

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C., 1985, c. C-36, AS AMENDED

-and-

IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF
URTHECAST CORP., URTHECAST INTERNATIONAL CORP., URTHECAST USA
INC., 1185729 B.C. LTD AND THOSE OTHER PETITIONERS SET OUT ON THE
ATTACHED SCHEDULE "A"

Petitioners

APPLICATION RESPONSE

APPLICATION RESPONSE OF: Land O'Lakes, Inc. and Winfield Solutions, LLC
(Collectively referred to as "Land O'Lakes" unless
context requires identifying "Winfield")

THIS IS A RESPONSE TO: The Notice of Application of the Petitioners dated
December 29, 2020.

Part 1: ORDERS CONSENTED TO

Land O'Lakes does not consent to any of the proposed orders set out in the
Petitioners' Notice of Application (collectively, the Petitioners are referred to as
"Urthecast").

Part 2: ORDERS OPPOSED

Land O'Lakes opposes the granting of the proposed assignment order called the
"**Land O'Lakes Assignment Order**" set out in Schedule "E" of the Notice of
Application and the Approval and Vesting Order set out in Schedule "C" but only as it

pertains to the non-consensual transfer of the contracts which Urthecast has defined as the "**Land O'Lakes Agreements**" in the draft orders.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

Land O'Lakes takes no position on the granting of the other orders sought by Urthecast.

Part 4: FACTUAL BASIS

A. Overview of Objection to Forced Assignment

1. Land O' Lakes is a leading provider of crop protection products, agricultural seed and agricultural services. Land O'Lakes has been a pioneer of using technology to improve agricultural practices.
2. Land O'Lakes' objects to this application because its business model is incompatible with the delayed launch date of 2024 proposed for the UrtheDaily constellation of satellites by Antarctica Infrastructure Partners, LLC ("**Antarctica**").
3. In 2013, Land O'Lakes acquired Geosys Technology Holding LLC and its subsidiaries ("**Geosys**") with the goal of providing cutting-edge satellite imagery services that would enable Land O'Lakes' customers to make decisions based on real-time data to improve agricultural field yields while reducing their environmental footprint. This acquisition made Land O'Lakes a leader in using satellite imagery.
4. When Urthecast announced the planned launch of the UrtheDaily constellation of satellites in 2016, Land O'Lakes was its first significant supporter with a long-term advance purchase commitment. Land O'Lakes recognized early on the benefits of daily high resolution satellite imagery.

Affidavit No. 1 of Richard Sundal dated January 4, 2021 ("Sundal Affidavit") at paras 18

5. Land O'Lakes' decision to sell Geosys to Urthecast in 2018 was made to enhance its R7 field monitoring tool. The R7 tool is hampered by: (i) the infrequency of satellite images; and (ii) lack of high resolution satellite images. These problems would have been addressed by the UrtheDaily's daily, high-resolution imagery.

6. R7 is marketed as an in-season precision farming tool that provides real-time information about a farmer's fields. The information that R7 provides allows Land O'Lakes to sell additional products and services such as seeds, pesticides or fertilizers. Therefore, a decrease in the usage of the R7 field monitoring tool directly correlates to a decrease in sales of Land O'Lakes' core products.

Sundal Affidavit at paras 28-29

7. The initial timeline proposed by Urthecast for the launch of the UrtheDaily was 2021 with commercial operations starting in 2022. During the years of failed financing efforts by Urthecast, five other satellite imagery companies have launched satellite infrastructure capable of providing "like-kind" products and services equal to UrtheDaily. Those companies – Axel Space, Pixxel, Capella, IceEye and Preda SAR – have now crowded the marketplace. Providing higher resolution and more frequent satellite imagery is now a commodity with little to no differentiation. If Antarctica secures financing and meets its proposed timelines, the UrtheDaily will then provide substantially similar services to what five competitors are offering today.

Sundal Affidavit at paras 21 & 32

8. Currently, Land O'Lakes uses the low resolution and sometimes infrequent data from Geosys for its R7 field monitoring tool. Urthecast's failure to obtain financing for the UrtheDaily has resulted in Land O'Lakes' losing customers and business because R7 is becoming increasingly viewed as irrelevant in the marketplace due to the poorer quality and frequency of the satellite imagery it uses.

