not exclusively so. It came to have multiple purposes, because as Mithaq Capital's activism increased, Aimia was content that the private placement strategy already being pursued might help Aimia resist that activism. Even though no bid was imminent in the summer of 2023, Mithaq Capital had contemplated a bid as one among many options. If a bid were to materialize, the private placement would serve the additional purpose of making it more difficult for Mithaq Capital to successfully complete its bid.

[103] This additional purpose neither negated nor overrode the original and still extant legitimate purposes of the private placement. However, we still considered it as part of our assessment of whether Aimia showed that the private placement was clearly not a defensive tactic.

[104] We do not conclude that the private placement was primarily designed as a defensive measure. However, once the Mithaq bid was announced, the private placement more clearly took on a defensive character. Accordingly, it cannot be said that the private placement was "clearly not" a defensive tactic.

5.5.3.e Conclusion

[105] The private placement's original and main purposes related to a need for financing rather than any existing or anticipated bid. However, as time went on, the private placement acquired a defensive character. Aimia failed to discharge its onus of showing that the private placement was clearly not a defensive tactic.

We therefore turn to additional factors we had to consider in deciding whether to cease trade the private placement or grant other relief.

5.6 Is the private placement clearly abusive?

5.6.1 Introduction

[106] Because Aimia did not establish that the private placement was clearly not a defensive tactic, the principles of NP 62-202 are engaged, and we must apply those principles in deciding whether to cease trade the private placement.[21] In doing so, we must assess whether the private placement constitutes "a clear abuse" of the Aimia shareholders or the capital markets.[22] In making that assessment, we considered:

a. whether the private placement would benefit Aimia's shareholders;

b. the extent to which the private placement alters the pre-existing bid dynamics;

c. whether the private placement investors are related to Aimia, or to each other, in such a way as to enable Aimia's board to summarily reject Mithaq's bid or a competing bid;

d. whether the views of other Aimia shareholders should influence our decision; and

e. whether Aimia's board appropriately considered the interplay between the private placement and Mithaq's bid.[23]

[107] We address each of these in turn, all the while balancing the corporate objectives served by the private placement against the facilitation of shareholder choice.[24]

5.6.2 Benefit to Aimia shareholders

[108] First, would the private placement benefit Aimia's shareholders? We concluded that it would, despite Mithaq's submission to the contrary.

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[21] *Hecla* at para 98
[22] *Hecla* at para 89
[23] *Hecla* at para 100
[24] *Hecla* at para 82

[109] Mithaq focused exclusively on the period of the bid, and submitted that Aimia did not require the funds during that time. We have already rejected that position. The private placement addressed Aimia's need for financing. A flow of capital to the issuer will not always be of benefit to shareholders, perhaps because it results from an issuance of shares that causes excessive dilution. However, on balance here, the private placement was beneficial to Aimia's shareholders.

[110] In reaching that conclusion, we rejected Mithaq's submission that the consideration that Aimia received under the private placement did not create value for Aimia and its shareholders. Mithaq pointed to the Ernst & Young report and, in particular, the report's conclusions about the discount at which the shares were issued.

[111] We did not find either the Ernst & Young report or the KSV Soriano report to be compelling. We prefer Ernst & Young's methodology, because the Black-Scholes method is well established, and Ernst & Young's approach better aligns with the generally accepted approach to valuing units made up of shares and warrants. However, despite our preference for that methodology, we were not prepared to adopt Mithaq's suggested conclusion.

[112] In private placements, shares are commonly issued at a discount to market. The Ernst & Young report did not provide a sufficient basis for us to conclude that the discount in this case was so far out of market as to render the private placement of no value, or unfair, to Aimia or its shareholders. In particular, we noted two issues:

a. First, the amount to be allocated to each share varied appreciably depending on the point in time at which the valuation was made.

b. Second, the Ernst & Young witness testified that with a valuation where first the warrant is valued, and then the remaining amount is attributed to the share, one should not adopt the result of that valuation unless the resulting value of the share remains fair. Despite this, Ernst & Young conducted no fairness analysis in preparing its valuation. We were, therefore, not comfortable relying on the report's conclusions.

5.6.3 Effect on pre-existing bid dynamics

[113] The second of the five factors considers the extent to which the private placement alters the pre-existing bid dynamics. We considered this question above in the context of determining the evidentiary onus. As we concluded, the private placement materially interfered with Mithaq's ability to achieve the minimum tender condition under its bid.

[114] In addition, as we concluded above, the warrant exercise price could be a discouraging factor to other potential bidders for Aimia.

[115] However, the significance of these findings was, for us, overwhelmed by the fact that almost every step involved in the private placement, including conditional approval by the TSX, preceded Mithaq's October 3 announcement of its intention to make a take-over bid. We therefore attach little weight to Mithaq's arguments about the impact of the private placement on pre-existing bid dynamics.

5.6.4 Nature of relationship between Aimia and the private placement investors

[116] The third factor required us to consider whether the private placement investors were related to Aimia, or to each other, in such a way as to enable Aimia's board to summarily reject Mithaq's bid or a competing bid.