Sundal Affidavit at paras 27 & 34.

9. Land O'Lakes has lost its first-mover advantage as the competition has capitalized and moved forward with other successful providers of satellite imagery. Even though Land O'Lakes will be foregoing the potential to receive millions of dollars from the "Stalking Horse Purchasers"¹ to remedy the monetary defaults under the

¹ Stalking Horse Purchasers are defined in the notice of application as EarthDaily Holdings, LP, EarthDaily Canada Holdings Corp., and EarthDaily Canada Limited Partnership.

applicable agreements, the further delays that will result from a forced assignment of these agreements is going to be even worse for Land O'Lakes' business.

B. Contractual Relationship

10. The relationship between Land O'Lakes and its subsidiary, Winfield, with Urthecast and its subsidiaries are governed primarily by three agreements:

- a. The **Purchase and Sale Agreement** by which Urthecast acquired Geosys in the first transaction that closed on January 14, 2019. In the second transaction, Urthecast would acquire from Winfield the remaining IP called the "Acquired Platform Assets". The second closing must occur by April 14, 2021 or Winfield is entitled to terminate the agreement.
- b. The **Interim License and Services Agreement** which governs the rights and obligations of the parties during time between the first and second transactions. The Joint Development Committee (**JDC**) was created under this agreement.
- c. The **Long Term License and Services Agreement** is the long-term contract under which, *inter alia*, Urthecast provides satellite imagery products and services to Winfield.

11. All of these agreements are governed by New York law. Disputes under the agreements are to be resolved by arbitration in New York. The courts of New York have exclusive jurisdiction to grant equitable relief relating to confidential and proprietary information of the other party.

Sundal Affidavit at paras 39-41

C. Defaults under Agreements

12. The three agreements do not specify a launch date for the UrtheDaily. This issue was dealt with by the JDC. As noted in paragraph 10 above, the JDC was created under the Interim License and Services Agreement. The JDC is made up of equal numbers of representatives from Winfield and Urthecast.

13. Pursuant to section 3.4(c)(vii) of the Interim License and Services Agreement, the JDC has the power to bind the parties to its decisions. Decisions of the JDC must be unanimous to be binding.

14. Under section 3.4(c)(i), one of the purposes of the JDC is to "*to accomplish UrtheDaily Improvements Completion...*". This is a defined term under the Long Term License and Services Agreement referring to, *inter alia*: "*(i) the UrtheDaily Constellation is launched and operational.*"

15. Given its importance, the timeline for the launch of the UrtheDaily was discussed at every meeting of the JDC. There have been 7 meetings in total.

Affidavit No. 1 of Benoit Mourot dated January 4, 2021 ("Mourot Affidavit") at paras 3-4

16. At the first meeting, the JDC reviewed and discussed a number of topics including the expected timeline for the launch of the UrtheDaily. However, no decisions were taken at the first meeting other than to review matters again at the next JDC meeting.

Mourot Affidavit at para 4 & Exhibit "A"

17. The ultimate decision of the JDC was a launch date in the fourth quarter of 2021. This is reflected in the minutes which state: "*Mission timeline to be maintained: pilot in 2022Q4 is mandatory to fully validate the UD Imagery service and allow a full-scale campaign in 2023*". "UD" is short form for the UrtheDaily and this is referring to pilot program to be held in the fourth quarter of 2022. The decision taken by the JDC is set out on the following page for ease of reference:

Joint Development Committee Minutes

To: Joint Development Committee
From: Vincent Lelandais
Date: 1/22/2020
Re: Meeting Minutes

Joint Development Committee took place on October 11th the following point have been reviewed and discussed:

- Status on action from previous meeting
- UrtheDaily mission update
- Geosys Program portfolio
 - R7 update
 - Platform separation status
 - UrtheDaily preparation status
- Geosys/UrtheCast roadmap early review of new products
- In-Season service delivery performance review

Summary:

Below is the status of actions identified during JDC3:

Actions	Owner	Status
Confirm data access condition as Deimos is on sale.	Geosys	In progress
Need to finalize Program Executive Summary template for next JDC	Geosys	In progress
JDC deck content on UD Update: • Need to have up to date slide on mission specs (number of satellites, daily acquisition...) • Mission timeline to be maintained: pilot in 2022Q4 is mandatory to fully validate the UD Imagery service and allow a full-scale campaign in 2023	Geosys	Completed
Slides to be added on SLA section to review Virtual constellation update for the interim period.		
On slide 65 – 66, soil depth analyzed by radar is 5-6 cm	Geosys	Completed



Mourot Affidavit at para 5 & Exhibit "D"

18. Antarctica's newest proposed date is 2024 and depends on obtaining financing in the next few months. On December 22, 2020, Land O'Lakes set out its position to the Monitor, Antarctica and Urthecast advising that the new launch date is or will be a breach of section 3.4 of the Interim License and Services Agreement. The reason for the "will be" caveat is that if the Stalking Horse Purchasers recommitted to the Q4 2021 launch date then no breach of the JDC decision will occur unless this launch date is missed.

Sundal Affidavit at para 22 & Exhibit "B"

Exhibit "L" to the Affidavit No. 7 of Sai Chu

19. A separate default under the Long Term License and Services Agreement relates to the flow through funding to critical third-party vendors. Approximately 20% of the fees that Winfield pays to Urthecast are supposed to be paid over to third party vendors. During the past twelve months, it is Land O'Lakes understanding that

those fees have been used to fund general Urthecast operating expenses leaving those vendors exposed as unpaid creditors.

Sundal Affidavit at para 55 & Exhibit "D"

20. Land O'Lakes has advised the parties of its position that it is entitled to terminate the Long Term License and Services Agreement pursuant to section 14.5(a) for the failure to make payments to these third party vendors.

Sundal Affidavit at para 56

Exhibit "L" to the Affidavit No. 7 of Sai Chu

21. A full list of the defaults by Urthecast under the agreements are set out in Land O'Lakes letter to the Monitor on December 22, 2020.

Exhibit "L" to the Affidavit No. 7 of Sai Chu

D. Bad Faith Allegations made against Land O'Lakes

22. On this application, Urthecast and Antarctica's representatives alleged in their respective affidavits that Land O'Lakes "abruptly changed course" in objecting to the transaction and further state that Land O'Lakes threatened "to terminate its agreements with the Petitioners immediately, notwithstanding the stay". These allegations were not raised by Urthecast or Antarctica when the parties were last before the Court on December 10, 2020, or any time previously. Land O'Lakes encountered this allegation for the first time upon reading the Notice of Application.

23. This evidence is disputed. None of these outlandish statements are true.

24. Neither Antarctica nor Urthecast included the actual email from Land O'Lakes that was sent by Richard Sundal on November 24, 2020, advising of the decision not provide waivers for the proposed transaction between Antarctica and Urthecast. It contains no threats and provides the business reason why consent would not be given.

Sundal Affidavit at para 6

25. Land O'Lakes, Urthecast, Antarctica and the Monitor had a conference call on December 2, 2020, where it was discussed that any termination of the agreements

by Land O'Lakes would be when it was able to do so in light of the insolvency proceedings in Canada, the US and France.

26. By that time, Land O' Lakes had already filed an objection in the *Redressement Judiciaire* proceedings commenced by Geosys in France on October 8, 2020 in order to start the process of terminating the Interim License and Services Agreement and Long Term License and Services Agreement in accordance with the provisions of the French Civil Code. Land O'Lakes also filed an objection in the US when Urthecast sought Chapter 15 recognition of the Canadian CCAA proceeding.

Affidavit No. 1 of Anastasia Markaroff dated October 15, 2020

Sundal Affidavit at para 4

27. Urthecast has also alleged bad faith because Land O'Lakes did not accept new Statements of Work ("**SOW**") under the Long Term License Agreement. However, this agreement does not require a SOW.

Sundal Affidavit at para 12

Exhibits "J", "K" and "M" to Affidavit No. 7 of Sai Chu

28. Land O'Lakes has and will in the future comply with its contractual obligations under the agreement with Urthecast as long as they remain in force, including issuing a purchase order and making payment within 30 days pursuant to section 8.9 of the Long Term License and Services Agreement.