[117] Mithaq did not seriously contend that the private placement investors were "related" to Aimia or one another, or that they were otherwise acting jointly and in concert with Aimia or with one another, within the legal meaning of those terms. Instead, Mithaq highlighted facts about how Eagle and others in the investor group became aware of the investment opportunity, and about the investors' stated intention not to tender to Mithaq's bid. We understood Mithaq to be asking us to infer that Mittleman recruited the private placement investors due to their willingness to just say "no" to Mithaq Capital's shareholder activism and to any forthcoming bid.

[118] We declined to draw that inference. In his testimony at the hearing, Roger Crandall, a principal of Eagle, denied that the private placement investors are a group of related parties or otherwise acting jointly and in concert. Crandall also testified that while Eagle did not intend to tender to the Mithaq bid as it then

existed, Eagle had no obligation to Aimia or otherwise to maintain this position, and the position might change if the bid were amended. Mithaq neither seriously challenged Crandall's testimony nor adduced persuasive evidence to the contrary.

[119] While Aimia's board might have been comforted by the private placement investors' intention not to tender to Mithaq's then-existing bid, the basis for that comfort might have evaporated if Mithaq modified its bid or another offeror made a bid. In any event, this tenuous degree of support was insufficient for us to conclude that we should cease trade the private placement.

5.6.5 Views of Aimia shareholders

[120] The fourth of the five factors refers to the views of shareholders.

[121] Both Mithaq and Aimia filed unsworn letters and emails from Aimia shareholders. We attributed no weight to those. We did not find these limited samples to be quantitatively persuasive either way.

5.6.6 Board's consideration of the interplay between the private placement and Mithaq's bid

[122] The fifth factor required us to consider whether Aimia's board appropriately considered the interplay between the private placement and Mithaq's bid. Mithaq raised concerns of two kinds: first, about the terms of engagement of Canaccord, the Special Committee's adviser; and second, about the advice that Canaccord gave and the extent to which the Special Committee followed that advice.

[123] With respect to the terms of the engagement, Mithaq relied on the Tribunal's decision in *HudBay Minerals Inc (Re)* to argue that we should accord no deference to the work and conclusions of the Special Committee because Canaccord's fee structure favoured an outcome in which Mithaq's offer expired or was withdrawn, and no other transaction had occurred. We did not accept this submission, because we read the engagement letter as providing that the highest potential fee was payable to Canaccord if a transaction were completed during the term of the engagement at a price higher than that of the Mithaq bid. This distinguishes the terms of the Canaccord engagement from those of the

financial advisor in *HudBay*, which were designed to promote only the result preferred by the HudBay board.

[124] As for the advice that Canaccord provided, and the Special Committee's actions or inaction, Mithaq asserted that Canaccord's work was "results-driven", designed to help the board show the deficiencies of Mithaq's offer and secure approval of the private placement. As an example, Mithaq pointed to the fact that Canaccord's advice and recommendations regarding proceeding with the private placement preceded the completion of its analysis of Mithaq's offer. Mithaq argued that the board ought to have focused on the impact the private placement would have on the likelihood of Mithaq's bid succeeding and the ability of shareholders to accept the bid and have it succeed.

[125] In response, Aimia submitted that the Special Committee considered anew whether the private placement was appropriate in light of Mithaq's bid. In its own submissions, the Special Committee asserted that its mandate included a review and reconsideration of the private placement in light of the announcement of Mithaq's bid. The Special Committee engaged Canaccord to advise it about the Mithaq bid, and Canaccord advised Aimia to proceed with the private placement, subject to negotiating potentially amended terms. Among the factors Canaccord considered when giving this advice was the fact that the private placement and Mithaq's bid were not mutually exclusive. In other words, even if the private placement were to be completed, shareholders could still tender to the bid, and the bid could still succeed. Relying on this advice, the Special Committee determined at its October 9 meeting that Aimia should continue to pursue the proposed private placement expeditiously. It recommended this to the Aimia Board.

[126] The Special Committee's work was not as comprehensive as it might have been. For example, the Special Committee does not appear to have considered, seriously or at all:

a. the data that Canaccord provided about the extent to which the private placement might affect, as opposed to eliminate, shareholder choice;

b. that one of the conditions of the Mithaq bid was that there could be no intervening equity financing; or

c. whether there were ways in which the private placement could be amended to make it more compatible with the existing Mithaq bid, an improved Mithaq bid, or a competing bid.

[127] While we share some of Mithaq's concerns about the work of the Special Committee, and the Aimia board's follow-up actions, we must proceed cautiously. The Tribunal noted in *Hecla* that when we balance the business judgment of a board against the securities law principle of facilitating shareholder choice, we should give "significant deference" to directors who are "following appropriate governance processes".[25] Deficiencies in the governance processes that the directors followed may well undermine the deference that would otherwise be accorded to the directors, but even if so, it remains the Tribunal's responsibility to assess whether the private placement is "abusive" because it denies shareholders the ability to participate in an offer or it improperly alters bid dynamics.[26]

[128] We give our own analysis of that question in the next section. For the purposes of this fifth factor, though, we cannot conclude that the deficiencies in the Special Committee's and board's work are consequential enough to overcome the compelling facts of Aimia's need for financing and the chronology of the private placement preceding, almost entirely, Mithaq's bid.