Sundal Affidavit at para 12

E. Impact on Land O'Lakes of the Forced Assignment

29. Under the Stalking Horse APA between Antarctica and Urthecast, Antarctica is paying \$1 million in cash for the assets and the Stalking Horse Purchasers are assuming certain liabilities which they may not pay depending on Antarctica's success in raising additional funds. The cash portion of the purchase price represents just 0.5% of the capital Antarctica predicts it will ultimately need to raise to launch the UrtheDaily.

30. The 2024 launch of the UrtheDaily is dependent on the Stalking Horse Purchasers raising more than US \$200 million in financing between February and April 2021.

31. Land O'Lakes is losing market share and estimates its lost sales are at more than US \$200 million due to the infrequent and lower resolution satellite imagery it is receiving from Urthecast for its R7 field monitoring tool.

Sundal Affidavit at para 34

32. Antarctica's financial projections show that the revenue from the Long Term License and Services Agreement will be insignificant to the total revenue of the UrtheDaily if it is launched.

Confidential Affidavit, Exhibit "A"

PART 5: LEGAL BASIS

A. Involuntary Assignments under the CCAA

33. The CCAA is not intended to avoid liquidation of an insolvent company at all costs. The Supreme Court has made clear that "*appropriateness*" is a "*baseline consideration that a Court should always bear in mind when exercising CCAA authority.*" As such, "*Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.*"

Century Services Inc v Canada (Attorney General), 2010 SCC 60 at para 70

34. The requirements of "*appropriateness*" and "*fairness to all stakeholders*" are especially important when considering assignments under the CCAA. This Court in *Veris Gold Corp. (Re)*, in approving an assignment, reviewed the law governing forced assignments and emphasized consideration of "*the effect of the assignment on the counterparty and the principle that third party rights should only be affected as is absolutely required to assist in the reorganization and in a manner fair to that counterparty.*"

Veris Gold Corp. (Re), 2015 BCSC 1204 at para 54

35. Section 11.3(3) of the CCAA sets out three considerations guiding involuntary assignment under the CCAA:

- (3) In deciding whether to make the order, the court is to consider, among other things,
 - (a) whether the monitor approved the proposed assignment;
 - (b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and
 - (c) whether it would be appropriate to assign the rights and obligations to that person.

36. Section 11.3(4) of the CCAA also requires monetary defaults to be remedied:

- (4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

37. Section 11.3 of the CCAA is an "*extraordinary power*," which should not be exercised in this case. The Court should not approve an involuntary assignment because it is inappropriate and unfair to force Land O'Lakes and Winfield to continue with a venture that has already failed and that has virtually no chance of becoming viable. The bleak future of UrtheDaily is best illustrated by the fact that there were zero qualified bids for the assets subject to the Stalking Horse APA. The cash component paid by Antarctica is just 0.5% of the capital it will need to raise to launch the UrtheDaily.

Dundee Oil and Gas Limited (Re), 2018 ONSC 3678 at para 27

38. There are already five competitors currently offering the kind of imaging services that Antarctica hopes to offer in 2024 if financing is raised. The business reality is the Antarctica will be unable to raise the financing for the same reasons why Urthecast was unable to raise the monies necessary to launch the UrtheDaily. This is a failed venture because Urthecast lost the competition for funding and market share to superior satellite imagery competitors. The Court should allow Land O'Lakes to terminate the agreements rather than involuntarily binding Land O'Lakes to Antarctica which has no track record in the field of satellite imagery.

B. Consent Requirement

39. The agreements with Urthecast provide that Land O'Lakes and Winfield have the contractual right to terminate the agreements in the event of a change of control where consent is not given.

40. This Court has authority under the CCAA to override the consent requirement. However, *"if a court finds that consent is reasonably withheld, it must acknowledge that the assignment is a clear violation of the counterparty's contractual rights."*

Jennifer Stam & Evan Stitt, "Not Quite True Love: Forced Assignment of Agreements" (2017) 18 ANNREVIN SOLV (WL Can).

41. Land O'Lakes and Winfield have reasonably withheld consent because:

- a. They are not seeking to terminate for any collateral purpose, but simply to make use of the contractual rights they bargained for in the agreements.
- b. The Stalking Horse Purchasers are undercapitalized and cannot perform the obligations unless further financing is obtained.
- c. Antarctica will not launch the UrtheDaily satellites in accordance with the timeline established by the JDC.
- d. UrtheDaily will never be a viable venture because competitors are already providing a like level of service to that which Antarctica hopes to provide in 2024.