5.6.7 Summary

[129] To summarize, two of the above five factors (the relationship between Aimia and the private placement investors, and the views of the Aimia shareholders) were neutral in our analysis. On the remaining three factors, we concluded that:

a. the private placement benefited Aimia's shareholders;

b. the private placement altered the pre-existing bid dynamics; and

c. there were deficiencies in the Aimia board's consideration of the interplay between the private placement and Mithaq's bid.

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[25] *Hecla* at paras 82, 88

[26] *Hecla* at para 83

[130] The result of the last of these three is that we did not defer to the Special Committee's work, as we might normally have. Instead, we reached our own conclusion independently, by weighing the impact on Aimia and its shareholders against the impact on the bid environment. We concluded that, while the private placement did have an impact on the bid environment, that impact was outweighed by the benefit to Aimia shareholders. We therefore concluded that the private placement was not "clearly abusive".

5.7 The private placement in the context of Mithaq Capital's shareholder activism

[131] In our analysis above about whether the private placement was "clearly not" a defensive tactic, it was significant that it was negotiated and largely completed before Mithaq's bid was announced.

[132] When we raised that timing issue, Mithaq directed us back to Mithaq Capital's shareholder activist campaign in the spring of 2023. Mithaq submitted that we should look at this case not only in the context of an imminent or existing bid (as in *Hecla*), but also in the context of Mithaq Capital's activism as shareholder, even without a bid. Mithaq urged us to rely on the Tribunal's decision in *Eco Oro*,[27] which was an application for a review of a TSX decision. The case did not involve a take-over bid, but the Tribunal did refer to the general principles set out in NP 62-202, and contemplated the possibility that, in the right case, the Tribunal might make an order under s. 127 of the *Act* even in the absence of a bid.

[133] In *Eco Oro*, the TSX conditionally approved an issuance of common shares to four recipients shortly before a shareholders' meeting to reconstitute the company's board. The TSX had approved the transaction without requiring prior shareholder approval. The applicants, who were two shareholders, sought to set aside the TSX decision. They said the TSX had deprived them of the opportunity to register their objections with the TSX before the transaction closed.

[27] *Eco Oro Minerals Corp (Re)*, 2017 ONSEC 23 (***Eco Oro***)

[134] In setting aside the TSX decision, the Tribunal found that the impugned share issuance materially affected control of Eco Oro. It concluded that a shareholder vote was required on the transaction.

[135] Mithaq points to the Tribunal's statement in *Eco Oro* that "[i]ssuances of shares as a defensive measure in the face of a contest for control of a public company to influence the outcome in management's favour are subject to review by the [Tribunal]."[28] While the reasons focus on what jurisdiction the Tribunal has in substituting its own decision for that of the TSX, the reasons explicitly contemplate that a person "may also [*i.e.*, in addition to seeking a review of a TSX decision] seek to invoke the [Tribunal's] public interest jurisdiction under section 127 of the Act … as the Applicants did here."[29]

[136] Ultimately, the Tribunal decided not to consider the applicants' alternative request for relief under s. 127, because the Tribunal's grant of relief in connection with its review of the TSX decision made the s. 127 request unnecessary. *Eco Oro* therefore does not establish guidelines for considering such a request, beyond the uncontroversial observation that, as is true in bid cases, fairness and market integrity are central considerations.[30]

[137] *Eco Oro* arguably contemplates a case where the Tribunal's public interest jurisdiction may be engaged in the context of a shareholder activism dispute. However, the case involved a proxy contest and a transaction that materially affected control of the issuer.

[138] Neither of those two factors was present in this case. First, Mithaq Capital's court challenge to the validity of proxies used at a previous shareholder meeting differs significantly from a proxy contest in anticipation of an upcoming vote, as was the case in *Eco Oro*. This is so in part because of the contrast between the urgency normally associated with a proxy contest on the one hand, and the uncertain and often extended timeline associated with litigation on the other.

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[28] *Eco Oro* at para 246

[29] *Eco Oro* at para 247

[30] *Eco Oro* at para 249

[139] Second, the dispute in *Eco Oro* was about a transaction that the Tribunal found materially affected control of Eco Oro,[31] a description that does not apply to the private placement in this case.

5.8 Conclusion about the request to cease trade the private placement

[140] The analytical framework that the Tribunal has applied when reviewing defensive tactics in the context of contested take-over bids (as in *Hecla*) would not necessarily govern cases that involve shareholder activism but no bid. Further, Mithaq did not persuade us that if we focus not on its bid in this case, but rather on Mithaq Capital's shareholder activism, we should read *Eco Oro* as providing a basis for s. 127 relief in this case. *Eco Oro* is distinguishable in material respects, including because here, unlike in *Eco Oro*, there was no proxy contest and no transaction that materially affected control.