42. No rational counterparty would choose to continue with a failed venture they are contractually entitled to exit.

43. This Court has applied the following test to assess the reasonableness of withholding consent (summarized for brevity):

- a. The burden is on the party seeking consent to demonstrate that the refusal to consent was unreasonable. The question is not whether a reasonable person might have given consent; it is whether a reasonable person could have withheld consent.

- b. Information available to the party refusing consent at the time of the refusal is relevant to the determination of reasonableness, not any subsequent facts or reasons.
- c. A refusal will be unreasonable if it was designed to achieve a collateral purpose wholly unconnected with the bargain reflected in the terms of the agreement.
- d. A probability that the proposed assignee will default in its obligations may be a reasonable ground for withholding consent.
- e. The financial position of the assignee may be a relevant consideration.
- f. The question of reasonableness is essentially one of fact that must be determined on the circumstances of the particular case including the commercial realities of the market place.

Jennifer Stam & Evan Stitt, “Not Quite True Love: Forced Assignment of Agreements” (2017) 18 ANNREVINOLV (WL Can).

See a more fulsome description of the test in *Re Hayes Forest Services Ltd.*, 2009 BCSC 1169 at para 33

44. The court in Alberta stressed the counterparty’s “*real and reasonable issues*” that it had to consider in its assessment of the assignee. The court held that the counterparty’s concerns about the capabilities of the proposed assignee were “*the same considerations that [the counterparty] considered in its decision to enter the Agreement with the financially solvent [debtor]*”, and that the very reason for the consent requirement in the agreement was to allow the counterparty to assess the suitability of any future contractual partners.

Exxonmobil Canada Energy v Novagas Canada Ltd, 2002 ABQB 455 at para 54

45. The evidence of Richard Sundal on behalf of Land O'Lakes is that:

- a. he was briefed on Antarctica's business plan and it is the same as Urthecast's failed business plan;
- b. Antarctica has no expertise in satellite imagery as has been relying on an outside consultant;
- c. he has been provided with nothing that suggests that Antarctica can raise in several months the financing that has eluded Urthecast for years; and

- d. he doubts the viability of the venture because Antarctica's plan is to raise approximately \$200 million and launch satellites in three years to provide services substantially similar to those currently offered by five competitors.

46. The failure to launch according to the timeline established by the JDC is a failure to fulfill Urthecast's obligations, and Antarctica has already acknowledged it will not perform this obligation.

Mourot Affidavit at para 6 & Exhibit "D"

C. Antarctica and Stalking Horse Purchasers will not be able to perform the obligations

47. Under s. 11.3(3)(b), the Court must consider "whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations." In *Dundee Oil and Gas Limited (Re)*, a decision relied upon by Urthecast, the Court held that "*a fundamental condition precedent to requiring a contract counterpart to be locked into an involuntary assignment post-insolvency is that the court sanctioning the assignment is able to conclude that the assignee will, in the words of s. 11.3(3)(b) of the CCAA, 'be able to perform the obligations'.*"

Dundee Oil and Gas Limited (Re), 2018 ONSC 3678 at para 30

48. The ability of the assignee to perform the assigned obligations is "*a factual inquiry as the question of performance might require far more than simply financial stability and could foreseeably depend on capabilities, expertise or otherwise.*" As such, "*management meetings, business plans, industry or regulatory expertise and other materials could potentially be required.*"

Jennifer Stam & Evan Stitt, "Not Quite True Love: Forced Assignment of Agreements" (2017) 18 ANNREVINOLV (WL Can).

See also *Re Hayes Forest Services Ltd.*, 2009 BCSC 1169 at para 33

49. Paragraphs 45 and 46 above summarize Land O'Lakes' evidence on Antarctica's anticipated ability to perform. Antarctica's own evidence in the Confidential Affidavit of Chandra Patel confirms that the ability to perform is based on "assuming

completion of the Project Financing". While Mr. Patel expresses confidence in obtaining financing, this is the same song and dance that Land O'Lakes has heard from Urthecast. If there was real interest in this business, there would have been other bidders in the sales process.