[141] Mithaq did not establish that the private placement was abusive, let alone clearly abusive (the standard set in *Hecla* for cases involving a take-over bid). The *Hecla* test aside, Mithaq did not persuade us that the circumstances surrounding the private placement were otherwise sufficient to justify the exercise of our s. 127 public interest jurisdiction, applying the principles in *Eco Oro*. We therefore dismissed Mithaq's request that we cease trade the private placement.

6. TSX DECISION

6.1 Introduction

[142] Mithaq asked us, as an alternative to cease trading the private placement, to set aside the TSX's decision to approve the private placement without requiring shareholder approval.

[143] The TSX submitted that we need not deal with this request at all, because if we were to find (as we have) that the private placement is not an improper defensive tactic, it follows that the private placement had a legitimate business purpose. The TSX argued that since some of the considerations relevant to that determination are the same as those that the TSX considered, there would be no basis to set aside the TSX decision. We disagree. The inquiries are not identical,

[31] *Eco Oro* at para 12

and our conclusion about the legitimacy of the private placement does not preclude us from finding that the TSX should have required shareholder approval. We therefore proceed to consider Mithaq's request.

[144] The TSX made its decision pursuant to the *TSX Company Manual*, which contains the rules that apply to TSX-listed issuers such as Aimia. The manual requires issuers to notify the TSX of any transaction involving the issuance of any of its securities (with limited exceptions not applicable here). The TSX may approve or reject the notice of the transaction, or it may impose conditions or allow exemptions from certain requirements.

[145] In making its decision, the TSX must consider the effect of the proposed transaction on the "quality of the marketplace", a concept that this Tribunal has described as "a broad concept of market quality and integrity"[32] and that includes several factors we discuss below.

[146] The manual also provides that if the transaction "materially affects control" of the issuer, shareholder approval will be required.[33]

[147] In this case, Aimia gave the TSX notice of its intention to carry out a private placement. Through that notice, and through later communications between Aimia and the TSX, Aimia provided information about the intended transaction. Ultimately, the TSX decided that shareholder approval would not be required.

[148] Mithaq brought this application under s. 21.7 of the *Act*, which allows anyone directly affected by a decision of the TSX to apply to this Tribunal for a review of the decision. Subsection 8(3) of the *Act* authorizes us to confirm the TSX's decision or to make such other decision as we consider proper.

6.2 Background

[149] Aimia's first notification to the TSX of its intention to carry out the private placement was on August 15, by way of a price protection form that Aimia filed with the TSX. Aimia filed an amended form on September 14.

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[32] *TSX Company Manual*, s 603; *HudBay* at para 212

[33] *TSX Company Manual*, s 604(a)

[150] On September 20, the TSX asked Aimia to explain the lead investor's seemingly disproportionate representation on the board. The TSX also asked for a copy of the Clarus report. Aimia answered those requests and provided further information on September 22 and 27.

[151] On September 28, the Listings Committee of the TSX met and decided to conditionally approve the private placement, with no requirement for shareholder approval.

[152] When on October 3, Mithaq announced its intention to launch its bid, the TSX viewed this development as possibly material. It invited Aimia to make submissions about the private placement in the context of the bid. On October 10, Aimia did so.

[153] On October 11, the Listings Committee met again. It concluded that the private placement should be conditionally approved, but with a new condition requiring Aimia to issue a press release announcing the private placement at least five days before closing. Aimia announced the private placement on October 13.

[154] The initial hearing in this proceeding took place on October 19. Aware of the Tribunal's order of that day, the Listings Committee met again on October 20 and decided to release its conditional approval letter.

[155] It was common ground before us that we should treat the Listings Committee's decisions of September 28, October 11 and October 20 together as the TSX decision for the purpose of Mithaq's application.

[156] We begin our analysis by describing the test for us to interfere with that decision. We then review Mithaq's submissions that the decision is deficient. In summary, Mithaq contended that the TSX proceeded on incorrect principles, in that the TSX did not properly consider the effect of the private placement on the quality of the marketplace, including whether the private placement would "materially affect control" of Aimia. Mithaq also argued that there is new and compelling evidence before us that was not presented to the TSX. We disagree with Mithaq's assessment of the TSX decision and disagree that there was evidence before us that was "new and compelling", so we dismissed the request that we interfere with the TSX decision.

6.3 Test for review

[157] This Tribunal has consistently chosen to adopt a restrained approach when asked to interfere with a decision of a self-regulatory organization, or of a recognized exchange such as the TSX. That approach is particularly appropriate where, as here, the decision at issue was a discretionary one that is squarely within the decision maker's expertise.[34] The Tribunal has said that to avoid creating excessive regulatory uncertainty, it will intervene only where the applicant meets the heavy burden of demonstrating that its case falls squarely within one of the following grounds:

a. the decision maker proceeded on an incorrect principle;

b. the decision maker erred in law;

c. the decision maker overlooked material evidence;

d. new and compelling evidence is presented to the Tribunal that was not presented to the decision maker; or

e. the Tribunal's perception of the public interest conflicts with that of the decision maker.[35]

[158] Even where one or more of those criteria is met, the Tribunal may choose not to set aside the decision.

6.4 Alleged deficiencies

6.4.1 Introduction

[159] Mithaq contended that the TSX proceeded on incorrect principles in interpreting and applying the "materially affect control" standard. Mithaq identified three principal issues that it said the TSX failed to adequately consider:

a. the impact of the private placement on Mithaq's offer, including on the economics of that offer;

b. the ongoing litigation between Mithaq Capital and Aimia; and

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[34] *HudBay* at paras 103-104

[35] *Canada Malting Co (Re)*, (1986) 9 OSCB 3565 at para 24; *Wilks Brothers, LLC (Re)*, 2021 ONSEC 25 at para 57; *HudBay* at para 114

c. the Aimia board's pattern of not seeking shareholder approval for defensive measures.

[160] Mithaq said the TSX was deficient in four additional respects, and that it again proceeded on incorrect principles as a result:

a. it incorrectly relied on Aimia's governance process with respect to the private placement;

b. it determined that it lacked the jurisdiction to consider whether the private placement was an abusive tactic;

c. it failed to consider the shareholder complaints; and

d. it too easily accepted Aimia's assertions about:

i. joint actorship;

ii. the effect of the private placement on control of Aimia;

iii. the lead investors' board nomination rights; and

iv. whether the private placement was on favourable terms.

[161] Finally, Mithaq contended that there is "new and compelling evidence" that the TSX did not take into account in its decision. Specifically, Aimia's director's circular reported that the private placement investors did not intend to tender to Mithaq's bid.

[162] We address each of these in turn.

6.4.2 Impact on Mithaq's offer

[163] The *TSX Company Manual* defines "materially affect control" to include "the ability to block significant transactions."[36] Mithaq submitted that in order to determine whether the private placement could block the offer, one must assess how the private placement affected the economics of the offer. Mithaq contended that the TSX did not sufficiently address this issue, and that the TSX did not adequately consider whether the private placement would effectively block the

[36] *TSX Company Manual*, s 1

offer by making it uneconomic for Mithaq to proceed, and thereby deny shareholders the opportunity to tender to the offer. We disagree.

[164] A private placement's impact on the economics of the offer may well be relevant to whether the private placement materially affects control of the issuer. However, we are not aware of any authority that supports the proposition that the impact on the economics of the offer should be a dominant consideration. It is but one factor among many.

[165] In any event, the TSX was alive to this issue, as is evident from its statement that the private placement would indeed impact the economics of the offer. The TSX noted that despite an impact on the economics, there would be no impact on any voting blocks of shares. We reject Mithaq's submission that the TSX's reference to the absence of an impact on any voting blocks reflected a misunderstanding of "materially affect control". Given that "materially affect control" includes "the ability to block significant transactions", the reference to voting blocks is directly relevant.

[166] The TSX correctly recognized the limitations on its authority, specifically the fact that it did not have jurisdiction to determine the critical question of whether the private placement was a defensive tactic. On this point, we disagree with Mithaq's submission that the TSX incorrectly determined it lacked this jurisdiction. The TSX's jurisdiction in the context of a private placement is to consider the effect on the quality of the marketplace.

[167] In recognition that it would be some other body (*e.g.*, this Tribunal) that would determine whether the private placement was a defensive tactic, the TSX added a condition to its approval, by requiring that Aimia give notice to the market of the transaction before closing. By doing this, and consistent with this Tribunal's comments in *Eco Oro*,[37] the TSX ensured that there was an opportunity for market participants to raise any concerns with the appropriate body, as Mithaq soon did before this Tribunal. The TSX explicitly contemplated that such concerns might relate to the dilutive nature of the private placement and its impact on the economics of the offer.

[37] *Eco Oro* at paras 3, 105

[168] We also do not accept Mithaq's submission that the TSX erred in principle by failing to consider the impact of the private placement on the minimum tender condition. The TSX submits that by the time it issued its final approval on October 20, we had issued our October 19 order, which eliminated the private placement's impact on the minimum tender condition. While we disagree that the undertakings Aimia had given were a complete answer to the impact on the minimum tender condition, we could have modified the requirements of the minimum tender condition if we decided it was appropriate to do so. The TSX decision was correct in saying that this Tribunal was engaged and had jurisdiction.

[169] Mithaq also submitted that the TSX erred by failing to analyze what would happen if the private placement investors rejected Mithaq's offer. We disagree. The TSX was not required to engage in the significant speculation that would have been needed to assess those consequences.

[170] In context, the TSX's treatment of the impact on Mithaq's offer was sufficient. It did not constitute an error in principle.

6.4.3 Court proceedings

[171] Mithaq submitted that the TSX should have considered the relief Mithaq Capital was seeking in the court litigation with Aimia and how that relief might affect the "materially affects control" threshold. In summary, Mithaq said that the TSX should have, but did not, consider the questions of whether the Aimia board was properly elected, and the serious dilutive impact of the private placement on upcoming votes about the shareholder rights plan or at any meeting ordered by the court. Moreover, said Mithaq, the TSX should have considered the facts underlying the litigation and how they were relevant to Aimia's motives for proceeding with the private placement.