D. Assignment is inappropriate

50. Under s. 11.3(3)(c), the Court must consider "*whether it would be appropriate to assign the rights and obligations to that person.*" An involuntary assignment is inappropriate in this case because the venture has already failed. No exercise of CCAA authority will change the fact that Urthecast already lost the competition for financing and market share. Competitors are currently providing like-kind services to what Antarctica proposes to do in 2024.

51. The purpose of the CCAA is not to avoid liquidation at all costs, particularly for an insolvent company with no real prospects of success. Land O'Lakes and Winfield are contractually entitled to withhold their consent to this assignment. The Court should respect those rights, particularly, because the evidence demonstrates that the Stalking Horse Purchasers will not perform the obligations.

E. Proposed Land O'Lakes Assignment Order is Draconian

52. In the alternative, if the Court orders an involuntary assignment, Urthecast's proposed order at Schedule "E" is contrary to fundamental principles of law. Numerous provisions in the proposed order are unfair, unnecessary and pose considerable harm to Land O'Lakes.

i. Expansive Stay of Rights is Unjust

53. At paragraphs 6(d) and 11 of Schedule "E", Urthecast seeks an order that:

- a. "[n]either Land O'Lakes, Inc. nor Winfield Solutions, LLC...will make or pursue any demand, claim, action or suit...relating to any failure by the Petitioners to perform a non-monetary obligation under any Assignment Order Contract" and they are "forever barred and estopped from taking such action."

- b. "[i]mmediately following the assignment and transfer of the Land O'Lakes Agreements neither Land O'Lakes, Inc. nor Winfield Solutions, LLC will have any claim whatsoever against the Petitioners."

54. In regards to paragraph 11, unsecured creditor claims are normally adjudicated in a claims process. Yet in the proposed order, Urthecast proposes to wipe out the ability of Land O'Lakes to make any claim whatsoever. This provision removes basic norms of fairness and due process.

55. In regards to paragraph 6(d), Land O'Lakes has a claim grounded in section 3.4 (c)(vii) of the Interim License and Services Agreement that the UrtheDaily must launch by 2021. It also has a claim that by not using the flow-through funding to pay Microsoft and other vendors, the Long Term License and Services Agreement may be terminated by Winfield with written notice to Urthecast pursuant to Section 14.5(a).

56. In *Re Playdium Entertainment Corp*, one of the counterparties withheld contractual consent to an assignment. The Court overrode the consent requirement but carefully preserved the objecting counterparty's right to sue for breaches of the contract that were ongoing. The reasoning is directly applicable to this case. If this Court orders the involuntary assignment, it should not permanently stay Land O'Lakes' right to assert the claims described in the preceding paragraph.

57. Jennifer Stam and Evan Stitt, in their article "Not Quite True Love: Forced Assignments of Agreements" for the 2017 Annual Review of Insolvency Law remarked that it is "*unlikely that when a counterparty objects strenuously but unsuccessfully to the assignment of its agreements, a court will also deny the counterparty its contractual remedies for breaches that continue post-assignment*".²

Jennifer Stam & Evan Stitt, "Not Quite True Love: Forced Assignment of Agreements" (2017) 18 ANNREVINSOLV (WL Can).

² Not Quite True Love: Forced Assignment of Agreements, 2017 Annual Insolvency Review 18.

ii. **Proposed Land O'Lakes Assignment Order rewrites the Agreements**

58. Urthecast's proposed order alters the agreements to secure superior terms for the Stalking Horse Purchasers. This violates the "*general rule*" repeatedly confirmed by the Supreme Court of Canada "*that it is not the function of the court to rewrite a contract for the parties.*"

Pacific National Investments Ltd. v. Victoria (City) 2004 SCC 75 at para 31

59. At para 10 of the proposed order at Schedule "E", Urthecast seeks that:

"Land O'Lakes Inc. and Winfield Solutions, LLC and their respective affiliates and subsidiaries (direct and indirect) are hereby ordered and directed to comply with all terms, obligations, and requirements applicable to them under the Land O'Lakes Agreements."

60. This provision transforms Land O'Lakes' contractual obligations under the agreements into an order that is punishable by a finding of contempt. The risk of a contempt finding only applies against Land O'Lakes; the Stalking Horse Purchasers would be free to breach the agreements with only contractual or equitable remedies available to Land O'Lakes.