[172] Aimia countered that not only did the TSX expressly consider the existence of the litigation, Mithaq failed to explain how the litigation ought to have affected the TSX decision. Aimia submitted that the TSX was not in a position to conduct a comprehensive review of the litigation and the merits of Mithaq's position; that would be outside its jurisdiction and its mandate.

[173] Staff added that the outcome of the litigation was uncertain, and any reliance by the TSX on the litigation might have significantly delayed its decision. Both the TSX and Staff submitted that requiring the TSX to consider potential litigation outcomes in this context would be detrimental to its role and process in approving the issuance of securities and could have a significant detrimental impact on legitimate capital raising activity.

[174] We agree with the submissions of Aimia, Staff and the TSX, substantially for the reasons set out beginning at paragraph [47] above about our own reluctance to assess the litigation. We reject Mithaq Capital's submission that the TSX ought to have given greater consideration to the litigation in determining the question of "materially affects control".

6.4.4 Board's alleged pattern of not seeking shareholder approval

[175] The third main issue that Mithaq said the TSX failed to adequately consider in assessing whether the private placement would materially affect control of Aimia is the Aimia board's alleged pattern of not seeking shareholder approval for defensive measures. Mithaq submitted that the TSX knew by October 20 that Aimia had taken no steps to ensure that by December 7 there would be an opportunity for shareholders to approve the shareholder rights plan. Mithaq argued that the TSX should have considered that the Aimia board was again seeking to implement a defensive tactic in the form of the private placement, without shareholder approval.

[176] Staff countered that Aimia's decision to implement a shareholder rights plan without shareholder approval did not reflect a pattern of problematic behaviour germane to the issue of whether the private placement materially affected control of Aimia. Staff submitted that, even if relevant, it would not be a basis to interfere with the TSX decision.

[177] The TSX added that at the time of the private placement, Aimia was still within the six-month period to seek shareholder approval for the shareholder rights plan and Aimia was entitled to seek the TSX's authorization for the private placement without prior disclosure to the market. The TSX submitted that it would have been speculative and premature for it to conclude that Aimia would not comply with its obligations.

[178] Aimia submitted that, in any event, the shareholder rights plan was irrelevant to whether the private placement would materially affect control of Aimia. Mithaq's offer was a permitted bid under the shareholder rights plan then in effect, and Aimia submitted that the plan had no impact on the offer. We disagree, because while the Mithaq bid was a permitted bid, the plan did restrict further stock accumulation by a bidder. Our disagreement is inconsequential, though, because that fact is also irrelevant to whether the private placement would materially affect control of Aimia.

[179] We agree with the TSX that it would not have been appropriate for it to conclude that Aimia would fail to seek shareholder approval within the six-month window. One could reasonably draw a range of inferences about Aimia's intentions. We were not persuaded that the facts supported a conclusion that Aimia was engaging in a pattern of conduct to defeat shareholder choice, and we cannot say that the TSX erred in principle in treating this issue the way it did.

6.4.5 Three additional alleged deficiencies

[180] Mithaq cited three additional ways in which it said the TSX decision was deficient. Mithaq argued that had the TSX not so erred, it would have concluded that a shareholder vote was required.

[181] First, Mithaq submitted that the TSX concluded that Aimia's governance process with respect to the private placement was sound and adequate without assessing that process, including the Special Committee's process and the nature of the advice delivered in the Clarus opinion.

[182] Despite our misgivings about the Special Committee's process, it was not unreasonable, given the timing of the TSX's decision and the record before it, for the TSX to have adopted its Compliance Department's conclusion that the governance process surrounding the private placement was sound and adequate. In any event, any disagreement we have with the TSX's assessment would not lead us to conclude that the TSX erred in principle or that we would be justified in interfering with the TSX decision.

[183] Second, Mithaq submitted that the TSX failed to consider shareholder complaints. We disagree. The TSX considered not only Mithaq's submissions, but also the correspondence received from shareholders both in support of and

against the private placement. We have already explained our reasons for not attributing any weight to the correspondence. The TSX need not have done anything differently.

[184] Third, Mithaq submitted that despite the TSX's obligation not to rely on "unverifiable discussions"[38] with respect to material facts, the TSX too easily accepted Aimia's assertions in four areas. We did not share Mithaq's concerns in any of those areas, which were as follows:

a. *whether the private placement investors were joint actors of Aimia's* – we did not share Mithaq's concern because, for the reasons set out above beginning at paragraph [117], we found insufficient evidence to conclude that the investors were joint actors;

b. *whether the private placement would materially affect control of Aimia* – we did not share Mithaq's concern because the TSX decision addresses this question directly;

c. *the lead investors' disproportionate board nomination rights* – we did not share Mithaq's concern because the TSX itself raised concerns with Aimia, following which Aimia adjusted the board representation rights; and

d. *whether the private placement was on "very favourable terms"* – we did not share Mithaq's concern for the reasons set out above beginning at paragraph [112], where we concluded that Ernst & Young did not provide a sufficient basis for us to conclude that the discount associated with the private placement shares was so far out of market as to suggest unfairness to Aimia shareholders.

[185] In addition to those reasons for dismissing the concerns, we disagree that the TSX merely accepted Aimia's assertions at face value. The TSX engaged with these issues at the outset and again as appropriate after Aimia announced and made the offer. The TSX asked questions of Aimia, reviewed the correspondence from Mithaq and other shareholders, and considered this proceeding and our October 19 order. In our view, the TSX's actions easily met the standard in *HudBay*, in which the Tribunal held that the TSX "does not generally have an

[38] *Eco Oro* at para 96

obligation to conduct an investigation or carry out due diligence when it is considering the exercise of its discretion under a provision of the TSX Manual".[39]

[186] We see none of the three additional grounds raised by Mithaq as supporting a conclusion that the TSX erred in principle in making its decision.

6.4.6 New and compelling evidence

[187] Mithaq submitted that there is new and compelling evidence that the TSX did not consider, and that we should interfere with the TSX decision on that basis as well. According to Mithaq, there were two kinds of new evidence.

[188] The first is the Ernst & Young report valuing the shares and warrants that would be issued under the private placement. The report is dated November 17, almost a month after the TSX issued its final decision. The report is therefore new, but we have already explained (at paragraphs [111] and [112] above) that we did not find it compelling. There is therefore no basis to conclude that even if the TSX had the report at the time, the report would have influenced the TSX's decision. We do not think it should have.

[189] The second kind of new evidence, according to Mithaq, was the private placement investors' stated intention (as reflected in Aimia's directors' circular) not to tender to Mithaq's bid. Mithaq submitted that this evidence was directly relevant to the TSX's inquiry about whether the private placement materially affected control of Aimia.

[190] Even though the directors' circular was issued early on October 20, and the TSX decision was issued later that day, the parties agree that the TSX did not have the directors' circular. There is no evidence that the TSX otherwise knew about the private placement investors' stated intention, and there was no suggestion that the TSX ought to have discovered that through reasonable diligence. Mithaq did suggest that Aimia ought to have conveyed this information to the TSX promptly, but that is irrelevant to this issue even if true. We had no evidence about when the investors communicated this intention to Aimia.

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[39] *HudBay* at para 139

[191] The evidence is therefore new, but again we did not find it compelling. As we discussed above, the private placement resulted from arms' length negotiations over several months. While the investors did not intend to tender to the then-existing bid, they made no similar statement about a revised or competing bid. The lead investor confirmed that it was not required to support management nor to vote its shares in any particular manner. There was no agreement, commitment or understanding to effect any particular result.

[192] The central issue before the TSX was whether the private placement would "materially affect control" of Aimia. Because there was insufficient evidence that the investors were acting jointly with one another or with Aimia, and because the private placement investors' stated intention not to tender as reflected in the directors' circular was non-binding and related only to the then-existing bid, we decided that evidence of that intention would be insufficient to cause the TSX to come to a different conclusion about "materially affect control". Without that potential causal relationship between the evidence and the TSX's decision, the evidence is not compelling.

[193] Mithaq also submitted that the new evidence would influence a decision about "materially affect control" in a less direct way. Mithaq argued that the evidence was compelling because the private placement materially affected the likelihood of success of the Mithaq bid given its prejudicial impact on the minimum tender condition, and therefore, in turn, affected the likelihood of a change in control. On this point, the TSX noted that this Tribunal had decided on October 19 not to cease trade the private placement, and in so deciding had relied on Aimia's undertakings, including the undertaking that until Mithaq's application was resolved, any shares issued under the private placement would not be included for the purpose of Mithaq satisfying the minimum tender condition. Accordingly, there is no basis to conclude that the TSX would have decided the issue of "materially affect control" differently than it did.

6.5 Conclusion

[194] None of the concerns that Mithaq raised about the TSX's process or its decision constituted, by itself, an error in principle. We reached the same conclusion

about all of those concerns taken together. We found little to criticize about the process or decision.

[195] As for new evidence, while both items of evidence that Mithaq pointed to were indeed new, we found neither to be a compelling reason to overturn the TSX's decision.

[196] Mithaq failed to meet the heavy burden associated with persuading us to interfere with the TSX decision on either basis. We therefore declined to do so.

7. RELIEF RELATING TO THE MINIMUM TENDER CONDITION, THE MINORITY SHAREHOLDER APPROVAL REQUIREMENT FOR A SECOND STEP BUSINESS COMBINATION, AND THE 5% EXEMPTION

7.1 Introduction

[197] Mithaq made an alternative request, should we decline both to cease trade the private placement and to require shareholder approval. Mithaq submitted that, in that event, we should order that shares issued under the private placement not be counted in the number of outstanding Aimia shares for purposes of satisfying either the minimum tender condition or any minority shareholder approval requirement under Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions* for a second step business combination.