61. In their application, Urthecast cites *Dundee Oil and Gas Limited (Re)* which stands for the proposition that counterparties are not entitled to improve the terms of the contract in the assignment process. The principle applies to paragraphs 8,9,10 and 13 of the proposed order.

Dundee Oil and Gas Limited (Re), 2018 (ONSC) 3678 at para 30

iii. **Effect of Proposed Order**

62. At para 13 of the proposed order at Schedule "E", Urthecast seeks to have this Court decide any disputes about whether Land O'Lakes has complied with the court order.

63. Under the agreements, the parties agreed to arbitrate their disputes in New York under New York law, and with the courts of New York having exclusive jurisdiction

to grant equitable relief. If these contracts are assigned, disputes arising from the contracts should be resolved through agreed upon mechanisms.

64. While the CCAA provides broad discretion, the Court uses that power sparingly as it relates to a third party's contractual rights. The proposed Land O'Lakes Assignment Order would never be voluntarily agreed to by any counterparty.

65. Urthecast and Antarctica are asking this Court to impose unreasonable and one-way obligations because Land O'Lakes withheld its consent (which it is contractually entitled to do). In considering the legal standard to apply in a granting a forced assignment, Justice Wilton Siegel remarked that "*The Court must also be satisfied that the requested relief does not adversely affect the third party's contractual rights beyond what is absolutely required to further the reorganization process and that such interference does not entail an inappropriate imposition upon the third party or an inappropriate loss of claims of the third party.*"

Nexient Learning Inc (Re), [2009] OJ No 5507 (SCJ) at para 59

66. The proposed Land O'Lakes Assignment Order extinguishes or stays possible claims under the agreements, alters the clearly worded provisions of the agreements, and transforms the contractual obligations into obligations under a court order that can be enforced only by the Stalking Horse Purchasers. The proposed order is draconian and, quoting the decision in *Veris Gold (Re)*, it does not satisfy "the twin goals of assisting the reorganization process while also treating a counterparty fairly and equitably."

Veris Gold Corp. (Re), 2015 BCSC 1204 at para 54

PART 6: MATERIAL TO BE RELIED ON

- 1) Affidavit No. 1 of Richard Sundal dated January 4, 2021;
- 2) Affidavit No. 1 of Benoit Mourot dated January 4, 2021;
- 3) Affidavit No. 1. of Anastasia Markaroff dated October 15, 2020; and

- 4) Such further and other materials as counsel may advise and this Honourable Court may permit.

The application respondent estimates that the application will take[time estimate]..... .

- ☐ The application respondent has filed in this proceeding a document that contains the application respondent's address for service.
- ☒ The application respondent has not filed in this proceedings a document that contains an address for service. The application respondent's address for service is:

Baker & McKenzie LLP
181 Bay Street, Suite 2100
Toronto, ON M5J 2T3

Attention: Michael Nowina
e: michael.nowina@bakermckenzie.com
t: 416 865 2312 / f: 416 863 6275

Attention: Brendan O'Grady
e: brendan.ogrady@bakermckenzie.com
t: 416 865 2333 / f: 416 863 6275

Date: January 4, 2021



Signature of

Michael Nowina

☐ Application Respondent

☒ Lawyer for the Application Respondent

[type or print name]

To be completed by the court only:

Order made

☐ in the terms requested in paragraphs _____ of Part 1 of this notice of application

☐ with the following variations and additional terms:

Dated: _____

Signature of ☐ Judge ☐ Master

SCHEDULE A
LIST OF PETITIONERS

1. 1185781 B.C. Ltd.
2. Deimos Imaging S.L.U.
3. DOT Imaging S.L.U.
4. Geosys Australia PTY Ltd.
5. Geosys do Brasil Sistemas de Informacao Agricolas Ltda.
6. Geosys Europe Sarl
7. Geosys Holding, ULC (was Geosys Technology Holding LLC)
8. Geosys-Int'l, Inc.
9. Geosys S.A.S.
10. UrtheCast Holdings (Malta) Limited
11. UrtheCast Imaging S.L.U.
12. UrtheCast Investments (Malta) Limited
13. UrtheDaily Corp.