[198] Mithaq also sought an order confirming that it could rely on the exemption in section 2.2(3) of NI 62-104 permitting it to buy up to 5% of the outstanding Aimia shares while the offer is outstanding. Aimia in turn sought an order prohibiting Mithaq from relying on that exemption.

[199] We decided not to grant any of the above relief.

7.2 Minimum tender or minority shareholder approval relief

[200] We turn first to Mithaq's requested relief regarding the minimum tender condition and minority shareholder approval requirements. Mithaq argued that there was a material risk its bid would fail, given the dilutive effect of the private placement and the private placement investors' intention not to tender. Mithaq submitted that minimum tender relief would ensure that shareholders could tender to the offer.

[201] Aimia and Eagle both opposed Mithaq's request. They submitted that the private placement investors were arm's length to Aimia, were not party to any voting support or other arrangements requiring them to oppose the offer, and were legitimate Aimia shareholders entitled to the same rights as all shareholders, including the right not to tender to the offer. They argued that the dilutive effect of the private placement did not mean the offer would necessarily fail. They also observed that the private placement investors may decide to tender to an improved offer or an alternative offer.

[202] As for any potential second stage business combination, Aimia submitted that the request was premature and lacking in detail, but for the same reasons, the private placement investors should have full participation in any related required vote.

[203] As this Tribunal has previously held, predictability is important, and we must be cautious in granting relief that alters the carefully calibrated bid regime. We should grant the kind of relief sought here only if there are "exceptional circumstances or abusive or improper conduct that undermined minority shareholder choice".[40]

[204] As we have discussed at length, Aimia's conduct in this case does not fit that description. Despite the effect of the private placement on the bid environment, we had no basis to conclude that it would deny shareholders the opportunity to tender to the offer. Consistent with the objective of protecting the integrity of the bid regime, we dismissed Mithaq's request that we vary the minimum tender condition.

[205] We also agreed that it is premature to consider granting relief from the minority shareholder approval requirements in the context of a potential future second stage business combination. As a result, we declined to grant that alternative relief as well.

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[40] *ESW* at paras 10, 81

7.3 The 5% exemption

[206] Turning next to the order Mithaq seeks confirming its ability to rely on the so-called 5% exemption, we declined to make any such order as we do not have the jurisdiction to do so.

[207] The Tribunal is a statutory tribunal with no inherent jurisdiction. It can order only what it is empowered to order. The Tribunal is not empowered to issue a declaration that a person or company is entitled to rely on an existing exemption.

[208] However, the Tribunal does have the jurisdiction to grant an order of the type that Aimia sought, denying Mithaq the ability to rely on the 5% exemption. To make such an order, we must conclude that it is in the public interest to do so.

[209] Aimia did not persuade us that we should reach that conclusion.

[210] Aimia argued that Mithaq should not be entitled to rely on the 5% exemption because Mithaq's offer was too conditional, containing 20 conditions and 27 subconditions. Aimia submitted that allowing Mithaq to rely on the exemption would allow Mithaq to acquire what is effectively negative control over Aimia, even though Mithaq can withdraw its bid at any time. According to Aimia, Mithaq's offer could not be considered to have been made in good faith, and Aimia shareholders could not rely on it. Aimia submitted that Mithaq should not be able to use the highly conditional offer as a shield to increase its ownership share in Aimia to almost 36%.

[211] After this proceeding was underway, Mithaq removed from its offer two conditions to which Aimia had taken strong exception – one relating to a resolution of the litigation between Mithaq and Aimia and one relating to rights of due diligence.

[212] Staff submitted that with these conditions removed, we should not find the offer to be too conditional to have been made in good faith. Staff also noted that the take-over bid regime does not prescribe what conditions are and are not appropriate, except for the minimum tender condition requirements and a prohibition on financing conditions in connection with cash bids.

[213] We agree that the nature of the conditions in the offer does not make the offer so conditional that it cannot be considered to have been made in good faith. In addition, as Staff submitted, if Mithaq does not exercise its discretion regarding the offer's conditions in a reasonable manner, there is the prospect of regulatory intervention.

[214] Accordingly, we concluded that it would not be in the public interest to deny Mithaq access to the 5% exemption.

8. REQUEST TO CEASE TRADE THE SHAREHOLDER RIGHTS PLAN

[215] In its application, Mithaq also asked us to cease trade the shareholder rights plan that then existed, or any replacement plan. The plan that existed at the time of Mithaq's application expired on its own terms on December 7. Aimia adopted the replacement plan on December 6 and announced it on December 7.

[216] In its written submissions, Aimia undertook to withdraw the plan upon the issuance of our decision. Accordingly, the plan ceased to have effect from December 14, the date of our order. Mithaq's request to cease trade the plan is therefore moot, so we do not need to address it.

9. CONCLUSION

[217] For the above reasons, we dismissed Mithaq's application and Aimia's cross-application.

Dated at Toronto this 8th day of March, 2024

"Timothy Moseley"

Timothy Moseley

"James D. G. Douglas"

James D. G. Douglas

"Dale R. Ponder"

Dale R. Ponder